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Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study

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**DOES THE USE OF GENERAL ANTI-AVOIDANCE RULES TO
COMBAT TAX AVOIDANCE BREACH PRINCIPLES OF THE RULE
OF LAW? A COMPARATIVE STUDY***

REBECCA PREBBLE** AND JOHN PREBBLE***

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INTRODUCTION

A. *The Rule of Law and Tax Avoidance*

“The rule of law” is a compendious term for a number of related values that people generally think good laws should adhere to. A.V. Dicey’s familiar formulation held that the rule of law requires “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power.”¹ It is theoretically possible to interpret this condition as requiring merely that there should be laws, as opposed to a series of isolated commands. Nevertheless, theorists writing since Dicey have supplemented Dicey’s basic formulation with a number of additional requirements that the basic formulation logically must entail if it is to be of value.² In the present context, the most important of these is that the law should be capable of guiding people. In order to guide people, laws must be relatively clear and their application relatively certain; otherwise, no one will know what is permitted and what is forbidden.³

That laws should be relatively certain seems at first to be a reasonable demand. Indeed, governments generally manage to ensure that their laws adequately satisfy this condition. However, the criterion has proven very difficult to satisfy when it comes to formulating rules to combat that tax avoidance.

Tax avoidance is a problem for every country. Avoidance is not evasion. Evasion means dishonestly reporting one’s income.⁴ For example, a cash business may understate its takings or fail to file any tax return at all. Avoidance is also not mitigation. Mitigation is not a term of art, but in this article and generally in the present context, it means reducing one’s tax in ways that a governing statute clearly encourages or permits; for example, taking a deduction for a gift to charity.⁵

Avoidance exists somewhere between evasion and mitigation. Avoidance means, approximately, contriving transactions typically but not necessarily artificial in nature, to reduce tax that would otherwise be payable according to what appears to be the policy of the taxing provision in question.⁶ This is a description rather than a definition, as terminology in this area is controversial.

1. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202 (10th ed., reprt. 1965).

2. JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 213–18 (2d ed. 2009).

3. *Id.* at 214.

4. James Kessler, *Tax Avoidance Purpose and Section 741 of the Taxes Act 1988*, 4 BRIT. TAX REV. 375, 376 (2004).

5. *Id.* at 377.

6. *Id.* at 377, 384.

Some people deny that we can draw a meaningful distinction between avoidance and mitigation;⁷ some people deny that the word mitigation has any right to exist as a meaningful term in this context.⁸

As a general rule, the law does not require people to arrange their affairs so that they incur the greatest possible tax liability. When faced with two possible legal ways in which to organize their money, taxpayers are legitimately entitled to choose the option that requires them to pay the lesser amount of tax.⁹ There comes a point, however, when governments begin to think that taxpayers are going too far in their attempts to decrease their tax liability. At this point, taxpayers cease to engage in legitimate tax mitigation and embark on unacceptable tax avoidance.¹⁰

Useful definitions of the point at which tax mitigation becomes tax avoidance are elusive. Lord Denning has said that for an arrangement to constitute tax avoidance, “[Y]ou must be able to predicate . . . that [the arrangement] was implemented in that particular way so as to avoid tax.”¹¹ This definition brings us no closer to knowing what constitutes tax avoidance, because all it says is “tax avoidance arrangements are those arrangements that look like tax avoidance arrangements.” Nevertheless, the definition highlights the difficulty of exhaustively defining tax avoidance or, indeed, the difficulty of defining tax avoidance in terms of legal rules at all.

Tax avoidance is perhaps best understood through examples, rather than by analysis. Examples of tax avoidance transactions from different jurisdictions abound. They tend to have a number of identifiable features, for example: artificiality;¹² lack of business or economic reality;¹³ lack of true business risk;¹⁴ and exploitation of statutory loopholes.¹⁵ Avoidance often involves taxpayers exploiting rules that were designed to reduce unfairness in the tax

7. See *Miller v Comm’r of Inland Revenue* [2001] 3 NZLR 316, 326 (P.C.).

8. *Id.*

9. *Mangin v Comm’r of Inland Revenue* [1971] NZLR 591, 598 (1970, P.C.).

10. See Kessler, *supra* note 4, at 378–79.

11. *Newton v Fed. Comm’r of Taxation* (1958) 98 CLR 1, 8 (Austl.).

12. NABIL OROW, GENERAL ANTI-AVOIDANCE RULES: A COMPARATIVE INTERNATIONAL ANALYSIS 18 (2000); see *Comm’r of Taxation v Spotless Servs. Ltd.* (1996) 186 CLR 404, 425 (Austl.); also *Comm’r of Taxation v Gulland* (1985) 160 CLR 55, 109 (Austl.).

13. OROW, *supra* note 12, at 18; see also *Mangin*, [1971] NZLR at 597–98 (quoting *Comm’r of Inland Revenue v Mangin* [1970] NZLR 222, 236 (CA)).

14. See *Challenge Corp. v Comm’r of Inland Revenue* [1986] 2 NZLR 513, 561–62 (P.C.).

15. OROW, *supra* note 12, at 18.

system¹⁶ or using existing legal structures in enterprising ways that the legislature, had it thought about the matter, would not have approved.¹⁷

To help to recognize avoidance, take, for example, *Inland Revenue Commissioners v Bowater Property Developments*, a United Kingdom case that the House of Lords decided in 1988.¹⁸ That case involved development land tax, a kind of capital gains tax that applied to land sales if the development value component of the sale was greater than £50,000.¹⁹ In a transaction potentially caught by the tax, Bowater proposed to sell land for more than £250,000 to a company called Milton Pipes Limited.²⁰

Instead of selling the land as one parcel, Bowater segmented the land into five undivided shares.²¹ It sold one share to each of five sibling companies in the Bowater group for £36,000 per share.²² Land in each of the undivided shares looked just like land; there was no subdivisional survey or separate titles.²³ The five Bowater companies owned the land under one title, just as a married couple owns their home in one title.²⁴ The Bowater companies resembled a modern marriage between five spouses. These five sales had no effect on the beneficial ownership of the land.²⁵ Both before and after the sales, the ultimate owners were the shareholders in the Bowater group.²⁶ The five companies then sold their undivided shares to Milton Pipes for £52,000 each.²⁷ That is, each company bought for £36,000 and sold for £52,000, earning a profit of £16,000, well under the capital gains tax threshold of £50,000.

16. See *Challenge Corp.*, [1986] 2 NZLR at 559. The court held that Challenge Corporation took advantage of rules that allowed it to consolidate the affairs of its members and to pay tax only on the resulting net profit. *Id.* at 561–62.

17. See *Mangin*, [1971] NZLR at 597. This case involved an arrangement whereby the taxpayer each year leased the profitable part of his farm, which was a different section each year, to a family trust. *Id.* at 591. The trust would then pay out the income from the section of the land to its beneficiaries, who were the taxpayer's wife and children. *Id.* The artificial element in this arrangement was that the part of the farm leased to the trust changed year by year, with the trust always receiving almost all of the farm's income for that year. *Id.* The result of the arrangement was that each beneficiary received a fraction of the farm's income. *Id.* The income was therefore taxed at a lower rate than it would have been had it been entirely derived by the taxpayer. *Id.* at 592.

18. *Craven v. White*, [1989] A.C. 398 (H.L.) (Eng.).

19. *Id.* at 499.

20. *Id.* at 430.

21. *Id.* at 499.

