THE JURISTIC NATURE OF TAXATION

Indranil Julian Ghosh

Clare Hall

This dissertation is submitted for the degree of Doctor of Philosophy

Date of Submission: 20th January 2020

PREFACE

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

It does not exceed the prescribed word limit for the relevant Degree Committee.

THE JURISTIC NATURE OF TAXATION

Indranil Julian Ghosh

Clare Hall

ABSTRACT

Taxation is modal: tax may be used to achieve several different social objectives, achievable by other means, both legal and non-legal. Taxation is heavily under-theorised. Juristic definitions of taxation, (in case law, textbooks or economic works) are inevitably thin and without analytical foundation. In particular, there has long been a misconceived notion of taxation as a property obligation rather than what it actually is, a personal monetary obligation. This has spawned a battle on the legitimacy of taxation between libertarians and egalitarians which has been fought on the wrong ground (property rights) entirely. A recognition of taxation as a personal monetary obligation has important practical consequences: First for the categorisation of certain charges (such as NIC) as "taxes" whereas other charges (such as particular tax-related penalties) are not "taxes" despite being contained in a Finance Act; second, the jurisdiction of the First Tier Tribunal (Tax Chamber) must, as a result, accommodate certain notions of legitimate expectation which would not be the case if taxation were a property obligation. Taxation may easily be distinguished not only from property obligations but from other monetary liabilities, such as the obligation to pay contractual monetary consideration for goods or services, a civil penalty, a criminal fine, or tortious damages. The distinction is made clear through the techniques of "individuation", that is, the description of (here) obligations by reference to the legal norms embedded in the legal material which gives rise to each type of monetary obligation, as exemplified by Raz, Bentham and

Kelsen. It is thus that taxation may be "individuated" from other areas of law. And the monetary nature of a tax obligation exposes a profound relationship between monetary obligations and responsibility (so that a purely monetary responsibility dilutes responsibility and also the effectiveness of tax in particular modes).

TABLE OF CONTENTS

INTRODUCTION

This study provides an analysis of the juristic nature of taxation. The study "individuates" taxation, that is, the legal material which gives rise to a liability to taxation is organised into a self-contained, coherent package which reveals taxation to be a personal (not a property) obligation, which is distinct from other types of personal monetary liabilities. The analysis ("individuation") of legal material and its organisation into distinct, coherent areas of law (whether "private law", such as tort, or contract, or "public law", such as immigration law, or administrative law) is important for two reasons. First, in so far as any juristic discussion of legal concepts or areas of law utilises particular juristic notions such as "tort", or "remoteness", any intelligible discussion must have an understanding of what is meant by the particular juristic notion being discussed. Second, any normative assessment of a juristic concept or areas of law and any scrutiny of the effectiveness of a particular juristic concept or, indeed, an area of law, in achieving its objective can only take place once the subject matter of study has been identified. Put another way, any normative assessment of an area of law entails the legal (and extra-legal) norms which inform that particular area of law be scrutinised, which norms must be therefore understood and analysed. It is impossible to assess whether the notion of, say, freedom of contract is normatively appealing and whether freedom of contract is effective in achieving objectives of economic efficiency or autonomy (if these are objectives sought by freedom of contract) unless the both notion of "contract" and "freedom of contract" are adequately defined. This analysis has a hard edged practical application, since the categorisation of a money obligation as a "tax" may attract a different limitation period to a non-tax charge (as in the case of National Insurance Contributions), whereas a charge which is in fact a penalty (not a tax), even if contained in a Finance Act (such as the so-called "Enablers Provisions", discussed in Chapter 3 below) is not properly within the scope of the Parliament

Acts as being part of a "money bill." The personal, monetary nature of a tax obligation also has important implications for the jurisdiction of the Tax Chamber of the United Kingdom First Tier Tribunal, by introducing an obligation on the Tribunal to distinguish an expectation to be taxed in accordance with the European Convention of Human Rights and a property interest in money.

This study provides a juristic definition of "taxation" as a legal concept and a distinct area of law (in particular distinct from the law of property). Taxation (like all legal mechanisms) is modal, not functional in nature, in that taxation is one technique out of several which might be employed to achieve a particular function, these functions, explored below, being several and various. Taxation is properly defined as follows: taxation is a personal (not a property) obligation to pay money lawfully claimed by a body, where the lawful claim (howsoever computed) arises because that body has asserted jurisdiction over the putative debtor. This "individuation" of taxation, advanced and applied in Chapters 2-4, permits the addition of the term "taxing" to the definition so as to read: "a personal (not a property) obligation to pay money lawfully claimed by a *taxing* body, where the lawful claim (howsoever computed) arises because that *taxing* body has asserted *taxing* jurisdiction over the putative debtor." It is the success of the individuation exercise which confers a "tax" character status upon the body which imposes the relevant obligation and its jurisdiction to do so. The remainder of this Thesis will make good this definition, not only to distinguish taxation from property obligations but from other, distinct, monetary obligations: an obligation to pay money as consideration for goods or services, or because of particular behaviour, say the breach of certain standards by a person who attracts a monetary obligation (which distinguishes taxation from civil or criminal penalties, or tortious damages).

Taxation as an area of law is heavily under-theorised and definitions of taxation which appear in case law, textbooks and works produced by economic or treasury bodies are all deficient in being either too narrow, by imposing conditions which are misconceived in order for there to be a liability to taxation, or too wide, in that the definitions require unnecessary express distinction from other monetary liabilities, such as charges for goods or services, or criminal fines, which are only needed if the initial definition of taxation is over-expansive (in both cases without any analytical foundation). Chapter 1 discusses common definitions of taxation and demonstrates these definitions to be inadequate (and also universally to ignore taxation's modal nature). But in order to arrive at a coherent and analytically sound definition of taxation, an exercise of "individuation" must be undertaken, whereby the legal material which comprises the law of taxation is organised and described in a manner which distinguishes the law of taxation from other areas of law and reveals a tax obligation to be a personal, not a property obligation and also distinct from other monetary liabilities. Chapter 2 discusses the individuation techniques of each of Raz, Bentham and Kelsen and concludes that all three jurists arrive at essentially the same individuated formulations of different types of money debt (although the individuation of taxation is left until Chapter 3).

The individuation techniques deployed in Chapter 2 provide a critical methodological foundation for the formulation (individuation) of the law of taxation (and a tax obligation) so as to (1) distinguish taxation from other monetary liabilities and other monetary liabilities from each other (Chapter 3, which also discusses the theoretical and practical juristic consequences of a properly individuated notion of taxation), (2) scrutinise the implications of taxation's personal, monetary nature for notions of retrospectivity and (3) subject taxation to both normative assessment and scrutiny of the effectiveness of taxation in achieving its various objectives, in the light of the philosophical and juristic nature of money (Chapter 4). The conclusions of Chapters 1 to 4 are revisited in Chapter 5 to expose much (if not all)

philosophical debate which wrongly assumes taxation to be a property obligation as misconceived. Chapter 6 presents overall conclusions.

CHAPTER 1: THE DIFFERENT OBJECTIVES AND LEGITIMISING BASES OF TAXATION, INADEQUACIES OF COMMON DEFINITIONS OF TAX

A liability to "taxation" is a function of the assertion of ("taxing") jurisdiction over a person (a "tax unit"), which leads to a computation of a sum ("the tax base") which, if positive, gives rise to a ("tax") obligation. This obligation is a personal (not a property) obligation to pay monies to the lawful ("tax body") claimant. This definition of taxation is presented and made good in Chapter 3. However, first the ground for the analysis must be cleared. The law of taxation is heavily under-theorised. Definitions of taxation are generally presented without analytical foundation. Chapter 1 contributes to existing literature by exposing the deficiencies of common juristic definitions of taxation and makes room for the individuation of taxation as a coherent distinct area of law, which exercise is undertaken in Chapter 2 and Chapter 3 (and permits taxation to be subjected to normative analysis and permits discussion as to taxation's efficacy in achieving its objectives in Chapter 4).

To assess the juristic nature of taxation, it is important to appreciate taxation's modal nature. It is in the light of this modal nature that a juristic definition of taxation should be advanced. Section I discusses the various, distinct, legitimising bases of taxation, by reference to the various functions taxation seeks to fulfil and demonstrates taxation to have a modal nature, not a functional nature, in the sense that taxation does not have a single function but rather is one of several available techniques, legal and non-legal, which may be employed to achieve one or more objectives (functions). Common definitions of taxation are uniformly deficient. Section II performs a destructive function, explaining why certain commonly advanced definitions of taxation presented are misconceived, either restricting the notion of taxation by reference to definitional features which analysis shows are neither necessary nor sufficient juristic features for a claim to amount to a tax charge against the addressee of that claim, or making conceptually

redundant distinctions between taxation and charges for goods or services, or criminal fines, yielding an over-inclusive definition of taxation. Section III examines the decision of the Court of Appeal in *Aston Cantlow and Wilmcote with Billesley Church Council v Wallbank* [2002] STC 313 ("*Aston Cantlow*") which is an important authority, since it is an example of a decision of the Courts within the United Kingdom which defines "taxation" (for the purposes of the Human Rights Act 1998) as part of the ratio (and is consistent with the conclusions of principle reached in Chapter 1 and in the thesis generally). Section IV sets out brief summary conclusions.

Section I. The various social functions taxation seeks to fulfil

Taxation seeks to fulfil a variety of social functions. For present purposes, it is sufficient to note that there is no common connecting factor amongst any of these functional objectives, which demonstrates that taxation does not have a function; rather, taxation is a legal mode, which is capable of fulfilling various functions. Furthermore, none of these functional objectives ascribed to taxation entails taxation to have a legislative source (as opposed to a common law source).

Citizenship objectives: taxation as a condition of suffrage or a form of joint enterprise

There are two ways in which an obligation to taxation has been described as fulfilling a citizenship objective. First taxation may be imposed as a condition of suffrage. Second, taxation may be utilised by the tax-raising body as a vehicle of a "joint enterprise" between citizen and State.

In relation to an obligation to pay tax as a proper condition for suffrage, as a protection against irresponsibility of those who elect the guardians of the State's resources, Mill argues:

> No arrangement of the suffrage, therefore, can be permanently satisfactory in which any person or class is peremptorily excluded – in which the electoral privilege is not open to all persons of full age who wish to obtain it [but] there are, however, certain exclusions … The assembly that votes the taxes, either general or local, should be elected exclusively by those who pay something towards the taxes imposed. Those who pay no taxes, disposing by their votes of other people's money, have every motive to be lavish and none to economise … He who cannot by his own labour suffice for his own support, has no claim to the privilege of helping himself to the money of others.[1]

an obligation to pay tax is not a condition of suffrage in the United Kingdom. However, this notion of taxation is worth addressing to ascertain whether it casts any light on taxation's alleged attribute of having a necessary legislative source (see below). There are any number of objections to the denial of a political voice to those who are outside the tax net: first, even on its own terms, there is no necessary correlation between paying tax and responsibility in spending tax revenues; after all, the beneficiaries of expenditure have an interest to ensure those benefits continue and are not exhausted by "lavish" tendencies in spending policy. Second, it is not at all obvious that those financing the expenditure of tax revenues would be more competent than those who are to benefit from that expenditure (or indeed those with expertise who have not contributed to the fund), when it comes to an efficient allocation of resources, the preservation of adequate reserves, etc. Third, it is unlikely that those in need of benefit will pay substantial amounts of tax, so Mills' approach results in a structural disconnect between the contributors to a fund and the fund's beneficiaries. However, the purpose of this section is neither to defend nor attack Mills' explanation of taxation as a badge conferring political participation. Rather, this section confines itself to observing that, while taxation as a condition of suffrage clearly serves a "public" purpose (in imposing a condition for participation in the governance of the tax-paying population), taxation in this role may conceptually have either a

[1] John Stuart Mill, *Considerations on Representative Government*, (first published 1861, Prometheus Books 1991) 174. The restriction is to guarantee competence, the suffrage to be restricted to those *"…being able to read, write and … perform the common operations of arithmetic …*."

legislative or common law source. To be sure, taxation imposed under a non-legislative source may lack (any) democratic credentials, but there is no juristic reason why such taxation cannot have a common law source.[2] The exercise of the Royal Prerogative arises from a common law source[3] and has an essential public nature, in that its exercise may affect citizens, for example in declaring war, or in signing treaties. Neither does the Bill of Rights (or the Claim of Right) affect status of a *common law* charge as a tax.

A separate judicial description of a tax obligation as a function of citizenship describes taxation as a form of joint project between a citizen and the State, along the lines of what Oakeshott would term an "enterprise association":[4] '[The excess profits duty imposed under Finance (No2) Act 1915, during the First World War]…appears to be due to the State's desire not to penalise the profiteer, but to *participate in the fortuitous prosperity of a time of war*.'[5] The reference to "participation" connotes some sort of mutual endeavour of taxpayer and State, rather than a demand for monies simpliciter. If taxation were indeed a mechanism for a joint enterprise between citizen and State (which entailed mutual rights and obligations between the two) then taxation would serve a "public" purpose (being that very joint enterprise). But the notion of "participation" may be accommodated (and indeed more accurately described) within any one of the other, distinct, functions which taxation may demonstrably be seen to have, discussed below, without any specific appeal to tax being a distinct tool of an "enterprise

---

2 See the discussion of *Aston Cantlow and Wilmcote with Billesley Church Council v Wallbank* [2002] STC 313 (EWCA) ("*Aston Cantlow*") in Section IV below.

3 And may be attacked as undemocratic: see Keith Syrett, '*Prerogative Powers: New Labour's Forgotten Constitutional Reforms?*' [1998] Denning Law Journal 111.

4 Michael Oakeshott, *Human Conduct* (Oxford, Clarendon 1975) 114, 200-203; an enterprise association in Oakeshott's world is 'a relationship between citizen and state where both have a shared [goal] from which an agent may extricate himself by a choice of his own', as opposed to a "civil" association, which has no common substantive purpose other than the cementing of intra-population loyalties, being governed by "non-instrumental" rules: Michael Oakeshott, '*The Rule of Law*' in *On History and Other Essays* (Indianapolis, Liberty Fund 1999) 137, discussed by Dominic De Cogan "*Michael Oakeshott and the Conservative Disposition in Tax Law*" in *The Philosophical Foundations of Tax Law* (Monica Bhandari (ed), OUP 2017) 101, 107-108.

5 *Wankie Colliery Co Ltd v IRC* [1922] 2 AC 51, per Lord Sumner at 69 (emphasis added).

association", so that any "public purpose" attribute of taxation must be found in one or more of these other functions described below. Certainly, taxation is not explained as a joint enterprise mechanism in the most recent authority to discuss the nature of a "tax", being the English Court of Appeal's decision in *Aston Cantlow*.[6]

It is to these other objectives of taxation to which we now turn.

Other functional objectives of taxation

Taxation fulfils the following uncontroversial functions,[7] unconnected to citizenship, in the sense that there is no necessary connection to suffrage or any other commitment to a particular political relationship between taxpayer and tax-raising body. These non-citizenship functions are, if not always mutually exclusive, distinct from one another.

First, taxation effects an allocation of resources ("public goods").[8] This "public-private division" determines how much of a society's resources will come under the control of government and how much is left in the discretionary control of private individuals. Public goods include the minimal conditions considered necessary for society to exist at all, such as domestic peace and security. Such "public goods" cannot be provided to anybody unless they are provided to everybody.[9] Here taxation is a *quid pro quo* for 'services [which taxpaying citizens] cannot dispense with or even, if he wished, refuse'.[10] Taxation does not perform a citizenship function, even here. Taxation is not imposed and paid to permit or obtain access to

---

6 *Aston Cantlow* (no 2). See Section IV below.

7 The description of these bases is not original: see John Tiley, *Revenue Law* (9th edition, OUP 2019 by Glen Loutzenhiser) 7-10. However, the analysis of the distinct respective outcomes sought and the different notions of justice which underpin them are those of the writer alone, as are their implications for a juristic definition of taxation.

8 Liam Murphy and Thomas Nagel, *The Myth of Ownership* (New York, OUP 2002) 76.

9 Ibid, 46.

10 Georg Simmel, *The Philosophy of Money* (Tom Mottonmore and David Frisby (trs), David Frisby (ed) first published in Berlin 1907, 3rd edn, Routledge 2004) (*"Philosophy of Money"*). This basis for taxation would encompass the "benefits" accruing to resident and non-resident taxpayers inherent in the connecting factors of residence and source, as explained in *Whitney v Inland Revenue Commissioners* (1924-1926) 10 TC 88.

the fruits of citizenship; taxation is imposed and paid on and by those subject to that taxation for the self-preservation of the payers (absent which there would be no society). It may well be that the fruits of self-preservation funded by taxation extend to those who do not pay tax (and enjoy the fruits of citizenship).

