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Taxes as practices of mutual recognition:
Towards a general theory of tax law

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For Elisa and in memory of Angela.

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Francisco Saffie
Santiago, Chile
18/12/2013

DECLARATION

As per the Assessment Regulation (n 26) for Research Degrees at the University of Edinburgh, I confirm:

- (a) That this thesis has been composed by me;
- (b) That the work contained in this thesis is my own;
- (c) And that it has not been submitted for any other degree or professional qualification.

I also acknowledge (as per Regulation 23) that parts of section four of chapter five ('Can law be a teleological institution?') have been published, in a previous form, as chapter nine ('Fulfilling the Law by Breaking it? Formalism within Legality') of the book *The Anxiety of the Jurist. Legality, Exchange and Judgement*, edited by Maksymilian del Mar and Claudio Michelon (Ashgate: Dorset, 2013).



Francisco Saffie
Santiago, Chile
18 December 2013

ABSTRACT

The thesis tries to provide an answer to the problem of tax avoidance. For this purpose a reinterpretation of taxes as practices of mutual recognition is defended. The conception of taxation and tax law defended in the thesis contrast sharply to the merely instrumental or functional conceptions of taxation and tax law that dominates today's common understanding of taxation and tax law. The thesis lays out the basis for a new general theory of tax law, but does not develop in detail each of the elements of such a theory.

The thesis first lays out the problem by analysing different definitions of tax avoidance, tax evasion, and tax planning, as well as their shortcomings. From that discussion, it emerges that the ways in which tax avoidance has been conceptualised are not only unclear but they also fail to produce any relevant insight into the problem of tax avoidance. The thesis then relates those shortcomings to what it calls the *classical paradigm* of tax law, which leads, in turn, to the *contemporary general theory* of tax law. A combination of these conceptions – of the substance (function) and form of tax law – explains that the structure of tax law is based on a conception of the obligation to pay taxes in which there is space for tax avoidance. The thesis argues that, in doing so, the purpose of tax law is defeated. Recent alternatives to the contemporary general theory are also analysed and critically evaluated.

The second part of the thesis develops the positive aspect of the argument, in three connected moves. First, an argument is provided to prove that both liberal egalitarian and luck egalitarian theories of justice are not able to offer an answer to tax avoidance because they consider taxes and tax law to be mere instruments for redistribution. Second, a substantive reinterpretation of taxation as a practice with an internal good is presented, in which mutual recognition is defended as taxation's internal good. Finally, an argument for the thesis that the best possible understanding of tax law requires us to interpret it as a teleological institution is provided. With this positive programme, the thesis aims at providing a superior alternative to the merely instrumental conception of taxation and tax law that derives from the classical paradigm presented at the outset. Its superiority is evidenced by the fact that the alternative provided can offer us the conceptual resources to understand the problem of tax avoidance and hence of what tax law is about.

INTRODUCTION

Tax avoidance is a problem for contemporary states that depend on taxes. Not only because avoidance brings less revenue, but also because it threatens the very same concept of taxation, that is, the idea that we all have to share in the maintenance of the state. Tax avoidance undermines ‘the fairness and integrity of tax systems’.¹ An example of tax avoidance that has been a major problem for G20 states consists of transnational companies shifting profits from ‘their home countries by pushing activities abroad to low or no tax jurisdictions’.² This avoidance scheme, adopted by companies such as Amazon, Starbucks and Apple, led the Finance Ministers of the G20 to request that the OECD develop an action plan in July 2013. This project is known as BEPS (Base Erosion and Profit Shifting) and ‘is looking at whether the current rules allow for the allocation of taxable profits to locations different from those where the actual business activity takes place and if not, what could be done to change this’.³ If the argument of this thesis proves to be right, project BEPS will not achieve its ends because it still works within the classical paradigm of tax law and the contemporary general theory of tax law. For the classical paradigm and the contemporary general theory of tax law, tax avoidance is a moral and not a legal problem. In chapter one I argue that tax avoidance has been such an elusive problem precisely because we do not have any legal elements by which to assess it. In chapter two I provide elements to show that taxation and tax law, if conceived within the classical paradigm and the contemporary general theory of tax law, are unable to conceive tax avoidance as legally problematic and, *a fortiori*, to respond legally to the problem of tax avoidance. This inability results from the fact that they are based on assumptions within which tax avoidance is not a possibility.

In the second part of this thesis (chapters three to five) I offer an alternative conception of taxation and tax law. Against merely instrumental justifications of taxation that mainly revolve around public finance and the justification of redistribution, I argue for a conception of taxation as a practice with an internal good (chapter four) and a conception of tax law as a teleological institution (chapter five). To demonstrate the importance of these alternative conceptions of taxation and tax

1. <http://www.oecd.org/ctp/beps.htm> (last access 24/11/13).

2. <http://www.oecd.org/ctp/beps.htm> (last access 24/11/13).

3. <http://www.oecd.org/ctp/beps.htm> (last access 24/11/13).

law I expose the shortcomings of a possible alternative, that is, liberal egalitarian and luck egalitarian theories of justice that try to justify redistributive taxation (chapter three).

To defend the argument that I advocate I will show the shortcomings of alternatives that have been proposed in the attempt to combat avoidance (chapters one and two). I also show that the possible alternatives for solving the problem have not moved away from the classical paradigm and that, therefore, taxation is justified as a mere instrument for redistribution. Moreover, alternatives that try to justify redistributive taxation have not been able to explain the importance of tax law (chapter three). So these arguments may justify the need to finance public expenditure and redistribution, but they cannot show the importance of taxation and tax law. These arguments may justify any other instrument or functional equivalent that is able to achieve those ends. On the contrary, I argue that taxation and tax law are important *per se*. For this purpose, my argument requires me to show that taxation is not a mere instrument, but that it is a practice with an internal good. I conclude that this internal good is mutual recognition (chapter four). I argue that the political dimension of distributive justice should be rescued and equality understood as a political ideal at the service of mutual recognition. The second step of my argument requires that I show that tax law can be properly understood as a teleological institution and not as an instrumental or functional institution (chapter five).

The basic thesis that I defend in what follows is that taxation is better understood as a practice with an internal good rather than as an instrument for redistribution. This implies the following sub-theses: (i) the internal good of taxation is mutual recognition, (ii) taxation and private property are co-original, (iii) we have a duty to pay taxes even if there is no need for redistribution, and (iv) tax law is a teleological, not an instrumental or functional, institution.

CHAPTER ONE. TAX AVOIDANCE AS A LEGAL PROBLEM

I met with a financial advisor and he said to me 'Do you want to pay less tax? It's totally legal'. I said 'Yes'.

Jimmy Carr, Comic.

1. THE PROBLEM

To say that tax avoidance is a problem and also that it is legal is today common sense. More and more people are conscious of the consequences of the state having less revenue for public expenditure and it is widely accepted that those who do not pay their dues are acting unfairly toward those who do. But as Jimmy Carr explains by quoting his financial advisor, when discussing his tax affairs it seems to be that there are perfectly legal ways to pay less tax. To put it in other words, tax avoidance is widely accepted as legal. Or to quote Prime Minister David Cameron, the tax scheme used by Carr to avoid taxes is 'quite frankly morally wrong'⁴ but legal. Chancellor George Osborne said the same in his budget speech in March 2012 when he described 'aggressive tax avoidance as "morally repugnant"'⁵ (in opposition to illegal tax evasion). The scheme used by Carr to reduce his tax – the K2 – is widely known in the market and is only one of many used around the world. The K2 scheme reduces income tax by splitting wages into part income and part loan. To achieve this result the employee resigns from his UK job and signs a contract with an offshore company (K2). K2 then hires out the employee to the old (or a new) UK employer and the UK employer pays the employee's wages to K2. Following this, the employee receives a small portion of these wages as a salary from K2 and a larger sum as a loan. Ultimately, via such legal

4. <http://www.bbc.co.uk/news/uk-politics-18521468> (last access 23/07/12).

5. <http://www.bbc.co.uk/news/uk-politics-18521468> (last access 23/07/12).

operations the employee is able to pay income tax on the low wage and not on the loan, which does not count as taxable income.⁶

The solutions for stopping tax avoidance that have been proposed so far are either moral or legal. With both approaches tax avoidance is, in principle, considered acceptable conduct because the law does not forbid it. It is morally wrong when it is ‘aggressive’ or ‘artificial and abusive’,⁷ or on the borderline of illegality, but it is assumed that there is a space in which the taxpayer can decide how to structure his activities in order to pay fewer or lower taxes. Legal solutions start from the same presumption, that is, that any tax obligations depend on the legal form adopted by the prospective taxpayer. Therefore, to stop tax avoidance it is necessary to create a rule according to which the legal structure in question is considered taxable. But it does not make sense to assume that taxable events depend on the consideration that certain specific structures are morally questionable (for the non-payment of taxes) but are not taxable, so that a new rule needs to be established in order for them to be taxable. How is it that perfectly legal conduct is morally objectionable for not fulfilling the law? Furthermore, once a new rule is created, how are we to deal with new (not covered by the rules) tax avoidance schemes? Should this be done by creating new rules to close a gap (or ‘loophole’) or by establishing a legal principle that allows judges to interpret the law substantively?

My claim is that the solutions to tax avoidance that have been proposed so far are doomed to failure. This is so because within what I call the *classical paradigm*⁸ of tax law tax avoidance cannot be understood as a legal problem. To fully grasp tax avoidance as a legal problem and offer a solution for it a teleological interpretation of tax law is required, and the classical paradigm does not leave any room for this. This explains why tax avoidance is of theoretical interest: it perspicuously shows the limits of available theories of tax law. However, to get to this argument we have to show the limits of the analytical distinctions that consider tax avoidance to be ‘perfectly legal’. This chapter is devoted to that task. In what follows I place in question the traditional categories used to describe strategic behaviour in tax law, that is, tax evasion, tax

6. For this description I follow the explanation provided at <http://www.bbc.co.uk/news/business-18533879> (last access 23/07/12).

7. http://www.hm-treasury.gov.uk/tax_avoidance_gaar.htm (last access 23/07/12).

8. *infra*, 58.

avoidance and tax planning, by showing their limitations for explaining the consequences of a legal obligation to pay taxes.

The argument within this chapter is structured in the following way. I start by identifying what is held in common among conducts included within the categories identified as ‘strategic behaviour’ within tax law (section 2). Each of these categories will then be analysed in particular, starting with tax evasion (section 2.1). A more detailed analysis is dedicated to tax avoidance (section 2.2) for the reason that tax avoidance is a more difficult concept to define and one that better shows the shortcomings of current theories of tax law. Here I develop what I consider to be two central elements in the available definitions of tax avoidance, namely, that it is legal (section 2.2.1) and that it is considered a problem (section 2.2.2). I then analyse the possible solutions given to avoidance and categorise them into two groups: (a) tax reform and (b) tax adjudication (section 2.2.3). I finish my analysis of avoidance by arguing that the possible solutions to tax avoidance offered so far are doomed to failure (section 2.2.4). For this purpose I describe and criticise some alternatives that try to address tax avoidance either through legal reform (section 2.2.4.1) or by adjudication (section 2.2.4.2). I finish this section of the argument by presenting what I consider to be the best alternative so far, namely, Professor Judith Freedman’s proposal of a general anti-avoidance principle, or GANTIP for short (section 2.2.4.3). After analysing tax avoidance, some time is then dedicated to tax planning or tax mitigation (section 2.3). The chapter concludes by showing the limits to these distinctions and why such categories can only be understood within the classical paradigm of tax law (section 2.4).

2. STRATEGIC BEHAVIOUR IN TAX LAW

Tax compliance has always been a concern for governments, ever since the need for taxation arose.⁹ As long as public revenue was needed for public expenditure and individuals' contributions became compulsory, with independence from the political and economic ideas behind the tax system in practice, those in power have tried to enforce this obligation. On the other hand, and at the same time, those individuals under an obligation to pay taxes have tried to escape from it. The historical evolution of taxation might then be explained as a compromise made among diverse interests. First, when the compulsory imposition of contributions was established the people replied by asking for greater political participation. Second, the distribution of this burden among social classes became a consequence of democratic demands for equality.¹⁰ Therefore, it has always been in the interests of the law enforcer to identify and stop any conduct oriented toward sidestepping the legal obligation to contribute.

In this scenario we can distinguish between two different groups of answers within this problem: the economic and the legal. First, we have the economic group. According to this approach, tax design should take into consideration the economic behaviour of individuals. What this means is that individuals will contribute by paying their dues so long as it is rational in economic terms for them to do so. This line of argument has led to public finance approaches toward tax design in which the aim is to determine optimal taxation.¹¹ The purpose of optimal tax theory is to develop tools that will allow the 'choice of a system of taxation that balances efficiency losses against the government's desire for redistribution and the need to raise revenue'.¹² I will not follow this approach because it is not adequate for an understanding of tax *law*. The

9. For an excellent description of the historical development of taxation *vid* Seligman, *Essays in Taxation*, Ch1, and Schumpeter's very interesting "The crisis of the tax state". In this piece Schumpeter shows the connection between the creation (and the form) of the state and taxation. Taxation and the state are, for Schumpeter, the expression of the modern 'individual economy' and the 'common interest'. *ibid*, 102–116.

10. Seligman, *Essays in Taxation*, 21. An example of this concerns the evolution of British taxation from a historical perspective, which can be seen in Daunton, *Trusting Leviathan. The Politics of Taxation in Britain 1799–1914* and Daunton, *Just Taxes. The Politics of Taxation in Britain 1914–1979*. According to Seligman, income tax is the latest historical expression of this evolution, *vid* Seligman, *The Income Tax. A Study of the History, Theory and Practice of Income Taxation at Home and Abroad*, 3–18.

11. Good recent examples of this approach are Kocherlakota, *The New Dynamic Public Finance* and Kaplow, *The Theory of Taxation and Public Economics*. The seminal work for this area is Mirrlees, "The theory of optimal income taxation".

12. Adam, Besley, *et al.*, *Tax by Design: The Mirrlees Review*, 36.

economic approach is not able in itself to explain the obligation to pay taxes. It is an argument that tries to determine what motivates people into paying taxes by aiming to align the individual's motivation with the state's ends by putting the right incentives in the right places. But once the preferred tax scheme is adopted and given legal form, the economic approach fails to understand tax law as a particular political institution within which what we owe to each other is contained. When we want to provide a better understanding of tax law it becomes clear that the economic approach to taxation is only one aspect of it. In this sense, an economic understanding of taxation – according to which we have to explain in economic terms the compulsory transfer of money from private to public ends – is not enough to distinguish tax law from any other compulsory source of public revenue, such as fines or compulsory payments.

The second group of answers to tax avoidance are the legal ones. They are not interested in the reasons that an individual may have for following the law, but in securing his compliance with it. According to the classical paradigm of tax law,¹³ we have to distinguish between legal and illegal conduct. Following a binary understanding of the law, only conduct that goes against what is required is problematic. Only once the law is broken can there be a reaction from public power, either by the sanctioning or modification of the legal consequences of an action. However, as democratic demands for establishing a fair tax system have grown, it has become more and more complex to simply provide a legal form to the ability to pay principle.¹⁴ As a consequence, the complexity of the system has grown and it has become easier for taxpayers to avoid their tax liabilities by developing legal strategies, for example, adopting alternative legal forms in order to not fit their transactions within the operative facts of tax rules, or engaging in creative compliance to go against

13. I develop the elements of what I call the classical paradigm of tax law fully in Ch2, *infra* 55ff. For the time being, it is suffice to say that the classical paradigm of tax law has the following central elements: (i) the individual is considered a pure rationaliser, (ii) private property is assumed to be a natural right as in the contractarian tradition, (iii) taxes are instruments of revenue, (iv) principles of justice in taxation are descriptions of positive law. These elements explain the following characteristics of tax law: (i) tax policy is justified according to moral and economic principles, (ii) tax obligations are born only once the conditions of the taxable event are verified, and (iii) legal reasoning in tax matters is formal reasoning.

14. Seligman, *The Income Tax. A Study of the History, Theory and Practice of Income Taxation at Home and Abroad*, Ch1. This principle, in its different versions, is understood to be the one that best expresses a demand for a just distribution of the tax burden.

the spirit of the law.¹⁵ For the time being we can follow Avi-Yonah *et al.* and envelope all these different conducts under the label of ‘strategic behaviour’.¹⁶ The strategies underlying the different decisions taken by taxpayers ‘striv[e] toward optimising taxes’,¹⁷ that is, increasing income and reducing tax liabilities. That these are considered strategic behaviours is important because here we are not dealing with conduct that results from what economists call the ‘substitution effect’ of taxes. In other words, those who participate in strategic tax behaviour continue to generate income; they have not substituted their work for a non-taxable activity. This distinction is not normally recognised by lawyers who define strategic tax behaviours as ‘actions designed solely to minimise tax obligations’ (this might include non-problematic conduct, such as playing amateur football instead of working).¹⁸

These strategic behaviours and the answers to them have been grouped into three categories. These categories attempt to distinguish among and provide a clear account of each of these strategic behaviours in order to classify them. These are the familiar categories: tax evasion, tax avoidance and tax planning (or tax mitigation). In the following sections I analyse these categories in the same order.

2.1. Tax evasion

Of the three categories that try to define and characterise strategic behaviour in tax law, tax evasion seems to be the clearest and its limits the least debatable. An example of the traditional definition of tax evasion reads as follows: ‘[I]ntentional illegal behaviours, *i.e.*, behaviour involving a direct violation of tax law, in order to escape payment of taxes’.¹⁹ A simple example provided by Tiley helps to illustrate the kinds of conduct included in this category. Tiley gives the example of a legal system in which a special tax treatment exists according to which married people pay lower taxes.

15. McBarnet, “When compliance is not the solution but the problem: from changes in law to changes in attitude”, 229.

16. Avi-Yonah, Sartori, *et al.*, *Global Perspectives on Income Taxation Law*, 101.

17. Karayan, Swenson, *et al.*, *Strategic Corporate Tax Planning*, xvii. In this book the strategy is called SAVANT, ‘an acronym for how tax planning fits into business decisions: through Strategy, Anticipation, Value-Adding, Negotiating, and Transforming’ *ibid*, xv and Ch2.

18. Avi-Yonah, Sartori, *et al.*, *Global Perspectives on Income Taxation Law*, 101. For the substitution effect *vid*, Stiglitz, *Economics of the Public Sector*, 108, 520ff.

19. Avi-Yonah, Sartori, *et al.*, *Global Perspectives on Income Taxation Law*, 101.

According to him, tax evasion occurs if two people expecting to reduce their tax burden ‘tell the revenue they are married when they are not’.²⁰

This definition of tax evasion seems to be accepted unanimously in the literature. Therefore, there is no risk in stating that the framework that distinguishes and identifies tax evasion includes three elements: (i) there should be an ‘intention to mislead’,²¹ (ii) this intention should manifest itself in illegal behaviour, and (iii) as a result the individual escapes any obligation that he is under.

The positive intention to mislead is a requirement that restricts the application of the norms that sanction tax evasion. This distinguishes evasion from other cases in which taxes are not paid because of a mistake or negligence,²² or from administrative failures sanctioned as misdemeanours.²³ In this sense then, ‘evasion requires more than the failure or omission to pay an amount which is payable’.²⁴ An analysis of the problems that this requirement may create within criminal law by far exceeds the limits of what I am debating here. However, it is suffice to say that this is not a peaceful matter among criminal lawyers for whom the problems of not having a clear definition of tax evasion are patent.²⁵

The second element, that is, that tax evasion implies illegal conduct, is a crucial characteristic that distinguishes it from other tax-related strategic behaviours. That evasion is illegal is repeated endlessly in the literature.²⁶ In what has come to be a commonplace claim, it is frequently stated that ‘avoidance is by definition legal and evasion illegal’.²⁷ However, it is not clear which illegal conduct defined as tax evasion is being sanctioned, as is the case with Tiley’s example above. It seems that there exists

20. Tiley, *Revenue Law*, 101.

21. Angell, “Tax evasion and tax avoidance”, 85.

22. *ibid*, 86 and Green, “Cheating”, 170.

23. Green, “Cheating”, 170.

24. Sawyer, “Blurring the distinction between avoidance and evasion – the abusive tax position”, 487.

25. *vid*, Green, “Cheating”. Green justifies tax evasion as a criminally sanctioned case of cheating.

26. A few examples are Tiley, *Revenue Law*, 101; Avi-Yonah, Sartori, *et al.*, *Global Perspectives on Income Taxation Law*, 101; Sawyer, “Blurring the distinction between avoidance and evasion – the abusive tax position”, 487; Sears, “Effective and lawful avoidance of taxes”, 78; Wheatcroft, “The attitude of the legislature and the courts to tax avoidance”, 210; Freedman, “Defining taxpayer responsibility: in support of a general anti avoidance principle”, 335; and, Committee, *Tax Avoidance*, ix, 1.

27. Bracewell-Milnes, *Tax Avoidance and Evasion: The Individual and Society*, 9. What is meant by this avoidance being by ‘definition legal’ will be addressed *infra*, 29ff.

confusion among those who understand that what is illegal is not paying taxes once that obligation has been established by the application of tax law – by a conduct that breaks tax law – and those who consider that what is sanctioned are those activities that make evasion possible – that are part of the ‘attempt to evade or defeat the tax, conceal income, or mislead the authorities’.²⁸ The first position seems to be defended by tax lawyers who advocate a clear distinction between tax evasion and tax avoidance or tax planning.²⁹

According to the final element, the consequences of any conduct that qualifies or should qualify as tax evasion are relevant: the individual escapes the obligation he is under, namely, the payment of tax. Here, again, there are two possible interpretations of what tax evasion implies. The first is that tax evasion implies breaking tax law and the law punishes those who do not pay their taxes. This is what the majority of definitions of tax law include for tax evasion, as in the above example by Avi-Yonah. Yet the criminal law approach to tax evasion adds, or understands, that the obligation any individual is under is not to commit fraud or cheat. In this case what is being sanctioned is harmful conduct that differs from the loss of revenue (to distinguish it from avoidance) and the moral wrongfulness of the conduct could be, for example, fraud or cheating.³⁰

2.2. Tax avoidance

Even though there are many juridical and economic definitions of tax avoidance in the literature, there does not seem to be any clarity or agreement as to its characteristics. There are, however, two aspects that are noted or referred to in all of them. The first is that it is legal,³¹ the second, that we are dealing with ‘a problem’,

28. Green, “Cheating”, 170.

29. The underlying idea is that in cases of tax avoidance the obligation to pay taxes does not yet exist and in cases of tax planning the will of parliament is not broken. This point is further developed in what follows in this chapter.

30. Green, “Cheating”, 170–2. For UK regulation and debate, *vid* Tiley, *Revenue Law*, 86–92. When criminal provisions were introduced into German law there was debate about these being part of criminal law or administrative regulation *vid*, Hensel, *Derecho Tributario*, 396–398. A taxonomy of the conducts associated with tax evasion that could receive criminal punishment will depend, of course, on the positive law of each particular legal system.

31. See all references *supra*, n26 and specially Freedman, “Defining taxpayer responsibility: in support of a general anti avoidance principle”, 335; Wheatcroft, “The attitude of the legislature and the courts to tax avoidance”, 209. In Sears, “Effective and lawful avoidance of taxes”, the author points out fundamental differences between methods of avoiding or reducing taxes that may safely be regarded

specifically ‘because it nibbles away at the edges of the tax base so reducing government revenue and, in extreme cases, making government policy implementers look foolish’.³² Beyond this, clarity about or agreement as to what qualifies as tax avoidance or how to conceptualise it is absent. As Cooper states, when asking about what constitutes tax avoidance, ‘[o]ne might obtain a fairly easy consensus about some practices, but more often one will get only a political opinion’.³³ The fact that all attempts to define tax avoidance in juridical terms have failed (we cannot say the same of economic approaches)³⁴ may explain why all efforts have focused on proposing solutions rather than on providing a juridical definition or understanding.³⁵ All clarity in the debate surrounding tax avoidance seems to derive from the fact that there are two interests in conflict with one another: the government’s and the taxpayer’s.³⁶ This is why definitions of tax avoidance seem to be, at best, a contradiction in terms. For example, here is what Avi-Yonah says about tax avoidance:

Illegitimate (but not necessarily illegal) behaviours aimed at reducing tax liability. These behaviours do not violate the letter of the law but clearly violate its spirit. A typical example of tax avoidance is the fictitious conversion of ordinary income into non-taxable capital gains.³⁷

as effective and lawful as distinguished from forbidden evasion (77).

32. Tiley, *Revenue Law*, 101.

33. Cooper, “The taming of the shrewd: identifying and controlling income tax avoidance”, 659. For some examples of the forms tax avoidance may take, *vid* Wheatcroft, “The attitude of the legislature and the courts to tax avoidance”, 210–212.

34. It is possible to say that economic approaches to tax avoidance succeed in understanding it in economic terms. This economic understanding of avoidance does not help us to understand why it is a problem in juridical terms. Moreover, economic approaches to tax avoidance depend on its juridical definition as the difference in economic terms between evasion and avoidance rests on the illegal/legal distinction. *vid*, Stiglitz, *Economics of the Public Sector*, 678–679. An economic definition of tax avoidance is provided by Goetz in “Tax avoidance, horizontal equity, and tax reform: a proposed synthesis”: ‘Tax avoidance can be defined as the *legal reduction of tax* through the use of preferential provisions of the tax laws. These preferential provisions of the tax system have been referred to as either tax loopholes, tax incentives, or tax expenditures’ (799). [Emphasis added].

35. ‘[M]uch of the discussion of tax avoidance centres on the need to draw boundaries to differentiate types of behaviour; evasion and avoidance; tax avoidance and tax mitigation. It is the contention here that it needs to be considered to what extent and in what circumstances, the failure to draw bright lines results in a real problem and when it may be not only inevitable but perhaps even helpful to steer away from any attempt to define the line categorically’. Freedman, “Defining taxpayer responsibility: in support of a general anti avoidance principle”, 345. Instead, she proposes to search for a principle to secure non-arbitrary legal decisions in particular cases. For details *infra*, 48.

36. Freedman, “Is tax avoidance “fair”?”, 87–89.

37. Avi-Yonah, Sartori, *et al.*, *Global Perspectives on Income Taxation Law*, 101.

The problem with Avi-Yonah's notion of tax avoidance is that it is not helpful as a definition because it simply summarises the two positions in conflict. Thus, we do not improve our understanding of avoidance by saying that these behaviours are 'illegitimate (but not *necessarily* illegal)' and then immediately say that they do violate the spirit of the law. Unless, of course, we assume that no juridical way of approaching the problem exists or that the law is only a form and does not contain any substance. Avi-Yonah's definition seems to suggest that the legitimacy of tax avoidance should be discussed in broader political terms. In turn, its status would depend on the policy implemented by the government. Here we come to the centre of the classical paradigm of tax law, where avoidance represents the tension between the objectives set out by the government through tax law and those of the individual who aims to pay as little tax as possible. According to the classical paradigm, tax avoidance is a problem of poor legislative technique: it is legal as long as the law does not prohibit the conduct in question.

Another example is the definition provided by Wheatcroft:

Hence, we must define tax avoidance as a transaction which (a) avoids tax, (b) is entered into for the purpose of avoiding tax or adopts some artificial or unusual form for the same purpose, (c) is carried out lawfully, and (d) is not a transaction which the legislature has intended to encourage.³⁸

Here again, we can see the limits of not having a juridical notion of avoidance independent of its consequences or independent of the reaction of the legal system. To put it in other words, we still do not know what it means to 'avoid tax', and so we have not moved far from the first element in Wheatcroft's definition, namely, a transaction that avoids tax. So far, we only know that it is a behaviour that diminishes revenue as a consequence (and, therefore, it is not very different from what tax lawyers understand as tax evasion).

The quoted definitions of tax avoidance bring together the descriptions of the two elements recognised as part of the strategic behaviours characterised as avoidance (that is, that they are legal and bring problems for the revenue authorities) with the way in which the legislature and the judiciary have reacted to what they consider avoidance to be. It is only because of the reactions from parliament and the judiciary

38. Wheatcroft, "The attitude of the legislature and the courts to tax avoidance", 209.

to features such as the motives of taxpayers and the artificiality of behaviour, that such conducts not encouraged by the law have become relevant elements in what is a nominal definition of avoidance.³⁹ This can easily be proved once we consider whether these behaviours generate problems for governments or not, and in light of the latter they would be legal and therefore invisible to the law (they would be cases of what McBarnet calls creative compliance⁴⁰). In the following subsections I analyse what I consider to be the central elements of tax avoidance according to the classical paradigm of tax law: (i) that it is legal and (ii) that it is a problem. This will pave the way for further analysis of the solutions for tax avoidance advanced in the literature.

2.2.1. The legality of tax avoidance

That tax avoidance is legal is today common sense. This common sense forms part of what is referred to as the ‘culture’⁴¹ or ‘ideology of tax avoidance’.⁴² The legality of tax avoidance was declared early on in judicial decisions. In the US, for example, we find the oft-quoted opinions of judges Holmes and Hand. According to the former, ‘[w]e do not speak of evasion, because, when the law draws a line, the case is on one side of it or the other, and if on the safe side, it is none the worse legally that a party has availed himself to the full of what the law permits’.⁴³ In Hand’s words, ‘[a]nyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes’.⁴⁴ When the same case came before the US Supreme Court, the unanimous opinion was that ‘the legal right of a taxpayer to decrease the amount

39. *vid infra*, 104, 233ff.

40. McBarnet, “When compliance is not the solution but the problem: from changes in law to changes in attitude”. I develop this idea in more detail *infra*, 31.

41. Ordower, “The culture of tax avoidance”.

42. Barker, “The ideology of tax avoidance”.

43. *Bullen v. Wisconsin*, 240 U.S. 625, 630–631 (1916).

44. *Helvering v. Gregory*, 69 F.(2d) 809, 810 (C.C.A. 2d, 1934); *aff’d*, 293 U.S. 465 (1935). To be fair with Hand, it is important to say that while he recognises this right, at the same time, he develops an interpretive theory of tax statutes that goes beyond the literal meaning of the law. *vid*, Chirelstein, “Learned Hand’s contribution to the law of tax avoidance” and *infra*, 34.

of what otherwise would be the amount of his taxes, or altogether avoid them, by means which the law permits, cannot be doubted'.⁴⁵

In the UK things are not that different.⁴⁶ In similar words to those used by his American colleagues, Lord Clyde states that,

No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel in his stores. The Inland Revenue is not slow – and quite rightly – to take every advantage which is open to it under the taxing statuses for the purpose of depleting the taxpayer's pocket. And the taxpayer is in like manner entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue.⁴⁷

This principle was recognised and set out by the House of Lords in the *IRC v Duke of Westminster* case:

Every man is entitled if he can to order his affairs so as that the tax attracted under the appropriate Act is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.⁴⁸

These decisions have received plenty of complimentary comments, mainly from those who recognise an 'entitlement' to avoid taxes. For example, referring to those who adopt tax avoidance schemes, Wheatcroft states that, '[t]here is, of course, no doubt that they are within their [taxpayers'] legal rights'.⁴⁹ Furthermore, Sears states that tax avoidance is 'an effective and legally innocent method of saving [...] [it] means a net profit'.⁵⁰

45. *Gregory v. Helvering* 293 U.S. 465m, 469 (1935) quoted by Angell, "Tax evasion and tax avoidance", 83. Commenting on this opinion, Angell says 'What the law permits is the question for the courts to decide, and it is not the function of the judiciary in this field to determine the morals of the matter' (83 fn.11).

46. For several examples in the UK *vid ibid*, 84 fn.15.

47. Lord Clyde, *Ayrshire Pullman Motor Services and Ritchie v. Inland Revenue Commissioners* (1929) 14 TC 754. Quoted by Bracewell-Milnes, *Tax Avoidance and Evasion: The Individual and Society*, 31.

48. [1936] A.C. at pp.19-20. For more examples, *vid* Wheatcroft, "The attitude of the legislature and the courts to tax avoidance", 217-218.

49. *ibid*, 218.

50. Sears, "Effective and lawful avoidance of taxes", 77.

It might also be argued that the legality of tax avoidance is a consequence of there not being any conceptual clarity as to the concept of tax law. Because of this lack of conceptual clarity, parliament and government tend to assign different and contradictory functions to tax policy. I will analyse this in greater detail below when developing the elements of the classical paradigm of tax law. Suffice to say for now that, as Freedman argues, some of these contradictory policies, for example, those according to which the government prizes taxpayers with tax deductions for several possible reasons, are some of the factors that foster the culture of avoidance.⁵¹

2.2.2. The problems of tax avoidance

Even if we accept that tax avoidance is legal and taxpayers are entitled to not pay more taxes than those required by the law, its consequences are a problem for governments. This is so because tax avoidance, as noted above following Tiley,⁵² endangers governments' tax policies and reduces tax revenue. These are the main reasons behind why tax avoidance has become relevant to public debate. Indeed, it is no mere coincidence that this happened once policies justified under egalitarian premises were established, as was the case with modern income tax. At first, governments that tried to secure compliance with income tax by combating tax avoidance did not make much effort to analytically distinguish it from evasion.⁵³ It was only because of opposition between those who recognised an entitlement to avoid taxes and the governments that intended to stop it that the problems of tax avoidance became relevant as a justification for governments' claims.

This is the point from which Doreen McBarnett's analysis of tax avoidance begins. Her work has been very helpful in identifying the problems of legal regulation in the implementation of egalitarian policies, especially in terms of analysing the way in which the subjects of the law 'use and manipulate it [...] to create strategies for

51. Freedman, "The tax avoidance culture: Who is responsible? Governmental influences and corporate social responsibility".

52. *supra*, fn.32

53. "To the professional mind, the phrase "tax evasion and tax avoidance" has been familiar for many years, for the legal problems which are implied by the phrase arose with the passage of our first Income Tax Act and have been with us since". Angell, "Tax evasion and tax avoidance", 80. Angell's argument is oriented to distinguish evasion from avoidance as being 'confused' by US President Roosevelt in an address to Congress in June 1937. In this address President Roosevelt said that evasion and avoidance 'are alike in that they are definitely contrary to the spirit of the law', *ibid*.

weakening the law by legally avoiding it'.⁵⁴ Tax avoidance is one of the examples that McBarnett uses to show the way in which the use that individuals make of the law endangers the connection between social justice and the law.⁵⁵ According to McBarnett, tax avoidance is a product of the 'method of literally complying with the words of the law while nonetheless defeating its purpose'⁵⁶ However, following McBarnett, not only egalitarian policies are endangered by tax avoidance; she is also worried that possible answers to it may be contested by those who defend an ideology of law (those who would consider that broad rules against tax avoidance risk the rule of law and democracy). As a consequence, she believes that tax avoidance is a problem for our understanding of the law. In her words, '[t]hose anxious to tackle the issue of whether the institutions of law [...] can foster egalitarian regulation and democracy are faced with the fundamental question of what is law? How far down the road to discretion can law go and still be law?'.⁵⁷ I understand McBarnett's concern to be one about the limits of the law, that is, about what is within or outside of it. This is why it may be understood that her answers to avoidance, and of the majority of the solutions that have been brought forward, constitute intents to include substance in tax law. As I will show later, I think we can depart from here in order to ask something more about the concept of law; not only in relation to its limits, but in relation to its aspirations.⁵⁸

Others argue that tax avoidance is a problem because it is unfair. The standard of fairness used for this purpose is the principle of horizontal equity, that is, those who are in the same economic position (for example, the same level of income) should contribute in equal terms (pay the same amount of tax). There are two ways of understanding why it is problematic that the principle of horizontal equity is affected by tax avoidance. The first, which is largely defended by economists, is that tax avoidance as deviance from the principle of horizontal equity affects the neutrality of the tax system. According to this idea, tax systems should be neutral so that individual decisions about work or leisure are not affected by taxes. Therefore, tax avoidance is

54. McBarnett, "Law, policy, and legal avoidance: can law effectively implement egalitarian policies?", 114.

55. *ibid*, 115–117.

56. *ibid*, 119.

57. *ibid*, 121.

58. As I try to argue in this thesis, the aspiration of law endangered by tax avoidance is fraternity or mutual recognition. *infra*, 188 and Ch5.

problematic because it presents a problem in the design of the tax system. As long as the tax system contemplates a differential treatment design in order to benefit or incentivise certain economic activities through preferential tax rates, people will try to adopt the preferential treatment established by the law. This approach to fairness is not concerned with the nature of avoidance because, as noted before, economists only distinguish between tax evasion and avoidance, between legal and illegal behaviours.⁵⁹ From this perspective the solution to tax avoidance is easy: tax reform.⁶⁰

The second begins from a different starting point, namely, that of justice. Here, horizontal equity is a standard of fairness that, as such, expresses a conception of justice. According to this approach, when horizontal equity is violated, what suffers is the fairness of the system: the avoider is not paying what he should according to a principle of justice in taxation that informs the tax system.⁶¹ The problem then is that this can place in doubt the legitimacy of the tax system, or, as Wheatcroft asserts, avoidance brings a ‘sense of injustice and inequality [...] in the breasts of those who are unwilling or unable to profit by it’, thus increasing tax evasion.⁶² From this perspective the solution to tax avoidance consists of finding a way to make sure that the law is applied.

In the following section I will revise current solutions to tax avoidance but only from the position of this second perspective (tax avoidance as a problem of justice, that is, of the application of the law). I will not address the tax reform solution according to the economic approach because I think it does not help us to determine what tax avoidance is and, furthermore, it does not help us in our intent to determine why tax avoidance is problematic for tax law. It only tells us that if we are concerned with tax neutrality then we should design a tax system in such terms that taxes are not something to be taken into consideration by individuals in their decision-making processes when choosing between labour and leisure. In other words, it provides an

59. *vid*, Goetz, “Tax avoidance, horizontal equity, and tax reform: a proposed synthesis” and *supra*, fn 34.

60. This is why some economists think that the solution to tax avoidance is either a flat tax or proportional taxation. For different proposals for tax reform within the economic approach to taxation *vid*, Adam, Besley, *et al.*, *Tax by Design: The Mirrlees Review*.

61. It is not necessary for this purpose to specify herein the content of the principle of justice in tax matters that underlies the system in question. This is, of course, a highly debatable aspect of tax law.

62. Wheatcroft, “The attitude of the legislature and the courts to tax avoidance”, 212.

answer to our intent to distinguish between different strategic behaviours in tax law by sidestepping the problem.

2.2.3. Possible solutions to tax avoidance

Several solutions have been proposed by those who consider tax avoidance to be a problem of justice (and therefore one that implies tax law). Part of that which explains the variety of solutions is that they approach the issue by using different conceptions – most of them non-explicit – of avoidance.⁶³ Notwithstanding the fact that conceptual clarity is absent in relation to what the problem is exactly, all the solutions deal with the enforcement of tax law. It is possible to systematise, in broad terms, all the alternatives into two categories: (i) those that deal with the application of the law and (ii) those that refer to the structure of the tax system. I analyse these alternatives below.

(i) Alternatives in the application of tax law. Initially, a formalistic approach dominated the interpretation and application of tax law. Accordingly, tax statutes had to be applied in the exact terms contained within the rules, which were interpreted in a literal way. It was thought that in this way the rights of taxpayers would be secured by limiting a government's power to tax. Taxpayers had an obligation to pay taxes only according to what was 'clearly' included in the rules. If the letter of the law did not cover the economic results or the legal operations developed by individuals then tax was not levied. Because individuals did not have an obligation to pay taxes unless the law said so, if someone did not have an obligation to pay taxes it was a problem of poor legislation. In other words, the legislature was responsible for creating the law according to which individuals were taxed. Consequently, if legislators were responsible for the poor drafting of the law the solution therefore had to be tax reform. Sears provides a good example of these ideas when he states that the 'free adoption of tax saving methods tends to make fair what legislators have made unfair and they make manifest errors in tax legislation which should be corrected'.⁶⁴ Or, in the more recent words of Orow, 'tax avoidance has more to do with what the legislature did not impose rather than what it actually imposed by way of taxation. It

63. In the same sense, Tiley, *Revenue Law*, 101.

64. Sears, "Effective and lawful avoidance of taxes", 79.

covers instances where legislative intention and policy miscarried and failed to anticipate and reach the transaction under consideration'.⁶⁵

The solution was to improve tax law by establishing 'better' rules, closing unwanted gaps or creating particular anti-avoidance legislation.⁶⁶ But these solutions have proved insufficient as taxpayers and their advisors create (and continue to create) new legal structures or use (and continue to use) the law for purposes different from those intended by the legislature. As Doreen McBarnet states, compliance with tax law can be a problem when it constitutes creative compliance. Those who 'have the resources [...] may set their lawyers to work on the legal form of their activities to package or repackage them in ways they can claim fall beyond the ambit of disadvantageous, or within the ambit of advantageous, law'.⁶⁷ Formalism makes equivalent compliance and non-compliance by '[escaping] the intended impact of law' by 'undermining the policy behind the words'.⁶⁸ One of the factors identified by McBarnet as facilitating creative compliance is formalism, that is, an identification of the law with rules.⁶⁹ As reported by McBarnet and Whelan, the problem with formalism is that it permeates the legal culture, pushing against any possible legislative intent to bring more substance into tax law.⁷⁰

According to McBarnet and Whelan, several methods were brought together to bring 'anti-formalism into practice' but none have been able to leave formalism behind.⁷¹ These methods include a stress on the purpose of the law, the use of broad

65. Orow, "Structured finance and the operation of general anti avoidance rules", 415. Orow finishes this paragraph by saying: 'Reduced to its bare essentials, tax avoidance is a conceptual anomaly that exists in the mind of those whose sense of morality is violated by certain tax effective practices'. Tiley cites this same paragraph but interprets it in a different way. He asserts that Orow is defending a conception of tax avoidance as a 'battle of wits', *vid*, Tiley, *Revenue Law*, 101. What Tiley does not see is that Orow defends a substantive conception of tax law, what I call in Ch2 the classical paradigm of tax law, according to which tax avoidance is not a juridical concept within tax law and therefore it is not a juridical problem. Orow's description of the elements of tax avoidance in that same paper, confirms my interpretation.

66. This includes, of course, the establishment of anti-evasion rules.

67. McBarnet, "When compliance is not the solution but the problem: from changes in law to changes in attitude", 229.

68. *ibid vid*, McBarnet and Whelan, "The elusive spirit of the law: formalism and the struggle for legal control", 848-853.

69. McBarnet, "When compliance is not the solution but the problem: from changes in law to changes in attitude", 230. For an analysis of formalism *vid*, Shklar, *Legalism. Law, Morals, and Political Trials*.

70. McBarnet and Whelan, "The elusive spirit of the law: formalism and the struggle for legal control".

71. *ibid*, 873.

criteria, the avoidance of tight definitions, and the use of professional self-regulation.⁷² Because the last of these is not relevant to what interests me here since it implies defeat for the project of finding a legal answer to tax avoidance, I will analyse only the first three methods.

Those who thought that rules or the letter of the law could not stop avoidance defended the first strategy. The alternative was to bring substance to the application and interpretation of tax law. If the law were to be more than mere form then what was needed was for it to be looked for and for it to be applied according to its purpose. In the application of the law the courts were asked to neglect the form of the law if this was the way in which its purpose could be achieved. Different alternatives were developed within this approach. The judicial approach required that objective and subjective factors be attended to. The first implied an evaluation of the economic reality of the transactions made and operations executed, thus neglecting the legal form adopted if it was not the expression of economic substance, mainly, under the notion of 'business purposes'. The subjective element required intent to avoid taxes. Yet presented in this way this requirement does not of course make much sense in juridical terms. If we recognise that individuals have the liberty to decide what legal form to adopt, then the economic reality cannot be independent of the subjective element. The problem with the objective requirement is that no one is obliged to generate income from his business transactions or to adopt in them a particular legal form. At the same time, how can we assume that an interest in avoiding taxes should be problematic for the law if individuals are entitled to it? This required the development of theories of the statutory interpretation of tax law in which statutes were interpreted according to their technical meaning in line with the purposes of the legislator.

(ii) Solutions that deal with the structure of the tax system. These solutions try to surpass the interpretive ones and as alternatives they coincide with the following two strategies in McBarnet and Whelan's list: the adoption of broad criteria and the avoidance of tight definitions. They can be brought together because they normally go hand in hand in some proposals. For example, both things are expected to be achieved by those who propose a move from the regulation of tax law based on rules to one

72. *ibid*, 854–855.

based on principles; or by those who advocate the establishment of particular or general anti-avoidance rules or principles. Those who propose the adoption of legislation based on principles rather than rules rely on one aspect of the debate about the concept of law that has occupied legal theorists during the last fifty years: Ronald Dworkin's criticism of H. L. A. Hart's conception of law as a system of rules is the locus classicus whereby the logical distinction between rules and principles is defended.⁷³ According to Dworkin's initial formulation of the distinction, the law is not only a system of rules but also one of principles, which are drafted in broader terms and pondered when applied, since they do not respond to the binary logic of yes and no. The idea behind bringing principles into tax law, therefore, is to make possible a broader interpretation and application of tax norms. These proposals have been strongly criticised by those who argue that 'giving arbitrary powers' to judges is a menace for the rule of law.

In answer to these formalistic critics, others have suggested that the best way to bring together the ideology of the rule of law, the values of form in law and legislative purpose is to establish anti-avoidance rules or principles. Again, governments have adopted several different approaches to anti-avoidance rules. They all have in common the intent to describe in as detailed as possible a way the behaviours covered by tax rules. Since these alternatives have proved to be insufficient and failed to achieve their objective, some have proposed the establishment of anti-avoidance principles. These are supposed to work in two ways: they inform taxpayers that tax laws will be interpreted substantively and, at the same time, they authorise judges to interpret tax norms in broader terms considering the purpose of the law. They intend to 'enable decisions to be made in individual cases fairly and within a legitimate and non-arbitrary framework'.⁷⁴

This overview helps us to see how the alternatives to formalism proposed so far go from extreme opposition to a more subtle integration of form and substance. As has happened in other areas of law, the 'cycle of adjudication', or the 'pendulum of

73. For Dworkin's original criticism *vid*, Dworkin, "The model of rules". For an overview of the debate *vid*, Leiter, *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Philosophy*, Ch6; Dworkin, *Justice In Robes*, Ch6; and, Coleman (ed), *Hart's Postscript. Essays on the Postscript to the Concept of Law*.

74. Freedman, "Defining taxpayer responsibility: in support of a general anti avoidance principle", 345. Further details *infra*, 48.

adjudication’, which swings from formalism to substance and back to formalism, has not been absent from tax law.⁷⁵ In addition, because of the null results obtained by these alternatives it is also possible to say that they have all failed. For example, McBarnet and Whelan argue that this failure is a consequence of the necessary formal character of the law and the legal practice.⁷⁶ This conclusion seems to be shared by those who have turned to social psychology and who are searching for new compliance techniques in order to understand taxpayer behaviour and motivate them into compliance with tax law.⁷⁷ However, there are still those who think that the project should not be abandoned because a legal answer is possible. Below I will analyse in more detail the best alternative available so far, namely, Judith Freedman’s argument for a ‘general anti-avoidance principle’ (GANTIP).⁷⁸

In what follows are some examples of the possible alternatives to formalism so far proposed, each of which will be analysed. The idea is to further explore the viability of these possibilities as solutions to tax avoidance. As I argue, all these solutions fail because they do not address the main problem of tax law, namely, that there is not any clarity of concept or any justification.

2.2.4. Why are the possible solutions doomed to failure?

In this section I analyse in some detail three examples of possible alternative answers to tax avoidance. I have chosen these examples because they aim to understand tax avoidance as a legal, and not only as an economical or ethical problem. However, I believe that all of them fail because they do not work with a juridical definition of tax avoidance as an aspect of a theory of tax law. In other words, they aim to improve legislative techniques against avoidance or are purposive interpretations absent of clarity regarding the purpose of tax law; they leave us without any possible juridical understanding of tax avoidance. In the best case, they might help us to acknowledge that there is not one purpose in tax law but many different policies. Yet they cannot

75. *vid*, Atria, “Adjudication and the particular” and Postema, *Bentham and the Common Law tradition*, 279–280.

76. McBarnet and Whelan, “The elusive spirit of the law: formalism and the struggle for legal control”, 873.

77. *vid*, Braithwaite, “Dancing with tax authorities: motivational postures and non-compliant actions, and Taylor, “Understanding taxpayer attitudes through understanding taxpayer identities”.

78. *infra*, 48.

provide a better understanding of the juridical structure of the legal obligation to pay taxes.

2.2.4.1. An expanded analysis of avoidance

In *The taming of the shrewd: identifying and controlling income tax avoidance*, George Cooper offers a defence of what he calls an ‘expanded analysis’⁷⁹ of tax avoidance. In his approach, Cooper expects to improve the results of the legal reform approach to tax avoidance by analysing the relationship between the structure of the tax in question (in this case, income tax) and those behaviours characterised as avoidance. Using several examples, mainly from the US, Cooper shows the enduring nature of avoidance.⁸⁰ He considers that this is the result of ineffective tax reform,⁸¹ which is incorrectly based on an understanding of tax avoidance as a series of unrelated, ad-hoc, activities that are ‘manifestations of a single wrong’.⁸² Thus, tax reform has provided only particular answers to particular transactions or operations considered as avoidance. This indicates that ‘much of the traditional liberal reform approach is misdirected and unproductive’.⁸³ Alternatively, Cooper proposes a broader approach in order to establish what might be considered ‘abuse’. What is needed is a starting point that stems from a consistent method that would secure constancy in what is being done or what is trying to be prevented.⁸⁴ In Cooper’s own words, ‘[t]his alternative, expanded approach seeks to identify the true “avoidance” in any situation, and to design a reform that addresses the fundamental sources of that avoidance’.⁸⁵ On the contrary, as long as we do not know what qualifies as avoidance, we will ‘not know what our anti-avoidance policy should be’. However, he considers that it is not possible to achieve a ‘pervasive agreement on what constitutes tax avoidance [...] because so much depends on political values and judgements’. The alternative, he argues, is to build consensus on a ‘relatively neutral principle’ that would work as a ‘guide for anti-avoidance reforms

79. Cooper, “The taming of the shrewd: identifying and controlling income tax avoidance”, 718.

80. *ibid*, 663–666.

81. For several examples of ineffective anti-avoidance tax reform in the US, *vid ibid*, 679–689.

82. *ibid*, 666–667.

83. *ibid*, 667.

84. *ibid*, 693.

85. *ibid*, 694.

and [would] give those reforms some precision and coherence'.⁸⁶ He then adds that the 'key to defining tax avoidance, and to structuring a consistent tax avoidance policy, is to sort out the desired and the undesired'.⁸⁷

The expanded approach to tax avoidance has three elements or perspectives: (a) efficiency, (b) equity and (c) practicality.

(a) In his definition of the efficiency perspective,⁸⁸ Cooper departs from the ideal economic definition of an efficient tax system. He does so to acknowledge that what is efficient for tax law purposes is not necessarily an ideal but that which is defined according to a particular tax policy. Or, as he puts it, 'What is "inefficient" in the classical economic sense becomes "efficient" in a larger social and economic policy sense, and its occurrence is not tax avoidance from this broader efficiency perspective'. Avoidance is only relevant then, when there is a result that differs from the one intended by the law, when there are 'instances of excessive effects'.⁸⁹

(b) Within the expanded approach equity is relevant only when 'a taxpayer is able to secure an effective after-tax rate of return more favourable than that generally available'.⁹⁰ Coherent with his approach, Cooper does not defend an ideal concept of equity, but the one that is contained within the tax system. Therefore, the equity problem does not exist if the tax system contains some benefits or privileges for certain activities and those who benefit from acting accordingly with what is intended by parliament.

(c) The third element introduced by Cooper is the practical aspect. According to Cooper, regardless of how inefficient or inequitable a practice is it should be changed only if there is good reason to believe that the situation will improve.⁹¹ The relevant criterion for justifying reform is 'whether the situation of the society and the taxpayer will be substantially modified by the proposed reform' and not 'whether the taxpayer will be able to do the same thing'.⁹² This requires a broad evaluation of the

86. *ibid*, 660.

87. *ibid*, 695.

88. *ibid*, 695–697.

89. *ibid*, 697.

90. *ibid*, 698.

91. *ibid*, 701.

92. *ibid*, 701–702.

tax system and its structure because the draftsman will have to consider whether his decisions will open or close new alternatives for the taxpayer. In other words, there is no point in reforming the law to stop a particular behaviour if this will not solve the source of avoidance.

Cooper tests his expanded approach by applying it to an analysis of tax shelters in the US and concludes that these are not problematic *per se*.⁹³ Tax shelters can become inefficient and inequitable only when leverage ‘moves transactions from the intended exempt-equivalent stage to the better-than-exempt situation’ or when it helps to create ‘non-market controlled tax advantages’.⁹⁴ A possible reform, therefore, should focus on leverage rather than on any particular tax shelter. Once the expanded approach identifies a ‘generic problem such as this, tax reformers ought to be pursuing a generic solution, not the ad hoc set of reforms that have been adopted periodically’.⁹⁵ In more general terms, Cooper identifies four sources from which tax avoidance has traditionally derived: (i) ‘any possibility of getting write-offs for capital investment at a pace significantly faster than actual decline in value’, (ii) ‘income taxed more favourably when earned by a controlled artificial entity’, (iii) ‘income is taxed more favourably when shifted to close family members’ and, (iv) if ‘accrued gains on assets are taxed more favourably’.⁹⁶

The expanded approach developed by Cooper is no doubt a step forward for those who see a solution to tax avoidance in law reform; it is not, however, exempt from problems. On the positive side, the expanded approach represents a sophisticated systematic approach that can help drafters in their aim to improve existing statutory legislation or when drafting new statutes. However, it does not move very far from this.

The main problem of the expanded approach is that it does not provide an operative understanding of avoidance for those who have to apply tax law, more precisely, in those cases in which clarity does not exist as to whether the case is covered by the legal disposition. In this sense, tax avoidance is not only an entitlement for taxpayers, but also an impossible category within valid tax law until, at least, when

93. *ibid*, 705–716.

94. *ibid*, 716.

95. *ibid*, 721.

96. *ibid*, 724–725.

tax law is reformed (even if in the broad terms proposed by Cooper). Within Cooper's expanded approach tax avoidance is incoherently treated as a behaviour that should be sanctioned.

It is incoherent to sanction tax avoidance in these terms if the solution to the problem can only come from tax reform (because of poor drafting that does not identify the 'sources of abuse'). This means that before the reform such conduct was 'legal', and Cooper states nothing to deny this. How then are judges to apply the expanded approach in particular cases if the conduct is not prohibited or does not go against the law? Are they supposed to become drafters rather than adjudicators? And if tax avoidance includes conduct that goes against the intended or defined conceptions of efficiency and equity within the system in question, is the intent to avoid relevant to declaring taxpayers as having 'responsibility'?

All these problems derive from not having a clear conception of avoidance that is able to explain the way in which it plays a juridical role within tax law. Cooper is still working with the traditional conceptions of avoidance,⁹⁷ particularly when he asserts that '[a]s long as there are income taxes, there will be income tax avoidance, the process of detecting and preventing tax avoidance is an ongoing one. There will never be a single, simple solution'.⁹⁸ It does not help much to state that tax avoidance will always be company to income tax. It can mean too many things for it to become an operative legal concept; it may refer to behaviour, to an entitlement to avoid, to problems within the tax law structure that impedes the imputing of avoidance to taxpayers, and so on. That so many solutions are needed may be explained by the fact that there are many conceptions of avoidance under discussion.

But the problem is that we cannot have a definition of avoidance that is applicable to each legal actor, that is, legal advisers, taxpayers, judges, administrative officials and so on, and dependent upon variable criteria for defining tax avoidance. There are different ways in which the solution to a problem might require different actions from different institutional roles depending on their functions, but they should all work around one concept or notion of avoidance (and not merely *ex post* 'abuse'). We should leave behind the substantive content of the elements in Cooper's expanded

97. *vid supra*, 29 and 31.

98. Cooper, "The taming of the shrewd: identifying and controlling income tax avoidance", 718.

approach and only adopt it as procedural guidance for reasoning in the process of law reform. At the end of the day, even if we adopt Cooper's expanded approach we will still not understand why tax avoidance is problematic in juridical terms.

2.2.4.2. Purposive interpretation in tax law

Even if we abandon Cooper's expanded approach there is an important aspect of his method that needs to be rescued. His approach is concerned with establishing the ways in which legislation drafters might ensure that the efficiency and equity elements of tax law are respected by taxpayers. In this sense, Cooper assumes that the law is supposed to express a purpose or intent. The problem is that he is working with a concept of avoidance that is operative from the perspective of the legislature, but not from the point of view of those who apply the law. As a result, we do not have any better a grasp of tax avoidance but instead a technique for developing better legislation. Nevertheless, there are those who have tried to develop this task from the perspective of adjudication; they are promoters of the substantive interpretation of tax law. In general terms, and in the best terms possible, those who approach the problem from this perspective try to bring together form and substance in tax law. The underlying idea is to show how a substantive interpretation of tax law does not endanger certainty or the rule of law. The debate among those who advocate for this approach delves further into determining the criterion or standards to which substantive interpretation should be subjected.