22. See *id.* at 496.

23. See *Craven*, [1989] A.C. at 429.

24. *Id.*

25. See *id.* at 407 (using “beneficial” in its substantive sense rather than with the meaning that obtains in trust law).

26. *Id.*

27. See *id.* at 496.

Legally, there were five separate sales from Bowater to the sibling companies and five more sales to Milton Pipes. Economically, there was just one sale from Bowater to Milton Pipes. Ignoring this economic reality, however, the House of Lords treated the transactions as genuine.²⁸ Bowater accordingly escaped development land tax.²⁹

B. General Anti-avoidance Rules

Typically, governments combat avoidance by adding specific and often very detailed rules to tax legislation—rules that frustrate one kind of avoidance transaction or another. For instance, jurisdictions might allow taxpayer companies to carry losses forward and to set them off against the profits of future years.³⁰ As an anti-avoidance measure, such jurisdictions tend to support these rules with requirements of certain minimum continuity of ownership between the loss year and the profit year.³¹ Tax statutes are replete with such rules.³² However, specific anti-avoidance rules cannot combat the more creative forms of tax avoidance that employ transactions governments cannot predict. Consequently, many tax systems feature general anti-avoidance rules in addition to specific ones.³³

There is considerable variation in the form that general anti-avoidance rules take in different countries. Nevertheless, the various forms have roughly the same effect, at least in theory. General anti-avoidance rules allow tax authorities to disregard schemes that would otherwise reduce tax liability. The transactions to which they apply are void for tax purposes. For a transaction being void, the tax lies where it falls, although modern general anti-avoidance rules often allow tax authorities to reconstruct a transaction to reflect the economic reality of the circumstances and to tax the taxpayer on the basis of the reconstructed transaction.³⁴

An example of a typical general anti-avoidance rule is Section 99 of New Zealand's Income Tax Act 1976, which relevantly read:

Every arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the Commissioner for income tax purposes if and to the extent that, directly or indirectly,—

28. *Craven*, [1989] A.C. at 401.

29. *Id.*

30. *See, e.g.*, Section IA 5(1) of the Income Tax Act, as substituted by Section 57(1) of the Taxation (Consequential Rate Alignment and Remedial Measures) Act 2009 (N.Z.).

31. *See, e.g.*, Section IA 5(2) of the Income Tax Act 2007 (N.Z.) (requiring companies in New Zealand to have a minimum continuity of ownership of 49% between loss year and profit year).

32. *See, e.g., id.*

33. *See, e.g.*, Section BG 1 of the Income Tax Act 2007 (N.Z.).

34. *See, e.g., id.*

- (a) Its purpose or effect is tax avoidance; or
- (b) Where it has 2 or more purposes or effects, one of its purposes or effects (not being a merely incidental purpose or effect) is tax avoidance, whether or not any other or others of its purposes or effects relate to, or are referable to, ordinary business or family dealings,—

whether or not any person affected by that arrangement is a party thereto.³⁵

Despite the great difference between the legal systems and cultures of the two countries, the corresponding German rule is to very similar effect:

- (1) It shall not be possible to circumvent tax legislation by abusing legal options for tax planning schemes. Where the element of an individual tax laws provision to prevent circumventions of tax has been fulfilled, the legal consequences shall be determined pursuant to that provision. Where this is not the case, the tax claim shall in the event of an abuse within the meaning of subsection (2) below arise in the same manner as it arises through the use of legal options appropriate to the economic transactions concerned.
- (2) An abuse shall be deemed to exist where an inappropriate legal option is selected which, in comparison with an appropriate option, leads to tax advantages unintended by law for the taxpayer or a third party. This shall not apply where the taxpayer provides evidence of nontax reasons for the selected option which are relevant when viewed from an overall perspective.³⁶

Countries that have anti-avoidance rules broadly similar in form to New Zealand's and Germany's include Canada,³⁷ South Africa,³⁸ Hong Kong,³⁹ and France.⁴⁰ The rule in Australia was formerly similar,⁴¹ but since 1981 it has been framed in much more detail.⁴² The United Kingdom does not have a statutory general anti-avoidance rule, but it does have a judicially developed anti-avoidance rule that can sometimes have roughly the same effect. This United Kingdom common law anti-avoidance doctrine was first propounded by the House of Lords in *W.T. Ramsay Ltd. v Inland Revenue Commissioners*.⁴³

35. Section 99(2) of the Income Tax Act 1976 (N.Z.). New Zealand's current rule is not so readily quotable because it is disaggregated into several elements, but it has roughly the same meaning and effect. See Section BG 1 of the Income Tax Act 2007 (N.Z.) (incorporating GB 1 and certain definitions in YA 1).

36. ABGABENORDNUNG [AO] [GENERAL TAX CODE], Mar. 16, 1976, BUNDESGESETZBLATT, Teil I [BGBl. I] at 26, § 42 (Ger.), available at JURIS.

37. Income Tax Act, R.S.C. 1985, c. 1, s. 245 (Can.).

38. Income Tax Act 58 of 1962 § 103 (S. Afr.).

39. Inland Revenue Ordinance, (1947) Cap. 112, § 61 (H.K.).

40. CODE DE PROCÉDURE FISCAL [C.L.P.F.] art. L64 (Fr.).

41. *Income Tax Assessment Act 1936* (Cth) s 260 (Austl.).

42. *Id.* at ss 177A–177G (Austl.); see *infra* note 116 and accompanying text.

43. *W.T. Ramsay Ltd. v. Inland Revenue Comm'rs*, [1982] A.C. 300, 302–03 (H.L.).

At the risk of gross over-simplification, one can say that the common law anti-avoidance doctrine essentially allows the court to look at a series of transactions, and to determine whether the transactions have any economic purpose other than the avoidance of tax.⁴⁴ There have been suggestions in the United Kingdom that its common law anti-avoidance doctrine is insufficient to combat tax avoidance and should be replaced by a statutory general anti-avoidance rule,⁴⁵ but so far these suggestions have not been taken up.

Until 2010, the United States was similar to the United Kingdom in that it resisted pressure to enact a statutory general anti-avoidance rule.⁴⁶ Instead of a statutory anti-avoidance rule, the United States had a judicially developed anti-avoidance rule, first established by the Supreme Court in *Gregory v. Helvering*.⁴⁷ The rule is often referred to as the economic substance doctrine.⁴⁸ It operated in a similar manner to the United Kingdom judicially-created rule.⁴⁹ In 2010, however, the United States codified its economic substance doctrine by means of a somewhat improbable vehicle: the Health Care and Education Reconciliation Act of 2010, which was primarily concerned with sweeping changes to the United States health care system.⁵⁰ The United States's new statutory general anti-avoidance rule had not yet been tested when this article went to press, but it is expected to operate in much the same way as statutory rules in other countries.

Some civil law countries rely on the "abuse of rights" concept, which forbids the use of rights for improper purposes.⁵¹ Others have statutory general anti-avoidance rules with broadly the same effect as those found in common law countries.⁵² The different forms that general anti-avoidance rules take do not affect associated rule of law issues; problems and justifications that concern general anti-avoidance rules are equally relevant to all of them.

44. *Id.*

45. See, e.g., Judith Freedman, *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle*, 4 BRIT. TAX REV. 332, 347 (2004).

46. Proposals to introduce a statutory general anti-avoidance rule to the United States have come before the United States House of Representatives on a number of occasions. See, e.g., Abusive Tax Shelter Shutdown and Taxpayer Accountability Act of 2003, H.R. 1555, 108th Cong. (2003).

47. *Gregory v. Helvering*, 293 U.S. 465, 469 (1986).