Second, taxation may fulfil a redistributive function,[11] in allocating wealth (however defined) in varying proportions amongst different individuals. Redistribution may have several conceptions. One is that all human beings have equal worth and equal claims, so that distributive justice looks 'to aim at equality and to favour the needy to reduce inequality'.[12] For example, Government may be seen to assume a responsibility to mitigate harm to certain market participants who lose out in the operation of that marketplace. Taxation may serve to implement 'economic and social background justice'.[13] To confine government responsibility (and taxation) to the funding of public goods is, for some, 'just too minimal'.[14] Redistribution may alternatively seek to reconcile the freedom to spend and the injustice of good luck inheritance,[15] or to avoid a concentration of wealth,[16] or to encourage experimentation.[17] For the same reasons as set out in relation to the funding of public goods, taxation does not perform any citizenship function in its redistributive role.

Third, taxation may be employed as a tool of social engineering (distinct from redistributive justice). So taxation may be used as an incentive; for example, tax relief may be given to

---

11 Simmel, *The Philosophy of Money* (no 10) 76, 77.

12 D. D. Raphael, *What is Justice* (OUP 2001) 5.

13 For example to maintain the Rawlsian difference principle: John Rawls, *Justice and Fairness-A Restatement* (Erin Kelly (ed), Belknap Press of Harvard University Press 2001) 161; see pages 160-162 for Rawls' consideration of the different types of taxes (estates tax, progressive income tax, proportional expenditure tax) best suited to achieve these ends.

14 Ibid, 181, 182.

15 Ronald Dworkin, *Sovereign Virtue* (Harvard University Press 2002) 347, 348.

16 David Duff, "*Tax Policy and the Virtuous Sovereign: Dworkinian Equality and Redistributive Taxation*" in *The Philosophical Foundations of Tax Law* (no 4)) 167, 186, 168. See also Jennifer Bird-Pollan, "*The Philosophical Foundations of Wealth Transfer Taxation*" in *The Philosophical Foundations of Tax Law* (no 4), 217, 224.

17 Miranda Perry Fleischer, "*How is the Opera Like a Soup Kitchen?*" in *The Philosophical Foundations of Tax Law* (no 4), 285 at 259, 260.

persons who acquire homes, rather than to those who merely pay rent.[18] Or taxation may be used as a disincentive. Thus taxation may be imposed to increase the price of alcoholic drinks to restrict consumption for health reasons.[19]

Fourth, taxation may be used as a tool of economic management, say, to dampen demand[20] or, conversely to incentivise investment in a particular geographical area.[21] This role of taxation might have very different (contradictory) objectives.

Fifth, taxation may finance government[22] activities, either in competition with private commercial enterprises or instead of them as a government monopoly (such as telecommunications).[23] Here taxation performs either a commercial role, as a supplement to government revenues for the provision of services,[24] which may be in competition with private operators, or a form of redistribution in financing government activities which, although not public goods, government consider to be beneficial for the populace, which cannot be accessed by all of the populace by private means.[25] Whether a particular governmental activity confers a "public good" which is necessary for the very existence of the market, as opposed to raising

---

18 See the Income and Corporation Taxes Act 1988, s.369(1) which provides that: 'If a person who is a qualifying borrower makes a payment of relevant loan interest … he shall be entitled, on making the payment, to deduct and retain out of it a sum equal to the applicable relevant percentage …'.

19 See Case 333/14 *Scotch Whisky Association and Ors v The Lord Advocate and The Advocate General for Scotland* [2015], paragraphs 42-50 of the judgment of the Court.

20 Milton Friedman and Walter Heller, *Monetary and Fiscal Policy*, (W W Norton & Company Inc 1969).

21 See, for example, Capital Allowances Act 2001, section 45K (tax relief for expenditure on plant and machinery on specified "designated assisted areas").

22 See Barassin Peters *et al* (ed) '*The Relevance of a Concept of Tax*' in "*The Concept of Tax in EU Market Member States*" 158 European Association of Tax Law Professors < http://www.eatlp.org/> accessed 14 October 2019.

23 *Executive Aircraft Consulting Inc v City of Newton* 845 P.2d 57 (Kan 1993).

24 But not as consideration for those services, since a charge for services can only arise if the service is provided to and the charge is imposed on a specific individual: see Chapter 3 below.

25 As a function of "rotational justice", where interests of all are catered for by having all interests funded through taxation whether or not particular taxpayers benefit from particular funded activities or not: See Joel Feinberg, "*Not With My Tax Money: The problem of Justifying Government Subsidies for the Arts*" in Joel Feinberg, *Problems at the Roots of Law: Essays in Legal Thought and Political Theory* (OUP 2003); or a form of (value-pluralistic) perfectionism: '[There is] no fundamental principled inhibition on governments acting for any valid moral reason', so that government may promote the good life, by means, inter alia, taxation: Joseph Raz, '*Facing Up: A Reply*' (1989) 62 Southern California Law Review 1153, at 1232; see also Joseph Raz, *The Morality of Freedom* (OUP 1986) 415.

finance to promote "non-public good" governmental activities is a question which is necessarily the subject of political debate and not easy to establish, an observation made starkly obvious by privatisation of services such as the delivery of utilities such as transport, water, or gas, or telecommunications, so that certain services which were once perceived as public goods are now relegated to the status of services which may be consumed (and paid for by consumers) or not.

These third, fourth and fifth functions fulfilled by taxation have no connection to citizenship functions. These functions fulfilled by taxation affect anyone within the taxing body's jurisdiction.

It is convenient to observe here that taxation as a mechanism for any sort of "joint enterprise" between citizen and State may be perfectly (and realistically) accommodated within any one of these non-citizenship functions described here. Any one of the finance of public goods, re-distribution, social engineering, economic management, or the finance of non-public goods may be described as a form of citizen and State engaging in a joint enterprise to the extent that the taxpaying population envisage taxation as financing endeavours in which the taxpayers are engaged as a collective, as opposed to activities selected by a government which are imposed upon the taxpaying population by a paternalistic or dictatorial tax-raising government. Thus the description of taxation as a mechanism for a joint enterprise (or otherwise) arises from a proper analysis of the nature of the tax-raising body and its relationship to the contributing taxpayers; it is not that taxation of itself has any essential joint enterprise attribute.

Taxation as a legal mode

The various functions which taxation may be said to pursue are clearly distinct and indeed contradictory. Taxation as a badge of suffrage implies that the larger the tax contribution to the pot out of which monies are spent, the greater the claim to suffrage. Taxation as a surrogate for

some sort of joint enterprise would be neutral as to the amount raised by the State from its joint venture partner; rather, the notion of taxation as some sort of badge of participation in a joint venture is founded on a perception that the taxpayer-citizen shares the fruits of their activities which is the objective of taxation, whatever the quantum of that share might be. Payment for public goods (and the finance of government, non-public goods) seeks to maximise aggregate taxation to secure the conferral of those public goods. Redistribution is, on the other hand, neutral as to the amount of aggregate taxation collected, rather looking to regulate those within the jurisdiction of the taxing power inter se, to achieve the end goals of distributive justice. Taxation as an incentive will, if successful, reduce the aggregate tax take, (since the incentive necessarily takes the form of an offer to reduce the incentivised taxpayer's tax obligation) whereas tax as a disincentive positively anticipates that tax revenue will not arise from the disincentivised activity. It is wholly unsurprising for a jurist to describe taxation as a 'sort of legal maid of all work … serving a multitude of obscure ends'.[26]

Further, each of these functional objectives may be served by alternative means, legal and non-legal. In relation to alternative legal means to achieve the objectives attributed to taxation, taking each of the objectives discussed above in turn, any number of criteria may be appropriate to identify conditions for suffrage. A "joint enterprise" between citizen and State may be achieved through other compulsory commitment mechanisms, such as compulsory purchase of citizens' property, or conscription. Public goods (and other government goods and services), equally may be conferred through compulsory acquisition of resources (say the compulsory acquisition of property to build a motorway, or courthouse) or, again, the conscription of

[26] Lon Fuller, *The Morality of Law* (New Haven and London, Yale University Press 1964) 166. Less generously taxation has been described as "a 'black box' technology that can be called upon to put into effect whatever distribution of economic benefits and burdens is required by the normative theory under discussion, without the need to consider the more detailed internal properties of the black box itself.": Alan Hamlin "*What Political Philosophy Should Learn from Economics about Taxation*" in "*Taxation: Philosophical Perspectives*" (OUP 2018) 18.

services, rather than through monetary claims. The same is true of redistribution, in that property, rather than money, may be compulsorily acquired for redistribution. Incentives may be conferred by, say, the free provision of goods and services and disincentives may be effected through criminal law, rather than taxation.

Alternative non-legal means may also achieve these objectives. While conditions for suffrage are necessarily legal in nature, a joint enterprise relationship between State and citizen may be secured by requiring a commitment to a State religion, or to a State political party, on pain of social or moral disapproval for non-compliance. Public goods and services (and non-public goods and services) may be secured through trade with or conquest of other nations, the fruits of which may be distributed to citizens. Incentives and disincentives may be made through techniques such as morality, religion or political persuasion.

These observations reveal a general truth, that law (including the law of taxation) is a mode, not a function. In other words, law (including tax law) is a means (mode) of pursuing a particular objective. Neither law nor any particular branch of law can be identified by reference to the function it serves:

> [L]aw is not a functional kind. It is a modal kind. There is no social function, nor any combination of social functions, that distinguishes law from any of its near neighbours [such as morality, or religion]. Rather, law is distinguished from many of its near neighbours (those that have social functions at all) by how it serves the many social functions that it, in common with those near neighbours, serves or is capable of serving.[27]

And taxation is a mode within law, to adapt Gardner's analysis, being a particular legal means to serve diverse social functions which has 'near [legal] neighbours' which can serve the same

[27] John Gardner, *Law as a Leap of Faith* (OUP 2014) 734.

social functions. Nevertheless, taxation is a single, coherent body of law despite taxation's modal nature, as demonstrated in Chapter 3.

The modal nature of taxation, whereby taxation has distinct functions which taxation might seek to fulfil, also exposes the fallacy of the notion of a "good" tax structure which is normatively appealing whichever social function taxation has as its object. So Adam Smith's 'Canons of Taxation',[28] that taxation should be charged in proportion to ability, should be certain and not arbitrary, charged at the most convenient time to the taxpayer and minimise compliance and collection costs, are intuitively consistent with taxation as a means of finance (whether of public goods or not), since the relevant finance is raised with minimised costs to both taxpayer and tax collector (whereas the certainty of a prospective tax charge permits budgeting by prudent taxpayers). But taxation employed as a tool of economic management, especially as a disincentive (or as a disincentive for social objectives, such as a brake on alcohol consumption) may act as a greater deterrent if the relevant tax charge arises at a very inconvenient time, or is quantified without any notion of ability to pay. The same is true of other attributes of a so-called "good" tax structure, such as its effect on economic incentives, fairness amongst taxpayers, its effects of resource allocation amongst different sectors of society.[29] A disincentive or deterrent in the mode of a tax charge is properly indifferent to "fairness" amongst taxpayers measured in terms of sacrifice of taxpayers' resources. Equally, if a tax incentive confers a disproportionate advantage on a taxpayer that is no bad thing at all for that particular tax incentive, even if it comes out of the blue, could not have been foreseen by anyone and was thus not in any way "certain".[30]

---

28 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, OUP 1976) Book 5, Chapter 2, 825-828.

29 See the Meade Committee Report, The Structure and Reform of Direct Taxation (Allen & Unwin 1978) 20. It follows that "neutrality" is not a feature which all "good" tax structures should aspire to (as suggested by Stephen Smith, *Taxation: A Very Short Introduction* (2015 OUP) 102-103.

30 Of course principles of fairness may dictate that all of the canons of taxation hold good despite taxation's modal nature but they cannot derive validity from any single function sought to be achieved by taxation.

Section II. Common definitions of "taxation" misconceived

Section II presents common definitions of taxation in order to identify features attributed to taxation by various sources and also in order to ascertain whether such attributes are correctly viewed as necessary juristic elements in a tax charge, by reference to the functional objectives which taxation may pursue and the anatomy of a charge to taxation. Such definitions either articulate an over-restrictive notion of "taxation" to charges raised under legislative authority, by a "public" body, or "government", for a "public" purpose, or make redundant definitional distinctions between tax and other liabilities, such as liabilities for payments for goods or services, or criminal fines, which suggest that the definition of taxation is over wide, requiring an express exclusion of other monetary liabilities from that definition. As made clear in Chapter 3, none of these restrictions on the one hand or distinctions from payments for good or services, or fines, on the other, are necessary or sufficient features of taxation as a juristic concept, either by reference to the anatomy of a tax charge or the social functions which taxation, as a legal mode, may seek to fulfil.

A common feature of the various definitions of taxation which have been advanced from time to time, whether in case law, in existing juristic literature, or by economists is the absence of any analytical foundation for the particular definition advanced.

Judicial definitions of a charge to "tax" have formulated the charge as one which is '(1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose': *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, *Re Eurig.* [31]

[31] *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357, per Duff J at 363. Although these observations are obiter, the levies in question being held to be ultra vires the charging authority because of the restrictions they presented to inter-Provincial trade (irrespective of their status

None of the features ascribed to taxation mentioned in *Lawson* or *Re Eurig* is analysed or defended on any principled basis in either judgement. They are simply taken as given.[32] The various attributed features are articulated as a cumulative definition of taxation. And this cumulative definition is simply adopted in specialist textbooks on United Kingdom Tax Law. For example, taxation has been defined as '…compulsory…imposed under the authority of the legislature levied by a public body and…intended for public purposes'.[33] Similarly, '*Revenue Law: Principles and Practice*' describes the 'basic features' of a tax as: 'First, it is a compulsory levy. Secondly, it is imposed by government or, in the case of Council Tax, by a local authority. Finally, the money raised should be used either for public purposes or, if the purpose of tax is not to raise money, it should aim to achieve social justice within the community.'[34] Taxation has also been defined as '…compulsory payments, exacted by the state, that do not confer any direct individual entitlement to specific goods or services in return'.[35]

Definitions provided by accounting and treasury bodies substitute an appeal to "government" purposes rather than to "public" purposes. These definitions also appeal to a notion of taxation being "compulsory" (as distinct from "enforceable in law") and further expressly distinguish taxation from other liabilities, such as an obligation to pay for goods or services and criminal

---

as "taxes"), this formulation was central to the decision in *Re Eurig* (1998) 165 DLR (4th) 1, adopted at 10, where the status of probate fees, calculated by reference to the value of the estate being administered, as "taxes" (on the *Lawson* formulation: see paragraph [15] at 576) meant that they were ultra vires because all "taxes" had to originate in the Legislature, being governed by the Constitution Act 1867, section 53 (and these particular fees had been unlawfully levied by the Governor in Council, not the Legislature).

32 See *Lawson* (no 31) at 363; *Re Eurig* (no 31) at [15] simply cites *Lawson* without any analysis.

33 Tiley, *Revenue Law* (no 7) 3-4.

34 Natalie Lee et al, *Revenue Law: Principles and Practice* (34th edition, Bloomsbury 2016) 4.

35 Smith, *Taxation: A Very Short Introduction* (no 29) 4. See also Lee et al, *Revenue Law: Principles and Practice* (no 35) for a definition which treats taxation as 'compulsory…imposed by government…or, in the case of council tax, by a local authority…[and] should be used either for public purposes or, if the purpose of the tax is not to raise money…[to] aim to achieve social justice within the community'. For a brief descriptive comparative treatment on the meaning "tax", with no analysis of the juristic or normative merits of particular meanings, see Victor Thuronyi, Kim Brooks and Borbala Kolozs, *Comparative Tax Law* (Kluwer International BV 2016) 39-46.

fines. These distinctions are conceptually redundant and lead to an over-inclusive definition of taxation, as discussed below.