One of the most popular substantive criteria argued for in the literature is the economic substance doctrine. This doctrine, which has its origins in several decisions made by US courts, looks at two elements: (i) 'whether the taxpayer had a business purpose for the transaction' and (ii) 'whether the transaction objectively had economic substance (essentially a prospect of profit before taxes)'.⁹⁹ As Lederman argues, the problem with the economic substance doctrine is that it is incompatible with the content of tax systems. With a description that could easily be applied to almost all Western tax systems, she says that 'identifying abusive transactions is so difficult largely

99. Lederman, "W(h)ither economic substance?", 391. This is the way in which the doctrine has been understood in the US. For the judicial approach to tax avoidance in the UK, *vid* Tiley, *Revenue Law*, 111–128. Among the common law doctrines of substantive interpretations, Geier notes: 'substance over form, sham transactions, business purposes, and assignment of income', in "Interpreting tax legislation: the role of purpose".

because some tax provisions merely try to measure income while others try to provide an incentive for particular behaviours'.¹⁰⁰ If this is so, '[a] tax-avoidance motive on the part of the taxpayer undermines the measurement function, but not the incentive function'.¹⁰¹ Therefore, Lederman argues, the subjective element in the economic substance doctrine cannot explain that sometimes the tax system expects taxpayers to behave so as to minimise their tax liability. Regarding the objective element, and after analysing all its possible interpretations,¹⁰² she concludes that it 'does little to distinguish abuse cases from legitimate activity'¹⁰³ where profits could not be obtained. Lederman's aim is to warn the American Congress of the problems of the economic substance doctrine in case they decide to codify it.¹⁰⁴ She tries to show that to get to 'the real question of whether the claimed tax results are abusive', what is needed is that the courts 'address the heart of the matter – Congress's intent'.¹⁰⁵ Therefore, the final question should always be, did Congress intend to provide the tax benefit in question or not?¹⁰⁶

So, as Lederman states, her approach tries to find a test that asks 'a question of tax law: whether the claimed tax results are consistent with the statutory or regulatory scheme in question'.¹⁰⁷ Questions about a taxpayer's subjective purposes or about the objective business purpose would only be relevant in cases in which they are required by law.¹⁰⁸ This does not differ much from any approach to statutory interpretation in other areas of law. What is needed is to 'undertake a purposive inquiry [...] to any relevant legislative history, surrounding statutes, and general tax principles'.¹⁰⁹ Lederman is interested in showing the importance of adopting a purposive approach in the interpretation of tax law, but she is not concerned with how best to achieve it.

100. Lederman, "W(h)ither economic substance?", 392–393 and *vid*, 394–398. *vid*, Gunn, "Tax avoidance", 749 fn.751.

101. Lederman, "W(h)ither economic substance?", 393.

102. *ibid*, 435ff.

103. *ibid*, 441.

104. *ibid*, 443.

105. *ibid*, 443. Affirming the same about Congressional intent in 392 and 394.

106. *vid ibid*, 396, 397.

107. *ibid*, 444.

108. *ibid*, 443.

109. *ibid*.

One of the best examples as to how courts might develop this purposive inquiry is presented by Geier's *Interpreting tax legislation: the role of purpose*. Differing from traditional approaches to the topic, she believes that purposive interpretation can be compatible with a textualist approach, a substantive non-literal interpretation, cases in which purpose informs language to cover new cases without going against the statutory text, cases in which there is not any debate about the meaning of words but where the transaction does not 'fit within the purpose', and, finally, an 'evolving purpose or an apparent absence of purpose' can help to better understand its role in the interpretation of tax legislation.¹¹⁰ In this way, Geier separates a purposive interpretation of the law alongside its form, or lack of it, particularly in relation to the dichotomy between rules and principles or between formalism and substantivism, thus bringing new insights into the debate. Her argument is based on the work developed by Summers and Marshall, for whom purposive interpretation should not abandon the formal values embedded in the law.¹¹¹ Geier develops this approach by posing the requirements of purpose not at the level of a particular rule, but at a different level, namely, in the 'structure of the income tax'.¹¹² This is where she considers the purpose of tax law to be found while, at the same time, the formal values of law can be respected. The 'fundamental structure of the income tax (though it surely is premised on prior social choices regarding the best way to finance government) is a larger constraint, a larger purpose, that must inform the interpretation of those provisions that implicate it'.¹¹³ As a consequence, as long as the letter of the law does not go against the structural value(s) of the system, courts should not deviate from it. Congress's policy has primacy over any possible evaluation of that policy that the courts may have. If the substantive application of norms according to the structural values of the tax system leads 'to results inconsistent with the intended policy' it is congress, and not the courts, that is forced to amend the statute(s).¹¹⁴

However, purpose is not only to be found in the structure of the law but also in the 'history of a provision', including the context, debates and a comparison with

110. Geier, "Interpreting tax legislation: the role of purpose", 496–497.

111. *ibid*, 514ff. She refers to Summers, "The formal character of law" and Summers and Marshall, "The argument from ordinary meaning in statutory interpretation".

112. Geier, "Interpreting tax legislation: the role of purpose", 497, 502.

113. *ibid*, 497.

114. *ibid*, 502.

the valid law at the moment.¹¹⁵ Even more so, in cases in which purpose ‘cannot be identified’ courts should not be restrained from creating new laws; on the contrary, they should collaborate with congress to bring into practice the statutory scheme. According to Geier, the help of lawyers is also necessary in this process of the application of tax law because they should not rely exclusively on language to interpret the law. The same can be said for judges, specifically that the adoption of a literal or substantive interpretation by lawyers will also depend on the structure of tax law and its history.¹¹⁶

Even if we follow Lederman and Geier and adopt a purposive interpretation of tax law by attending to its structure, we still have to address the question, how are we to identify abusive behaviour? What they provide us with are reasons for purposive interpretation and a method for finding that purpose. Indeed, we can agree with them on this. However, we still do not have a juridical mechanism by which we might distinguish conducts that comply with the law from those that do not before the moment of adjudication. Therefore, if form has primacy from the perspective of the taxpayer, we cannot address cases of creative compliance. In light of this criticism, I venture that Lederman and Geier may develop the answer that there is not any difference between tax evasion and tax avoidance. If what is relevant is congress's purpose, then the only alternatives a taxpayer would have would be either to follow the law or to not follow it. If he follows the law he will pay in any case what is due. Indeed, he would be paying what is due even if he were benefitting from a tax saving policy, in case this is what the law permits him. We would be back to the binary structure of the law, but yet abandoning formalism by adding purpose to the form of the law. Avoidance would be, according to this understanding of tax law, nothing but a putative problem. There would be only two possible behaviours that a taxpayer could develop: compliance or tax evasion.

This way of understanding tax law rests on an important previous idea about its purpose that, at the same time, has consequences for the way in which we understand tax liability. Lederman believes that ‘identifying abusive transactions is so difficult largely because some tax provisions merely try to measure income while

115. *ibid*, 503–504.

116. *ibid*, 503–512.

others try to provide an incentive for particular behaviour'.¹¹⁷ So, according to her, tax law has two purposes: measuring income and incentivising particular behaviours. The difficulty then is that taxpayers might develop either purpose. Consequently, she suggests that courts should attend to the purpose of law so that they can determine if taxpayers are doing either and following the law. If they do follow the law, there would be no abusive behaviour. Lederman seems to be following a widely supported opinion according to which 'tax avoidance [...] cannot mean simply "tax reduction". If it means more than that, and if it does not describe tax-motivated conduct, it must mean the reduction of taxes in circumstances where taxes should not be reduced'.¹¹⁸ This is a sound conclusion for the argument if we accept that the purpose of tax law is that described by Lederman. But is it?

At the same time, Lederman's approach changes our understanding of tax liability because it stops being an obligation to contribute according to a determinate notion of justice in taxation to become an obligation to 'measure income'. This would require some further clarification.

The only clarity that we can derive from such an argument for a purposive interpretation in tax law is that we need to address the issue of the purpose of tax law in a deeper way. Only once we have a clear and justified idea of the purpose of tax law might we improve our understanding of tax avoidance. Or, in more general terms, only once we know the purpose of tax law can we define what it means to comply with it and how that purpose becomes operative through legal form. Therefore, we cannot opt for one method of purposive interpretation in tax law without first developing an enquiry into the purpose of tax law and how tax is charged through law. But as this thesis constitutes a philosophical enquiry into taxation and tax law, we are led to ask not only about the particular content of positive tax law, but also about the best justification of taxation as a legal institution. So we have the same lack of justification for tax law as the one found previously in Cooper's expanded analysis.¹¹⁹

By bringing together all that can be rescued from the approaches analysed so far, is there an alternative that supplements them? In what follows I will analyse what I

117. Lederman, "W(h)ither economic substance?", 392.

118. Gunn, "Tax avoidance", 759.

119. *supra*, 39.

consider to be the best alternative so far: Judith Freedman's proposal of a general anti-avoidance principle.

2.2.4.3. General anti-avoidance principle

So far, I have reviewed and shown the limits of those approaches that try to address tax avoidance exclusively, either from the perspective of institutions that develop legislative functions or those that perform adjudicative functions. In the first case, the main problem is that we lack an idea of how to apply the law in particular cases of avoidance. In the second, even in cases in which purpose is invoked for the application of tax law, we cannot progress very far since the purpose of tax law is still open to discussion. The result is that in both cases we cannot have a legal idea of what avoidance is: it is either a very broad idea of 'abuse'¹²⁰ or it is conceptually reduced to tax evasion.¹²¹ Here I will analyse a third alternative that tries to build a bridge between both approaches in order to move forward: to include in the tax system a general anti-avoidance principle (GANTIP). Such a general provision would refer to the general principles of tax law to help courts ascertain the intentions of the legislature. This alternative has been defended in the United Kingdom by Professor Judith Freedman in different works, but mainly in *Defining taxpayer responsibility: in support of a general anti avoidance principle* and *Interpreting tax statutes: tax avoidance and the intention of Parliament*. Freedman's project is particularly interesting because it implies a redefinition of both the way in which taxes are levied and tax law by changing normative elements. In this sense, she is clearly trying to answer Doreen McBarnett's concern about tax avoidance never having had a legal answer.¹²² In general terms, her approach implies changing our understanding of tax law structures in order to move from rules to principles, without compromising certainty. This intent has been called 'principles-based legislation',¹²³ the details of which will be analysed and criticised in a

120. As for Cooper, *vid supra*, 39.

121. As for Lederman, *vid supra*, 43.

122. *supra*, 31.

123. Freedman, "Improving (not perfecting) tax legislation: rules and principles revisited". According to Freedman, previous examples of this intent are Avery Jones, "Tax law: rules or principles?", Braithwaite, "Making tax law more certain: A theory" and Weisbach, "Formalism in tax law".

different place.¹²⁴ Here I am only interested in explaining one aspect of that proposal, the GANTIP.

According to Freedman, it is almost impossible to draw a clear line between tax avoidance and tax planning or tax mitigation.¹²⁵ Even if many have tried to provide a legal definition of avoidance, she believes that these have been unsatisfactory because a definition can be ‘helpful [...] only where there is a clear underlying concept’ and this has not been the case because avoidance depends on ‘one’s philosophical starting point’.¹²⁶ Part of the problem derives from the ‘lack of a conceptual and principled framework’, which is needed to develop policies against avoidance. This is the product of too many functions being attached to the tax system, namely, ‘raise revenue [...], redistribute income and wealth [...], mould behaviour and influence the economy’.¹²⁷ In her earlier work she even thought of defining tax avoidance as quite an unproductive and unnecessary task,¹²⁸ because even without a proper definition there are ways to combat avoidance while at the same time maintaining legitimacy, the rule of law, clarity and a relatively high level of certainty in the tax system. She reached this conclusion after showing how judicial aims to develop anti-avoidance principles in the UK proved not only to be unsuccessful but also contradictory.¹²⁹ At the same time, she argues, the creation of specific anti-avoidance provisions or more detailed legislation would open the door for more creative compliance and less certainty because of the difficulties associated with purposive interpretation in tax law.¹³⁰

Freedman's analysis starts by asserting the two main judicial principles associated with tax avoidance in the UK. These are the Westminster and the Ramsay

124. *infra*, 98.

125. She does not think the same for the distinction between tax evasion and tax avoidance, *vid* Freedman, “Defining taxpayer responsibility: in support of a general anti avoidance principle”, 347–348. In this she follows what has been described in previous sections of this chapter.

126. Freedman, “Is tax avoidance “fair”?”, 86–87.

127. *ibid*, 87.

128. Freedman, “Defining taxpayer responsibility: in support of a general anti avoidance principle”, 345 and Freedman, “The tax avoidance culture: Who is responsible? Governmental influences and corporate social responsibility”, 365.

129. Freedman, “Interpreting tax statutes: tax avoidance and the intention of Parliament”, 53, 85–86, 90.

130. *ibid*, 54.

principles.¹³¹ According to the first principle, avoidance is legal and taxpayers are entitled to it by arranging their business so as to legally pay the least amount of tax possible. The second principle was developed at the beginning of the eighties and was considered the ‘new approach’ for countering tax avoidance. As stated by Lord Wilberforce, this principle does not go against other established principles, especially the Westminster principle. Therefore, subjects were to be taxed according to the words of an Act and not on ‘intendment’ or ‘equity’, while at the same time taxpayers’ motivations were irrelevant unless a particular provision prescribed the contrary.¹³² The judicial doctrine initially recognised in Ramsay suggests that this is ‘a judicially-created rule of construction that require[s] the analysis of the transaction as an indivisible whole in given circumstances’.¹³³ However, as Freedman argues, in later cases the House of Lords defended an alternative view according to which there never was a judicial doctrine in Ramsay, but only ‘an application of the normal rules of statutory construction’.¹³⁴ The point defended by the courts was that there could not be the creation of legislation in an area where parliament had not legislated. However, the very same day that this decision was reached (arguably, according to Freedman) the Ramsay principle was defended as a judicial doctrine in a different case.¹³⁵ As the courts put the problem, what is needed is a way in which the intentions of parliament can be easily identified and applied to a particular case.

Some propose the creation of detailed rules in which the intentions of parliament are clearly stated. This may or may not be combined with a general anti-avoidance rule (GAAR). A GAAR contains a general provision with a detailed description of economic substance or interpreting tests to be used in the application of specific legislation. Freedman opposes these intents since they would only replicate the problems of existing tax systems. They would provide opportunities for more creative compliance, the system would become more complex because of ‘hyperlexis’, uncertainty would increase because of additional litigation and detailed rules will

131. *vid supra*, 29.

132. Freedman, “Interpreting tax statutes: tax avoidance and the intention of Parliament”, 56.

133. *ibid*, 57–58.

134. *ibid*, 58.

135. *ibid*, 65–70. *vid also*, Hoffmann, “Tax avoidance”.

never close all the possible gaps in the system.¹³⁶ Without referring to principles or content, and only referring to broad interpretive principles, a statutory GAAR would replicate the logic of statutory construction: ‘A broad GAAR that merely applies a purpose test and refers to abusive and impermissible actions will simply be read by the court as an instruction to look at what is impermissible or abusive under the normal rules of statutory construction’.¹³⁷

Contrary to these approaches, Freedman believes that ‘what is needed are fewer detailed rules backed up by principles in accordance with which the rules can be interpreted in a purposive way’.¹³⁸ So her solution implies the creation of a GANTIP by parliament. Initially, a GANTIP would permit the courts to fill in gaps in the law under the terms established by parliament;¹³⁹ these would be broader than ordinary statutory interpretation, and would allow the courts to build an ‘anti-avoidance strategy which would be based on statutory interpretation in a broader sense’.¹⁴⁰ In the way in which she uses the term, a principle does not have any moral content and does not derive from case law.¹⁴¹ A principle, according to Freedman’s use of the term, is a broadly drafted statute that works as a guide to interpret a rule. ‘In this context, the legislative principle would be a method of signposting; a parliamentary indication that it was its intention that certain types of gap in its rule making should be filled by judicial decision based on the principles set out’.¹⁴² According to Freedman, we should not be worried about a GANTIP bringing uncertainty to the tax system. She understands that certainty is only relevant for the purposes of the evasion/avoidance divide as criminal penalties could be involved. The real concern when determining which conducts qualify as avoidance should be a different one: ‘producing a practical system with a fair test which is workable for the compliant majority but not as

136. Freedman, “Interpreting tax statutes: tax avoidance and the intention of Parliament”, 73–74 and Freedman, “Defining taxpayer responsibility: in support of a general anti avoidance principle”, 353.

137. Freedman, “Interpreting tax statutes: tax avoidance and the intention of Parliament”, 75.

138. Freedman, “Defining taxpayer responsibility: in support of a general anti avoidance principle”, 346.

139. ‘Initially’ because the aim of a fully established principles-based legislation (PBL) project is that there are no gaps in tax law. *vid infra*, 98.

140. Freedman, “Defining taxpayer responsibility: in support of a general anti avoidance principle”, 352.

141. Freedman, “A GANTIP: Was it really such a bad idea?”, 8–9. These principles are, therefore, different from Dworkinian principles. The implications of this definition from the perspective of legal theory will be dealt with *infra*, 98ff.

142. Freedman, “Defining taxpayer responsibility: in support of a general anti avoidance principle”, 354.

susceptible to manipulation as would be an entirely certain test, even assuming such a test could be devised'.¹⁴³

Freedman advocates a GANTIP as she believes that this is the best juridical solution to the moral and political demands against tax avoidance. Compared with other alternatives, a GANTIP appears to be an integral solution to tax avoidance in substantive and formal terms. It is an integral solution because it does not focus on one aspect of tax avoidance but tries to show how by bringing together the functions of parliament, the courts and the law it can be solved. In substantive terms a GANTIP respects the ideals of the rule of law; in formal terms, it is a substantive solution that respects the values of the form of law. At the same time, to become operative, and because it constitutes a structural approach, the GANTIP implies and requires a redefinition of tax law through principles-based legislation (PBL). All of these reasons make Freedman's GANTIP a serious candidate for the best possible approach to solving tax avoidance within a legal framework. I do think, however, that it is not free of problems. But because a critique of the GANTIP can only be developed after analysing PBL in tax law, I will focus on the shortcomings of this alternative later in chapter two.¹⁴⁴

However, let me say for the time being, even if not in detail, why I think this is the best approach for combating tax avoidance so far. After analysing and criticising Cooper's expanded approach and Lederman and Geier's arguments for purposive interpretation in tax law, in Freedman's GANTIP we find an alternative in which building in these intents overcomes their difficulties. But in these three approaches we see how there is a relevant underlying question that has not yet been tackled: what is the relationship between tax law and the function of taxes? This question is important because it would allow us to take one step back and revise the justification that underlies the different approaches of the theories in question. We cannot answer the problem of avoidance with a poor theory of tax law that according to which whatever parliament labels a tax is considered so. A theory of tax law is supposed to improve our understanding of tax law and not only restrict its scope to the limits posed by the posited law. Unless, of course, we limit ourselves to observing and describing the existing law, a case in which we would not be able to offer a solution to tax avoidance.

143. *ibid*, 355.

144. *vid infra*, 98ff.

However, even if it does not directly discuss this topic, Freedman's GANTIP moves in the right direction because, as she argues, it 'would become a counterbalance to the principle in the Duke of Westminster's case and to that of profit maximisation'.¹⁴⁵ This is a change that should bring consequences for the interpretation of tax law, but it goes even further because it changes the purpose of tax law, or at least shows a different understanding of tax law from the predominating one. But, as said before, a detailed analysis of Freedman's proposal will have to wait.

2.3. Tax planning

The third category that has been used to describe strategic behaviour in tax law is tax planning or tax mitigation. Here the analysis starts again with a definition provided by Avi-Yonah:

Licit tax savings can be defined as commonly accepted forms of tax behaviours that contradict neither the law nor its spirit and are intended to reduce the tax burden. This category can also be referred to as 'legitimate tax planning'.¹⁴⁶

Tax planning is the extreme opposite of tax evasion. First, because tax minimisation obtained by tax planning does not constitute illegal behaviour. Second, because tax planning is not considered a problem for governments; on the contrary, it is understood that those engaged in tax planning are following an alternative offered to them by the law. In other words, when involved in tax planning taxpayers obtain a reduction in their tax liability because they follow the law and not because they go against it. If to obtain that very same tax benefit they go against the law, they either fall into the category of tax evasion or tax avoidance. But if they do not contradict 'the law nor its spirit' then they can legitimately claim the consequences of the rules that reduce their tax liability.

But there is a less clear line between tax planning and tax avoidance. How are we to draw the line between behaviours that go together with or against the law? Are we to contrast the facts only with the word of the law or also with its substance? Here is where determining the difference between avoidance and evasion – that is to say, the importance of having a concept of avoidance – becomes relevant again. Is that line to

145. Freedman, "Defining taxpayer responsibility: in support of a general anti avoidance principle", 357. *vid* also, Freedman, "A GANTIP: Was it really such a bad idea?", 9.

146. Avi-Yonah, Sartori, *et al.*, *Global Perspectives on Income Taxation Law*, 102.

be drawn according to the intent of parliament? Or are we to consider the intentions, namely the intention to mitigate or to avoid taxes, of those individuals who engage in the questioned transactions?

Tax mitigation is understood as a 'benefit' given by the state to its citizens whenever a particular government decides to incentivise or prize a conduct. As discussed above, this is one of the possible consequences of one of the several functions assigned to modern tax systems. There is not much clarity in the legal literature regarding the many ways in which this might be done. So, for example, tax mitigation might be achieved by adopting a particular activity that is exempt from or charged with lower taxes, or through 'benefits' given to subjects under certain conditions. For those who have an economic approach to taxes, even progressive taxation might be understood as an incentive scheme: if you receive a lower income then you pay fewer taxes. This is known as the 'substitution effect' of taxes. Therefore, any rule in the tax system that is not neutral from an economic perspective might be considered mitigation.

Here we see once more, just as happened with the analysis of tax evasion and avoidance, that if we want to have a clear idea as to what qualifies as tax mitigation (or evasion or avoidance) we need to have a clearer idea of the purpose of tax law. Only then can we develop a standard for distinguishing among strategic behaviours. To define such a standard we also need to revise the criteria according to which its content will be determined. Therefore, we have to acknowledge that unless we want to have a descriptive taxonomy of what qualifies as tax planning (or evasion or avoidance), a discussion about the telos of tax law and the tax system becomes urgent. To reach this debate we first need to analyse what I call the classical paradigm of tax law. The following chapter is dedicated to this task. This paradigm forms the underlying justification of tax law as we know it and explains the actual legal form of the obligation to pay taxes. Tax avoidance is so difficult to define, and it brings so many problems to the legal status of the obligation to pay taxes, because there exists a tension between the legal structure of the classical paradigm of tax law and the political justification of taxes, or in other words, between private property and taxation.

CHAPTER TWO. THE CLASSICAL PARADIGM OF TAX LAW

1. INTRODUCTION

In the previous chapter I analyse why tax avoidance is a problem and how it cannot be understood using the traditional categories in which strategic behaviour in tax law has been classified and studied. I also argue that aims to provide a legal solution for tax avoidance have failed systematically due to a lack of a legal understanding of tax avoidance; in other words, contemporary tax law theory is unable to explain tax avoidance. I hypothesise that this situation might be explained in light of underlying presuppositions that typify contemporary theories of tax law, namely, what I call the classical paradigm of tax law.

In the present chapter I expound the classical paradigm of tax law by depicting its elements and limitations. To provide clarity I divide the argument into two parts. In the first part of the chapter I briefly describe the evolution of tax law, its relationship with public finance, the main elements of the classical paradigm of tax law, and the general theory of tax law that stands today with its distinctive mode of legal reasoning. In the second part of the chapter I dedicate some time to analysing in detail Professor Judith Freedman's principles-based legislation proposal as an alternative to the classical paradigm. The problems evident in Freedman's alternative show why a complete revision of the elements of the classical paradigm is needed. To that task I will dedicate the second part of this thesis (Chs. 3-5).

2. PUBLIC FINANCE, TAXATION AND TAX LAW

In comparison with other areas of law, especially private and criminal law, tax law represents a recent historical development. This 'unwelcome child of the law', as Johannes Popitz calls it,¹⁴⁷ became an independent legal field in the early twentieth century. In Germany, for example, tax law was only taught independently from finance law by Ludwig Waldecker at the University of Berlin from 1915.¹⁴⁸ According to Michael Stolleis, three factors contributed to its founding as a scholarly discipline of public law in Germany. First, tax law was only possible once Germany became a unitary and 'self-contained' nation state in 1871. Second, tax law could only exist once

147. Quoted in Stolleis and Dunlap, *A History of Public Law in Germany, 1914-1945*, 224.

148. *ibid*, 219.

the state was funded primarily from taxes, and this happened after the second half of the nineteenth century.¹⁴⁹ The third factor was ‘the establishment of the Rechtsstaat, which created the preconditions for a scholarly treatment of tax law within the procedure and reservation given to the law, the introduction of administrative jurisdiction, and a corresponding more sharply outlined conceptualisation of legal doctrine’.¹⁵⁰ After the First World War, when new sources of revenue were required, the Reich went for its first big tax reform between 1919 and 1920. A new administrative organisation was created, the jurisdiction between the Reich and the Länder was allocated and the financial adjustment of taxes was regulated.¹⁵¹ The decisive impulse for the creation of tax law was the Reich Tax Code of 1919. This reform elucidates the future development of tax law and, in particular, the interest in and the scientific-systematic development of a general theory of tax law. This general theory of tax law was aimed at explaining and bringing together all the common elements of tax law.¹⁵² The man responsible for this development was Albert Hensel, whose work on the general theory of tax law will be analysed later in this chapter.¹⁵³ A similar development to that which occurred in Germany also took place in Italy and Austria.¹⁵⁴ In the UK, the evolution of tax law was not that different. According to Freedman, tax law ‘is a relative newcomer to the UK law degree curriculum’. It was taught as an independent legal discipline only in the 1950s when Wheatcroft started teaching and publishing in his role at the London School of Economics.¹⁵⁵

Tax law is important not because it was constitutive of the financial and economic practices used by monarchs in need of funds – there is no doubt that public funds were needed before tax law was recognised as a field of law and institutional practices were created for that need. Throughout history public needs have been financed by public funds – most notably, peace and security – before there was any unity in tax law. But tax law heralded an important change in the way in which these practices developed and in our understanding of them. The legal aspect of these

149. *vid*, Arendt, *The Origins of Totalitarianism*, Ch2.

150. Stolleis and Dunlap, *A History of Public Law in Germany, 1914-1945*, 218.

151. *ibid*, 219.

152. *ibid*, 219–220.

153. *ibid*, 220–221. *vid infra*, 93.

154. *ibid*, 218.

155. Freedman, “Taxation research as legal research”, 15.

practices added something to the pure financial need and brought both new terms and new institutions to support those terms. Bringing the law to these practices had important institutional consequences: national revenue replaced the monarch's patrimony and taxes replaced exactions, while public expenditure was also subject to legal constraints and requirements. Revenue had to be legitimately obtained, which meant that individuals had to have good reasons to accept the legal obligation to contribute and the state had to have good reason to ask for money. In a sense, the iteration of the financial needs and institutional changes shows how taxes and the concept of the state have evolved hand in hand. It is the 'concept of the independent state which should be recognised as the basis for the historical and organisational evolution of taxes into constitutional tax systems – so much so, that in fact the labour of millennia was needed before taxation could begin in the nineteenth century, to reach its full development'.¹⁵⁶ Public finance became the arch that covered all these different practices.

Historically, public finance has therefore been understood as a theory for studying public revenue and expenditure, and tax law is concerned with the former. As Richard Musgrave explains, the 'classical question' of public finance was 'when and where resources should be put to public rather than private use, and who should bear that cost'.¹⁵⁷ It was only after the Great Depression that the theory of public finance was dominated 'by the study of the effects of fiscal policy upon the levels of income, employment and prices',¹⁵⁸ an attitude that dominates the economic approach to taxation to this day.

The question of how to determine who should contribute to financing public resources, and with how much, is an important aspect of tax law. As we will see later,¹⁵⁹ many of the debates surrounding tax law focus on the determination of a principle of justice in taxation that should inform fiscal policy, legislation and the sorts of taxes that should be established by a government.

156. von Stein, "On taxation", 30. Here von Stein argues that it is the concept of the state and not that of the natural community of men that explains taxation.

157. Musgrave and Peacock, "Introduction", ix.

158. *ibid.*

159. *vid infra*, 85.

However, things tend to get more complicated once the dependency of public finance on a theory of the state is acknowledged. We cannot have a clear idea of public finance if we do not revise its justification in light of the justification of the state, which, at the same time, rests on a particular notion of man. In the formation and justification of the modern state, for example, the importance given to the (natural) rights of man explains not only contractarian theories of the state but also that its function is to protect those rights.¹⁶⁰ Or, in C. B. Macpherson's words,

Every political theory which sets out to justify or advocate a particular system of government, or a limited or unlimited degree of obligation of the citizen to the state, must rest on an explicit or implicit theory of human nature. The theorist must show, or assume, that the human beings who will have to submit to and operate the desired system do need it and are capable of running it.¹⁶¹

To summarise then, the field of law we know today as tax law is a very recent development, that is, the legal form of the historical evolution that led to the modern state as a public economic agent was only very recently adopted. Furthermore, this phenomenon was not exclusively based on economic concerns but it also had an important element of justice. At the same time, the legitimacy of the state's power to tax depended on the justification of the state and public expenditure, so much so that taxes are explained because of public expenditure. The crucial question was, then, how to determine the criterion by which each individual should contribute to these expenses.

In what follows I analyse the underlying elements of what I call the classical paradigm of tax law.

3. THE CLASSICAL PARADIGM OF TAX LAW

The classical paradigm of tax law is built around various iterations of different historical conceptions of man in society and his interactions with the state. These interactions include debates about the function assigned to the state, the private-public allocation of goods, and the right to private property and public expenditure, among others. As said before, the evolution of this iteration was systematised around a theory

160. *vid*, Locke, *Second Treatise of Government*.

161. Macpherson, "Editor's Introduction", x.

of public finance, the function of which was to determine the relationship between revenue and public expenditure under a criteria of justice applicable to it. It is important to analyse the elements of the classical paradigm of tax law because these are the elements that still justify and explain the legal categories of contemporary tax law systems and their shortfalls (including the inability to understand tax avoidance). These elements are not to be found in one particular political theory or one theory of tax law, but they can be found in several. They are common elements that can help us to better understand the underlying assumptions of tax law. In what follows I distinguish between and analyse four elements in which the classical paradigm of tax law lies. These elements are:

- I. The individual as pure rationaliser (section 3.1).
- II. Private property as a natural right (section 3.2).
- III. Taxes as instruments of revenue (section 3.3).
- IV. Blindness to aspirational principles of justice in taxation (section 3.4).

3.1. The individual as pure rationaliser

The first element of the classical paradigm of tax law concerns an idea of the individual that underlies the contemporary approach to taxation. Of course, this notion of the individual is not exclusive to taxation, but my own interest lies in showing how this notion forms the basis of contemporary tax policy and tax law. Also, I am not interested here in producing – and I am not trying to produce – an exhaustive philosophical history of the evolution, interpretations and importance of this notion of man both within and for modernity. I simply want to make explicit a notion of the individual that pervades the justification of taxation and the structure of tax law, as we know it today. For the time being, let me say that this notion of the individual has been particularly influential in taxation because of the consequences it presents, that is, a tendency to understand taxes through the achievement of economic ends. I will show the influence and consequences of this notion of the individual after I develop the remaining elements of the classical paradigm of tax law. Thus, in this

section, I focus on delineating the pervading notion of the individual to which I am referring.

A central characteristic of this individual is the seventeenth-century idea that the individual is a pure rationaliser who acts according to self-interest.¹⁶² In trying to move deeper into this idea we must begin by providing a better account of what I mean by individuals. In a relevant sense for the argument herein, individuals are persons or beings ‘with a certain moral status, or a bearer of rights’. This moral status requires or presupposes ‘certain capacities’, in particular, that this being ‘adopt life plans’ and that his decisions are ‘attributable to him’. Or, as Charles Taylor asserts, ‘[a] person is a being who can be addressed, and who can reply [...] a “respondent”’.¹⁶³

Therefore, the notion of a respondent that has dominated the institutional design available to us today finds its origin in the seventeenth century, namely, and following Taylor, in an ‘epistemologically grounded notion of the subject. A person is a being with consciousness [...] as a power to frame representations of things’.¹⁶⁴ These persons act as respondents because their resources to reply come from the way in which they have a representation of the world and of their situation.¹⁶⁵ This capacity to represent the world allows agents to plan and rationally decide what to do, thus giving them the possibility to understand complex relations between things in the world. This is an essential capacity for those who see the ability to engage in strategic behaviour as a defining character of responding agents – in contrast with animals, for example.¹⁶⁶ From this conception a notion of agency flows, this being the possibility of acting as one wishes. Or, in Taylor’s words, ‘[a]n agent is a being who acts, hence who has certain goals and endeavours to fulfil them’.¹⁶⁷ Finally, this definition makes the ends of respondents unproblematic: they can be chosen according to their capacity to plan. The authority of my decisions, and consequently the respect that my decisions demand, depends on their being rationally understood in these terms.

162. There are many different approaches that I could adopt in order to build on the argument I am trying to make here. I have opted to follow the work of Charles Taylor.

163. Taylor, “The concept of a person”, 97.

164. *ibid*, 98.

165. *ibid*.

166. *ibid*, 101–102.

167. *ibid*, 103.

It is because of the ideas described above that for this conception of a person '[r]eason is and ought to be primarily instrumental' and therefore '[h]is world is one of potential means, which he understands with a view to control'.¹⁶⁸ Taylor is right when he says that under this conception of an individual freedom consists of subjecting the world to (the respondent's) desires or purposes.¹⁶⁹ In one possible variant of this conception, perhaps the most successful in terms of its persistence in modernity, persons are concerned with maximising their individual utility.

This conception of a person and the consequences that follow are supposed to present a more realistic or naturalistic account of human rationality than the one belonging to a religious or premodern world. This has consequences for the argument developed in this thesis since under this idea of an individual the authority of norms (moral or legal) depends on their acting in accordance with rationality in the terms explained: norms are to be followed only when it is rational for the person to do so.¹⁷⁰ This explains why, for some theorists, policies and laws are to be designed according to outlines that any rational individual would accept. Or, if we want to obtain allegiance from them, this makes evident the way in which these policies and laws act in their self-interest.¹⁷¹

In tax matters this model of a person leads to an understanding of the relationship between the government and citizen-taxpayers as one in which each struggles to set up a tax system in the terms that most benefit it or him from an economic point of view. A very good example of the application of these ideas can be found in Brennan and Buchanan's *The Power to Tax. Analytical Foundations of a Fiscal Constitution*.¹⁷²

Brennan and Buchanan begin their analysis with the following epigraph, taken from Stuart Mill's *Considerations on Representative Government* (1861): 'The interest of the government is to tax heavily: that of the community is, to be as little taxed as the

168. *ibid*, 112.

169. *ibid*.

170. For a similar reading *vid*, Dworkin, *Justice for Hedgehogs*, 15–19. For a different idea of what rationality implies regarding reasons and morality *vid*, Gardner, "Nearly natural law".

171. *vid*, Wenzel, "Tax compliance and the psychology of justice: mapping the field".

172. Brennan and Buchanan, *The Power to Tax. Analytical Foundations of a Fiscal Constitution*.

necessary expenses of good government permit'.¹⁷³ Before going deeper into Brennan and Buchanan's ideas I would like to start by analysing one of their premises as derived from their understanding of Mill. As will be shown later, Brennan and Buchanan use Mill's above assertion by way of a literal interpretation, that is to say, that the power to tax should be limited because governments always heavily tax individuals, whose interest is indeed to the contrary. This is what they call the '[m]odel of Leviathan' as 'revenue maximisation'.¹⁷⁴ But Mill does not mean to say that government is interested in taxing community heavily per se. Mill is actually referring to the problems of excessive power in monarchic or aristocratic governments, both of which only look to their own interests and not to the 'general good'. In his words, 'evils arising from the prevalence of modes of action in the representative body, dictated by [...] interests conflicting more or less with the general good of the community',¹⁷⁵ that is, 'endless privileges without censure' in the cases of monarchy and aristocracy. This interpretation should be confirmed if Mill's analysis is followed. A few lines after this epigraph, Mill shows how democracy may have similar problems: this happens if people act according to the selfish interests of class and put excessive burdens on the rich.¹⁷⁶ In more general terms, Mill is interested in showing how good government requires representation for the interests of all classes and group identities within a nation and what is required to achieve this. In other words, he is interested in exploring the relationship between political representation and general (non-sinister) interest(s).¹⁷⁷ Mill maintains that forms of government were a matter of choice within the limits set by the customs and particular characteristics of the society in question.¹⁷⁸ Although forms of government constitute human creations they are not machines (that is, they are not only questions of 'means and end' or 'expedients for the

173. Mill, "Considerations on Representative Government", 441.

174. Brennan and Buchanan, *The Power to Tax. Analytical Foundations of a Fiscal Constitution*, 33.

175. Mill, "Considerations on Representative Government", 441. All this should be clear when reading the following lines from Mill: 'One of the greatest dangers, therefore, of democracy, as of all other forms of government, lies in the sinister interest of the holders of power: it is the danger of class legislation; of government intended for [...] the immediate benefit of the dominant class, to the lasting detriment of the whole. And one of the most important questions demanding consideration, in determining the best constitution of a representative government, is how to provide efficacious securities against evil'. (*ibid*, 446).

176. *ibid*, 442–443.

177. I come back to these ideas in Ch5 where I analyse the importance of representation for the idea of the law as the will of the people, *vid infra*, 220ff.

178. Mill, "Considerations on Representative Government", Chs1 and 2.

attainment of human objects') or 'a sort of spontaneous product'.¹⁷⁹ Limitations on this choice mainly derive from 'three conditions' that Mill identifies as necessary for the created 'political machinery' to 'act'. These are: (i) the people must be willing to accept the form of government, (ii) they 'must be willing and able to do what is necessary to keep it standing', and (iii) 'they must be willing and able to do what it requires for them to enable it to fulfil its purposes'. Any form of government will be 'unsuitable for the particular case' if it fails in any of these three conditions.¹⁸⁰ These, of course, are not necessary conditions because, as Mill says, people can learn the benefits of having new institutions so long as they desire them.¹⁸¹ Keeping this in mind forms an important part of the work of those who want to create and establish new institutions. At the same time, Mill thought that good forms of government could not be defined according to a list of particular ends. What 'causes and conditions good government' is, on the contrary, the 'qualities of the human beings composing the society over which government is exercised'.¹⁸² So good governments should 'increase the good qualities [moral, intellectual and active] in the governed, collectively and individually'.¹⁸³ This is the way in which, according to Mill, the interests of the government, namely the well-being of the individual members of the political community, and the moving force of the machine, namely the good qualities of the individuals, are put to work together. This allows him to state that '[t]he ideally perfect constitution of a public office is that in which the interest of the functionary is entirely coincident with his duty'.¹⁸⁴

The last sentence of a superbly written paragraph, in which Mill sums up his ideas on the matter, may also be of use to us here:

Government is at once a great influence acting on the human mind, and a set of organised arrangements for public business: in the first capacity its beneficial action is chiefly indirect, but not therefore less vital, while its mischievous action may be direct.¹⁸⁵

179. *ibid*, 374.

180. *ibid*, 376 and 413.

181. *ibid*, 379ff. Specially, 380.

182. *ibid*, 389.

183. *ibid*, 390.

184. *ibid*, 391.

185. *ibid*, 392.

All of the above elements to be considered in the determination of a good form of government led Mill to defend representative government. But there is one more element that we should consider in order to refute Brennan and Buchanan's interpretation of Mill. Mill considers there to be two principles upon which 'any general propositions which can be laid down respecting human affairs' rest. These are: (i) 'that the rights and interests of every or any person are only secure from being disregarded, when the person interested is himself able, and habitually disposed, to stand up for them', and (ii) 'that the general prosperity attains a greater height, and is more widely diffused, in proportion to the amount and variety of the personal energies enlisted in promoting it'. He labels these principles by stating that they explain men as 'self-protecting' and 'self-dependent'.

Mill explicitly states that the 'self-protecting' principle is not the same as a 'doctrine of universal selfishness', but is instead based on the idea that 'mankind, as a rule, prefer themselves to others'.¹⁸⁶ Yet at the same time as he sees that those who have an interest in their own issues prefer their well-being over that of others, or precisely because of this, Mill defends the idea that each individual should participate in government decisions.¹⁸⁷ So now we are able to better make sense of Mill's sentence that is quoted as an epigraph by Buchanan and Brennan. What worries Mill – and taxation is nothing more than an example of that worry – is the tendency of those in power to use (abuse) it in their exclusive interest. The reason why this might happen is largely because of the first principle stated above, namely, that of the tendency of men to promote their self-interests. To this it should be added that when thinking of their self-interests men tend to see only their immediate interests and not those of others or 'distant or unobvious interests'. According to Mill, the way in which this last element might be achieved is by directing the minds of a person to distant and unobvious interests by 'disinterested regard for others, and especially for what comes after them, for the idea of posterity, of their country, or of mankind, whether grounded on sympathy or on a conscientious feeling'.¹⁸⁸ So, as stated before, the problem here is class legislation in favour of sinister interests (and not taxation *per se*). This is why Mill

186. *ibid*, 404.

187. *ibid*, 404–412.

188. *ibid*, 445.

defends representative government as the best form of government. Another summary by Mill is needed here:

The representative system ought to be so constituted as to maintain this state of things: it ought not to allow any of the various sectional interests to be so powerful as to be capable of prevailing against truth and justice and the other sectional interests combined. There ought always to be such a balance preserved among personal interests, as may render any one of them dependent for its successes, on carrying with it at least a large proportion of those who act on higher motives, and more comprehensive and distant views.¹⁸⁹

This long detour on the right exegesis of Mill's work is justified for two reasons. The first shows Mill's conception of the individual as a pure rationaliser principally concerned about his self-interest and how this might be tamed by determining the right form of government. Mill's is a good example of how a moral theory like utilitarianism, despite starting from a point of self-interest, aspires to follow one abstract and general standard that is applicable to all. This explains the resistance and endurance of utilitarianism according to MacIntyre.¹⁹⁰ Mill's *Considerations on Representative Government* is a theory in which – after starting from a point at which the individual is a pure rationaliser – self-interest is the main explanation for individual action, and individual or group (sectorial) interests can be put to the service of the general interest. The second reason derives from the first then: it allows us to expose Buchanan and Brennan's ideas as an extreme form of individualism.

Brennan and Buchanan introduce their work by stating that they will analyse taxation from a 'positive' perspective regarding government and from a normative perspective concerning taxpayers or citizens.¹⁹¹ The positive analysis of government requires them to consider how governments behave or might be expected to behave in reality. As with many available economic analyses, they do not want to provide advice to government decision makers on equitable and efficient tax systems.¹⁹² Their normative concern for taxpayers derives from their analysis of a 'taxpayer's constitutional choice calculus' as the only 'legitimate basis for the derivation of

189. *ibid*, 447.

190. MacIntyre, *After Virtue*, Ch6.

191. Brennan and Buchanan, *The Power to Tax. Analytical Foundations of a Fiscal Constitution*, 3.

192. *ibid*.

possible norms for tax reform'.¹⁹³ In this sense, the central question that Brennan and Buchanan try to answer is 'what sort of tax institutions would [...] the rational citizen-taxpayer [...] select as elements in the constitution?'.¹⁹⁴ For this purpose they aim to think 'radically' in order to reach the 'nature of taxation' and what is 'involved in the power to tax'.¹⁹⁵ Their analysis combines a Hobbesian starting point, in which the enforcement of 'basic property right[s]' and 'rules by which those property rights might be exchanged' help us to leave behind the state of nature, with the 'notion of social contract'.¹⁹⁶ In this scheme constitutional limits are put in place to ensure that governments do not go against the interests of individual citizens, as originally decided and defined by them behind a veil of ignorance (equivalent to that proposed by John Rawls in *A Theory of Justice*). Constitutional tax limits are the solution that they propose for ensuring that individuals in government will not hurt individual citizens' interests. The assumption ('both empirically reasonable and analytically necessary') that any rational individual should make is that those in government 'will exploit' the power to tax 'for their own purposes, whatever these may be'.¹⁹⁷ This leads them to start from a 'model of Leviathan' as revenue maximiser. In-period governments, not limited by electoral considerations, tend to maximise their own utilities. In its simplest version, the model 'presumes that governments maximise revenues from whatever sources of taxation are made available to them constitutionally'.¹⁹⁸

They give three arguments to show why an unlimited government would not present an efficient decision in a pre-constitutional setting.¹⁹⁹ The first argument they provide is that individuals are not indifferent regarding the distribution of benefits. As individuals are risk averse they prefer a restricted government rather than the distribution of large benefits for few individuals. The second argument is that the transfer of money from citizen-taxpayers to politician-bureaucrats has its costs. This is always the case so long as these transfers impose an excess burden above the revenue released to the government, something that, according to the authors, always happens.

193. *ibid*, 14.

194. *ibid*, 4 and 42–66.

195. *ibid*, 4.

196. *ibid*, 6–7.

197. *ibid*, 11.

198. *ibid*, 33.

199. *ibid*, 39–41.

The third and final reason is that an unrestricted government would generate a ‘rent-seeking’ effect, that is to say, everyone will try to reach a position of power since they will secure profits from being there. Therefore, a restricted government ensures that there will not be any efficiency losses in the competition to obtain a position in government. They conclude:

[A]ll rational individuals, behind a veil of ignorance, would seek to constrain exploitation by revenue-maximising government to the maximum possible extent.²⁰⁰

So Brennan and Buchanan assume that a rational person has an interest in protecting himself from government. The assertion that each person is looking out for his self-interests is similar to Mill’s first principle of self-interest, but Brennan and Buchanan do not recognise the importance of Mill’s second principle, that of self-dependency. This is a crucial difference because, for Mill, protection is not something that is against government as a form of political organisation. Conversely, according to Brennan and Buchanan we have to protect against government (any and not only that which defends sinister interests). They consider government to be dangerous *per se*, with independence from the interests of those in power. It will always be in the interests of any (form of) government to tax people heavily. Governments always tend to be revenue-maximisers against which people are vulnerable. In this sense, Brennan and Buchanan’s *The Power to Tax. Analytical Foundations of a Fiscal Constitution* present a very good example of a fully developed idea of the individual as pure rationaliser.

3.2. *Private property as a natural right*

The second element of the classical paradigm of tax law is, today, familiar and is that of the idea of private property as a natural right. Again, the origin of this idea is to be found in seventeenth-century contractarian theories of the state that justify its existence by assigning to it the function of protecting a person’s natural rights. There are also contemporary applications of this idea, the most notable being Nozick’s libertarian argument in *Anarchy, State, and Utopia*. This is, perhaps, the most

200. *ibid*, 41.

characteristic element of the classical paradigm and is one that requires taxation to be justified, because otherwise it is equivalent to ‘stealing’ people’s money.²⁰¹

There are two aspects that need to be addressed here. The first deals with the justification of private property and the second with it being a natural right. Both aspects are not only related but also, in the terms explored here, the justification of the right to private property explains it in terms of being considered a natural right, and vice versa. I am not concerned here with other debates surrounding the right to private property, including that which deals with the determination of its content (the idea that private property is a bundle of rights).²⁰² The reason for not addressing the debates surrounding this last point is due to its logical subordination to the first in relation to what interests me here.

There are two theories that originate from seventeenth-century England that are relevant to this discussion, namely, those developed by Hobbes and Locke. Although these theories share a vocabulary and a structure, they differ substantially in various aspects. But before getting into the details of these theories and some of their differences, let me first confirm that in what follows I am guided by what I think is the best interpretation of these contractarian theories developed so far, more specifically, the interpretation developed by C. B. Macpherson. Macpherson’s main work on this topic aims to historically situate Hobbes and Locke’s political philosophies as the central elements of what he calls the ‘political theory of possessive individualism’.²⁰³ Macpherson’s claim is that Hobbes and Locke’s works have more similarities than differences since they represent an effort to leave behind the political structures of the Middle Ages by setting out the theoretical aspects of the new bourgeois (Hobbes) and capitalist (Locke) political (and economic) organisation(s).

In *Leviathan*, Hobbes provides the justification for sovereign power by deriving it from the ‘logical abstraction’²⁰⁴ of the state of nature. If we follow Macpherson’s interpretation, this implies that Hobbes starts from ‘[t]he natural condition of mankind’

201. The need for justification will connect the argument presented in this section with the third element of the classical paradigm, that is, taxes as instruments of revenue and public expenditure, *vid infra*, 77.

202. *vid*, Honoré, “Ownership” and Penner, *The Idea of Property in Law*, Ch4–6.

203. Macpherson, *The Political Theory of Possessive Individualism*.

204. *ibid*, 26.

as he knew it in seventeenth-century English civil society and took from it common power.²⁰⁵ So Hobbes shows what would happen if there were not any common power to restrict the ‘natural condition of mankind’. The natural condition of mankind, according to Hobbes, is one of ‘natural equality, competition, diffidence, and vanity’.²⁰⁶ He expounds that under natural conditions man would fall into a state of permanent war of all against all: fear would dominate passions and lead to the accumulation of all kinds of power (as ‘defensive and offensive strength against others’).²⁰⁷ But because man has a passion for living a better life, with advancement being made possible by peaceful and secure living,²⁰⁸ they renounce their initial liberties (the same liberties that allowed them to secure their lives). Men agree to do this as a way of making liberties unnecessary: these would be transferred to a superior force that would secure that valued state of peace and security for each of them. Only after this does mankind possess the rights that allow individuals to develop their lives, industries, the arts, commerce, and so on. Because these rights are now recognised justice is possible, since not everything is permitted. These rights, argues Hobbes, provide a definition of right and wrong and this is only possible when there is a superior authority that establishes the law.²⁰⁹

In this scheme the right to private property depends on it being constituted by the sovereign power.²¹⁰ The right of private property, that is, ‘the constitution of Mine, and Thine, and His’, is required to be enforced by the ‘Sovereign Power’; otherwise it could only be kept by force. If not, says Hobbes, then it is not property but ‘uncertainty’. Certainty requires laws, and such laws can only be established by the one (monarch or assembly) that holds the ‘Sovereign Power’. This implies that the initial distribution of property is to be made by the sovereign, who is not excluded from the private property of every individual. Therefore, the distribution of property has to

205. *ibid*, 24ff.

206. *ibid*, 25.

207. *ibid*, 37.

208. This is one of the important interpretative arguments developed by Macpherson, namely, that Hobbes’ theory is not only physiological but that it also rests on the possessive market model of society, *vid ibid*, 46–70.

209. Hobbes, *Leviathan*, 159, 161 and in general ChXXVI.

210. *ibid*, 149 and ChXXIV.

answer the ends of the commonwealth, namely, peace and security.²¹¹ At the same time, he is not excluded by individuals' private property when the purposes of the commonwealth so require it, that is to say, whenever peace and security are at risk. This is how we understand, according to Hobbes, the contrary doctrine, '[t]hat every private man has an absolute Propriety in his Goods', which is a doctrine that 'tendeth to the Dissolution of a Common-wealth'.²¹² But after this initial distribution, and having confirmed that private property is to be secured, its distribution is given to the operation of the market. This is the reason why Hobbes is dismissive of ancient conceptions of corrective and distributive justice. He replaces these with corrective justice as the 'justice of a contractor': that of just value given by those who exchange, that is, 'that which they be contented to give',²¹³ and distributive justice as not having to do with merit, but with defining what is just, namely, the 'justice of an arbitrator' distributing 'to every man his own'.²¹⁴

What about Hobbes' conception of private property as a natural right? Here we can follow Macpherson's definition of natural rights: 'rights which by the nature of things entail an obligation of other men to respect them'.²¹⁵ Connected with this understanding of natural rights is Hobbes's principal contribution to this debate, namely, the idea that natural rights are not dependent on the 'old [n]atural [l]aw tradition, in which natural rights had been derived from natural law or divine law or sociability, and in which there had been a strong element of hierarchy'.²¹⁶ This modern interpretation of natural rights is based on the idea that all men are equal. It is an important shift from previous justifications of political obligation because the thought is derived from the fact that there is an 'equal need of continued motion'.²¹⁷ The source of political obligation is to be found in the nature of man as he is situated in

211. *ibid*, 150, 195.

212. *ibid*, 195.

213. *ibid*.

214. *ibid*.

215. Macpherson, "Natural rights in Hobbes and Locke", 225.

216. *ibid*, 226.

217. Macpherson, *The Political Theory of Possessive Individualism*, 76–77, 265 and Macpherson, "Natural rights in Hobbes and Locke", 226.

possessive market societies. Or, as Macpherson has put it, ‘men in possessive market society [...] are all irretrievably subject to the determination of the market’.²¹⁸

Locke’s political theory can be read as a correction of Hobbes’ where he aims to limit the power of the unlimited sovereign that Hobbes’ theory leads to.²¹⁹ But these changes require the introduction of some inequalities among the people that are incompatible with Hobbes’ theory of equality. These inequalities derive from Locke’s theory of property, as it allows us to distinguish between those who own and can accumulate more than their self-ownership from those who cannot and who only own their self. In this sense, Locke’s theory can be read as a combination of modern ideas regarding the nature of men and private property, while allowing some space for traditional (non-Hobbesian) ideas of natural rights as part of natural law regarding the justification of political obligation.²²⁰ According to Macpherson, the combination of these ideas, although problematic, was very accommodating for the society that Locke lived in.²²¹

The limitation to sovereign power in Locke’s theory is a consequence of the way in which he delineates the right to property. The right to private property is an individual natural right and its protection, its ‘preservation’, explains the constitution of government.²²² Thus, a property right exists prior to the constitution of government. In other words, a property right as such exists in the state of nature; the problem is that in this state it becomes uncertain. For this purpose, Locke provides a broad definition of what he means by the right to property. According to this definition, included in the ‘general name [...] property’ are men’s ‘lives, liberties and estates’.²²³ The uncertainty of its preservation in the state of nature comes from the fact that everyone is equally the ‘absolute lord of his own person and possessions’ and therefore exposed to the ‘invasion of others’.²²⁴ Even though everyone has the right to

218. Macpherson, *The Political Theory of Possessive Individualism*, 106.

219. *vid.*, Locke’s argument against absolute monarchy as ‘inconsistent with civil society’ in Locke, *Second Treatise of Government*, 44, §90.

220. Macpherson, *The Political Theory of Possessive Individualism*, 194–262.

221. *ibid.*, 270.

222. Locke, *Second Treatise of Government*, 66, §124.

223. *ibid.*, 66, §123.

224. *ibid.*, 65–66, §123.

enforce their rights, since they are judges of their own case,²²⁵ nothing secures the revenge (excessive zeal in the defence of rights) that leads to never-ending revenge. The war of all against all is a possibility that every rational man wants to avoid and this is why they renounce not their rights, but to the exercise of those rights in the state of nature. Man puts himself 'into [...] a common-wealth, by setting a judge on earth, with authority to determine all controversies'.²²⁶

Locke's argument in favour of private property ('a part of him, that another can no longer have any right to', as Locke says of the venison if it is to be of any use to the wild Indian hunter)²²⁷ starts as an argument about how to justify how someone can have private property over the common. This is his big contribution: the idea that 'every man has a *property* in his own *person*' which nobody 'has a right to but himself' and from which derives the fact that everyone has property to the '*labour* of his body, and the *work* of his hands'.²²⁸ Locke's theory is known as the 'labour theory of property'. According to this theory, everything that has been produced by man and anything to which he adds his labour is his property. Other men are excluded from this product because it is omitted from the commons by the labour added by whomever has property over it ('*labour* put a distinction between them and common [...] and so they became his private right'²²⁹ and '[t]hus *labour*, in the beginning, *gave a right of property* wherever any one was pleased to employ it upon what was common').²³⁰ In these 'natural' conditions – before civil society was constituted and before 'the desire of having more than man needed had altered the intrinsic value of things'²³¹ – everyone could have property over that which was of use to him. There was a natural limit to that which someone could own: nobody could accumulate more than that which he needed because this would cause prejudice and 'intrench upon the right of another'.²³² In other words, accumulation without use would go against original common property. But, according to Locke, there are different historical and

225. *ibid*, 48, §90 and 66–67, §127.

226. *ibid*, 48, §89.

227. *ibid*, 19, §26 and 20, §30.

228. *ibid*, 19, §27}. [Emphasis in the original].

229. *ibid*, 19, §28. [Emphasis in the original].

230. *ibid*, 27, §45. [Emphasis in the original].

231. *ibid*, 23, §37.

232. *ibid*, 22, §36.

(what we would now call) economic factors that transform the conditions of the first stage of development of the natural right to private property where ‘labour could at first begin a title of property’.²³³ Locke goes on:

[I]n some parts of the world, (where the increase of people and stock, with the *use of money*, had made land scarce, and so of some value) the several *communities* settled the bounds of their distinct territories, and by laws within themselves regulated the properties of the private men of their society, and so *by compact and agreement, settled the property* which labour and industry began.²³⁴

Here Locke makes a two-step argument to explain the conditions under which he was living in England at that time.²³⁵ His first step takes it as a given that some transformations – an increase in people and stock, the use of money, scarcity and the creation of new value deriving from scarcity (value not only of the use of things) – happened at some moment in history and that he does not need to justify them (precisely because they were evident for those living in the same place and time as him). The second step of his argument is that these transformations explain in part the need to settle property by agreement in civil society following the conditions that justified private property in the state of nature.²³⁶

The right to private property is a natural right for Locke, but it has a different justification from the one given by Hobbes since it combines both modern and traditional elements. Or, to put in another way, Locke justifies this natural right according to the nature of man and according to natural law. Accordingly, private property is justified either by ‘natural reason’ or by ‘revelation’.²³⁷ Natural reason explains that property is a product of each man’s right to preservation and revelation ‘gives us an account’ as to how the world and its fruits were given to mankind in

233. *ibid*, 30, §51.

234. *ibid*, 27, §45. [Emphasis in the original].

235. This interpretation – that Locke (and Hobbes) were highly influenced by the conditions in which they lived – is one of the central interpretative shifts made by Macpherson’s *The Political Theory of Possessive Individualism*.

236. According to Macpherson, this is crucial to Locke’s argument (he calls it ‘Locke’s achievement’) because it allows him to transcend the limits of natural law, thus giving way to the capitalist system by which he justifies capital accumulation (the accumulation of money). Crucially, this does not go against the original limitations of the state of nature with regard to property accumulation. See *ibid*, 199–221.

237. Locke, *Second Treatise of Government*, 18, §25.

common. Locke solves the tension between these two explanations through the labour theory of property. Here, the property given in common to all men by God requires ‘a means to appropriate’ part of it so that it is of any use to men.²³⁸ This is the notion from which Locke derives the idea that if men have property over their own person then they have the right to appropriate the produce of their labour (and they need no ‘assignation or consent of any body’ because it was given by God to all).²³⁹ The main consequence of this combination for the justification of private property is that it creates the conditions that allow Locke to justify the unequal distribution of property within civil society. In other words, from the very origins of the justification for private property in the state of nature, Locke does not follow the radical equality of Hobbes’ justification.