48. Christopher M. Pietruszkiewicz, *Economic Substance and the Standard of Review*, 60 ALA. L. REV. 339, 342 (2009).

49. Assaf Likhovski, *The Duke and the Lady: Helvering v. Gregory and the History of Tax Avoidance Adjudication*, 25 CARDOZO L. REV. 953, 963 (2004).

50. Health Care and Education Reconciliation Act of 2010 § 1409, 26 U.S.C. § 7701 (2010).

51. Zoë Prebble & John Prebble, *Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law*, 62 BULL. FOR INT'L TAX'N 151, 152–53 (2008).

52. *Id.* at 159.

C. *How Do General Anti-avoidance Rules Breach the Principles of the Rule of Law?*

The exact content of the concept of the rule of law is the focus of a continuing debate between legal theorists.⁵³ Nevertheless, as far as certainty is concerned, there is near unanimity: Most, and probably all, legal philosophers consider that a law must be relatively certain in order to conform to the principles of the rule of law.⁵⁴ It is this requirement of certainty that general anti-avoidance rules offend. Although a number of countries have statutory general anti-avoidance rules, the legislation adds little to the common understanding of what constitutes tax avoidance. In most jurisdictions, there is uncertainty as to which transactions fall inside the general anti-avoidance rule.

The uncertainty surrounding tax avoidance stems from the fine line that separates unacceptable tax avoidance from acceptable tax mitigation. Lord Templeman, in *Challenge Corporation Ltd. v Commissioner of Inland Revenue*, considered the two concepts with reference to Section 99 of the Income Tax Act 1976, as the New Zealand general anti-avoidance rule was then numbered.⁵⁵ His Lordship took an example from United Kingdom practice, namely a covenant to assign income, which, if in due form and for a duration of at least six years, can shift liability for tax from the assignor to the assignee.⁵⁶ He said:

Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an "arrangement" but from the reduction of income which he accepts or the expenditure which he incurs.

Thus when a taxpayer executes a covenant and makes a payment under the covenant he reduces his income. If the covenant exceeds six years and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the payment under the covenant.

. . . .

Section 99 does not apply to tax mitigation where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.

53. See generally Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137 (2002) (discussing the confusion among legal philosophers of what certain terms mean).

54. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 143 (1960); see also JOHN RAWLS, *A THEORY OF JUSTICE* 235 (1971).

55. *Challenge Corp. v Comm'r of Inland Revenue* [1986] 2 NZLR 513, 561 (P.C.).

56. *Id.*

Section 99 does apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income, or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.⁵⁷

Although it is generally accepted that general anti-avoidance rules apply to tax avoidance and not to tax mitigation, drawing the line between the two is often problematic. A literal application of general anti-avoidance rules would improperly include many legitimate transactions.⁵⁸ General anti-avoidance rules, therefore, mean something more than their bare words.

D. Why Are General Anti-avoidance Rules Especially Bad?

The preceding sections of this article have demonstrated that general anti-avoidance rules are vague. However, all legislation is vague to some extent. The most specific of rules will always have borderline cases. Why, then, do some people single general anti-avoidance rules out as particularly egregious breaches of the rule of law?⁵⁹ Drafters of most laws cannot foresee all relevant fact situations. As Hart pointed out, all laws admit of “core” situations, where the law will definitely apply, and “penumbra,” where it is less certain whether the law will apply.⁶⁰ To criticize general anti-avoidance rules because their application is unclear in some situations appears to subject them to a higher standard than we demand of law in general.

The difference is that general anti-avoidance rules have far larger penumbras than most laws. Arguably, general anti-avoidance rules are nothing but penumbras. The reason why legislators decide that they need general anti-avoidance rules is that all situations where the rules may be needed cannot be defined in advance. If legislators could foresee all varieties of tax avoidance, they would pass specifically targeted rules to frustrate those endeavors. No doubt, most tax policy makers could give examples of the sorts of arrangements that might be caught by general anti-avoidance rules, but these examples would be cases that have been found to constitute avoidance in the

57. *Id.*

58. *See, e.g., id.* at 546 (alluding to the somewhat paradoxical consequence situation of a literal interpretation of a general anti-avoidance rule being quite obviously not what Parliament intended).

59. *See, e.g.,* Graeme Cooper, *Conflicts, Challenges and Choices—The Rule of Law and Anti-Avoidance Rules*, in *TAX AVOIDANCE AND THE RULE OF LAW* 13, 25 (Graeme Cooper ed., 1997) (discussing papers collected from the conference *The Rule of Law and Anti-Avoidance Rules: Tax Administration in a Constitutional Democracy*, convened in Sydney in 1995 to explore the apparent tension between anti-avoidance rules and the rule of law).

60. H.L.A. HART, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958), *reprinted in* *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 63 (1983).

past. The fact that general anti-avoidance rules exist at all is evidence that policy-makers and legislators themselves cannot predict what structures taxpayers will eventually contrive. The following sections of this article examine the deeper values that the requirement of certainty seeks to preserve and consider whether general anti-avoidance rules truly offend those values. If they do, are there situations in which the rule of law must give way to countervailing considerations? And is tax avoidance one of those situations? An important factor is public tolerance of general anti-avoidance rules. It appears that the rule of law is seen as more important in some areas of law than in others. This article examines why this is so.

I. THE UNDERLYING VALUES OF THE RULE OF LAW

A. *Guidance*

The rule of law requires that the law be certain so that it can provide guidance.⁶¹ Generally, laws that are as vague as general anti-avoidance rules attract considerable criticism, because they fail to provide people with sufficient information about what is and is not permitted to allow them to plan their lives. For example, on August 29, 1935 the Senate of the Free City of Danzig decreed an amendment to the Danzig Penal Code that criminalized acts “deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling.”⁶² In an uncomfortable common law echo, the House of Lords in the English case of *Shaw v. Director of Public Prosecutions* decided that it had jurisdiction to create new offenses in order to punish acts that were contrary to public morals, but that had not previously been held illegal.⁶³ The Danzig legislation, which was enacted in order to align the city’s criminal law with that of Nazi Germany, is sometimes known as the “Danzig Decree.”⁶⁴ Article 386 of the Criminal Code of the Qing Dynasty, which ruled China from 1644 to 1912, furnishes an interesting comparison.⁶⁵ The Qing Code contained a long list of specific offenses, but taking a form very similar to the decree of the Senate of Danzig, Article 386 provided that “[doing] that which ought not to be done” was an offense.⁶⁶ It is hard to think of a norm that claims to be a rule of law that could authorize more arbitrary action on the part

61. See, e.g., RAZ, *supra* note 2, at 213.

62. Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 65, at 44–45 (Dec. 4) [hereinafter Danzig Legislative Decrees].

63. *Shaw v. Dir. of Pub. Prosecutions*, [1962] A.C. 220 (H.L.) 267 (appeal taken from Eng.).

64. See STEPHEN M. SCHWABEL, *JUSTICE IN INTERNATIONAL LAW* 151 (1994).

65. *THE GREAT QING CODE: A NEW TRANSLATION* 359 (William C. Jones trans., 1994).

66. *Id.*

of the authorities. Even the Nazi rule incorporated the (admittedly spurious) criterion of “sound popular feeling.”⁶⁷

Both the Danzig Decree and *Shaw v. Director of Public Prosecutions* have been heavily criticized. For example, the Permanent Court of International Justice delivered an opinion condemning the amendment to the Danzig Penal Code.⁶⁸ People criticize *Shaw* for similar reasons.⁶⁹ Should we be concerned that the reasons that make the Danzig Decree, the decision in *Shaw*, and Article 386 of the Qing Code objectionable appear to apply equally to general anti-avoidance rules?