The OECD defines taxes as 'compulsory unrequited payments to general government'.[36] This definition is adopted for the purposes of classification in the United Kingdom's national accounts (and the impact of this classification on Public Sector Finances). HM Treasury's Classification Paper defines taxes by reference to international guidelines as 'compulsory, unrequited payments in cash or in kind which are levied by general government, or by the Institutions of the European Union'.[37] A distinction is also made between taxation and fines and penalties, which are viewed as 'punitive in nature'.[38] The System of National Accounts defines taxes as 'compulsory, unrequited payments, in cash or in kind, made by institutional units to government units'.[39]

Other definitions, promoted by economists, also focus on the "compulsory" financing of (specifically) government expenditure in defining taxation and focus on the absence of a relationship between a tax obligation and the provision of goods or services: 'Taxes, the principal means of financing government expenditures, are compulsory payments that do not necessarily bear any direct relationship to the benefits of government goods and services received'.[40]

The notion of "compulsory" is, according to such a definition, one where 'there is no reasonable alternative' to making the payment, which would include a payment made to a governmental body in a monopolistic position, supplying something that is required by the market. The

---

36 OECD Revenue Statistics (2009).

37 The *European System of Accounts* (ESA 1995), *The System of National Accounts* (IMF 1993) ("SNA 1993"), paragraph 2.1 and supporting Manuals.

38 SNA 1993, paragraphs 2.12-2.24. Again, the redundancy of such express exclusions is exposed in Chapter 3.

39 *System of National Accounts* (IMF 2008) section C, paragraph 8.52.

40 David Hyman, *Public Finance: A Contemporary Application of Theory to Policy* (3rd edition, Cengage Learning 1990) 23.

conceptual confusion of equating "compulsory" to the absence of "a reasonable alternative" is analysed below.

As for "unrequited", this is an attempt to distinguish taxation from "user charges" for goods or services, on the basis that the two categories are mutually exclusive.[41] The distinction is between payments of a type that 'cannot be demanded by other sectors of the economy', or 'where the charge is out of all proportion with the service being provided' and payments for services at market prices (together with payments of rent and land, interest and dividends, occupational pension contributions etc. which can be made to other sectors of the economy). Any payment for goods in a competitive marketplace would not, on this classification, be a "tax".[42] But charges for goods or services which far exceeded costs would indeed be a "tax" on this definition, which demonstrates the over-inclusiveness of this definition.[43] An adequate juristic definition of taxation would be sufficient to distinguish tax from "user charges" (if these liabilities were indeed mutually exclusive) without the need for an express exclusion in the definition of taxation itself and the definition of taxation set out above and discussed in Chapter 3 achieves this objective easily, demonstrating that the reference to taxation as distinct from "user charges" in the very definition of taxation is at best redundant and at worst misleading.

Again, none of the accounting, treasury or economists' definitions of taxation are analysed or founded in any principled analysis. One searches in vain as to why these features discussed above are properly attributed to taxation in any of these works.[44] The analysis below

---

41 Mark Bowler Smith and Huigenia Ostik in "*Towards a Classification of the Central London Congestion Charge as a Tax*" [2011] BTR 487 at 490 suggest that the "unrequited" criterion replaces the criteria of "compulsory" and "payable to government" (that is, imposed by a public body) but this observation is simply wrong: the accounting and treasury definitions of taxation (which appeal to the notion of "unrequited" payments) all refer to "government" purposes and, further, the latest editions of the specialist textbooks referred to above (which adopt the *Lawson* definition of "taxation") all post-date the accounting and treasury definitions.

42 OECD Revenue Statistics (2009) Paragraph 2.5, 2.6.

43 Ibid, Paragraph 2.14.

44 Of course it may be that accounting, treasury or economists' definitions of taxation may differ from that of a jurist but the complaint made here is that the former attribute features to taxation without offering

demonstrates that, while one or all of these features may be found in a particular tax, none of these purported attributes of taxation are either necessary or sufficient juristic features of a definition of taxation. Thus Section II contributes to the literature concerning the juristic definition of taxation (such as it is) by demonstrating seemingly orthodox descriptions of taxation to be incorrect (and analyses which found on such orthodoxy to be faulty).

Put short, the analysis of the functional objectives which taxation might seek to pursue and the discussion of the definitions of taxation discussed above on their own terms reveal these definitions to be misconceived. It is convenient to take each feature ascribed to taxation by these various definitions in turn.

Enforceable by law

This feature simply recognises that taxation must be lawful, that taxation must meet the membership[45] criteria of the legal system which claims to impose a charge to tax. So it follows that a claim for taxation may be [lawfully] sued for.[46] There is nothing particular to taxation about this feature, as opposed to any other branch of law, say the enforcement of a contractual debt.

"Compulsory"

As discussed above, in judicial definitions, textbook definitions and in Treasury and accounting definitions of taxation, taxation is ascribed a feature of being "compulsory".[47] '[T]he essence of taxation is that it is imposed by superior authority without the taxpayer's consent, except in so far as representative government operates by the consent of the taxpayer.'[48] If this simply

---

any principled basis (in any discipline) they obtain these features from, so that they give the jurist no assistance at all, even as a starting point for a juristic definition.

45 The terminology is that of Joseph Raz, *The Concept of a Legal System* (OUP 1980) 1-2.

46 *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* (no 31), at 363 per Duff J.

47 See, inter alia, *Airservices Australia v Canadian International Ltd*, (2000) 202 CLR 133; Tiley, *Revenue Law* (no 7); OECD Revenue Statements 2009, all referred to in Section I (together with other offending definitions also articulating this notion of taxation being "compulsory")."

48 *City of Halifax v Nova Scotia Car Works Ltd* [1914] AC 992 at 998, per Lord Sumner.

means that a taxpayer subject to a lawful tax charge cannot opt out of that charge, this notion of "compulsion" adds nothing to the feature that taxation is enforceable by law, that "it can be sued for". However, the notion of "compulsion" has been treated as distinct from being "enforceable", as being "a practical compulsion", a 'practical and legal necessity'.[49] And despite observing that '…taxes can be avoided by simply not undertaking the relevant taxable activity',[50] Bowler Smith and Ostik deploy, without analysis as to why a notion of "compulsion" is analytically useful or a correct description of a juristic feature of taxation in principle, a broad version[51] of "compulsion" in an exercise to classify the Central London Congestion Charge at a "tax", so that where a payment cannot be described as "voluntary", in that there is no 'reasonable alternative' as to whether or not to pay,[52] that payment satisfies a necessary condition for taxation (that the payment is "compulsory"). But given that taxation is avoidable simply by not undertaking the relevant taxable activity, as Bowler Smith and Ostik themselves accept,[53] what intelligible distinction can be made between a "compulsion" to pay monies and a simple obligation to be sued in the capacity of debtor simpliciter? In what sense are taxes which can be avoided merely by not undertaking taxable activities not (to that extent) "voluntary" (or "not compulsory")? Such taxes are only "compulsory" in the sense that if the trigger conditions are met (taxable activities have yielded taxable receipts) then taxable receipts may be sued for. What can "compulsion" add to an obligation to be sued qua debtor simpliciter

---

49 *Re Eurig* (1998) 165 DLR (4th) 1, paragraph [15] at 577 per Duff J.

50 Ibid, 491.

51 Ibid, 492, appealing to the HM Treasury Classification Paper "Class (2010) 2 Receipts, March 2010, PU975b. No explanation is made or analysis given as to what is meant by "broad", or the limits (if any) Bowler Smith and Ostik put on the notion of "compulsion".

52 So that, for Bowler Smith and Ostik, although the Central London Congestion Charge is only payable for private vehicles which enter the relevant zone, the Congestion Charge is "compulsory" because (1) inadvertent vehicle entries are caught (2) residents who live within the relevant area cannot escape the charge since they must (for those who drive private vehicles) drive to and from home (3) for diplomats in particular, alternative modes of travel (taxis, public transport) are not suitable for diplomats (prohibitively expensive, insufficiently secure), and (4) the observation that the charges arise from an effective monopolistic position of the authorised bodies who levy the Congestion Charge ("as "[t[here are no free alternative routes into or across Central London by car during charging hours…" (at 494), the Central London Congestion Charge is "compulsory" for diplomats and thus a "tax." (see 492-495).

53 Ibid, 494; this is not, of course to say that avoidability is a necessary condition for a charge to be a "tax".

in an exercise to classify a payment as a "tax" or as something other? This is not a debate about non-legal "compulsion" in the sense of a gunman extorting payment of monies, as distinguished from a lawful demand for monies. The distinction made by Bowler Smith and Ostik (and those others, mentioned above, who appeal to a notion of "compulsion" as a distinct juristic feature of taxation which goes beyond a mere obligation to be sued in the capacity of debtor alone) is between a "compulsion" to pay monies because is it lawfully demanded (that is, a mere obligation to be sued qua debtor simpliciter) and some other "practical" (but lawful) "compulsion" to pay monies which arises from some other state of affairs which causes that payment to be a "tax", the latter providing, for Bowler Smith and Ostik (and others) an additional juristic reason to classify a payment as a "tax". The answer is that no intelligible relevant distinction can be made between an obligation to be sued for monies qua debtor simpliciter and a "compulsion" to pay monies when payments which are uncontroversially "taxes" may be "voluntarily" avoided merely by avoiding the trigger conditions for the obligation to make the payments (not undertaking the taxable activities).[54]

It might be said that an absence of an opportunity to avoid an obligation makes that obligation "compulsory" but this sense of "compulsion" is used in a very different sense to the antonym of "voluntary". This sense of "compulsion" scrutinises the legitimacy of an obligation visited upon (here) a debtor and observes that the debtor had no chance to escape that obligation by doing something before being faced with that obligation. This certainly goes to the legitimacy of any obligation which is imposed upon a person, who has no opportunity to escape from it but has no significance to the juristic analysis of taxation. Such a notion of "compulsion" is

[54] The notion of "compulsion" as a necessary juristic attribute of taxation beyond mere enforceability becomes even more unintelligible in the light of Bowler Smith and Ostik's suggestion (no 41) 494 that a "monopoly", that is, where a service provider is the only source of services which 'are required by the market' results in those services being 'effectively compulsory' and any payment for them becoming a "tax". Why a monopolistic service provider charges a "tax" rather than "consideration" is left unexplained, except by reference to their undefined extended notion of "compulsion".

irrelevant to the juristic definition of taxation, as demonstrated in Chapter 3. For present purposes, Section II confines itself to observing that "compulsion" (beyond the sense of merely "enforceable") as a necessary attribute of taxation makes no sense in principle.

Ostik and Bowler claim support in case law,[55] both from the United States and Australia, for their particular notion of "compulsion" (as distinct from an obligation to be sued in enforcement of a tax obligation) as an attribute of taxation, *Bolt v City of Lansing*[56] and *Attorney-General (New South Wales) v Homebush Flour Mills Ltd.*[57]

While *Bolt* indeed founds upon the notion of taxation being "compulsory" in a way which extends beyond being monies which may be sued for, in order to define "taxation", *Homebush* does not. Put short, the analysis of "taxation" and the alleged necessity for "compulsion" in a tax charge, in contradistinction to a "voluntary" charge (for a "user fee") in *Bolt* is unconvincing and has no attraction in principle, while *Homebush* is simply irrelevant to this whole issue.

In *Bolt*, a storm water charge, calculated on the basis of the property built upon each parcel of land, which was imposed to defray the costs of the provision of combined sanitary and storm sewers, was held to be a "tax" for the sole reason that those who owned property within the jurisdiction of the charge-imposing body had no choice but to pay that charge. The majority[58] contrasted taxation which was compulsory by law and a "voluntary" "user charge" which was '…only compulsory for those who use the service [for which the user charge is levied] [and] have the ability to choose how much of the service to use, and whether to use it at all'.[59] The conceptual confusion which led the Court in *Bolt* to embark on a distinction between "taxation"

---

55 See, for example: Bowler Smith and Ostik (no 41) 492.
56 587 N.W. 2d 264 (Mich 1998), discussed in Bowler Smith and Ostik (no 41) 492.
57 [1936-37] 56 CLR 390.
58 Delivered by Major J.
59 Paragraph [7], at 272.

and "user charges" as a necessary exercise in classifying a particular charge as "tax" (or not) is examined below (and revisited in Chapter 3). The storm water service charge may be easily classified as a "tax" by observing that there was an obligation (for monies) imposed by reference to a demand alone (albeit calculated by reference to property built upon in each parcel of land within the charge); it is a cross check and no more that the charge could not be properly viewed as consideration for any services. Any distinction between "compulsory" taxation and "voluntary" user fees is irrelevant, quite apart from being redundant.[60] For present purposes it is sufficient to note that a putative taxpayer has the "ability" to choose how much of a particular activity to undertake or whether to undertake that activity at all. He may thus self-regulate whether or not to become liable to taxation, (as noted by Bowler Smith and Ostik). This makes the *Bolt* notion of "compulsion" unintelligible in principle, since the notion of "compulsion" and "voluntariness" used by the Court simply does not distinguish between a tax charge and a "user charge" (both are "voluntary" on this basis, in that in both cases a person prospectively liable to both may manipulate that obligation in exactly the same way by undertaking less of the obligation-attracting activity, whether a taxable activity or buying services). Thus *Bolt* and the reasoning of the majority does not shore up the notion of "compulsion" to which Bowler Smith and Ostik appeal in principle (and there is no attraction in principle to adopt "compulsion" in Bowler Smith and Ostik's[61] sense in any juristic definition of "taxation" in respect of the UK Tax Code).

---

60 See Chapter 3. In *Bolt*, the Court had to classify the storm water fee as a permitted user fee or an unpermitted tax for the purpose of the Headlee Amendment Constitution Act 1963. But once the fees were classified as an unpermitted tax, consequential classification as a permitted user fee was only relevant if the vires of the charging body was restricted to "user fees", which is a completely separate question. The point made here is that the initial classification of a charge as a tax should not depend upon any notion of "compulsion" in contradistinction to a "voluntary" payment (as a "user fee" or any other "voluntary" payment).

61 Although Bowler Smith and Ostik (no 41) 489 describe "compulsion" (or rather absence of voluntariness) as one of the 'less helpful' criteria to define a payment as "tax", their treatment of the "compulsion" criteria runs from page 491 to page 501, which is a substantial proportion of their entire analysis.

Homebush does not afford any basis for Bowler Smith and Ostik notion of "compulsion" as a juristic feature of taxation at all. Here, the compulsory acquisition of flour at a particular price, with an option for the compelled seller to re-acquire at a higher price was held to be a "tax" for the amount of the difference since the option to re-acquire was in truth 'illusory' (the miller was economically compelled to exercise the option to reacquire the flour at a higher price in order to remain in business). Put another way, the acquisition of flour was a mere mechanism to extract money from the millers to evade the absence of tax raising powers. The notion of "compulsion" was used by the Court was not used to distinguish "compulsory" tax payments and "voluntary" payments payable as consideration (for flour) on the exercise of options as part of some definitional distinction between the two[62] but rather to reveal the "option" as being what it was, a mechanism to extract money, not a genuine commercial instrument which gave the miller a choice as to whether to re-acquire his flour or not. Thus *Homebush* is simply irrelevant to the Bowler Smith and Ostik notion of "compulsion".

"Compulsion" in so far as this notion goes beyond an obligation to be sued qua debtor simpliciter is unattractive in principle as a juristic definitional feature of taxation; while the notion has had support in the literature, such as that set out above and by Bowler Smith and Ostik (in the case of the latter playing a material part in their analysis of whether the Central London Congestion Charge is a "tax") and in the case law of the United States, there is no basis in principle to adopt it (and as seen below "compulsion" is not a feature used by the English Court of Appeal in *Aston Cantlow*: see Section III below).

---

62 See 399-400. To "respect" the option was to adopt "an analysis which, like the dissection of a living thing, may destroy reality by professing to exhibit it", per Latham CJ at 399. Indeed distinction between a "compulsory" payment of "tax" and a "voluntary" payment of consideration on the exercise of an option could be made; if the holder of a put option exercises that option to compel the counterparty to acquire the asset subject to the option, the price paid by that counterparty is not any sort of "compulsory tax."