In this scheme in which a natural right to private property is included in the state of nature – justified according to the labour theory of property and deriving from natural reason and natural law – and recognised as such in the constitution of civil society into which men entered for the protection of that right, it is almost evident that taxation will be a problem. I am not concerned here with giving the justification for taxation within the classical paradigm of tax law; this I will do in the next section of this chapter. What interests me here is an expansion of the idea that under this justification of private property there is no possible way of justifying an obligation to pay taxes independent of the consent of the individual. This is an idea that has pervaded public debate on taxation until today.

Therefore, Locke presents us with the third limitation that he imposes on the legislative power (‘the supreme power’ constituted by the ‘*first and fundamental positive law* of all common-wealths’).²⁴⁰ According to this limitation government ‘*cannot take* from any man any part of his *property* without his own consent’.²⁴¹ Were it not for this limitation then there would not be any reason for men to enter into civil society. If property could be taken from them without their consent then it would mean that

238. *ibid*, 18–19, 20, §25–27, §30.

239. *ibid*, 20, §28.

240. *ibid*, 69, §134. [Emphasis in the original]. The first limitation is that this power cannot ‘be absolutely *arbitrary* over the lives and fortunes of the people [...]’ (*ibid*, 70, §135. [Emphasis in the original]). According to the second limitation, it ‘cannot assume to its self a power to rule by extemporary arbitrary decrees [...]’ (*ibid*, 71, §136).

241. *ibid*, 73, §138. [Emphasis in the original].

they did not have any property at all. This, Locke explains, would happen in states in which an absolute monarch has the power, because his interests would go against the interests of all.²⁴² On the contrary, there is no such risk where the legislative is in an assembly of people with the same interests.

There is something important that needs to be rescued from the theories of Hobbes and Locke regarding their notion of natural rights. In both cases, their conceptions of natural rights were revolutionary. They were able to place in question the traditional hierarchies of authority and power as they were known according to custom; both transformed the source of political authority. They left behind the idea that authority could be imposed on a society from the ‘outside’, that is, by God or a certain natural order. Hobbes and Locke were able to show that in their societies authority came from the nature of man and society as expressed in the justification of natural rights. The dark side of this is that we have inherited the idea that man owes nothing to society and that the inequalities produced by market relations are justified. This is a problem for those of us who live in the twenty first century. Or as Macpherson states, this is our dilemma and the dilemma of modern liberal democracy:

[I]t must continue to use the assumptions of possessive individualism, at a time when the structure of market society no longer provides the necessary condition for deducing a valid theory of political obligation from those assumptions.²⁴³

Contemporary liberal theories of justice can be understood as attempts to answer this dilemma. But, as Robert Nozick shows, if these liberal political theories start from the premise of natural rights then their answer does not follow logically. This is the main argument of his *Anarchy, State, and Utopia* which goes against theories of justice that defend ‘patterned principles of justice’.²⁴⁴

Nozick presents his argument for the minimal state as the logical consequence of a political theory that starts from the idea of rights or, in his words, an ‘entitlement conception of justice’.²⁴⁵ This explains his famous argument against those who defend theories of distributive justice in which a patterned notion of justice revises – in order

242. For a discussion of Brennan and Buchanan’s interpretation of Mill, *vid supra* 59.

243. Macpherson, *The Political Theory of Possessive Individualism*, 275.

244. *vid*, Nozick, *Anarchy, State, and Utopia*, Ch7. For a critique *vid*, Psarras, “A critique of Robert Nozick’s critique of patterned principles of justice”.

245. Nozick, *Anarchy, State, and Utopia*, 160.

to correct – the distribution of goods that is a result of individuals’ voluntary exchanges.²⁴⁶ On the contrary, Nozick defends a theory of historical justice in holdings. According to Nozick, a distribution is just if it obtains by legitimate means. This means that the final distribution should be the result of the logical application of the three principles of justice identified in his theory: (i) the principle of justice in acquisition, (ii) the principle of justice in transfer, and (iii) the principle of justice in holdings.²⁴⁷ Therefore, a just distribution derives from the logical application of these principles. If this is so then the only way that we can justify the actual distributions of property is according to Nozick’s ‘complete principle of distributive justice’. This means that ‘a distribution is just if everyone is entitled to the holdings they possess under the distribution’.²⁴⁸ There are two ways in which we can explain the final distribution. The first is that it obtains by the logical application of the first two principles. Nozick’s theory of historical justice in holdings implies that as long as the acquisition of property is just and is justly transferred then any final distribution will be just. The second alternative is that the operation of the third principle, in accordance with the first two, brings a distribution that constitutes the rectification of an injustice. Justice is logically derived from the justice of each person’s holdings.²⁴⁹ The unequal distribution of property cannot be but a logical conclusion if one starts from these premises and rational and self-interested individuals would not accept any ‘redistributive’ reason for an institutional design.

More importantly for the arguments in this section, Nozick needs to recognise, just as Hobbes and Locke did, that there cannot be taxation without consent from the individual right holder. Moreover, according to Nozick the ‘taxation of earnings from labour is on a par with forced labour’.²⁵⁰ Nozick does not state that the taxation of earnings is equivalent but, instead, that it is very similar. According to his example, there appears to not be any difference between saying that ‘taking the earnings of n hours labour is like taking n hours from the person; it is like forcing the person to

246. *ibid*, 155ff.

247. *ibid*, 150–153.

248. *ibid*, 151.

249. *ibid*, 153.

250. *ibid*, 169.

work n hours for another's purpose'.²⁵¹ If this is so, his argument continues, then this is a big problem for theories of self-ownership apropos Locke. Obliging me to work for others implies that I am no longer the owner of my own self and that someone else can decide for me what I have to do. Taxation implies giving others property over myself; I stop having self-ownership to become a 'part-owner' of myself.²⁵²

So we can say that Nozick cannot answer Macpherson's challenge because the kind of revolutionary function fulfilled by Hobbes and Locke's theories of natural rights was simply a step on the path toward modernity that could not continue along the same line of development since market-based equality cannot be but unequal. So political equality has not achieved social and economic equality (as a principle for authority, not as material equality). For the time being, let me state that Nozick's defence of the entitlement conception of justice is a strong argument against taxation and a very good example of a contemporary theory of justice in which property is understood as a natural right within the seventeenth-century contractarian tradition, particularly in its Lockean form. I will return to this idea later when discussing distributive justice and at this point I will deal with Nozick's argument in more detail.

With this I close the analysis of the second element of the classical paradigm of tax law, that is, the idea that private property is a natural right and what it means for a theory of taxes. Even if initially no justification for taxation, except that of an individual's consent, can be seen, we still have to analyse these justifications. In what follows I argue that such a justification cannot be but an instrumental one: taxes are instruments of revenue for public expenditure. The way in which this analysis influences doctrinal law and judicial decisions in tax law will be developed later.²⁵³ Suffice to say for now that this conception of property requires strict legality in tax law and this makes tax avoidance easier.

3.3. Taxes as instruments of revenue and public expenditure

We have so far designated considerable time to analysing the first two elements of the classical paradigm of tax law, that is to say, the conception according to which the

251. *ibid*, 169. I will not address this issue here, but *vid infra*, 160.

252. *ibid*, 172.

253. *vid infra*, 92.

individual is a pure rationaliser and private property is a natural right.²⁵⁴ Taking stock of this analysis we can say that, according to the classical paradigm, taxes will only be justified if they go in the interests of individuals and if, consequently, these individuals consent to them. In this sense, taxes should be a means to an end for civil society.

One of the first to provide a definition of taxes, which would eventually become a traditional definition, was Professor Seligman. According to his definition, taxes are a ‘compulsory contribution from the person to the government *to defray the expenses incurred in the common interest of all*, without reference to special benefits conferred’.²⁵⁵ Following this definition, taxes are the means according to which government can compulsorily obtain part of the public revenue necessary to finance its activities.²⁵⁶ For the purposes of this section this definition will not be contested. I will adopt it not only because it still is an accepted definition, but also because it is the best expression of the classical paradigm. It is also a definition general enough to be independent of any particular tax policy and, therefore, any particular kind of tax.²⁵⁷

The first important thing that we can say of this definition is that it is coherent with the idea that taxes are to be accepted by rational individuals so that their private property is respected and, as thus, taxes are understood as contributions; people contribute and so ‘they give to help achieve’²⁵⁸ something. So even if taxes are compulsory, they are a compulsory *contribution* (they are not something to be taken and are not another form of obtaining economic resources). Therefore, what distinguishes taxes from other compulsory sources of revenue is that they are ‘contributions’ and not payments, fees or fines. This is reinforced by the final part of the definition in which we are informed that there is not any direct benefit from this contribution. But then, we have to know why we are contributing and this is what the second part of the definition aims to explain. Taxes have a function and this function is the funding of ‘expenses incurred in the common interest of all’.

254. *vid supra*, 59 and 67, respectively.

255. Seligman, *Essays in Taxation*, 304. [Emphasis added].

256. *ibid*. There are other sources of revenue that differ from taxes, such as the economic activity of state corporations, sovereign wealth funds, privatisation and public debt. *vid*, Ferreiro Lapatza, *Instituciones de Derecho Financiero*, 103–136 and Stiglitz, *Economics of the Public Sector*, 43ff.

257. By the end of the thesis, however, I will revisit this definition to show how the obligation to pay taxes should be justified independently from public expenditure.

258. Oxford Dictionary definition.

Whereas other compulsory payments or fees are justified by a direct benefit for an individual, or because the payment expresses a sanction for an unwanted conduct, taxes are characterised by a function that is set to ‘defray the expenses incurred in the common interest of all’. So taxes cannot be understood as a sanction because the obligation to pay them does not depend on the occurrence of any prohibited conduct. Taxes can also not be understood as a price, quasi-private prices, public prices, fees or special assessments.²⁵⁹

Because taxes are ‘contributions from the person to the government’ they are also different from exactions. The difference is that taxes respond to a conception of justice and fairness and the requirement that they are established through law (that is, the principle of legality) ensures that this is so. In other words, taxes should be legitimate; individuals should be given reasons that explain why they have an obligation to pay them. This is perhaps one of the most important advances obtained as a result of the evolution of tax law according to the classical paradigm, more specifically, the idea that those in power can only require compulsory contributions with the support of a law authorising them to do so.²⁶⁰ This requirement is the institutional expression of two other elements of the classical paradigm so far acknowledged, that is, a particular conception of the person and the idea that private property is a natural right.²⁶¹ But the legitimation of taxes in the classical paradigm also depends on what they are destined or used for; in other words, the reasons why the rational individual has to contribute. This is the third element of the classical paradigm in which taxes are instruments for revenue and public expenditure.

The mutual dependency of taxation and expenditure informs an important part of the debate about tax justice and tax policy. The justification or the determination of the content of what are or should be the ‘expenses incurred in the common interest of all’ has worried almost everyone who has discussed the modern state and its institutions. Before the formation of the modern state an idea of the

259. Seligman, *Essays in Taxation*. Of course, not everyone would agree with this. For example, economic justifications of taxation understand them as economic incentives. They would make synonymous public prices, fees and fines because of their effects as economic incentives for individuals. Thus, under a standard of economic efficiency and incentives there is no difference between taxes, excise duties and ‘green taxes’, as it is argued in any public finance book.

260. von Stein, “On taxation”, 30.

261. *vid supra*, 59 and 67 for details of the argument.

‘common interest of all’ did not exist, and neither did the provision of public goods.²⁶² As stated previously, and following Hobbes and Locke’s contractarian theories of the modern state, these public goods were peace and security so that (natural) rights could be preserved. The justification of the authority and power of the sovereign depended upon the provision of these goods. Furthermore, since all those (equals) who lived under the authority of the sovereign benefited from the protection of their rights, all had to provide the economic means for this end. This justification of taxes, highly dependent on their economic use, is what I call the ‘instrumental justification’ of taxation. According to this instrumental justification taxes are instruments of revenue for public expenditure. In other words, taxes are a mechanism by which to ensure the provision of economic means for the state to develop its functions. This instrumental justification of taxes is given whenever the legitimacy of taxes is questioned, even today.²⁶³ A few examples will be enough to illustrate the instrumental justification of taxation.

Two good examples of the instrumental justification of taxation in the contractarian tradition are to be found in Hobbes and Locke. In ChXXX of *Leviathan*, Hobbes refers directly to taxes when discussing the office of the sovereign representative, highlighting ‘the end, for which he was trusted with the Sovereign Power, namely the procuration of the safety of the people’.²⁶⁴ Even if it is true that Hobbes does not fully develop any sort of economic theory,²⁶⁵ since he is mainly concerned with the justification of the sovereign power and the function of the commonwealth, this does not imply that he does not have a justification for taxation.²⁶⁶ In *Leviathan* taxes have a clear justification: they are to provide the necessary economic means that will allow the sovereign representative to fulfil its functions. It is interesting to note, however, that taxes are necessary here because other means that might provide funding would be a problem for Hobbes’s conception of authority. According to Hobbes, if it were not for the nature of men then property

262. Schumpeter, “The crisis of the tax state”.

263. *vid.* Adam, Besley, *et al.*, *Tax by Design: The Mirrlees Review*, Ch1; and the discussion *infra* Ch3.

264. Hobbes, *Leviathan*, 201.

265. Levy, “Economic views of Thomas Hobbes”.

266. Jackson, “Thomas Hobbes’ Theory of Taxation”. In this paper Jackson summarises all the references to taxes in Hobbes’ works and quotes *De Corpore Politico Or the Elements of Law, Moral and Politic; De Cive* and *Leviathan*.

(‘distribution of land’) could be assigned to the representative of the commonwealth so that ‘such portion may be made sufficient, to susteine [sic] the whole expense of the common Peace, and defence necessarily required’. However, as representatives are not ‘free from human passions, and infirmities’ the land apportioned may either not be enough or badly administered.²⁶⁷ Thus, if the representative of the commonwealth cannot hold all property and fulfil its function then taxes are needed.²⁶⁸ According to Dudley Jackson, this explains that the right to charge people with taxes can be justified ‘in substance [with the same] answer still given today: taxes pay for the necessary expenditure of the sovereign power (the government)’.²⁶⁹ As Jackson interprets the situation, the justification for taxing individuals has as ‘corollary [...] that the obligation to pay falls on *every* citizen’.²⁷⁰ Yet here Jackson moves too quickly, for the correct interpretation of Hobbes’ idea is that we have to distinguish between the ‘equal imposition’ of taxes and the ‘obligation to pay’ taxes. Hobbes argues that taxes should be equally imposed.²⁷¹ However, at the same time he affirms that some (‘the rich’) ‘may be debtors not only for their own persons, but for many more’.²⁷² Taxes should be equally imposed because of a demand for equal justice upon which the ‘safety of the People’²⁷³ depends and, therefore, the sovereign fulfils its duty of maintaining peace and security. According to Hobbes, equal justice does not depend on ‘the riches, but on the Equality of the debt, that every man oweth to the Common-wealth for his defence’. So everyone has an obligation to pay taxes since everyone benefits from the defence provided by the commonwealth. Taxes are ‘nothing else but the Wages, due to them that hold the publique [sic] Sword, to defend private men in the exercise of severall [sic] Trades, and Callings’.²⁷⁴ However, this does not mean that everyone has to pay taxes. In principle, everyone has the same debt because everyone benefits from the enjoyment of life, but some may owe more than others. The rich, Hobbes says, ‘may be debtors not only for their own persons, but for many more’: for all the poor that serve

267. Hobbes, *Leviathan*, 150.

268. So here we find another argument against Brennan and Buchanan’s interpretation of a Leviathan state in *The Power to Tax. Analytical Foundations of a Fiscal Constitution. vid supra*, 59.

269. Jackson, “Thomas Hobbes’ Theory of Taxation”, 178.

270. *ibid.*

271. Hobbes, *Leviathan*, 207.

272. *ibid.*, 207.

273. *ibid.*, 206.

274. *ibid.*, 207.

the rich. But I do not want to go any further into the details of Hobbes' conception of taxation and its consequences for tax policy (which lead him to advocate a consumption tax).²⁷⁵ What interests me here is showing how in Hobbes' theory taxes are justified as the best means for obtaining public revenue in order to finance public expenditure.

We find the same instrumental justification of taxation in Locke's *Second Treatise of Government*. Taxes are to be paid so that the government can protect individuals' natural rights: 'every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it'.²⁷⁶ There are, of course, differences in the ways in which Hobbes and Locke justify the contractarian state as a way to leave the state of nature. Relative to the topics discussed herein, these differences have their consequences for the justification and protection of natural rights. However, beyond these differences both defend an instrumental justification of taxation.

Beyond the historical examples in Hobbes and Locke's contractarian theories, the instrumental justification of taxation is still the main justification for taxes. It persists in theories of public finance and in recent theories of justice. The language has changed, but taxes continue to be understood primarily as instruments of revenue and public expenditure. They are the mechanism according to which individuals contribute to the financing of public goods.²⁷⁷

The key question that public finance theorists try to answer is how to bring together the public and private economies. In particular, how should the cost of public expenditure be distributed among individuals?²⁷⁸ Indeed, there are many different approaches to providing an answer to it. Some argue that the cost should be distributed as if it were a price in a private market,²⁷⁹ while others state that different

275. *ibid*, 207–208.

276. Locke, *Second Treatise of Government*, Ch11, § 139.

277. Of course, this does not mean that all these theories agree on the level of public expenditure or the level at which the public-private distribution of goods should be established. But this is a different discussion. More or less with public expenditure, and more or less with redistribution, the justification for taxation is still an instrumental one. *vid infra*, Ch3, 123ff.

278. Musgrave and Peacock, "Introduction", ix and Ritschl, "Communal economy and market economy", 240.

279. Sax, "The valuation theory of taxation", 187.

principles should be applied at the same time, that is, those of finances, economics, justice and administration, as a ‘standard for the tax system’²⁸⁰ since it has, ‘besides its “purely financial”, *immediate* purpose [...] a second purpose, which belongs to the realm of social policy’.²⁸¹ But again, even if public finance theorists recognise that taxation may have secondary purposes or purposes different from those that are ‘purely financial’, these are consequences or effects of the instrumental conception of tax law. They do not stand as core arguments for taxation, but as the more or less acceptable consequences of decisions concerning the finances of public expenditure. This debate in public finance represents an antecedent for the discussion about the determination of the principles of justice that should guide the contribution of each citizen; I will return to this later in the chapter.²⁸² Perhaps the best summary of the public finance approach to taxation is to be found in Knut Wicksell’s concise statement: taxes should be ‘regarded as what they really should be [...] *means to procure* the community as a whole and to each of its classes particular benefits which could not be obtained in other ways’.²⁸³

It should not come as a surprise then, that in the contemporary debate concerning political philosophy, as contained in the theories of justice advocated by John Rawls’s *A Theory of Justice* and Robert Nozick’s *Anarchy, State, and Utopia*, we find different versions of the instrumental justification of taxes. This is not the same as saying that they have the same taxation policies, because they do not. But even if they disagree as to the extent and justification of taxation – Rawls justifies more redistribution than that which Nozick would accept as the necessary justified redistribution of the minimal state – both understand taxes as economic instruments.

Rawls’ instrumental justification of taxation is one according to which taxes form background institutions for his conception of distributive justice. Not wanting to go deeper into Rawls’ theory of distributive justice,²⁸⁴ here it is suffice to say that he assigns to taxes two functions a corrective and a purely redistributive one.²⁸⁵ According

280. Wagner, “Three extracts on public finance”, 10–12.

281. *ibid*, 8. [Emphasis added].

282. *vid infra*, 85.

283. Wicksell, “A new principle of just taxation”, 97. [Emphasis added].

284. For a detailed discussion, *vid infra*, 131.

285. Rawls, *A Theory of Justice*.

to his categorisation of state activities, he considers that taxation is a good instrument for correct market distributions aiming to achieve efficiency (in what he calls the 'allocative' branch of government). Furthermore, they are the best mechanism for achieving a certain justice in distributive shares within society (according to the 'distribution' branch of government) by correcting distribution and by raising the revenue required to develop exactly that which justice requires.²⁸⁶ Perhaps what makes Rawls' instrumental approach to taxation more clear is the fact that he considers that in a well-ordered society the exclusive function of taxes is to obtain revenue.²⁸⁷ Thus, even if Rawls states that decisions on different tax policies are not part of a theory of justice, but instead they are questions of political judgement, he has a very clear idea that at the level of the theory of justice taxes are economic instruments.

The same can be said when analysing Nozick's theory of justice. So much so that, for Nozick, taxes are payments for funding the activities assigned by individuals to the minimal state. This is important because the justification of taxes as instruments of revenue and public expenditure is a common understanding for all theories of justice, independent of the level of redistribution or the property regime they advocate. The difference is that those who defend the minimal state will only accept the level of redistribution that is morally justified for the defence of the natural rights of individuals, while those who advocate for more redistribution will look for more revenue.

Another example of how the instrumental justification of taxes has permeated all possible arguments in favour of taxes can be found in Holmes and Sunstein's *The Cost of Rights. Why Liberty Depends on Taxes*. Holmes and Sunstein argue that every right (negative or positive) implies that the state should invest some money in their protection; or, as they put it, 'rights cost money'.²⁸⁸ Therefore, every right is a positive right if it requires some action from someone for its protection and enforceability.²⁸⁹ The argument, then, is that taxes are needed to cover the expenses that this protection of rights implies. Hence, taxes are the instruments for protecting and financing rights. In other words, without taxes there would be no individual rights. This argument does

286. *ibid*, 245–246.

287. *ibid*, 246.

288. Holmes and Sunstein, *The Cost of Rights. Why Liberty Depends on Taxes*, 15.

289. *ibid*, Ch1.

not transform taxes in prices, they say, because what are being financed are public goods, that is, rights.²⁹⁰ But my argument is not that prices only are instruments for obtaining a good produced by someone else. The argument is that taxes are justified and legitimised because of what can be done with revenue, and one possible use that might be given to revenue is that of financing rights. So, even if taxes can be related to the existence and enforceability of rights then the kind of argument defended by Holmes and Sunstein is an economical one, according to which taxes are the means for achieving a particular end.²⁹¹

I think that I have provided enough arguments and examples to make my point that the main justification, which is understood as legitimising taxation,²⁹² is that taxes are instruments of revenue for funding public expenditure. In what follows, I analyse the final element of the classical paradigm of tax law: the function and content of principles of justice in taxation.

3.4. Principles of justice in taxation

Few things could be discussed from such different perspectives as those regarding principles of justice in general. The debate about principles of justice in tax matters is no different. This is one of the features that explains the complexity of this topic in taxation. This complexity increases even further as the debate surrounding tax issues normally brings together ethical, economic and political factors. The traditional approach – as we have seen in the analysis of the classical paradigm of tax law – understands that taxes are economic means for the realisation of the ends of the state according to a certain conception of man. Within this tradition the debate about principles of justice in taxation implies a determination of the criteria that explain these relations and an emphasis upon these different factors. So justice in taxation supposes the determination of the principles according to which the burden of taxation is to be distributed among members of a political society.

290. *ibid*, 48.

291. As I argue *infra* Ch3, 123ff, this intention of maintaining the distinction between taxes and payments does not obtain when there exists a price for the public provision of certain goods, as argued by Dworkin in *Sovereign Virtue*.

292. For an argument in which this problem (the justification of taxes as a means for economic ends) is mainly posed in the language of legitimacy, *vid*, Dworkin, *Is Democracy Possible Here?: Principles for a new political debate*, Ch4. I will come back to Dworkin's arguments on taxation *infra*, 135ff.

An alternative for those who have an interest in dealing with this issue is to face the complexity of categorising the relations between these different approaches in order to decide which, if any, have a prevalent role.²⁹³ Under this approach, and as developed for example by Stephen Francis Weston, the determination of the principles of justice would follow the determination of that order.²⁹⁴ This means that the different principles within each area should be ranked according to this relevance grading (so first, principles of justice, and then economic and political principles). But this procedure has an important caveat: it requires that at least an idea of what taxes are exists and, even more so, that a definition of taxes exists.²⁹⁵ This would not be a problem if we were trying to determine what the principles of justice that justify taxes, as we know them, are – and this Weston is not trying to do. Yet this begs the important question that the debate about principles of justice in taxation should help us to solve: how to determine the form that taxation should adopt? So, if I may state this in other terms, the debate about principles of justice in taxation should suspend our knowledge of tax law and tax policy as we know them in order to help us in our debate about the grounding ideas of taxation, that is to say, of the conditions that would explain and justify the form of tax law and particular taxes.

There is another problem in this debate that is similar to the one identified above in Weston's analysis and which plays a very important role in Liam Murphy and Thomas Nagel's arguments. According to Murphy and Nagel, the traditional approach to this debate has two problems: (i) it is myopic and, (ii) it assumes a certain "everyday" libertarianism'.²⁹⁶ What they mean is that there are certain assumptions within the traditional debate that have not been questioned and that hinder the debate concerning justice in taxation. If, in the case of Weston, the problem is that he assumes a particular definition of taxes according to their valid legal form, Murphy and Nagel identify moral and political assumptions in the traditional debate about principles of justice in taxation. They show, for example, that the traditional criteria of vertical equity are myopic because they assume that the debate in tax justice is an

293. For example, this is suggested by Weston in *Principles of Justice in Taxation, passim*. He argues that the ethical aspect of taxation should be prevalent because taxes' ends are dependent on a conception of the state and the individual. But his argument is not clear as he always insists on the inseparable importance and relations of the three aspects mentioned, *vid ibid*, Ch2, 69-72.

294. *ibid*

295. *ibid*, 43-54.

296. Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, 14-15 and *passim*.

isolated political issue.²⁹⁷ On the contrary, Murphy and Nagel advocate a whole view of the picture. One of the main arguments they develop in their book is that ‘justice in taxation cannot be determined without considering how government allocates its resources’.²⁹⁸ The second problem that they identify also has consequences for this debate. The traditional criteria of vertical (and hence horizontal) equity implicitly assume that taxation changes what is originally a fair distribution of property rights according to a ‘laissez-faire capitalist market economy’. The problem then is that the distribution of property that is the result of market exchange becomes the baseline from which the ‘fair sharing out of tax burdens [is] assessed’.²⁹⁹ Murphy and Nagel advocate a comprehensive debate: justice in taxation cannot be understood separately from or independent of a theory of justice in which private property is not a natural right but a social convention. I devote some time to a critical debate of their ideas below in chapter three.

These two criticisms are difficult to answer by those who defend the traditional approach to the debate on justice in taxation and I do not know of any attempt to answer it so far. Therefore, in my understanding there is no point in progressing deeper into an analysis of the particular principles of tax justice that have been defended within the classical paradigm by several authors for the purposes of the argument that I am trying to develop here.³⁰⁰ For the point that I am trying to make it is suffice to say that there is another way of approaching the debate. The ideas surrounding the debate on the principles of justice in taxation can be distinguished from a different perspective. Therefore, I will attempt to distinguish, in the debate to which I have been referring, two different approaches: the first being inductive and the second being a descriptive process for identifying the principles of tax law within a valid legal system. I will call the first kinds of principles aspirational or ideal principles,

297. Traditional criteria for tax equity assume that in determining how the burden of taxation will be distributed it is important to distinguish between those who are in different position (vertical equity) and those who are in the same position (horizontal equity).

298. Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, 14 and *passim*.

299. *ibid.* I believe that Murphy and Nagel’s reference to a ‘laissez-faire capitalist market economy’ is a too much of a demanding requirement. I would say that it is suffice to state in this regard that this is the assumption of anyone who starts from any economy based on the market system and what it implies. For the market system economy and its requirements see, Lindblom, *The Market System. What It Is, How It Works, and What to Make of It*.

300. Details can be found in Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, Chs2 and 3, or in Weston, *Principles of Justice in Taxation*, *passim*.

and the second the legal principles of tax law. In the former, all principles that aspire to define the tax system according to a particular political ideal are included. In the latter, all those principles that can be deduced from existing tax systems that are usually used by legal actors (judges, practitioners and legal academics) are included. Both kinds of principle are understood to have a normative force, that is, they work as standards. However, the normative force of legal principles has, regrettably, been understood as independent and beyond the debate concerning aspirational principles; it is as if there is just one conception of taxes and tax law possible, that is, the one that logically follows from the classical paradigm of tax law that I analyse in the next section. If the aspirational approach characterises the Anglo-American debate, then the legal one is characteristic of the Continental legal tradition.

The Continental legal tradition's approach to the legal principles of tax justice is particularly problematic when trying to argue in favour of or against different criteria of justice in taxation as it leaves no space for debate. Its consequences have been perverse for the consolidation of the idea that taxes affect property and liberty. Their main effect has been to reinforce the now common-sense idea that the only concept of taxes is that which is founded upon the classical paradigm. This conclusion can be obtained from the influence and importance given to the principle of legality over the principle of equality.³⁰¹ According to the interpretation given to the first of these principles, the requirement of legality has been understood as a limitation on the taxing power of the state and as stringent as the principle of legality as applied to criminal law. This means that taxes cannot be established if not established by law and that the law should fully specify all the conditions that make taxes applicable. The democratic interpretation, in which the principle of legality implies that the law according to which a tax is created is our law and not imposed upon us, is not normally applied in tax matters. At the same time, the principle of equality has been completely subordinated to the principle of legality; equality does not go much further than formal equality before the law (even if constitutions such as those of Spain and Italy can be read as including substantive views of equality in tax law).

301. For a general introduction to the common principles of constitutional tax law, *vid* Uckmar, *Principios Comunes del Derecho Constitucional Tributario*. *vid* also, Menéndez, *Justifying Taxes. Some Elements for a General Theory of Democratic Tax Law*, Ch8.

To summarise, aspirational and legal principles of justice in taxation have been understood as broader rules of thumb within the different elements of the classical paradigm of tax law. In the following section I analyse the legal form adopted by the classical paradigm of tax law, that is, what I call the *contemporary general theory* of tax law.

4. THE CONTEMPORARY GENERAL THEORY OF TAX LAW

So far, I have analysed the elements of what I have called the classical paradigm of tax law. According to the characterisation of the classical paradigm that I delineate herein there are four elements that underlie our contemporary understanding of taxation. These elements are: (i) a conception of the individual as a pure rationaliser, (ii) a conception of private property as a natural right, (iii) a conception of taxes as instruments of revenue and public expenditure and, (iv) blindness to the aspirational principles of justice in taxation that justify the tax system. But how do all these elements relate to tax law? The answer to this question can be found in the contemporary general theory of tax law. Or, put in other terms, the contemporary general theory of tax law is the legal form that the elements of the classical paradigm have adopted over time. The contemporary general theory of tax law tries to explain the nature and structure of the legal obligation to pay taxes that each individual taxpayer has. It is not an explanation of the different tax policies that a particular government may adopt over time; that is the job of political philosophy or of an economic theory of taxation. Here, I am not interested in this justificatory or policy discussion. What interests me is explaining the contemporary general theory of tax law, its presuppositions, structure and the way in which it explains the legal obligation to pay taxes. My argument aims to show that the legal form adopted by tax law is one of the main reasons why tax avoidance is problematic. Tax avoidance is invisible for the contemporary general theory of tax law. This will clarify my statement that all the alternatives that try to solve tax avoidance are doomed to failure as long as they continue to work within the classical paradigm of tax law and its legal expression.³⁰² The argument within this section is the last one to show the limitations of available tax law theories and, therefore, the last before my starting to build a new paradigm of tax law better able to give legal form to the duty to pay taxes.

4.1. *The duty to pay taxes*

302. For a particular analysis of the different attempts made to solve tax avoidance *vid supra*, 38.

There is a trivial sense in which the duty to pay taxes depends on the existence of a legal norm that specifies the conditions under which a particular taxpayer (T) is under the obligation to pay a certain tax (P). This triviality comes from the fact that even if there are good reasons for justifying taxes as an institution, these reasons are not enough to determine why T has to pay P. As we have seen so far, there may be good instrumental reasons for the state to set up a system of taxes and, even more so, there may be good political reasons or an accepted theory of distributive justice that justifies a particular policy or distribution of taxes. For example, within the classical paradigm of tax law, a government may decide that the best way to finance a national health system is through redistributive progressive income tax. Let us assume that in abstract terms there are good reasons for individuals to accept this redistributive progressive income tax; the system has a clear financial scheme. Let us also assume that they all accept that a universal health system should be paid by and for all in a redistributive manner. Yet who is going to pay how much? How are we going to determine the way in which T has to pay P? This is where tax law comes to the fore.

I am not interested here in determining the sorts of reasons that an authority may give or hold in consideration when establishing a legal duty to pay taxes, as would be the case with Joseph Raz's dependence thesis, for example.³⁰³ Neither am I concerned with the moral reasons that may justify the (moral) obligation to pay taxes but that require or depend on the legal structure to become proper duties, as Tony Honoré argues.³⁰⁴ No doubt these are all very interesting and important aspects of the legal duty to pay taxes. However, what interests me here is what the previously made trivial point implies and what it does not imply. To make this point clear I distinguish between a thin and a thick understanding of how the law makes possible the legal duty to pay taxes. According to the thin interpretation of this relationship, there is a necessary dependency of morality or political reason in law. There are many political or moral ideals that are too abstract to have consequences in practical reason or to coordinate our conduct in complex social enterprises (as is the case with taxation).³⁰⁵ Applying these ideas to tax law, the conclusion is that without legal determination there is no duty to pay taxes. A thick interpretation would reach the same conclusion

303. Raz, *The Morality of Freedom*, 47.

304. *vid*, Honoré, "The dependence of morality on law".

305. *vid*, Raz, *The Morality of Freedom*; Honoré, "The dependence of morality on law"; and, Menéndez, *Justifying Taxes. Some Elements for a General Theory of Democratic Tax Law*, 120ff, particularly 126–127.

but through more demanding requirements. It would require a stronger legal specification of all the elements that would permit us to determine in detail how much and under what conditions T has to pay P. In the absence of any of these elements, or where clarity in the terms used in the law is absent, those who defend the thick interpretation will conclude that T has no obligation at all (not that T has to not pay P).

The thinner interpretation shows that there can be no duty without law; the thicker, that there is no duty if the law does not fully and clearly establish how much P has to be paid by T under conditions C. As may be clear because of the analysis developed so far (in Ch1 and the previous sections of this chapter) the thick interpretation prevails within the classical paradigm of tax law. This explains, as stated above,³⁰⁶ that tax avoidance is considered either a moral problem or a problem of poor drafting; if T is not under C then he has no obligation P. But the problem with tax avoidance is that T organises his business so that he decides not to be under C in order to not have obligation P. So now we cannot distinguish between P or \neg P according to the law, but rather it is T who decides when he is under P because he decided to C.³⁰⁷ As stated before, we are in this situation because of the particular way in which the classical paradigm of tax law has influenced the legal form of tax law, in particular, because of the way in which the obligation to pay taxes has been transformed into a duty (as in the thin interpretation). In what follows, I analyse the elements of the contemporary general theory of tax law.

4.2. The contemporary general theory of tax law

The general theory of tax law specifies the conditions and elements according to which the state imposes the duty to pay taxes on individual taxpayers; because of this it has both normative and descriptive elements. The normative elements derive from the fact that the decisions adopted in order to give form to the duty to pay will determine the way in which individuals should behave. It also has descriptive elements because it constitutes an account of those elements of the classical paradigm analysed earlier in this chapter. The generality of the theory comes from the fact that it does not refer to

306. *vid supra*, 26ff.

307. I will come back to this later when discussing Judith Freedman's argument for 'principles-based legislation' in tax law. She defends the thick interpretation and so she considers that there is no duty to P in cases where T is not clearly under C. *vid infra*, 98.

any tax in particular, but to those conditions that explain the duty to pay and which are common to different taxes. So, for example, beyond the differences between income tax and VAT regarding the particularities of the tax base, the person responsible for the payment of the tax, the tax rate and so on, both kinds of tax share these categories as elements that may explain the duty to pay taxes. In more abstract terms, the general theory of tax law sets up the legal conditions under which the state can impose a duty on individuals.

Contrary to the situation for the Continental tradition, there is not much literature available on this topic in relation to the Anglo-American situation. The latter mainly focuses on the debate concerning aspirational principles of justice, while it leaves the specification of these principles to the courts. The former has dedicated some time to the debate, particularly when taxes were initially instituted (or given legal form). Today, all of the work has been left to economists who, based on purely instrumental arguments for tax law, use 'rules' to apply their policies but cannot see what the importance of institutionalisation through law is. The original debate was, or at least had to be, more sophisticated since new institutions were being created. These introductory notes are helpful in explaining why in the analysis that follows I focus chiefly on the Continental approach.

4.3. The legal relationship between the state and the taxpayer

The legal duty to pay taxes has a correlative right, namely, the state's enforceable right to claim for the payment of the tax. This relationship between the state and the taxpayer locates the tax duty in a statesructure in which there is a legal relationship under the logic of public law. According to the contemporary general theory of tax law, in this legal relationship the taxable event represents the will of the state. The taxable event (TE) contains the description of the relevant facts and operative conditions (C) according to which the taxpayer (T) will have a determinate legal obligation to pay (P) a certain amount of tax. This is the way in which the duty to P

by T, referred to above, is expressed and specified in tax law.³⁰⁸ Therefore, P becomes a duty in relation to T only once C gives way to TE.³⁰⁹

The particularities of each of these elements, and the way in which they relate to one another, varies depending on the justification of the obligation to pay taxes. Indeed, some authors assign more or less relevance to the fact that it is an obligation funded in solidarity, or that it is merely an instrumental obligation. Therefore, the specification of the TE may strongly depend on the economic expression of a particular principle of justice in taxation,³¹⁰ or in its legal form since the TE will only be able to detect legal structures of private law.³¹¹ Certainly, this has important consequences for a theory of legal reasoning in tax matters. In the former case a substantive interpretation of tax law based on economic criteria will be acceptable. In the latter, the TE and P will depend heavily on the options taken by a prospective T under the conditions of private law. Once the conditions of TE correspond in a particular case, T will be under P. T will then become a ‘debtor’ of the state, which in turn becomes a ‘creditor’.³¹² This explains the way in which the substantive elements that protect the individual from arbitrary actions by the state have a legal form. The state’s claim to be able to demand P is subordinated to the law (and, therefore, to the principles of legality or the rule of law).³¹³ So the tax law relationship is given an equivalent form to the obligations of private law. The important difference, however, is that in tax law the will of the individual is, in principle, irrelevant. If in private law the terms, conditions and content of the obligation is left to the parts engaging in that legal relation, this does not happen in tax law. In tax law the source of the duty is the law and in it we find the content and particular terms of the duty.

308. For a description of how different substantive elements may be taken into consideration in this process *vid*, Menéndez, *Justifying Taxes. Some Elements for a General Theory of Democratic Tax Law*, 127–132.

309. According to Hensel, the legal duty to pay taxes is ‘born with the realisation of the taxable event’ *Derecho Tributario*, 154.

310. *vid*, Jarach, *El Hecho Imponible. Teoría General del Derecho Tributario Sustantivo*, 91–103.

311. *vid*, Taveira Torres, *Derecho Tributario y Derecho Privado. Autonomía Privada, Simulación y Elusión Tributaria*, Ch3.

312. Hensel, *Derecho Tributario*, 153.

313. *vid, ibid*, 85, 137ff. The way in which the administration executes this claim is not our concern here. According to the contemporary general theory of tax law this is the work of administrative tax law.

But even when a T is under P according to TE, we still need an objective criterion according to which the amount of P is determined. This is the function of the tax base (TB). The determination of the TB is also dependent on the substantive elements of the tax, for example, if the tax is either progressive or calculated on certain quantitative measures in light of a particular principle of justice in taxation.

To summarise, the elements of the contemporary general theory of tax law are: an active (the state) and a passive subject (the taxpayer), the taxable event and the tax base.³¹⁴ Therefore, a person (A) will become T if some juridical acts can be subsumed under TE. The amount of P that T will have a duty to discharge is determined according to TB.

There have been many attempts made to explain that the source of the legal tax relation is the law. Some argue that the state's right to tax is based on its sovereign power. From this perspective, tax law is part of administrative law and this implies that the state can demand the payment of taxes from individuals according to its needs. The legal tax relation is, in this case, an abstract relation according to which citizens have a duty to contribute according to what the administrative officials determine. Others argue that the power to tax derives from the law, normally at the constitutional level. This power entitles the state to create the laws according to which it exercises tax. Only when the conditions established in that law are fulfilled is the state entitled to demand the payment of the tax. The latter has been the majoritarian position in the literature and is the one that predominates today. It is said that the structure of legal tax relations is not different from private law relations. Indeed, it is said that the only way in which the tax duty in itself (that is, independent from other formal or administrative duties) can be correctly explained is according to the structure of private law obligations. The only difference is that the public character of the obligation is given because one of the parts involved is the state and because it is destined to satisfy public needs. One of the main arguments given by the advocates of this position is that the duty to P is a personal relationship between the taxpayer and the state.³¹⁵

314. *vid.*, Jarach, *El Hecho Imponible. Teoría General del Derecho Tributario Sustantivo*, 65–72.

315. For details of the different positions and the defence of the private law relations structure as equivalent to the tax law relations structure, *vid ibid.*, 47–63.

This reading of tax law relations is reinforced by the interpretation given to the principle of legality in tax matters. This principle is understood as an argument for the justification of the structure of a tax law's legal relations as equivalent to a private law relation. Through the application of this principle the administration cannot demand P from T whenever it pleases. It is only according to substantive law that P can be demanded from someone. From this requirement derives another substantive one. If it is only according to the law that someone can have a duty to P, then the law must clearly specify all the conditions of the legal relations (T, TE and TB). In this sense, it is said that the principle of legality in tax matters is equivalent to the principle of legality in criminal law: '*nullum tributum sine lege*'. According to this requirement, there 'must be a corpus of legal norms destined to foresee the facts that give origin to tax duties and the amount and the subjects under that duty'.³¹⁶

So a correspondence exists between the structure of tax law relations and the structure of private law obligations and criminal law. This is no doubt problematic and, as I have argued, this is one of the reasons why tax law is not able to solve or to grasp what tax avoidance is. If the structure of tax law is understood to be equivalent to private law relations, then there are evidently some problems. In what sense can we say that there is a relationship between the moral obligation and the legal duty to pay taxes as required by the trivial demand (or the thin interpretation according to which morality depends on law)? It seems to be that the duty to pay taxes according to the contemporary general theory of tax law is completely separate from the moral obligation at the level of the structure of the law. I am not arguing that this split exists at the justificatory level because there is an attempt to make the ends of tax law and its structure coherent, but this is not successfully reflected at the structural level. Something is lost when we give the obligation to pay taxes the same structure as that of private law relations. We win a certain level of democratic participation, so to speak, because it is assumed that the individual is not under any duty unless this is established according to the law. But this is also achieved by the trivial requirement of the duty to pay taxes to be established by law (as defined before). It seems as if the only way in which the will of the individual is represented is as that of a contractor. Would it be better to recognise that in public law the individual's will concurs with the law

316. *ibid*, 27. [Personal translation].

through law creation processes in which the individual takes parts as a citizen?³¹⁷ This problem only increases once the principle of legality in tax law is interpreted as equivalent to the (allegedly heuristic) criminal law interpretation of it. Why should tax law require the same level of detail and specification as criminal law? Is it that paying tax should be equivalent to the imposition of a sanction? However, if this is the case then which conduct is to be prohibited?³¹⁸ And which goods are we protecting from the infliction of a sanction? (Freedom and private property?) Of course, there is a sense in which certainty is required so that people can decide and organise their lives in advance. Yet is it not enough for someone to know that he will have to pay, at the end of a period, a certain amount of tax that will be determined according to certain formula? Do we need a high level of specification such as that for each TE the moment at which the duty is born is detailed and previously determined?³¹⁹

The worst problem with the combination of these two approaches is that we have been left with a formalistic interpretation of tax law that goes along with the contemporary general theory of tax law. Indeed, we have already seen the problems that derive from substantive intents to overcome it.³²⁰ For the issue that I am dealing with here, the problems and limitations of the contemporary general theory of tax law are crucial. This shows how tax law is unable to comprehend tax avoidance because there is not any legal structure that demands the fulfilment of a moral or political obligation to pay taxes.³²¹

Let me summarise the argument and provide some conclusions for this part of the thesis. In spite of a majoritarian adherence to a traditional understanding of the contemporary general theory, we should do away with this because it lacks explicatory force. If we apply it then we will have trouble understanding some of the most relevant characteristics of tax law as a particular area of law. Furthermore, we will not be able to explain one of its main problems, namely tax avoidance. The legal structure given to the contemporary general theory of tax law renders incoherent the legal duty

317. *vid infra*, 220.

318. 'A punishment for a crime, such as a fine, is not the same as a tax on a course of conduct, though both involve directions to officials to inflict the same money loss' (Hart, *The Concept of Law*, 39). *vid* also, Feinberg, "The expressive function of punishment", 96–98.

319. *vid*, Fuller, *The Morality of Law*, 59–62.

320. *vid supra*, 34ff.

321. Here I am not defending any political or moral justification for this obligation, but *vid infra*, 167ff.

to pay taxes with the justification for the obligation to pay taxes, as well as with the substantive elements that inform it. In other words, something is lost if we understand that the taxpayer as a debtor of the state (and it is not difficult to concede to Nozick's argument against taxation, namely that it is forced labour). The only way out that gives a lot of leeway to tax avoidance is to assume that the legal duty to pay taxes depends on the citizen's will to become a taxpayer (debtor) under the conditions of the TE (which becomes the terms of the contract). All these lead us to the conclusion that the contemporary general theory of tax law is the reflection or embodiment of the elements of the classical paradigm of tax law. In this sense, the individualistic comprehension of life and the respect of private property as a natural right explains the duty to pay taxes and its limitations. In other words, the legal structure of tax law (and its underlying political and moral justifications) has not been updated to accommodate contemporary political and moral demands. Thus, we lack a true contemporary general theory of tax law. The contemporary general theory of tax law is directed mainly toward creating the largest possible space for strategic behaviour, thus allowing individuals to reach their ends regardless of the interests of the political community.

But before starting the argument for the new general theory of tax law I will revise a recent alternative suggested by Judith Freedman, namely principles-based legislation. We have had to wait until this moment for this analysis because only now do we have enough elements for a proper analysis of it as an alternative. However, I can already advance to my conclusion: this alternative cannot solve the problems that it aims to because there is not any relationship between its justification and its legal structure.

4.4. An alternative? Freedman's principles-based legislation

So far we have seen the difficulties involved in defining and understanding tax avoidance within the structure of the contemporary general theory of tax law. The main argument I have been trying to develop so far is that this difficulty is a consequence of the classical paradigm of tax law. To be more precise, the argument asserts that no solution for tax avoidance can be found within the contemporary general theory as it both derives from and is based on the classical paradigm of tax law. However, as explained above, when analysing possible solutions to tax avoidance there

is one proposal that should be analysed in detail since it seems to provide a feasible alternative to the contemporary general theory of tax law.³²² This alternative is Judith Freedman's principles-based legislation (PBL). As I argue here,³²³ Freedman's PBL is not an alternative to the contemporary general theory of tax law because it is still based on the classical paradigm. In this sense, it is not possible to adopt the legal form of PBL if the classical paradigm is its underlying substance. If my argument is correct then two conclusions will follow: (i) there is a relationship of dependency between the contemporary general theory of tax law and the classical paradigm, and (ii) we cannot solve the problems of the first without addressing the content of the second. By the end of this chapter, and once Freedman's PBL has been abandoned, the field will be settled in order for me to start building a new alternative to the classical paradigm of taxes and its related contemporary general theory of tax law; one in which a solution to tax avoidance may be found.

4.4.1. Principles-based legislation and tax avoidance

Freedman's version of PBL presents an alternative theory of tax legislation thought to better grasp legislative intent in tax law.³²⁴ PBL is based on the idea that there is a difference between legislative intent and the abstract notion of the 'will of the law'. The difference is that the former is part of the law dictated by parliament while the latter is imposed on the law from 'outside', thus going beyond what parliament has established in the law. According to Freedman, this distinction is easily forgotten; yet its importance cannot be disregarded so easily since in tax legislation there is always a tension or 'clash between economic substance and legal reality'.³²⁵ This tension is the element that requires the legislature to better express its intention. Therefore, following Freedman, whatever the intention of parliament is – focusing on economic substance or legal concepts – it has to be clearly established. Or, if this is not possible, they (the legislators) should bear this in mind and provide courts with the proper guidance for implementing their intention (whatever its content).

322. *vid supra*, 48.

323. *vid infra*, 104.

324. According to Freedman, her conception of PBL derives from the work of John Avery Jones "Tax law: rules or principles?" and Greg Pinder's work for the Australian Taxation office. *vid*, Freedman, "Improving (not perfecting) tax legislation: rules and principles revisited", 725.

325. Freedman, "Interpreting tax statutes: tax avoidance and the intention of Parliament", 73.

The approach in PBL seems to provide a good answer to one of the main problems faced by those who defend substantive interpretations in tax law, that is, how to determine the intention of the legislator. This is especially important for those who are concerned with respecting formal and substantive values associated with law, such as democracy, the rule of law and the separation of powers,³²⁶ while also interpreting tax law beyond mere literalism. From this perspective the question to be addressed is how judges should apply the law while respecting the intentions of parliament. There are, therefore, two different areas that PBL tries to cover: (i) providing a clear criterion for the determination of the intention of parliament in tax law, and (ii) creating a guideline for judges, which aims to identify and apply that intention.

Before moving deeper into PBL, we should remember that what explains the importance given to the determination of parliament's intention is its relevance to (the definition or solution for) tax avoidance. The underlying premise under the assertion according to which tax avoidance is legal – that is, the one defended within the classical paradigm – is that the letter of tax law statutes does not consider certain acts (those that form part of the avoidance scheme) as part of taxable events. On the contrary, those who defend a substantive interpretation of tax law will try to show that those same acts should be taxable according to the intention of parliament. Thus, tax avoidance can be problematic only once the legislator's intention is clearly established. Only then can tax avoidance be considered as resting 'outside' of the law or closer to illegal acts. The expectation is that we will have a clearer idea as to which activities carry a tax and who is responsible for its payment only once we know the legislator's intention. Before this (here Freedman would say following Honoré) there is not any duty to pay taxes since tax law obligations are not moral obligations.³²⁷ In the same way, so long as taxpayers do not go against the legislator's intention then the way in which they organise their business – even if exclusively for the purpose of reducing their taxes – should be irrelevant. We have already seen above that the judicial and legislative alternatives developed to make this approach operative have failed to achieve any success in identifying legislative intent and stopping tax avoidance.³²⁸ Moreover, Freedman has argued that so long as 'transactions are successfully structured

326. Freedman, "Improving (not perfecting) tax legislation: rules and principles revisited", 717.

327. *vid.*, Honoré, "The dependence of morality on law".

328. *vid supra*, 26ff for the definition, problems and possible solutions to tax avoidance.

to avoid a tax' then tax avoidance is nothing but 'a contradiction in terms'.³²⁹ This is because 'any scheme that is held by the supreme tribunal to be effective is, by definition, not avoidance'.³³⁰

As proposed by Freedman, PBL seems to be a good alternative for solving this conundrum from the various new approaches that have been explored.³³¹ It appears to be the best since it directly aims at making explicit legislative intent by asking the legislature to better express its intention (whatever it may be), that is to say, leading either to economic substance or legal reality.³³² Freedman also suggests that if there is no clear intention in tax law, then the legislature should acknowledge this decision and provide the courts with the proper guidance for implementing that will. As this might be a paradigmatic case, since parliament may not have any clarity on policy or because a particular policy might be argued on different grounds, or even because particular cases might be problematic due to not having been thought of in advance,³³³ Freedman argues in favour of a new kind of tax legislation in which rules are replaced by principles. One particular example of this kind of legislation is a general anti-avoidance principle (GANTIP).³³⁴ But this is not enough. The general argument is that any particular principle should be accompanied by 'more detailed drafting but policy-based, principles-based drafting'.³³⁵ If this is the kind of tax legislation created by parliament, Freedman argues, purposive interpretation by the courts would not create 'new' laws beyond the intention of parliament, but would only be a concreting of that intention.

Once PBL is adopted, that which changes is the way in which the legislature expresses its will. It goes from a detailed and 'rule like' expression to a 'principles' one. This principles expression would permit legislators to make sure that its ends are

329. Hoffmann, "Tax avoidance", 203, quoted in Freedman, "Interpreting tax statutes: tax avoidance and the intention of Parliament", 71.

330. Freedman, "Interpreting tax statutes: tax avoidance and the intention of Parliament", 71.

331. *vid supra*, 34ff.

332. Freedman, "Interpreting tax statutes: tax avoidance and the intention of Parliament", 73.

333. This is similar to what Hart calls the open texture of law, particularly what he says about legislation through general norms, *vid Hart, The Concept of Law*, 128–130.

334. Freedman, "Interpreting tax statutes: tax avoidance and the intention of Parliament", 74.

335. *ibid.*

achieved and, at the same time, that courts have some leeway in order to overcome the problems presented by the particular cases in question. In Freedman's words,

[P]arliamentary intention can [...] be expressed at a number of levels. A general anti-avoidance principle or set of principles could set out references to economic substance, to the manner of creation and implementation of the scheme in question and to other objective factors that would reveal the motive for the scheme and whether it was consistent with the legislation.³³⁶

Under PBL, tax legislation would be structured in different layers – starting from very general principles, with other layers of more detailed secondary legislation being added as needed.³³⁷ With this kind of drafting in mind, Freedman argues, tax legislation would improve because legislators would have to have a very clear idea of the policy that they are trying to achieve in order to express it in general principles. At the same time, judges would not be creating policy when applying these principles; in this sense, PBL is different from purposive interpretation.³³⁸ The principles of PBL would not be 'a broad instruction to look at whether the purpose of the legislation has been abused, or merely at the motive of the taxpayer', instead they would be set so as to express clear 'principles and criteria'.³³⁹ Therefore, the content of the particular rules of a statute would be subject to the broader purposes contained in the principles. Freedman is careful to argue that PBL does not imply that the obligation to pay tax would be justified only in morality or that this obligation 'should be based on the "spirit of the law"'.³⁴⁰ On the contrary, if the legislature explicitly provides the overarching policy, the judiciary would have a clear guide for application and would not contravene its function.³⁴¹ A particular and concrete duty to pay taxes would be the application of these principles to a particular case.

336. *ibid*, 74–75.

337. Freedman, "Improving (not perfecting) tax legislation: rules and principles revisited", 719.

338. *ibid*, 721–723.

339. Freedman, "Interpreting tax statutes: tax avoidance and the intention of Parliament", 75, 87.

340. Freedman, "A GANTIP: Was it really such a bad idea?", 8.

341. Freedman, "Interpreting tax statutes: tax avoidance and the intention of Parliament", 87. According to Freedman, the only restrictions that would apply in this case are those deriving from the exercise of judicial function. Parliament should not expect the courts to develop policies when they do not have the ability to do so. *ibid*, 88–89.

A principle within PBL is to be understood as ‘a statement about the essence of all intended outcomes in a general field and not just a less-specific rule’.³⁴² All this makes PBL different from purposive interpretation. The former implies that principles are operative provisions that would not contradict or go against the rules, but that they would make explicit their background, that is, legislative intent. On the other hand, the latter may produce contradictions between the rules and the purpose of the law if the courts interpret that the letter of the rule is not able to express (in any specific way) its purpose. PBL, according to Freedman, is expected to eliminate the need for purposive interpretation.³⁴³ In other words, Freedman’s PBL proposal implies a change in our understanding of tax legislation and tax avoidance: from the determination and identification of conduct that goes against the law to a broader structural definition of what is included in tax law (or for the same purpose, in the law). Therefore, PBL implies a change of the actual onus in tax law: from the revenue authority demonstrating ‘that something is included in the charging provision, to the taxpayer, who must now show that a case is specifically excluded’.³⁴⁴ So, PBL is an indirect solution to tax avoidance. Because it redefines the way in which the duty to pay taxes is determined it reduces the space open to it by the absence of law. In other words, the possibility of developing possible conduct that might configure cases of tax avoidance is limited by redefining the way in which tax law is a given form. This redefinition is a consequence of the way in which tax law is understood as contained in particular legal dispositions: because after PBL is adopted judges will have a clearer notion of those cases in which a particular transaction is covered by a legislator’s intent.³⁴⁵

Freedman’s PBL proposal is apparently promising. To summarise, she opens up the possibility of a new understanding of tax law in which taxpayers cannot shield themselves behind the letter of the law. This is achieved by modifying the structure of tax law, moving from ‘strict rules’ to ‘broader principles’ containing policy directives for the judiciary. At the same time, she seems to safeguard the traditional values associated with the rule of law, such as clarity, certainty and generality. Furthermore, she does not need to rest on moral arguments to justify the legal duty to pay taxes

342. Freedman, “Improving (not perfecting) tax legislation: rules and principles revisited”, 725.

343. *ibid*, 724–725.

344. *ibid*, 725.

345. *ibid*.

since it suffices for PBL that the legislature's intention to do so is contained within the law (whichever particular structure it adopts). Her defence of PBL rests on the idea that so long as there is legislation, namely a universal norm containing an authoritative decision, a particular duty would follow by application of the norm.

However, as promising as it may seem Freedman's proposal of PBL is problematic on two fronts: (i) under PBL tax law becomes a vacuum category in which there is no substantive content (a 'nominal kind'), and (ii) it jeopardises the distinction between legislation and adjudication. The consequences of these problems are (a) that tax law lacks any legitimation since PBL creates a hiatus between form and substance, and (b) there is no tax law to be applied in a particular case but simply particular legislation. In other words, PBL simplifies tax law at the level that it becomes the command of the sovereign, just as law was understood in earlier versions of legal positivism as defended by Austin or Bentham. Consequently, PBL lacks explicatory force since it cannot explain the difference between tax law and exactions or punishment.³⁴⁶ One feature that explains the failure of PBL is that it still works within the classical paradigm of tax law. The way to move forward is to offer a substantive interpretation of taxation and only then offer the different legal forms that it may adopt. This will bring together form and substance in tax law by overcoming the problems and limitations of the different alternatives so far analysed.³⁴⁷ In what follows I provide arguments to show how Freedman's PBL is problematic in terms of the two aforementioned aspects.

4.4.2. According to PBL, tax law is a nominal kind

Freedman proposes that tax law should adopt a new form, that is, move towards principles-based legislation rather than strict rules-based drafting. This approach to tax law aims to solve application problems and, in particular, tax avoidance. But applicative efficiency cannot be the only evaluative standard for PBL (or for any other particular area of law). We should also evaluate what PBL means for tax law. Does it transform its nature? Does it become form without substance? Should we assume that tax law is simply (the legislator's) will without any particular content? What I am suggesting is

346. Therefore, the historical evolution of tax law in political and legal terms cannot be coherently integrated. *vid*, Taylor, "Explanation and practical reason". *vid supra*, fn.318.