It is difficult to know what effect general anti-avoidance rules have on people’s actions. It has been suggested that such rules act *in terrorem*, in that people are discouraged from constructing tax avoidance schemes because of the risk of being caught by the general anti-avoidance rule.⁷⁰ While this consequence may be what governments hope for when they resort to general anti-avoidance rules, such an effect is not what scholars mean when they argue that the law should be capable of guiding people. To demonstrate that general anti-avoidance rules offend the rule of law, however, it is not sufficient simply to show that they do not guide people’s actions. To see what is so objectionable about general anti-avoidance rules, it is necessary to examine the underlying values of the rule of law, and to reveal why it is important that people should be able to rely on its principles to guide them.

B. Liberty

The relationship between liberty, on one hand, and laws that can be relied upon, on the other, is a key part in many theorists’ conceptions of the rule of law. For Rawls, people must know exactly what legal rights they can claim because “[i]f the bases of these claims are unsure, so are the boundaries of men’s liberties.”⁷¹ An essential part of being free, then, is knowing exactly how free one is. This argument has particular resonance when we look at general anti-avoidance rules. The argument is that general anti-avoidance rules’ truly objectionable aspect is that no one really knows how far their reach extends. People are prevented from taking action that might be allowed, the

67. 4 OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 600 (1946).

68. Danzig Legislative Decrees, *supra* note 62, at 44–45.

69. See, e.g., C.C. Turpin, Comment, *Criminal Law—Conspiracy to Corrupt Public Morals*, 1961 CAMBRIDGE L.J. 144, 144–46.

70. See, e.g., Michael O’Grady, Revenue Comm’r, Speech at the KPMG Tax Conference: Acceptable Limits of Tax Planning: A Revenue Perspective 5–6 (Nov. 7, 2003) (transcript available at www.tax-news.com/asp/res/ogradyspeech.pdf).

71. See RAWLS, *supra* note 54, at 235.

argument continues, because they do not want to take the risk of their action being disallowed.

F.A. Hayek also stresses the connection between the rule of law and liberty, but his conception of liberty is slightly different from that of Rawls. Where Rawls would describe knowledge of the degree of liberty that the law allows as an essential component of liberty itself, Hayek simply sees liberty as the absence of coercion.⁷² If people know what the law is in advance, they can choose to put themselves in the position of being subject to it.⁷³ Subjection to the law is, therefore, a willful act.⁷⁴ This argument is particularly relevant to general anti-avoidance rules. Since no one knows exactly when general anti-avoidance rules will apply, people who are caught by them have not made a conscious decision to be subject to them, and are therefore coerced.

The argument in the preceding paragraphs appears to support the proposition that general anti-avoidance rules offend the rule of law as Rawls and Hayek explain that doctrine. But when tax professionals make this argument they are likely to put it in more specific terms, namely, that the existence of a general anti-avoidance rule has a chilling effect on legitimate tax planning and that fear of general anti-avoidance rules prevents investors and businesses from utilizing effective business structures that appear to be economically sensible.

There may be some truth in this claim, but it is not borne out by reported cases. All cases known to the present writers where the Commissioner has attacked an arrangement using a general anti-avoidance rule involve schemes that an informed but objective bystander would predicate entail tax avoidance.⁷⁵ From another perspective, at meetings of tax professionals, one of the writers has frequently asked for examples of transactions or structures that could reasonably be predicated to be legitimate but that taxpayers have rejected because of fear of a general anti-avoidance rule. Examples have not been forthcoming.

C. *Human Dignity*

For Raz, the criterion that the law should be capable of guiding action is closely linked to human dignity.⁷⁶ The law must assume that people are capable of rational thought and that they, therefore, want to plan their lives with the knowledge of what the law is.⁷⁷ Raz sees this factor as even more

72. *Id.*; HAYEK, *supra* note 54, at 11.

73. HAYEK, *supra* note 54, at 142.

74. *Id.*

75. *See, e.g., Cridland v Comm'r of Taxation* (1977) 140 CLR 330, 330–31 (Austl.); *Slutzkin v Comm'r of Taxation* (1977) 140 CLR 314, 314–15 (Austl.).

76. RAZ, *supra* note 2, at 221.

77. *Id.* at 222.

important than the rule of law's connection with freedom.⁷⁸ Laws that do not conform to the rule of law are an affront to human dignity, because the law "encourages autonomous action only in order to frustrate its purpose."⁷⁹ Raz might well charge general anti-avoidance rules with such an offense. The detailed formality of tax law encourages people to find ways to circumvent it, but general anti-avoidance rules may frustrate their efforts.

D. Effective Law and Fuller

It is unlikely that Lon Fuller would disagree with Rawls's argument that the rule of law protects liberty or Raz's proposition that it protects dignity. Fuller, however, focuses his argument on the theory that certain formal criteria of the rule of law must all be sufficiently satisfied in order for law to exist.⁸⁰ Laws must be public, prospective, understandable, non-contradictory, possible to conform to, and relatively stable; there must be congruence between how the rules are written down and how they are enforced; and laws must be rules as opposed to ad hoc decisions.⁸¹

In order to demonstrate how continuous breaches of the rule of law reduce the effectiveness of legal systems, Fuller gives us the example of King Rex.⁸² King Rex is a ruler who tries but fails to make law on eight separate occasions.⁸³ Each time that Rex attempts to make law, he manages to breach one of these eight criteria.⁸⁴ For example, on one occasion, Rex publishes a legal code that is so convoluted that no one can understand it and, on another occasion, he announces that all cases will be decided retrospectively.⁸⁵

Naturally, Rex's subjects are dismayed at their king's disregard for the rule of law and are annoyed at the way the consequences of that disregard affect them.⁸⁶ For present purposes, however, the interesting point is the consequence for Rex. Rex is unable to rule effectively, because his rules cannot be followed.⁸⁷ There is really no point in Rex having laws at all, because his laws do not guide the behavior of his subjects.⁸⁸ However much his subjects might want to obey Rex's laws, they cannot. Fuller's examples show that laws that do not conform to the rule of law can, therefore, be just as frustrating to law-makers as they are to law-followers.

78. *Id.* at 220.

79. *Id.* at 222.

80. LON L. FULLER, THE MORALITY OF LAW 39 (1964).

81. *Id.* at 38–39.

82. *Id.* at 33.

83. *Id.* at 33–38.

84. *Id.*

85. FULLER, *supra* note 80, at 34–35.

86. *Id.* at 38.

87. *Id.* at 36.

88. *Id.*

E. Are General Anti-avoidance Rules Effective?

General anti-avoidance rules tend to be counterexamples to Fuller's general theory of effective law. They are frustrating to the citizen, but they are useful to governments. When general anti-avoidance rules work, they are undeniably effective, because they allow governments to collect tax that they would otherwise lose. Nevertheless, the experience of some countries with general anti-avoidance rules reveals that such rules can sometimes be ineffective for reasons very similar to those that plagued King Rex.