Legislative source

There is no conceptual reason why a "lawful" tax charge need be levied under statute rather than under common law. When one commentator declares that taxation can only be levied 'on the basis of statute approved by Parliament',[63] if this means that taxation levied by a public body under statutory authority attracts the application of constitutional principles specific to taxing statutes, this is unexceptionable (albeit trite). But an acceptance that taxation is *almost always* levied by statute does not entail that taxation *must* be levied by statute. The source of an obligation need not (and in the case of taxation does not) dictate its juristic nature *a priori*. This point is expanded in Chapter 3, which examines the anatomy of a tax charge and looks at the UK Tax Code which imposes taxation through legislative means. But a tax charge may arise at common law. A tax unit, the tax base, the tax rate and enforcement measures may all be defined as a function of common law. As discussed below, the tax charge scrutinised by the Court of Appeal in *Aston Cantlow* arose at common law and at no stage did the Court of Appeal suggest that a non-legislative source of itself deprived an obligation to pay monies of its character of a "tax" obligation, if the obligation was otherwise properly viewed as a tax obligation (and neither was this point the subject of any criticism by the House of Lords, for the simple reason that the House of Lords did not consider this point at all). *Aston Cantlow* would, of course, displace any contrary persuasive force of the Commonwealth authorities referred to above, so far as United Kingdom taxation is concerned.

The definitions of taxation, discussed in Section II, which attribute a necessary legislative source to taxation, above do not explain why a tax charge must arise from a legislative source and not a common law source. Nothing in the anatomy of a tax charge (identification of a tax unit, the definition of a tax base, the setting of rates or compliance provisions) entails that these

63 Tony Prosser, *The Economic Constitution* (OUP 2014) 85.

elements of a tax charge must come from statute. Neither need any of the functional objectives which taxation may pursue arise under statute, rather than at common law (including even those connected to citizenship, such as taxation as a condition for suffrage). Once a tax obligation is imposed, the functional objective it seeks to achieve may be realised (if taxation is an effective method of realising that particular objective) whatever its source. If the common law is capable of evolving the scope and content of the Royal Prerogative it is perfectly capable of fashioning tax liabilities. An obligation to pay monies, however measured, to whichever body, may arise under common law just as much as under statute, as in *Aston Cantlow*.

Public body

The requirement that taxation be imposed by a public body implies that taxation arises from legislation, since taxation which had a common law source is not "imposed" by any "body" ("public" or not) at all (albeit that the payment will be enforceable by the entitled payee).

The notion of taxation as having a necessary attribute of being imposed by a public body has been developed by at least one commentator[64] as entailing taxation as having a "public law" quality, 'defining the reciprocal duties of State and individuals',[65] 'in part an instance of constitutional law',[66] so that taxation is, on this view, 'part of the apparatus of government…[tax law's] regulatory and facilitative functions…[being] orientated to aims and objectives…[adopting] an instrumentalist social policy approach'.[67] Taxation is, on this same view, '…also in part an instance of administrative law'.[68] According to this view, the necessary constitutional-law archaeology of taxation makes tax law a State prerogative, an expression of

64 John Snape, *The Political Economy of Corporation Tax: Theory, Values and Law Reform* (Hart 2011) ("*Political Economy of Corporation Tax*").

65 Ibid, 36, citing CK Allen, *Law in the Making* (7th edition, Harvard UP 1995) 300, Martin Loughlin, *Foundations of Public Law* (OUP 2010) 446.

66 Ibid, 38.

67 Ibid, 38, citing and modifying Loughlin's observations in *Public Law and Political Theory* (OUP 1992) 60.

68 Ibid, 38.

political practice and sovereignty,[69] so that taxation is aptly described as "political jurisprudence"; taxation serves to advance the "public interest", establish and regulate government authority and maintain state authority (albeit constrained by constitutional principles).[70] The proposition that taxation must be imposed by a public body thus bleeds into the proposition that taxation must serve a "public" purpose (which is equally misconceived: see below).

The proposition that taxation must be raised by a "public" body is misconceived and wrong. At this stage it is convenient to note that the notion of an imposition by a "public" body as a necessary feature of taxation has been expressly rejected by Australian case law (as has the proposition that taxation must serve a "public purpose"): *'[T]here is no reason in principle…why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that is was by a non-public authority or for purposes which could not properly be described as public.'*[71] To be sure, virtually all tax liabilities are statutory, imposed by public bodies, such as central or local government but as Chapter 3 makes clear, this is not a necessary condition for an obligation to pay monies to be a "tax" obligation. It is easy to agree with conclusions that, to the extent that taxation is imposed by a sovereign public body, taxation may be an expression of sovereignty and any public body which imposes taxation is subject to the constitutional, public law constraints which apply to that particular tax-imposing public body (and to that extent there may well be a "Public Law of Taxation"). But it simply does not follow that non-public bodies cannot impose "taxation" as a matter of principle (or as a matter of legality in the United Kingdom).

---

69 Ibid, 166-168.

70 Ibid, 168-169.

71 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467, cited in *Australian Tape Manufacturers Association and Ors v Commonwealth of Australia* [1991-93] 177 CLR 480 at 501, where the majority (the judgement delivered by Mason CJ at 501) observed that 'It is not essential to the concept of a tax that the exaction should be by a public authority'. For criticism of the "public purpose" attribution to taxation, see below.

Public purposes

That tax be imposed for a "public purpose" is described (without analysis) as 'a core element of identifying a charge as a tax in modern taxation'.[72] And "public purpose" is assumed to be a necessary component of taxation in such literature as there is which reaches for a juristic definition of taxation.[73] These commentators provide no analytical basis for this proposition in their definitions of taxation. But the proposition has gained sufficient currency for one commentator to suggest that 'it is the presence or absence of a political justification for the chosen purposes that affirms or denies both the status of a levy as a tax and the categorization of tax law as public law'.[74] But this latter suggestion does not defend the proposition in principle at all and simply seeks support from *Re Eurig*[75] (but does not mention *Air Caledonie International v Commonwealth*,[76] which holds the opposite conclusion: see above and discussed further below) and the literature mentioned above, which itself has no analytical foundation.[77]

It must be acknowledged that a "public purpose" condition for an obligation to be a tax obligation is also present in case law, at least in Canadian jurisprudence, where the notion is a

---

72 Monica Bhandari, "*Introduction to the Philosophical Foundations of Tax Law*" in *Philosophical Foundations of Tax Law* (no 4) 2.

73 See, for example: Marco Barassi *"The Notion of Tax and the Different Types of Taxes"* in Bruno Peeters et al (eds*), The Concept of Tax* (Amsterdam, IBFD 2005) 59, 73.

74 John Snape, *"The 'Sinews of the State' Historical Justifications for Taxes and Tax Law"* (*"Sinews of the State"*) in *Philosophical Foundations of Tax Law* (no 4) 9.

75 *Re Eurig* (no 31): see Section I.

76 (1988) 165 CLR 462 at 467.

77 See Snape *"Sinews of the State*" (no 4) 9, footnote 2. The alleged "public purpose" component of taxation advanced by Snape adapts Loughlin's analysis of "the parliamentary state" and "the administrative state" (in Loughlin *"Foundations of Public Law"* (OUP 2010, page 259, 435); Snape concludes that taxation's necessary "public purpose" component excludes, from the notion of "taxation" liabilities which were "tributary" or "appropriations" rather than "legal compulsion" under "legislative authority" (see page 27). For Snape, taxation "properly so called" (see page 27) is exclusively a function of "public law" (so also committing Snape to taxation being a function of "[exclusively] legislative authority") (ibid). This edifice rests entirely on the attribution of "public purpose" as a necessary juristic feature of taxation which is not only contrary to Australian and English authority but also contrary to principle and to Parliamentary sovereignty, so far as the United Kingdom is concerned. Bowler Smith and Ostik (no 41) also treat the "public purpose" condition as one "traditionally" ascribed to taxation (see page 489), without exploring or defending this condition analytically.

synonym for the expenses of government. In *Fairfax v Federal Commissioner of Taxation*[78] taxation was described as '… ordinarily levied to replenish the Treasury, that is to provide the Crown with revenue to meet the expenses of government. That is the prime purpose of income tax'.[79] In the same case Callinan J describes the power to tax as one which has '… [the] whole purpose [of]…the collection of property (money) from recipients, of means or property, generally and discriminately, except as to quantum, and not in exchange for any identified service provided to any particular taxpayer, in order to finance the activities of government generally'.[80] This notion of taxation as a charge necessarily imposed by government, which is distinct from consideration for goods or services, remains orthodoxy, tax being described in the 1980s as 'judicially understood as a compulsory extraction of money by a public authority for public purposes, enforceable by law, and … not a payment for services rendered'.[81]

However, as seen above the public purpose condition was rejected in *Air Caledonie International v Commonwealth.*[82] The point was made even more strongly in subsequent Australian case law: 'It is scarcely to be contemplated that the character of an impost as a tax depends upon whether the authority is a public authority…it is not essential to the concept of a tax that the exaction should be done by a public authority.' [83]

The Australian approach is correct in principle, although it must be conceded that the propositions advanced are not informed with any more or better analysis than the contrary propositions in the Canadian case law or the commentaries which rely on the latter. So it must

---

78 (1965) 114 CLR 1 at 19; see also *Re Eurig* (no 31).

79 Per Windeyer J.

80 Paragraph 534.

81 *Airservices Australia v Canadian Airlines International Limited* 2000 (202) CLR 133, per Gaudron J at paragraph 132, citing Latham CJ in *Matthews v Chicory Marketing Board* (Vict) (1983) 60 CLR 263 at 276. The reference to taxation not being a payment for services, replicated in definitions of taxation provided by treasury and accounting bodies, is redundant, as discussed in Section IV.

82 Supra at 467, cited with approval by the majority in *Australian Tape Manufacturers Association and Ors v Commonwealth of Australia* [1991-93] 177 CLR 480 at 501, 504.

83 *Australian Tape Manufacturers Association and Ors v Commonwealth of Australia* [1991-93] 177 CLR 480 at 501 per Mason CJ, delivering the judgement of the majority.

be explained why the notion of "public purpose" as a necessary condition for the juristic classification of a particular obligation to be a "tax" obligation is at best redundant and at worst misleading, whether applied to the imposition of the obligation or to the use or purpose to which the monies, once raised, are put. The explanation is provided below.

If a "public" purpose is simply a synonym for the purposes to which a "public" body which lawfully raises tax chooses to put the tax revenues, this notion of "public" purpose adds nothing to the (misconceived) proposition that taxation must be raised by a "public" body (and falls for the reasons discussed above, that the prospect of a common law source means that taxation need not be raised by a public body).

However, if the notion of a "public" purpose means to add a juristic (necessary or sufficient) feature to taxation, over and above taxation needing to be raised by a "public" body, this approach is also misconceived, certainly if this "public purpose" attribute is advanced as a necessary juristic feature of taxation. Let us assume that a "public" purpose may be distinguished from a "private" or "personal" purpose. To re-visit the various functions which taxation may seek to fulfil, examined in Section I, taxation as a badge of suffrage, or as a mechanism for a joint venture between citizen and State are clearly "public" purposes. As is the finance of "public" goods. But equally the finance of non-public goods or services is not a public service, since the taxing State is simply financing the provision of goods or services which the public may choose to consume or not, perhaps in competition with private competitors. Taxation here is financing a body (albeit a "public" body) in its capacity of a private operator. As for taxation which operates as a tool of economic management, while the imposition of a tax charge may serve a "public" purpose, say to act as a brake on consumer spending by reducing disposable net of tax income, the tax receipts once gathered may be spent by the taxing authority for any purpose within its vires, which may or may not be a "public"

purpose. Taxation gathered in respect of taxes imposed to decelerate economic activity may be spent on financing beneficiaries of the Civil List, or furnishing the dwelling place of the Lord Chancellor with expensive wallpaper. While such beneficiaries of tax revenues may receive the fruits of taxation in a capacity of a "public" figure, there is little in the way of an obviously "public" purpose to such expenditure. The same may be said of taxation raised by way of taxes imposed as disincentives. The imposition of taxation may serve a "public" purpose, the expenditure of the tax revenues raised need not. Given that taxation serves to fulfil social functions which may be achieved by other legal or non-legal modes (see Section I), that taxation may be imposed for non-public purposes and even if the imposition of taxation may be for "public" purposes (to act as an economic brake, or to discourage alcohol consumption), tax revenues need not be spent on those, or any, "public" purposes, the notion of a "public" purpose cannot be a necessary feature of taxation. And given that any particular "public" function which taxation might seek to achieve may be fulfilled by other legal modes or non-legal modes, a "public" purpose cannot be sufficient to identify an imposition to tax from any other legal or non-legal mode which seeks to achieve that "public" purpose (for example, both a criminal fine and a tax charge may seek to discourage excess alcohol consumption; quite apart from the taxing body's powers to spend the monies raised by either mode in any intra vires manner, the "public" purpose objective is insufficient to distinguish taxation from a criminal fine). Indeed, the legislative provisions of the UK Tax Code examined in Chapter 3 in relation to the anatomy of a tax charge do not yield any restriction on the purpose ("public" or otherwise) to which tax revenues must be put.[84]

Furthermore, so far as taxation imposed by the legislature within the United Kingdom is concerned, any juristic definition of taxation which seeks to confine taxation to monies raised

[84] An appeal to the UK Tax Code to demonstrate the absence of any necessary public purpose attribute of taxation does not, of course, mean that the source of all taxation need be legislative.

for "public" purposes (assuming the charge to be lawful) conflicts with parliamentary sovereignty. Neither is any such restriction justified by conventional notions of tax jurisdiction in public international law.

Parliamentary sovereignty

The power to impose tax by central government in the United Kingdom is exercised as a straightforward function of Parliamentary legislative sovereignty. Orthodoxy is that Parliament has unlimited continuing sovereignty. Parliament may legislate whatever she chooses.[85] The power to tax is generally viewed as a hallmark of legislative sovereignty.[86] Only Parliament may impose taxation. The Executive (in particular the tax collecting authority, in the United Kingdom Her Majesty's Commissioners of Revenue and Customs[87]) has no power to impose tax[88] through the prerogative but only 'collection and management' powers to administer the tax code as enacted by Parliament.[89]

Taxation, so for as the United Kingdom is concerned, is the means by which the Executive, the government, meets government expenditure authorised by Parliament.[90] Tax revenues raised to meet that government expenditure are paid into the Consolidated Fund. Government expenditure is authorised by Parliament, by means of "Supply and Appropriations Acts", upon the government making staged estimates of expenditure. Importantly, Parliament authorises not only the principle of government expending sums from the Consolidated Fund each year,

---

85 Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Oxford, 1999); Mark Elliott and Robert Thomas, *Public Law* (2nd edition, OUP 2014) 212 et seq.

86 *Brown (Surveyor of Taxes) v National Provident Institution* [1921] 2 AC 222 at 257 per Lord Sumner: 'It is a most wholesome rule that in taxing the subject the Crown must show that clear powers to tax were given by the Legislature.'

87 ("HMRC").

88 The Bill of Rights 1689, Article 4, in England and the Claim of Right 1689 in Scotland**;** *Congreve v Home Office* [1976] QB 629.

89 Taxes Management Act 1970 ("TMA 1970"), section 1.

90 The Crown requests money, the Commons grants it and the Lords assents to it (albeit that the letter is nominal): Erskine May, *Parliamentary Practice* (Malcolm Jack (ed), 24th edition, Lexis Nexis 2011), S26, HC 711.

under these Supply and Appropriation Acts but specifies in a Schedule to the Supply and Appropriation (Main Estimates) Act, the total net resources, net capital, and the net cash from the Consolidated Fund authorised for each government department or service for the particular financial year in question.[91] So not only the principle of government expenditure is authorised by Parliament but (at least at some level) the very allocation amongst government functions.

What emerges from the above analysis is that a tax charge is imposed to meet Parliamentary-authorised expenditure (even emergency expenditure and expenditure to meet contingencies have Parliamentary approval, through, respectively, the Banking Act 2009, section 228(5) and (7) and the requirement that Parliament must subsequently pass primary legislation to authorise payments out of the Contingencies Fund). Thus the very essence of a charge to tax is a demand by the legislature for money (not property)[92] from the taxpayer, for it is money which is required by government to meet its authorised expenditure.

The lack of any "public purpose" feature of a tax charge arises from the observation that the charge to tax itself arises from primary legislation, that is, through a legislative act, not an exercise of any Crown power (whether statutory, prerogative, or so-called "third source powers") to meet authorised government expenditure. It follows that Parliament may authorise, in the exercise of unlimited sovereignty, any expenditure whatsoever, to be met by taxation. There is no need for any purpose authorised by Parliament to have any essentialist "public" attribute. To observe that taxation imposed by Parliament must have a "public" purpose because Parliament has imposed the charge to taxation is either simply to observe that the taxation is "lawful" or tautologous (Parliament is "public" and therefore Parliamentary-authorised taxation is raised for "public" purposes). There is no juristic impediment to

---

91 See A. Bradley, K. Ewing and C. Knight, *Constitutional and Administrative Law* (17th edition, Pearson 2018) 187-191 for a summary of the relevant Parliamentary procedure.