347. *vid supra*, 19ff.

that in order to evaluate PBL we should broaden the analysis to consider whether tax law is something more than an instrument (a legal one) for legislators' purposes. We should analyse what PBL means for the nature of tax law. For this purpose I draw upon analytical tools from legal theory; in particular, from some conceptual elements surrounding the debate about the nature of law. To put it in different words, PBL should be evaluated under the standards set by conceptual and analytical developments in legal theory. Two reasons explain this decision: (a) tax law is part of the law and (b) what distinguishes it from other areas of law are its particular concepts and legal structure.³⁴⁸ Showing the limitations of PBL should help to achieve a proper understanding of what tax law is about (its substance), while at the same time it will show the limits of contemporary general theories of tax law. Once this work has been done we will be in a better position to not only look for a new form for tax law, but also to better grasp its substance, something I propose in the following chapters.

According to Freedman, one of the main advantages of PBL is that it is 'designed to eliminate the need for' purposive interpretation.³⁴⁹ This is achieved by creating overarching principles that contain guidelines for second-tier or lower regulations that would make tax law gapless. Judges will not need to exercise discretion, in a strong sense,³⁵⁰ in particular cases because they will be applying the law. As part of PBL, principles would be operative in the sense that they give 'the courts the tools they need to find the answers provided by parliament'.³⁵¹ This is important for Freedman because she is interested in showing that PBL does not increase uncertainty. This is why she tries to show that the principles of PBL are different from Dworkin's conception of principles.³⁵² According to Freedman's conception, the principles of PBL are: (i) not abstruse descriptions of the informative principles

348. One of the main achievements of tax law was for it to become an autonomous area of law, that is to say, an area of law with its particular theories and a particular structure. For more information about tax law as an autonomous area of the law *vid*, Jarach, *El Hecho Imponible. Teoría General del Derecho Tributario Sustantivo*, *passim*. The problem was that this structure and conceptual independence failed since they were built around the classical paradigm. In other words, the classical paradigm was never able to overcome the limitations of a structure adopted from private law relations.

349. Freedman, "Improving (not perfecting) tax legislation: rules and principles revisited", 725.

350. For the distinction between weak and strong discretion *vid*, Dworkin, *Taking Rights Seriously*, 31–39.

351. Freedman, "Improving (not perfecting) tax legislation: rules and principles revisited", 729.

352. For Dworkin's characterisation of principles *vid*, Dworkin, *Taking Rights Seriously*, Ch2.

contained but not specified within legislation, and (ii) they are ‘not intended to imply any introduction of morality onto tax law’.³⁵³ Freedman argues that principles in tax law are there to provide the necessary context in order to avoid interpretative mediation.³⁵⁴ By providing context, and following Andrei Marmor’s ideas on legal interpretation, Freedman argues that principles provide certainty because participants will have a clear idea of what tax law is about, or at least have a clearer idea than when there exists too much detailed legislation. Thus, principles as ‘operative provisions’ should provide ‘all the intended outcomes’, thus appealing to ‘the way in which the tax system works’ by leaving no space for strong judicial discretion and providing ‘legislative guidance’ to fill any gap.³⁵⁵ Principles should be ‘comprehensive’ and rest at the ‘top’ of a ‘pyramid’ structure, as if they are a statement ‘of all intended outcomes’.³⁵⁶ Or, as Freedman puts it, when referring to a GANTIP as part of PBL, ‘it would be more than purposive interpretation because it would look beyond the language of the statute at the surrounding facts’.³⁵⁷ Therefore, ‘the judiciary could apply [the principle] and develop it with full legitimacy’.³⁵⁸ This is part of Freedman’s argument for tax minimisation. PBL combined with a GANTIP would contain the parameters for tax minimisation while administrators and courts would ‘have to flesh out the provisions and make them workable’. A GANTIP based on PBL would provide these institutions with ‘a legitimate framework within which to develop the law’.³⁵⁹

If we follow Freedman’s ideas then there are two possible readings of PBL.³⁶⁰ According to the first, PBL might form part of a structure of delegated powers from legislators to judges so that the latter can create law (an idea found in Joseph Raz and Andrei Marmor’s work). In the second reading, PBL may represent a case of a practice structured on first principles (a schema similar to that which distinguishes

353. Freedman, “Improving (not perfecting) tax legislation: rules and principles revisited”, 729–730.

354. *ibid*, 730.

355. *ibid*, 725, 731.

356. *ibid*, 725. *vid*, Freedman, “GAAR: Challenging assumptions”, 14.

357. Freedman, “A GANTIP: Was it really such a bad idea?”, 9.

358. *ibid*, 10.

359. Freedman, “Is tax avoidance “fair”?”, 90. *vid*, Freedman, “The tax avoidance culture: Who is responsible? Governmental influences and corporate social responsibility”, 388.

360. There is a third alternative here that should be disregarded since Freedman disregards it herself, namely a Dworkinian interpretation of PBL. We should also add that the kinds of principles to which PBL appeals are different from those principles described *supra* as principles of justice in tax law, *vid*, 85.

epistemology within MacIntyre's reading of Aristotle and Aquinas' conception of first principles).³⁶¹ In what follows I develop these possible readings and show that PBL fails to explain tax law or justify a normative ideal for tax law.

One of the core ideas of PBL is that the judiciary should create tax law. What kinds of legal power do judges need for this? An important debate in legal theory addresses the possibility of judges creating law. Some oppose this idea because it would make impossible, or at least endanger, adjudication. Judges should apply the law to particular cases and not create universal norms when adjudicating since the latter approach does not consider the particular case in question in its own terms. When judges create laws there is the risk that they might treat persons as means and not as ends. This is a central issue in legal theory because it relates to identifying the law and its limits, thus questioning two main claims within contemporary legal positivism. Whenever judges have to decide a particular case and there is a gap in the law, should they create laws by exercising their discretion? This would imply that judges decide cases by creating and not applying law. Are they applying morality when deciding those cases? Some have suggested this and Ronald Dworkin's argument has been particularly strong on this point. Those who defend positivist conceptions of the law reply that morality can be part of the law so long as the law refers to or includes it within a legal system. Others reply that law can only be that which can be identified according to the sources thesis, that is, law that can be identified according to a social source. The latter is the position defended by exclusive or hard legal positivists, of whom the most prominent torchbearers are Joseph Raz and Andrei Marmor. Because Freedman suggests that she is following Marmor's ideas when justifying PBL,³⁶² I will continue the analysis with the answer given by Raz and Marmor to explain how judges can create laws while at the same time not endangering the positivist conception of law.

So, can tax law be developed and created by judges? To answer affirmatively, Freedman follows Raz and Marmor: yes, they can and there is no risk for a positivist conception of the law if they do so. How can they justify this answer? Here they state that judges have these powers to create laws in line with the idea of 'directed

361. MacIntyre, *First Principles, Final Ends, and Contemporary Philosophical Issues*.

362. Freedman, "Improving (not perfecting) tax legislation: rules and principles revisited", 719 fn.13.

powers'.³⁶³ Therefore, positivism explains that judges can create laws as long as the power to create a law is established by binding social sources.³⁶⁴

Legal positivists who adhere to the strong version of the social thesis or, as Raz calls it, the sources thesis,³⁶⁵ are committed to the view that the law is that which can be identified as established by binding social sources,³⁶⁶ or 'if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument'.³⁶⁷ The sources thesis, argues Raz, is the best explanation for the authority claimed by those who create laws because it is of its essence that they can 'identify those rulings without engaging in a justificatory argument'.³⁶⁸ Thus, the sources thesis makes possible a law's 'claim to authority';³⁶⁹ only because it is source-based can the law fulfil or perform its 'mediating role'³⁷⁰ 'between ultimate reasons and people's decisions and actions'.³⁷¹ This, Raz says, allows us to clearly distinguish between courts applying the law and courts creating laws. In the first case, courts apply legal standards that form part of the law according to the sources thesis; in the second, they create new standards that become part of the law because they are created by a social source.³⁷² According to the sources thesis, the function of law is to guide conduct or human behaviour. Or as Raz puts it, '[l]aws guide human behaviour, help people in planning and deciding on their future course of action, and provide standards for

363. Raz, "The inner logic of the law", 244.

364. Raz, "Legal positivism and the sources of law".

365. *ibid*, 46–47. Raz states that according to the sources thesis, '[a]ll law is source-based' in his "Authority, law, and morality", 210. Raz distinguishes between a narrow and a wide thesis for the source thesis: 'The narrow thesis concerns the truth conditions of pure legal statements only', while '[t]he wide thesis concerns the truth conditions of all legal statements, including applied ones', 231.

366. Raz, "Legal positivism and the sources of law".

367. Raz, "Authority, law, and morality", 211.

368. Raz, "Legal positivism and the sources of law", 52. Raz develops his conception of authority in Raz, "Authority, law, and morality", 214. Here he explains that his conception of authority implies three theses: the dependence thesis, the normal justification thesis and the pre-emption thesis. *vid*, Raz, *The Morality of Freedom*.

369. Raz, "Authority, law, and morality", 216.

370. *ibid*, 234.

371. *ibid*, 231. This is what Raz calls the 'service conception of authority'. For this idea *vid*, *ibid*, 214–215. For the argument *vid*, *ibid*, 216–220. Raz argues in this text that neither the 'coherence thesis' nor the 'incorporation thesis' are able to explain a law's claim to authority *ibid*, 220–30.

372. Raz, "Legal positivism and the sources of law", 48–52.

evaluating past or planned actions'.³⁷³ Is this function of law questioned or endangered when judges create law? Raz answers this question negatively. A legal system containing legal norms that authorises judges to create laws would not go against his conception of law. Law created by judges would be part of the wider sources thesis.³⁷⁴ He argues that there are two different types of law that determine the identification of legal norms. These two types of 'ultimate laws' are 'laws of recognition' and 'laws of discretion'.³⁷⁵ Laws of discretion determine the ways in which judges can create laws. In a more developed version of this argument, Raz refers to these rules as those that contain '[t]he directed powers of courts'.³⁷⁶ Because of its close connection with and importance for Freedman's justification of PBL, let me develop this point further.

According to Raz, 'judicial decisions are a source of law' in 'all legal systems'.³⁷⁷ This means that in judicial decisions judges can not only refer to existing laws, but also they can create new ones. He argues that judicial decisions not only repeat existing laws but they also modify them.³⁷⁸ This modification changes the law by creating a new law. Judicial decisions that create laws will be part of the law so long as they can be identified (as part of it) according to the sources thesis. It is the law that establishes that courts are under an obligation to create laws. This is the way in which the 'law provides (operative) reasons for its own development'. Raz develops this idea by analogy with 'directed legislative powers' as the way in which the law develops by delegation. This is especially applicable in cases of subordinate legislation contained in statutes. The case for 'directed judicial law-making powers' is a bit different. These are more pervasive as '[t]hey exist in all cases in which judicial decisions are a source of law and in which the courts are legally required to apply certain moral consideration to the determination of the case'.³⁷⁹ But Raz also argues that 'legal doctrines which call for the exercise of moral judgement in their application [...] also address

373. Raz, "The identity of legal systems", 86.

374. *vid supra*, 365 and Raz, "Authority, law, and morality", 234–235, also Raz, "The problem about the nature of law", 205–208.

375. Raz, "The identity of legal systems", 96.

376. Raz, "The inner logic of the law", 244.

377. *ibid*, 245.

378. *ibid*, 246–249.

379. *ibid*, 250.

themselves to the public'.³⁸⁰ This implies that these legal doctrines are 'defeasible to a particularly high degree'³⁸¹ because they provide the law's subjects with access to the courts.³⁸² So Raz has no problem with recognising that judges can create laws and that they can even appeal to moral and political considerations for this whenever the law directs them to do so.³⁸³

What about Marmor? Marmor also advocates an exclusivist conception of law. He defends it not on the grounds of authority, as Raz does, but due to the conventional character of the law. For Marmor, law is 'founded on *constitutive conventions*, namely, a set of conventions which determine what the practice is and how one goes about engaging in it'.³⁸⁴ Therefore, the sources thesis is the way in which law, conventionally constituted, can be identified. In other words, without the sources thesis we would not be able to distinguish the constitutive convention that creates law from that of other normative systems. He introduces a similar idea to Raz's 'directed judicial law-making powers' when he provides an argument that shows how to interpret legal norms that refer to morality. Marmor's idea is that those '[l]egal rules which prescribe that the validity of other legal rules depend on certain moral or political considerations actually function as power-conferring rules, granting to the judiciary *limited and guided* legislative power'.³⁸⁵ It is not necessary to go deeper into Marmor's argument here. It is enough for the argument developed in this part of the chapter to show the close connection with Raz's ideas and how both serve as a foundation for Freedman's PBL. Marmor's ideas are more helpful for this purpose because he further develops the consequences of the conceptual points made by Raz when analysing 'directed judicial law-making powers'. In particular, his description of these powers as restricted by its 'legally prescribed aims and reasons', and the fact that they are 'a kind of power which the norm subjects (i.e. Judges or other officials) have a legal duty to exercise',³⁸⁶ are precisely the kinds of power needed for PBL to work.³⁸⁷

380. *ibid.*

381. *ibid.*, 251.

382. *ibid.*, 252.

383. *ibid.*, 253.

384. Marmor, *Positive Law and Objective Values*, 51.

385. *ibid.*, 67.

386. *ibid.*, 67.

387. See also Marmor's application of these ideas to constitutional interpretation in *Interpretation and*

These ideas help Freedman in her aim to show that PBL works in accordance with positivist ideas about the law (tax duties do not rest in morality but they are established by law), and at the same time they provide certainty about the content of tax law (we know that judges have a duty to create tax law within the certain limits established in it).

Does PBL benefit from the ideas developed by exclusive legal positivism? My impression is that it does not. As Fernando Atria shows,³⁸⁸ one of the main problems of Raz and Marmor's judicial directed powers is that they pay too high a price by trying to show that the sources thesis is able to explain the way in which judges create law. As there are so many references to morality or abstract concepts in the law of contemporary legal systems, we would arrive at the absurd conclusion that we could not identify a valid law (and its content) until there is a judicial decision against which no appeal proceeds. This is of course, as Atria states, ironic for those who defend a conception of law according to which law is only that which can be identified as such according to the sources thesis. So this is a first criticism that would also apply to PBL. How can it bring more certainty to tax law if its content will depend on laws developed by judges? We would only know what law is once a judicial decision has declared what law is and this provides certainty, but one which is not relevant as guidance for an individual behaviour.

Moreover, what Freedman achieves through PBL is, as Hart has famously said, a case in which 'distortion [is] the price of uniformity'.³⁸⁹ Just as Hart said of those theories that reduced all laws to laws establishing a sanction,³⁹⁰ PBL distorts tax law by making its content dependent on laws created by judges following whatever legislators establish as tax policy. Those who reduce all laws to sanctions distort the law because they cannot explain the differences between orders and rules, the key being that the latter are general,³⁹¹ that is to say, they contain general types of conduct and apply to a general class of people.³⁹² PBL, on the other hand, distorts tax law because it cannot

Legal Theory, 160ff.

388. Atria, "La ironía del positivismo jurídico".

389. Hart, *The Concept of Law*, 38.

390. *ibid*, Ch3.

391. *ibid*, 39.

392. *ibid*, 21.

tell us anything about it. PBL makes it impossible to distinguish between ‘[a] punishment for a crime, such as a fine, [and] a tax on a course of conduct, though both involve directions to officials to inflict the same money loss’.³⁹³

So we must analyse one last possible reading of PBL. Can PBL be read as one of those practices the content of which can be derived from a ‘first principle’?³⁹⁴ The analysis that follows is short because it is quite clear that the answer to this question must be negative. The reason that justifies the negative answer is that PBL does not have any telos since it is whatever tax policy legislators might hold.

According to Alasdair MacIntyre, ‘[g]enuinely first principles [...] can have a place only within a universe characterised in terms of certain determinate, fixed, and unalterable ends, ends which provide a standard by reference to which our individual purposes, desires, interests and decisions can be evaluated as well or badly directed’.³⁹⁵ In this sense then a principle is in a dependency relationship with a final end, or with a particular telos. It is only because there is a final end, a telos, that a first principle can be explained. MacIntyre’s argument in *First principles, final ends, and contemporary philosophical writing* is that there is no place for this idea in the ‘contemporary universe of discourse’ because it is a discourse in which there is no place for fixed ends but only for principles that are ‘decided upon or invented’.³⁹⁶ I will not develop the consequences that MacIntyre’s genealogical work might have for philosophical enquiries in general, but this insight will be important to show that the language used by PBL is not based on the Aristotelian/Thomistic tradition. Furthermore, because it is a form adopted for the mere expression of parliament’s policies, it cannot provide a better understanding of tax law.

The point that I am making is that we should avoid any possible confusion derived from the use of the notion principles in PBL. Principles as used by Freedman in PBL are mere tools for stating that judges have the legal power to develop tax law according to certain general directions given by parliament. The content of these principles depends exclusively on whatever policy parliament wants to implement

393. *ibid*, 39.

394. For the analysis developed here I follow Alasdair MacIntyre *First Principles, Final Ends, and Contemporary Philosophical Issues* and “First principles, final ends, and contemporary philosophical writing”. References are made to the latter since it is a revised version of the argument.

395. MacIntyre, “First principles, final ends, and contemporary philosophical writing”, 146.

396. *ibid*, 146.

through (tax) law. So there is not any substantive content according to which we can identify tax law (or those principles) but only what positivist theorists identify as a source of law. In PBL, tax law does not have a telos: no ‘end internal to activity of [this] specific kind, for the sake of which and in the direction of which activity of [this] kind is carried forward’.³⁹⁷ Therefore, PBL cannot fulfil its promise of making possible the development of tax law by judges respecting those values traditionally associated with legislation, such as certainty, because there is no substantive content to which to appeal;³⁹⁸ this is not even the case for those values that, according to positivist theories of law, are fulfilled by posited legislation.³⁹⁹ Principles in PBL cannot ‘provide premises for demonstrative arguments’ and cannot ‘specify the ultimate causal agencies, material, formal, efficient, and final for’⁴⁰⁰ tax law. In this sense, our understanding of tax law is not improved by PBL. It does not move us forward to better grasp our knowledge of what tax law is about. According to PBL, any tax policy defined by parliament and contained in abstract ‘principles’ is enough for tax law (until it is further specified by judges?). What is missing here is a substantive approach to tax law for which a particular legal structure is adopted. This does not mean that tax law should have a particular moral content directly applicable by the courts, but that that content should inform the legal form adopted by tax law. There is a connection between reasons and legal structure that explains the mediating role of law,⁴⁰¹ while at the same time there are certain internal values to practices that need to be fleshed out.⁴⁰²

To put it in canonical terms and place it within recent debates within legal theory, the problem with PBL is that it understands tax law as a nominal kind. In his

397. *ibid*, 156.

398. This is an argument for PBL made by Freedman, as noted *supra*.

399. See for example MacCormick, “The ethics of legalism”, Raz, “The functions of law” and Postema, “Law’s autonomy and public practical reason”. For Postema, “[a]ccording to this tradition, while the law’s ultimate aspiration may be justice, its proximate aim and defining task is to supply a framework of practical reasoning designed to unify public political judgment and co-ordinate social interaction; and in this view of law’s fundamental task lies a key to understanding its nature’, *ibid*, 80.

400. MacIntyre, “First principles, final ends, and contemporary philosophical writing”, 157.

401. Raz, “Authority, law, and morality”.

402. I give arguments for this statement *infra*, Chs4 and 5, 167ff.

attempt to argue for law as a functional kind,⁴⁰³ Michael Moore introduces a distinction between natural,⁴⁰⁴ nominal and functional kinds of things.⁴⁰⁵ Nominal kinds are those that ‘are simply a set of individual things that share no nature save a common name used to refer collectively to the class’.⁴⁰⁶ Or, in the modified definition of this concept adopted by Fernando Atria, nominal kinds ‘have no nature: there is nothing internal to them by virtue of which they are instances of the kind’.⁴⁰⁷ Both Moore and Atria try to show that law cannot be a nominal kind because we cannot explain some basic distinctions used daily in our legal practices. This is the problem with PBL because it does not explain what distinguishes tax law. It only gives us a nominal identification of the set of norms dictated according to the exercise of a particular ‘directed judicial law-making power’. PBL does not offer a structural account of tax law nor a substantive or functional approach to it.⁴⁰⁸ If we adopt PBL as proposed by Freedman, tax law is a nominal kind, that is to say, the principles enable the legislator to achieve whatever end they might have. In tax law these ends may be either incentivising or sanctioning for certain activities, obtain certain economic means, and so on.

As I argue later in part II of this thesis,⁴⁰⁹ to better understand tax law we should determine what its substantive content is. To put it in the terms used here, we need to address the question of the proper function of tax law and this is a task that needs justification from political theory.⁴¹⁰ Once this is done I will develop an argument for the particular structure that tax law should adopt. The problem with PBL is that it is not able to justify why or in what way the structure it proposes for tax

403. Those kinds that ‘have a nature that each instance of the class shares, [it is a] functional [nature]’, Moore, *Placing Blame. A General Theory of the Criminal Law*, 19.

404. ‘These are kinds like water or gold that not only exist “naturally” (that is, without human contrivance) but also have a nature to them that gives the essence of the kinds’, *ibid*, 19.

405. *vid ibid*, 19–23. It is not necessary at this stage to fully flesh out the definition of these kinds of things. I will come back to this debate with more detail *infra*, 233.

406. *ibid*, 19.

407. Atria, “Legislation and adjudication”, 345.

408. PBL is not a structural approach because it does not aspire to describe the way in which tax law should better be described. PBL as proposed by Freedman is a normative idea of what the structure of tax law should be for whatever purposes legislators might have.

409. *vid infra*, Chs3, 4 and 5.

410. Murphy, “The political question of the concept of law”, 375.

law would be better for tax law. For this we will need to abandon the contemporary general theory of tax law and distance ourselves from the classical paradigm of tax law.

PART II

DISTRIBUTIVE JUSTICE, TAXATION, AND TAX LAW

1. INTRODUCTION TO PART II

In the first chapter of this thesis I argue that tax avoidance is a legal and not a moral problem. In the second chapter I endeavour to show that some of the reasons that explain why we do not consider tax avoidance to be a legal problem are due to the fact that it is not comprehensible under the classical paradigm of tax law. Moreover, chapter two concludes that if the classical paradigm cannot understand tax avoidance as a legal problem then its legal expression, which is the contemporary general theory of tax law, cannot provide a legal answer to it. Therefore, after the first two chapters we are in a position from which we can assert that because of the problems associated with the classical paradigm of tax law, as well as unsuccessful attempts to provide an alternative to the contemporary general theory, a revision of the relationship between tax law – as a special or particular area of law – and its substance is needed.

However, this discussion has not yet taken place among scholars of tax law and there is not one particular area of study where we can find a remedy for the aforementioned diagnostic. On the contrary, while taxation issues have been discussed from several perspectives (economic – in its macro and microeconomics variants –⁴¹¹ historical,⁴¹² political science,⁴¹³ political philosophy,⁴¹⁴ social psychology,⁴¹⁵ and legal⁴¹⁶) none have focused on the connection between the substance of taxation and

411. *vid*, Musgrave and Musgrave, *Public Finance in Theory and Practice*; Stiglitz, *Economics of the Public Sector*; Hassett and Hubbard (eds), *Inequality and Tax Policy*; Mirrlees, *Welfare, Incentives, and Taxation*; Kocherlakota, *The New Dynamic Public Finance*; and, Adam, Besley, *et al.*, *Tax by Design: The Mirrlees Review*.

412. *vid*, Gross, *Fair Share for All. Jacobin Egalitarianism in Practice*; Daunton, *Trusting Leviathan. The Politics of Taxation in Britain 1799–1914*; and, Daunton, *Just Taxes. The Politics of Taxation in Britain 1914–1979*.

413. *vid*, Steinmo, *Taxation & Democracy* and; Bräutigam, Fjeldstad, *et al.* (eds), *Taxation and State-Building in Developing Countries. Capacity and Consent*.

414. *vid*, the bibliography discussed *infra* Ch3.

415. *vid*, Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion*.

416. *vid*, Bergman, *Tax Evasion and The Rule of Law in Latin America. The Political Culture of Cheating and Compliance in Argentina and Chile*.

the form of tax law. Each of these different approaches explains taxation from its particular point of view, but none explains or provides arguments for it adopting a legal form.⁴¹⁷ To this dual task I dedicate in the second part of this thesis (Chs 3, 4, and 5). In chapter three I provide an argument to show the shortcomings of liberal and luck egalitarian's defence of taxation. Arguably, these theories are concerned with obtaining a justified level of distribution rather than with an argument for taxation or tax law *per se*. Hence, taxation and tax law are justified as mere instruments. As such, taxation and tax law are fungible and might be replaced by any other instrument. In chapter four I explore an alternative substantive understanding for taxation as a practice with an intrinsic good. This substantive aspect of taxation should provide an argument for it being an obligation and consequently, for it becoming a legal duty. In chapter five, therefore, I provide an argument for taxation's form (tax law). The arguments in chapters four and five aim to understand the importance of taxation and tax law *per se* (and not as mere instruments for an economic conception of distributive justice).

Political philosophy is the field within which the substance of taxation has been discussed in the terms relevant to my argument. This discussion regarding taxation has mainly focused on its legitimacy and justification, rather than on the relationship between its substance and form. So, for example, contemporary debates in political philosophy, particularly those concerning theories of justice from the second half of the twentieth century, have provided alternative (and often overlapping) accounts of this relationship between distributive justice and taxation. However, this relationship has been justified externally and merely on instrumental grounds.⁴¹⁸ Therefore, according to this approach, taxation is nothing but a fungible means for achieving a particular conception of distributive justice. In other words, effort has been put into determining which is the best justified conception of distributive justice and, as a corollary, the justified level of taxation required to instrumentally achieve its ends. Under this scheme (henceforth referred to as the mere instrumental justification for taxation) the debate has mainly focused on justifying a particular conception of

417. The point that I am making is that none of these approaches ask why taxation adopts a particular legal form. They take tax law for granted and assume that it is explained by virtue of its coerciveness. These approaches assume that they should explain or justify the contingent aspects of tax law.

418. Throughout this chapter I follow Alasdair MacIntyre's distinction between internal and external goods in practices and institutions, respectively. *vid*, MacIntyre, *After Virtue*, Ch14.

distributive justice that would subsequently give legitimacy to a particular tax design. As a consequence, tax law is a coercive form of taxation that is in turn justified on moral grounds. This explains why the main argument for coercive taxation depends upon the degree of redistribution that a particular theory of justice is able to justify. Alternatively stated, tax law is legitimate so long as it is a successful means by which to achieve a particular standard of redistribution justified according to a theory of justice.⁴¹⁹ Yet as I venture to show here, this justification of taxation renders taxation and tax law irrelevant since here it might be replaced by any functional equivalent (referred to later in this chapter as the Murphy and Nagel paradox).

Here I argue that the solution to the problems outlined in chapters one and two of this thesis require us to abandon the mere instrumental justification of taxation and tax law. These have to be replaced with an understanding of taxation as a practice with an internal good. This is an argument oriented toward showing that taxation is better understood as a practice with an internal good (and, that, therefore it is not a justificatory argument).⁴²⁰ For this purpose I draw on Alasdair MacIntyre's distinction between practices and institutions and their relationship with internal and external goods.⁴²¹ In chapter four I provide an argument that shows that the internal good of taxation is recognition and that its external good is redistribution. This argument aims at showing that taxes are justified so long as we live in political societies that recognise private property as a necessary aspect of the political project of autonomy.⁴²² According to the argument defended herein, taxes represent the other face of private property and are not instruments for redistribution. In other words, if private property – and therefore taxation – is justified as a constitutive aspect of recognition, there exists a duty to pay taxes even when there is no need for redistribution. This understanding of taxation provides a better theoretical apparatus for proposing a new approach to tax law (and therefore to the legal form of the duty to pay taxes) that is better equipped to provide an answer to tax avoidance.⁴²³

419. *vid*, Dworkin, *Is Democracy Possible Here?: Principles for a new political debate*, Ch4. Dworkin links redistributive taxation with the legitimacy of government based on the two principles of justice defended by him, namely, equal concern and equal respect.

420. *vid infra*, Ch3 and Ch4.

421. *vid*, MacIntyre, *After Virtue*, Ch14, and MacIntyre, *Dependent Rational Animals*, Ch11.

422. *vid infra*, 202.

423. *vid infra*, Ch4.

Let me present the structure of the second part of the thesis by summarising its argument in some detail. The main aim of chapter three is to show the limits of the mere instrumental justification for taxation when a merely economic conception of distributive justice provides the starting point of an argument for redistribution. Hence, the objective of chapter three is to deliver the first step toward a non-instrumental, that is to say an intrinsic, justification for taxation. For this purpose I criticise the arguments provided by both liberal egalitarian and luck egalitarian political philosophers. In particular, when criticising liberal egalitarians' justifications I focus on the way in which the mere instrumental justification is argued for by John Rawls, Ronald Dworkin, and Liam Murphy and Thomas Nagel. The aim of this argument is to show that their conception of distributive justice leaves us without any justification for taxation and with only a moral justification for redistribution.

The same problem affects luck egalitarians; they miss the point of taxation by assuming that the mere instrumental justification can achieve the redistributive equality they argue for. I argue that an economic approach to distributive justice, based on a particular conception of equality as a state of affairs to be achieved, misses the point that underlies justice and equality as political ideals. The approach I advocate is pessimistic in that it affirms the fact that distributive justice cannot be reduced to economic concerns for (at least) two reasons: (i) material economic equality does not represent a political ideal in itself (it has no value in itself nor it is achievable or sustainable in time); and (ii) when equality is reduced to economic terms it loses its political-transcendental dimension.⁴²⁴ As I understand it, the political-transcendental dimension of equality, as an aspect of distributive justice, comprises the idea that we can only aspire collectively toward the achievement of individual emancipation. I fully develop these ideas in chapter five. Yet this idea operates as a motive for the persistent critique and revision of existing institutions (in this sense it is pessimistic). Or, in other terms, distributive justice should be understood pessimistically in its immanent aspect and positively in its transcendental dimension.⁴²⁵ To paraphrase Anne Phillips, and to use more familiar political categories, once this perspective of political concepts is

424. *vid infra*, 168ff.

425. I have to thank Claudio Michelon for showing me the importance of the distinction between the immanent and the transcendental when applied to institutions. I owe the phrasing of this idea to Fernando Atria.

adopted, taxes represent a movement from access to recognition.⁴²⁶ This is important because the political dimension of distributive justice is not captured by the mere instrumental justification of political institutions that is provided by contemporary liberal theories of justice. For liberal egalitarians and luck egalitarians institutions – and therefore legal institutions – are justified so long as they can achieve a particular end (for example, a justified level of redistribution) and they are irrelevant if they cannot.⁴²⁷ This implies abandoning institutions once they fail to achieve those ends, in order to replace them with morality by extending the scope of justice.

The crucial consequence of tax law being justified in instrumental terms is that we cannot see the importance or significance of it being tax law. This implies that the theories criticised herein cannot solve the problems inherent in the classical paradigm of tax law, nor those belonging to the contemporary general theory of tax law; tax law does not possess any intrinsic substance and tax avoidance appears to be a problem of moral demands in non-ideal theories of justice.⁴²⁸ In chapter four I will argue for a conception of distributive justice that allows space for its political dimension. For this purpose, I return to Aristotle's conception of distributive justice as a part of general justice.

Chapter four further develops the argument for a non-instrumental justification of taxation and tax law. I argue that taxation is better understood as a practice with an internal good and that tax law should adopt a form capable of embodying that internal good. The evident question is therefore, which is taxation's internal good? By revisiting the redistribution or recognition debate between Nancy

426. Phillips, *Which Equalities Matter?*, 83.

427. In legal theory a similar position is defended by John Gardner, for whom legal institutions are justified as long as they work. *vid*, Gardner, *Law as a Leap of Faith*: '[Law] is distinguished rather by the distinctive means that it provides for serving whatever ends it serves' (207). 'The law is no more than a means and we should welcome reliance upon it only to the extent that reliance upon it serves some worthwhile end' (212).

428. For a general overview of non-ideal theories of justice *vid*, Valentini, "Ideal vs. non-ideal theory: a conceptual map". According to Valentini, the debate between ideal and non-ideal theories came about as a methodological turn in political philosophy and is built around Rawls' *Theory of Justice*. In this paper Valentini maps the debate and distinguishes three possible aims for non-ideal theories: (i) 'full compliance' versus 'partial compliance'; (ii) 'utopian or idealistic' theory versus 'realistic' theory; and (iii) 'end-state' theory versus 'transitional' theory. Because of the scope of this thesis I will not be able to go deeper into this debate. However, the argument that I put forward in this chapter contains elements of the three interpretations of 'non-ideal' theories as distinguished by Valentini. I have to thank Cristián Rettig Bianchi for calling my attention to this point.

Fraser and Axel Honneth,⁴²⁹ I argue that the internal good of taxation is recognition. At this point of the argument I will have developed enough elements in order to revise the relationship between taxation and private property. In chapter four I argue that when understood as a practice guided by recognition, taxation is constitutively connected with private property. I try to argue that the kind of recognition that taxation as a practice contains is not significantly different from the Hegelian justification of private property. By the end of chapter four I show that understanding taxation as a practice with recognition as its internal good is a more suitable interpretation of the persistence of tax law (and that would also, provide a reason not to replace it by any other available redistributive mechanism). With the argument developed in these chapters I expect to show that the conception of taxation argued for solves the two problems previously mentioned in the thesis: (i) it shows that tax avoidance is not simply a moral problem to be left to individuals' ethical decisions but instead is one of misrecognition to be approached politically and institutionally; and (ii) the interpretation of taxation advocated for leads to the radical consequence that we have an obligation to pay taxes even if the need for redistribution is absent.

429. Fraser and Honneth, *Redistribution or Recognition?*

CHAPTER THREE. WHY SHOULD I PAY TAXES?

1. INTRODUCTION

Taxes are essential for the existence of a state.⁴³⁰ This is because they provide revenue ‘by means of which [government] can procure both services and the material goods necessary for the performance of its functions’.⁴³¹ In chapter two I argue that this economic function of taxes is one of the characteristic elements of the classical paradigm of tax law, namely that taxes are instruments of revenue and public expenditure.⁴³² Most contemporary political philosophers assume this element of the classical paradigm. Even libertarians who argue that the only morally justifiable version of the state is the minimal state agree with this.⁴³³ However, if we want to go beyond the common place and explain what this agreement consists of then we cannot advance much. Are we implicitly saying that there are certain activities that the state must develop or finance? Or that taxation defines the level of public provision of goods and the contours of private property? Or that the state should redistribute wealth? Are taxes means for obtaining revenue to finance public expenditure? If this is so then does the justification of the duty to pay taxes depend on a particular level of provision of public goods (or redistribution)? Furthermore, which perspective – a purely economic one or one originating in justice and fairness – should we adopt in debates regarding tax policy? The answers to all these questions depend on the justification of taxation, that is to say on the function or purpose of taxation (and tax law).⁴³⁴ The function assigned to taxation takes for granted a particular relationship between taxes and distributive justice. This acquires special importance because in

430. Tipke, *Moral Tributaria del Estado y de los Contribuyentes*, 27. For an application of this idea to the building of the state in developing countries *vid*, Bräutigam, Fjeldstad, *et al.* (eds), *Taxation and State-Building in Developing Countries. Capacity and Consent*.

431. Weston, *Principles of Justice in Taxation*, 44. *vid*, Steinmo, *Taxation & Democracy* and Ferreiro Lapatza, *Instituciones de Derecho Financiero*, 14–17.

432. *vid supra*, 77.

433. Nozick, *Anarchy, State, and Utopia*, Ch7 and Ch10. ‘The minimal state is the most extensive state that can be justified. Any state more extensive violates people’s rights’(149). ‘No state more extensive than the minimal state can be justified’ (297). The minimal state requires a minimum level of taxation. Libertarians following Nozick would not assign many functions to the government, but this is a different argument.

434. Contemporary liberal political philosophers have addressed the issue in these terms. However, in Ch5 *infra* I offer a teleological conception of institutions as an alternative to the functional approach.

actual debates of political philosophy, capitalism is assumed to be a characteristic of contemporary Western modern plural societies. In what follows I accept this assumption for the sake of my critical review of some representative liberal egalitarian and luck egalitarian arguments for taxation.

My aim is to show that the merely instrumental justification of taxation is problematic because taxes and tax law become anything that is able to achieve coercive redistribution. There are not any reasons for taxation and tax law independent of the reasons given to justify the ends of a particular theory of distributive justice. Thus, tax law and taxation become instruments and their justification is purely instrumental; is this particular tax (law) policy a good instrument for achieving a particular level of economic justice (and therefore, redistribution)?⁴³⁵ I believe that the source of this problem is found in a misplaced relationship between distributive justice and taxation, where the former is defined as a particular distribution of goods and the latter as an instrument subordinated to that purpose. Part of this problem derives from the fact that contemporary political philosophy places excessive emphasis on achieving a conception of distributive justice that is purely economic without consideration of its political dimension.⁴³⁶ This understanding of distributive justice – as economic justice –⁴³⁷ inevitably leads to the instrumental justification of taxation and tax law.⁴³⁸ In brief then, taxes are understood as the means by which to obtain revenue in order to implement a particular conception of distributive justice. Therefore, taxes are a means either for redistribution (for whatever criterion defined by a particular theory of distributive justice) or for financing the minimal state. For those who adopt instrumental justification tax law is nothing but the coercive expression of that justification. It is not strange then to say that, at this conceptual level, liberal egalitarians and libertarians share the same conception of taxation and tax law.

Furthermore, the economic approach to distributive justice creates a problem for those who defend egalitarianism. Egalitarians mainly focus on debates concerning the standards for defining what is to be equally distributed (what G. A. Cohen calls the

435. As argued in Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, *passim*.

436. Therefore, excessive emphasis is placed on the way in which individuals agree on the distribution of certain goods, as if this agreement might be something they could come into as equals. *vid.*, MacIntyre, *After Virtue*, Ch17.

437. Macpherson, *The Rise and Fall of Economic Justice and Other Essays*, 1–20.

438. *vid supra*, 77.

‘currency’ of egalitarian justice).⁴³⁹ Arguably, this focus brings two problems for egalitarians. First, because of their concerns about the determination of a particular equalisandum they miss what Aaron James identifies as ‘the significance of distribution’.⁴⁴⁰ Second, and following an argument put forward by Cécile Fabre,⁴⁴¹ for libertarians and (Cohenian) egalitarians a legal duty to pay taxes is equivalent to forced labour. The difference, of course, is that for the latter this legal obligation would be justified, while for the former it would not. Therefore, Fabre argues that a strong egalitarian theory, such as G. A. Cohen’s, does not succeed in making an argument for taxation against Robert Nozick’s objection, according to which a duty to pay taxes is equivalent to forced labour.⁴⁴² The point I want to highlight from Fabre and Cohen’s arguments is that they are both trapped by the moral argument posed by Nozick. Among contemporary political philosophers it has become usual to find moral arguments for institutional arrangements. The problem with this approach is that moral arguments without concern for historical institutional evolution risk missing the point of institutional arrangements.⁴⁴³ Fabre and Cohen’s defence of egalitarian redistribution provides a good example through which I am able to illustrate what I consider to be problematic in the moral justification of taxation as a duty to help others by redistribution.

As I argue below, both liberal egalitarians (who argue for an economic conception of distributive justice applied to institutional design) and egalitarians (who argue for a moral duty to help others under an ideal of equality) miss the point of taxation because they focus on redistribution. Taxation becomes either a label for anything able to achieve redistribution or a moral justification to help others that does not differ from any other moral duty to help others. The problem for a justification of

439. Cohen, “On the currency of egalitarian justice”.

440. James, “The significance of distribution”.

441. Fabre, “Distributive justice and freedom: Cohen on money and labour”.

442. For Cohen’s argument, *vid* Cohen, *Rescuing Justice & Equality*. Nozick’s argument is in *Anarchy, State, and Utopia*.

443. For an example of this problem *vid*, Rosanvallon, *Democratic Legitimacy. Impartiality, Reflexivity, Proximity*. Without any concern for the historical evolution of political institutions and the (historical) reasons that explain that evolution, Rosanvallon proposes several reforms to answer to contemporary legitimacy challenges posed to those institutions. *cf.*, Geuss, *History and Illusion in Politics*.

taxation is evident. Why should we not replace taxation with social service?⁴⁴⁴ My answer to this is that other morally justified attitudes or institutions in contemporary market economies based on the economic conception of distributive justice cannot replace taxation. As I argue herein, once distributive justice is understood as an aspect of what Aristotle calls general justice, taxation is connected with the political definition as to how we are to relate to each other and in this sense taxation cannot be detached from private property. This requires us to keep in mind that legal institutions try to materialise what Cornelius Castoriadis calls the political ‘project of social individual autonomy’⁴⁴⁵ (where, if we follow the Hegelian justification, private property has an important role to play in the political definition of an individual).

2. DISTRIBUTIVE JUSTICE AND THE DISTRIBUTION OF GOODS

There are two main concerns that exist among contemporary advocates of what can broadly be covered under the notion of pattern theories of distributive justice.⁴⁴⁶ The first concern is to provide a moral justification for redistribution;⁴⁴⁷ the second is to determine what should be the thing to be distributed and how much of it should be allocated.⁴⁴⁸ These theories try to provide content for a conception of distributive justice, the core of which is the right determination of the distribution of the social product. Therefore, contemporary theories of distributive justice focus on determining the right principle(s) for the distribution of the social product.

Before going any further I would like to introduce a distinction (that later on will be related to the Aristotelian distinction between general and particular justice)⁴⁴⁹ between distributive justice and social justice. These two concepts are not always distinguished and when they are different authors use ad hoc definitions. John Rawls is an example of the former since he uses both terms indistinctively in *A Theory of*

444. In fact, this is the conclusion at which we might arrive by following Fabre’s critique of Cohen.

445. Castoriadis, *Figures of the Thinkable*, 94. According to Castoriadis, this political project appeals to the ‘autonomous action of people and at establishing a society organised to promote the autonomy of all its members’ (Castoriadis, *The Imaginary Institution of Society*, 95).

446. Nozick, *Anarchy, State, and Utopia*, Ch7.

447. Among the advocates of this position we find Rawls, Dworkin and Nagel. In general, those who defend liberal egalitarianism.

448. Advocates of this approach defend egalitarianism, among whom Amartya Sen, Martha Nussbaum and G. A. Cohen can be mentioned.

449. *vid infra*, 176.

Justice.⁴⁵⁰ David Miller⁴⁵¹ and Iris Young⁴⁵² are examples of the latter. Miller and Young have different ad hoc conceptions of social justice. For Miller, social justice derives from the Aristotelian and Thomistic notions of distributive justice but is wider in scope since its origin lies in an early twentieth-century concern with the ethical scrutiny of the existing economic and social institutions.⁴⁵³ He proposes a broader notion of burdens and benefits to be distributed according to three principles of justice (need, desert and rights), which are associated with three possible relations (solidaristic communities, instrumental associations and citizenship, respectively).⁴⁵⁴ Young, on the other hand, argues that social justice cannot be defined by broadening distributive justice. She rather proposes abandoning the distributive paradigm in order to adopt a conception of social justice as ‘the elimination of institutionalized domination and oppression’.⁴⁵⁵ For the purpose of this argument I understand distributive justice in a canonical fashion as concerned with the distribution of benefits and burdens among society’s members in a world with limited resources.⁴⁵⁶ On the other hand, the conception of social justice that I adopt partially follows Young’s perspective. Her approach calls us to remember that justice is not only about the distribution of things but that it also requires a critical attitude toward institutional arrangements upon which distributional patterns depend because, as she argues, nonmaterial social goods are not static but ‘a function of social relations and processes’. Her concept of social justice ‘includes all aspects of institutional rules and relations insofar as they are subject to potential collective decision’. As will become clear later in the argument, I distance myself from her conception because I believe that the ‘concepts of domination and oppression’ that she sets as ‘the starting point for a conception of social justice’⁴⁵⁷ should be replaced by recognition.⁴⁵⁸

450. Rawls, *A Theory of Justice*.

451. Miller, *Principles of Social Justice*.

452. Young, *Justice and the Politics of Difference*.

453. Miller, *Principles of Social Justice*, Ch1.

454. *ibid*, Ch2. Miller also develops in detail the content of the three principles of justice in the first part of his *Social Justice*.

455. Young, *Justice and the Politics of Difference*, 15.

456. *vid* MacCormick, *Practical Reason in Law and Morality*, Ch.8. However, MacCormick does not distinguish between distributive and social justice. This idea of distributive justice is commonly expressed as ‘giving each its due’ or *sum cuique*.

457. Young, *Justice and the Politics of Difference*, 16.

As an example of the economic conception of distributive justice, we should consider what Samuel Fleischacker has to say about distributive justice in its modern (or contemporary) sense. Fleischacker analyses the history of distributive justice and concludes that there are ‘two notions of “distributive justice” in Western political philosophy’.⁴⁵⁹ According to his argument, these two notions can be identified with two authors or periods. The first runs from Aristotle to the late eighteenth century, while the second is formulated by John Rawls based on intuitions from the nineteenth and early twentieth centuries.⁴⁶⁰ The main difference between these two notions, according to Fleischacker, is that the latter, and not the former, is concerned with the ‘poor’. In its modern sense then, distributive justice ‘calls on the state to guarantee that property is distributed throughout society so that everyone is supplied with a certain level of material means’. Therefore, he says, ‘[d]ebates on distributive justice [...] centre on the amount of means to be guaranteed and on the degree to which state intervention is necessary for those means to be distributed’.⁴⁶¹ According to Fleischacker, the main difference between the ancient and the modern principles of distributive justice centres on the role of merit. On the one hand, merit determines the content of the ancient principle of distribution. On the other, the modern principle of distribution ‘demands a distribution independent of merit’.⁴⁶² Merit is relevant to the modern notion of distributive justice only after a certain level of distribution has been secured for all. What characterises the modern idea of distributive justice is the ‘belief that justice demands the redistribution of wealth’.⁴⁶³ Hence, Fleischacker concludes that it is not possible to bring together the Aristotelian and Rawlsian conceptions of distributive justice. Later in chapter four I will argue that if we adopt a political conception of distributive justice, leaving behind the economic

458. I develop this argument *infra*, 188.

459. Fleischacker, *A Short History of Distributive Justice*, 125.

460. *ibid.* Fleischacker considers that some of these intuitions can be found in Rousseau, Smith and Kant (53–79). He considers Smith’s contribution to be the most important one as he changed the ‘moral imagination’ toward the poor and considered them as morally equal to the rich (62–68). According to Fleischacker, the modern notion of distributive justice arrived with Babeuf’s consideration of poverty as a justiciable ‘affront [...] to people as human beings’, and not as a problem of becoming a good citizen (79).

461. *ibid.*, 4.

462. *ibid.*, 5.

463. *ibid.*, 43. ‘[N]one of the [ancient] traditions say that a certain level of material comfort is owed to the poor by virtue of their being human beings, that justice demands some distribution of goods to all’ (44).

conception of distributive justice, Fleischacker's analysis is not ultimately relevant. The interesting point is not to oppose political and economic justice, because there is no doubt that they dealt with different historical realities, but to show how these two approaches can be brought together. This could be achieved by showing that political and economic conceptions of distributive justice aim at mutual recognition.

By critically revising the arguments for taxation developed by liberal egalitarian political philosophers, in what follows I reveal how the instrumental justification forms the expression of the economic conception of distributive justice. The conclusion of this argument is that the justification of taxation in Rawls' theory still works within the classical paradigm of tax law; that Dworkin's justification of redistributive taxation instrumentalises taxes at the cost of not justifying taxation but any progressive instrument for redistribution; and finally, that although Murphy and Nagel try to justify taxation they paradoxically privilege any institutional arrangement capable of achieving a particular level of distributive justice. I call this the Murphy and Nagel paradox. All these justifications leave us with a moral justification for redistribution but without any justification for taxes *as such*. The particular problems derived from the moral justification for redistribution will be dealt with at the end of the chapter, when the critique posed by Fabre to Cohen is revised.

Before continuing, let me introduce a brief clarification to avoid possible confusion. The argument that I am developing is different from the criticism developed by Amartya Sen against that which he calls 'theories of ideal justice'. For Sen, these theories are far too concerned with institutions and ideal justice and do not show the same concern for practical changes that might improve people's lives. Sen calls this approach to a theory of justice 'transcendental institutionalism' that aims for 'perfectly just societies' in opposition to a 'realisation-focused comparison' approach that is concerned with 'social realisations' (to be found, according to Sen, in the work of Adam Smith, the Marquis of Condorcet, Jeremy Bentham, Mary Wollstonecraft, Karl Marx and John Stuart Mill).⁴⁶⁴ Sen prefers to advocate for institutions 'that promote justice'.⁴⁶⁵ However, Sen shares with the liberal egalitarian theorists mentioned

464. Sen, *The Idea of Justice*. This argument crosses the entire book, however, it can predominantly be found in the preface, introduction and Ch2.

465. *ibid*, 82. [Emphasis in the original]. As I will try to show later, political concepts properly understood contain both aspects – the transcendental and the immanent – which Sen tries to separate, *vid infra*, 168.

above the idea that institutions have a ‘significant instrumental role in the pursuit of justice’.⁴⁶⁶ So, for the purpose of the argument developed here, Sen shares the same problems as liberal egalitarian theorists even if he tries to take seriously, or rather precisely because he tries to take seriously, the mere instrumental justification of institutions that I am trying to leave behind.⁴⁶⁷

To summarise, the argument in this section aims to show that liberal egalitarian theories of justice fail to answer the problems detected in chapters one and two of this thesis because they assume that the justification of tax law depends on moral arguments in favour of redistributive taxation. Thus, these theories cannot solve the problem of tax avoidance because they disregard the importance of tax law. In what follows I critically revise some of these justifications for taxation.

3. LIBERAL EGALITARIAN JUSTIFICATIONS FOR TAXATION

From the second half of the twentieth century onwards, liberal egalitarian justifications for distributive justice have played an important part in justifying redistributive policies, especially against those who argue that the only possible just distributions of the social product are those that result from market exchanges.⁴⁶⁸ Arguing that equality in the distribution of (certain) goods is important for individuals when developing their life plans in modern capitalist economies was, for example, a key argument in John Rawls’ landmark contribution to the debate. Rawls argues that justice should be predicated on social institutions and aspire to pure procedural justice through his two famous principles of justice.⁴⁶⁹ As a landmark work, Rawls’ *A Theory of Justice* contribution has been attacked from all possible fronts (from conservatives to egalitarians) and at all possible levels (from his idea that social institutions are the subject of justice to his two principles of justice). In what follows I analyse his work, in particular regarding the function assigned to taxation and its relationship with redistribution. Following this, I discuss an alternative to Rawls’ theory brought forward by Ronald Dworkin within the liberal egalitarian tradition. Dworkin proposes a modification to the criterion of equality aspired to by Rawls by moving away from

466. *ibid*, xii.

467. I distinguish between mere instrumental institutions and teleological institutions *infra*, 209.

468. *vid*, Hayek, “The mirage of social justice”, 67–70.

469. In what follows I use Rawls’ last formulation of the principles of justice as stated in Rawls, *Justice As Fairness: A Restatement*.

ex-post equality (Rawls' 'difference principle') toward ex-ante equality ('equality of resources'). According to Dworkin, this would secure the coexistence of personal responsibility and equality. Dworkin argues that if two principles of justice are adopted (equal concern and respect) the combination of equality of resources and individual responsibility for economic decisions provides justification for unequal market distributions better than the economic differences permitted by Rawls' difference principle. Dworkin argues that his theory is able to bring together liberty and equality as political values and, therefore, to respond to the libertarian criticism posed by Nozick, for whom equality endangers liberty. I will revise critically what Dworkin has to say about taxation and the way in which he justifies redistribution. With my discussion of Rawls' and Dworkin's arguments in place, I will move on to focus on Liam Murphy and Thomas Nagel's arguments for taxation as developed in *The Myth of Ownership. Taxes and Justice*. Murphy and Nagel defend taxation as part of a broader scope of institutional arrangements dependent on the adoption of a conception of distributive justice. Within this broader distributive schema every economic institution is dependent upon political decisions. Therefore, the definition of private property – as a contingent institutional construction – depends on institutional arrangements, of which taxation is one. But Murphy and Nagel are so concerned with a particular distributive outcome that, paradoxically, they end up forgetting about taxes. Above I called this the Murphy and Nagel paradox. It consists of providing a justification for taxation that leaves taxation behind. This paradox is a consequence of the way in which liberal egalitarians understand taxation. In order to explain this conclusion I present the argument that follows.

3.1. Rawls: Taxation's corrective and redistributive functions

Ever since John Rawls tried to revive the contractualist tradition in the first edition of *A Theory of Justice*⁴⁷⁰ the discussion about distributive justice and institutions has become a central topic in contemporary political philosophy. Some of the questions Rawls' theory tries to answer are: How do we secure justice in social interactions? How do we fairly distribute rights and duties in political societies? A central part of Rawls' answers defines two principles of justice according to which the basic structure

470. G. A. Cohen has recently argued that Rawls failed on this intent, *vid* Cohen, *Rescuing Justice & Equality*, 337ff.

of society is to be designed. These principles of justice should obtain by agreement among individuals acting in an ideal hypothetical situation (the ‘original position’) in which they lack information about their particular situation (behind a ‘veil of ignorance’), in conditions of equality and considering that resources are scarce (the ‘circumstances of justice’). Those individuals should agree ‘once and for all’ on the principles that shall regulate future social agreements. Rawls argues that under these conditions rational individuals would agree on two principles of justice: first, the principle of equal liberty and second, a principle that establishes the conditions under which social and economic inequalities are justified.

In Rawls’ last formulation the principles of justice read as follows. The first principle of justice, states that ‘each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all’.⁴⁷¹ The second principle of justice contains two conditions for the justification of social and economic inequalities, ‘first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society’.⁴⁷² These two principles are lexicographically ordered so that the first principle has primacy over the second, and the first part of the second principle has primacy over the second (the ‘difference principle’). As a result, liberty should never be risked by equality. These two principles of justice provide the standard under which a scheme of pure procedural justice will secure that the just distribution of the social product obtains.

In this scheme, institutions (‘a public system of rules which define offices and positions with their rights and duties, powers and immunities, and the like’)⁴⁷³ that are part of the basic structure of society have a central role to play. They materialise the principles of justice within a political society and through their operations determine substantive justice. With this argument, Rawls expects to bring together as close as possible formal and substantive justice.⁴⁷⁴

471. Rawls, *Justice As Fairness: A Restatement*, 42.

472. *ibid*, 42–43.

473. Rawls, *A Theory of Justice*, 47.

474. *ibid*, 52.

Institutions have a crucial role to play in ethical theories such as Rawlsian ethical constructivism.⁴⁷⁵ Without the particularisation that a designed set of rules supposes, the abstraction and generality of the principles of justice would make it very difficult to determine the ways in which our particular behaviour adjusts to the restrictions imposed by justice. Or, as Onora O'Neill states, '[j]ust institutions and practices provide the specifications for judging the justice of particular acts or decisions'.⁴⁷⁶ Thus, institutional design should be, as much as possible, the expression of the two principles of justice in such a way that within the deontic scheme defined by social institutions the collective result of individual actions will be just.⁴⁷⁷ This explains why, for Rawls, the basic structure of society is the subject of the principles of justice.⁴⁷⁸

What is the role of taxes in Rawls' theory of justice? They have a role to play among the basic institutions of the political economy, namely 'economic arrangements and policies, and their background institutions'.⁴⁷⁹ Following Musgrave, Rawls divides these institutions into four branches: allocation, stabilisation, transfer and distribution.⁴⁸⁰ Taxes are only relevant for two of those branches: the allocation and distribution. Taxes play a minor function within the allocation branch. The agencies or activities of this branch maintain a system of competitive prices, avoiding unreasonable concentrations of market power and also identifying and correcting the most evident deviances of efficiency that result from the inability of the market to measure social costs and benefits. To achieve these ends governments use taxes and subsidies, and modify the right to private property.⁴⁸¹ The most relevant function of taxes occurs within the distribution branch. According to Rawls, the task of this branch is 'to preserve an approximate justice in distributive shares by means of taxation and the

475. 'Political constructivism is a view about the structure and content of a political conception. It says that once, if ever, reflective equilibrium is attained the principles of political justice (the content) may be represented as the outcome of a certain procedure of construction (structure)'. Rawls, *Political Liberalism*, 89–90.

476. O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*, 182.

477. 'The social system is to be designed so that the resulting distribution is just however things turn out'. Rawls, *A Theory of Justice*, 243.

478. Rawls, *Political Liberalism*, 39–42.

479. Rawls, *A Theory of Justice*, 228.

480. Musgrave, *The Theory of Public Finance. A Study in Public Economy*, Ch1. Rawls, *A Theory of Justice*, 228, 243–245.

481. Rawls, *A Theory of Justice*, 244.

necessary adjustments in the rights of property'.⁴⁸² In this branch taxes have two functions: first, they correct the distribution of wealth in order to secure the two principles of justice and their lexicographical order, that is political freedom, equality of opportunities and the difference principle; second, they secure the revenue required by justice, for example, to finance the provision of public goods.⁴⁸³ Examples of taxes that fulfil the first function are estate and inheritance taxes.⁴⁸⁴ Rawls does not provide any particular example of taxes that fulfil the second function, but it is safe to assert that he could agree with any kind of taxation policy that obtains revenue so long as it respects the two principles of justice (and their lexicographical order).⁴⁸⁵

From the previous analysis we can say that the functions Rawls assigns to taxes do not differ from those that, according to the classical paradigm of tax law, are widely accepted within public finance theory.⁴⁸⁶ His main contribution has been to provide a justificatory framework (namely, the principles of justice) for tax policy by locating it within a broader scheme of distributive justice (as economic justice). However, we do not find much help to solve the problems detected in chapters one and two in Rawls' ideas because taxes are still understood according to the classical paradigm and tax law as justified merely instrumentally. In this sense, by not providing a particular justification for the legitimation of taxation *per se*, Rawls is still open to the criticism developed by Nozick in *Anarchy, State, and Utopia*, for whom taxes are equivalent to forced labour. Nozick argues that any theory, starting from the recognition of rights, cannot explain coerced redistribution as justified by a patterned conception of distributive justice. I agree that Nozick's criticism carries the day, at least if it is presented as a logical argument, that is, how can you conclude that coerced redistribution is justified when the major premise is a right? There does not seem to be an intermediate premise to conclude that what those rights produce can be redistributed, except that the rights of the major premise are conditional rights;

482. *ibid*, 245.