For example, when Sir Garfield Barwick was Chief Justice of Australia, the Commissioner was seldom successful in litigation when he deployed the general anti-avoidance rule.⁸⁹ Chief Justice Barwick felt very strongly that "[i]t is for the Parliament to specify, . . . with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax."⁹⁰ The Chief Justice had little time for the vagueness of the general anti-avoidance rule and tended to find for the taxpayer even in cases of the most blatant tax avoidance.⁹¹

Chief Justice Barwick's pro-taxpayer stance reached its apogee in the cases of *Slutzkin v Federal Commissioner of Taxation*⁹² and *Cridland v Federal Commissioner of Taxation*.⁹³ *Slutzkin* was a case of dividend-stripping.⁹⁴ The taxpayer was a shareholder in Francis Richard Holdings Pty. Ltd. (FR Holdings), a company that was pregnant with profits.⁹⁵ Had the company distributed the profits as a dividend, they then would have been taxable in the hands of Slutzkin and his fellow shareholders.⁹⁶ The same result would have obtained had the shareholders liquidated the company and distributed the proceeds.

Instead, the shareholders cashed the company up by liquidating its assets.⁹⁷ They then sold their shares to Cadiz Corporation, which was a trader in

89. See *Income Tax Assessment Act 1936* (Cth) s 260 (Austl.) (setting forth at the time, Australia's general anti-avoidance rule).

90. *Comm'r of Taxation v Westrad Party Ltd.* (1980) 144 CLR 55, 59 (Austl.).

91. See Geoffrey Lehmann, *The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism*, 9 MONASH U. L. REV. 115, 135 (1983). Lehmann argued that Sir Garfield Barwick did not deprive Australia's general anti-avoidance rule of all effect, because to do so would invite speedy law reform. *Id.* at 139. In fact, Chief Justice Barwick allowed the former section 260 to continue to operate where an "antecedent transaction" was involved. *Id.* at 135. See also *Mullins v Comm'r of Taxation* (1976) 135 CLR 290, 302 (Austl.).

92. *Slutzkin v Comm'r of Taxation* (1977) 140 CLR 314 (Austl.).

93. *Cridland v Comm'r of Taxation* (1977) 140 CLR 330 (Austl.).

94. *Slutzkin*, 140 CLR at 317.

95. *Id.* at 316, 322.

96. *Id.* at 319.

97. *Id.* at 317.

shares.⁹⁸ Cadiz Corporation caused FR Holdings to distribute its retained profits as a dividend.⁹⁹ Without its retained profits, the company was now worth very little.¹⁰⁰ Cadiz Corporation sold its shares in FR Holdings for a very small sum.¹⁰¹

For Slutzkin, the fiscal effect of these transactions was that he sold his shares for a non-taxable capital receipt.¹⁰² Cadiz Corporation, on the other hand, derived a taxable profit from the dividend, but sustained a deductible loss in selling the shares.¹⁰³ The loss neatly cancelled the gain from the dividend and left Cadiz Corporation with, in effect, a fee for its trouble. The fee was taxable, but was a very small fraction of the income that Slutzkin and his fellow shareholders had stood to derive from either a profit distribution or a liquidation.¹⁰⁴

Arguing that the only reason that Slutzkin and his fellows sold their shares was to avoid tax on profits that would otherwise have been distributed, the Commissioner submitted that the price of the shares was economically the same thing as a dividend and that the general anti-avoidance rule applied.¹⁰⁵ Chief Justice Barwick rejected this argument, holding that the sale of the shares was “no more than a realization by them of the benefit of their shareholding in a way which would not attract tax.”¹⁰⁶

Cridland involved a scheme designed to take advantage of a rule that allowed primary producers to average their incomes over a number of years and to pay tax on that average.¹⁰⁷ The rule was intended to make the tax system fairer for people like farmers, whose income often varies considerably from one year to the next.¹⁰⁸ The scheme relied on rules that made anyone with even a small amount of farming income a primary producer and that allowed for averaging of all primary producer income, not just farming income.¹⁰⁹ Subscribing to the scheme, Cridland, a university student, bought a share in a unit trust.¹¹⁰ The trust was a primary producer.¹¹¹ Cridland’s

98. *Id.*

99. *Slutzkin*, 140 CLR at 321.

100. *See id.* at 317.

101. *Id.*

102. *Id.* at 328.

103. *Id.* at 318–19.

104. *See Slutzkin*, 140 CLR at 317 (characterizing the challenged transaction as “dividend stripping”).

105. *Id.* at 316.

106. *Id.* at 315.

107. *Cridland v Comm’r of Taxation* (1977) 140 CLR 330, 331 (Austl.).

108. *See id.* at 334. Where there is a progressive scale, people with variable incomes can find themselves propelled unfairly into very high bands of tax, bands that do not reflect their average income calculated over several years.

109. *Id.* at 330.

110. *Id.* at 331, 337.

interest as a beneficiary of the trust was only one dollar a year.¹¹² The years in which he was a beneficiary straddled his time as a student and also his time as a salaried graduate, when his income was much higher.¹¹³ Cridland claimed to be a primary producer and, therefore, averaged his income—spreading much of it back into his impecunious years as a student.¹¹⁴ Despite the general anti-avoidance rule, the Barwick Court upheld the claim, with Justice Mason delivering the leading judgment.¹¹⁵ Both *Slutzkin* and *Cridland* were almost certainly situations where Australia's general anti-avoidance rule should have applied, but Chief Justice Barwick's High Court found in both cases that the taxpayers had not avoided tax.

In response to this judicial attitude, which rendered Australia's general anti-avoidance rule almost useless, in 1981 the Australian Parliament enacted a new type of general anti-avoidance rule that attempted to define avoidance more precisely.¹¹⁶ It is certainly more prolix than the older version.¹¹⁷ In hindsight, Parliament's action was possibly not necessary: Following Chief Justice Barwick's retirement, the High Court was able to revitalize Section 260, Australia's then general anti-avoidance rule.¹¹⁸ The history of how Section 260 fared during Sir Garfield Barwick's term as Chief Justice is an interesting example of how rule-of-law defects in general anti-avoidance rules can render them ineffective.¹¹⁹

It is interesting to note that when general anti-avoidance rules are ineffective, this ineffectiveness is not due primarily to taxpayers being inadequately guided. Rather, when general anti-avoidance rules are ineffective, it is because the judiciary does not know what to make of them. To return to general anti-avoidance rules' sinister counterpart, the amendment to the Danzig Penal Code, it seems that the Nazis had a similar experience to that of the Australians with Sir Garfield Barwick. The same rule applied in Germany as in Danzig, but it ultimately led to very few prosecutions in either

111. *Id.* at 331.

112. *Cridland*, 140 CLR at 337.

113. *See id.* at 332.

114. *See id.*

115. *Id.* at 334.

116. *Income Tax Assessment Act 1981* (Cth) s 260 (Austl.).

117. *Income Tax Assessment Act 1936* (Cth) ss 177A–177G (Austl.).

118. *See Comm'r of Taxation v Gulland* (1985) 160 CLR 55, 56 (Austl.)