92 The conceptual distinction of money claims and property claims, locating taxation exclusively in the former category, in made in Chapters 2 and 3 below.

Parliament imposing taxation for any purpose at all. Any contrary view undermines Parliamentary sovereignty. Indeed, an accepted "public purpose" of regulating milk supplies to maintain food supplies generally shortly after the First World War did not render an ultra vires licence fee to be a lawful "tax" by reason of the public interest, which demonstrates that the lawful status of a demand as a "tax" (or otherwise) is exclusively a function of Parliamentary sovereignty.[93] For completeness, it is convenient to observe at this stage that the Crown, being the government (comprising all of its constituent departments) is the "beneficial owner" of the Consolidated Fund into which tax revenues are paid.[94] Furthermore, no one government department, including Her Majesty's Commissioners of Revenue and Customs ("HMRC"),[95] which has power to collect taxes and of care and management of the provisions which comprise the United Kingdom tax regime ("the UK Tax Code"),[96] is the beneficial owner of the Consolidated Fund, which means, in turn, that HMRC have no vires to alter the scope or application of taxation provisions (only Parliament has such a power).[97] It is also convenient to note here that Parliamentary sovereignty and the absence of any "public purpose" requirement in a tax obligation also means that a hypothecated tax, where tax receipts are earmarked for a particular purpose, is nonetheless a "tax". A contemplated specific use for tax receipts is simply an application of the freedom of a recipient of monies to decide in advance what to do with those monies, once received.

---

93 *Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 884.

94 *Re West End Networks Limited (in liq), Secretary for Trade and Industry v Frid* [2004] UKHL 214, paragraph [26], [27], per Lord Hoffmann. The Crown is, as observed above, accountable to Parliament as to how monies in the Consolidated Fund are allocated and expended (Ibid, paragraph [27]).

95 A non-ministerial government department, constituted under the Commissioners for Revenue and Customs Act 2005 ("CRCA 2005"), which merged the Inland Revenue and Customs and Excise (see section 53).

96 Taxes Management Act 1970 ("TMA 1970"), section 1.

97 *R (Wilkinson) v IRC* [2006] STC 270, paragraphs [20], [21], per Lord Hoffmann.

Public international law and the jurisdiction to tax

Having located taxing jurisdiction firmly within Parliament's sovereign legislative jurisdiction, we turn to how the United Kingdom Parliament exercises her specific taxing jurisdiction. This exercise further reveals that taxation need not have any "public purpose" condition.

Parliament's sovereignty has practical constraints upon it on any view. So if Parliament enacts 'that smoking in the streets of Paris is an offence, then it *is* an offence' but the French police and courts would 'take no notice of that law'.[98] Such practical constraints have been judicially recognised and comprise a rule of construction of statutes within the United Kingdom.[99]

Tax law in the United Kingdom recognises the practical limitations on the scope of taxing legislation by imposing its own territorial limits, as a straightforward application of the rule of construction formulated in *Ex parte Blain*.[100] There is a consensus that as a matter of Public International Law a taxing State must establish some sort of "connection" between it and any particular person it wishes to tax in order to be able to impose a tax charge on that person, for that tax charge to be legitimate.[101] The two conventional "reasonable connecting factors" are "residence" and "source". In relation to tax "residence", the taxing rights of a particular State are legitimised because of a personal or legal connection between that State and a particular person. In the case of individuals, the notion of "residence" may be defined by reference to

---

98 Ivor Jennings, *The Law and the Constitution* (University of London Press 1959) 170-171, discussed in Elliott and Thomas, *Public Law* (no 87) 221.

99 *Ex parte Blain* (1879) 12 Ch D 522 at 526, per James LJ. Cited with approval in relation to taxing jurisdiction in *Clark v Oceanic Contractors Inc* [1983] STC 35 at 40, 41 (per Lord Scarman) and at 46 per Lord Wilberforce.

100 *Clark v Oceanic Contractors Inc* (no 99).

101 Richard Vann *"International Aspects of Income Tax"* in Victor Thuronyi (ed), *Tax Law Design and Drafting*, (Washington DC, International Monetary Fund 1996) 721 ("Tax Law Design and Drafting"). See also F.A.P. Mann, *The Doctrine of Jurisdiction in International Law* (Hague Racueil 1964), Volume 1, 109-119, cited in *Public International Law of Taxation*, op cit at 37-43; F.A.P. Mann, *The Doctrine of International Jurisdiction Revisited after 20 Years* (Hague Racueil 1984), Volume 111 28-30, cited in *Public International Law of Taxation*, op cit at 44-46; A.R. Albrecht, "*The Taxation of Aliens under International Law"* (1952) 29 British Year Book of International Law 152, excerpted in *Public International Law of Taxation*, op cit at 46-60; and Jacinto Martha, *The Jurisdiction to Tax in International Law: Theory and Practice of Legislative Fiscal Jurisdiction* (Kluwer 1989) 12-18, cited in *Public International Law of Taxation*, op cit at 61-65.

the facts and circumstances which attach to that individual, such as physical presence in the Taxing State, economic ties and habitual abode.[102] Domicile and citizenship may also be relevant, either to define and inform the notion of tax residence or, as an alternative connecting factor.[103] In relation to legal entities, residence may be defined by reference to the place of incorporation, statutory seat, or the place of central management and control.

Source establishes legitimacy of taxing rights over a particular person because of a territorial link between the Taxing State and the taxable person, not because of the characteristics attaching to the person himself but rather because of the situs of that person's profits within that Taxing State. Situs of a source of profits within a Taxing State attracts a legitimate obligation to tax for that owner of those profits (albeit that the owner of those profits may himself be located outside the Taxing State's jurisdiction and not have any other connection to the Taxing State).[104]

Orthodoxy dictates that if a person is "resident" within a taxing State, he has all of his (worldwide) income taxed by that State ("unlimited taxation"), while non-residents are taxable only on profits arising from sources located within that State ("limited taxation"). Unlimited taxation for residence and limited taxation by reference to source has been explained by reference to a perceived very specific quid pro quo for benefits received:

> The policy of the [United Kingdom Income Tax Acts] is to tax the person resident in the United Kingdom upon all his income wheresoever derived, and to tax the person not resident in the United Kingdom upon all income derived from property in the United Kingdom. The former is taxed because (whether he be a British subject or not) he enjoys the benefit of our laws with the protection of his person and his property. The latter is taxed because in

---

102 The notion of residence was effectively extended in *Clark v Oceanic Contractors Inc* (no 110) by imposing PAYE obligations on a company which was non-United Kingdom tax-resident which paid emoluments subject to income tax to United Kingdom tax resident employees, by reference to a "tax presence" of that Company comprising the trading by that Company within the United Kingdom Continental Shelf, which amounted to the Company bringing itself within the jurisdiction (including the taxing jurisdiction) of the United Kingdom.

103 Vann, *International Aspects of Income Tax* (no 112) 729.

104 Vann, *International Aspects of Income Tax* (no 112) 734.

> respect of his property in the United Kingdom he enjoys the benefit of our laws for the protection of that property …[105]

The proposition is, as a rationale for the distinction between unlimited and limited taxation, questionable. For natural persons and their property, citizenship, rather than tax residence, is more likely to confer the protection of a particular State (and generate allegiance). For legal persons, in particular companies, tax residence is generally defined by reference to (alternatively) the place of incorporation[106] and the location of central management and control,[107] the link between a tax obligation and any allegiance to a particular Taxing State is even more tenuous.[108] More relevant for the jurist, this explanation of the conventional connecting factors betrays a type of "benefits" analysis,[109] the type of which has been discredited as early as Mill, as providing a counter intuitive prescriptive regressive charge to tax, which offends distributive justice:

> If we wanted to estimate the degrees of benefit which different persons derive from the protection of government, we should have to consider who would suffer most if that protection were withdrawn: to which question if any answer could be made, it must be, that those who would suffer most who were weakest in mind or body, either by nature or by position. Indeed, such persons would almost infallibly be slaves. If there were any justice, therefore, in the [benefits] theory of justice now under consideration, those who are least capable of helping or defending themselves, being those to whom the protection of government is the most indispensable, ought to pay the greatest share of its price: the reverse of the true idea of distributive justice, which consists not in imitating but in re-dressing the inequalities and wrongs of nature.[110]

---

105 *Whitney v Inland Revenue Commissioners* (1924-1926) 10 TC 88 at 112, per Lord Wrenbury.

106 Corporation Tax Act 2009 ("CTA 2009"), section 14(1).

107 *De Beers v Consolidated Mines Ltd v Howe* (1903-1911) 5 TC 198.

108 For a discussion on the roles of residence and source, in particular in the context of the internal market provisions contained in the Treaty of European Union and the Treaty of the functioning of the European Union, see Julian Ghosh, *Principles of Internal Market and Direct Taxation* (Keyhaven 2007) 2-6, on which text this discussion heavily relies.

109 See Graeme Cooper, *'The Benefit Theory of Taxation'* (1994) 11 Australian Tax Forum 397 for a summary of "benefits theory" analysis. It is convenient to note here that in any event, such "benefits" may be conferred by private law (the law of property, or contract and for cross border cases, conflicts of laws principles) as easily as by any sort of "public" law.

110 John Stuart Mill "*The Principles of Taxation"* in *Principles of Political Economy with some of their Applications to Social Philosophy* (7th edition, WJ Ashley 1909), Book V, Chapter 2, paragraph [2].

In any event, whatever may be said about the juristic foundations of residence and source as necessary connecting factors to establish taxing jurisdiction, these notions are firmly embedded in the UK Tax Code.[111] And this brief description of taxing jurisdiction in the United Kingdom demonstrates that taxation is a function of legislative sovereignty and comprises a money demand to meet Parliamentary-authorised government expenditure (which is any expenditure at all, of any nature, which Parliament chooses to authorise). As such, at least the constitutional context of a tax charge does not import (or permit) any notion of "public purpose" to determine the juristic nature of taxation. Parliament must authorise both the expenditure which taxation and the very raising of taxation to meet that expenditure but that does not lead to a conclusion that tax revenues must be used for a "public purpose." This simply recognises that only Parliament may raise taxes to meet expenditure which Parliament has itself authorised. In other words, to say that tax must be used for a "public purpose" is to say that tax may only be lawfully raised by Parliament for purposes approved of by Parliament, which says nothing further about the nature ("public" or otherwise) of that approved expenditure, being the purpose of the tax charge imposed to meet it.

These observations show that none any of any social functions which taxation seeks to achieve examined in Section I restricts taxation (and tax revenues) to the service of any "public" purpose (as opposed to the lawful purpose of the tax raising body, which might be a public body but need not be) and that the sovereignty of Parliament positively precludes any such restriction in principle for taxation imposed by the legislature (which observation is not disturbed by the conventional principles of public international law which give content to the notions of tax residence and source to establish taxing jurisdiction). Thus the "public purpose" feature identified as a necessary juristic feature for taxation in the literature and case law is

---

111 *Colqhoun v Brooks* (1883-1890) 2 TC 490 at 499, per Lord Herschell, approved in *National Bank of Greece SA v Westminster Bank Exr and Trustee Co (Channel Islands) Ltd* (1967-1971) 46 TC 472 at 493.

misconceived. The rejection of any "public purpose" restriction is also consistent with *Aston Cantlow*, discussed in Section III below.

Taxation distinct from user charges and criminal fines

Any juristic description of taxation being conceptually distinct from user charges or criminal fines is, so far as it goes, correct, as demonstrated in Chapter 3. But if taxation is a distinct area of law, any such express contradistinction as part of any definitional process is, at best, redundant. The only question to be addressed is whether there is any overlap amongst these three (or other) juristic notions so that a particular obligation may be correctly as one or more of a tax obligation, user charge or criminal fine (the answer is "no", as explained in Chapter 3). But an express contradistinction between taxation and user charges, or criminal fines may be more than an unnecessary distraction and be positively misleading.

Take the definitions, set out in Section II, of taxation which identify, as a feature of taxation, the attribute that taxes 'do not necessarily bear any direct relationship to the benefits of government goods and services received',[112] especially 'where the [putative tax] charge is out of all proportion with the service being provided.'[113] These definitions seek to make the notions of taxation, user fees and criminal fines mutually exclusive but perceive that taxation may overlap with user fees or with criminal fines without an express exclusion by means of some juristic technique or other. But as demonstrated in Chapter 3, an adequate juristic definition of taxation necessarily excludes all monetary liabilities outside that definition (such as user charges, fines and consideration for goods or services).

---

112 David Hyman, *Public Finance: A Contemporary Application of Theory to Policy* (3rd edition, Cengage Learning 1990).

113 OECD Revenue Statistics (2009) (no 36), paragraph 2.14. See also Bowler Smith and Ostik (no 41) 488 who advance a test of a payment yielding a "significant profit level" where there is "evidence, but uncertainty or disagreement as to the level of service provision to the payer" to determine that payment to be a "tax."

It is not at all obvious that an excessive charge (however defined) for goods or services is a "tax" charge, rather than simply an excessive charge for goods or services. And the definition produces an imprecise test. For definitional purposes, to scrutinise the relationship between costs of supply and charges in order to identify a charge as a "tax" charge or consideration for those goods or services begs many questions, not least whether the notion of an "excessive" cost is subjective (bearing in mind supply, demand and competition for those goods or services) or objective (by reference to some hypothetical market and if so, how that marketplace is to be defined), whether there is a threshold over which any charge ceases to be a charge for goods or services and becomes a "tax" and which "costs" of the supplier (direct costs of production only, or overheads also, in which case which OECD Revenue overheads?) are to be taken in to account in any evaluation of whether the charge for goods or services is "excessive."[114] These observations demonstrate that any definitional process which adopts an express distinction between taxation and consideration for goods or services invites a very messy definition indeed. Chapter 3 explains why this approach is misconceived and a juristic definition of taxation (as a lawful unilateral monetary claim by an assertion of jurisdiction simpliciter) automatically excludes consideration for goods or services (irrespective of the quantum of the latter and the relationship of a charge for goods or services and costs).

Also consider the distinction made between taxation and fines and penalties, in the OECD Revenue Statistics (2009), set out in above, fines and penalties (but not tax) being viewed as 'punitive in nature'.[115] Taxation as a legal mode which may be employed to disincentivise behaviour (such as excessive alcohol consumption) may well seek to achieve the same social

---

114 These difficulties are not addressed in any of the literature which advocates a link between the level of a charge and services provided: see for example Bowler Smith and Ostik (no 41) 488, who merely postulate a "tax" to be a fee which is for services but at a level which is "over and above an appropriate or reasonable market rate of return."

115 (no 36) Paragraphs 2.12-2.24. Again, the redundancy of such express exclusions is exposed in Chapter 3. For present purposes, it is pointed out that although the HM Classification paper avoids any misconceived appeal to "public purposes", the paper has other serious defects which are addressed in Chapter 3.

function as a "punitive" legal mode, such as a penalty or fine. If the social function which a particular legal mode seeks to achieve confers the juristic status on that legal mode, it is not at all obvious that taxation, fines and penalties can be distinguished easily (or at all) by reference to a function of disincentivising any particular behaviour. Chapter 3 demonstrates that the notion of taxation developed there (by reference to taxation's juristic features, not the social functions taxation might seek to achieve) is sufficient to exclude penalties and fines from the scope of the juristic definition of taxation.

The individuation of tax law is not sensibly undertaken by incorporating an express distinction from consideration for goods or services as part of fashioning a definition of taxation. Once taxation has been convincingly juristically defined, any distinctions between taxation and consideration payable for goods or services or penalties and fines should be obvious. This exercise is undertaken in Chapter 3.

Current definitions of taxation do not recognise taxation's modal nature

A further complaint about the definitions of taxation considered in Section II is the failure to acknowledge the modal nature of taxation. The definitions of taxation which impose conditions such as the necessity of a public body making a tax claim, or that taxation revenues must be put to a "public" purpose, do not acknowledge the diverse functions which taxation might seek to achieve (and constrain the functions that taxation might achieve by imposing these misconceived conditions). Equally, those definitions of taxation which make unnecessary distinctions between taxation and other monetary liabilities (in particular criminal fines) suggesting that the definition of taxation is too wide, since otherwise the distinction is redundant, ignore taxation's modal nature. Taxation may be imposed, as demonstrated in Section I, as a disincentive in the same way was a criminal fine; it follows that any distinction between taxation and a criminal fine made on the basis of the latter's "punitive" nature makes

no sense (all disincentives are designed to be "punitive"). The variety of functions which taxation may seek to achieve necessarily informs taxation's juristic nature and any definition must therefore accommodate this modality. The definition of taxation advanced in Chapter 3 accommodates taxation's modality without difficulty.