483. *ibid*, 245–247.

484. Rawls is particularly concerned with inheritance taxation to limit that which he considers to be as unjust as the natural distribution of intelligence, namely the inheritance of wealth. According to Rawls, inheritance is permitted if it does not endanger the two elements of the second principle of justice. *vid, ibid*, 245.

485. For the full argument of this statement, *vid* Sugin, "Theories of distributive justice and limitations on taxation: what Rawls demands from tax systems".

486. *vid supra*, 58.

however, to advance an argument that will be developed later,⁴⁸⁷ I would say rather that Rawls is not able to explain why we have taxation *per se* as opposed to any other mechanism able to achieve (re)distributive justice respecting his two principles of justice.

3.2. Dworkin: Redistributive taxation as insurance against bad luck?

Ronald Dworkin's contributions to the theory of distributive justice can be read as offering corrections to perceived deficiencies in Rawls' theory.⁴⁸⁸ Throughout his career, Dworkin argues that equality and liberty are not values in conflict because they should stand together for liberals whom, as Dworkin put it, are committed to equal liberty. In the debate concerning distributive justice he advocates for equality of resources. More precisely, he argues that the standard of equality should be equality of resources and not welfare or strict material equality. Equality of resources is an ex-ante criterion of equality (as opposed to the difference principle that is an ex-post criterion) that justifies economic differences that follow from individuals' decisions for which they are responsible. Therefore, for Dworkin, economic inequalities are justified so long as they are an expression of individual choices for which each is responsible. This implies that inequalities that are a consequence of bad luck or which derive from differences in the natural distribution of talents highly valued by the market are not justified. Therefore, within this scheme redistribution is justified only when it is necessary for equality of resources (and not for welfare or simple ex-post equality of resources because in these cases redistribution goes against responsibility). Dworkin develops his idea of distributive justice as an expression of the two basic principles of justice that he advocates for, namely equal concern and respect.⁴⁸⁹

The function of taxes in Dworkin's theory is, therefore, to secure the equal initial distribution of resources necessary to consider everyone with equal concern and respect. But what is the justification for (progressive) taxation? Dworkin offers an

487. This argument will be fully fleshed out later on when discussing Murphy and Nagel's ideas on taxation, *vid infra*, 148.

488. *vid*, Dworkin, *Justice In Robes*, Ch9.

489. Dworkin defines these two principles in different ways in different works. Sometimes he calls them equal concern and dignity, while in other works he refers to them as principles of ethical individualism. These principles are advocated for throughout his work, *vid*, Dworkin, *Taking Rights Seriously; A Matter of Principle; Sovereign Virtue; Is Democracy Possible Here?: Principles for a new political debate*; and, *Justice for Hedgehogs*.

original argument to show that every rational individual would agree with redistributive taxation by building an analogy between taxation and a hypothetical insurance against bad luck. This is a hypothetical insurance because we live in fully operative societies and cannot expect to stop everything in order to redefine the extant distribution of goods to satisfy the demands made by equality of resources.⁴⁹⁰ The hypothetical exercise proposed by Dworkin consists of determining the conditions under which prudent individuals would have bought insurance against bad luck and the natural distribution of talents. This system would make individuals responsible for their future; those who buy insurance will avoid future risk and those who do not will be responsible for their position. Dworkin assumes that everyone will buy insurance – those who have benefitted from luck and from natural talents and those who have not – in a hypothetical initial situation of equality. As a result, every member of a particular political community would buy insurance to forestall those inequalities that are not ascribable to them. The price of each of these hypothetical insurance policies would be determined by following the existent conditions of the insurance market, as we know it today. Just as happens in the existing insurance market, insurance premiums would be fixed according to the risk that each individual carries according to his or her position in the existing distribution of goods or well-being. With this argument Dworkin makes sure that those who have a bigger risk (those who can lose more) will pay more for insurance than those who have a lower risk (those who do not risk much), just as happens in the insurance market today. Consequently, the hypothetical insurance system operates through progressive rates and justifies redistribution whenever unjustified inequalities affect individuals. Dworkin's aim is to show that rational individuals would agree with a progressive and redistributive tax system.

If Dworkin's argument is successful at justifying everyone's interest in a progressive redistributive insurance scheme (and for the sake of my argument here let us assume that it is) why should we not replace taxes for that system? The point I am trying to make here is that, a corollary to Dworkin's argument is that any other institution able to achieve the same economic effects can replace taxes.

490. In "Sovereign Virtue revisited", Dworkin adds that this insurance scheme is hypothetical since it is based on counterfactual arguments that explain how the insurance market would work in case individuals would have contracted.

However, as I will argue in what follows and in chapter four, something is lost when we assume that what needs justification in taxation is only the economic result that a redistributive policy aims at. Let me just outline the reasons why I believe taxes are different from insurance in a significant political sense, that is, not only in the trivial sense that they are conventionally different institutions in the Rawlsian conception of institutions defined above. Taxes and insurance might be analogue in economic terms, but they have different *political meanings* and, hence, they are intrinsically different. I will argue that an individual who is being taxed and an individual who pays for insurance are not performing the same kind of activity, from the point of view of justice. In fact, it is not even the same kind of individual who takes part in each of these activities. In the former individuals acting as citizens have a duty to pay taxes, while in the latter individuals acting as rational economic agents buy insurance according to their economic interests. There are differences between taxes and an insurance market that have to do with the way in which we relate to each other. As citizens we assume that there is a certain kind of equality of status from which some of our duties derive; as insured individuals we have no political relationship with those who participate in that market, other individuals appear as a nuisance against whom I have to protect my economic interests. Furthermore, an important difference between taxes and insurance is that, in the former, revenue is destined to whatever ends the political community decides, while the latter they are paid in exchange of something according to the will of the insurance buyer. To recall Seligman's definition of taxation – according to the classical paradigm – ‘the compulsory contribution from the person to the government to defray the expenses incurred in the common interests of all, *without reference to special benefits conferred*’.⁴⁹¹ In other words, there is an important dissociation between private property and public expenditure. On the contrary, in Dworkin's hypothetical insurance scheme the (hypothetical) individual decides what to do with his property. Of course, Dworkin could argue that to act differently would be irrational, but this would not be an answer to the problem that I am trying to pose. Individuals would still have the last word on their property (otherwise it would not make sense to talk about private property in a contractual scheme) and the insurance scheme cannot explain why the duty to pay

491. Seligman, *Essays in Taxation*, 304. [Emphasis added].

taxes (as we know it today) assumes that the will of individuals is not needed for the duty to exist.

It is not strange to say that one of the characteristics that substantially differentiates taxes from other social interactions from which duties are created is that they imply a denial of private property. It is proper of taxes that taxpayers lose the possibility of directly determining either who will benefit from or what revenue will be destined for. As we shall see later, when analysing Murphy and Nagel's ideas, taxes imply that private property does not exist before taxes. In this sense, taxes are a constant reminder of the conventional character of private property. Before moving to this analysis, however, let me first conclude the analysis of Rawls and Dworkin's ideas about economic institutions. This is important because I show that besides the problems with justifying taxation merely instrumentally, there are other (internal) problems with Rawls and Dworkin's theories of justice that have consequences for the best understanding of taxation.

3.3. Does an economic system require a moral idea of citizenship?

One of the most interesting ideas that Rawls has in mind when discussing the way in which the 'principles of justice as fairness apply to the basic structure of society' is that the 'cumulative effect of social and economic legislation [...] specify the basic structure'.⁴⁹² This is important for Rawls because, as he says,

the social system shapes the wants and aspirations that its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they are. Thus an economic system is not only an institutional device for satisfying existing wants and needs but a way of creating and fashioning wants in the future. How men work together now to satisfy their present desires affects the desires they will have later on, the kind of persons they will be. [...] Since economic arrangements have these effects, and indeed must do so, the choice of these institutions involves some view of human good and of the design of institutions to realize it. This choice must, therefore, be made on moral and political as well as on economic grounds.⁴⁹³

492. Rawls, *A Theory of Justice*, 229; also, Rawls, *Justice As Fairness: A Restatement*, 10–12, 39–42.

493. Rawls, *A Theory of Justice*, 229.

It is important for Rawls to make this point in order to explain that the two principles of justice as fairness ‘despite its individualistic features [...] are not contingent upon existing desires or present social conditions’.⁴⁹⁴ This allows him to answer possible criticisms against his idea that the principles of justice could be decided from an Archimedean point independent of the circumstances in which individuals are situated. This is not, however, the criticism that I wish to put forward. I believe that what Rawls fails to create is what he calls an ‘essential idea’. In his words, he wants to ‘account for the social values, for the intrinsic good of institutional, community, and associative activities, by a conception of justice that in its theoretical basis is individualistic’.⁴⁹⁵ So the analysis he develops to appraise economic institutions implies adopting a predominantly moral perspective. But is the moral perspective adopted by Rawls the right one for his purpose? Does he show the ‘intrinsic good’ of ‘institutional, community, and associative activities’? I would like to argue that, his individualistic conception of justice is not able to offer a solid foundation to what he was aiming to produce, that is, a proper account of the ‘intrinsic good of institutional [...] activities’. At best, Rawls can argue for the existence of an instrumental good in certain market and capitalist arrangements. I have already shown how his conception of the role of taxation rests on the classical paradigm and how this cannot be but an instrumental justification for taxation. Here I want to broaden the scope of the criticism beyond the realm of taxation.

This problem I want to highlight in Rawls’ theory of justice also affects Dworkin’s argument, in particular regarding his claim that distribution is determined according to a broader consideration of social arrangements.

The distribution that any society achieves is a function of its laws and policies, not only its property and tax laws, but the full, complex legal structure that its citizens and officials enact and enforce.⁴⁹⁶

Dworkin makes this point to argue that his conception of distributive justice is more complex than that of achieving economic equality, that his notion of equality of resources is a sort of equality of status that includes other aspects of equality, such as

494. *ibid*, 232.

495. *ibid*, 233.

496. Dworkin, “Equality, luck and hierarchy”, 197–198.

political equality.⁴⁹⁷ Hence, he expects to show that the distribution any society achieves is a function of the adoption of the principles of justice he argues for, namely equal concern and respect. But what kind of equal concern and respect can be expected from the individuals who take part in the institutional arrangements that he advocates for? I want to argue that the institutional framework defined by Dworkin does not allow for an equal concern and respect deeper than the one that individuals who meet in the market can aspire to, that is to say an instrumental notion according to which each individual shows each other equal concern and respect as long as it is useful for their economic interests.

Thus, in Rawls and Dworkin's theories there is an expansion of the logic of the market that goes beyond market institutions. In more perspicuous terms, the kind of justification Rawls and Dworkin provide for taxation is not one that should be expected for a practice that is supposed to work with a logic different from the market one. Taxation limits the logic of the market, modifying the market distribution of goods by embodying a definition of what we owe to each other; taxes modify market rationality (not only its results). On the contrary, Rawls' conception of political economy and his principles of justice imply that individuals understand themselves as concerned with their own well-being, just as individuals normally behave in the market (and a similar point might be elaborated in the case of Dworkin).

This is important for the argument I am trying to develop because the kind of individual presupposed by liberal egalitarians has no (economic) reason to agree with taxation (perhaps they will only have reasons to purchase insurance). In other words, taxation cannot be justified as affecting market distribution (by developing the allocative or distributive tasks assigned to it by Rawls) for egalitarian reasons,⁴⁹⁸ but only as making possible inequalities to which we would agree as a result of exchanges within a market economy. This idea is evident in Dworkin's hypothetical market insurance. Here individuals are supposed to behave as market agents who are convinced to buy insurance (because they are self-interested), thus completely replacing the logic of taxation. This has consequences for tax avoidance. Institutions

497. *vid ibid*, where he brings this argument against a critique posed by Samuel Scheffler in "What is egalitarianism?"

498. I explain what I mean by equality as a political ideal *infra*, 168. For the time being it is suffice to say that this conception of equality tries to rescue the political aspiration underlying the demand for equality.

created under the conception of the individual here criticised embedded conditions under which each has reasons to behave strategically to improve his individual market distribution (by not fulfilling his tax duties). To this objection Rawls and Dworkin might reply that they were trying to justify taxation and tax law. However, if they provide a justification for taxation it can only be instrumental (and, therefore, not contain an intrinsic good). From this perspective tax law can only appear as instrumental coercion aiming to achieve necessary redistribution for the correct functioning of the market (and its justified inequalities under the principles of justice, that is either Rawls' justice as fairness or Dworkin's equality of resources). As a consequence, these theories are not able to provide the substantive content that I am looking (and arguing) for regarding the justification of taxation. Two consequences follow: Rawls and Dworkin either (1) provide a justification for the classical paradigm of taxation, or if they deny (1) they have to assume (2) the classical paradigm with all its problems.

3.3.1. The moral limits of markets

In a recent book,⁴⁹⁹ Debra Satz convincingly argues that markets should be assessed not only for the good things we can achieve through them (mainly efficient allocation of goods and voluntary cooperation among strangers),⁵⁰⁰ but should also have in mind 'the effects [...] on social justice, and on who we are, how we relate to each other, and what kind of society we can have'.⁵⁰¹ So, Satz argues, markets have to be evaluated not only by considering their economic effects, but also through their political and moral consequences. She proposes a return to the classical political economists (Adam Smith, David Ricardo and Karl Marx) for whom the nature and limits of the markets are different than for contemporary economists, who apply market logic to any possible social interaction. For classical political economists, the market is 'socially embedded' – so it may have limits – and they understand that it might 'shape societies as well as individuals'.⁵⁰² Satz convincingly concludes that classical political economists are concerned with the distribution of the social product among different social classes as

499. Satz, *Why Some Things Should Not Be For Sale. The Moral Limits of The Market*.

500. *ibid*, Ch1.

501. *ibid*, 4.

502. *ibid*, 39–40.

guided by their conceptions of a good society.⁵⁰³ Contemporary economists, on the contrary, approach economic problems as if everything might be reduced to economic relations between homogeneous individuals who behave as consumers. In the third chapter of her book, Satz subjects contemporary egalitarian political theory and the role it assigns to the market to revision. For this purpose, she introduces a distinction between general egalitarianism and specific egalitarianism.

According to Satz, general egalitarians ‘believe that the goal of efficiency entails that any desired redistribution take place through progressive taxation and transfer, not through a limit on the scope of the market’.⁵⁰⁴ On the contrary, specific egalitarianism ‘requires that particular goods not be distributed using a market at all, even when blocking exchanges in these goods is inefficient’ and that ‘some scarce goods [...] should be distributed (in kind) equally to all’.⁵⁰⁵ According to Satz, Ronald Dworkin’s theory of justice presents an example of general egalitarianism while Michael Walzer’s⁵⁰⁶ an example of specific egalitarianism.

Satz convincingly argues that Dworkin’s reliance on the market as ‘*intrinsically* connected to the distributive implications of treating people with equal concern and respect’ is a mistake. Markets, according to Satz, cannot tell us ‘what resources people are entitled to or what distributive outcomes are fair’.⁵⁰⁷ Her main argument is that sometimes treating individuals as equals requires more than providing them with resources, as happens with individuals with disabilities and female caregivers for example.⁵⁰⁸ The problem for people with disabilities is that even if they are given plenty of resources these are not enough for them to ‘achieve inclusion in society as equals’.⁵⁰⁹ I understand that Satz is trying to provide an argument to show that there is a group of important inequalities that cannot be solved using the ‘tax and transfer’ system because some inequalities do not respond to the logic of the market: they are related to the complex interaction of different institutions and institutional positions among those who take part in different aspects of social life. In other words, there are

503. *ibid*, 60–61.

504. *ibid*, 63.

505. *ibid*, 64.

506. Walzer, *Spheres of Justice. A Defense of Pluralism & Equality*.

507. Satz, *Why Some Things Should Not Be For Sale. The Moral Limits of The Market*, 69.

508. *ibid*, 70–71.

509. *ibid*, 71.

important category differences between market and moral interactions and the first do not cover the complexities of the second. In her words, '[f]ocusing on what distributions markets throw up will not tell us under which conditions people can interact as equals'.⁵¹⁰ In this sense, market interactions already contain an idea as to how individuals should behave (as rational economic agents) and this says nothing of how we should relate to each other outside of the market. Dworkin's ideas about the market conceive its instrumental goods as if they were intrinsic goods.

This also explains, in part, the concerns of specific egalitarians such as Michael Walzer.⁵¹¹ Walzer considers that there are certain specific goods that should not be left to market exchange because they could '*change and degrade*'⁵¹² their meaning. Satz argues that adopting this argument in order to limit markets has two problems: it is difficult to show that there is a shared value or that we assign the same meaning to certain goods, and, even if this problem could be solved by assigning or sharing a common meaning for certain goods, there is no close connection between 'this understanding and the use of markets'.⁵¹³ Markets are 'typically instrumental mechanisms for achieving our ends; a market price is rarely the direct expression of our evaluative attitudes towards a good'.⁵¹⁴

So Satz contends that the solution to the problems she is trying to address is not to determine the criteria under which goods should be distributed,⁵¹⁵ but to look at the 'conditions under which cooperating members of a society can interact as equals'.⁵¹⁶ Satz proposes that certain markets be restricted or that trading certain goods be blocked whenever those markets are 'noxious'.⁵¹⁷ I am interested in exploring the way in which Satz takes seriously the idea of the market and political economy assumed by classical political economists. This is important for the argument that I am developing because it shows that even if Rawls and Dworkin declare that they are

510. *ibid*, 76.

511. Satz mentions other authors that she considers to be specific egalitarians, among which Elizabeth Anderson, Michael Sandel and Margaret Jane Radin have a place.

512. Satz, *Why Some Things Should Not Be For Sale. The Moral Limits of The Market*, 80. [Emphasis in the original].

513. *ibid*, 81–82.

514. *ibid*, 82.

515. *ibid*, 84–89.

516. *ibid*, 89.

517. She develops the argument in *ibid*, Ch4.

concerned with the way in which economic institutions have consequences for ‘the kind of persons [we] will be’, there are reasons to suspect that they are only paying lip service to the existence of a connection between institutions and those who live under those institutions.

Satz is concerned with developing criteria that will allow her to show that certain markets ‘need to be blocked or severely constrained’ because these (noxious markets) can endanger the equal standing that individuals owe to each other as citizens in a democracy.⁵¹⁸ The consequence of her argument is that if other values are to be brought into the market, market interactions are to be transformed by setting moral limits to them before they change us. At the same time, this implies that certain social interactions ought to be kept out of the market. Satz considers that equal citizenship is one of those social interactions that should be kept away from the market. For this to be achieved the elements (‘preconditions’ according to Satz) that constitute the equal status of citizenship should be secured for every individual. She adds that these should be thought of in general as ‘social practices and not acts’.⁵¹⁹ These ideas are endangered once a market approach is adopted and legitimised to explain interactions among citizens. As Satz says,

Human beings are malleable in a way that goods such as apples are not. We do not usually need to worry about the noneconomic effects of a market on the apples exchanged, but we do need to worry about whether a particular kind of market produces or supports passivity, alienation, or a ruthless egoism. Labor markets may be structured so as to accustom people to being pushed around and managed by others.⁵²⁰

With all these elements covered it is now time to take stock of the argument so far. Why is Satz’s argument about the moral limits of markets relevant to the argument that I am developing about taxation? Satz is concerned that Dworkin’s ideas about the moral justification of markets under equality of resources are unable to explain why some markets should be hardly regulated or even blocked. This would imply that we are not able to explain why in modern democracies we aim at equality of status and not the equality required for acting in the market. In more general terms, Satz’s arguments about the moral limits of markets supports my argument against Rawls and

518. *ibid*, 93.

519. *ibid*, 100.

520. *ibid*, 103.

Dworkin's instrumental justifications for taxation. The instrumental justification deprives from taxation its public elements, reducing it to a private concern for individuals interacting in the market. In this sense, taxes are merely instrumental in achieving a particular economic result but have no relation to how we understand each other as citizens. Hence, Rawls and Dworkin cannot explain why taxes are part of those public institutions with which citizens are concerned. Thus far, Rawls' allocative and distributive functions assigned to taxation, and Dworkin's analogy between taxation and a hypothetical insurance, are not useful for justifying taxation. On the contrary, we lose important aspects of taxes in relation to citizenship obligations (in opposition to contractual market obligations).

3.3.2. Political economy for citizens or economics for market agents?

Rawlsians might rejoinder that my argument is unfair to Rawls' justice as fairness. In order to establish if my argument is indeed unfair, is the question as to whether Rawls' conception of political economy is compatible with an appropriate conception of citizens – as he expects to show when he includes distributive justice within the basic institutions of society as a reflection of the principles of justice – or, on the contrary and notwithstanding the above,⁵²¹ that his basic structure mirrors a conception of a political economy tailored for market agents.

There are two reasons for saying why Rawls is not immune to my critique. The first is that he explicitly acknowledges that markets distributions can and should be corrected through taxation, and that taxation works as a corrective for market inefficiencies. In fact, if we follow Satz's arguments Rawls assumes that markets should be corrected whenever they bring problems to efficiency. Furthermore, redistribution should be used to allow individuals to participate in market transactions. Therefore, Satz's arguments would also apply here. But there is a second, stronger reason, for saying that Rawls also assumes that individuals behave as market agents and that his principles of justice require this. This second reason questions the redistributive task assigned by Rawls to taxation. According to an argument put forward by Fernando Atria and Claudio Michelon, Rawls' difference principle assumes and encourages individuals to behave as market maximisers.⁵²² Atria and Michelon argue that if the

521. *vid* Rawls' quote *supra*, fn.493.

522. Atria and Michelon, "Una crítica al principio de diferencia".

difference principle is justified because of the conditions of justice assumed by Rawls (who here follows Hume) individuals who have a bigger part in market distribution are entitled to it because otherwise those who are in worse conditions would not benefit from the increase in the social product.⁵²³ Atria and Michelon argue that by incorporating the circumstances of justice in the justification of the difference principle (namely, the second element of the second principle of justice) Rawls includes ‘market motivation’ as a ‘fact of human nature’. Following Atria and Michelon, the difference principle can only be introduced by Rawls once he naturalises human motivation as market motivation. Market motivation means that individuals have an incentive to produce so long as they can appropriate the fruits of their labour. So inequality is not only justified but is also necessary for ‘just’ institutions.⁵²⁴ Along the same lines, G. A. Cohen develops his argument against market incentives to show that Rawls does not stand up to the importance he assigns to fraternity.⁵²⁵ Cohen argues that the justification of inequalities brought by the difference principle ‘presupposes a model of society as non-community, in which relations among human beings are construed as strategic, with people taking one another into account as so many opportunities for and, obstacles to, gain, rather than as fellow citizens’.⁵²⁶ Cohen argues that this could lead towards a justification of, or take as a given, two kinds of inequalities that those who defend the difference principle would not accept: (1) structural inequalities and (2) ‘inequality-endorsing attitudes’.⁵²⁷ Therefore, for Cohen, committed egalitarians can only accept the inequalities that the difference principle would justify whenever achieving equality is not possible because of existing circumstances. These egalitarians would then have a commitment with

523. *ibid*, 222ff.

524. Elsewhere, I argue that Rawls’ theory of justice should be interpreted as a justification for the institutional arrangements existing in the USA at the historical moment in which Rawls was living and not as a theory aiming for justice. In other words, Rawls’ conception of justice is not able to explain how political concepts have an effect on political action; he limits his theory to morally justify existing capitalist institutional arrangements. *vid*, Saffie, “De la reciprocidad a la fraternidad”.

525. Cohen, *Rescuing Justice & Equality*, Ch1. This is a reproduction of his 1991 Tanner Lecture, ‘Incentives, Inequality, and Community’.

526. *ibid*, 15. For the details of the argument, *vid*, 32ff. This does not mean that Cohen opposes the difference principle as a ‘principle of intelligent policy’ (30, fn.7) or as ‘optimal from the point of view of distributive justice’ (85, fn.7) in the absence of an egalitarian ethos, but as a principle of justice. Atria and Michelon do not make this distinction, although their arguments seem to reject the difference principle *tout court*.

527. *ibid*, 33.

equality adjusted by reality (but not a commitment with inequality as a principle of justice).⁵²⁸ This distinction explains why egalitarians should oppose policies that rest on incentives for the well-off, such as tax cuts, namely because they go against equality as a principle of justice and do not pass the ‘interpersonal test’ for a ‘comprehensive justification’ proper of ‘justificatory communities’.⁵²⁹ So Cohen’s criticism of the difference principle as a principle of justice is that because it assumes that individual behaviour rests on incentives, it makes impossible a justificatory community among the well-off and the worse-off in political societies. The difference principle, therefore, ‘tolerates inequality which is *not* necessary to improve the prospects of the worse-off’.⁵³⁰ I will discuss the consequences that Cohen derives from this argument shortly.

With this last argument we are now in a position from which we can conclude the argument against Rawls and Dworkin’s justifications for taxation. I have argued that Rawls and Dworkin cannot offer justifications for taxation but that their theories should be read as attempts to provide justifications for a certain level of redistribution. Hence, their justifications for taxation assume that taxation is subordinated to the moral justification of redistribution. Therefore, if redistribution is subject to the underlying assumptions of the market, taxation can only be instrumentally justified. The problem then is twofold: (1) Rawls and Dworkin cannot offer a justification for taxation *per se* (because any other instrument could achieve the same functions) and (2) taxation can only be justified as long as it benefits the individual who is paying. Here they assume the classical paradigm and they do so with a vengeance: taxation becomes the justification for market capitalism.⁵³¹ Rawls and Dworkin’s instrumentalist justifications for taxation expect individuals to behave as market agents convinced that taxation will allow market incentives to continue operating against their expressed concerns with the achievement of fraternity or equal concern and respect among fellow citizens.

We can now move one step further. In what follows I aim to show that under the assumptions of liberal egalitarian theories of justice, taxation cannot justify tax law

528. *ibid*, 34.

529. *ibid*, 41–46.

530. Murphy, “Institutions and the demands of justice”, 265. [Emphasis in the original].

531. This is not to say that they justify private property. I offer an interpretation of how taxes justify private property, but not a market capitalist system, *vid infra*, 202.

per se. The instrumental justification of taxation justifies any instrument able to achieve a particular expected level of distributive justice as the distribution of goods, but does not justify tax law *per se*. To sustain this point I analyse Liam Murphy and Thomas Nagel's attempt to justify tax law and tax policy that paradoxically ends in leaving tax law and taxation behind. As I mentioned above, this is the Murphy and Nagel paradox.

3.4. Murphy and Nagel: *The myth of taxes?*

Is it possible to analyse the justice of a tax system within a particular political community independent from the totality of institutional, political and economic arrangements of which it is a part? In one of the central arguments of their book *The Myth of Ownership. Taxes and Justice*, Murphy and Nagel try to show that the answer to this question must be negative. According to them, one of the problems that constantly affect discussions about justice and tax policies is one of 'myopia'. This problem consists of assuming that 'justice in taxation [is] a separate and self-contained political issue. [...] For what counts as justice in taxation cannot be determined without considering how government allocates its resources'.⁵³² Thus, applying an economic criterion to measure distributive justice, what is relevant is not exclusively to establish a principle of justice according to which we can determine how much each taxpayer is to contribute. According to Murphy and Nagel, we are supposed to assess the final position in which individuals are after a distribution cycle. The crucial question, therefore, is to determine how much a person contributes and how many resources the government transfers to the same person. The solution they propose to this myopic approach is to broaden the view and to include in the discussion about justice in a particular economic system (not only about tax policy) the general scheme of fiscal revenue and fiscal distributions. Distributive justice requires, for Murphy and Nagel, knowledge about how much will constitute the welfare level that each member of a political community counts at any particular moment in time.

The second central element in Murphy and Nagel's argument points to a problem in considering that principles of justice in taxation, namely the standards used to evaluate justice in tax policy (that specify a classical criteria of equity in tax matters)⁵³³ are applicable when evaluating and deciding upon tax policy. According to

532. Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, 14.

533. *vid supra*, 85.

Murphy and Nagel, these criteria of justice should be abandoned as they are founded upon a mistake. If the first problem consists of a myopic view that only considers revenue as part of a distribution scheme without considering the benefits given by the government (including the benefits derived from living within an institutionalised political community); the second problem, namely the use and application of principles of justice in taxation, assumes that the foundation from which the discussions of tax justice is predicated is a fair (market) distribution independent of the effects of taxes and a conventional scheme of rights, especially of the conventional definition of the right to private property.⁵³⁴ They call this mistake ‘everyday libertarianism’.⁵³⁵

With this argument, Murphy and Nagel show that traditional criteria for tax equity that aim to specify the economic principles of vertical and horizontal equity in the distribution of the tax burden assume that market distributions are fair.⁵³⁶ According to the principle of vertical equity, justice in a tax system depends on unequals contributing unequally to tax revenue, put simply, those who have more pay greater taxes. Horizontal equity, on the other hand, demands that those in the same position pay the same taxes. Horizontal equity therefore rests on vertical equity. Murphy and Nagel argue that the problem with these traditional criteria for tax justice is the assumption that market distribution forms an adequate basis upon which to argue about justice in the tax system.⁵³⁷ In other words, if we follow these principles of justice in taxation – determining who are equal and according to which criteria – this implies accepting that the results of market distributions are just. ‘Everyday libertarianism’ implies that existing economic institutions are just, even with all their assumptions, such as, for example, the idea that the right to private property is a natural right, that it is a right independent from our political decisions expressed in conventional definitions. What Murphy and Nagel remind us is that assuming that market distributions are just presupposes that there are politico-philosophical reasons that justify the application of an adjective to that distribution and those reasons cannot be but reasons provided by a libertarian theory of justice. Murphy and Nagel’s

534. Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, 15.

535. *ibid*, 15, 31–37.

536. *ibid*, 16–39.

537. For a similar argument, *vid* Green, “Concepts of equity in taxation”, 89–95. Green criticises horizontal equity as predicated from a base that is not questioned by the criteria of equity.

argument for tax policy would obtain once the ‘myopia’ is corrected and ‘everyday libertarianism’ abandoned, or so they seem to believe. Once ‘everyday libertarianism’ is abandoned private property should be understood as a conventional right, the definition and content of which depends on institutional arrangements (including taxes) justified according to a particular theory of justice (and, therefore, of a particular conception of distributive justice).

The concurrence of these two elements of the argument, namely that tax justice is an aspect of distributive justice as economic justice and that property rights are defined in a complex scheme of rules among which taxes are included, allow Murphy and Nagel to situate the argument at the level they so desire and as thus, within a broader discussion of political philosophy about which is the best conception of distributive justice.⁵³⁸ Therefore, taxes are necessarily one more element in a scheme of justice that conventionally defines private property. If we follow Murphy and Nagel’s argument we are invited to conclude that we cannot discuss pre-tax or post-tax justice; we can only understand that the arch of a conception of distributive justice covers the discussion about taxation and private property:

All the normative questions about what taxes are justified and what taxes are unjustified should be interpreted [...] as questions about how the system should define those property rights that arise through the various transactions – employment, bequest, contract, investment, buying and selling – that are subject to taxation.⁵³⁹

Once they reach this conclusion, Murphy and Nagel review the different aspects from which the justice of the tax system has been discussed. They apply their analytic scheme to analyse, in turn, debates surrounding the tax base, about how progressive the tax system should be, the application of taxes to inheritance, and the possible discrimination problems within a tax system.⁵⁴⁰ In all these cases the conclusion reached is the same: to be able to analyse the justice or injustice of political decisions in each of these aspects it is necessary to look to the general effects that result from the final distribution of the social product. Only then can the (distributive) state of affairs

538. Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, 173.

539. *ibid*, 74. The same argument is repeated throughout the book, for example, 124, 131, 157, 162 and 164.

540. *ibid*, Chs.5–8.

be evaluated according to the conception of distributive justice better justified in moral terms.

Murphy and Nagel leave open the debate about which conception of distributive justice (utilitarian, liberal or egalitarian) should inform tax policy. They do not consider it necessary to make such a decision or argument because, they argue, it is possible to have a certain margin of theoretical disagreement in fundamental aspects of political and moral theory (which they claim happens between themselves). However, they agree as to the kind of function fulfilled by a tax system.⁵⁴¹ Of course, according to Murphy and Nagel, the thicker the conception of distributive justice that is defended the more it will be demanded from the tax system. Yet they also argue that for the setting of limits for these demands it is necessary to have in consideration the economic effects of taxes. Here I quote the authors in extenso:

We believe that the main problem of socioeconomic justice is this. A capitalist market economy is the best method we have for creating employment, generating wealth, allocating capital to production, and distributing goods and services. But it also inevitably generates large economic and social inequalities, often hereditary, that leave a significant segment of society not only relatively but also absolutely deprived, unless special measures are taken to combat those effects. Our view is that while every government has the fundamental duty to guarantee security against coercion and violence, both foreign and domestic, and to provide the legal order that makes prosperity possible, it is almost as important to find ways of limiting the damage to the inevitable losers in market competition without undermining the productive power of the system. [...] The most realistic aim is to try to ensure that everyone in the society should have at least a minimally decent quality of life.⁵⁴²

After this statement we can confidently situate Murphy and Nagel among those political philosophers who defend conceptions of distributive justice within the post-Rawlsian liberal egalitarian tradition. As discussed earlier,⁵⁴³ according to this tradition some of the functions assigned to government are those that try to assure each individual has the minimal conditions for developing a life plan. This is especially important for those who do not benefit directly from market interactions. On the

541. *ibid*, 181.

542. *ibid*. The same argument is repeated on 164.

543. *vid supra*, 120.

other hand, those who benefit from market distributions should share part of their benefits with those in worse conditions. Thus, the government does not only provide the conditions that make it possible that the market works properly, it must also try to eliminate poverty. In Murphy and Nagel's words, this is the 'fundamental positive responsibility we have toward our fellow citizens'. They consider this to be even more important than 'attacking inequalities at the upper end of the distribution'.⁵⁴⁴ So they advocate for what Fleischacker calls a modern conception of distributive justice. The final aim of this conception of distributive justice as economic justice is to secure a certain level of distribution of the social product in an adequate way among the members of a determined political society. But this adequacy is, as Murphy and Nagel state in the passage quoted above, the correct function of the market. This is the way in which Murphy and Nagel justify the function that taxes are called to fulfil. It is not only about obtaining the means for the state to provide public goods, but it is also about securing certain distributive effects and about this the market has something to say.⁵⁴⁵ In this way it is possible to secure economic progress with a minimum level of individual well-being for each person.

This review of Murphy and Nagel's arguments confirms what has been said before with the analysis of the Rawlsian and Dworkinian conceptions of distributive justice. It seems that liberal egalitarians assume that distributive justice only operates to secure and justify the inequalities that are a product of market distributions. This is problematic because it assumes that men behave as rational market agents, making it difficult to achieve justice without, at the same time, compromising with a sort of inevitable economic inequality produced by market capitalism. So liberal egalitarians defend a more limited version of the political economy than conveys the importance they claim to assign to it.

Ultimately then, if we follow the argument and analysis proposed by Murphy and Nagel we should accept that taxation,

[H]as two primary functions. (1) It determines how much of a society's resources will come under the control of government, for expenditure in accordance with some collective decision procedure, and how much will be left in the discretionary control of private individuals, as their personal property. Call this

544. *ibid*, 182.

545. *ibid*, 25, 26, 147.

public-private division. (2) It plays a central role in determining how the social product is shared out among different individuals, both in the form of private property and in the form of publicly provided benefits. Call this *distribution*.⁵⁴⁶

According to Murphy and Nagel, this is a conceptual and normative distinction that should be borne in mind when discussing economic justice and taxes. This distinction might have consequences in the design of fiscal policies because they are able to work independently; depending on what a particular conception of distributive justice demands, governments can deal with either function of taxation.

Indeed, as they argue taxes depend on the justification of the level of public-private division and distribution that a particular government aims to achieve while at the same time not affecting the efficiency and economic growth that characterises capitalist market economies.⁵⁴⁷

It should be clear by now that the main functions assigned to taxes according to Murphy and Nagel (and in general, liberal egalitarians) are in the realm of economic policy. Taxes are instruments that fulfil a complex task, because the right design for tax policy should consider efficiency, the correct functioning of the market, and the ends of a particular theory of economic justice. Even if Murphy and Nagel do not expressly say so, this explains in part that the design of this ‘optimal’ tax system has been assigned to sophisticated economists who are able to tell us which tax policy design we need according to the results provided by complex mathematical models.⁵⁴⁸

Murphy and Nagel’s argument needs to be assessed on two different grounds. At the tax policy level they show that economic decisions cannot be evaluated independent of political decisions and institutions. What they term the ‘public-private division’ depends on the institutional arrangements decided by the members of a particular political society. The main consequence of this is that private property cannot be defined without considering taxation. Private property is what is left for individuals after the ‘public-private division’.⁵⁴⁹ However, and notwithstanding the

546. *ibid*, 76. [Emphasis in the original].

547. *vid supra*, the main text accompanying fn.542.

548. *vid*, Kocherlakota, *The New Dynamic Public Finance*.

549. I believe that there is a problem in distinguishing between the two functions that Murphy and Nagel assign to taxation in the way they do so. I am not sure that in market economies, as defended by the authors, the ‘public-private division’ can be separated from ‘distribution’. This could only be differentiated if we assume that the ‘public-private division’ is static and previous to

importance of this insight, there is a paradox in the defence of taxes that they advocate: they do not say anything about tax law and taxation *per se* and end up justifying whichever institutional arrangement able to achieve the ends of a particular theory of distributive justice. This is the Murphy and Nagel paradox. This stems from the consequences that derive from a consideration of taxes as fulfilling merely economic functions (or that distributive justice is purely economic justice). This characterisation of taxes does not say much about taxation in itself and says even less about tax law *per se*. Any institutional arrangement able to achieve the two economic functions that Murphy and Nagel assign to taxation will suffice. It might be said that Murphy and Nagel do not consider this a problem. They even say when starting the book that taxes are ‘the most important *instrument* by which the political system puts into practice a conception of economic or distributive justice’.⁵⁵⁰ But of course, this is not an argument for taxation or tax law. Murphy and Nagel would have to accept that if we follow their conception of taxation, then tax law also becomes an instrument. Law is the means by which the results expected according to a particular tax policy design are coercively obtained. The coercion of law is the way in which we make sure that there are not any free riders that do not want to cooperate. But what *distinguishes tax law* from other areas of the law cannot be explained from this perspective. Neither can the authors explain how we come to be under the legal obligation to pay taxes.⁵⁵¹ Even more importantly for the argument of this thesis, they cannot explain the conceptual difference between tax avoidance and tax evasion because a mere instrumental conception of tax law can only see tax evasion.⁵⁵²

market exchange. Once individuals exchange in the market we can only have ‘distribution’. However, if we take seriously their definition of the ‘public-private division’, then ‘distribution’ should also be a consequence and not a separate function of the ‘public-private division’. The main reason for this is that private property should always be subject to institutional division or the ‘public-private division’. The distinction between the two functions can only work if the product of private property is private property independent of institutional arrangements. This is important because if we assume that the ‘private-public division’ is the important aspect of taxes, there is a constitutive connection between property and tax law according to which ‘redistribution’ does not make sense. I argue this *infra*, 202.

550. Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, 3. [Emphasis added].

551. *vid supra*, 93ff.

552. I would like to emphasise that the importance of the distinction is conceptual, because it allows us to better understand what it means to fulfil the obligation to pay taxes, even if tax avoidance and tax evasion might have the same conventional legal consequences.

As far as I can see, there are two possible alternatives for solving this paradox. Either we abandon the division of labour proposed by liberals, according to which institutions are the exclusive subject of justice and embrace an approach in which the role of the individual is important for achieving justice, as G. A. Cohen and Liam Murphy argue; or we abandon the liberal approach to institutions and political concepts *tout court* to redefine the relationship between institutions, political concepts and individuals' behaviour. If we discard the first alternative then the door is open to explore the second. In what follows I explore the first alternative by reviewing a recent critique posed by Cécile Fabre to Cohen. I explore the second alternative in chapter five.

3.4.1. Murphy's monism and Cohen's egalitarian ethos

The analysis presented in the previous section leads us to the Murphy and Nagel paradox. Now we must explore one possible solution to this paradox. I call this possible solution the scope question and it entails questioning the Rawlsian idea that the basic structure of society is the subject of the principles of justice. The advocates of the scope question propose a modification to the applicability scope of the principles of justice whereby it also includes individuals. The analysis of this answer is important for the argument of this thesis because if successful it would provide a solution to tax avoidance.⁵⁵³ The answer would be formed in the following manner: if tax law is justified according to one or more fundamental principles of justice that apply to individuals and to institutions, then individuals should have to apply such a principle or principles to their everyday unconstrained choices in order to behave accordingly with what justice demands. If the principle or principles of justice entail egalitarian principles then something we can assume is that tax avoidance would not then be a form of conduct admissible according to any fundamental (egalitarian) principles of justice.

Permit me to advance my problem with the scope question in a nutshell. I think it presents an unsatisfactory answer because (1) it stills rests on a mere instrumental conception of institutions that would leave us without any intrinsic

553. I am not saying that these theories had this in mind. I am advancing an answer for my argument that might be produced by liberal egalitarians who have answered the scope question broadening the demands of justice by applying principles of justice to individuals.

justification for existing and particular institutional arrangements; (2) it reduces legal duties to moral obligations; and (3) it is unable to explain how individual duties are born from legal institutions. Thus, liberal egalitarianism corrected by the scope question would leave us in the same place in which Prime Minister David Cameron left us in chapter one of this thesis, that is, with the understanding that tax avoidance is morally unacceptable.

In what follows I explore two answers to the scope question. The first is Liam Murphy's monism in non-ideal justice. The second is Cohen's egalitarian ethos of justice. Both answers are open to the same objection, to which I will turn after presenting Murphy and Cohen's ideas.

Murphy proposes a monist approach to non-ideal justice. He argues that 'any plausible overall political/moral view must, at the fundamental level, evaluate the justice of institutions with normative principles that apply also to people's choices'.⁵⁵⁴ His monism stands in opposition to what he calls the 'dualist' liberal approach to justice. According to the dualist approach, the 'two practical problems of institutional design and personal conduct require, at the *fundamental level*, two different kinds of practical principle'.⁵⁵⁵ According to Murphy, monism is compatible with specific principles that apply only to particular policies, 'such as the principle that taxation should be levied according to taxpayers' "ability to pay"', yet denies that this principle might be justified according to any 'fundamental' principle that 'does not apply directly to people's conduct'.⁵⁵⁶ Murphy's is a non-ideal theory because he tries to show that there are demands of distributive justice even in circumstances of partial compliance, 'where at least some others are not doing what they are required to do'.⁵⁵⁷

Murphy's monism may work as an answer to the Murphy and Nagel paradox. According to this reading, monism would be compatible with any institution so long as the specific principle(s) of justice for that institution (for example, the 'ability to pay

554. Murphy, "Institutions and the demands of justice", 253.

555. *ibid*, 254. [Emphasis added]. In this he mainly criticises Nagel's defence of dualism contained in *Equality and Partiality*, Ch6 and Ch9.

556. Murphy, "Institutions and the demands of justice", 254. I am not sure if Murphy would continue to defend this idea, that fundamental and specific principles might coexist. He and Nagel argue that the traditional criteria of tax equity cannot subsist if distributive justice is the standard for evaluating tax policy. I cannot explore this point further here. But contrast this argument by Murphy with Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, Ch2 and Ch3.

557. Murphy, *Moral Demands in Nonideal Theory*, 5. *vid* also *ibid*, Ch.5.

principle' for taxation) is (are) justified according to the fundamental principle(s), that is, those principles that apply not only to institutions but also to individuals. Therefore, individuals would have the moral obligation to behave according to the fundamental principle(s) of justice, even when others do not fully comply with their institutional obligations. Notice that here I am not concerned with the content of the fundamental principle(s) of justice, but with the form of Murphy's argument. This implies that tax avoidance would not be a problem for tax law because its demands would be equivalent to that of the fundamental principle(s) on which the institution is based. So individuals would still have the obligation to behave according to justice, even if they did not follow the letter of the law. This is so precisely because individuals would be under the same fundamental principle(s) of justice even in the absence of law. In this sense, the particular form adopted by the law would not provide any further specificity to the obligation as contained in the fundamental principle. Individuals would then be subject to duty within or outside the institution. Because Murphy is subject to the same criticism as Cohen, let me turn to Cohen's argument before presenting a critique.

In *Rescuing Justice & Equality*, G. A. Cohen convincingly presents a critique against Rawls according to which focusing too much on the basic structure of society as the subject of justice implies missing the point of justice. Cohen argues that this is a consequence of the liberal approach, according to which there is a division of labour between what the state and the individual should do for justice. Rawlsian liberals would defend the idea that institutions are the subject of distributive justice (that the principles of justice apply to the basic structure of society), while individuals can do as they please privately. Cohen argues that, on the contrary, the demands of distributive justice are also applicable to individuals.⁵⁵⁸ In Cohen's words, '[a] society that is just within the terms of the difference principle, [...] requires not only just coercive *rules*, but also an *ethos* of justice that informs individual choices'.⁵⁵⁹ Here we recall Cohen's idea about what a 'justificatory community' requires, namely that individuals behave in accordance with the difference principle '*in their daily life* and achieve a sense of their

558. Cohen, *Rescuing Justice & Equality*, introduction and response to critics, and Cohen, "Where the action is: on the site of distributive justice".

559. Cohen, *Rescuing Justice & Equality*, 16.

own justice in doing so'.⁵⁶⁰ Cohen is interested in showing that this correction of the difference principle would fully justify egalitarian taxation rather than taxation according to the standard Rawlsian application according to which it should not affect the incentives that individuals have to act as rational market agents. So, an ethos of justice according to the difference principle, rather than coercive rules, is what is required so that in their choices individuals behave by following the demands of equality. According to Cohen, this ethos is also necessary for guiding choice within rules that cannot be designed so perfectly as to fit with what justice demands in all possible situations.⁵⁶¹ So Cohen, as Murphy, also has a monist approach to the principles of justice.⁵⁶²

Cohen is concerned with correctly determining the site of distributive justice. He understands distributive justice as economic justice in the same terms that I have been discussing in this chapter: 'justice (and its lack) in the distribution of benefits and burdens to individuals'.⁵⁶³ For this to be achieved, or in the terms I put it above and to answer the scope question, it is not enough to focus on the basic structure of society. Something more is needed.⁵⁶⁴ Cohen exemplifies his idea by analysing justice within the family. He shows that even if the family were to have been successfully included within the basic structure of society, as Susan Moller Okin demands in her critique of Rawls,⁵⁶⁵ the problem would still persist. Cohen seems to be saying that an extension of the basic structure of society to include more institutions to be subject to Rawls' principles of justice would never suffice. There will always be space for some people, namely 'those who have much more power than others', and 'to determine what

560. Cohen, "Where the action is: on the site of distributive justice", 8. [Emphasis in the original].

561. *ibid*, 10.

562. Some would argue that Cohen's theory is also a case of non-ideal theory, *vid* Valentini, "Ideal vs. non-ideal theory: a conceptual map". Cohen's would be a realist non-ideal theory as he thinks that justice is not the only relevant value in political communities that is to be promoted. Therefore, we could never know what to do by attending exclusively to justice; justice should be pondered along with other values *ibid*, 657–658. I do not go deeper into this aspect of Cohen's theory since it is not relevant for the argument that I make in this section.

563. Cohen, "Where the action is: on the site of distributive justice", 12.

564. Cohen argues extensively that there is no clear definition of what Rawls would have included within this structure.

565. *vid*, Okin, *Justice, Gender, and the Family*. For the argument that justice should be a central virtue for the family, *vid* Ch2, 26–33. For the argument that Rawls pays no attention to the internal justice of the family, *vid* Ch5, 93–97.

happens *within* those rules'.⁵⁶⁶ With this argument Cohen tries to reaffirm the feminist claim, according to which 'the personal is political'. However, he modifies the 'site' of that claim to state that the personal is political because 'personal choices to which the writ of the law is indifferent are fateful for social justice',⁵⁶⁷ and not merely because the personal is integrated into the basic structure of society, as Okin argues.

Although Cohen does not mention it in his argument, it seems to me that his ideas about the egalitarian ethos apply squarely to tax avoidance.⁵⁶⁸ Remember that tax avoidance, according to the contemporary general theory of tax law, implies that even where there are rules determining legal duties, individuals can legally avoid those rules when their action is not covered by a literal interpretation of the taxable event. The adoption of an ethos of justice would provide a solution to tax avoidance because if taxation were based on the right fundamental principle(s), individuals would have to comply with it even if a particular legal rule defining their tax liability did not explicitly refer to that principle. This would be a direct consequence of what justice demands from individuals according to the ethos of justice. Under such an ethos – according to which the principle(s) of justice that apply to institutions also applies to individuals – individuals concerned with justice and motivated by it should not choose to act in such a way that the fundamental principle of distributive justice is endangered by their personal behaviour. This is a plausible interpretation of Cohen's ideas because even if he does not specifically refer to the justification of tax law in any of his works, he continually defends taxation as the means by which to achieve (his conception of) the fundamental principle of equality.⁵⁶⁹ Thus, it is possible to conclude that, according to Cohen, without the kind of ethos of justice he prescribes to political communities, tax law would be eroded through tax avoidance. To put it in positive

566. Cohen, "Where the action is: on the site of distributive justice", 23. [Emphasis in the original].

567. *ibid*, 24.

568. Cohen refers to two possible objections to his argument that he seems to admit would place into question his argument, *vid* the endnote to *ibid*, 29–30. The first is that the laws of the basic structure require compliance in order to be laws (according to Cohen, this is a possible Hartian objection based on H. L. A. Hart's conception of social rules, *vid* Hart, *The Concept of Law*), while the second is that a coercive structure can only achieve its results if individuals comply (in opposition to being forced to comply). But if Cohen would have considered tax avoidance then he might have found a perfect example for his argument and an answer to these possible objections.

569. His notion of equality as equal access to advantage. *vid*, Cohen, "On the currency of egalitarian justice", and "Equality of what? On welfare, goods, and capabilities", Otsuka (ed), *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy*, 61–72.

terms, taxation could only exist in a society operating under such an egalitarian ethos. This conclusion is reaffirmed if we follow Cohen's definition of the ethos of a society as 'the set of sentiments and attitudes in virtue of which its normal practices, and informal pressures, are what they are'.⁵⁷⁰

So is the scope question successful in solving the problem for which we are trying to find an answer? I think it is not. Broadening the scope of the principles of distributive justice to include individuals and institutions is not a solution to the Murphy and Nagel paradox; rather it only makes it more manifest. As stated previously, Murphy and Cohen's monist solution is unsatisfactory since it (1) rests on a merely instrumental conception of institutions, (2) resolves legal obligations into moral obligations, and (3) is not able to explain that (or indeed how) legal institutions specify individual obligations. I have already referred to the problems of (1) in the previous sections of this chapter so I will not return to this issue here. (2) and (3) can be understood as common issues that derive from assuming that the arguments in favour of principles of justice are moral arguments. Focusing on morality to explain the practical force of principles of justice denies what I will call in the next section 'institutional differentiation' or why certain social interactions require different institutional arrangements. Because the first possible answer to the scope question analysed here does not recognise the importance of institutional differentiation, they are open to the sorts of criticism recently formulated by Cécile Fabre in relation to Cohen for the justification of taxation. To that criticism I now turn.

3.4.2. Can Cohen justify that taxation is not forced labour?

The first answer to the Murphy and Nagel paradox, the strategy of widening the scope of application of the principles of justice, ends up reducing distributive justice to a moral demand. In doing so monism and the ethos of justice cannot provide an explanation for institutional differentiation. Hence, any demand of justice is reduced to a moral demand and the Murphy and Nagel paradox is confirmed. Any institution able to achieve the moral demands of justice is fungible or functional equivalent or even irrelevant if individuals follow the principle of justice directly. So neither the scope strategy nor the liberal egalitarians justifications reviewed previously are able to grasp the importance of institutions. This is problematic because if we only observe

570. Cohen, "Where the action is: on the site of distributive justice", 28.

certain distributive results and, consequently, limit our concern to assuring behaviour according to certain principles of justice, we will be led to a conceptual confusion which would have a detrimental effect to our ability to understand why institutions are relevant. So, for example, if we aim to ground social interactions on an egalitarian principle of justice it does not make any difference if we focus on the justification of taxation rather than on the egalitarian distribution of the work of individuals. As Nozick has famously argued, taxation and forced labour would be equivalent: both practices might be connected with equality at a moral level. Institutional differentiation is relevant because institutions embody important differences for the ways in which we relate to one another (recall the discussion above, p. 141ff, about the importance of market interactions for the classical political economist). The problem of institutional differentiation is clearly seen in a recent critique posed to Cohen by Fabre. Fabre's critique might be read as demanding Cohen to fully take on board the consequence that would follow from his moral egalitarianism, that is to accept that taxation is indeed equivalent to forced labour. Fabre might not adhere to or agree with the critique formulated herein. However, this does not show that my argument is wrong but that Fabre is also subject to the institutional differentiation deficit.

In *Distributive justice and freedom: Cohen on money and labour*, Cécile Fabre criticises Cohen's attempt to defend coerced taxation while at the same objecting to forced labour.⁵⁷¹ Even if Fabre directs her critique specifically toward Cohen, she asserts that her argument still applies to any egalitarian theory that: (a) 'claims the better-off are under an enforceable duty to transfer material resources to the poor or worse-off' and (b), 'maintains that the talented are not under an enforceable duty of justice to labour for the sake of the worse-off'.⁵⁷² Thus, Fabre argues that (1) 'Cohenian egalitarians are committed to holding the talented under a moral duty to choose socially useful work for the sake of the less fortunate' and (2) that, 'Cohen's arguments against coerced labour fail, particularly in the light of his commitment to coercive taxation'. In this sense, Cohen's egalitarianism would be placed in doubt because of his partiality to 'the interests of the better-off to the detriment of the less

571. An argument Cohen makes in *Self-ownership, Freedom, and Equality*, 230ff and *Rescuing Justice & Equality*, Ch5.

572. Fabre, "Distributive justice and freedom: Cohen on money and labour", 395–396.

fortunate'.⁵⁷³ As a consequence, liberal egalitarians would still be open to Nozick's infamous challenge to coercive taxation, namely that it is equivalent to forced labour.⁵⁷⁴ Fabre concludes that under Cohenian egalitarianism the 'talented are under a moral duty of justice to choose occupations which benefit the less fortunate'.⁵⁷⁵ I am not concerned here with the intricacies and details of the argument developed by Fabre in order to sustain her internal critique of Cohen. Neither am I interested in determining if she is right in that in moral terms there is no difference between coercing the talented into choosing a particular occupation for the benefit of others and taxation under egalitarianism. I simply want to highlight how two elements that underlie Fabre's argument (and therefore Cohen's also) are problematic. The first is the instrumental justification for taxation and the second is the moral foundation of distributive justice. By critically revising these two aspects of her argument I expect to restrict the domain of her critique to one that might apply to Cohen but not to egalitarians who are committed to the two points specified above as (a) and (b). Egalitarians might continue to hold (a) and (b) so long as they purge morality to provide space for politics and institutional differentiation. However, this assertion requires the arguments to be developed in chapter four and then fully fleshed out in chapter five. For the time being I want to focus on the two elements of Fabre's argument to close the argument of this chapter by showing that the mere instrumental justification for taxation and the economic conception of distributive justice should be complemented if we are concerned with grasping a conception of both taxation and tax law able to solve the problems and shortcomings of the classical conception of tax law. This might also be put into more general terms: we should complement the economic conception of distributive justice if we want to recover the political aspect of our institutions and of equality.

573. *ibid*, 394. So Cohen would be exposed to a similar critique that the one he formulates against Rawls' difference principle.

574. 'Taxation of earnings from labour is on a par with forced labour. Some persons find this claim obviously true: taking the earnings of an hour labour is like taking n hours from the person; it is like forcing the person to work n hours for another's purpose. Others find that claim absurd. But even these, if they object to forced labour, would oppose forcing unemployed hippies to work for the benefit of the needy'. Nozick, *Anarchy, State, and Utopia*, 169. [Emphasis in the original].

575. Fabre, "Distributive justice and freedom: Cohen on money and labour", 411.

Although she only refers directly to this point in a footnote,⁵⁷⁶ throughout her paper Fabre assumes that taxation has an instrumental function that traditionally has been attached to it, that of achieving redistribution. Therefore, taxation is justified because of the benefits it may bring to the less favoured. If we combine this idea with the substantive ideal to be achieved (a conception of equality) then it is quite evident that there should not be any moral reasons for distinguishing taxation from other institutional arrangements capable of achieving the same result; Fabre does in fact do this by comparing taxation with forced labour. So she asserts that taxation implies a level of coercion that is acceptable to its ends (and she would extend this argument to cover forced labour). Compare this with what she says about justified coercion in punishment and criminal law. According to Fabre, punishing someone coercively requires a very high standard of epistemic certainty, so that the one who is punished is not used as a means. This leads her to justify criminal law under a retributive approach. However, when it comes to taxation and forced labour, Fabre would justify both under less demanding epistemic constraints because both are to be evaluated considering their ends, that is considering the benefits that would develop for the less fortunate. Fabre leaves open the question as to whether her argument redefines Cohenian egalitarianism in such a way as to make its egalitarian demands unacceptable. However, even if that debate is still open what I want to emphasise that it is with such a moral argument the instrumental justification for taxation has finally arrived to absolute moral instrumentality. So even if Fabre argues that coercion might be worthy in such cases as when ‘the law, *pace* Cohen, often helps [agents] develop the right mindset in their dealings with one another’, she suggests that this could happen with the law because it ‘can also help instil in agents adaptive preferences which are conducive to equality’.⁵⁷⁷ As I argue in the next chapter, I agree with Fabre in that the law can teach us to behave in certain ways. But precisely because of this, how can this be made compatible with a merely instrumental conception for taxation? What do we learn about equality? If we follow her argument we learn that equality is a result to be achieved by any possible institutional arrangement as long as it is correctly justified in moral terms. My point is that if Fabre wants to take this idea seriously so that agents by ‘being coerced, [...] get used to doing it [behave as equality demands], learn to see

576. *ibid*, 405 fn16.