119. The United Kingdom's experience with a judicially developed anti-avoidance doctrine might be used to illustrate the same point. The doctrine, as developed from its original formulation by Lord Wilberforce in *W.T. Ramsay Ltd. v. Inland Revenue Commissioners*, is so vague that no one seems to be certain whether it even exists. Its application can therefore appear somewhat haphazard. *W.T. Ramsay Ltd. v. Inland Revenue Comm'rs*, [1982] A.C. 300, 323–26 (H.L.) (appeal taken from Eng.). *See generally* Robert Walker, *Ramsay 25 Years On: Some Reflections on Tax Avoidance*, 120 LAW Q. REV. 412 (2004) (discussing the evolution of the original doctrine).

jurisdiction, because its terms were too vague for even the compliant judges of the Nazi era to make much sense of them.¹²⁰

There appears to be a parallel with Article 386 of the Qing Dynasty Criminal Code. A penalty that was rather limited for the times mitigated the wide embrace of the language of the rule. The punishment for breach of Article 386 was caning with the *banzi*: either 40 strokes of the light bamboo, or 80 strokes of the heavy bamboo for more serious offenses.¹²¹ Although harsh enough by our standards, such a punishment was then thought to be on the lenient side.¹²² For this reason, it was generally understood that the catch-all Article 386 was intended to apply only to relatively minor misdemeanors.¹²³ Knowledge of the operation of the criminal law under the Qings is limited, but it may not be drawing too long a bow to suggest that Article 386 is another demonstration of Fuller's thesis. Uncertainty as to its coverage may have stunted the operation of what, on its face, was a rule that offered unlimited scope for oppression.

General anti-avoidance rules in the tax area furnish a marked contrast to rules like the Danzig Decree and the Qing Article 386: Situations where statutory general anti-avoidance rules are ineffective are relative rarities. The majority of jurisdictions that have general anti-avoidance rules find them to be reasonably effective though not foolproof tools for frustrating tax avoidance.¹²⁴

It is difficult to know what conclusion to draw from the fact that general anti-avoidance rules tend to be relatively effective. Fuller's argument that laws are more effective when people know what they require certainly seems uncontroversial and likely to be true in most situations. While Fuller does not demand that legal systems satisfy each of his criteria perfectly in order to conform to the rule of law,¹²⁵ it is unlikely that he would approve of the protracted and unapologetic breaches that accompany general anti-avoidance rules.

120. MARTIN BROZAT, *THE HITLER STATE: THE FOUNDATION AND DEVELOPMENT OF THE INTERNAL STRUCTURE OF THE THIRD REICH* 338–39 (John W. Hiden trans., Longman, Inc. 1981) (1969).

121. Charles Aylmer, Book Review, 7 *BULL. OF EUR. ASS'N OF SINOLOGICAL LIBRS.* (June 1994) (reviewing *THE GREAT QING CODE*, *supra* note 65), available at www.easl.org/beasl/be7.html#9.

122. See Jérôme Bourgon, *Abolishing 'Cruel Punishments': A Reappraisal of the Chinese Roots and Long-term Efficiency of the Xinzheng Legal Reforms*, 37 *MOD. ASIAN STUD.* 851, 852–53 (2003) (discussing the history and eventual outlaw of torture in China).

123. Several scholars of Chinese law have confirmed this point to the authors. See generally Aylmer, *supra* note 121.

124. See *supra* notes 30–52 and accompanying text. Examples of cases where a general anti-avoidance rule has misfired abound. See *Peterson v Inland Revenue Comm'r* [2005] 3 NZLR 433 (P.C.); *Cridland v Comm'r of Taxation* (1977) 140 CLR 330 (Austl.); *Slutzkin v Comm'r of Taxation* (1977) 140 CLR 314 (Austl.).

125. See FULLER, *supra* note 81, at 41.

This point is even clearer if we use Fuller's framework to assess individual laws, as opposed to entire legal systems. A state with some laws that offend Fuller's criteria may still be able to be governed effectively, but, according to Fuller's thesis, an individual rule that continuously breaches many of his criteria ought not be effective. It is an interesting feature of general anti-avoidance rules that their criteria for effectiveness are almost the exact opposite of the effectiveness criteria of other laws.

II. ARE GENERAL ANTI-AVOIDANCE RULES JUSTIFIED DESPITE BREACHING THE RULE OF LAW?

A. *Problems of Income Taxation*

The intuitive alternative to a general anti-avoidance rule is a system of very many specific rules that detail exactly what is and is not subject to income tax. Of course, all tax systems already have such specific rules in at least some areas of economic activity, whether or not they also have general anti-avoidance rules.¹²⁶ Unfortunately, however, the more specific and detailed a system's rules become, the more ways people find to circumvent those rules.¹²⁷ Tax law is unusual in two key respects. First, there are very few other areas of law that people so aggressively try to avoid. Second, the nature of tax law means that tax legislation contains a large number of potential loopholes.¹²⁸ The result is that in the absence of a general anti-avoidance rule, there is apt to be a great deal of tax avoidance that the government is powerless to stop.

It is tempting to suggest that if legislators cannot frame a tax avoidance rule that conforms to the rule of law, they should not have an anti-avoidance rule at all. Governments should just put up with the adverse consequences. However, this suggestion overlooks the fact that tax avoidance is not a problem for governments alone; it is a problem for society generally. Avoidance undermines two key purposes of a tax system. First, the principle of horizontal equity states that people in the same economic position should be taxed at the same rate.¹²⁹ Tax avoidance makes horizontal equity difficult to achieve, because successful tax avoidance results in some people being taxed less than

126. Victor Fleischer, *Regulatory Arbitrage* 28 (Legal Studies Research Paper Series, Working Paper No. 10-11, 2010).

127. Freedman, *supra* note 45, at 346.

128. For an explanation of why tax law is more susceptible to loopholes than other areas of law, see John Prebble, *Income Taxation: A Structure Built on Sand*, Address at Sydney University Law School Ross Parsons Memorial Lecture (June 14, 2001), in 24 SYDNEY L. REV. 301, 303 (2002) (discussing Ross Parsons, *Income Taxation—An Institution in Decay*, 3 AUSTL. TAX. F. 233 (1986)).

129. Richard E. Krever, *Structure and Policy of Australian Income Taxation*, in AUSTRALIAN TAXATION: PRINCIPLES AND PRACTICE 1, 11 (Richard E. Krever ed., 1987).

others who are in the same economic position. In other words, people who avoid tax are not paying their fair share as measured by their wealth.

Second, tax avoidance makes it more difficult for tax systems to be economically neutral. Economic neutrality demands that tax systems distort the normal workings of the market as little as possible; that is, that people should not make decisions for purely (or even partially) tax reasons. The existence of opportunities for tax avoidance frustrates this goal. To illustrate, consider the case of *Peterson v Inland Revenue Commissioner*,¹³⁰ decided by the Privy Council in 2005. *Peterson* was a case involving films funded principally by non-recourse loans.¹³¹ Pursuant to a scheme, Mr. Peterson and others invested in films and deducted their investment from their other income.¹³² The deductions took the form of allowances for depreciation, which permitted investors in films to amortize the cost over two years when calculating assessable income.¹³³

The promoters of the film told the investors that the cost of the film was (say) \$2,000, while in fact it was only (say) \$1,000.¹³⁴ To fund their investment in the films, Mr. Peterson and his co-investors borrowed.¹³⁵ The borrowing was in the form of non-recourse loans—that is, loans that were repayable only if the films were successful.¹³⁶ Interest was not charged.¹³⁷ Loans on such favorable terms naturally attract questions, and indeed, the court found that the money was never borrowed at all.¹³⁸ The fact that the extra money from investors was not available did not bother the film's promoters, because they had overstated the cost of the film anyway.¹³⁹

The cost of the films was so overstated because it led to tax savings. Instead of being able to write off \$1,000 over two years, investors were able to write off \$2,000, even though they had never actually spent the second \$1,000 (and, except on paper, had not even borrowed it).¹⁴⁰ Whether or not the films were successful, the investors would gain a tax advantage. This tax advantage meant that a scheme not ordinarily attractive to investors became worthwhile.

This situation is a clear example of the tax system creating market distortions. The transactions in *Peterson* were not attractive for their intrinsic

130. *Peterson v Inland Revenue Comm'r* [2005] 3 NZLR 433 (P.C.).