Section III. Aston Cantlow

Section III examines the decision of the English Court of Appeal in *Aston Cantlow and Wilmcote with Billesley Church Council v Wallbank*[116] as a rare example of a decision of the English Courts which confronts the definition of taxation head on. *Aston Cantlow* confirms, at least for the purposes of the Human Rights Act 1998 ("HRA 1998"), that taxation is a monetary obligation (not a property obligation), that taxation may arise from a common law (not legislative) source and that there is no special notion of "public" or government purpose inherent in the juristic notion of taxation.

Freehold owners of English real property assumed (by reason of ownership) the capacity of rectors of the rectory of the parish of Aston Cantlow and the obligation to meet the costs of repair of the parish church chancel. The freeholders and the land they owned was "'shorn of any connection' to the church or the rectory.[117] The obligation was imposed by common law, not statute,[118] travelled with the land[119]and indeed was expressly provided for in the conveyance to the owners.[120] The obligation was enforceable by the Parochial Church Council ("PCC").[121] The Court of Appeal held that the obligation was a "tax" obligation, at least for

116 [2002] STC 313 (EWCA) (*"Aston Cantlow"*); the judgment of the Court was delivered by the Vice-Chancellor, Sir Andrew Morritt.
117 Paragraphs [45], [51].
118 Paragraph [12], [37], which meant that the power to impose this obligation was not protected by the Human Rights Act 1998 ("HRA 1998"), section 6(2) [powers exercised in a manner demanded by primary legislation outside the scope of the sanctions imposed by HRA 1998).
119 Paragraphs [15], [16]
120 Paragraph [21].
121 Paragraph [2].

the purposes of Article 1 of the First Protocol of the European Convention on Human Rights ("ECHR").[122] The central issues were (1) whether the PCC was a "public authority" for the purposes of HRA 1998[123] (2) if so, whether this common law obligation was a "tax"[124] obligation (3) if so, whether that "tax" was in the public interest[125] and (4) even if so, whether that tax was either disproportionate or discriminatory (for HRA 1998 purposes, since HRA 1998, construed in the light of the ECHR prohibited taxation which offended either principle). The Court of Appeal held (1) that the PCC was a 'public authority, thus engaging HRA 1998',[126] which also engaged the application of principles of non-discrimination and proportionality (2) that the repairing obligation was a "tax" obligation (for HRA 1998 purposes)[127] (3) that "tax" was in the "public interest"[128] but (4) that this tax was both disproportionate[129] and discriminatory.[130]

The House of Lords reversed the Court of Appeal's decision that the PCC was a "public authority"[131] holding that the PCC was neither a 'core' public authority (bound by HRA 1998 in all of its undertakings) or even a 'hybrid public authority', 'certain of whose functions are functions of a public nature'.[132] The PCC, in enforcing the obligation of the freeholders was not exercising a "public function" (the PCC was not publicly funded, was not exercising statutory powers, was not taking the place of central or local government or providing a public

122 A right to peaceful enjoyment of property and possessions.
123 If so, the PCC was subject to the application of HRA 1998, which in turn meant that the freeholders may appeal directly to the ECHR, Article 1 of the First Protocol that the common law obligation interfered with their "peaceful enjoyment of …possessions…"
124 So that the PCC might, in turn, appeal to the same provision that the obligation was a "tax" obligation which was imposed "in the general [public] interest and thus protected from any complaint under that provision."
125 Ibid.
126 Paragraphs [28]-[36].
127 Paragraph [40]
128 Paragraph [41].
129 Paragraph [42]-[46], discussing the legality of the "tax" for HRA 1998 purposes.
130 Paragraphs [47]-[52].
131 [2003] UKHL 37
132 See HRA 1998, section 6(3)(b).

service[133]). The PCC '[was] seeking to enforce a civil debt. The function which it is performing has nothing to do with the responsibilities which are owed to the public by the State'.[134] As such the obligation was within the class of "private acts" outside the scope of HRA 1998.[135] All of these considerations were relevant only to issue (1) (the "public authority" status, or otherwise, of the PCC for HRA purposes). The classification of liabilities as "private" acts rather than "State" responsibilities was confined to this threshold question of whether the PCC exercised a "public" function, not whether the relevant monetary obligation was a "tax" obligation. Issues (2) to (3) concerning the status of the repairing obligations as a "tax", the "public interest" legitimacy of that "tax" and questions of proportionality became irrelevant once the House of Lords held that the PCC was not a "public authority" and thus HRA 1998 was simply not engaged.

Thus the categorisation by the Court of Appeal of the obligation for chancel repairs as a "tax" was left untouched by the House of Lords and the Court of Appeal's decision as to the components of a charge to tax stands, albeit in respect of an issue which became irrelevant in the light of the House of Lords' decision.[136]

---

133 Lord Nicholls, paragraph [12]

134 Lord Hope at paragraph [64].

135 Section 6(5).

136 The proposition that the House of Lords "by inference" deprived the repairing obligation of its "tax" status in Tiley, *Revenue Law* (no 7) at 4 is unsustainable. The decision of the House of Lords that the PCC was not a "public authority" for the purposes of HRA 1998 does not entail that the repairing obligation was not a "tax" obligation. The reversal of the Court of Appeal's conclusion on the HRA 1998 "public authority" issue does not entail that the Court of Appeal's decision on every other issue was reversed (including the question of whether the repairing obligation was a "tax" obligation imposed at common law). A decision of the Court of Appeal on a particular point binds all lower courts and the Court of Appeal itself, unless the Court of Appeal reached its decision on an issue which the House of Lords (now the Supreme Court) considers irrelevant to resolving the dispute: *Al-Mehdawi v Secretary of State for the Home Department* [1989] 1 All ER 777 at 779, per Taylor LJ. The Court of Appeal cannot be overruled 'by inference' on a point not decided on by the House of Lords, or Supreme Court, if the point (here, the juristic definition of "tax") did indeed have to be considered by the Court of Appeal (which the point did: the point was simply rendered obsolete because the House of Lords tested the "public authority" status of the Parish Council first, which meant that it did not have to consider the definition of "tax" at all). The definition of "tax" in *Aston Cantlow* was not one (on any view) which it was not necessary for the Court of Appeal to decide in disposing of the matter before the Court of Appeal itself. Indeed, even if the Court of Appeal had decided an issue which the House of Lords/Supreme Court decides the Court of Appeal need not have addressed, so that the Court of Appeal's decision on that particular point is not binding, it is still, on that

The entirety of the Court of Appeal's analysis in contained at paragraph [40] of the judgment of the Vice-Chancellor. The touchstone of categorisation of the obligation as a "tax" was that 'the legal obligation [was]…a personal obligation [albeit][137] deriving from a legal relationship with land…', analogous to council tax.[138] 'The levy is upon [the freeholders'] personal funds. Their ownership of [the real property conveyed to them, subject to the obligation for repairs expressed in the relevant conveyance], while it is the source of their obligation, is undisturbed.'[139] The Court of Appeal rejected the High Court's analysis of the obligation as '…quite different from that in which an outright owner of property finds that his ownership is entrenched upon by some outside intervention in the form of taxation'.[140]

The first point to observe is the distinction made by the Court of Appeal between a personal obligation and an obligation arising from a capacity as landowner. For the Court of Appeal, while it was true that the freeholders' obligation would not have arisen "but for" their ownership of the relevant land (the land ownership was the "source" of the obligation), the obligation was upon the "personal funds" of the freeholders. It was this personal monetary obligation which was correctly categorised as a "tax." Put another way, although the Court of Appeal did not use this terminology, the fact that the title to the property imposed the relevant monetary obligations did not ipso facto mean that the obligation was a property obligation; the title was merely the mechanism by which a common law monetary obligation (connected not to the property to which the debtor had title but to a different property to which the debtor was not, other than by reason of the repairing obligation, connected) was fixed upon a debtor. The

point, of 'high persuasive value' (Taylor LJ, *Al-Mehdawi* (supra) 780). On no view can the Court of Appeal's decision on what is, or is not, a "tax" in *Aston Cantlow* be viewed, as a matter of *stare decisis*, overruled 'by inference'.

137 This critical implied caveat which distinguishes between an obligation qua landowner and a personal obligation is made clear by the Court of Appeal in its subsequent observations.

138 Paragraph [40].

139 Paragraph [40]. Thus, the distinction between an obligation qua landowner and a personal obligation is made clear.

140 Per Ferris J, set out by the Court of Appeal at paragraph [40].

notion of taxation as a money debt, as opposed to a claim over property, is developed in Chapter 2 and Chapter 3 (*Aston Cantlow* is revisited in Chapter 3 in this context).[141]

Second, there is no appeal to any notion of "compulsion" in the sense which goes beyond an obligation to be sued.

Third, in relation to the "public body" status of the PCC and the source (common law, not statute) of the obligation, the Court of Appeal did not consider these features to be necessary features of a charge to tax at all. The status of the PCC as a "public body" was addressed only to ascertain whether the HRA was engaged, nothing else. And that the "tax" was a function of common law, not statute, was also irrelevant in the eyes of the Court of Appeal. The obligation to the PCC was treated as a "tax" obligation without any reference to its common law source at all. This feature of the Court of Appeal's (correct) approach is also analysed further in Chapter 3, which sets out why "taxation" may indeed be properly levied by a non-State entity, with a non-legislative source for its demand, provided it is acting lawfully and that all of these features of a tax charge are consistent with Parliamentary sovereignty.[142]

Fourth, the critical point of the Court of Appeal's analysis in *Aston Cantlow* to which attention is turned for the purposes of this Chapter, however, is that the Court of Appeal assessed the taxation nature of the freeholders' obligation for the chancel repairs without any appeal to any "public purpose" to which the monies were to be put. The "public authority" status of the PCC was assessed to ascertain whether HRA 1998 was engaged. Once the "public authority" status of the PCC had been established by the Court of Appeal (albeit wrongly, according to the House of Lords) the nature of the repairing obligation was assessed as a "tax" for HRA purposes at paragraph [40] of the Court of Appeal's decision without any reference to the "public

---

141 Chapter 3 will make good that this proposition is normatively appealing.

142 Chapter 3 also, in this context of taxation having legality as a necessary condition, considers the Court of Appeal's analysis of proportionality in *Aston Cantlow*.

authority" status of the PCC at all.[143] The sole criterion was that the obligation for chancel repairs was personal, not a property obligation. There was no reference to the legislative scheme of HRA 1998, nor to any HRA 1998 or ECHR case law on "tax", which would confine the Court of Appeal's analysis of what is a "tax" to the corners of HRA 1998.

Furthermore, critically, the "public interest" nature of the obligation or otherwise of the repairs obligation was irrelevant to the exercise of categorising it as a "tax" in the first place. The Court of Appeal, in its categorisation of the repairing obligation as a "tax", confined attention, as set out above, to the question of the capacity of the freeholders subject to the obligation (although the Court of Appeal did not use the term "capacity", it addressed itself to the question of whether the obligation was a personal obligation or an obligation qua landowner, so that the obligation was a characteristic of the land which the freeholders happened to own).[144] It was only once the repairing obligation had been categorised as a "tax" that the question of whether that "tax" was in the public interest was addressed. It was common ground that it was, being to maintain the 'upkeep of England's church buildings, at least of those old and interesting enough to be part of [England's] history and landscape…'.[145]

The approach of the Court of Appeal in *Aston Cantlow*, so far as omitting any reference to "public purpose", in its assessment of whether the charge in question was a "tax", was correct and reflects the text of ECHR, Article 1 of the First Protocol, which askes first, whether peaceful enjoyment of possessions is disturbed by a "tax" and second whether that "tax" is in

143 Of course the Court of Appeal had to consider whether the PCC was a "public authority" for HRA purposes and whether the obligation was a "tax" obligation or not only became relevant if the answer was "yes." But the analysis in paragraph [40] makes no reference to the "public authority" status of the PCC at all in reaching the conclusion that the obligation imposed a "tax."

144 See paragraph [40].

145 Paragraph [41].

the "general interest". The inference of the text of Article 1 of the First Protocol is that a "tax" need not be in the "general" (public) interest.

Of course, the notion of a "common law tax" means that the debt is not (or need not) be one owed to the Crown or any public body as the creditor, which means, in turn, that the enforcement and compliance mechanisms must also be found in common law. But this observation has no analytical implications for any of the observations made above.

There are no other authorities within the United Kingdom jurisdictions defining "taxation" for a specific statutory purpose (although there are authorities which consider "tax" as part of the ratio in the context of private law instruments[146] and also in relation to conflicts of law principles, which preclude one state enforcing the revenue laws of another,[147] as well as authorities which make obiter observations as to the nature of taxation, all dealt with in Chapter 3[148]).

Section IV. Conclusions

Chapter 1, having examined the modal, rather than fictional, nature of taxation, has revealed existing definitions advanced in certain case law, specialist textbooks and by accounting and treasury bodies to be deficient. All of these definitions attribute unwarranted restrictions on the notion of taxation (that taxation must have a legislative source, be imposed by a public body and be applied for public or governmental purposes). Some definitions appeal to a notion of taxation as being "compulsory" which (in so far as this means anything beyond enforceable

146 *Brewster v Kidgill* (1697) 88 ER 1239, *Baker v Greenhill* (1842) 114 ER 443.

147 *Metal Industries (Salvage) Ltd v Owners of the S.T. "Harle"* 1962 SLT 114.

148 Or, in holding a charge to be ultra vires, describing that ultra vires charge to be a "tax" rather than an intra vires charge authorised by statute: see, for example *Attorney-General v Wilts United Dairies* [1922] The Law Times 820 at 823. The categorisation of ultra vires payments as a "tax" rather than an intra vires payment of whatever charge was permitted adds nothing to the juristic definition of tax, since if the payment was authorised, its description as a "tax" was neither here nor there.

in law) is unintelligible, while other definitions seek to expressly distinguish taxation from user charges or criminal fines, both exercises being unnecessary. Chapter 1 contributes to existing literature not only by exposing the absence of any theoretical basis for these existing definitions but by providing a theoretical basis in principle as to why these attributes are not either necessary or sufficient attributes of any juristic definition of taxation. Finally, Chapter 1 thus lays the foundations for the "individuation" of taxation as a distinct, coherent area of law (despite the modal nature of taxation) in Chapter 3 which demonstrates that taxation is a personal (monetary) obligation and not a property obligation, distinct from other monetary debts (having identified the principles to be applied in the individuation exercise in Chapter 2).

CHAPTER 2: METHODOLOGY: INDIVIDUATION, PERSONAL AND PROPERTY OBLIGATIONS AND RIGHTS AND THE NATURE OF MONEY OBLIGATIONS

Introduction

Having demonstrated the deficiencies of common definitions of taxation in Chapter 1, Chapter 2 sets out the methodology to be used in Chapter 3 to identify the positive juristic features of a taxation obligation , which permit tax obligations to be distinguished from other obligations (both from property obligations and from other monetary obligations). Any discussion, amongst jurists or philosophers, as to the effectiveness or normative appeal of legal concepts or specific areas of law must first identify and particularise the subject matter of discussion. To discuss legal concepts and areas of law requires a common understanding amongst the discussants as to their meaning. Otherwise any discussion in unintelligible. Thus the methodology used to define the subject matter under scrutiny deserves careful attention. The methodology deployed in Chapter 2 to identify taxation's juristic features and to distinguish taxation from other obligations is the notion of "individuation", which organises legal material into distinct, mutually exclusive areas and identifies any[149] rights and obligations (this thesis confines attention to obligations, as the subject matter of scrutiny is the nature of a tax obligation) by reference to the legal norm (or set of norms) which most accurately describes that legal material. The exercise is not one of mere taxonomy. The process of individuation, in categorising legal material into distinct areas of law by reference to the legal norms each area of law has embedded within it, not only allows different legal obligations to be

[149] Certain legal material may not confer rights or impose obligations.

distinguished inter se but has hard edged practical legal consequences, for example, in relation to limitation periods and Parliamentary procedure, as discussed in Chapter 3. Also (and importantly) the individuation of particular areas of law and taxation in particular reveals much philosophical discussion on the legitimacy of taxation, which confuses notions of taxation and property, to be misconceived.