577. *ibid*, 408.

the advantages of doing it, and so on',⁵⁷⁸ what is needed is not an instrumental justification of institutions but an intrinsic one. In other words, one that shows the good the practice in which the institution is based aspires to. This is the task that I assign to institutional differentiation. In this particular case, institutional differentiation should be able to provide reasons for distinguishing forced labour from coercive taxation. As I argue in chapter four by following Claudio Michelon, institutional differentiation does this labour by mediating on political ideals and their concrete instantiation.

The second problem with this approach is the moral foundation of the economic conception of distributive justice. By the moral foundation of distributive justice I refer to the common liberal egalitarian and luck egalitarian redirection of their claim to equality and to a moral principle. However, this attempt to moralise the normative source of redistribution denies the political dimension of equality and distributive justice. Liberal egalitarians and luck egalitarians seem to be committed to obtaining a particular level of equality in the distribution of certain goods, rather than with always being open to political demands for equality.⁵⁷⁹ Therefore, they would first define the principle of distributive justice and then expect to achieve the equality demanded by that principle of justice, either through coercive institutions or by direct appeal to the moral principle. Liberal egalitarians and luck egalitarians have a positive idea as to what might be achieved by (an instrumental conception of) institutions. However, the political demand for equality turns this relationship on its head. Rather than being a standard of distribution for particular goods, equality is understood as a political ideal: a reason that prompts political action. In this sense, the ideal of equality is always open to redefinition. The political approach is pessimistic with respect to the work of existing institutions but it is positive regarding the ideal. The political ideal works as a constant source of critique. It is what explains the requirement of constant institutional reform. In taxation, for example, the underlying demand for equality expresses a demand for mutual recognition (through property) rather than for material equality. In this scheme distributive justice depends on the political content of that demand for political equality. In this sense the relevant question regarding taxation and

578. *ibid.*

579. The vagueness in this phrasing is due to the different possible contents that might be argued for these concepts, *vid infra* 168.

tax law is not the liberal egalitarian and luck egalitarian motto with which I began this section; it is not 'Why should I pay taxes?' but 'Why do we have taxes?'. These ideas are further developed in the following chapter.

CHAPTER FOUR. TAXES AS PRACTICES WITH AN INTERNAL GOOD

1. INTRODUCTION

I finish the analysis of the previous chapter by proposing a pessimistic approach to institutions (the immanent) combined with a positive standing toward political ideals (the transcendental). Furthermore, I show that the economic approach to distributive justice, combined with a moral demand for equality, creates a problem for egalitarians that is particularly troubling in taxation, namely the Murphy and Nagel paradox. Moreover, their argument might end up justifying too much, as in the case of Cohen and forced labour. I conclude that liberal egalitarians and luck egalitarians end up missing the political aspect of equality and the significance of distribution. They start with the wrong question ('Why should I pay taxes?') because they assume that individuals are entitled to property as within the classical paradigm of tax law.

The question posed should be a different one: 'How are we as citizens to understand what living together means?' I am not an isolated individual who needs to be convinced that paying taxes works in my own interests. As individuals situated within political communities we are citizens and this in itself supposes that there are some burdens that we have to share. These burdens are connected with what being a citizen involves among those who share a particular political project, the collective project of autonomy. This project is another way of putting across the idea that we aim at fraternity, that is to say recognition of our mutual dependency. In other words, an understanding of taxation (able to provide a solution to tax avoidance)⁵⁸⁰ cannot be 'found simply by appeal to self-interest and instrumental rationality [...] what needs to be reformed in these cases is people's understanding of the meaning of their relationship to those with whom they are interacting'.⁵⁸¹ In this chapter I try to offer an alternative to the liberal tradition in which these ideas have a place. The argument is structured in five parts. In the first I offer a reading of equality in which it is recovered as a political ideal rather than as a material state of affairs (section 2). With that in place I focus on rescuing the political dimension of distributive justice at the expense of its economic conception (section 3). In the third part of the argument I introduce MacIntyre's distinction between practices with internal goods and

580. In the next chapter I build the bridge between these ideas.

581. Anderson, "Beyond Homo Economicus: new developments in theories of social norms", 198.

institutions with external goods; this is important for showing how taxation and tax law might have an intrinsic rather than an instrumental good (section 4). The fourth part of the argument argues that the internal good of taxation is mutual recognition (section 5). I fully resolve the argument by revisiting the relationship between taxation and private property to show how they are constitutively connected (section 6). The conclusion of this argument is that we are under an obligation to pay taxes even if there is no need for redistribution.

2. WHAT IS THE POINT OF EQUALITY?

Under this title Elizabeth Anderson presents a very strong criticism against luck egalitarians.⁵⁸² According to Anderson, luck egalitarians' theories of justice combine the worst of capitalism and socialism (mean-spiritedness, contemptuousness, hierarchical structures and morally distinguishing between the responsible and the irresponsible) thus denying what egalitarians should be concerned with. Anderson defends a conception of egalitarianism in which society is 'generous, humane, cosmopolitan [...] recognizes individuals as equals in all their diversity' and at the institutional level is constructed so as to 'promote [...] arrangements that enable the diversity of people's talents, aspirations, roles, and cultures to benefit everyone and to be recognized as mutually beneficial'.⁵⁸³ She argues that, on the contrary and by advocating for market efficiency and responsibility for choices, luck egalitarians assume 'atomistic egoism and self-sufficiency as the norm for human beings'.⁵⁸⁴ In this sense, Anderson claims, luck egalitarianism implies a denial of the different approaches that characterise egalitarians' concerns, that is, that relations among citizens should be guided by the intrinsic and equal moral worth of every individual. Following Anderson, egalitarians should advocate two claims which when formulated in positive terms are defined as follows:

582. In this paper, Anderson brings to the fore the label 'luck egalitarianism' to refer to theories that are 'hybrid[s] of capitalism and the welfare state', among which she includes those of Dworkin, Cohen, Roemer, Rakowski, Van Parijs and Arneson. Anderson. "What is the point of equality?", 292.

583. *ibid*, 308.

584. *ibid*, 311.

(a) That all competent adults are equally moral agents: everyone equally has the power to exercise and develop moral responsibility, to cooperate with others according to principles of justice, to shape and fulfil their conception of their good.⁵⁸⁵

(b) A social order in which persons stand in relations of equality. They seek to live together in a democratic community, as opposed to a hierarchical one. Democracy is here understood as collective self-determination by means of open discussion among equals, in accordance with rules acceptable to all.⁵⁸⁶

These two claims represent the social and political equality claimed by egalitarian political movements. This sort of egalitarianism, which Anderson calls democratic equality, is different from luck egalitarianism in the following respects: (1) it ‘aims to abolish socially created oppression’; (2) ‘is [...] a relational theory of equality: it views equality as a social relationship’; and (3) ‘is sensitive to the need to integrate the demands of equal recognition with those of equal distribution’.⁵⁸⁷ In what follows I will briefly refer to the contents of (1) and (2) and discuss how this relates to the argument that I have developed so far. Later in this chapter I turn to an analysis of (3).

Anderson’s democratic conception of equality progresses in the same vein as the argument that I started developing in the previous chapter. This is exceptionally remarkable regarding (2), the relational theory of equality. Instead of (2), liberal egalitarian theories advocate for equality as a pattern of distribution. In the terms outlined in the previous chapter, and following Fleischacker, they defend an economic idea of distributive justice.⁵⁸⁸ According to Anderson, this leads to an instrumental conception of social relations: ‘Social relationships are largely seen as instrumental to generating such patterns of distribution’.⁵⁸⁹ To this I would add that it also leads to an instrumental conception of institutions, as is argued extensively in the previous chapter.

In more general terms, Anderson’s democratic equality seems to me to present the right approach to rescuing equality as a political concept. Even if Anderson is silent

585. *ibid*, 312.

586. *ibid*, 313.

587. *ibid*, 313–314.

588. *vid supra*, 126.

589. Anderson, “What is the point of equality?”, 313.

about this point, the conception of equality she defends is one that is sensible to the political. It assumes that the content of equality is open to political disagreement and always open to modifying its content so long as it is necessary for (1). This aim within democratic equality leaves it open to constant change through political, not moral, debate. At the same time, when combined with (2) it is able to motivate and explain political action. Contrary to the conception of equality that underlies economic theories of distributive justice, in its political reading equality is not a state of affairs that works as a standard to be achieved at some point in time but is an ideal against which we contrast social and political arrangements.

Joseph Raz's argument about the importance of equality is useful here to better express the idea I am trying to put forward about the substantive content of equality. However, as I argue *infra*, I disagree with Raz's conception of political ideals. According to Raz, equality is relevant only when there are other independent reasons – different from that of equality – that explain our concern with the distribution of what we value or not.⁵⁹⁰ For Raz, 'Equality is said to matter where it affects what is valued for independent reasons; it matters only because what is to be distributed is valuable for independent reasons'.⁵⁹¹ He argues that what gives priority to someone (S) over the other (O) in the distribution of goods is that S is at a disadvantage, in need, in pain or suffering in relation to O in relation to something that we value. But it is not inequality between S and O, 'as an independent evil' (of that which we value), that explains our concern with equality.⁵⁹² According to Raz then, it is the disadvantage, the need, pain or suffering of S that concerns us.

It might be argued that Raz would disagree with my reading of his ideas concerning equality. In particular, that he is not dealing with equality as a political ideal precisely because he is trying to show that equality is not in itself 'a foundation of morality and politics' because theories founded on the 'strictly egalitarian principle'⁵⁹³ lead to an equalising of people even if this implies, for example, destroying some goods that cannot be distributed equally. Following Raz, strict egalitarianism might be

590. Raz, *The Morality of Freedom*, 235.

591. *ibid*, 240.

592. *ibid*.

593. The formulation of this principle is 'All Fs who do not have G have a right to G if some Fs have G'. *vid ibid*, 225, 230–231.

expressed in a matrix formed by coupled principles. The first couple comprises the insatiable/satiable principles and the second, non-diminishing/diminishing principles.⁵⁹⁴ Raz affirms that insatiable principles can be either non-diminishing or diminishing and that satiable principles are normally diminishing. He also affirms that non-diminishing principles admit large inequalities and that this is why they need an equality principle or egalitarian constraint to solve conflicts in the distribution of goods. On the other hand, diminishing principles tend to achieve egalitarian results even if they do not aim at equality, so they are better for guiding distributive conflicts. According to Raz, satiable diminishing principles are better expressions of the sort of problem that egalitarians try to solve (which in his reading only deal secondarily with equality). For example, if A and B are hungry and A receives food, then the next unit of available food should go to B even if this implies a non-egalitarian distribution of food.⁵⁹⁵ However, Raz argues that egalitarian theories are ‘based on non-diminishing, usually insatiable principles the operation of which is subjected to egalitarian constraints’⁵⁹⁶ and that they should be abandoned because the ‘ideals at the foundation of morality and politics are all diminishing and satiable principles’.⁵⁹⁷ Here he appears to be following Marx and Engels for whom, according to Raz, ‘[i]t has no normative force, it signifies no *moral or political ideal*, but it can serve as a useful political slogan, claiming for the proletariat the rights and privileges of the bourgeoisie’.⁵⁹⁸ Against this possible objection I would answer by distinguishing two aspects of the discussion. First, if equality can be a political concept then what importance should we assign to it? I will come back to this point later when discussing recognition⁵⁹⁹. For the time being it is suffice to say that I do not think that equality is the main political concept or ideal to which a political philosophy should aspire. Notwithstanding this assertion, equality

594. Insatiable principles are those ‘which it is always possible in principle to satisfy to a higher degree’ *ibid*, 236. Satiable principles are those ‘marked by one feature: the demands the principles impose can be completely met’ *ibid*, 235. Non-diminishing principles are not defined by Raz but from his arguments they could be defined as those in which there are no limits to achieving the good aim to (as would happen with a principle stating the maximisation of wealth). These principles oppose diminishing principles. Diminishing principles are those according to which ‘the more G that F has the weaker becomes the reason to give him more G’. *ibid*, 236.

595. *ibid*, 229–240.

596. *ibid*, 240–241.

597. *ibid*, 241.

598. *ibid*, 217. [Emphasis added].

599. *infra*, 188ff.

has a very important role to play, just as in Anderson's (1) and (2). The interesting question comes with the second aspect. Here I need to specify what I mean by a political concept because this is the source of an important difference from Raz's argument. First, I mean something different from that which Raz has in mind when dealing with principles of equality. Raz tries to find a principle with normative force. In this respect he seems to understand that the task of political philosophy is finding moral principles with normative force, as seen previously in that liberal egalitarians and luck egalitarians did. So Raz's argument would be that equality is not the best nor is it an adequate moral principle upon which to found a political philosophy (he would actually opt for freedom as that principle). Through this Raz becomes open to the same criticism formulated earlier by myself that goes against theories that moralise political and legal concepts. Therefore, the important point here is to make a distinction between moral and political ideals, something that Raz conflates according to the quote above. This difference starts from a different conception of the task of political philosophy. Once we define this we will be in a position to better understand how political ideals (or political concepts) work. The importance of this task connects with Anderson's (1) and its aim of democratic equality.

The main difference that distinguishes between political philosophies that conflate moral and political ideals and those that do not is the way in which they conduct political philosophy and the purpose they conduct it for. Following Raymond Geuss, I use his labels and refer to the former as Kantian theories and the latter as realist theories.⁶⁰⁰ Kantian theories of political philosophy, those that conflate morality with political ideals, try to anchor normativity in morality. Because we live in a world in which institutions and political concepts are left without any justificatory moral order,⁶⁰¹ these theories can be interpreted as trying to solve problems of practical reasoning by referring to moral principles. They start their enquiry from the ideal world of morality in order to derive from it what we should do. As thus they focus on a determination of the moral principles in which we find guidance regarding how to act and what to do. These theories make a strong separation between how things are from how they should be, that is to say, between the 'is' and the 'ought', hence

600. Geuss, *Philosophy and Real Politics*, introduction and *passim*.

601. *vid.*, MacIntyre, *After Virtue*.

distinguishing between political philosophy and political theory.⁶⁰² The ‘realist approach to politics’, on the other hand, does not distinguish between ‘philosophy’ and ‘theory’ and has, in Geuss’ version of it,⁶⁰³ four main assumptions.⁶⁰⁴ (1) It must be realist. This means that it starts from existing institutions that actually operate on different social levels at a given time. (2) It should recognise ‘that politics is in the first instance about action and the contexts of action, not about *mere* belief or propositions’.⁶⁰⁵ This implies that theories or ideas have an important effect on the way in which individuals exposed to those theories or ideas will behave in the future. The important idea here, even if Geuss does not put it in these terms, is to acknowledge the effects of what might broadly be considered speech acts. (3) Politics is historically located, that is to say, ‘it has to do with humans interacting in institutional contexts that change over time, and the study of politics must reflect this fact’.⁶⁰⁶ In this sense, politics cannot rest on immutable generalisations because such generalisations cannot tell us anything about practical reasoning within a particular institutional context. The importance of the historicity that Geuss appeals to rests in its connection with the way in which institutional contexts determine how political problems are presented to us and the ways in which they can be solved. (4) Politics is a craft because it is ‘about getting things done when people do not agree’.⁶⁰⁷ Geuss differentiates politics from the application of a theory because of the particularities that surround political action. This is what makes it a skill rather than a technique and it demands ‘political judgment’.⁶⁰⁸ All these elements highlight the connection between politics and power, a thing to which Geuss assigns great importance.⁶⁰⁹ If we accept Geuss’ realism then the tasks of political philosophy are five: (1) to provide an explanation of forms of political action and their results; (2) to evaluate the world we live in; (3) to provide an orientation for action; (4) to contribute ‘constructively to

602. Geuss, *Philosophy and Real Politics*, 16–19, 101.

603. For other realist approaches, *vid* Valentini, “Ideal vs. non-ideal theory: a conceptual map”.

604. Geuss, *Philosophy and Real Politics*, 9–16.

605. *ibid*, 11. [Emphasis added].

606. *ibid*, 13.

607. Geuss, *History and Illusion in Politics*, 117.

608. Geuss, *Philosophy and Real Politics*, 97.

609. *ibid*, 90–94. *vid* also Geuss, *Politics and the Imagination*, Ch3 and Ch4.

politics by conceptual invention or innovation’; and (5) to analyse and help dissolve ideologies.⁶¹⁰

Adopting Geuss’ realist approach, political ideals are relevant to the task of conceptual invention or innovation. In this sense they are important for political action but not because of their normative force as moral values. Being part of political action, political ideals have a different connection with practical reason when compared with what follows from rules. According to Geuss, political action is not subject to rules nor is it engaged in finding a solution to a specific problem; it is the sort of action that ‘changes a situation in a way that cannot be seen to be a mere instantiation of a pre-existing set of rules. It creates new facts, violates, ignores, or even changes the rules’.⁶¹¹ In this sense political action is connected with the ways in which we decide what kinds of people we will be. Political action deals with different problems that come about within political communities, such as deciding what to do in a particular case in which, for example, there are several technical alternatives, or where we know what to do but have to deal with the means by which we might do it.⁶¹² These are common issues in which political decisions are important. However, as Geuss argues, there is a third kind of problem in which political philosophy’s task of conceptual invention or innovation is important.⁶¹³ These are the sorts of situations in which we do not have a clear idea about how to discuss a problem because there is not any clarity about the problem itself.⁶¹⁴ In these cases the problem becomes clear only once we have a solution for it. For Geuss, conceptual innovation is not simply the task of providing a label for an existing reality or creating a name for something that does not exist. Conceptual innovation is relevant because such concepts can change reality. They are the sorts of concepts that create new possibilities for action, such as, for example, the ‘state’. These concepts help to clarify a problem, create a new reality, have a normative aspect, and are as much a description as an aspiration. In this sense then these concepts are ‘an important contribution both to clarifying an obscure

610. Geuss, *Philosophy and Real Politics*, 37–55.

611. Geuss, *Politics and the Imagination*, 41.

612. Geuss, *Philosophy and Real Politics*, 42–43.

613. *ibid*, 42–50.

614. *ibid*, 43.

situation and to guiding action directed at institutional change'.⁶¹⁵ But I submit that the most important characteristic that distinguishes political ideals from moral values is that the former, but not the latter, are open to political appropriation. These concepts have a life of their own. They are not mere tools that we construct in order to solve a particular problem and use whenever we have to deal with that problem. Their main characteristic is that they are open to new meanings. However, this meaning is not fixed. Because these concepts become part of political reality someone different from the 'creator' can appropriate their meaning. In this sense these concepts are similar to what Laclau calls an 'empty' and a 'floating signifier', the meaning of which depends on political 'hegemonic struggles'.⁶¹⁶ In other words, political concepts are open to political conflict; they are 'the type of action whose objective is the transformation of a social relation which constructs a subject in a relationship of subordination'.⁶¹⁷ In the way in which I understand them, political concepts try to avoid the sort of reasoning proper of morality. In the words of Chantal Mouffe, this is the sort of 'reasoning that is specific to moral discourse and the effect of which when applied to the field of politics is to reduce it to a rational process of negotiation among private interests under the constraints of morality'.⁶¹⁸ Morality and values, understood in liberal egalitarian terms, oppose the political since they represent an attempt to provide certainty where there is radical democratic indeterminacy.⁶¹⁹ This approach to political ideals should not be confused with postmodernism. I am not advocating the radical indeterminacy and subjectivism of postmodernism. What I am trying to do is to take seriously the idea that in modernity we are the authors of the law; the consequence is that we should be open to the democratic determination of the content of political ideals. Equality in this sense implies a political definition of what it means to be equal.

615. *ibid*, 46.

616. Laclau, *On Populist Reason*, Ch5.

617. Laclau and Mouffe, *Hegemony and Socialist Strategy*, 153.

618. Mouffe, *The Return of the Political*, 49.

619. For an interesting argument against the tyranny of values, *vid* Schmitt, *La Tiranía de los Valores*. According to Schmitt, nihilism led to the subjective attribution of value to what were previously convictions and interests. This helped individuals to assume a perspective from which they could express what they considered important, that is, of worth. However, according to Schmitt different reasons replaced the subjective attribution of value with an objective scale of values. For Schmitt the risk underlying the adoption of 'values' in dealing with interests and convictions is that within this logic values are values for someone against another. What underlies a value, therefore, is someone's decision to attribute worth to an interest or conviction.

3. THE POLITICAL DIMENSION OF DISTRIBUTIVE JUSTICE

In the previous section I conclude that the importance of equality can be better grasped if it is interpreted as a political ideal rather than as a demand for material equality. Equality as a political ideal may imply, in particular circumstances, the need to fight for material equality. However, this is a manifestation of a broader concern with what we consider relevant for individuals as members of a political community. How does this conception of equality relate to distributive justice? The answer to this question implies a greater distancing from the economic conception of distributive justice that is characteristic of liberal and luck egalitarians. The difference is as follows. The political ideal of equality is located at the foundation of distributive justice and not in a state of affairs (an equality of X for all As) to be achieved as if the positions in which individuals are in at a determined moment are independent of a political and institutional framework. Under this non-economic approach to distributive justice the distribution or allocation of goods that distributive justice is concerned with is based on a previous political decision that conditions the criterion of distribution.

Among contemporary political philosophers Charles Taylor emphasises that distributive justice 'becomes relevant when men are associated together in society, and have to share in some sense'.⁶²⁰ What Taylor argues is that underlying a notion of distributive justice there is a certain notion of men and society, that which he calls a 'social view of man' and according to which 'the human good is bound up with being in society'.⁶²¹ This opposes what he calls 'political atomism' or, in other words, those political doctrines that have a 'vision of society as in some sense constituted by individuals for the fulfilment of ends which were primarily individual'.⁶²² In the latter there is not any space for distributive justice because individuals enter into the association to protect what they had before entering it. In the former, on the other hand, men are situated within a 'certain kind or structure of society' that is considered an 'essential condition of human potentiality'.⁶²³ This structure defines the framework

620. Taylor, "The nature and scope of distributive justice", 294.

621. *ibid.*

622. Taylor, "Atomism", 187.

623. Taylor, "The nature and scope of distributive justice", 294.

of distributive justice. Other principles of justice depend on the structure of society because it defines the sorts of goods to be distributed or the agents among whom goods should be distributed. Only once the structure is settled is there space for particular principles of distribution. Taylor explicitly states that his analysis of distributive justice is close to Aristotle's. Therefore, Taylor's argument can be put into different words: he argues that the nature and the scope of distributive justice are defined according to what Aristotle calls general justice and particular justice, respectively. I consider this relationship between general justice and the structure of society to deserve further exploration, especially since it depends on the political definition of the kind of society we would like to live in. Naturally, these terms are slightly anachronistic for Aristotle, who has a limited idea of the 'we' that defines the structure of society. However, he recognises that this is important when he connects justice with the 'constitution' of society. So let us move deeper into Aristotle's ideas about distributive justice.

In the *Nicomachean Ethics*, when distinguishing between justice in a broad sense as just actions according to excellence (universal justice, namely the kind of justice connected with the law) and justice in a particular sense as part of the former, Aristotle says:

[I]f one man commits adultery for the sake of the gain and makes money for it, while another does so at the bidding of appetite though he loses money and is penalised for it, the latter would be held to be self-indulgent rather than grasping while the former is unjust, but not self-indulgent; evidently, therefore, *he is unjust by reason of his making gain by his act*. Again, all other unjust acts are ascribed invariable to some particular kind of wickedness [...]; but if a man makes a gain, his action is ascribed to no form of wickedness but injustice.⁶²⁴

This is an important passage. Here Aristotle defines the ways in which we can identify what exactly characterises particular justice according to the actions of the unjust man. If particular justice is a species of the genus justice then it must refer to a specific kind of virtue different from those comprised by universal justice, specifically those virtues that are realised in the agent who follows the law. Particular justice is defined in opposition to grasping. The grasping man is he who tries to gain from his actions. But grasping should not be unjust exclusively or only because of the fact that it is a gain. It

624. (NE, 1130a25-1130b). [Emphasis added].

is unjust because the gain represents a certain sort of inequality. In Aristotle's theory this inequality is unjust because it is unmerited or undeserved.⁶²⁵

According to Aristotle there are two ways in which a man can be said to be unjust. An unjust man can be unlawful or grasping. By opposition then, '[t]he just [...], is the lawful and the equal' (EN, 1129a34).

The lawful man is just because the 'acts laid down by the legislative are lawful, and each of these [...] is just' (EN, 1129b13-14). This idea of the law being just must be interpreted according to what Aristotle says in the *Politics*. According to his idea, when positing the law, the legislator is aiming at the common good. The common good depends on the system of government adopted, so it can be 'the common advantage either of all or of the best or of those who hold power, or something of the sort' (EN, 1129b15-16). Governments that look for the common good 'are constituted according to strict principles of justice, and are therefore true forms' (Pol, 1279a19-20). Those who behave according to the law exercise absolute excellence in relation to others (EN, 1129b26). However important this may be, it is not the sense of justice that is relevant as 'a part of excellence' (EN, 1130a14).

Justice as a part of general justice is concerned with the second way in which a man can be said to be unjust, that is when he acts in a grasping manner. Aristotle argues that this kind of justice is 'indicated by the fact that while the man who exhibits in action for the other forms of wickedness acts unjustly but not graspingly' (EN 1130a17-18). Here is when the passage quoted extensively above becomes relevant. It is the grasping action that allows Aristotle to build his notion of justice as one of particular excellence, which differs from the general excellence obtained by acting lawfully.

Grasping is relevant then for determining when a man is acting unjustly and is understood to be unjust 'by reason of [someone] making gain by his act' (EN, 1130a29). The motive of this injustice 'is the pleasure that arises from gain' (EN, 1130b3-4) and its force comes from relations with others that concern 'honour or money or safety' (EN, 1130a35-6). Thus, he who acts unjustly because he is acting graspingly is one who obtains gain in his relations with others. Aristotle is not very

625. According to Miller, '[d]istributive justice is concerned with the distribution of goods, including political offices and property, [...] according to some principle of merit and desert'. Miller Jr., "Aristotle on natural law and justice", 300-301.

clear as to the kinds of relations from which a grasping action might be predicated. However, it seems to entail a broad notion that not only refers to particular goods but also includes the less ‘bad things absolutely’ (EN, 1129b8). This becomes clearer once we analyse the different categories of particular justice.

There exists debate about the character and number of the species of particular justice distinguished by Aristotle;⁶²⁶ these discussions are not relevant for the purposes of the argument herein. It is suffice to say that in Book V of the *Nicomachean Ethics*, Aristotle distinguishes between distributive, rectificatory or corrective, and reciprocal justice. For the purposes of the argument presented in this paper I focus exclusively on distributive justice as a form of particular justice.

Distributive justice as a kind of particular justice ‘is manifested in distributions of [...] things that fall to be divided among those who have a share in the constitution’ (EN, 1130b31–2). Aristotle exemplifies the sorts of things that can be distributed in accordance with this kind of justice, mentioning honour and money as he does so. The key aspect of distributive justice is that it refers to the distribution of ‘things that can be divided among those who have a share in the constitution’. This poses two questions that need to be answered in order to get the point right. Who are the ones who have a share in the constitution? What is included in the constitution to be distributed? I endeavour to answer these questions in a moment, but before I do so it is necessary to understand the connection between justice and equality because, as said before, the unjust (in terms of particular justice) is equivalent to the unequal (EN, 1131a10–1).⁶²⁷

Following Aristotle, we can say that equality in any kind of action is the intermediate between a more and a less (EN, 1131a10–14). As equality is connected with the just it makes reference to things and persons. Therefore, equality must exist between things and persons.⁶²⁸ This has consequences for the just. For a distribution to be just there must exist equality ‘between the persons and between the things concerned’ (EN, 1131a20). Aristotle understands that equality can exist only between

626. *vid ibid.* According to David Keyt, ‘Aristotle distinguishes two kinds of (particular) justice: distributive (*dianemetikon*) and corrective (*diorthikon*)’, ‘Aristotle’s theory of distributive justice’. *ibid.*, 238.

627. *vid.* Miller Jr., ‘Aristotle on natural law and justice’, 300.

628. Miller Jr., *Nature, Justice, and Rights in Aristotle’s Politics*, 68–74. *vid.* Castoriadis, *Crossroads in the Labyrinth*, 294–299.

those who are equal in merit.⁶²⁹ This is where we find parts of the answers to the questions posed above. Merit becomes relevant because ‘awards should be [given] according’ to it, and this seems to be evident from the fact that ‘all men agree that what is just in distribution must be according to merit’ (EN, 1131a24–6). But at the same time, Aristotle says that men disagree on what sort of merit is relevant: ‘democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with excellence’ (EN, 1131a26–8). Therefore, it is in the constitution where we find the relevant criteria of merit that allow us to determine equality. The relation of equality with the questions posed above is evident. It is in the constitution that we find the relevant factors (things and persons) that will allow us to determine what is equal (and just).

Equality between men and things to be distributed implies, according to Aristotle, that the just is ‘a species of the proportionate’ (EN, 1131a29). This kind of proportion is the equality of ratios between the four terms included in distribution, and it is relevant because it establishes the standard of justice in the distribution of common possessions (EN, 1131b27–8; Pol. 1280a15–19). From this it follows that the standard of equality in the distributions of common goods between equal men is given by proportionality.⁶³⁰

So far, the analysis of distributive justice as one part of particular justice seems to leave us at a halfway point. The rest of the path can only be properly understood once we look at general justice. This is how we can determine those who are equal and which goods are common goods. This will explain why, after specifying the different species of justice, Aristotle introduces ‘political justice’ as a new term, not used before, to refer to just acts (EN, 1134a26). This kind of justice is that which is,

[F]ound among men who share their life with a view to self-sufficiency, men who are free and either proportionately or arithmetically equal, so that between those who do not fulfil this condition there is no political justice but justice in a special

629. This becomes more relevant when Aristotle discusses reciprocal justice and the necessity of money as an equalising standard. ‘For it is not two doctors that associate for exchange, but a doctor and a farmer, or in general people who are different and unequal; but these must be equated. This is why all things that are exchanged must be somehow commensurable. It is for this end that money has been introduced, and it becomes in a sense intermediate; for it measures all things, and therefore the excess and the defect [...]’ (EN, 1133a7–20).

630. For a very informative analysis of Aristotle’s principle of distributive justice, *vid* Keyt, “Aristotle’s theory of distributive justice”, 240ff.

sense and by analogy. For justice exists only between men whose mutual relations are governed by law; and law exists for men between whom there is injustice; for legal justice is the discrimination of the just and the unjust.⁶³¹

Although Aristotle refers to particular justice, when equality is specified as proportional (distributive) or arithmetical (corrective) his argument is oriented here to describe political justice. At this point it is important to distinguish political justice from legal justice. Political justice exists between free and equal men who share their life with a view to self-sufficiency. But since these men may act unjustly in their relations, it is necessary that law governs them. Here Aristotle should be read as referring to the ‘institution of law’. Because men can act unjustly, ‘we do not allow a *man* to rule, but law’ (EN, 1134a36). In this way, and with the help of the magistrate (‘the guardian of justice, and, if of justice, then of equality also’, EN, 1134a37-b1), we are able to ensure justice among those who have ‘equal share in ruling and being ruled’ (EN, 1134b15).

However, political justice (and the function assigned to law for it) is different from legal justice; the latter is a species of the former. There are two species of political justice: natural and legal justice.

Natural justice is ‘that which everywhere has the same force and does not exist by people’s thinking this or that’. Legal justice is ‘that which is originally indifferent, but when it has been laid down is not indifferent’ or that which derives from ‘all the laws that are passed for particular cases’ (EN, 1134b18-21). However, this does not mean that law can be arbitrarily created. The law is substantively dependent on the content of the constitution. According to Aristotle, ‘the goodness or badness, justice or injustice, of laws varies of necessity with the constitutions of the states’ as the ‘laws must be adapted to the constitutions’ (Pol. 1282b1 and ‘laws are and ought to be, framed with a view to the constitution, and not the constitution to the laws’, 1289a9). Otherwise laws would be ‘only a convention’ (Pol. 1280b13) and not different from any other convention.

If this is the correct reading of Aristotle’s treatment of justice in Book V of the *Nicomachean Ethics*, then we might review the analysis by stating that political justice is only possible between equal and free men who share their life with a view to self-

631. EN, 1134a26-32.

sufficiency. These men have an equal share in ruling and being ruled. This kind of justice is expressed in the law. In this way equality can be assured because nobody will have an unequal share in his part. Political justice has two parts: natural and legal justice. The law contains aspects of natural and legal justice. Natural and legal justice as parts of political justice expressed in the law can constitute either general or particular justice. General justice as contained within the law refers to conduct that expresses virtue and this is why it is connected with excellences in general. Particular justice is concerned with the avoidance of grasping, and it has two parts: distributive and corrective justice. The first refers to the correct distribution of common goods and the second corrects inequalities derived from voluntary or involuntary transactions. However, there is another justice, that which is ‘without qualification’ (that is, not political) (EN, 1134a24–26). This kind of justice shows how the reciprocal is related to justice between unequal men in their exchanges. Reciprocal justice is that which makes possible associations for exchange. Here ‘reciprocity is established in accordance with a proportion [represented by money] and not on the basis of equality. For it is by proportional requital that the city holds together’ (EN, 1132b33–35). This kind of justice is not enough for defining a state, yet it is one of the conditions without which a state could not exist since the end of the state is the good life and this is one of the means for achieving it (Pol., 1280b18–1281a2).

Even if we have so far been able to answer the questions posed above – what is to be distributed and among whom – if we follow Aristotle’s scheme it is also important that we determine who distributes. In this sense, equality is one of the conditions for the existence and subsistence of any state. As a condition of existence, equality is connected structurally with the common good because it is the common interest in equal terms for equal people (Pol. 1282b14–20). As a condition of subsistence equality should be maintained in time. This is the way to maintain peace and avoid revolutions (Pol. Book V).

With this analysis of Aristotle’s conception of distributive justice I intend to show how justice is connected with a political notion of equality. Equality in Aristotelian terms can be understood not as an economic end but as a political ideal the content of which is defined as part of political justice (by reference to the political constitution of a particular political community). The economic content of distributive

justice is subordinated to the political definition of the principles of distributive justice.

4. PRACTICES AND INSTITUTIONS

Until this point the argument has shown that equality should be understood as a political concept and that distributive justice depends on the definitions of the common good adopted by a political community in which men are situated. These two arguments are necessary steps in advancing toward an understanding of taxation that supersedes the mere instrumental justification that I have criticised previously. The next step in this argument requires a new mode of arguing for institutions that is different from the instrumental justification attached to the self-interested notion of man that underlies the liberal and luck egalitarian arguments. If we review the argument we see that institutional arrangements should be structurally dependent on a conception of the common good, of that which is good for those who live within a political community. This argumentative shift will reveal what I consider to be the most important difference of the economic approach to distributive justice, namely the possibility of showing that taxes are practices with an internal good.

What do I mean by a practice? For this I will follow Alasdair MacIntyre's, for whom a practice is,

any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the results that the human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.⁶³²

Example of practices according to MacIntyre include a vast array of human activities in which the elements of the definition meet, such as, the 'arts, sciences, games, politics in the Aristotelian sense, the making and sustaining of family life'.⁶³³ I want to argue that taxation is a practice with an internal good in MacIntyre's sense. For this purpose I divide the argument into two. In this section, following MacIntyre, I discuss the

632. MacIntyre, *After Virtue*, 187.

633. *ibid*, 188.

relationship between practices with internal goods and institutions. In the next section, I argue that the internal good of taxation is recognition.

In *After Virtue* MacIntyre distinguishes between two kinds of good that can be related to human activities: internal and external goods.⁶³⁴ Internal goods have two characteristics: (a) they can only be specified by reference to the practice they are part of and (b) ‘they can only be recognized by the experience of participating in the practice in question’.⁶³⁵ These are ‘genuine goods’ because they are ‘ends worth pursuing for their own sake, if they are pursued at all’.⁶³⁶ External goods, on the other hand, are goods that obtain from participating in a practice because they are ‘externally and contingently attached’⁶³⁷ to the practice. In this sense, ‘[t]hese things are good only *qua* means to something further that is itself good’.⁶³⁸ MacIntyre’s example is of someone who wants to teach a child who is more interested in candy than in chess, how to play chess. One might offer money to buy candy for the child to first move him to play and then more every time that he wins. The teacher expects the child to acquire a ‘taste’ for the game so that he ends up playing not for money (to buy candy) but for the love of chess. In this example money and candy are external goods to the internal goods of chess, and the child might be willing to acquire them even by cheating. However, with time the expectation of the teacher is that the good in playing chess will be shown and realised so that the child comes to play chess because he likes it. Practices with internal goods require participation in the practice so that the person taking part learns about what is good within the practice. Each practice, or a group of similar practices, is distinguished from another practice or other practices by virtue of the internal good that characterises it or them.

To be part of a practice requires following the ‘standards of excellence and obedience to rules as well as the achievement of goods’.⁶³⁹ He who wants to participate in a practice has to acknowledge the rules and standards that define the

634. In a later book *Dependent Rational Animals*, MacIntyre adds a third kind of goods, namely, those related with human flourishing, goods that are goods for us *qua* human beings. These are the goods that allow us to order internal and external goods, *vid ibid*, 67. I will come to this later, *infra* 209.

635. MacIntyre, *After Virtue*, 188–189.

636. MacIntyre, *Dependent Rational Animals*, 66.

637. MacIntyre, *After Virtue*, 188.

638. MacIntyre, *Dependent Rational Animals*, 66.

639. MacIntyre, *After Virtue*, 190.

practice and be subjected to criticism accordingly. If I want to play football then I not only have to learn the rules of the game, but also how to play the game. This is, for example, something that characterises great football players. Maybe these players are not the best athletes around (the fastest, the better trained, and so on), but they know exactly where to stand in the field and they know how to ‘read the game’. The same applies in a different way to a good referee. A good referee not only has to memorise the rules of the game, but he also has to have some experience of playing football or at least some experience that allows him to distinguish between, for example, when to award an indirect free kick because a player ‘plays in a dangerous manner’ and when to award a goal scored with a ‘scissor kick’ when the defender’s head is close to the foot of the scorer. To take a more complex example, he has to know when to caution a player with a yellow card when several fouls are committed by different members of his team in the middle of the field as a tactic that falls within the remit of unsporting behaviour.

According to MacIntyre, a crucial difference between internal and external goods is that the latter, ‘when achieved [...] are always some individual’s property or possession’.⁶⁴⁰ This explains that the more an individual has of an external good the less there is for others to achieve. This may happen because of the nature of the good or it may happen contingently. This differentiates external goods from internal goods because even if there is competition to excel in obtaining such goods, ‘their achievement is a good for the whole community who participate in the practice’.⁶⁴¹ So when Messi plays for Barcelona not only does Barcelona win more championships, but the whole game of football is transformed. Barcelona’s achieving excellence in football implies that other teams will improve in their training, tactics, and so on.

However, assuming for a moment that football is a practice with an internal good, how are we to distinguish between an excellent football player and one who tries to achieve the external goods of professional football by winning no matter what? This is the point at which virtues become relevant. MacIntyre states that ‘every practice requires a certain kind of relationship between those who participate in it’.⁶⁴² According to MacIntyre, these relationships are defined by the goods we share or, in

640. *ibid*, 190.

641. *ibid*, 190–191.

642. *ibid*, 191.

other words, the virtues that define the practice. So if we follow MacIntyre then the internal goods of a practice are its virtues.

The way in which we share certain standards and purposes that characterise the practice defines the way in which we relate to each other. So, for example, acting justly requires that we treat everyone equally according to a certain standard. Justice requires that we do not treat two people differently in the same situation. The content of justice, what MacIntyre calls the ‘code of a practice’,⁶⁴³ may vary (such as if in the case of justice it requires merit or desert, for example) across different cultures or perhaps due to other factors, yet he affirms that practices cannot ‘flourish in societies in which the virtues were not valued’.⁶⁴⁴ MacIntyre does not say here that a vicious individual cannot perform brilliantly or greatly within a practice (such as, for example, a player scoring with God’s hand). What he is saying is that to be a great performer that individual needs virtues in order to learn how to perform (indeed, that same football player might have been inspired by other great football players) and that by being vicious he will deny himself the rewarding experience of achieving those goods (this might explain why that same football player might become an unsuccessful football manager).

For MacIntyre, practices should be distinguished from two other possible modes of acting in the world with which they can be confused.⁶⁴⁵ Practices are different from technical skills. Although technical skills are relevant for achieving the goods of practices they indeed lack some important aspects of practices. The ends and goods of practices change since they are an expression of the internal goods and the human powers that relate to them. In this sense, the ends and goals of a practice mutate because a practice has a history and its own development requires that it supersede that history. On the contrary, a technical skill has a limited use in relation to a particular fixed end. A technical skill changes either because it is not good for achieving a particular fixed end or because the end changes. However, here there is not any historical relationship with a tradition.

The second contrast occurs with institutions. MacIntyre argues that practices are different and should not be confused with institutions. This point is particularly

643. *ibid*, 193.

644. *ibid*.

645. In the next few paragraphs I follow *ibid*, 193–197.

important for the argument that I am trying to develop because my argument rests on the possibility of sustaining that taxation and tax law stand as practice and institution, respectively. Let me explain what the relationship between practices and institutions is for MacIntyre. There are two elements to this relationship. The first explains why practices and institutions can be confused and the second explains why they should be differentiated. Let me start with the features that differentiate the two. According to MacIntyre, practices are concerned with internal goods and institutions with external goods. This is quite a strong difference since MacIntyre states that institutions are ‘necessarily’ concerned with external goods, such as money, other material goods, the distribution of power, and so on. Because these are goods ‘no one can despise them altogether without a certain hypocrisy’; however, they are not virtues. This is because institutions are always competitive. But what differentiates practices and institutions from one another is something that simultaneously explains why they are closely connected. For MacIntyre, institutions are necessarily connected with external goods because they are the ‘bearers’ of practices. To be sustained over time practices require institutions. In this close relationship there also lies a risk. Practices may succumb to the ‘acquisitiveness of the institution, in which the cooperative care for common goods of the practice is always vulnerable to the competitiveness of the institution’.⁶⁴⁶

If I understand MacIntyre correctly then the external goods of institutions may be helpful in achieving and sustaining the internal goods of practices. However, and this is an important difference, with the mere instrumental justification of institutions provided by liberal individualism they are not merely explained because of those external goods. Institutions should be the expression of practices and this implies that they are also connected with the internal goods that characterise the latter. This is what I interpret MacIntyre as saying when he states that the ‘virtues are of course themselves in turn fostered by certain types of social institutions and endangered by others’.⁶⁴⁷ So in the particular case that I am interested in – the revision of the deficits of the contemporary theory of tax law in explaining tax avoidance – this has led me to question the existing institution. The way in which I have been doing this is by offering an understanding of the institution as connected with something that is good for the members of political communities. In the first section of this chapter I have

646. *ibid*, 194.

647. *ibid*, 195.

shown that this institution is not explained via instrumental justifications of taxation. What I am now in the position of doing is using MacIntyre's distinction between practices and institutions to search for the practice that underlies tax law or, to put it differently, to ask whether taxation is a practice with an internal good.

5. RECOGNITION, SOLIDARITY AND TAXATION

Up until this point of the argument I have offered an interpretation of equality as a political concept, attempted to rescue the political dimension of distributive justice by using Aristotle's ideas of general and particular justice and, with the help of MacIntyre's distinction between practices and institutions, shown that there exists a relationship between both institutions' external goods and practices' internal goods. I have arrived at these interpretations by trying to overcome the limits of liberal egalitarian and luck egalitarian theories of justice. But all these efforts would not make sense if I continued to work with the liberal conception of the rational individual.⁶⁴⁸

The plausibility of the alternative views that I am trying to develop here about political concepts and institutions rests on a different notion of human beings. This notion of human beings is more complex than the liberal atomistic approach, because it tries to bring together both the individual and social elements that characterise the life of individuals in modern societies. So, for example, we cannot assume the Lockean social contract interpretation of society according to which a rational autonomous individual enters into social life to protect its natural rights via a social contract. On the contrary, for the complex notion individuals are never isolated and are always part of a political community. Rather than being a rational individual who decides to enter into a contract, and here I paraphrase MacIntyre's ideas in *Dependent Rational Animals*, the individual can only develop his practical rationality as the product of a series of interrelated and complex processes within social relations and interactions. Needless to say, these scenarios of alternative notions of human beings qua individuals only became possible when the modern subject replaced the ancient idea of the human being as *zoon politikon* in communities in which everyone had a predefined position.⁶⁴⁹

The complex notion could be interpreted as an attempt to bring together the ancient idea of an ethical community with the modern notion of the individual.

648. *vid supra*, 59.

649. Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts*, 7–10.

There is not one dominant definition of the complex notion of the individual and indeed, on the contrary, different arguments have been provided. Among contemporary thinkers, and to mention but a few examples, MacIntyre argues that we can only flourish as human beings if we develop a certain kind of practical reason that stems from our dependent and vulnerable nature;⁶⁵⁰ according to Axel Honneth, who combines the theoretical Hegelian model of social struggles with Mead's social psychology, the possibility of becoming a fully autonomous individual depends on certain forms of social recognition;⁶⁵¹ finally, for Castoriadis, individual and collective autonomy cannot but be understood as a (the socialist) revolutionary political project (a project that rests on two previous historical moments in which institutions were questioned, namely ancient Greece and the end of the High Middle Ages in Western Europe).⁶⁵²

I cannot go deeper into the details of these theories here, not only because the intricacies and complexities of the arguments merit a specialised monograph, but also because it would take us away from the line of argument that I am putting forward. For the purpose of this argument it is enough to develop two points. First, to show how is it that according to these theories interaction with other individuals explains the way in which we might become autonomous subjects. In other words, the first task is to explain the idea of recognition. For this purpose I follow Honneth's social theory, to which I will also add some of MacIntyre's insights.⁶⁵³ Second, I explore the connection between taxation and recognition. Stated differently, the second task is to show that taxation is a practice with an internal good. This is a crucial argument for my thesis because it allows me to show that taxation has an intrinsic good and it is not

650. An argument he develops in MacIntyre, *Dependent Rational Animals*.

651. For Honneth's general account of this idea, *vid The Struggle for Recognition. The Moral Grammar of Social Conflicts*. *vid* also Anderson and Honneth, "Autonomy, vulnerability, recognition, and justice", where the authors criticise Rawls' conception of autonomy applying the structure of social recognition.

652. *vid*, Castoriadis, *The Imaginary Institution of Society*, 80ff; Castoriadis, *Philosophy, Politics, Autonomy. Essays in Political Philosophy*, 124–34; Castoriadis, *Figures of the Thinkable*, Ch5; Castoriadis, *A Society Adrift. Interviews and Debates, 1974–1997*, 3–4. For Castoriadis, revolutionary politics is 'a praxis which takes as its object the organisation and orientation of society as they foster the autonomy of all its members and which recognises that this presupposes a radical transformation of society, which will be possible, in its turn, only through the autonomous activity of individuals'. Castoriadis, *The Imaginary Institution of Society*, 77.

653. I do not develop Castoriadis' theory because it is highly dependent on psychoanalytical ideas and its connection with existing social arrangements would be too demanding to show the point I make.

to be justified merely instrumentally. There is a second reason as to why this is important for the argument of this thesis. If taxation has intrinsic value then I have solid ground to show why tax avoidance is (something more than a moral) problem.

Recent debates in political philosophy have rescued the term ‘recognition’ from Hegel’s *Phenomenology of Spirit*.⁶⁵⁴ Honneth, for example, develops his normative social theory by starting from Hegel’s early University of Jena works. Honneth takes from Hegel the theoretical explanation as to how identity formation depends on intersubjective recognition. According to this explanation human flourishing depends on different ethical relations, each of which is constituted through different struggles for recognition. Within this scheme, social conflicts are not mere expressions of individual interest, but they are a fight for the very possibility of becoming an individual. According to Honneth’s reading, Hegel provides a closed system of recognition that culminates in an ethical life (*Sittlichkeit*) that is too closely built in relation to existing institutions. Honneth argues that these two characteristics limit the application of Hegel’s theory of recognition in modern times because it requires an extremely substantive idea of the good and because it limits the possibility of extending the struggle for recognition to new social interactions outside existing institutions. Honneth tries to overcome these limitations by providing a formal conception of ethical life (*Sittlichkeit*) that works as an ‘appropriate tool for categorically unlocking social experiences of injustice as a whole’.⁶⁵⁵ The theory of recognition advocated by Honneth becomes a normative standard, according to which social institutions are constantly evaluated by individuals who, because of unjust existing institutions (and their legitimation principles), struggle for recognition.

654. For an informative review of Hegel’s ideas on recognition and its application to contemporary practical philosophy, *vid* Siep, “Recognition in Hegel’s *Phenomenology of Spirit* and contemporary political philosophy”. There is some debate in the literature about the origin of the term recognition. Siep, for example, argues in this paper that the concept is originally found in Fichte, although Hegel extends the application of the concept beyond direct intersubjective relations. In contemporary practical philosophy, Siep distinguishes three different uses that have been given to the term: (i) as mutual respect among autonomous persons, (ii) in the context of social psychology and philosophical research on the development of identity, and (iii) among different worldviews and cultures in multicultural communities (113–114).

655. Fraser and Honneth, *Redistribution or Recognition?*, 133. *vid* also Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts*, Ch9.

Following Hegel, Honneth identifies three ‘forms’⁶⁵⁶ or ‘spheres’⁶⁵⁷ of recognition. Each of these spheres represents a different stage in which a human being might become the subject of recognition. In each of these stages there are different modes of recognition and different content for recognition depending on the concept of the person to be found in each one. The different stages at which a human being can be the subject of recognition are: the individual, the person and the subject. The modes of recognition for each of these stages are: the family, the civil society and the state. The content of recognition for each of these spheres is also different. In the family the individual is recognised through an affective relationship that covers his concrete needs; in civil society the law recognises a person as an abstract legal person and therefore in terms of his formal autonomy; finally, in the state subjects are recognised according to their individual particularity as ‘concrete universals’ through solidarity.⁶⁵⁸ The end of these intersubjective stages of recognition, according to Honneth, is to achieve human self-realisation. Each of these stages contains ‘normative demands that are, structurally speaking, internal to the relationship of mutual recognition’.⁶⁵⁹ To reach this point Honneth has had to add to Hegel’s theory what he considers a ‘postmetaphysical naturalistic equivalent’ that can be found in Mead’s social psychology.⁶⁶⁰ The combination of these ideas gives a common ground to Honneth’s application of recognition as a social theory. This common ground is the claim that,

the reproduction of social life is governed by the imperative of mutual recognition, because one can develop a practical relation-to-self only when one has learned to view oneself, from the normative perspective of one’s partners in interaction, as their social addressee.⁶⁶¹

However, Honneth has to add a crucial element to show that these ideas can explain the way in which individuals struggle for recognition. This is the idea of disrespect, the ‘negative equivalents for the corresponding relations of recognition [that] enable social actors to realise that they are being denied recognition’.⁶⁶²

656. Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts*, 25.

657. Fraser and Honneth, *Redistribution or Recognition?*, 138.

658. Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts*, 25.

659. *ibid*, 92.

660. *ibid*, Ch4.

661. *ibid*, 92.

662. *ibid*, 93. Honneth fully develops these forms of disrespect in *ibid*, Ch6.

After this short introduction to Honneth's social theory, let me briefly describe the content of each sphere of recognition and its correlative negative equivalents. The first sphere is that of love. Love covers those 'primary relationships [...] constituted by strong emotional attachment among a small number of people'. This is the first stage of reciprocal recognition in which each individual recognises the other in terms of his or her most basic needs or, as Honneth reports, what Hegel describes as 'being oneself in another'.⁶⁶³ Here the paradigmatic relationship is that of the mother and child. This relationship starts immediately after birth as one of 'absolute dependency' between mother and child or, as Winnicott calls it, a stage of 'symbiotic togetherness'.⁶⁶⁴ The child develops its individuality through a complex separation with the mother. The baby learns to differentiate herself from the mother by being able to separate her needs from her mother's. The mother also learns to relate to the baby in a way in which she is able to provide security while at the same time distancing herself. In this process of mutual recognition both child and mother are able to relate to each other in terms through which they recognise their needs but at the same time they recognise each other as individuals. This relation of recognition can be understood as a 'communicative arc suspended between the experience of being able to be alone and the experience of being merged'.⁶⁶⁵ Therefore, in loving one 'recognizes in the other [...] only the other's individual independence' as it supported by reciprocal or 'shared concern'.⁶⁶⁶ Relations of love are essential to developing self-confidence.

Though substantively different from the one of love, the sphere of law is structurally identical to it. In this sense, 'we can only come to understand ourselves as the bearer of rights when we know, in turn, what various normative obligations we must keep vis-à-vis others'.⁶⁶⁷ The law puts us in the place of a general other. This understanding of law, or better of the legal system, as a space of recognition is only possible after modernity. Only then, once exceptions and privileges are no longer acceptable, could the legal system be understood as 'the expression of the universal

663. *ibid*, 95.

664. Winnicott, *The Maturation Processes and the Facilitating Environment: Studies in the Theory of Emotional Development*, 84–87. Cited by Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts*, 99.

665. Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts*, 105.

666. *ibid*, 107.

667. *ibid*, 108.

interest of all members of society'.⁶⁶⁸ In the modern legal system the law is the expression of an agreement among equal and free partners. According to Honneth, legal rights are the expression of this new form of recognition. Thus, '[i]n obeying the law, legal subjects recognize each other as persons capable of autonomously making reasonable decisions about moral norms'.⁶⁶⁹ With the transition to modernity legal rights became recognised in a universalistic fashion for members of political communities. So legal recognition is the recognition of the equal worth of persons in legal decision making, that is to say in autonomous ruling. Honneth executes a historical analysis to show how what started as a formal recognition of legal equality – with civil and political rights protecting negative liberty and political participation – has led to a more substantive conception of citizenship so that individuals can truly participate autonomously in civil society with social rights guaranteeing a certain level of welfare.⁶⁷⁰ The 'positive relation-to-self that legal recognition makes possible' is that of self-respect.⁶⁷¹ This is the product of every individual becoming responsible for his or her own decisions while sharing with everyone else the conditions that make autonomous decision making possible. I develop self-respect by respecting the decisions of others who respect my decisions.

The last sphere of recognition is solidarity, which positively provides self-esteem. In this final stage the development of an undistorted relation-to-self comes back to the individual, this time however as part of a kind of 'social esteem that allows [individuals] to relate positively to their concrete traits and abilities'.⁶⁷² The evolution of this notion of self-esteem is also historically dependent. Thus, in the ancient world, self-esteem was dependent upon the position that corresponded with the individual in a pre-ordered society. In modernity, Honneth argues, social esteem has come to be determined according to the 'dominant conceptions of ethical goals in a society'.⁶⁷³

668. *ibid*, 109.

669. *ibid*, 110.

670. *ibid*, 110–121. In this historical description of the evolution of rights, Honneth follows T. H. Marshall's very influential work. *vid*, Marshall, "Citizenship and Social Class". Honneth does not mention two very important theoretical building blocks of these ideas, specifically, Rousseau's transformation of man into citizen after the social pact, *vid* "The Social Contract", Ch6, and Marx's critique of the rights of man as the right of the bourgeois, *vid* "On the Jewish question".

671. Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts*, 118.

672. *ibid*, 121.

673. *ibid*, 122.

The sphere of social-esteem prizes those differences that the law does not consider for recognition because of its universality. In other words, these are differences that we should all recognise in other individuals. This historical evolution,⁶⁷⁴ as explained herein, has led to solidarity in a form in which each member of different social groups 'knows himself or herself to be esteemed by all others to the same degree'. According to Honneth, members of these groups share a value horizon 'in which each participant learns to recognize the significance of the abilities and traits of the others'.⁶⁷⁵ Individuals develop self-esteem because they are in a position to refer to themselves via those achievements that the group considers to be valuable. For Honneth these are solidaristic relations because our shared goals can be realised only if I care actively for the development of the other's characteristics, even if they are foreign to me.⁶⁷⁶

The normative force of Honneth's social theory of recognition requires an ethical framework, an ethical life or *Sittlichkeit*, according to which the forms of recognition are oriented. Honneth tries to set his conception of ethical life between a Kantian universal morality and the substantive ethos of a concrete political community. He therefore offers a formal concept of ethical life and one that explains the ways in which the structures of recognition can provide the social conditions for self-realisation. In this task he considers it inevitable that we start from the forms of recognition related to love. To repeat, these are the forms that allow individuals to develop self-confidence. Honneth considers these to be necessary for 'every type of self-realization'.⁶⁷⁷ While initially in *The Struggle for Recognition* he was unable to see that these relations are also open to redefinition, he later argues that they might be redefined through the requirements of new forms of care.⁶⁷⁸ The other two forms of recognition should be adjusted to fit our contemporary forms of social interaction. In this sense, Honneth argues that opening up these forms of recognition to their historical evolution is the right path to follow. This movement maintains the formal structures of recognition while at the same time allowing for their redefinition by social struggles of recognition. Thus, for Honneth, the law should continue to develop in 'the direction of increased consideration for the particular circumstances of the

674. Details of which can be found in *ibid*, 122–128.

675. *ibid*, 128.

676. *ibid*, 129.

677. *ibid*, 176.