131. *Id.* at 437.

132. *Id.* at 438.

133. *Id.*

134. *See id.* at 440.

135. *Peterson*, [2005] 3 NZLR at 440.

136. *Id.* at 439.

137. *Id.* at 453.

138. *Case U32* (2000) 19 NZTC 9302, 9312.

139. *See Peterson*, [2005] 3 NZLR at 433. If the investors did make the extra money available, the promoters recycled it back to the lender immediately.

140. *See id.* at 453.

merits; they were attractive because of tax advantages. Jurisdictions that have general anti-avoidance rules are able to counteract the effect of this distortion to the extent that investors see the tax advantages of a particular scheme as unlikely to stand up to close scrutiny. They therefore refrain from investing in it and distorting the market.

The aims of the tax system are related to the more general point about the purpose of tax systems. Governments do not tax people only to amass wealth. Rather, tax is necessary to keep states functioning. Governments must provide public services such as defense and education. Furthermore, most societies use tax to redistribute wealth to some extent. Tax avoidance reduces the effectiveness of welfare systems, a matter that is particularly important in the light of the public perception (that is probably accurate) that most tax avoidance is perpetrated by the rich or by people who are relatively well-off.¹⁴¹ Though few people have reasoned the issue through to a sufficient depth to put it this way, the prevalence of general anti-avoidance rules, either statutory or judge-made, indicates that countries may think the negative results from not having a general anti-avoidance rule outweigh the breaches of the rule of law that general anti-avoidance rules entail.

This balancing exercise reveals much about the nature of the rule of law and its values. Adherence to the rule of law can often interfere with a society's other goals. Some philosophers insist that the rule of law must be preserved without compromise.¹⁴² Other writers, such as Raz, stress that the rule of law is only one yardstick against which a legal system may be measured.¹⁴³ Just as a society's conformity to the rule of law does not ensure that the society is good, a breach of the rule of law does not make that society bad.¹⁴⁴ Rawls expands on this point, saying that a breach of the rule of law may be "the lesser of two evils."¹⁴⁵ Tax avoidance is a very real evil for society: A breach of the rule of law seems to be a necessary remedy.

In modern days, at least in democracies that follow a Western model, there is seldom anything sinister about legislators breaching the rule of law. As Fuller observes, laws tend to be most effective when they conform to the rule of law,¹⁴⁶ so governments have a vested interest in making sure their laws conform to its values. In situations where laws offend the rule of law, it will often be the case that the alternative is even less desirable. Tax law is by no

141. Robert McLeod, *Tax Avoidance Revisited*, 6 N.Z. J. TAX'N L. & POL'Y 103, 103-04 (2000); see also Fleischer, *supra* note 126, at 4.

142. See, e.g., HAYEK, *supra* note 54.

143. RAZ, *supra* note 2, at 210-11.

144. Even Fuller, who is strongly committed to the rule of law, accepts that isolated breaches do not automatically condemn a legal system. See FULLER, *supra* note 80, at 39.

145. RAWLS, *supra* note 54, at 242.

146. See FULLER, *supra* note 80, at 39.

means the only situation where the rule of law must be sacrificed to the common good. It is easy to imagine situations where the preservation of human rights or the fulfillment of justice requires a breach of the rule of law. For example, a retrospective law may be necessary to compensate fully for a human rights breach. In such situations, most people would think that breaching the rule of law would be justified.

B. The Importance of Certainty

Certainty is clearly an important rule of law value. Usually certainty is important for both the law-follower and the law-maker. Most laws are more effective when people can be certain what they are meant to do or not do.¹⁴⁷ That is, in most cases the rule of law helps to promote effective law. General anti-avoidance rules are, therefore, an aberration: It is their very vagueness that makes them effective. If they were not vague, they would not be effective.¹⁴⁸ This characteristic, together with the fundamental problems of tax law, plus what many see as the dubious moral standing of tax avoiders, prompts some commentators to argue that certainty is simply an inappropriate value for general anti-avoidance rules to strive for.¹⁴⁹

Challenge Corporation v Commissioner of Inland Revenue exemplifies the negative effect that certainty can have on the utility of an anti-avoidance rule.¹⁵⁰ Challenge Corporation, the taxpayer company, acquired a subsidiary that had suffered heavy losses.¹⁵¹ Challenge Corporation then purported to set off the subsidiary's losses against its own profits.¹⁵² At the time, the provisions that allowed intra-group loss consolidation did not require any continuity of shareholding between loss year and profit year.¹⁵³ Challenge Corporation had, therefore, complied with the letter of the law.¹⁵⁴ Without a general anti-avoidance rule, companies in Challenge Corporation's situation would be able to take deductions despite having suffered no economic loss.¹⁵⁵

Where the principles of the rule of law negatively influence a law's effectiveness, it is necessary to weigh the consequences of not having the law

147. *See id.* at 36.

148. As mentioned previously, there are some cases that are definitely tax avoidance (although these cases are mainly ones that have been judicially decided to be tax avoidance); so general anti-avoidance rules' sphere of application is not entirely unknown. Nevertheless, it is true to say that general anti-avoidance rules depend on their vagueness for their effectiveness. *See supra* notes 1–29 and accompanying text.

149. *See, e.g.,* Freedman, *supra* note 45, at 346.

150. *See Challenge Corp. v Comm'r of Inland Revenue* [1986] 2 NZLR 513, 513 (P.C.).

151. *Id.*

152. *Id.*

153. *Id.* at 519.

154. *Id.* at 529.

155. *Challenge Corp.*, [1986] 2 NZLR at 529.

in question against the possibility that some people will be surprised by the manner in which the law operates. Certainty and related rule of law values are, therefore, extremely important where criminal sanctions are imposed but are less important where the issue is tax avoidance.¹⁵⁶

C. *The Morality of Tax Avoidance*

In the face of such an obvious breach of the rule of law, the fact that so many countries have general anti-avoidance rules seems difficult to account for. The idiosyncrasies of tax law no doubt make general anti-avoidance rules necessary, but it is unlikely that the public tolerance of general anti-avoidance rules is due to public knowledge of these idiosyncrasies. Tax law is extraordinarily complicated, but it is unrealistic to suppose that most people see it as different in kind from other branches of the law. How, then, can we account for the lack of public condemnation of general anti-avoidance rules? The explanation may be a perception of tax avoidance as being questionable from a moral perspective.

The moral status of tax avoidance is contentious. A number of cases hold that people have the right to arrange their affairs so as to pay as little tax as possible; some even hold that there is nothing immoral about tax avoidance.¹⁵⁷ Relying on such decisions, lawyers tend to assume that as a matter of law tax avoidance is morally unimpeachable. However, it is a logical error to say that because tax avoidance is not immoral as a matter of law it is not immoral in any sense. Whether a certain act is moral must be determined according to principles of ethics, not by reference to statements in judgments.¹⁵⁸ It is possible that judges who say that there is nothing immoral about tax avoidance are correct, but if that is so, it must be because tax avoidance is moral according to ethical principles. As a matter of logic, a judge saying that a particular act is moral as a matter of law cannot determine whether the act is in fact moral.

What is the moral status of tax avoidance according to basic principles of ethics? As a matter of morality untainted by law, people know that they have a

156. While taxpayers are usually extremely annoyed if their tax avoidance schemes are disallowed because of the operation of general anti-avoidance rules, general anti-avoidance rules do not impose criminal penalties—though there are some penalties. It is arguable that it is more important for laws that impose criminal penalties to conform to the rule of law. See RAWLS, *supra* note 54, at 241.