Section I deals with the question of "individuation" by reference to legal norms, whereby the legal material of a particular legal system is systematically and exhaustively organised and described *as* a legal norm, in *self-contained* "packages" ("*complete* laws", which are, using Razian terminology, "one unit", "one rule", so that any description of an area of law has, within its four corners, a description of all of the relevant legal consequences which arise in that particular area).[150] Each packaged formulation of a particular complete law is distinct from any others, which describe other complete laws. Individuation permits the juristic or legal[151] relationships ("patterns" including resulting rights and obligations) amongst the packaged legal materials to be identified and analysed. Section I sets out the approach to individuation of, respectively, Raz, Bentham and Kelsen, to conclude that, at least as far as duty-imposing prescriptive legal material relating to the monetary liabilities discussed below[152] is concerned, the formulations by each of them of the legal norms which describe these distinct types of monetary obligation yield materially identical results, in that all of the respective approaches treat each type of monetary obligation as distinct from a property obligation and as distinct from each other. Put another way, the formulation by each of Raz, Bentham and Kelsen of the legal norms embedded in each of the monetary liabilities discussed below results in

150 Joseph Raz, *The Concept of a Legal System* (OUP 1980) 70, 71, 223. The term "package" is not used by any of the proponents of individuation examined here, nor by their critics discussed below but this term captures the essence of the task undertaken by individuation.

151 The terms "juristic" and "legal" shall be used inter-changeably.

152 Monetary liabilities arising from a contractual duty to pay consideration for goods or services, a civil penalty, a criminal fine and tortious damages: see further below.

packages containing the same legal material which yield the same substantive obligations, although the technique for such formulation of Raz is superior to those of Bentham and Kelsen.[153] This thesis, while identifying Raz's *technique* for individuation to be superior to those of Bentham and Kelsen, for the reasons given below, does not seek to ascertain which *particular formulation* of the legal norm embedded in a particular monetary obligation is superior to any other. The target of Chapter 2 is to individuate areas of law, not to individuate legal norms. Chapter 2 demonstrates that whichever individuation technique is used, the different types of monetary obligation discussed below are revealed as distinct from any type of property obligation and from one another. This insight is then applied in Chapter 3 to demonstrate that a tax obligation is juristically distinct from any property obligation and from other types of monetary obligation.

Section II sets out the well-known distinction between personal rights and real rights and (more importantly, for the purposes of this Thesis) personal obligations and property obligations, which provides the analytical foundation for individuating taxation in Chapter 3 as a (critically) personal (not property) obligation. Section III further refines this analysis in relation to rights and liabilities for money debts, revealing that while creditors may well have "property" rights, debtors have (exclusively) personal obligations. Section IV revisits the principles of individuation of each of Raz, Bentham and Kelsen examined in Section I and applies these to the monetary liabilities analysed in Section III to demonstrate that different types of monetary liabilities are easily and convincingly individuated into distinct descriptive canonical formulations. Section IV also demonstrates (through this latter exercise of individuating

153 Of course, each of Raz, Bentham and Kelsen had radically different underlying assumptions and explanations as to why their respective formulations were correct, in describing legal duties (which assumptions and explanations, if not the content of each package, in relation to Bentham and Kelsen are subject to legitimate criticism). What Section I shows is that the content of legal duties arising from their respective formulations of prescriptive legal material into individuated packages (in the form of canonical propositions) were indistinguishable (more so than any of them, particularly Raz himself, may have thought).

monetary liabilities) that the objectives of individuation may be achieved using the language of "capacity" and role responsibility. Section V sets out the conclusions of Chapter 2.

Chapter 2 provides the basis for Chapter 3 to apply the conclusions of Chapter 2 to individuate taxation, to reveal taxation to be a distinct coherent juristic notion despite the many different (sometimes conflicting) functions taxation may seek to fulfil (see Chapter 1).

Section I. Individuation

The nature and importance of the exercise of individuation

The notion of individuation advanced here has the objective of expressing the legal norms embedded in legal material which distributes obligations, so far as duty imposing laws are concerned. This exercise also clarifies the legal concepts which form the legal material itself. The exercise of individuation will be examined by reference to three jurists, Raz, Bentham and Kelsen. Raz and Bentham are the only jurists who have expressly conducted the exercise of individuation, of organising legal material into distinct, coherent, complete units. Kelsen does not expressly refer to "individuation" but deploys a version of it implicitly. And although each of Raz, Bentham and Kelsen adopts different individuation techniques, each of them succeeds in differentiating personal money debts from property obligations and different types of money debt from each other, which distinctions will be demonstrated to be critical to a proper understanding of (and provide a foundation for an analysis of) the nature of taxation, which is explored in Chapter 3.

Put short, the process of individuation is critical for any study of legal material by a legal philosopher or a practitioner. The exercise is not a trivial exercise in typology. Raz[154] correctly supports Kelsen's observation that 'it is the task of the science of law to represent the law of a

[154] Raz, *Concept of a Legal System* (no 150) 72.

community, i.e. the material produced of the legal authority in the law-making procedure, in the form of statements of a certain structure'.[155] The articulation of the legal material of a particular legal system into descriptively correct formulations which convey the nature and application of that legal material to an onlooker (whether that onlooker is subject to the application of that legal material or not) is a necessary condition of any intelligible analysis of that material. And legal material which comprises component parts of an ascertainable whole should be looked at as part of that whole, since otherwise omissions of relevant components of a whole give a misleading picture of the legal material under scrutiny. To take a popular example,[156] the legal material comprising the rule in *Rylands v Fletcher* cannot be understood by looking at just the decision itself but requires analysis of subsequent decisions, against the background of the general principles of tort and the assessment of the quantum of damages. For a legal philosopher, a political philosopher, or a moral philosopher, to be able to evaluate the normative status of, say, "tort", or "property" it is, on any view, critical to establish what those concepts mean before subjecting those concepts to normative evaluation. Of course, a philosopher may choose to give such concepts a meaning which is different to their juristic meaning, but if a normative assessment of legal concepts is the objective of study, this would be a pointless and sterile exercise in playing with definitions. And the practitioner must be equally vigilant in ensuring that the presentation of the legal material he constructs is accurate and complete to identify its application in the context relevant to him and his client. Although the assumptions and methodology of a particular individuation technique may be the subject of debate and criticism, the importance of individuation cannot be overstated.

---

155 Hans Kelsen, *General Theory of Law and State* (first published 1945, 2005 Transaction Publishers) 45.

156 For example, see Raz, *Concept of a Legal System* (no 150) 217; Tony Honoré, '*Real Laws*' in P.M.S. Hacker and Joseph Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press, 1977) 100-101.

Critics of the exercise of individuation

Critics of attempts to individuate legal material by reference to legal norms accuse the exercise as misconceived essentialism which leads inevitably to distortive conclusions, or simply as unnecessary to the analysis of legal material. Both grounds of criticism are mistaken. It is useful to take two notable exemplars of critics of the individuation exercise to demonstrate that their respective criticisms are without foundation, Honoré and Dworkin.

Criticism of individuation: Honoré

For Honoré, the exponent of individuated laws by reference to legal norms is a misguided essentialist: the exercise of individuation, particularly as developed by Raz, is 'a strange form of analytical metaphysics'.[157] This type of individuation, says Honoré, is an exercise which seeks to discover non-existent legal constructs: '… it cannot really be suggested that law consists of units waiting to be discovered by some "empirical" procedure analogous to experiment'.[158] So, for Honoré, the individuation exercise of packaging legal material into descriptively accurate formulae is pointless because it must always be fruitless: 'there is no theoretical way of settling the form, identity or individuality of laws other than to scrutinise them as they appear in professional discourse'.[159] Such criticism misrepresents the individuation exercise which describes legal material in legal norm language. As demonstrated below, the individuation exercise is not a search to unearth hidden legal units which await discovery. The exercise, as undertaken by each of Raz, Bentham and Kelsen, takes existing (perfectly visible) legal material and asks whether different legal materials (statute, case law, perhaps general legal principles[160]) display relationships, so that, as a function of a particular

157 Honoré, '*Real Laws*' (no 156) 100.
158 Ibid, 100.
159 Ibid, 100.
160 The content of relevant legal "material" is confined to these components. Any defence of restricting the notion of "legal" material to statute, legal principle (that is principles recognised as having substantive effect by courts) and case law is outside the scope of this thesis.

relationship, certain legal material is correctly described as a coherent unit, a "package", distinct from other coherent units comprised of different legal material. Individuation using legal norm language thus describes legal material in what purports to be descriptively accurate "packages", which, in turn, permits the analysis of the relationships amongst these "packages".[161] In relation to legal duties or obligations, if the legal material in question is capable of individuation by reference to a legal norm embedded in it, so that rights or obligations as described in that formulation indeed reflect the rights and obligations protected or enforced by courts, individuation is a useful juristic tool. Looking specifically at obligations, since this Thesis scrutinises legal material which imposes an obligation to taxation, the description of obligations in norm language permits precise juristic assessment of the nature of the particular obligations. Of course, this exercise assumes that the legal material is capable of such individuation (expression as a norm) but is not, at least in a strong sense, "analytical metaphysics". There is only an investigation into whether there is any connection between two or more items of legal material so as to treat these items are forming part of a single ("natural") unit, which natural unit is aptly described in canonical form to describe obligations. Honoré has no complaint here at all. Individuation also practical; for example, individuation permits investigation as to whether two seemingly distinct packages of legal material in fact reflect identical legal norms, so that these two packages are revealed as duplicating legal obligations (permitting one set of these identical obligations to be repealed). And the description of the distribution of obligations by particular legal material in canonical form, using norm language permits a systematic normative assessment of that legal material, albeit that particular assumptions or methodology may be criticised. By contrast a "pragmatic" packaging of legal material (that is a description of different areas of law) by an exclusive reliance upon "legal

[161] Which Raz describes as either "internal" or "external" relationships: see further below. Raz, *Concept of a Legal System* (no 150).

discourse", that is, the labelling of obligations by the courts, without analytical scrutiny of that labelling, disguises any duplication of legal obligations and makes any normative assessment of legal material unnecessarily difficult (by potentially ignoring patterns or relationships amongst different component packages of legal material which may materially affect the distribution of rights and obligations[162]). And the legal discourse may change over time, further obscuring the actual nature and distribution of obligations which arise from particular legal material. It easy to sympathise with Raz's puzzled response that '… all those [who Honoré] criticises are engaged in the same enterprise as he. The main difference between different writers and this problem has been their solution to it'.[163]

Indeed Honoré himself adopts the technique of a canonical form to express particular legal material. The canonical form of the law should read, according to Honoré, that 'prima facie/for the purpose of X/within the limits of Y/all-any-whenever-only etc. [unless …]'.[164] Honoré adopts this canonical technique to consider two alternative formulations of the obligation to answer the questions asked by the Police: first, Honoré considers the formulation that 'no person may be compelled by the Police to answer questions unless …' and then, second, the alternative formulation that 'Police may compel an answer to questions, provided that …'. Honoré considers that the first formulation is correct whereas the function of the rule is the protection of personal freedom, not to facilitate Police investigations. This is the very exercise of individuation Honoré criticises, that of taking legal material (here, the statutory powers of the Police to compel answers to their questions) and organising that material into an accurate description which permits identification of rights and duties. Of course the very existence of different areas of law means that everyone individuates (even unwittingly) but Honoré's own

---

162 In that rights or obligations conferred by legal material comprised in a particular area of law (a labelled by the courts) may be qualified by legal material comprised in a differently labelled area. For example rights in contract may be affected by capacity and the law of persons.

163 Raz, *Concept of a Legal System* (no 150) 215, Footnote 15.

164 Honoré, '*Real Laws*' (no 156) 109.

explanation of the duties to answer Police questions is an exercise in individuation in canonical form which expresses a legal norm. The "individuating" feature of such a presentation is to distinguish and isolate the nature of Police powers (that is, to express a legal norm) to compel answers to questions from other legal material which permits, say, doctors or teachers to compel answers to questions from patients or pupils in very different circumstances. This illustrates that all legal material is organised into distinct packages, one way or another. To the extent that individuation on the basis of canonical expression of legal norms is demonstrated to convincingly differentiate legal material into distinct packages (for which see the application of the respective techniques of Raz, Bentham and Kelsen below, which do indeed succeed in differentiating different types of monetary debt), the exercise is analytically preferable to an ad hoc "pragmatic" approach.

As for potential distortions caused by the exercise of individuation by reference to legal norms, Honoré's complaints amount to no more than criticising the assumptions and methodology of particular individuation techniques. Honoré considers it simply wrong to treat and express the *content* of a legal rule as indistinguishable from its *function*, or its place in the network, branch or system of law.[165] Otherwise , for Honoré, a tail wags a dog.[166] Content of legal material is, for Honoré, (incorrectly) re-written to be moulded to its function. So, for Honoré, Bentham 'tortures the real laws'[167] by treating and re-writing all laws as expressing the content of duties. Further, Honoré rejects Bentham's proposition that laws should be individuated on the basis that every act situation (broadly, every legally relevant action) governed by the law is the core of a separate law.[168] For Honoré, normative and non-normative laws are not tied to any particular act situation[169] but rather one has basic norms such as "pay debts" which are 'not

165 Ibid, 102.
166 Ibid, 104.
167 Ibid, 102.
168 Ibid, 103.
169 Ibid, 103.

tied to specific act situations' and should not therefore have a significant input into the exercise of individuation.[170] The exercise of individuation, which connects each law to an act situation obscures general rules, general principles, and legal concepts,[171] obscures, says Honoré, the nature of protective laws (for example invalidating transactions which cannot be said to 'regulate human conduct'[172] and are reductionist). To be sure, criticisms, particularly of Bentham's reduction of all legal material to duty-imposing laws are legion and well-founded.[173] And whether the content of all legal material should be expressed as having a specific legal connection to particular 'act-situations' is a legitimate debate. But it does not follow, as Honoré suggests, that such criticisms undermine the validity of the exercise of individuation and expose this exercise to the allegedly fatal observation that '… given the freedom to individuate as he chooses the theorist can restate laws in terms of a variety of central concepts'.[174] If (and only if) the individuation ("packaging") exercise operates on correct assumptions and accurately reflects the relationship of different legal material to reveal a coherent whole (such as the rule in *Rylands v Fletcher*) does the exercise escape an accusation of selecting a self-serving central organising concept to permit a circular re-writing of the content of legal material (such circularity being an analysis something like "there is a legal norm embedded in this legal material, so that the legal material may be re-written to express that legal norm, therefore the legal material is properly expressed as reflecting that legal norm"). The individuation exercise takes up legal material and expresses the content of that legal material in its most accurate form, in the context of the other legal material to which it is relevantly and coherently related. A

170 Ibid, 118.
171 Ibid, 106.
172 Ibid, 107.
173 It is sufficient to refer to those of Hart, discussed below.
174 Ibid, 107.

(valid) objection to particular assumptions and methodology (that is, individuation done badly) cannot entail a valid objection to the exercise itself.[175]

The criticisms of Honoré to the objectives of individuation are thus demonstrated to be unfounded.

Criticism of individuation: Dworkin

Dworkin dismisses Raz's notion of individuation and seemingly the need for individuation entirely, in the context of a sterile aspect of a debate on the distinction between rules and principles, in *Taking Rights Seriously*.[176]

Dworkin's view that legal material is comprised (at least in part) in flexible "principles" rather than in rigid "rules", leading in turn to Dworkin's view that "rules" (but nor principles) have an 'all or nothing' quality and, further, that, for Dworkin, rules could not conflict, whereas principles might,[177] drew the retort from Raz that rules might well conflict, contrary to Dworkin's thesis. For Raz, this showed that there was no qualitative distinction between rules and principles of the sort suggested by Dworkin.[178] Raz offers, as an example of conflicting rules, the rules on assault and self-defence (the conflict occurring because an assault committed in the course of self-defence is not criminal).[179] Dworkin replies that this is a mis-formulation

---

175 As it happens, a technical methodological criticism by Honoré of Raz's treatment of the "patterns" revealed by individuation is puzzling. Raz considers that legal rules may be informed by norms which direct human behaviour ("legal norms") but that legal rules may also exist which are not informed by norms; however, the latter derive their legal relevance from legal norms: see below. Honoré concedes that such non-norm rules cannot be applied except parasitically upon the application of normative rules but goes on to say that '… this does not make them dependent or derivative' (op. cit. page 106). If what Honoré means is that such laws (which would include laws relating to procedure) are deserving of proper study, even though they may not be informed by legal norms, this is unexceptionable. But if Honoré considers that the observation that such non-norm rules apply parasitically to legal rules which reflect legal norms but should not, therefore, be relegated to a status of 'dependent or derivative', this is more difficult to follow. If a non-norm rule is parasitic in its application to a legal norm rule, the former is very much "dependent" and "derivative" in its application in relation to the latter. This criticism of Raz is best dismissed as either irrelevant or misconceived.