678. Fraser and Honneth, *Redistribution or Recognition?*, 144–147.

individual without losing their universal content'.⁶⁷⁹ The biggest problem for Honneth is how to provide for a substantive but not fixed horizon of common interests as required by solidarity. This problem has increased with the continuous exacerbation of the individual proper of modern forms of capitalism. Honneth does not provide an answer to this problem (at least not in *The Struggle for Recognition*)⁶⁸⁰ but trusts that it might be solved through future struggles for recognition.⁶⁸¹ In this way, Honneth's theory of recognition is always ready to explain the ways in which new social movements' struggles for recognition require changes in any of the spheres of recognition without, at the same time, a systematic closure by identifying with any of these demands.⁶⁸²

MacIntyre is more dramatic than Honneth regarding this last point. He actually thinks that 'neither the modern nation-state nor the modern family provide the kind of political and social association needed' to sustain those virtues that we require to flourish as rational human animals.⁶⁸³ However, there is a very important point that stands in common between Honneth and MacIntyre. They both develop their ideas from a conception of the good through which individual autonomy depends on the autonomy of others in interaction.⁶⁸⁴ True, MacIntyre does not develop his argument in terms of recognition, but his argument in *Dependent Rational Animals* rests on intersubjective relations upon which human flourishing depends. In *Dependent Rational Animals*, MacIntyre calls these the virtues of 'independent rational agency' and the virtues of 'acknowledged dependence'. In this sense then both theories have in common an important teleological aspect since both theories aspire to the realisation of our humanity.

679. Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts*, 177.

680. Because of the way in which his work has evolved, he will very probably address this issue in a soon to be published (in English) book: *Freedom's Right. The Social Foundation of Democratic Life*.

681. Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts*, 179.

682. Honneth argues for this interpretation of his theory in his response to Nancy Fraser's critique in Fraser and Honneth, *Redistribution or Recognition?*, 110–137. This allows him to incorporate demands for redistribution in the grammar of the struggles for recognition without limiting recognition to redistribution (or for this purpose any other social demand).

683. MacIntyre, *Dependent Rational Animals*, 9. The argument is fully developed in *ibid* Ch11.

684. For Honneth's point *vid*, Fraser and Honneth, *Redistribution or Recognition?*, 259.

To the two different kinds of good referred to above in section 4, namely internal and external goods,⁶⁸⁵ in chapter seven of *Dependent Rational Animals*, MacIntyre adds a third kind of good. These goods are those that make possible human flourishing. These are goods that are good for us *qua* human beings. Through these goods we learn to think as human beings. According to MacIntyre, what distinguishes us from other dependent animals is that we think in a particular way since we are rational animals capable of developing practical reasoning:⁶⁸⁶ ‘Human beings need to learn to understand themselves as practical reasoners about goods, about what on particular occasions it is best for them to do and about how it is best for them to live their lives’.⁶⁸⁷ In this sense, without these goods we cannot distinguish between internal and external goods.

MacIntyre argues that to become practical reasoners we are necessarily dependent on others. In his words, ‘[t]o become an effective practical reasoner is an achievement, but it is always one to which others have made essential contributions’.⁶⁸⁸ The contribution that the other makes is directly related to our animal dependency. What differentiates us in this sense from other animals, according to MacIntyre, is that we have memory and from birth to death are in different positions regarding dependency; we begin receiving care, we learn to behave as carers and we will have to care for others in some point of our life. Or we even learn to behave according to what is expected of us by depending on what others can teach us. This happens when, for example, we engage in a particular existent practice. To return to the football example, we have to learn what it means to be a good football player and we only learn this by engaging with others. This is what MacIntyre means when he says that,

There is no point [...] in our development towards and in our exercise of independent practical reasoning at which we cease altogether to be dependent on particular others.⁶⁸⁹

Moreover, MacIntyre convincingly argues that because we are part of these networks of relations what we give will at some point depend on what we receive. Neither what

685. *vid supra*, 183.

686. MacIntyre, *Dependent Rational Animals*, Chs.1–6.

687. *ibid*, 67.

688. *ibid*, 82.

689. *ibid*, 97.

we receive nor what we give can be measured by strict reciprocity. This happens either because we might have to give to one from which we did not receive or because we might have to give much more to someone from whom we have received less.⁶⁹⁰ Here MacIntyre makes an interesting point about certain relationships of giving and receiving in institutionalised contexts. These are, according to MacIntyre, certain ‘relationships without which I and others could not become able to achieve and be sustained in achieving our goods. They are constitutive means to the end of our flourishing’, although they also have an oppressive face proper of institutions and their connection with external goods.⁶⁹¹ Here it is important to note what MacIntyre means by ‘means to the end of our flourishing’. He does not assume the mere instrumental approach I criticise earlier in this thesis. This is an instrumental approach in which the instrument becomes constitutive of the end, as he argues, going back to Aristotle.⁶⁹² Therefore, there is a necessary connection between the way of doing something (the means) and the end, because the means is part of a whole. In the example given by MacIntyre, making a particular move in a game of chess is a means for playing chess. MacIntyre continues his argument by showing how social networks of giving and receiving rest on a group of particular virtues. These are the virtues of ‘independent rational agency’ and the virtues of ‘acknowledged dependence’. But I will not describe the content of these virtues since this exceeds my point.

So, how do these ideas come together in the analysis of taxation as a practice? With the help of Honneth’s ideas about struggles for recognition and MacIntyre’s ideas of our mutual dependency, we are in the position of being able to say that our development as human beings is conditioned by social interactions. To develop as human beings to our full capacity we depend on others and the complex social networks that we build with those with whom we interact. The sphere of love – or the first stages of our animal dependency – establishes the ways in which we are to relate to others in our early life regarding our concrete needs. As important as this space is for basic self-esteem it is not the main concern of those practices that come to be institutionalised. The spheres of recognition that closely relate to practices and institutions are those of law and solidarity. So, if I am looking for a justification for

690. *ibid*, 99–102.

691. *ibid*, 102. At this point, recall what was said *supra*, 183.

692. *ibid*, 106.

taxation as a practice within this scheme then I need to find the good in that practice (this would provide the foundations for that practice to become an institution). I think that there are good reasons for saying that taxation is one such practice, either by adopting Honneth's formal conception of the good or MacIntyre's substantive conception of human flourishing.⁶⁹³

What kinds of reasons do we have for having taxation? In chapter three I extensively argue that the reasons for having taxation cannot be mere instrumental reasons.⁶⁹⁴ Now we have another reason for explaining why they cannot be mere instrumental reasons: the kinds of goods that an instrumental conception of taxation is related to are the kinds of goods that MacIntyre calls external goods. But these external goods are not enough for explaining the persistence of taxation. Even more so, and as I have argued before, the mere instrumental approach to taxation rests on a poor understanding of our humanity. It assumes that we live our lives as market agents who engage in 'cooperative' interaction since it is rational to do so (recall the Dworkinian individual who buys insurance). Or as MacIntyre puts it,

Each participant [...] must have good reason to believe that maximization constrained by rules governing access to and engagement in cooperative bargaining with others will afford her or him more of what she or he wants than will unconstrained maximization.⁶⁹⁵

The mere instrumental justification of institutions therefore denies the connection that exists between our social arrangements and interactions, as well as the ways in which they transform our lives. What the mere instrumental justification denies is precisely the point that Honneth and MacIntyre put forward, that the possibility of our full development as individuals is a collective enterprise. The mere instrumental justification of taxation thus denies the very idea of our mutual dependency. This is still a very general affirmation. I will try to be more specific by further developing the relationship between taxation and (spheres of) recognition. For this purpose the two logical spheres of recognition would be the law and the state. However, as I am not yet

693. Note however that this is not what a liberal would call a moral conception of the good. MacIntyre is not concerned with a substantive conception of the good life, but what is good for us as the kinds of beings that we are.

694. *vid supra*, 123ff.

695. MacIntyre, *Dependent Rational Animals*, 114.

concerned with the institutionalisation of taxation in tax law I will leave this analysis for the next chapter.

What we know as taxation deals with the ways in which goods are distributed among members of a political community.⁶⁹⁶ As stated in previous chapters, taxation is an important aspect of our living together since it secures the material conditions that make possible our living together. Taxation in this sense cannot but be understood as part of a historical evolution in which recognition through law and the state have made possible the full development of self-realization. In this sense, taxation is part of ethical life and an essential practice for solidarity. It is one of the ways in which we realise the demands of recognition at the level of the state. To use Honneth's terms, the good in taxation is self-esteem. A possible objection to this idea is that I still have to show that taxation is not a contingent good, that it is not a possible good for a particular community at a particular time. This objection would advance allowing the following lines: defining the good in these terms limits us to existing practices as we know them, or as Nancy Fraser would put it, I would be falling into a 'dogmatic attachment to the Keynesian-Westphalian frame'.⁶⁹⁷ I can think of two possible answers to this objection. The first is the same answer given by Honneth to Fraser's criticism in their exchange about redistribution and recognition. This answer rests on one of the central theoretical elements of the critical theory tradition, specifically the claim that there is transcendence in the immanent.⁶⁹⁸ One of the central characteristics of critical theory is that it starts from existing institutions, as we know them, in order to subject them to constant criticism. This explains that institutions as we know them are open to constant extension and redefinition. Or, in the different terms previously articulated, it requires us to adopt a pessimistic approach toward existing institutions, while at the same time being positive about the underlying political ideals. So situating taxation as a practice in the sphere of solidarity does not mean accepting the contingent institutionalisation of the practice as it exists, namely as tax law. On the contrary, the idea is to explain the historical transformation of that practice – in light of its evolution and the demands associated with it from the perspective of

696. *vid supra*, 55ff.

697. Fraser, *Scales of Justice*, 37.

698. Fraser and Honneth, *Redistribution or Recognition?*, 238–248.

solidarity.⁶⁹⁹ Thus, starting from practices as we know them does not restrict our possibilities; on the contrary, it guides new debates in light of the sort of relevant good.

This leads us to the second possible answer. This answer requires us to show that taxation is a practice in which there is a good that is good for us *qua* human beings. Applying MacIntyre's ideas, this would mean that in taxation we find a good that allows us to flourish as human beings, that is as animals able to fully develop practical reason. More precisely, taxation would have to be a practice in which we can learn about the virtues of 'mutual dependence'.⁷⁰⁰ Of course, it would be a mistake to read within this that taxation is the practice through which we learn about such virtues. This would be equivalent to saying that it is the only practice or a practice that includes all those virtues. My claim is more modest. I think it is enough to show that taxation is a practice where we have the possibility of learning these virtues. As such, this possibility defines our best explanation and understanding of that practice. But just as MacIntyre argues, the achievement of those virtues requires a network of practices and different communities in which the individual develops his or her life. We have to distinguish this potentiality for the virtues with another possible problem, in other words, that the practice is institutionalised in such a way that it makes impossible this reading. Indeed, part of the difficulty in accepting an interpretation of taxation such as the one that I propose rests in the way in which taxation has been institutionalised in contemporary Western capitalist countries. This explains in part why it is seen as an oppressive institution. The institutionalisation of taxation, as justified under the mere instrumental justification combined with existing neoliberal market economies, produces an explosive result in which there is no possible space for solidarity or the virtues of mutual dependency. Each is supposed to understand oneself as an isolated monad (a God or an animal in Aristotelian terms) that competes for external goods against other monads.

As stated at the beginning of this section, once it has been shown that taxation is a practice with an internal good, we have good reason for explaining why tax avoidance is problematic. The advantage of this approach is not simply that we have a better systematic explanation for tax avoidance, namely one that depends on the

699. For the idea of a historical justification and explanation *vid*, Taylor, "Explanation and practical reason".

700. MacIntyre, *Dependent Rational Animals*, Ch10.

definitions adopted. This would be a superfluous advantage obtained only by fiat. The advantage of the interpretation I argue for is that it allows us to better understand the social complaint and indignation levelled against companies and individuals engaged in tax avoidance. Through a combination of the ideas developed above, if taxation is a practice that relates to those goods that are part of our mutual dependency, then the indignation concerning and the reason why tax avoidance is so problematic is because taxation becomes the site of a struggle for recognition, a struggle that solidarity demands. Tax avoidance stops being a moral problem ascribed to individuals; it is a problem of disrespect. In this sense, tax avoidance shows a lack of recognition for those with whom we share the 'ethical life' in the state. But the denial of recognition that comes from tax avoidance is even worse since it can become a problem of reification. In Honneth's terms, reification is 'the process by which we lose the consciousness of the degree to which we owe our knowledge and cognition of other persons to an antecedent stance of empathetic engagement and recognition'.⁷⁰¹ Consequently, through this process of 'amnesia', as Honneth calls it, we lose the correct perception of the expressions of others, we lose the capacity to be affected by them.⁷⁰² We lose, that is to say, the cognitive ability to understand that our 'cognition owes its existence to an antecedent act of recognition'.⁷⁰³ This is what happens in cases of tax avoidance because we engage in a practice in which we have completely lost the elements of recognition embedded in it. In this case we do not see the internal good in taxation but only its external good. Moreover, I would say that in cases of tax avoidance we also lose the sense in which private property is justified in terms of recognition. He who engages in avoidance does not see how his property depends on it being recognised by others. He denies recognition in private property by accumulating more than that which corresponds. Other individuals hinder his property and they become mere obstructions to his impulse of accumulation.⁷⁰⁴

To sum up the ideas in this section, taxation is a kind of practice that constantly reminds us of our mutual dependency. In this sense, it is a practice with an internal good since it brings us closer to the recognitory virtues of mutual

701. Honneth, *Reification: A New Look to an Old Idea*, 56.

702. *ibid*, 58.

703. *ibid*, 59.

704. In this I follow Honneth's ideas about the social sources of reification, *vid ibid*, 75–85.

dependency. Tax avoidance shows a lack of respect to others with whom we share our dependency and carries the risk of reification. However, we still have to add a further argument in order to explain why taxation is just this kind of practice. So the question is why do we do what we do through taxation? The answer to this question highlights the relationship between private property and taxation. To this I turn in the next section.

6. TAXATION AS PRIVATE PROPERTY OR PRIVATE PROPERTY AS TAXATION

If the argument has been successful so far then I should have been able to show that taxation is a practice with an internal good. But taxation is not a practice that stands alone in the world, it is part of a complex network of practices and it is particularly related with one of these, namely private property.⁷⁰⁵ Here it is relevant to recall the discussion made in section 3.2 of chapter two about the relationship between private property and taxation according to the classical paradigm of tax law.⁷⁰⁶ According to this paradigm, private property is a natural right that can be limited only to the acceptance of the owner. This justification of private property explains, to an important extent, that the justification and justice of taxation is linked to public expenditure for the protection of natural rights and is distributed according to the benefit principle. Yet in contemporary political societies and legal systems it is almost unanimously accepted that this justification of private property rests on a previous decision about the system of property allocation to be adopted. That is, there is not one system of property justified *per se* according to considerations that are different from political decisions.

If we follow Jeremy Waldron then the concept of property is ‘the concept of a system of rules governing access to and control of material resources’.⁷⁰⁷ This system might be configured under different alternative forms for allocating those material resources. The most commonly known systems are private property, collective property

705. I am not concerned here with the particular content of the right of ownership in any particular legal system. My concern is with the concept of property and its possible justifications.

706. *vid supra*, 67.

707. Waldron, *The Right to Private Property*, 31.

and common property,⁷⁰⁸ but there may be others that our institutional imagination may allow for.

So private property is one of the possible systems for allocating property. Furthermore, the justification for this system can also vary. There may be utilitarian or consequentialist justifications, such as Hume's,⁷⁰⁹ or deontological or rights-based arguments.⁷¹⁰ Rights-based arguments are those that justify a right to private property through the protection of an individual interest considered to be of such importance that it holds 'others (especially the government) to be under duties to create, secure, maintain, or respect an institution of private property'.⁷¹¹ If we follow Waldron's analysis, there are two different kinds of rights-based justifications: (i) special and (ii) general.⁷¹² A special-rights (SR) based argument is an 'argument which takes an interest to have this importance not in itself but on account of the occurrence of some contingent event or transaction'. A general-rights (GR) based argument is one that 'attributes that importance to the interest itself, in virtue of its qualitative character'.⁷¹³ According to Waldron, these justifications have important differences, particularly regarding redistribution. Because of its dependency on the contingent event or transaction on which it depends, a SR-based argument is less permeable to redistributive concerns. On the contrary, a GR-based argument would justify redistributive policies.⁷¹⁴ In the first, the possibility of redistribution depends on the specific way in which the SR is to be acquired; if there is not any conformity with these conditions then there is more space for redistribution. In the second, redistribution is part and parcel of the GR since private property is understood to be something that everyone should have. If Locke's theory of property presents a paradigmatic case of a SR-based argument, Hegel's is the paradigmatic case of a GR-based argument. The right to private property in the latter case would be a necessary

708. *ibid*, 37–42.

709. Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, 42. For the difference between utilitarian and rights-based considerations in justifying private property, *vid* Waldron, *The Right to Private Property*, 73–78.

710. Waldron, *The Right to Private Property*, Ch3, and Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, 42–45.

711. Waldron, *The Right to Private Property*, 115.

712. *ibid*, 115–117, in general Ch4.

713. *ibid*, 116.

714. *ibid*, 440–441, 444.

component of recognition, that is the objectification of the subjectivity of an individual in the world.⁷¹⁵

Waldron does not give reasons for preferring any of the possible alternatives for justifying a right to private property as an SR-based or GR-based argument. He just describes the various possible alternatives given by different theorists. He is certainly right in saying that politicians and theorists should have a clear idea of these different alternatives since they entail different implications for the particular configurations of the right to private property that are normally not considered.⁷¹⁶ However, he does not give us much help in addressing the relationship between taxation and private property. He only gives us an indirect idea when he says that each of these justifications is differently exposed to redistribution.

Murphy and Nagel address this issue directly. They generalise Waldron's point by saying that any definition of private property is conventional. Therefore, its specific content and justification depend not only on a decision about the justification of that particular right, but on a theory of distributive justice of which decisions about taxation constitute an important part. Their argument therefore turns Waldron's point about redistribution on its head; private property cannot be the standard against which we measure redistribution because whatever private property we have, it is a creation of the tax system. Murphy and Nagel argue that the relevant question here is not what part of my property can the government take, but how should the tax system decide about the public/private division of the social product?⁷¹⁷ In their words, 'the issues of taxation are not about how the state should appropriate and distribute what its citizens already own, but about how it should allow ownership to be determined'.⁷¹⁸ This would give way, Murphy and Nagel argue, to political arguments about what kind of distributive justice we want to have in a particular political community. However this may be, Murphy and Nagel still have not answered the problems that derive from their paradox.⁷¹⁹ Remember that according to this paradox anything able to perform the function of taxes might be considered a tax. The definition they provide about private

715. Hegel, *Elements of the Philosophy of Right*, §§41f.

716. Waldron, *The Right to Private Property*, 444–445.

717. Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, *passim* and Ch9.

718. *ibid*, 176.

719. *vid supra*, 148.

property confirms the paradox because even if they are saying that the definition of private property depends on taxation, what they are really saying is that the definition of private property will depend on the definition of the theory of distributive justice adopted. So they seem to be arguing for a much more radical idea than the one they are willing to support. This radical idea is that private property and taxation are conceptually inseparable. This is, for example, exactly what they do when they say that

the main problem of socioeconomic justice is [that] [a] capitalist market economy is the best method we have for creating employment, generating wealth, allocating capital to production, and distributing goods and services. But it also inevitably generates large economic and social inequalities [...]. [I]t is [...] important to find ways of limiting the damage of the inevitable losers in market competition without undermining the productive power of the system.⁷²⁰

From this quote I understand that Murphy and Nagel are subordinating taxation to a redistributive function, rather than accepting the necessary consequence of the radical idea that they suggest (that private property is constitutively linked with taxation).

I believe that the reason why Murphy and Nagel cannot accept the radical consequence that underlies the conventional approach to private property is to be found in their liberal background; or, to be more specific, the atomistic conception of man characteristic of the liberal tradition.⁷²¹ How is it that ‘the productive power’ of the market system can be undermined? Within the liberal tradition this would happen whenever an individual sees that there is no point in producing more wealth because they cannot benefit directly from the accumulation of that wealth. But this is precisely the point that is undermined if we adopt the conception of man introduced in the previous section of this chapter.⁷²²

The intersubjective development of the subject, or the possibility of our flourishing as human beings, requires that we recognise rights when this is needed for our self-respect. The right to private property is this kind of right. If we follow Hegel, it is a right that grants us space for the objective expression of our subjective will in the world. Waldron says that this has consequences for redistribution. I would rather say that this has consequences for the amount of property we can accumulate. This

720. Murphy and Nagel, *The Myth of Ownership. Taxes and Justice*, 181.

721. Taylor, “Atomism”.

722. *vid supra*, 188.

definition of the right to private property has an intrinsic limit: the recognition of private property for others. If we assume, along with Murphy and Nagel, the conventional nature of private property, then this limit implies that taxation is constitutive of private property. This is the radical consequence of the argument: taxation is a constitutive aspect of private property. Private property and taxation are two faces of the same coin.

However, if this is so then two other important consequences follow. The first is that we do not have any need to justify redistribution. What we call redistribution will become a necessary consequence of recognising a conventional right to private property. Redistribution (affecting private property in order to modify a previous distribution) should be a constitutive consequence of private property; we will have a constant allocation of goods under a conception of 'ethical life'. This makes perfect sense in the scheme that I describe above, namely one in which taxation is an expression of solidarity in a structure of distributive justice as part of general justice. This leads to a second consequence that is crucial to the legal form that taxation should adopt once it is institutionalised in tax law. If we take Murphy and Nagel's idea seriously, that is, that the definition of private property depends on taxation (and taxation is not justified on mere instrumental grounds), the obligation to pay taxes can be explained on new grounds. The obligation to pay taxes will no longer depend on the will of an individual, but on the objective existence of the right of private property. Each individual, to whom a right of private property is recognised, will have the duty to pay taxes. Or in terms concurrent with the content of this chapter, the duty to pay taxes cannot be justified in mere instrumental terms; it will be part of private property. With this argument I expect to have offered a better understanding of taxation than the one of the classical paradigm of tax law. In the next chapter I explore an alternative to the contemporary general theory of tax law.

CHAPTER FIVE. TAX LAW AS A TELEOLOGICAL INSTITUTION

1. INTRODUCTION

In this chapter I argue for the institutionalisation of taxation as a practice, applying and expanding on some of the ideas and arguments contained in the previous chapter. My aim is to provide an explanation of tax law as a teleological institution. This task requires showing that tax law can constitute the institutionalisation of taxation as a practice with an internal good (and that this requires more than establishing or creating ‘a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like’).⁷²³ To fulfil this task I distinguish between teleological and merely instrumental institutions as two different kinds of institution. Institutions of the first kind mediate between political ideals (the transcendental) and political action (the immanent).⁷²⁴ These institutions perform their mediating role by embodying the conception of the good contained in the underlying practices they are based on to achieve a superior good (their ‘telos’). Hence, within immanent conditions teleological institutions always aim for their telos. This means that the telos of these institutions sets a direction of movement according to which the immanent is subject to critique, rather than defining a state of affairs to be achieved. Thus characteristically, teleological institutions do not have the task of achieving a particular state of affairs. By state of affairs I understand the allocation of certain kinds of goods, rights and duties, powers and immunities to people, which obtain from an institution understood as a public system of rules. This is the main difference between teleological and merely instrumental institutions. Merely instrumental institutions lack any transcendental dimension and are designed to bring about a particular state of affairs. They are designed as technological instruments and as such are evaluated according to their achievements. As will become clearer later in this chapter, these institutions are exclusively functional. This kind of institution is functional for political ends, understood as a fixed and achievable state of affairs. This does not mean that

723. Rawls, *A Theory of Justice*, 47.

724. In this I follow some of Claudio Michelon’s ideas about political institutions. Michelon characterises political institutions as mediating between political ideals and political action in Michelon, “The Public Nature of Private Law?”. However, as I explain later in this chapter, my conception of teleological institutions varies from Michelon’s conception of political institutions, *vid infra*, 209ff.

teleological institutions do not bring changes to the immanent. However, the kind of change that they bring is different, that is, they can change the way in which we relate to each other rather than a state of affairs defined exclusively according to a public system of rules. Hence, teleological institutions are the kinds of institution that can achieve political or relational justice. In other words, they fit the conception of distributive justice as political justice advocated for previously in chapter four.

There is not any place in contemporary political philosophy for teleological institutions; this makes the task of explaining some of their characteristics more difficult. To overcome this, I start this chapter by revising the telos in tax law (section 2) and I then attempt to provide a definition of teleological institutions (section 3). Later, I endeavour to show that modern law can be a teleological institution (section 4), and for this purpose I defend a distinction between teleological and exclusively functional institutions (sections 4.1. and 4.1.1) and show the limitations of adopting a functional conception of the law (section 4.1.2). Finally, to fully characterise teleological institutions I leave behind contemporary political philosophy to draw upon political theology as an alternative perspective that can provide further insight (section 4.1.3). In this section I argue that teleological institutions are the secularised version of their equivalent theological concept, viz. the sacraments.

By the end of the chapter (section 4.2) I explore the way in which a general theory of tax law might benefit from the ideas developed herein. In particular, how these ideas provide criteria by which to adopt a substantive interpretation of tax law. For this purpose I examine notions of ‘law’s aspiration’ and ‘legality’ or the ‘ethics of legalism’, as developed by Zenon Bankowski and Neil MacCormick.

2. THE TELOS IN TAX LAW

In chapter four I argue in favour of a political conception of distributive justice based on the Aristotelian structure of justice.⁷²⁵ Within this Aristotelian framework the content of distributive justice rests on a previous political decision. Structurally then, distributive justice depends on the political definitions that belong to general justice. This conception of distributive justice explains better than the economic conception of distributive justice the way in which equality should work as a political ideal, that is,

725. *vid supra*, 176.

as part of the political definitions of general justice.⁷²⁶ I also provide the substantive political ideal that defines the content of general justice, namely mutual recognition. By bringing together Honneth's ideas of recognition and MacIntyre's ideas about the good, I try to show that the internal good of taxation as a practice is solidarity. I finish chapter four by showing that within the modern political project of collective autonomy, taxation and a general right to private property are constitutively mutually dependent.

Notwithstanding the arguments and conclusions arrived at in chapters three and four, I have not yet provided an explanation for the institutionalisation of the practice of taxation in tax law. The main problem here is to show that tax law is able to embody the good of taxation. The risk is losing this good by assuming that tax law is a mere instrument by which to achieve the ends of the practice of taxation. This would imply falling back onto liberal egalitarian and luck egalitarian understandings of taxation and tax law as mere instruments.⁷²⁷ Or, to paraphrase MacIntyre, the danger is that the institutional embodiment of taxation as a practice might focus exclusively on its external obscuring its internal good. Hence, to avoid this risk or danger I need to explain the way in which tax law can embody the internal good of the practice of taxation, that is to say, how tax law can be conceived of as having intrinsic value. To develop this explanation I introduce a distinction between two kinds of institution: teleological and mere instrumental (or exclusively functional) institutions. Showing that tax law has intrinsic value requires an adoption of the teleological conception of institutions. According to the teleological conception, institutions are not mere instruments, tools or technological devices designed to achieve an end. Teleological institutions do not operate in this form because rather than bringing about a particular state of affairs their role is to mediate between the immanent and the transcendental.

3. TELEOLOGICAL INSTITUTIONS

In chapter four I utilise MacIntyre's distinction between internal and external goods to develop an argument that shows that taxation is a practice and that its internal good is mutual recognition.⁷²⁸ This is a first necessary step in offering an explanation of

726. It also explains why the logic of the market denies the equal political standing of citizens.

727. *vid supra*, 130ff.

728. *vid supra*, 183ff.

taxation alternative to the merely instrumental justification I identify in liberal egalitarianism. Here I further develop MacIntyre's distinction and ideas to argue that tax law is the institutionalisation that makes possible the persistence of that practice.

Let me very briefly return to MacIntyre's distinction between internal and external goods; I would like to clarify its relationship in relation to a second distinction made between practices and institutions. Internal goods are goods that can only be specified by reference to the practice they are part of; they can only be recognised by experiencing them within the practice and they are pursued for their own sake. On the other hand, external goods are a necessary concern of institutions (and only contingently attached to practices); they can normally be achieved and experienced outside practices and they exclude others because they are always someone's property or possession. According to MacIntyre's definitions, external goods are not goods per se. They are so, that is they are goods, 'qua means to something further that is itself good'.⁷²⁹ This definition sets a condition for the relationship between institutions and the good because external goods will only be goods if they are 'means' to the good in itself. Therefore, the condition that needs to be satisfied is connecting an institution with a telos (with this 'further that is itself good'). To summarise, the relationship between institutions and the good is contingent; it depends on identifying a further good to which the external goods of the institution are 'means'. In more general terms, institutions might have a telos so long as they are 'means' for the good. On the contrary, they will not have a telos if they are not 'means' for the good.⁷³⁰ In conclusion, external goods will be goods so long as they are attached to teleological institutions. Institutions, therefore, are important for the good because they stabilise and bring continuity to practices, but at the same time they imply a risk because they make the 'further' good unstable. This instability means that rather than fostering the practice and its underlying good, they can destroy both of them.

From the analysis of the preceding paragraph I would like to put forward the following idea: teleological institutions have to be transitive between the goods of

729. MacIntyre, *Dependent Rational Animals*, 66.

730. *vid infra*, 228ff.

practices and the goods of human flourishing.⁷³¹ Here I would like to distinguish two senses in which an institution might be transitive.⁷³² The first I call a general level and the second, a particular level. An institution is transitive at the general level when the universe of rules from which it is composed is able to embody, as a whole, the good of the practice. An institution is transitive at the particular level when each of its rules is open to redefinition by appealing to the good of the practice. This second sense, the particular level, should be discarded because it makes it almost impossible to coordinate conduct and this is one of the most important reasons for having institutions. Rules would be continuously open up to redefinition according to the substantive content of the institution and would not make any difference in practical reason for those participating in the institution. On the contrary, at the particular level institutions should exclude the reasons that justify the institution as a whole. If they do not then they would be nothing but putative or apparent institutions. This does not mean that the application of rules within teleological institutions should be blind to the institution's telos. At the general level, transitivity requires that those who have to apply particular rules are open to the best possible interpretation of those rules according to the institution's telos. At the same time however, that telos restricts the possible interpretations of those particular rules in light of the institution's telos. So the telos works both as the substantive openness and substantive closure of possible interpretations.⁷³³

However, teleological institutions are not supposed to be, and nor could they be, the perfect embodiment of the good. There are two characteristics of teleological institutions that explain why they cannot be a definitive embodiment of the good. The first characteristic is their transcendental dimension and the second, their immanent dimension. Their transcendental dimension derives from their connection with the telos. The telos presents itself as an image of the future and as such is open, that is to say, we can move toward it or away from it.⁷³⁴ MacIntyre combines this connection between an uncertain future and the telos with the idea that human actions are only

731. As argued *supra* Ch4s5, 188ff, these goods are independent.

732. The distinction that follows is inspired by Rawls' distinction between two different conceptions of rules, namely, the summary and the practice conception of rules. *vid.*, Rawls, "Two concepts of rules", 33–40.

733. I come back to these ideas *infra*, 248.

734. MacIntyre, *After Virtue*, 215.

intelligible within a historical narrative.⁷³⁵ This gives him ground to affirm that if our individual lives are to make sense, or if we describe our actions as those of a good lawyer, doctor, academic, or any other that implies assuming a role,⁷³⁶ we must understand ourselves as part of a tradition. Because of this combination between the historical and the teleological:

What I am, [...], is in key part what I inherit, a specific past that is present to some degree in my present. I find myself part of a history and that is generally to say, whether I like it or not, whether I recognize it or not, one of the bearers of a tradition.⁷³⁷

The tradition is important because it ‘grounds’ the telos. History provides an important direction, orienting present actions to a telos that is in part contained within the historical evolution of the tradition. It is important not to mistake the sort of transcendentalism I am presenting here for either a certain kind of ‘religious’ idea about the future – one that does not connect us with the present – or for the idea of the transcendental as the normative foundation of our moral order as pertaining to an eternal time.⁷³⁸ In this ‘religious’ sense transcendentalism would be disconnected from the immanent and of no use to criticism. The transcendental aspect of institutions is derivatively connected with its religious origin, but the way in which I interpret MacIntyre’s ideas about it is similar to the way in which this idea is part of ‘the legacy of Critical Theory’s left-Hegelian[ism]’, as Honneth argues.⁷³⁹ According to this legacy, institutions are to be understood as containing ‘inner-social transcendence’.⁷⁴⁰ In this context, Honneth argues that ‘the real challenge of [this] tradition is being able to show that such reference points – such demands – are not the result of contingent

735. *ibid*, 204–218.

736. For the idea of role, *vid ibid*, Ch3, 27–32.

737. *ibid*, 221.

738. *vid*, Taylor, *A Secular Age and Modern Social Imaginaries*.

739. Fraser and Honneth, *Redistribution or Recognition?*, 238–239.

740. One good reason that might explain this connection between MacIntyre and the left-Hegelian tradition is their connection with Marxism. On MacIntyre’s ideas about Marxism and Christianity and the way in which these traditions connect the present and the future, *vid* MacIntyre, *Marxism & Christianity*. ‘Only one secular doctrine retains the scope of traditional religion in offering an interpretation of human existence by means of which men may situate themselves in the world and direct their actions to ends that transcend those offered by their immediate situation: Marxism’ (2).

conflict situations, but rather express the unmet demands of humanity at large'.⁷⁴¹ In this sense, the transcendental is not only an unfulfilled ideal but also the 'normative potential that re-emerges in every new social reality because it is so tightly fused to the structure of human interests'. As Honneth explains, the transcendental is attached to an existing 'form of practice or experience which is on the one hand indispensable for social reproduction, and on the other hand [...] points beyond all forms of social organisation'.⁷⁴² So the transcendental aspect of teleological institutions explains why they cannot be perfect, that is, because they have a seed of change within them (and not because they cannot fulfil a 'religious' standard). Their transcendental dimension explains how the force of constant critique moves the existing institution, as we know it, towards its full realisation.

Someone might object to this conception of teleological institutions by arguing that they cannot be part of the modern world and, particularly, contemporary political societies. For this critic teleological institutions can only have a place in an ancient world in which a substantive definition of the good is presupposed and heteronomous. On the contrary, there would be no place for teleological institutions in plural contemporary secular societies. Hence, for example, in contemporary societies institutions cannot have a teleological dimension even within comprehensive liberalism.⁷⁴³ Let us take the example of Rawls' perfect procedural justice. According to Rawls institutions are the subject of justice and, as such, they are instruments. This is what characterises the liberal 'positive' approach to institutions.⁷⁴⁴ For the 'positive' approach existing institutions are important so long as we can effectively realise political values through them. A liberal like Rawls would argue that if we were not able to achieve a state of affairs that works as a justified goal – that is, according to

741. Fraser and Honneth, *Redistribution or Recognition?*, 243–244.

742. *ibid.*

743. Here I am thinking of Rawls' argument as contained in *A Theory of Justice*. In this book Rawls advocates a conception of justice as fairness characterised by proceduralism. Dworkin's liberalism is more problematic for the characterisation made in the body of the text. Dworkin defends a substantive conception of liberalism according to which institutions and the good life are defined. Dworkin's substantive version of institutions, however, is not radically open to the future as a liberal framework always provides its closure. To put it in other terms, he does not have a telos based on the good (for human flourishing, as in MacIntyre, or for solidarity, as in Honneth) but his theory is functional to American political liberalism. I will come back to this discussion when analysing the functional approach to the law. *vid infra*, 233.

744. *vid supra*, 117ff.

justified political values – the problem is mainly due to the defective design of institutions. Remember what was stated in chapter four about equality as a value.⁷⁴⁵ For those who defend a mere instrumental justification of institutions, once the political value is justified, it works as an end to be achieved. According to this conception of institutions, that is, the merely instrumental one, there is no dependency between the institution and the value but a merely instrumental contingent connection. There is no dependency, that is, because the content of the end is fixed; it will not change according to the way in which institutions condition our existence. Vice versa, the end does not provide any critical standard by which to criticise and reform our existing institutions other than efficiency in achieving their goal. If these institutions are not able to achieve an end, as the technical tools as they are considered to be, a better tool should replace them. Institutions and political values are understood to be independent from one another and the relative importance is assigned to the value (this is why it is expressed as a value).⁷⁴⁶ The value's substantive content might expand to cover several institutions and become of more value than other values. In this scheme there is no communication between institutional reality and the underlying justification of the value. Contrary to what happens in teleological institutions, the future is not open but limited to the effective achievement of the value and it is not contained in existing practices, since these are merely instrumental. Furthermore, the mere instrumental approach to institutions does not consider them to be connected with a history. They are understood merely as contingent historical arrangements.⁷⁴⁷

One possible answer to this specific argument put forward by the positive critic to the teleological conception of institutions, is to show him that the good is neither as rigid as he assumes it to be and neither it is imposed from the “outside”. This possible answer would have to show, first, that the good is not a value but that it is what I call in the previous chapter a political ideal. This implies that a sort of metaphysical standard does not rigidly fix the content of the good, because it is open

745. *vid supra*, 168ff.

746. *vid Schmitt, La Tiranía de los Valores*.

747. An example of this approach can be found in Pierre Rosanvallon's *Democratic Legitimacy. Impartiality, Reflexivity, Proximity*.

to political definition.⁷⁴⁸ Another argument with which to answer the critic comes from what I point out earlier as one of the relevant characteristics of teleological institutions, namely that they are part of what MacIntyre calls a ‘living tradition’.⁷⁴⁹ To be part of a living tradition means that the institution is set within a historical narrative. Being part of a historical narrative has the consequence that bringing together the past and the future of the tradition changes the present. Consequently, teleological institutions move toward the good as a result of the constant revision of the good and its institutional expression. In MacIntyre’s words,

[A]n adequate sense of tradition manifests itself in a grasp of those future possibilities which the past has made available to the present. Living traditions, just because they continue a not-yet-completed narrative, confront a future whose determinate and determinable character, so far as it possesses any, derives from the past.⁷⁵⁰

Teleological institutions do not, therefore, yearn for a past that was lost with modernity. On the contrary, as stated before, I understand them as bringing the past and the future together to change the present. This explains that the transcendental aspect of teleological institutions can only be understood as part of a narrative within a living tradition. In this sense, the transcendental aspect of teleological institutions cannot be properly understood without bearing in mind their second characteristic, namely their immanence.

The second characteristic of teleological institutions is their immanent dimension. This characteristic of teleological institutions highlights their connection with politics and history. Teleological institutions have something in common with merely instrumental institutions: they are ways to help produce political decisions about what should be done in concrete cases. In this sense, they depend on political power and the material conditions that exist in a determinate place and time. The immanent character of teleological institutions is what makes them part of modern imaginaries according to which we are the ones that autonomously decide about what we are to do.⁷⁵¹ The immanent in this sense highlights that institutions are directly

748. For a similar idea, *vid* Atria, “La verdad y lo político (i): La verdad y su dimensión constitutiva” and “La verdad y lo político (ii): Democracia y ley natural”.

749. MacIntyre, *After Virtue*, 222.

750. *ibid*, 223.

751. Taylor, *Modern Social Imaginaries*.

connected with human life, as we know it.⁷⁵² Notwithstanding that they are both political institutions in the sense described earlier, there is an important difference between them. Teleological institutions differ from mere instrumental institutions in that their immanence is historical. It is not just that they deal with this world as it is, but that they have a history within it. Therefore, teleological institutions do not respond to the mere instrumentalism of functional logic because they are part of an order that ‘must also be able to explain historically how normative changes and improvements in the forms of social organization have come about’.⁷⁵³

The way in which I have been trying to characterise teleological institutions has a very close connection with Claudio Michelon’s non-liberal conception of political and legal institutions. According to Michelon, from a non-liberal perspective, political institutions, of which the law is a species,⁷⁵⁴ mediate between the transcendent and the immanent ‘in the sense that they offer mechanisms that help answer the question about what should be done in concrete cases, while still pointing to an ultimate meaning that lies beyond them’.⁷⁵⁵ On the other hand, from the liberal perspective institutions are understood in an instrumental way, ‘as tools to purge private vice collectively, either by effectively building better people [...] or by providing mechanisms that make private vice work for the benefit of the public good.’⁷⁵⁶ From Michelon’s non-liberal approach, institutions create a space for political discussion about the meaning of communal life and political action by insulating the discussion from the ‘pressures of deciding what to do here and now’.⁷⁵⁷ Michelon’s characterisation of political institutions has consequences for the law. According to him law has a claim to connectedness. This means that law is normally presented by political authority as being in the interests of all and not just a particular faction of society. In this sense, a political decision presents itself as an interpretation of truth and

752. Taylor, *A Secular Age*.

753. Fraser and Honneth, *Redistribution or Recognition?*, 245.

754. Michelon, “The Public Nature of Private Law?”, 196–197.

755. *ibid.*, 196. In “The public, the private, and the law”, Michelon provides a different definition. He says that ‘law must be understood as a mediating institution, positioned between the struggle towards the *arché* of politics (which includes a raised consciousness of the ultimate meaning of political life), and the pressing need to act – to carry on in the absence of the fulfilment of that quest’ (92–93). True, Michelon is talking here about the law as a mediating institution, but he makes it synonymous with political institutions in general as is clear from the text in the body.

756. Michelon, “The Public Nature of Private Law?”, 196.

757. *ibid.*

this is characteristic of all factions that put forward a political agenda. Hence, ‘a claim to truth cannot differentiate one proposed policy or legal regulation from another in and off itself’.⁷⁵⁸ I understand that Michelin is trying to make a conceptual point about law, namely that it necessarily has a claim to connectedness. This is substantively equivalent to Aquinas’ claim that law is intrinsically connected with the common good, as Michelin argues. In the latter’s words, law’s claim to connectedness means that ‘all members of a particular political community have an interest in the flourishing of everyone else, whether they acknowledge it or not’.⁷⁵⁹ Michelin offers an argument to show that substantively, ‘at a deep level, law is an expression of the intrinsic connection between the realisation of each member of the relevant community’.⁷⁶⁰ In other words, if law were used to secure the interests of a faction of society, it would not be law. Or as Michelin puts it, ‘there is a philosophically meaningful awkwardness in using the law to destroy policies that embody that connection’.⁷⁶¹ For Michelin this awkwardness comes from the fact that those who advocate for an individualist approach to law and politics conceptually claim through law that this sort of policy goes in the interests of all.

As stated previously, there is a difference between my conception and Michelin’s conception of political and legal institutions. Although we agree on describing political institutions and the law as mediating between the immanent and the transcendental, we differ in the extent to which we assume that legal institutions would work in the common interest. The difference is that I would add to Michelin’s ‘conceptual’ claim about the law that there should also be space for substantive demands that aim for the common good within the law. Correctly identifying the substance of the institution would also give space to distinguishing between those who claim to represent the general interest and those who appropriate institutions for their interest. These substantive criteria would imply that it would be perfectly acceptable to say of those who are in the latter position that they do not understand what they are doing when referring to the institution. Hence, if Michelin expects his criterion to be directly concerned with institutions per se, he must include a substantive criterion to

758. *ibid*, 197.

759. *ibid*, 198.

760. *ibid*, 199.

761. *ibid*.

distinguish between those institutions that ensure the interests of all from those putative institutional arrangements. My point is that the kind of argument according to which institutions mediate between the transcendental and the immanent requires not only a formal approach but also a substantive one.

For the purpose of my argument, Michelin's conception of political institutions helps me to emphasise by contrast that my conception of teleological institutions includes a substantive aspect. In the way in which I define them above, teleological institutions provide a better idea of how these institutions are connected with political concepts. In this sense, teleological institutions are a different kind of institution from those institutions that fulfil mere instrumental functions. As stated previously, merely instrumental institutions do not relate to the superior good and, therefore, the external goods they serve are simply that: external. This is not just a minor philosophical detail. The difference is important for political purposes. The teleological conception of institutions that I am trying to delineate provides a clearer space for political criticism. It provides us with a criterion to distinguish between those institutions that are an expression of the common interest and those that represent factional interests. It also gives a better account of the difference between political ideals and political values. Or to put it in different words, there is a categorical difference between instrumental and teleological institutions that should be acknowledged in a conceptual enterprise concerning institutions. Let me exemplify how this would work when evaluating policies. I will use a tax policy example to show how the teleological conception of institutions allows us to distinguish between teleological institutions and merely instrumental institutions.

A very prominent debate in contemporary tax policy revolves around the question of which tax base should be chosen for direct taxation.⁷⁶² There are two main positions regarding this issue. The first alternative is to tax according to (one among various possible definitions of) income, and the second, according to consumption. How can we distinguish which of these two alternatives is the real expression of taxation and tax law? In this debate it is recognised immediately that these alternatives express some 'equity issues', namely that one of them comes closer to what a just system should be. The substantive interpretation of taxation that I defend in this thesis

762. For details about this debate, *vid Meade, The Structure and Reform of Direct Taxation. Report of a Committee chaired by Professor J.E. Meade, Ch3.*

becomes relevant in this kind of problem as the decision about which of the two alternatives should be chosen depends on the underlying conception of taxation. As already argued, according to the teleological conception of taxation those who have property have a duty to pay taxes and this duty is part of what mutual recognition requires. On the other hand, arguments from an economic efficiency standpoint have completely different criteria upon which to base the decision. From the economic perspective the following reasons recommend the adoption of a consumption base: (i) it is difficult to acutely define what income is; (ii) 'it taxes what a person takes from the economic production system rather than what he puts into it'; (iii) it provides more opportunities for enterprise and taxes heavily those who consume and dissipate wealth; and (iv) 'it avoids problems arising from the distinction between earned income and investment income'.⁷⁶³ But the reasons for adopting this consumption base are not innocuous; they are the expression of a particular conception of taxation that could be included within the classical paradigm of tax law.⁷⁶⁴ According to this conception of taxation, taxes are necessary for financing public expenditure but they should not affect economic efficiency; they should be neutral between the income and the substitution effect, they should reflect vertical and horizontal equality, be aware of possible international effects on capital flowing from jurisdictions with high tax rates to those with lower tax rates, should have a low cost of administration and compliance, and should be flexible to economic changes and stable in time.⁷⁶⁵ Based on these standards those who adopt the economic perspective recommend the adoption of the consumption base for direct taxation. This tax base allows individuals to accumulate capital to invest or save as they wish without paying direct taxes. Direct taxes would only apply when these individuals decide to consume. So here we see a conception of taxation according to which there is no connection between property and taxation, rather, individuals have an 'incentive' to accumulate capital. Notice that the difficulty is not that the state will face financial problems; establishing a high tax rate can solve this. The problem, rather, is that it is assumed that taxation has a merely instrumental function. How are we to decide which of the tax bases should be chosen? The teleological conception of institutions I am arguing for provides us with a substantive

763. *ibid*, 44. For arguments about how this tax could be applied, *vid ibid* Ch8.

764. *vid supra*, 58.

765. Meade, *The Structure and Reform of Direct Taxation. Report of a Committee chaired by Professor J.E. Meade*, 7-22. *vid*, Stiglitz, *Economics of the Public Sector*, Ch17.

definition of what taxation should be and therefore will provide us with substantive criteria to say that a direct tax with a consumption base would not be taxation at all. This implies that tax law cannot be designed in such a way that private property is assumed to depend exclusively on a labour-like theory of property or, in more general terms, a theory of private property based on Lockean grounds. Notice how this conclusion is different from that which Michelin would have to arrive at following his notion of law's claim to connectedness. Michelin would have to say that, even if they do not know it, those who choose the consumption base would be under an institutional arrangement that makes claims to connectedness. This conclusion seems to be a denial of the purpose that those who defend these policies would have, that is, to deny that private property depends on mutual recognition. In sum, Michelin's argument implies denying political differences by assuming that political and legal institutions subject those who appeal to them to the claim to connectedness. This does not seem to me to be a sound conclusion. Rather, I would say that those who do not agree with teleological institutions, that is, institutions that aim for mutual recognition, should assume that they cannot claim to be talking of the same institutions. In the example discussed here, those who opt for the consumption base tax would have to assume that they do not know what taxes are because they consider them to be equivalent to exactions. This shows an important political difference between those who consider that we are part of a political community, in which mutual recognition is relevant because we are all of equal moral worth, and those who consider that each of us is entitled to what each achieves in the market with no concern for those who have no fortune in it.

4. CAN LAW BE A TELEOLOGICAL INSTITUTION?

So far I have argued that institutions can be teleological so long as they mediate between the transcendental and the immanent or, in other words, so long as they embody practices with internal goods. What remains to be explained is whether (and how) law might be one of these institutions. This is an instance of the general problem of how to conceive of the good in pluralist societies. What makes it particular is that the question is now asked about an *institution*. The general problem can then be rendered specific in the question of whether (and how) teleological institutions might have a place in contemporary pluralist societies. As we saw above, teleological

institutions are the embodiment of the good. They are part of what is good for us as members of political communities and as such they are part of the common good. This concern with the common good is, of course, one of the characteristics of natural law theories within the Aristotelian and Thomistic traditions. Earlier I argued that mutual recognition is part of the common good and that taxes are practices of mutual recognition. Is this enough to show that tax law can be a teleological institution? This is a difficult question and MacIntyre's answer to it lacks in subtlety: in our contemporary political societies it is not possible to appeal to a common good.⁷⁶⁶ For MacIntyre, advanced modernity brought with it a fragmentation of the good between my good and what is good for others.⁷⁶⁷ According to him, a characteristic of contemporary societies is that we are to choose what is good for us in individual terms. Moreover, he considers that contemporary attempts to update natural law with cultural modernity have failed.⁷⁶⁸ Thus, if we were to follow MacIntyre, teleological institutions could not be part of what is good for us because of the moral disagreement characteristic of modernity.

MacIntyre's pessimism leads us to a dilemma: should we accept that we live under oppressive heteronomous⁷⁶⁹ institutions because there is moral disagreement in modernity? Do we have any alternative? Contrary to what MacIntyre argues there are good reasons that show that our political institutions rest on an aspiration to commonality and the common good.⁷⁷⁰ One of the best reasons for explaining the aspiration to commonality is precisely that such institutions are part of the law. Let me briefly develop this idea. One of the facts that liberal political theorists tend to disregard is the fact that from the very moment we are born we are members, and are

766. MacIntyre, *After Virtue*, Ch18. *vid* also, MacIntyre, *Dependent Rational Animals*, Ch13.

767. MacIntyre, "Theories of natural law in the culture of advanced modernity", 109ff.

768. *ibid*, 93ff. According to MacIntyre, this is the case of intents such as the ones from Neil McCormick, Ernst Weinrib, Michael S. Moore, Germain Grisez and John Finnis.

769. In my interpretation of MacIntyre, institutions will be oppressive as opposed to emancipatory because, following Atria, we see 'the other's interest as opposed to one's own'. Atria, "Living under dead ideas: Law as the will of the people", 121. At the same time, again in my interpretation of MacIntyre, institutions are heteronomous because they are instruments for someone's will. All this is consequence of MacIntyre's pessimism about moral disagreement: we are subject to another's will as there is no way in which I can be sure that that will is also mine because there is no common moral ground. I do not share MacIntyre's pessimism for the reasons provided in the main text.

770. In this part of the argument I expand and modify the application scope of some ideas and arguments I developed as a criticism of Zenon Bankowski's *Living Lawfully. Love in Law and Law in Love* in Saffie, "Fulfilling the law by breaking it? Formalism within legality".

part of, a political society that we did not choose to join.⁷⁷¹ At the same time, one of the main characteristics of being part of a community is to be subject to the law, or as Herbert McCabe has put it, '[t]o be subject to law is to be a member of a community; law is, if you like, the bearing of the community as such on its individual members'.⁷⁷² So there is not one moment in which autonomy could be understood as being outside of the world that exists (and will continue to exist) with the independence of our will. If one tries to explain political arrangements from a starting point that assigns overwhelming weight to the claim that autonomy is what truly matters, one would necessarily be denying our mutual dependence and vulnerability.⁷⁷³ That is the truth of communitarianism (or a certain version of it): a better starting point in an attempt to explain our political arrangements is to assume that the individual is a social creation and that autonomy can be politically relevant only when it is part of a political project aiming at mutual recognition.⁷⁷⁴ How can we avoid heteronomy if we come to a world that is pure heteronomy? Here is where the law has something to say in modernity. The main characteristic of modern law is that it stopped being the expression of another's will or of the *logos* of the world. In other words, in modernity the law stopped being heteronomous. In modern times the law is the autonomous creation of the people; the law is the expression of the general will or of the will of the people. Two important modern political ideas conflate in this understanding of the law. The first is concerned with determining what constitutes 'the people';⁷⁷⁵ the second, with the possibility of identifying and determining the content of the will of the people as what goes in the interests of all. Both ideas address the problem of explaining how the universality of the law can come to terms with individual freedom.⁷⁷⁶ We are now in a position to return to Michelon's idea that law has a claim to connectedness. This time however, his idea will not be interpreted as a conceptual

771. Walzer, *Politics and Passion. Toward a More Egalitarian Liberalism*, Ch1, and Arendt, *The Human Condition*.

772. McCabe, *Law, Love and Language*, 36.

773. *vid supra*, 188ff.

774. Castoriadis, *The Imaginary Institution of Society*, 77.

775. Fernando Atria has very convincingly argued that the law allows us to identify people and not the other way around. This argument has the consequence that the people is politically constituted and identified through the law, thus avoiding any naturalistic conception of the people that might lead to totalitarian consequences, *vid Atria*, "Living under dead ideas: Law as the will of the people".

776. *vid*, Pelczynski, "Political community and individual freedom in Hegel's philosophy of state"; Taylor, *Modern Social Imaginaries*, Ch13; and, Laclau, *On Populist Reason*, Ch4 and Ch5.

claim. If it is not interpreted in conceptual terms, the differences between my position and his position disappear. We would agree that law has a claim to connectedness and I would like to argue further that this will remain so as long as the law is understood as the will of the people or the expression of the general will. Yet to argue that law has a claim to connectedness is not enough to answer to MacIntyre's pessimism. This conception of the law needs to be complemented with a certain kind of institution oriented toward realising the common good. My claim is that these institutions are teleological institutions.

The teleological nature of the institution we call law is often made opaque to us for reasons that are closely related to MacIntyre's scepticism about the impossibility of law embodying the common good. Modern law is the result of a political process; hence we cannot assume that teleological institutions will be the necessary product of that process. There is no reason to assume that the political process and therefore political institutions cannot be appropriated to promote the interests of a faction (as in non-democratic countries) or even used to implement policies designed to benefit a particular group of society in economic terms (as we have seen neoliberal policies do).⁷⁷⁷ This is equivalent to saying that we cannot be sure that institutions will embody the underlying practices and their goods. The antidote to this problem, and to MacIntyre's scepticism, is to provide the best understanding of political institutions (in the way I have been trying to do in this thesis with taxation and tax law). Thus, what we need to make explicit is the connection between political institutions, the law and the common good. In this task the political concept of representation has a lot of work to do. Representation is the political concept that tries to bring together the general and the particular will/interests. It is through the concept of representation that my will can be contained in the general will.

For this purpose it is helpful to look at what Gillian Rose says about political representation. In *Mourning Becomes the Law: Philosophy and Representation*, Rose builds her argument by showing how the polarisation of the political debate between liberals and communitarians has left individuals subject to either 'the arbitrariness of the "libertarian" individual, and the arbitrariness of the "communitarian" interest

777. This could be read as part of the criticism that I make above about Michelon's conceptual claim about the law's claim to connectedness.

group'.⁷⁷⁸ For Rose, the abandonment of the universal by making it synonymous with 'totalitarian', and at the same time the attempt of liberating the individual or the community from domination, 'disqualifies both the libertarian and the communitarian [...] from any understanding of the actualities of structure and authority, intrinsic to any conceivable social and political constitution and which their opposed stances still leave intact'.⁷⁷⁹ What is needed is to build a third category that is able to relate the two opposites. This third category is, according to Rose, the universal. Only through the universal can we recognise the 'devastation between posited thought and posited being, between power and the exclusion from power'.⁷⁸⁰

Rose adds further complexities to this diagnosis of the shortcomings of the liberal/communitarian (false) dichotomy. She argues that we will never find a clear answer for the content of the categories and their relation, so that we can only 'mourn' this loss. For Rose, 'mourning' is the process of not letting go; 'mourning becomes the law' because we can only live in this uncertainty, constantly redefining the boundaries between the three categories.⁷⁸¹

According to Rose, the universal – that is, the law – is neither the 'superior term' nor the 'symbolic', but the 'middle' that falls 'towards or away from mutual recognition' that is 'formed or deformed by reciprocal self-relations'.⁷⁸² But as we shall never achieve mutual recognition in the law, we mourn and rediscover politics, that is, 'the risk of action arising out of the negotiation of the law'.⁷⁸³ We thus come closer to finding an answer to the question about the relationship between political institutions, the law and the common good. We are starting to understand that politics and the law do not stand in polar opposition to the individual. However, we know that the 'middle is broken', that we shall not find certainty in the universal. Here is when political representation becomes relevant as the place of the 'broken middle'. Only political representation can ensure that the inescapable universal consequences of political action are considered as such by those in power. Political representation 'understands

778. Rose, *Mourning Becomes the Law: Philosophy and Representation*, 4, 15–16.

779. *ibid*, 4.

780. *ibid*, 10.

781. *ibid*, 11–12.

782. *ibid*, 75.

783. *ibid*, 85.

all agents *in power and out of it*, to face the dilemma of asserting this moral will solely to guard their particular interest'.⁷⁸⁴ At the same time, it is only representation that can allow us to understand that law should also be an institution of the 'middle.' Only through representation does the law become *my* law; the law that I apply to myself is the law that someone else applies to him/herself. To put it in terms of what Fernando Atria has called 'a dead idea'; this political understanding of the law is the way in which the law is an expression of the will of the people (of the general will).⁷⁸⁵

So the law is part of the political aspect of our lives; that is, the law is not a particular but the general will. If the law is not part of the general will then relations of power become opaque to the critique of the citizen and, at the same time, for those who do not take part in the process according to which the law is defined, it becomes more and more distant from mutual recognition. So any political theory concerned with freedom and autonomy should assume that we are born into and become part of different groups, in which we have not chosen to be a part. In other words, we cannot avoid being born into, then being part of and subject to, structures of power into which we never freely decided to be born into or to belong to. The law, therefore, should be understood in its connection with the general interest, as this is the only way in which we can ensure that everyone can be heard in an unavoidably alienated world:

For politics does not happen when you act on behalf of your own damaged good, but when you act, without guarantees, for the good of all – this is to take the risk of the universal interest. Politics in this sense requires representation, the critique of representation, and the critique of the critique of representation.⁷⁸⁶

In politics, our particular interests can only appear through representation as an expression of the general interest. Or in Rose's words, '[p]olitics begins not when you organise to defend an individual or particular or local interest, but when you organise to further the "general" interest within which your particular interest may be represented'.⁷⁸⁷ To summarise, representation is a necessary aspect of law in modernity

784. *ibid*, 62.