157. Probably the most famous statement on the morality of tax avoidance comes from Lord Tomlin in *Commissioner of Inland Revenue v Duke of Westminster*, where his Lordship stated that “[e]very man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be.” *Comm’rs of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1, 19–20 (H.L.) (Eng.).

158. Zoë Prebble & John Prebble, *The Morality of Tax Avoidance*, 43 CREIGHTON L. REV. 693, 716 (2010).

duty to pay tax, so seeking to pay less tax might appear to be shirking that duty.¹⁵⁹ Furthermore, despite the complexity of tax laws, most people have a reasonably clear idea of what the policy of the law would require them to pay.¹⁶⁰ General anti-avoidance rules do not set out to catch individual taxpayers trying earnestly to comply with complex tax laws.¹⁶¹ Rather, they tend to catch instances of tax planning that are at least relatively aggressive.¹⁶² People who are ultimately caught by general anti-avoidance rules almost always know that they have engaged in something that they would at least concede to be “tax planning”—usually aggressive tax planning—even if they do not expect to be called to account.¹⁶³ Taxpayers who engage in tax avoidance schemes are consciously putting other taxpayers at a relative disadvantage and may be criticized on moral grounds.¹⁶⁴

If the arguably dubious moral status of tax avoidance partially explains the conspicuous lack of public outcry over general anti-avoidance rules, what can we deduce about the relationship between the rule of law and morality? It cannot be correct that people lose their right to rely on the law when they act immorally.¹⁶⁵ No one would suggest that the rule of law is unnecessary in the field of criminal law, which typically involves far more obvious immorality than tax avoidance. Possibly the real explanation is that the rule of law itself, as a strict formalist doctrine, inevitably allows people to some extent to circumvent the laws that conform to it. As far as criminal law is concerned, this shortcoming of the rule of law is far outweighed by the benefits that the rule of law offers. In contrast, when it comes to tax avoidance, the benefits to society of legal certainty are outweighed by its detriments.

The argument that the detriments of the rule of law in a particular area outweigh its benefits is, nevertheless, unsatisfactory. At least, it would not satisfy Hayek, although it might satisfy Rawls or Raz.¹⁶⁶ Hayek would argue that the merits of the rule of law should not be evaluated on a case-by-case

159. Nevertheless, the exact amount of tax that each individual should pay is open to debate. It is questionable whether taxpayers who have paid the amount of tax specified by black-letter law can really be shirking a duty. See Freedman, *supra* note 45, at 337.

160. *Id.*

161. *Id.*

162. See O’Grady, *supra* note 70, at 8.

163. See *id.*

164. See Lord Templeman, *Tax and the Taxpayer*, 117 LAW Q. REV. 575, 575 (2001).

165. But see Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425 (1982) (arguing that people have no right to rely on their immoral acts not being retrospectively criminalized).

166. See, e.g., RAWLS, *supra* note 54, at 235 (“A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations.”); RAZ, *supra* note 2, at 213 (arguing that an important principle to the rule of law is that “the making of particular laws should be guided by open and relatively stable general rules”).

basis, leaving us free to disregard its principles when those principles are inconvenient.¹⁶⁷ Rather, Hayek would point out that one of the reasons why societies value the rule of law is that it applies despite leading to a net societal detriment from time to time.¹⁶⁸ Societies commit to adherence to the rule of law for the very reason that there will be instances when it is tempting to tolerate breaches.¹⁶⁹

This argument echoes David Cole's criticism of Richard Posner's *Not a Suicide Pact: The Constitution in a Time of National Emergency*.¹⁷⁰ In his book, Posner argues that the protections offered by the United States Constitution should be interpreted flexibly, in order to allow the government to address the threat of terrorism.¹⁷¹ Posner argues, for example, that the United States's wiretapping international telephone calls should be considered a "reasonable" search in the context of the threat of terrorism.¹⁷² Cole, however, points out that allowing the provisions of the Constitution to be interpreted more strictly or less strictly according to administrative convenience misses the point of having a constitution in the first place.¹⁷³ A constitution like that of the United States, and the rule of law, should be adhered to notwithstanding the fact that doing so is not always beneficial to society. Any kind of cost-benefit analysis is simply inappropriate where the Constitution is concerned. The same considerations apply with respect to the rule of law.

It would follow from the principles advanced by Hayek and by Cole that the disadvantage to society at large that can accompany adherence to the rule of law when it is a matter of tax avoidance does not seem to explain the apparent acceptance of general anti-avoidance rules even among well-informed sectors of the public. Nor would that disadvantage justify the breach of the principle of the rule of law entailed in the uncertainty of general anti-avoidance rules. What, then, may be the explanation and the justification?

With respect to the public acceptance of general anti-avoidance rules, tax avoiders appear to be, and are seen as, fundamentally different from criminals. Generally speaking, when criminals break the law, they simply break it: They do not try to find ways to circumvent the law in order to avoid technical breaches. In contrast, there is an entire industry devoted to manipulating fiscal laws with a view to obtaining tax advantages without incurring a corresponding economic loss. In the light of this difference, the fact that the

167. HAYEK, *supra* note 54, at 153.

168. *Id.*

169. *Id.*

170. See David Cole, *How to Skip the Constitution*, N.Y. REV. BOOKS, Nov. 16, 2006, at 20 (reviewing RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006)).

171. See POSNER, *supra* note 170, at 88.

172. *Id.* at 96.

173. Cole, *supra* note 170, at 23.

informed public appears to accept general anti-avoidance rules despite their shortcomings as far as the rule of law is concerned is not surprising.¹⁷⁴

With respect to the justification for the breach of the rule of law, unlike criminal behavior, tax avoidance takes advantage of the very nature of law itself. In particular, it takes advantage of law's adherence to formality. The formality of law in general, and of tax law in particular, is an essential prerequisite for contriving artificial transactions that enable the creators of the transactions or their clients to avoid tax. These are transactions that shift income from higher-taxed people to lower-taxed people; that enable revenue-to-capital conversions; that achieve the deferral of receipts or the acceleration of expenditure; that, through international arbitrage, permit the recharacterization of receipts or expenditure; and so on.

The quality of relying on the formality of the law while circumventing the law's policy distinguishes tax avoidance from criminal behavior, the area where rule of law questions tend to be most prominent. While it is true that there are difficult cases at the edges of criminal law, most criminal activity is clearly wrong by the lights of most people, whether or not there is law to forbid it.¹⁷⁵ In contrast, tax avoidance exploits the formality of the law and, in doing so, exploits the values of the rule of law itself. It attacks those values while pretending to honor them. Enacting a general anti-avoidance rule to frustrate that exploitation presents a justifiable counter-measure.

CONCLUSION

General anti-avoidance rules demonstrate that the rule of law is not an unqualified good. As with all principles, the rule of law can be outweighed by competing considerations. General anti-avoidance rules give an example of what those competing considerations might be. Furthermore, while general anti-avoidance rules themselves are justified, they also are useful in showing exactly why we value the rule of law. Most societies with developed legal systems tend not to breach the rule of law very often. As a rare example of a breach, general anti-avoidance rules are a useful reminder of why values such as certainty are important.

174. People who move in the same circles as tax advisors may dispute this statement. But who has heard of a mainstream political party campaigning for support to repeal a general anti-avoidance rule?

175. Difficult cases include assisted suicide of very sick people and certain practices in cultures other than our own.