785. Atria, "Living under dead ideas: Law as the will of the people", *passim*.

786. Rose, *Mourning Becomes the Law: Philosophy and Representation*, 62.

787. *ibid*, 4.

because it makes possible political autonomy, that is, that the law is *my* law even if I do not agree with its content.

We still have to address the problem of how are we to determine the good in contemporary societies if there is no common moral framework to which to appeal. Part of the answer to this problem is developed by showing that political representation has the task of making autonomous law possible. So we have a political concept that permits each of us to be the author of the law through political participation and political critique.⁷⁸⁸ But we still have to answer the question concerning the content of the law. How can we know if its content is part of the good? To answer this question the work of Cornelius Castoriadis is particularly helpful. Castoriadis's analysis of the institution of society shows how institutions can only be understood as part of the 'project of social individual autonomy'.⁷⁸⁹ This project in turn underlies what he calls the political 'project of radical democracy';⁷⁹⁰ that is, the attempt to achieve mutual recognition. As a project it aims to achieve mutual recognition through the 'autonomous action of people and at establishing a society organised to promote the autonomy of all its members'.⁷⁹¹

According to Castoriadis, society is instituted as a consequence of the work of the radical imaginary. One aspect of the radical imaginary is that it is social-historical. The 'social imaginary' is what 'in the social-historical is positing, creating, bringing into being'.⁷⁹² It is in the European or Greco-Western tradition where we find the seeds of the radical imaginary as the founding of philosophy and democracy.⁷⁹³ This is

788. Notice that I am not saying here that this mechanism is perfect or that it does not come under scrutiny. On the contrary, representation has always been a debated political concept and as a political paradigm its bases have been in question with special intensity during the last decade because of the advocacy of new political arrangements that go beyond the Westphalian state. These intents, however important, have not yet been successful enough to explain the kind of problems that I am dealing with in the body of the text. For an argument showing the exhaustion of the paradigm of representation and its institutional arrangements, *vid* Rosanvallon, *Counter-Democracy. Politics in an Age of Distrust*. For a seminal intent to explain the post-sovereign state, *vid* MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*. For an intent to apply these ideas to legal theory, *vid* Walker, "Out of place and out of time: law's fading co-ordinates".

789. Castoriadis, *The Imaginary Institution of Society*, 94.

790. *ibid*, 77.

791. *ibid*, 95.

792. *ibid*, 369.

793. *ibid*, 93.

important, according to Castoriadis, because it is only through this social-historical consciousness that societies can become autonomous. Otherwise, they are heteronomous societies: societies in which the individual is absorbed by institutions and does not have the disposition to contest them.⁷⁹⁴ This project made possible the calling 'into question, in words and in deeds'⁷⁹⁵ the institutions that constitute the social. This is the way in which what is instituted is open to constant transformation. Following Castoriadis, the law is the primal institution of society, without which society cannot exist. For a society to be autonomous it has to accept that its laws are given by itself 'without the possibility of alluding to any non-social basis, to any norm for its norm, to any measure of its measure',⁷⁹⁶ and 'without the possibility of resorting (except by deluding itself) to some non-social source or foundation'.⁷⁹⁷ For Castoriadis, the law has two aspects: it is both instituted and institution. This means that at the same time that the law makes possible the existence of society it also makes possible action, that is, our doing. Within this schema we make sure that the law is our law and, at the same time, that if we want to change it we are not subject to any external norm.

Therefore, once the law is the product of an autonomous society committed to the project of radical democracy, there is no epistemological certainty about the good. On the contrary, an important aspect of the political project of modernity is that we are open to the constant possibility of changing our institutions according to our social imaginaries. We become the authors of our own law. Does this mean that we shall not be able to solve our political disagreement, that we cannot achieve a common ground for the good? Maybe MacIntyre is right in this (but, does not the fact that we are discussing this point go against his argument?); however, it seems to me that we have to learn to live with this uncertainty. What helps us in dealing with it is precisely that we have historically established institutional arrangements according to which we can overcome those limitations. In this sense, political and legal institutions help us in being conscious of the limits of the world we live in. In this particular case, that we cannot assume the existence of a clearly identifiable content of the good. However,

794. *ibid*, 94.

795. *ibid*, 93.

796. *ibid*.

797. *ibid*, 94.

political and legal institutions do aspire to what can be considered the modern good, that is, the project of achieving mutual recognition. Otherwise institutions would be nothing but oppressive and heteronomous.

Before analysing the differences between teleological and functional institutions, let me very briefly take stock of the argument developed so far. I start by defining teleological institutions as mediating between the immanent and the transcendental; I also argue that transcendence has to be understood as aiming at mutual recognition and for this purpose teleological institutions have to be transitive to the good of the practices they embody. Then I apply this definition of teleological institutions to show that the law can be such an institution even in advanced contemporary societies. I provide two arguments to sustain this conclusion. First, that in modernity law identifies and expresses the content of the will of the people and that as long as political representation operates, the will of the people is autonomous. Second, I argue that the good in contemporary societies is defined politically and that teleological institutions are committed to the radical democratic project of modernity that implies achieving autonomy through mutual recognition.

4.1. Are teleological institutions functional?

In the previous section I deal with a possible objection against teleological institutions: that they do not have a place in advanced modernity. I expect to have shown that law is a teleological institution and that for this to be so we have to bear in mind law's political justification, according to which the notion of the law as the will of the people has an important role to play. There is, however, a second possible objection to the teleological conception of institutions. According to this objection, teleological institutions would not be different from functional institutions. Hence, teleological institutions would be fully equivalent to functional institutions and they would not bring any further insight to our understanding of institutions. In functional terms, the teleological conception of institutions defended here could be stated as:

- Tax law is established in contemporary political societies because it facilitates the distribution of private property; or,
- Tax law has an internal good because it facilitates mutual recognition.

Trying to answer this possible objection is particularly important in law, as some influential legal theorists advocate that law is of a functional kind or that it can be better understood as having a point or purpose.

Before analysing the difference between teleological and functional institutions I would like to introduce a distinction between functional explanations and saying that something is functional (including both natural and conscious functions,⁷⁹⁸ and expressed as ‘what *the function* of something is’).⁷⁹⁹ The distinction is relevant because here I am trying to make a point not about the former but about the latter. Functional explanations, as possible explanations of certain consequences or events in the world, can be understood as answering what G. A. Cohen has called a why-question (‘Why it is the case that *p*?’).⁸⁰⁰ In this sense, functional explanations explain that something has occurred. This is why Cohen says that ‘reference to the effects of a phenomenon contributes to explaining it’. According to Cohen, there is a ‘*special* type of causal explanation advanced in these and like instances, deriving its peculiarity from generalisations of distinctive logical form’.⁸⁰¹ Cohen makes an important point in distinguishing between making a functional explanation and attributing a function to a thing. Hence, it would be logically possible to have a functional explanation of a phenomenon without attributing a function to the explanandum. In logical terms then, a functional explanation is able to answer any why-question: ‘It could explain why a certain event occurred, why a particular thing has a certain property, why something regularly behaves in a certain manner, and so on, without restriction’.⁸⁰² I am not concerned here with functional explanations defined in this way, because I think Charles Taylor is right when he says that there would be no difference between them and teleological explanations as explanations of the form ‘in-order-to’.⁸⁰³

What I am interested in arguing here is that there is a difference between saying that something is teleological and that something is functional (that has a

798. Wright, “Functions”, 142–143. Conscious functions should be understood here as ‘designed’ functions and not be confused with ‘appeals to consciousness’ as the attribution of a goal or the mental attribution of a function, *ibid*, 143.

799. *ibid*, 140.

800. Cohen, *Karl Marx's Theory of History. A Defence*, 251. [Emphasis in the original].

801. *ibid*, 250. [Emphasis in the original].

802. *ibid*, 255–256.

803. Taylor, *A Secular Age*, 213.

function). This would serve as a basis to affirm that teleological and functional institutions are different. On the contrary, if there were no difference between something being teleological and something being functional, the teleological conception of institutions would not bring any further insight to our understanding of institutions. This is particularly important in law, as different functional explanations have been offered to explain what kind of thing the law is. In what follows I first deal with the difference between teleology and functionality in the second sense defined here. Then I revise functionalist conceptions of the law.

4.1.1. Functionality

The literature on the legal and political importance of functionality and, more specifically, on functionalism, is vast and it deals with many different aspects of functionalism, not all of which are relevant to the argument I am developing. I shall focus on one particular way in which institutions can be said to be functional which is directly relevant to the problems I am interested in discussing. These instances are: (i) those in which a function is attributed to a thing or (ii) those in which a thing is characterised because of its function.⁸⁰⁴ Cornelius Castoriadis has referred to functionality as the,

[U]nbroken chain of means and ends or of causes and effects on the general level, the strict correspondence between the features belonging to the institution and the 'real' needs of the society considered; the accent is placed, in short, on the complete and uninterrupted circulation between a 'real' and a 'rational-functional' element.⁸⁰⁵

I am interested in this notion of functionality because it is at the centre of the mere instrumental conception of institutions that I criticise in this thesis. The problem with adopting this notion of functionality to describe institutions is that it is not able to explain appropriately the institution because it reduces them to an instrument. Or, as Castoriadis puts it, this approach should be criticised as long as it 'holds that institutions can be reduced to this [functionality] and that they are perfectly comprehensible on the basis of this role'.⁸⁰⁶ I understand that Taylor makes a similar

804. I interpret these two instances as equivalent to what Wright calls conscious and natural functions, respectively. *vid supra*, fn798.

805. Castoriadis, *The Imaginary Institution of Society*, 116.

806. *ibid.*

point when he argues that materialism should not be understood as a teleological explanation of events in time.⁸⁰⁷ According to Taylor, ideas have as much an important place in historical motivation as the materialist thesis. Taylor's argument is that practices require not only material conditions to exist but also a shared background of meaning. In his words, '[p]eople have to share certain understandings of how they can function with others, and what the norms are, if they are to engage in these practices'.⁸⁰⁸ This is how Taylor tries to explain, 'without offering anything like a causal explanation of the changes',⁸⁰⁹ how the idea of moral order was a result of the combination of several factors including ideas, institutions, and so on.⁸¹⁰

The functional approach to institutions, therefore, is unable to explain the complex way in which political and social changes as well as the ideas that shape our social world take place in history. According to Castoriadis, the functional-economic approach explain institutions 'by its role in the *overall economy* of social life'.⁸¹¹ The characteristics and explanation of institutions depend on the place that they have in the general economic organisation of social life. Hence 'instituted rules *must appear* either as functional or as really or logically implied by functional rules'.⁸¹² This functional-economic rationality denies that institutions have an important symbolic dimension. This is what Castoriadis means when he says that institutions are 'impossible outside a second-order symbolism; for each institution constitutes a particular symbolic network'.⁸¹³ This symbolic aspect of institutions is what explains that they can lead to social realities that did not exist before the institution was in place.⁸¹⁴ The functional-economic conception, on the other hand, assumes that symbolism is neutral or irrelevant. This means that the functional institution embodies a previously existing reality (to which it is functional as a mere instrument). Therefore, functionalism would imply that there is 'a substance which would be preconstituted in

807. Taylor, *A Secular Age*, 213. Ch5 *passim*.

808. *ibid*.

809. *ibid*, 214.

810. *ibid*, 214–216.

811. Castoriadis, *The Imaginary Institution of Society*, 116. [Emphasis in the original].

812. *ibid*, 123. [Emphasis added]. Giorgio Agamben develops a similar idea but in politico theological terms when he says that an *oikonomia* is a 'plan that requires an activity of realization and revelation'. Agamben, *The Kingdom and the Glory*, 50.

813. Castoriadis, *The Imaginary Institution of Society*, 117.

814. *vid* also, González, *Teología de la Praxis Evangélica. Ensayo de una teología fundamental*, *passim*.

relation to institutions'.⁸¹⁵ But Castoriadis is right when he says that 'the "real social relations" concerned here are always *instituted*, not because they wear legal garb [...], but because they have been posited as universal, symbolised and sanctioned ways of doing things'.⁸¹⁶ So institutions operate in a world that has already been instituted in the sense that there is already meaning and a 'way of doing things'. It is in this very important sense that there is a crucial difference between the teleological conception of institutions that I am advocating for in this chapter and the functional reading of institutions. The teleological conception of institutions, as said before, rests on a previously instituted practice (to use Castoriadis' terminology) that provides its telos. On the contrary, functional institutions become progressively more autonomous and therefore more oppressive because they 'predominate' 'with respect to society'.⁸¹⁷ I will come back to this particular idea when discussing about functional conceptions of the law below.

This brings us to a second problem of the functional approach. This second problem is again captured by Castoriadis:

A society can exist only if a series of functions are constantly performed (production, child-bearing and education, administrating the collectivity, resolving disputes and so forth), but it is not reduced to this, nor are its ways of dealing with its problems dictated to it once and for all by its 'nature'. It invents and defines for itself new ways of responding to its needs as well as it comes up with new needs.⁸¹⁸

According to Castoriadis, reducing a society to certain functions, as much as they are needed, impoverishes the possibilities (the 'new ways of responding' to its 'new needs', in Castoriadis' words) that the society can come to a set up according to the project of radical democracy. I call this problem the 'petrification of society' problem. This problem precisely implies a petrification process of an organic society and its institutions. Hence, functionalism implies forgetting that a society is committed to achieving mutual recognition and doing whatever is required for that purpose.

815. Castoriadis, *The Imaginary Institution of Society*, 124.

816. *ibid.*

817. *ibid.*, 132. In this I also follow Atria, for whom, 'institutions have two faces: one emancipatory and the other oppressive', *vid.*, "Living under dead ideas: Law as the will of the people", 119ff. The emancipatory face aims at recognition, the oppressive face leaves space for manipulation or permits to 'behave instrumentally towards the other'.

818. Castoriadis, *The Imaginary Institution of Society*, 116–117.

Functionalism, on the other hand, cannot explain that new possibilities can be created to obtain mutual recognition; it assumes that what society is and needs is defined ‘once and for all by its “nature”.’ It is interesting here to note the terms Castoriadis uses to refer to the kind of society that is presupposed by functionalism; they are exactly the same that Rawls uses to refer to the status of his principles of justice. According to Rawls, individuals under the veil of ignorance in the original position ‘must decide *once and for all* what is to count among them as just and unjust’.⁸¹⁹ This choice determines the principles of justice that will apply to the basic structure of society. That the two principles of justice are given this status by Rawls is important then, because it gives further arguments to sustain that liberals (including liberal egalitarians) adopt the functional approach to institutions. This further elaborates the argument I developed before in chapter three, according to which liberal egalitarians consider institutions, in general, and taxation and tax law in particular, as mere instruments for redistribution.

4.1.2. Two functional conceptions of law: Moore and Dworkin

The petrification of society as a problem derived from functionalism is especially relevant when functional conceptions of the law are scrutinised. In this section I will argue that Michael S. Moore and Ronald Dworkin’s conceptions of law suffer from petrification. I focus on these two conceptions of law because they are two widely accepted functional conceptions of law.

Functional conceptions of law conceive of themselves as alternatives to positivist conceptions of law. More precisely, they are the distilled from several critiques to which the two most important positivists theories of the mid-twentieth century, those of H. L. A. Hart and Hans Kelsen,⁸²⁰ were subject. I do not have space here to analyse in detail that debate. Suffice to say that functionalist conceptions of law try to overcome two central elements of Hart and Kelsen’s positivism. The first is the strict separation of law and morals. The second, the thesis that law is a system of rules.

Michael S. Moore’s analysis of natural law as a functional conception of law is a good example of an attempt to overcome the strict separation of law and morals.⁸²¹

819. Rawls, *A Theory of Justice*, 11. [Emphasis added].

820. Hart, *The Concept of Law*; Kelsen, *Teoría Pura del Derecho*; Kelsen, *General Theory of Law and State*.

821. Moore, “Law as a Functional Kind”.

The kind of natural law he defends is one that rests on moral realism;⁸²² at the same time he affirms that there is ‘some necessary connection between law and morality’.⁸²³ Moore argues that the necessary connection of law and morality rests on the kind of thing that the law is and not on analytical or contingent necessity.⁸²⁴ For this purpose, Moore distinguishes three different kinds of things that may exist: natural, nominal or functional.

‘A natural kind is a thing that exists in nature as a kind without human contrivance’.⁸²⁵ Things that belong to this kind have a nature that is completely independent of men. They are the things that are independent of what we think about them or even if we do not know that they exist. Examples of things that belong to this kind are ‘gold’, ‘tiger’ or ‘H₂O’. ‘A nominal kind, by contrast, does not exist as a kind in nature, although its particular specimens may exist.’⁸²⁶ Things that belong to these kinds of thing exist only because of the label that brings them together. Different specimens that belong to the category may not have anything in common except that they are conventionally put together. Men characteristically create nominal kinds. Moore gives an example of a thing that belongs to this kind: Figueroa Street in Los Angeles. Finally, Moore defines things that belong to functional kinds as those that ‘[u]nlike nominal kinds [...] have a nature that they share that is richer than the “nature” of merely sharing a common name in some language. [And that] [u]nlike natural kinds the nature that such items share is a function and not a structure’.⁸²⁷ As an example of a functional kind Moore mentions the stomach. According to his example, the stomach is a functional kind because, distinctively, the thing able to perform the first-stage processing of nutrients is a stomach.⁸²⁸

According to Moore, a functionalist jurisprudence claims that law’s essence is identified with law’s final goal and not with any structural feature. Only those structural features that are necessary for the achievement of that goal will be part of

822. *ibid*, 191.

823. *ibid*, 193.

824. *ibid*, 198–200.

825. *ibid*, 206.

826. *ibid*.

827. *ibid*, 208.

828. For Moore’s summary of this analysis, *vid* Moore, *Placing Blame. A General Theory of the Criminal Law*, 18ff.

the law. The goal of law according to which its essence is identified should be a good only achievable through law.⁸²⁹ Which is that good is open to argument. Here we can complement Moore's conception of a general theory of law with the arguments he provides for distinguishing between particular areas of law. Because for him the 'law itself has [no] essential structural features', particular areas of law can hardly have any structural essential feature in themselves.⁸³⁰ So, for example, there is not much structural difference between tax law and criminal law (one of Moore's recurrent example).⁸³¹ According to Moore, particular areas of law would be either nominal (as he suggests that administrative law is so) or functional (as he advocates that criminal law is so). For Moore, the task of determining of which kind an area of law might be is ontological. Only once that ontology is defined can the individuation problem be answered. This means that any law that corresponds to the ontological category ascribed to a particular area of law will be part of that area of law. For example, if an area of law is ontologically functional, any norm able to fulfil that function will be part of that area of the law.⁸³²

I would like to put forward two critiques to Moore's functionalist approach. Both critiques derive from the dependency of his functional conception of law on a conception of natural law based on moral realism. Remember that, according to Moore, there is a necessary connection between law and morality. This necessary connection determines the ontological nature of the kind of thing that area of law is. At the same time he advocates for moral realism. Hence, according to Moore's theory, law is functional to moral realism. The first critique derives from the controversial philosophical standing of moral realism. If moral realism proves to be wrong, does it mean that there would be no necessary connection between law and morality? Alasdair MacIntyre criticised Moore on this point so I will not develop the argument

829. Moore, "Law as a Functional Kind", 218 and 223.

830. Moore, *Placing Blame. A General Theory of the Criminal Law*, 22.

831. *vid.* Hart, *The Concept of Law*; Kelsen, *Teoría Pura del Derecho*; and, Feinberg, "The expressive function of punishment". However, part of the problem I am dealing with in this thesis is the assumption that there is not any structural difference between these particular areas of law. So rather than referring to structural differences (precisely because they are relevant) I would rather say that areas of law are not much different because they all end up in a sanction. Hence, particular areas of law are phenomenologically, rather than structurally, similar.

832. Moore, *Placing Blame. A General Theory of the Criminal Law*, 22–23.

here.⁸³³ For the second critique I want to put forward we could assume that Moore is right about moral realism; that is, that law in some way is functional to the moral good that exists ‘out there’.⁸³⁴ But when we bring together this connection between law and morality with functionalism, a problem appears. If the law is functional to moral reality, who is to decide the content of law and morality? How are we to discover that content? If we have to give an account of moral concepts that are real and exist in the world, law would only be an account of that pre-existing world. The problem is that it becomes progressively more difficult to escape from heteronomy and oppression.⁸³⁵ An alternative would be to say that that moral content could be determined according to the best possible argument of the content of that practice, but this would be rejected by Moore as some kind of conventionalism.⁸³⁶

Can we solve the problems of Moore’s functional conception of law if we adopt a non-naturalist approach to law? That is, can we still argue that law is a functional kind even if we replace Moore’s metaphysical commitments? A good alternative might be found in Ronald Dworkin’s conception of the law. I am not going to give a detailed account of Dworkin’s theory of law here as it would lead me far from the point I am trying to make. That account would require showing how Dworkin’s argument evolved from the first critique to Hart’s conception of law as a system of rules,⁸³⁷ to his interpretive alternative.⁸³⁸ What interest me here are the underlying assumptions of his argument. This became an easier task after Dworkin fully stated the basis of his argument, that is, the interpretive approach to moral values, in his latest statement of these issues in *Justice for Hedgehogs*.

833. *vid*, MacIntyre, “Theories of natural law in the culture of advanced modernity”, 102–104.

834. This is a requirement deriving from realism theory of truth as correspondence. For the other requirements that realism should satisfy, according to Moore, *vid Educating Oneself in Public. Critical Essays in Jurisprudence*, 248. These requirements are: that classical logic applies to moral propositions; that the meaning of those propositions will depend on them being true according to the correspondence thesis; and that the ‘meaning of words like “justice” is guided by the nature of the thing (justice) to which the word refers’. *ibid*, 250.

835. In the same terms I referred to MacIntyre’s skepticism and the problems of functionalism, *vid supra*, 220ff.

836. Moore, *Educating Oneself in Public. Critical Essays in Jurisprudence*, Ch8.

837. Dworkin, *Taking Rights Seriously*, Ch1 and Ch2.

838. Dworkin, *Law's Empire*. Actually Dworkin did this job in, Dworkin, *Justice In Robes*, Chs6–8.

Dworkin argues for ‘a conception of law that takes it to be not a rival system of rules that might conflict with morality but as itself a branch of morality’.⁸³⁹ Morality for Dworkin has a tree structure: the central branch is concerned with a theory of what it is to live well, from which a branch of personal morality derives. From this last branch, in turn, the branch of political morality derives and from political morality, finally, the legal branch.⁸⁴⁰ Hence political concepts are relevant for law;⁸⁴¹ a branch of political morality law is meshed with political concepts. So to grasp fully Dworkin’s conception of law we need to know what he means by political concepts.

For Dworkin, political concepts express political values. He argues that all political concepts are interpretive. We share a concept when we are able to identify instances or examples of those concepts, even if we are not in complete agreement about all those instances and even if we have not reached an agreement on the criteria something has to meet to have the concept appropriately applied to it. According to Dworkin, some political concepts ‘function for us as interpretive concepts’. This means that ‘[w]e share them because we share social practices and experiences in which these concepts figure’.⁸⁴² Disagreements about the content of those practices are, therefore, disagreements about political values. For a liberal such as Isaiah Berlin this conflict of values is irresolvable.⁸⁴³ Dworkin, on the other hand, argues for what can be called the ‘unity of political value’. For Dworkin, conflicts of value rest or draw on values that go beyond themselves. Because of this dependency, he argues that values should be integrated rather than stand in opposition. So any defence of a political value (that is, any interpretation of a political value) needs to show how that conception ‘fits with and into appealing conceptions of the others’.⁸⁴⁴ Or as Dworkin puts it, ‘[m]oral concepts are [...] interpretive concepts: their correct use is a matter of interpretation, and people who use them disagree about what the best interpretation is’.⁸⁴⁵ This

839. Dworkin, *Justice for Hedgehogs*, 5 and 405.

840. *ibid*, 5.

841. To use Castoriadis ideas about functionality: Dworkin’s conception of law is functional but instead of the economic order, he is guided by a moral order, that is, as I argue below, the two principles of justice: equal concern and respect.

842. Dworkin, *Justice for Hedgehogs*, 6. *vid* also, 50–51. On political concepts, *vid* Dworkin, *Justice In Robes*, 145–162.

843. Berlin, “Two Concepts of Liberty”, 212–217.

844. Dworkin, *Justice for Hedgehogs*, 7.

845. *ibid*, 120.

theoretical relationship between political concepts, interpretation, and value, provides substance to Dworkin's historical claim that liberty and equality are not conflicting concepts but two concepts that come together as equal liberty.⁸⁴⁶

What about Dworkin's famous claim about the right answer in law?⁸⁴⁷ How can it be justified when there are conflicting interpretations of political concepts and values? The answers to these questions are to be found in Dworkin's conception of moral objectivity. Moral objectivity in Dworkin's theory is a requirement of the importance we assign to politics and to the justification of coercion. According to Dworkin, it would be 'irresponsible' to defend a theory of justice without at the same time assuming moral objectivity. But Dworkin's moral objectivity does not have any metaphysical commitments. So Dworkin would not accept any correspondence theory of truth regarding political values. Moral objectivity depends, for him, on how strong the argument is for the particular interpretation of the political value advocated for, 'of the substantive case that can be made for them'. The moral realm is not a realm of brute or raw facts, but of argument.⁸⁴⁸ This explains that for Dworkin, 'moral judgments are made true, when they are true, by an adequate moral argument for their truth'.⁸⁴⁹ In this sense, moral ontology can only be found within morality because the argument for it is also a moral argument.⁸⁵⁰ So good reasons are those that are good on moral grounds.⁸⁵¹

But is Dworkin a functionalist? Dworkin does not explicitly argue that his is a functional theory. But there are good reasons to say that his theory is in fact so. First, take his theory of interpretation. Interpretation for Dworkin consists of determining the point of the practice in question, 'we interpret [...] by attributing [...] what we take to be its proper purpose – the value that it does and ought to provide'.⁸⁵² So 'interpretation is therefore interpretive [...]. A particular interpretation succeeds – it achieves the truth about some object's meaning – when it best realises, for that object, the purposes properly assigned to the interpretive practice properly identified as

846. *vid*, Dworkin, "Sovereign Virtue revisited".

847. *vid*, Dworkin, "Is there really no right answer in hard cases?".

848. Dworkin, *Justice for Hedgehogs*, 11. For Dworkin's ideas about interpretation, *vid ibid* Ch6.

849. *ibid*, 37.

850. *ibid*, 37–38. *vid* also, 66–67.

851. *ibid*, 77.

852. *ibid*, 131.

pertinent'.⁸⁵³ By establishing the criterion for successful interpretation as one in which the interpreter best realises the purpose *assigned* to the practice, Dworkin's interpretive theory is, according to what I said earlier, equivalent to saying that interpretive practices are functional: they are *assigned* a purpose even if the definition of that purpose is 'interpretive'. So the right interpretation has to give an account of that purpose. What in Dworkin's terms is the purpose or point of the practice, for Wright would be its conscious or designed functions.⁸⁵⁴

This interpretation is reinforced when we recall that Dworkin said that 'concepts serve different kinds of functions in the thought and discourse of people who share and use them'.⁸⁵⁵ Dworkin distinguishes three kinds of concepts: 'criterial' (like the concept of a bachelor, in his example); 'natural concepts' (like the concept of a tiger, also in his example); and, finally, 'interpretive concepts' (under which he includes justice and democracy).⁸⁵⁶ Dworkin argues that different conceptions of law follow depending on which kind of concept the law is considered to be. In his reading the law cannot but be interpretive. He argues that law can be neither the kind of concept determined by shared criteria of application (as if it was a 'criterial' concept) nor can it be a 'natural' kind.⁸⁵⁷ This is predominantly so because there are different interpretations of the political values on which the law is based. Dworkin argues that his interpretation of the law as an 'interpretive concept' is better than other alternatives that also consider – what he calls – the 'doctrinal concept' of law to be interpretive, such as legal pragmatism and a certain kind of conventional legal positivism.⁸⁵⁸

853. *ibid.*

854. *vid supra*, 228 and 230.

855. Dworkin, *Justice In Robes*, 223.

856. *ibid*, 223–224 and 9–12. *vid also*, Dworkin, *Justice for Hedgehogs*, 158–160.

857. Dworkin, *Justice In Robes*, 225–226.

858. *ibid*, 226. Dworkin distinguishes four possible concepts of law: doctrinal, sociological, taxonomic and aspirational. Doctrinal concepts of law, 'explore the concept of "the law" of some place or entity being to a particular effect'. Sociological concepts of law are those according to which law is used 'to name a particular type of institutional social structure'. The taxonomic concept of law 'supposes that any political community that has law in the sociological sense also has a collection of discrete rules and other kinds of standards that are legal standards as opposed to moral or customary or some other kind of standards'. Finally, the aspirational concept of law is the one 'we often refer to as the ideal of legality or the rule of law [...] an aspirational concept [that] is a contested concept'. *vid, ibid*, 2–5. The doctrinal concept of law is concerned with the truth conditions of legal propositions and is relevant because '[w]e reflect on the character of law to

Dworkin's argument seems better equipped to respond successfully to the two objections made above to Moore's functionalism. First, Dworkin does not have to deal with problems derived from moral realism because he rests on his interpretive theory of political values and his theory of truth. Second, it seems as if Dworkin is immune to the petrification objection. This means that his functionalism is not constrained by a certain order of the world or morality of which it has to give an account. Even more, he argues that there is 'no causal interaction between moral truth and moral opinion'.⁸⁵⁹ This would be reinforced by Dworkin's affirmation that only scientific explanations are based on causality and that political concepts are interpretive concepts open to the best possible interpretation because they are contested concepts. Or, as he puts it, concepts such as,

liberty, democracy, and the rest function in ordinary thought and speech as interpretive concepts of value: their descriptive sense is contested, and the contest turns out on which assignment of a descriptive sense best captures or realizes that value.⁸⁶⁰

However, he is not free from petrification. If we consider the basis of what Dworkin calls the anatomy of a general theory of law, his interpretive concepts turn out to be fully functional concepts to one particular political conception of the good: political liberalism. Let me briefly develop this idea.

According to Dworkin, the anatomy of a general theory of law has four stages: the 'semantic', the 'jurisprudential', the 'doctrinal', and the 'adjudicative'.⁸⁶¹ Because he accepts that law as a practice has a value, he has to justify which value it is. His general theory of law 'rests on moral and ethical judgments and convictions'.⁸⁶² Hence, the interpretivist concept of law advocated by Dworkin requires that those moral values that are part of the law be identified and followed transitively in the four stages of legal theory. It is particularly important in legal reasoning so that it can include, according to Dworkin, the moral principles on which the law is founded. Consequently, a particular legal decision must express the political values in which the law is best justified as a practice. Under this reading of the law, when law and morality are

know what we must do'. *ibid*, 229.

859. Dworkin, *Justice for Hedgehogs*, 70.

860. Dworkin, *Justice In Robes*, 149–150.

861. *ibid*, 9–21.

862. *ibid*, 141.

integrated, the role of lawyers and judges changes, as they are ‘working political philosophers of a democratic state’.⁸⁶³ All this is perfectly coherent with Dworkin’s claim that law is a department or branch of morality.⁸⁶⁴

It is not self-evident how the petrification problem affects Dworkin’s conception of the law. If we accept it at face value, his theory of law allows for changes and new interpretations of the law whenever a particular case needs it. He is neither an originalist nor a positivist giving discretion to judges.⁸⁶⁵ Dworkin requires judges to apply the law. But when we analyse holistically his theory the problem becomes a bit clearer. How are judges to determine what the law requires in a particular case? According to Dworkin, when adjudicating, judges are to give an account of the best possible reading of the law according to the moral or political principles that justify it as a practice.⁸⁶⁶ In their more abstract formulation these are, according to Dworkin, the principles of human dignity. The first is the principle of ‘intrinsic value’, according to which ‘each human life has a special kind of objective value’.⁸⁶⁷ The second principle is that of ‘personal responsibility’, defined as that according to which ‘each person has a special responsibility for realising the success of his own life’.⁸⁶⁸ These principles, Dworkin argues, are at the base of American liberalism and any other political community which values democracy. So Dworkin’s functionalism is at the service of this political conception of democracy. His functionalism petrifies not at the particular level but at a general level what turns out to be a very particular reading of what is the best way to serve American liberalism. He argues that this is the best possible reading under which Americans can still have a democracy according to the

863. Dworkin, *Justice for Hedgehogs*, 414.

864. Dworkin, *Justice In Robes*, 34.

865. *vid*, his arguments in Dworkin, *Taking Rights Seriously* and *Law's Empire*, *passim*.

866. This cannot but be a vague assertion, as it will depend to which level we refer. However, Dworkin gives different formulations for these principles depending on the level of abstractness he is interested in arguing. It would take a different thesis to offer a detailed account of Dworkin’s formulation of these principles and their evolution.

867. Dworkin, *Is Democracy Possible Here?: Principles for a new political debate*, 9. In *Sovereign Virtue*, this principle was named the ‘principle of equal importance’, 5. *vid* also, Dworkin, *Justice for Hedgehogs*, 202ff.

868. Dworkin, *Is Democracy Possible Here?: Principles for a new political debate*, 10. In *Sovereign Virtue* this principle was named the ‘principle of special responsibility’, 5. *vid* also, Dworkin, *Justice for Hedgehogs*, 202ff.

political project of the founding fathers.⁸⁶⁹ The problem with this argument is that it does not take seriously the political, as that sphere of conflict where collective decisions are taken, because it puts a condition to that debate by restricting the possible moral grounds of the political.⁸⁷⁰ In other words, by fusing law to morality he conditions political decisions and the law (as an institution) to a liberal conception of the good life. So he does not take institutional arrangements and the way they change our lives seriously. As a consequence, Dworkin's claim that institutions are not merely instrumental is difficult to sustain even if he has a particular substantive reading of politics.⁸⁷¹ When he claims that institutionalisation is required to bring political concepts to the legal realm, he is not really concerned with the way in which institutions have a life of their own. He assumes that institutions can change reality as any instrument would, that is, at will.⁸⁷² Dworkin's general theory of law lacks a theory of institutions like the teleological conception I have been arguing for in this chapter, one that makes possible political autonomy.

4.1.3. Teleological institutions as sacraments

After the analysis developed in the previous sections we can conclude that the functional conceptions of institutions are not able to match the task performed by teleological institutions. This conclusion, however, seems to leave my argument with a problem; how can I argue that our institutions, as we know them, are teleological? To express the point differently: If institutions are conceived as teleological, we need some conceptual and intellectual resources. Those resources need to be embedded in at least one tradition of rational reflection that conceives institutions as teleological. Is there an available tradition that conceives of institutions teleologically in the way I characterised teleological institutions? If that tradition is available, we would be able to conceive of an institution as teleological, thus being able to 'transplant' the understanding of one tradition to another. In that 'transplant' certain aspects of the concept might become clearer than they would have been if the concept is directly applied or created *ex nihilo* to contemporary law and politics, because that other

869. Dworkin, *Is Democracy Possible Here?: Principles for a new political debate*, *passim*.

870. Here I follow the conception of the political I argued for in *supra*, 168ff.

871. Dworkin, *Justice for Hedgehogs*, 405.

872. *vid supra*, 230 and Ch3, 130ff.

tradition might already have developed the concept more thoroughly than we would be able to do in the conditions of contemporary law and politics.

These questions open a search for a different political tradition, one in which institutions are open to the transcendental possibilities which political ideals invite into our political lives rather than being conceived simply instrumentally in relation to those ideals. The available alternative is to look to political theology.⁸⁷³ I interpret Carl Schmitt's famous statement that '[a]ll significant concepts of the modern theory of the state are secularised theological concepts'⁸⁷⁴ as providing an answer to the problem posed in the previous paragraph.

Schmitt described three alternatives according to which political theology could explain modern political concepts: as a historical analysis of the evolution from theological concepts to the political, as an analogy, or as a sociology of juridical concepts.⁸⁷⁵ Schmitt opts for the last alternative and offers it as a method for studying political concepts. Political theology as a sociology of juridical concepts is a thesis about the correlation between a society's metaphysical image and its political organisation.⁸⁷⁶ I cannot develop here a fully detailed account and critique of Schmitt's political theology or the discussions it has generated.⁸⁷⁷ Suffice to say that Schmitt's sociology of juridical concepts rests on a poor theology that comes back as a poor political philosophy and also that political theology should not be understood as a

873. The reason I have to refer to political theology is different from the one given by Kahn, *Political Theology. Four New Chapters on the Concept of Sovereignty*. Kahn argues that political theology 'as a form of inquiry is compelling only to the degree that it helps us recognise that our political practices remain embedded in forms of belief and practice that touch upon the sacred' (3). So for him political theology 'is a project of descriptive analysis [...] to identify and describe the presence of the sacred, wherever it appears' (25). This is an approach that has more to do with secularisation than with political theology. I do not think this is a good reason to look for insights in political theology; by merely describing the presence of the sacred it leaves things as they are. Such an enterprise does not bring any insights either to political philosophy or to theology. I understand that Habermas makes the same point when he says that secular and religious citizens stand in complementary relation in the public sphere, *vid* Habermas, "'The Political': The Rational Meaning of a Questionable Inheritance of Political Theology". For a proposal of a "radical" approach, *vid* Crockett, *Radical Political Theology. Religion and Politics After Liberalism*. For an interesting intent to extend the application of religious concepts to political concepts, *vid* Critchley, *The Faith of the Faithless. Experiments in Political Theology*.

874. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, 36.

875. *ibid*, Ch3.

876. *vid*, Schmitt, *Political Theology II. The Myth of the Closure of any Political Theology*, editor's introduction, 5–7.

877. Those interested in this topic should read Meier, *The Lesson of Carl Schmitt. Four Chapters on the Distinction Between Political Theology and Political Philosophy*.

mere analogy with political philosophy. The reason why political theology is important is that we can find insights, concepts and problems that are similar, if not identical, to those that we find in the political realm. That is the best light with which to look at Schmitt's argument about sovereignty.⁸⁷⁸ Another example of the sort of use of political theology I have in mind is Fernando Atria's use of Aquinas' ideas about imperfect meaning and negative theology in order to study the political concept of the people.⁸⁷⁹ Atria argues that political theology, in the relevant sense, 'is not a thesis about the genealogy of political concepts, but about their meaning [...]'.⁸⁸⁰ In this vein, I believe that a brief analysis of the theology of sacraments will shed light to the teleological conception of institutions I am advocating for in this chapter.

In the Christian tradition the sacraments express the mediation between immanence and transcendence, they are part of a 'pre-Kingdom era' as in them 'the gospel *seeks* to be at home in a transitional world'.⁸⁸¹ Sacraments are a very important part of what Christian identity is. According to Louis-Marie Chauvet, the sacraments, the scriptures and ethical conduct are the elements that show the 'marks of the reign'.⁸⁸² According to Herbert McCabe, the centrality of the sacraments in Christian theology relates to its purpose of making Christians part of the new creation that the resurrection of Christ made possible. The sacraments are 'the signs which reveal to us the new reality'.⁸⁸³ This explains why McCabe asserts that 'a sacrament is a symbol which makes real what it symbolises'.⁸⁸⁴ This implies that the sacraments are not mere symbols because they do not give account of a previously existing reality or a meaning that exists independent of the symbol. The sacraments make possible meaning by changing reality.⁸⁸⁵ Two characteristics of the sacraments explain the way in which they operate: (i) they bring together past, present and future, and (ii) they have a

878. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*.

879. *vid.* Atria, "Living under dead ideas: Law as the will of the people".

880. *ibid.*, 111.

881. McCabe, *God Matters*, 175. [Emphasis in the original].

882. Chauvet, *The Sacraments. The Word of God at the Mercy of the Body*, 29ff.

883. McCabe, *God Still Matters*, 116.

884. McCabe, *The New Creation*, 26.

885. This is what in the literature is called 'sacramental ontology'. *vid.* Boersma, *Heavenly Participation. The Weaving of a Sacramental Tapestry*, 19–26 and Chauvet, *Symbol and Sacrament. A Sacramental Reinterpretation of Christian Existence*, part one.

special kind of language. These characteristics are what make the sacraments different from purely secular conceptions of politics and their characteristic functional logics.⁸⁸⁶

By bringing together past, present and future the sacraments make us part of a community of meaning that goes beyond us as individuals. Past, present and future come together in the sacraments allowing us to become part of a real community through which we are no longer alienated. Sacraments are neither the symbol for something that existed previously nor are they 'simply looking forward to something which is not yet, they symbolise something actually present'.⁸⁸⁷ This idea is also expressed in the different realities that coexist in the sacraments. According to McCabe, there are three different realities in the sacraments: the rite, the sacramental reality and the final reality. Of these the 'central difficulty [...] is the notion of sacramental reality'. The sacramental reality is difficult to grasp because it is that in which meaning changes reality. This reality is 'an object of faith, hidden from the unbeliever who sees merely the outward sign of it, but it is not the final object of faith. It is itself a symbol leading the believer on to a greater depth of mystery'.⁸⁸⁸ The sacraments are objects of faith precisely because they belong to an intermediate era such as ours.⁸⁸⁹ This is very important for a proper understanding of the sacraments. The sacraments are not purely a future. They are 'not merely a mental reaching out to what is to come; rather we make contact with what is really present now'.⁸⁹⁰ This means that the sacraments change what we do here and now. So they are not mere symbols, they are connected with reality but in a different way; they contact the mystery with the real, with what we are doing now. Rowan Williams has put this idea into very clear words:

'There is another world, but it is the same as this one'. All sign-making is the action of hope, the hope that this world may become other and that its experienced fragmentariness can be worked into sense.⁸⁹¹

886. Williams, *On Christian Theology*, 209.

887. McCabe, *The New Creation*, 27, *vid* also 137.

888. *ibid*, xiii.

889. *ibid*, xiv.

890. *ibid*, 137.

891. Williams, *On Christian Theology*, 207.

As I understand Williams, sacraments work in the world that we know, but they bring a new light and a new meaning to it. The sacraments are not mere symbols or reminders of something that happened or hoping for the world to change. They change the world as we know it by providing a new meaning for it. They do not 'create' something that was not there before (only God could do that), but they connect us with the deep meaning of what we do. This brings us to the second characteristic of sacraments: their special language.

Sacraments stand within this world and aim to transcend it. However, they cannot do this with the existing language. This language refers to reality as it is; it shows us the limits of the world. But language is also open to transformation. To overcome the alienation of this world the sacraments have to refer to a sacramental language.⁸⁹² Using Wittgenstein's ideas concerning language, McCabe claims that the sacraments become part of a language of the future; they talk about things that we do not know yet: 'The kind of shift that takes place here is not one of translation but of translanguification, it is not that we must look for an obscure meaning, but that we are looking in the wrong language'.⁸⁹³ So the way in which the sacraments change the world is not by 'magically' changing the nature (the 'substance' or 'essence', to use Aristotelian or Thomistic language) of things or persons. Indeed, this cannot be different since the sacraments '[point] towards and partially [realise] a third level of meaning, the ultimate mystery that is signified-and-not-a-sign of anything deeper'.⁸⁹⁴ According to McCabe, this third level of meaning is *agape, caritas*. The consequence of this understanding of the sacraments is that the Church and its sacraments are, in themselves, 'sacramental sign[s] and realisation[s] of our life in the Kingdom'.⁸⁹⁵

These two characteristics bring the sacraments very close together with the conception of teleological institutions that I advocate. Both sacraments and teleological institutions (a) should be understood as performing a role in an inevitably alienated world, (b) do not operate within functional logic, (c) they try to change this world as it is pointing to the future, (d) as human creations they have meaning, and, crucially, (e) they change the world and how we understand each other within it. Both

892. McCabe, *God Matters*, 175.

893. *ibid*, 178–179.

894. McCabe, *God Still Matters*, 134.

895. *ibid*, 135.

of them, importantly, also share the notion of human beings as dependent and vulnerable. Finally, and most importantly of all, they share the ideal of human realisation as a community of interests (even if they receive different names, that is, solidarity, fraternity and love). At the same time, these characteristics differentiate sacraments and teleological institutions from the merely instrumental and the functional conceptions of institutions.

With this in place, let me now show how teleological institutions and the sacraments allows us to unlock the deeper meaning of taxation and tax law. I argue in this thesis that taxation and tax law possess an intrinsic good.⁸⁹⁶ This argument concludes that taxation and private property are co-original because they are two faces of the same coin. They are intrinsically connected if we aspire to mutual recognition. Sacramental language can shed further light on this idea. Using sacramental language we can say that taxation is private property transubstantiated. What does this mean? Transubstantiation is an important concept in the Eucharist, a crucial Christian sacrament. In this sacrament the consecrated host and wine are the body and blood of Christ. How this happens has historically been a matter of theological dispute. Is it a real transformation of the substance of the host and wine to flesh and blood? It is clearly not so in a *literal* interpretation. But in a sacramental way that host and wine *is* Christ's flesh and blood. This sense is what makes that practice sacramental by providing a new meaning for it. The first meaning is the significance of this alienated world, that is, eating is part of our human rituals of friendship. At the second level of meaning, the Eucharist is a token meal of the love of God for us. It is the expression of Jesus accepting the word of God as an expression of love for us, according to which he became the first proper human being truly open to the vulnerability of love. Finally, at the third level of meaning the sacraments show us what is to come: our life in the kingdom in which there is no alienation but where we live in love.⁸⁹⁷ In McCabe's words, 'The notion of transubstantiation depends on the idea that there can be a kind of transformation in what it *means* to exist which is not simply a change in *what it is* that exists'.⁸⁹⁸

896. *vid supra*, previous sections of this chapter and Chs3, 123ff, and Ch4, 167ff.

897. McCabe, *God Still Matters*, 134–135.

898. McCabe, *God Matters*, 150. [Emphasis in the original].

How is it that taxes are transubstantiated private property? As a *rite* taxes are an institutional arrangement according to which we have to fulfil a legal duty. As a *sacramental reality* taxes show our dependency and vulnerability; how private property depends on mutual recognition and the political importance we assign to private property as an aspect of autonomy. As a *final reality* taxes bring solidarity or fraternity (the kind of love that will wither taxation, tax law and private property).⁸⁹⁹ Also, if we adopt the idea that the sacraments bring together past, present and future, then we better grasp how taxation is part of the allocation of property; that there is no such thing as an original distribution of property and the subsequent redistribution that needs to be justified. The point is that the distribution of property always already contains within it redistribution.

4.2. *Legal reasoning in law as a teleological institution*

In this section I want to deal with an important aspect of law as a teleological institution. Someone might raise an objection saying that, following this conception of law, those who apply it may appropriate it as they please. If there are no epistemological certainties on which the law is based (Dworkin's principles of justice, for example), the critique might continue, I would have to embrace either a certain scepticism about the law (as legal realism or positivism's judicial discretion),⁹⁰⁰ or subject the law to certain kinds of moral reason,⁹⁰¹ or to whatever is determined in a political procedure.⁹⁰² Such an argument would mean that the conception of law as a teleological institution would be a sham because that sort of legal reasoning is not fit for this kind of institution (it is proper of merely instrumental or functional institutions). However, teleological institutions are compatible with giving a privileged status to certain reasons, that is, the reasons that explain the institution, and to a certain procedure, that is, that by which the law becomes the will of the people. So we need a theory of legal reasoning that could go hand in hand with the theory of law as a

899. For the way in which these three levels of reality are involved in baptism, the Eucharist, and marriage, *vid* McCabe, *The New Creation*, 114–115.

900. For legal realism in its American variant, *vid* Leiter, *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Philosophy*, Chs1–3. For judicial discretion as the positivist way to solve interpretive problems, *vid* Hart, *The Concept of Law*, Ch7, and Kelsen, *General Theory of Law and State*, 145–153.

901. *cf.*, Raz famously advocates that legal rules are exclusionary reasons, *vid* Raz, *Practical Reasons and Norms*.

902. *cf.*, Habermas, *Between Facts and Norms* and Waldron, *Law and Disagreement*.

teleological institution is included. An outline of this conception could be provided starting with Neil MacCormick's conception of 'legalism'⁹⁰³ and Zenon Bankowski's 'law's aspiration' or 'legality'.⁹⁰⁴ These notions show the importance of rules while at the same time they allow a space in legal decision-making to consider why and under which conditions rules should be adapted according to the particularities of the case at hand.

MacCormick's legalism is a defence of the political value underlying legal regulation; that is, the value of conducting life under general and clear predetermined rules. Legalism is the value according to which morality is excluded from the law but not from legal reasoning.⁹⁰⁵ In MacCormick's words, '[i]t is the morality according to which the moral substance of an issue or type of issue has first to be argued out both in abstract terms and in terms of what is concretely practicable in a legal-institutional setting'.⁹⁰⁶ The adjudicator must show that her decision can be explained within valid law, precisely because they are adjudicating and not legislating. MacCormick summarises his position, saying that legalism 'demands a suspension of abstract moral beliefs for the purpose of resolving legal questions. But this it does as a matter of moral belief. So the suspension must never be absolute or unconditional'.⁹⁰⁷ Moral arguments should be at the service of the law whenever they are required.

Bankowski advocates for a similar value, which he calls 'legality'. For Bankowski, this value 'stands in the middle' between formalism and pure contingency. Because we cannot live our lives constantly open to contingency, legality allows us to rest on what has been decided and instituted in rules, while at the same time being open to an encounter with the particular. Legality, therefore, requires a certain attitude from us. We should be open to the encounter with the particular and the way in which this encounter can change us. According to Bankowski, reasoning with rules cannot avoid the particular without running the risk of becoming formalistic. This

903. MacCormick, "The ethics of legalism".

904. Bankowski, *Living Lawfully. Love in Law and Law in Love*.

905. This does not mean that we have to accept Dworkin's characterisation of this as part of the canonical idea that law and morality are two different systems. The point is that there is moral value in legality and that it accepts morality in legal reasoning. *vid*, Dworkin, *Justice for Hedgehogs*, 400–403.

906. MacCormick, "The ethics of legalism", 186.

907. *ibid*, 192.

shows us, therefore, that we cannot decide without the risk of being wrong, and at the same time we cannot avoid making a decision. This explains why Bankowski advocates for an ethical approach to legal reasoning, what he calls 'living lawfully'.⁹⁰⁸ Drawing on Lon Fuller's distinction of a morality of aspiration and a morality of duty,⁹⁰⁹ Bankowski explains that complying with the law requires from us 'to look at the rule of duty within the context of the practice of aspiration of which it is a part'.⁹¹⁰

To summarise, MacCormick and Bankowski show us the importance of rules, but at the same time they do not limit law to rules. How do these ideas apply to tax avoidance? In tax avoidance the master of the rules – the tax lawyer – follows the rules in order to (creatively) break the law. Avoiding taxes is so easy because tax law is interpreted as a set of rules that are the product of a binary understanding of the law and thus derivative of the identification of the law with rules. The problem with tax avoidance is that by following rules the tax avoider redefines the content of tax law in its application. So, for those of us who consider tax avoidance to be a problem, we have a case in which the meaning of rules cannot depend exclusively on its application to a particular case. What we require here is a standard external to the rule according to which we share the meaning of the rule. This is precisely what the understanding of the law as the will of the people defended above achieves. We share the meaning of the rule because it is part of an institution, the content of which has been determined through a political process. In applying this approach to tax avoidance we would have to provide an understanding of tax rules within a political decision concerning the definition of the right to private property, which at the same time redefines the way in which tax is determined to make it independent of the will of any individual.

Bankowski could answer that he provides a solution to this problem when he introduces the distinction between formal and substantive justice. He would agree that from the perspective of formal justice we cannot grasp tax avoidance and we can only see tax evasion, as we are either within or outside of the law.⁹¹¹ It might be argued that the solution to tax avoidance could be found by introducing substantive considerations

908. *vid*, Bankowski, *Living Lawfully. Love in Law and Law in Love*, Ch7. For a discussion of Bankowski's argument, *vid* Saffie, "Fulfilling the law by breaking it? Formalism within legality".

909. Fuller, *The Morality of Law*, 5ff.

910. Bankowski, *Living Lawfully. Love in Law and Law in Love*, 72.

911. *ibid*, 139ff.

to overcome the dichotomous character of formal law. But then, who will determine the substantive content of the law? Should we assume a liberal, neoliberal or socialist reading of tax law? As I argue extensively in this thesis, it seems to me that the only way we can overcome this problem, without risking autonomy, requires a reading of tax law as able to bring into it its institutional and political aspects.

Tax law should be explained as part of the autonomous decisions taken by a political society. Its legal aspect is an expression of the will of the people and its substantive content should be determined according to that will. That content should show in some way that the political project is connected with the general interest or mutual recognition. There should not be room for an instrumental use of the law, either by individuals or by any political group, because that would imply using the law for the interests of a faction or individual in society, thus making the law heteronomous and oppressive. I expect to have provided enough arguments in this thesis to show that the best understanding of taxation is as a practice in which mutual recognition is its internal good and that tax law is the teleological institution that secures the persistence of that practice.

5. CONCLUSION TO CHAPTER FIVE

In this chapter I provide an argument to consider how tax law can be the institutionalisation of taxation as a practice with an internal good. The argument develops at a general and a particular level. At the general level, I propose an understanding of law as a teleological institution; at the particular level, I try to show the way in which tax law is an instantiation of that general conception of law. The teleological conception of law (as genus) and tax law (as species) I advocate for explains how institutions embody and make stable the internal good of practices. This is possible if the external good of institutions (in this case, tax law's consistent and comprehensive allocation and reallocation of private property) is able to embody the internal good of practices (in this case, taxation's solidarity) as means for a telos, that is, something further that is itself good (law's mutual recognition).

The teleological conception of law explains how law mediates between political ideals (the transcendent) and political action (the immanent). I argue that this understanding of law is better than functional conceptions of law. Functional

conceptions of law are not able to explain the complex relation between political ideals and institutions because they assume that institutions are technological devices to implement political values that were defined 'once and for all'. The teleological conception of law, on the contrary, provides a better explanation of the way in which political and social changes and the ideas that shape our social world combine in history. In this sense, the teleological conception of law is a better understanding of the way in which the symbolic dimension of institutions opens new possibilities of action, redefining political ideals. As an institution, law embodies the good of two political practices: individual autonomy as a collective political project and representation as collective autonomy. This is what it means that the law is the will of the people or that it represents the general will. Hence, I argue that the good of law as a teleological institution is mutual recognition.

As an instantiation of the teleological conception of law in general, tax law's external good (its consistent and comprehensive allocation and reallocation of private property) makes stable the internal good of the practice of taxation (solidarity). But for this relation between practice and institution to work, tax law should be understood as a means to the good of law in general, that is, mutual recognition. Therefore, tax law makes possible solidarity as an aspect of mutual recognition. As I argue in the chapter, these ideas have two implications: (i) they establish a criterion against which to evaluate tax policy, and (ii) they set the criteria for the substantive interpretation of tax law. The latter is important for legal reasoning in tax law because it sets the substantive criterion for legal decision making. This substantive criterion would make possible to identify those conducts that represent a violation of tax law. But this is not enough. It is also necessary to offer an structure of tax law able to embody these ideas (or a dogmatics of tax law), that is, the details of the general theory of tax law. I have not been able to do that here. However, if sound, the argument of this thesis lays the groundwork for that task.

CONCLUSION

As a conclusion, I present a summary of the main arguments that I develop in the thesis and how they are connected in each chapter.

1. Tax avoidance is a legal (not a moral) problem (Ch1, s2.2).
 - 1.1. Legal alternatives have not succeeded in providing a solution to avoidance (Ch1, ss.2.2.3 – 2.2.4.3 and Ch2, s4.4ff).
 - 1.2. The reason why possible legal alternatives have not succeeded so far is due to the classical paradigm and the contemporary general theory of tax law (Ch2, s3).
 - 1.3. An inquiry into the substantive content of tax law is needed (Ch2, s.4.4.2).
2. Liberal egalitarian and luck egalitarian theories of justice cannot provide this substantive content because they take as given the classical paradigm and the contemporary general theory of tax law (Ch3).
 - 2.1. They can only provide a moral argument for redistribution (Ch3, ss.2.2.1, 2.2.2 and 2.2.4.1).
 - 2.2. They cannot justify taxation and tax law *per se* but only instrumentally (Ch3, s2.2.4).
3. A political rather than an economic conception of distributive justice provides a better grounding for understanding taxation (Ch4, s3).
 - 3.1. Equality is a political ideal and not a value (Ch4, s2).
4. The substantive content (and not merely instrumental justification) of an institution depends on the underlying practice (Ch4, s4).
 - 4.1. Taxation is a practice with an internal good (Ch4, s5).
 - 4.2. The internal good of taxation is mutual recognition in the sphere of solidarity (Ch4, s5).
 - 4.3. Tax avoidance shows a lack of recognition for those with whom we share an 'ethical life' in the state (Ch4, s5).
5. The right to private property is part of recognition in its dimension of self-respect (Ch4, s6).
 - 5.1. As such it is a general right (Ch4, s6).
 - 5.2. As a general right it has an intrinsic limit: the recognition of private property for others (Ch4, s6).

- 5.3. The internal good of taxation is mutual recognition in the sphere of solidarity (Ch4, s5).
- 5.4. Taxation and private property are co-original (Ch4, s6).
- 5.5. The duty to pay taxes depends on the recognition of private property and not on the justification of redistribution (Ch4, s6).
6. Taxation is a practice with an internal good (Ch4, s5).
 - 6.1. Its institutionalisation requires a kind of institution that makes possible the persistence of the practice (Ch5, s3).
 - 6.2. Teleological institutions are the kind of institutions that can fulfil that task (Ch5, s3).
 - 6.3. Law is a teleological institution (Ch5, s4).
 - 6.4. Tax law as a teleological institution aims at securing the persistence of taxation as a practice with an internal good (Ch5, s4).
 - 6.5. Reasoning and adjudicating in tax law are determined according to 6.4. (Ch5, s4.2).
 - 6.6. No one can legally endanger the telos in tax law, hence there is not any space for tax avoidance (Ch5, s4.2).
7. The internal good of tax law is mutual recognition in the dimension of solidarity (Ch4, s5).

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