176 Ronald Dworkin, *Taking Rights Seriously* (2nd Edition, 1997 Bloomsbury Revelations).

177 Ibid, 38-45.

178 Raz, *"Legal Principles and the Limits of the Law"* (1976) 81 Yale Law Journal 823.

179 Ibid, 825.

by Raz of the law on assault and that self-defence is simply an exception to the law of assault and attributes what Dworkin perceived as Raz's error to the Razian version of individuation. Dworkin attributes Raz's mistake (as Dworkin sees it) to

> … [Raz appearing to be] of two minds about his theory of individuation of law. Sometimes he treats a theory of individuation as a strategy of exposition, that is to say, a theory about the most illuminating way in which the legal system of a nation may be described … At other times however, Raz seems to think that the problem with individuation of laws has to do, not with any strategy of explaining what the law is to students or to lawyers, but with the more philosophical application of what law is. He says that it is a problem about the formal structure of the law, which is of importance to the legal philosopher and not to the offer of [legal rules]. [Raz] poses central problem in this way: "What is to count as one complete law?" And [Raz] adopts Bentham's elaboration of this question "What is the law? What is the part of the law?" The subject of these questions, it is to be observed, is the *logical*, the *ideal*, the *intellectual*, whole not the physical one.[180]

Dworkin views Raz's "ontological" perspective as leading Raz to mis-state the self-defence exception to assault as a separate (conflicting) rule which permits assault in certain circumstances. But this criticism amounts to no more than a criticism of Raz's application of Raz's principles on individuation to particular legal material. In answering the arid question as to whether rules, as opposed to principles, may conflict, Dworkin might well have accused Raz of failing to follow Raz's own principles of individuation as a strategy of exposition, discussed below (which Razian analysis, it might be supposed that Dworkin would have said, would demonstrate that the legal material which comprises the juristic notion of self-defence is inherent in the notion of assault).

But Dworkin does not criticise Raz's application of Raz's own strategy of individuation as exposition. There is no examination by Dworkin of the relationship between the legal material comprising the legal notion of assault and that comprising self-defence. Rather, Dworkin contends that there is nothing to be gained at all in expressing legal material in canonical form

---

180 Dworkin, *Taking Rights Seriously* (no 176) 97-98, citing Raz, op cit, at 825.

and the exercise of individuation. For Dworkin, no particular statement 'is canonical' in the sense that one can say the same thing using different words.[181] 'Nothing … is a legal ontology that assumes any particular theory of individuation.'[182] Put another way, it is, for Dworkin, always pointless to re-express legal material (or to re-express express several items of legal material in any verbal formulation which seeks to capture their legal attributes), since the same legal material may be expressed in any number of different ways, which means, in turn that the nature (ontology) of legal material cannot (ever) be ascertained by reference to how a jurist chooses to formulate that legal material.

Dworkin thus moves from an initially benign attitude to individuation as a 'strategy of exposition' of legal material to a hostile position towards Raz's approach as fundamentally flawed in seeking to identify the nature of legal material. Dworkin attributes to Raz a motivation which is not seeking merely to expose the most descriptively accurate formulation of legal material but rather to glean its very nature (for Raz, "rules" rather than "principles"). Raz's 'ontological mood', as Dworkin puts it, (a commitment to a position where legal material is comprised in rules[183]) is, says Dworkin, over-assertive and therefore misleads Raz in ascertaining whether Dworkin is indeed correct in distinguishing rules and principles (by reference to the juristic notions of assault and self-defence). And in any event, the very exercise of the formulation of legal material, for Dworkin, is an irrelevant exercise since such formulations are too fluid to be of any use to analyse the nature of legal material. For Dworkin, how legal material is expressed (individuation) is irrelevant altogether to ascertain its juristic quality (for Dworkin, all legal material being comprised in "principles").

181 Dworkin, *Taking Rights Seriously* (no 176) 98.
182 Ibid, 98.
183 Raz does in fact seek to accommodate principles into his notion of formulations of legal material in ways not relevant to this thesis.

Dworkin mounts two quite different attacks on the exercise of individuation and Raz in particular, neither of which is valid. The attribution of an "ontological" motivation to Raz echoes Honoré's accusation that a jurist may simply select an organising concept to re-write content of legal material. But Raz's reference to 'the *logical*, the *ideal*, the *intellectual*, *whole not the physical [law]*[184]' merely observes that an accurate description of legal material may have to accommodate several component items to yield a coherent presentation of that legal material. A legal norm has, in a way, been found to "exist" by way of an expression of the distribution of obligations found in particular legal material in norm language. Although a re-expression of this nature purports to discover an item of legal material distinct from the legal material which is expressed, this is "ontological" in a very weak sense indeed. And Dworkin's assumption that there are many potentially different formulations of the same legal material (which makes the exercise of formulation itself pointless) is without foundation. The very task of individuation by reference to legal norms is to ascertain the most accurate descriptive formulation of particular legal material (excluding less convincing alternative formulations).

Both Honoré and Dworkin make legal discourse and analysis unintelligible by rejecting the objectives of individuation

It has been demonstrated that the criticisms of the exercise of individuation and of Raz in particular by both Honoré and Dworkin are unfounded. Furthermore, without individuation, the "legal discourse" which Honoré refers to becomes unintelligible.

Participants in any discussion of concepts embodied in particular terminology must each understand what another participant means, in the use of that terminology. Otherwise there is no subject matter which can be identified to discuss at all. For example, to anticipate the discussion in Section III of the fundamental distinction between "personal" and "property"

184 Raz, *Concept of a Legal System* (no 150) 71.

rights and obligations, any analysis must respect the respective confines of the juristic concepts of "property" and "contract", failing which any discussion sinks into anarchy.

Take, in the context of employer-employee relationships, the law of contract (including the Unfair Contract Terms Act 1977), as supplemented by employment protection laws,[185] which (assume) seeks to achieve a just workplace relationship. That relationship yields profits in the hands of both employer and employee. Property law defines the circumstances in which both may aptly call their respective profits "theirs" (when each may exercise rights of excludability and transferability over their identified monetary assets). Property law may be adjusted by criminal law, so that profits made by, say, extortion, cannot be said to be "owned" by the person who extorted the payer. Taxation then (and only then) applies to the profits of both employer and employee.

It cannot be advanced sensibly that the just adjustment of the terms of employment (and its fruits to its parties) is at all a function of the juristic notion of "property". The ultimate quantum of profits which the employer and employee may call "theirs" as a matter of property arises not as a function of the legal material comprising the juristic notion of "property" but of "contract". These particular juristic mechanisms operate at different stages of commercial behaviour. Contract and employment protection laws regulate the terms on which employer and employee may establish their workplace relationship and regulate that relationship. Any juristic debate as to the nature and scope of a particular legal mechanism will concern whether the legal features of that mechanism achieve its objectives. So a juristic debate about the adjustment of contractual terms concerns the appropriate mechanism to identify whether parties have contracted freely and which adjustments are necessary where they have not. These concerns

185 Which seek to adjust unequal bargaining powers of employers and employees by providing for protection against, for example, unfair dismissal and by regulating the payment of wages, and cannot be contracted out of: Employment Rights Act 1996, Part II.

differ from those which must be had in ascertaining whether certain payments are aptly thought to "belong" to a particular person as a matter of property. There is no place for assessing whether the contract between employer and employee should be adjusted by looking at any property rights of the employee over his own assets.

The observations made above take the rhetoric which assumes that there are indeed distinct juristic concepts of "property" and "contract" and deploys individuation to organise the raw legal material into Razian (and indeed Benthamite and Kelsenian) "complete laws" (here, one "complete" law of property and a different "complete" law of contract) by reference to the respective packages of legal material embodying different legal norms which apply to different act situations. Individuation allows scrutiny of which package operates at which stage of human behaviour (in the above example, contract law, as adjusted by statute, to establish the terms of the employment relationship and then, once contract has operated, property law to create title to the profits for each party under the employment bargain). The success of the individuation depends, of course, on the integrity of the underlying assumptions and methodology of a particular individuating technique. As discussed below, Raz's approach to individuation is convincing and superior to competing analyses (albeit that Raz, Bentham and Kelsen are materially identical in their respective approaches to duty-imposing laws, as applied to taxation, which is the subject matter of this thesis).[186] But in any event, without individuation, there can be no intelligible analysis of the relevant legal material.[187] A critic of

---

186 In the sense that each of these approaches yields materially identical formulations of the distribution of the relevant obligations. While this is unsurprising given that the respective approaches are applied to the same legal material, what is telling, for the purpose of this Thesis, is that different types of monetary obligation are differentiated from each other by each of Raz, Bentham and Kelsen which, in Chapter 3 permits a tax obligation to be differentiated from other monetary debts with precision by all three jurists. This,, in turn, not only allows for an analytically sound, precise juristic definition of taxation as a personal monetary obligation which all three of Raz, Bentham and Kelsen would agree with but also exposes the misconceptions of most (if not all) philosophers who perceive taxation to be a property obligation because they have not paid attention to the relevant legal norms at play in taxation and other monetary liabilities.

187 Of course individuation may accommodate principles which apply generally across areas of law (say Parliamentary Sovereignty), so that domain specific individuated laws would have an internal

individuation would have any analysis of legal material depend on the scrutiny of legal material which has not been organised into any coherent subjects of scrutiny and thus the analysis itself necessarily becomes random and disorganised.[188]

That criticism of the individuation exercise is wholly misconceived is further demonstrated in Section IV, where the principles of Raz, Bentham and Kelsen (set out below) are applied to monetary liabilities, to show that the techniques of individuation by each of them successfully distinguishes different types of monetary debts in a manner which exposes such criticisms as a misunderstanding of both the necessity and the nature of the individuation process.

Raz's notion of individuation: a theory of legal norms

For Raz, law is a dimension of a political system. For Raz, the law is not an autarkic social organisation.[189] The existence and identity of a legal system is, therefore, for Raz, inextricably bound up with the existence and identity of a political system.[190] However, in any analysis of legal material,[191] autonomous legal considerations are, of course, 'part of the essence of law'.[192]

For Raz, 'the philosopher's role is to provide a systematic account of the meaning of the class of legal statement "Legally you owe me £5" '.[193] The Razian process of individuation consists of the 'systematic study of units interrelated in various very standard ways',[194] specifically to arrange and divide legal material into self-contained units in a 'natural way'.[195] Raz seeks to

---

relationship with such principles; the point made here is that domain specific individuation is a necessary condition for any intelligible legal analysis.

188 Hence the misconceived perception that taxation imposes "property" obligations, discussed in Chapter 5.

189 Raz, *Concept of a Legal System* (no 150) 210.

190 Ibid, 211.

191 This Thesis does not address what is "legal" and what is "extra-legal" material. What Raz would call "identity" and "membership" questions are anterior questions which are assumed to have been answered in identifying "legal" material.

192 Ibid, 212.

193 Raz, *Concept of a Legal System* (no 150) 217 - 218.

194 Ibid, 224.

195 Ibid, 110, 144.

identify the identity and completeness of a law,[196] so as to identify that law's 'logical ideal intellectual whole';[197] every aspect of human behaviour (every "act situation") is, for Raz, at the core of a specific law,[198] being the object of a normative modality ("ought", or "must", or "may"), or a normative predicate (where one has a right or a duty).[199] Each unit of individuated law is 'an independent law [which] is a unit of content. It contains some legal material sufficiently independent of the rest and of sufficient interest to deserve singling out as a separate unit…and yet sufficiently simple to be regarded as one unit, one whole'.[200] Thus each Razian separate law is a distinct coherent whole unit, containing legal material mutually exclusive from every other separate law.

Critically, for Raz, norms direct behaviour.[201] Laws consist of either duty laws, which prescribe conduct, or permission laws, which confer permissions or powers ("facilities") (both duty laws and permission laws having a normative function). Such duty imposing and power conferring laws reflect legal norms. However, a legal system may also contain laws which are not normative in their function at all.[202] Such non-normative laws may apply limiting or trigger conditions (such as procedural laws, or rules relating to territoriality) and although not themselves norms have "interrelationships" to norms.[203]

The normativity of legal norms is assessed by Raz by distinguishing between (metaphorically) the "deliberative" stage and the "executive" stage of a decision. The deliberative stage assesses the 'relative merits of alternative courses of action'; the executive stage excludes any such

196 Ibid, 71.
197 Ibid, 71.
198 Ibid, 144. Raz (correctly) does not discount the prospect of a single act situation being the core of two separate laws, for example, an act of professional negligence being at the core of the law of contract (engaging the rules on breach of contract) and tort.
199 Ibid, 145, although Raz recognises that every law need not be a legal norm (see below and page 145).
200 Ibid, 222-223. Chapter 3 shall revisit this description of each separate law to show that taxation is indeed a separate Razian law, distinct from property law and all other types of monetary obligation.
201 Ibid, 75.
202 Ibid, 158.
203 Ibid, 145.

assessment and applies memory (which action was decided upon) to identify appropriate courses of action amongst a residual choice of actions, all of which will achieve the conclusion reached at the deliberative stage.[204] For legal norms,[205] Raz distinguishes between a legal intention that the law is the sole determinative factor (that is, law is engaged at what Raz would term the executive stage)[206] and circumstances in which law is one of a number of factors which permit an assessment at the deliberative stage as to what is the concluded course of action. The latter are '… at best added to the agent's other considerations in reaching a selected course of action'.[207]

Furthermore, Raz is confident that all of the legal material comprised in a particular legal system may be individuated. Thus Raz concludes that while certain rules and legal material may be ad hoc, 'every [unitary content, even if ad hoc] roughly meeting the conditions of relative independence, simplicity and interest can quite properly be picked out designated in a rule or law for some transient purpose'.[208] Moreover, laws are not normally ad hoc, says Raz: legal material generally is arranged in a coherent way.[209] Even if the content of a unit is not crystallised into a particular rule, that content is normally carved up into recognisable "patterns", which arise from the application of recognisable principles. Such patterns take the form of "internal relationships" (where one separate law has a legally relevant connection to another), or "external relationships", where the relationship amongst different laws varies with their respective social consequences.

---

204 Raz, *Concept of a Legal System* (no 150) 213.

205 Ibid, 231 –232.

206 Ibid, 213.

207 Examples of law engaged at the deliberative stage include, for Raz, a legal obligation to buy a TV licence if a person acquires a television and startlingly that, for an employee deciding at the deliberative stage on a particular course of action, that an employer is liable in damages for torts committed in the course of that employee's employment: Ibid, 232.

208 Ibid, 223.

209 '… law is not thought of as a heap of odds and ends but as a reasonably well organised structure of different types of units interrelated in various standard ways'. Ibid, 223-224.

The specific individuation technique developed by Raz treats each and every separate law as a function of an 'individuating operator': Each and every separate law may, says Raz, be expressed in the form: 'There is a law that "p" '.[210] It is this formulation that, for Raz, organises 'natural units' of legal material so as to describe one complete law.[211] The individuating operator describes "pure" legal statements, where the truth of the legal statement arose from law-creating facts alone (as opposed to "applied" legal statements, where the truth of the legal statement depended on both law and facts). The statement "there is a law that p" is a sub-class of logically pure statements.[212] These 'law-creating facts' arise from 'law-creating acts'.[213] Importantly, Raz's formulation that "there is a law that p" does not formally identify any sanction or legal consequence to a breach (or application) of 'that [complete] law'. The content of the legal proposition that "there is a law that p"[214] assimilates all of the relevant legal material, which comprises a "natural" unit, which applies to a particular act situation, which enters the deliberative or executive stage of an actor's decision-making process. The "natural unit" may or may not, even for duty-imposing legal norms, include the legal material which imposes a sanction for breach of that legal norm, provided that the individuating operator delivers a "complete" natural unit of legal material (that is, it leaves no need to scrutinise further legal material, in particular sanctions, to understand, in relation to duty imposing laws, the juristic content of a legal obligation).[215]

---

210 Ibid, 217.

211 Ibid, 219.

212 So that the logically pure statement that 'women over 45 are liable to pay income tax' (Ibid, 219) may be true but is not a true "legal" statement that "*there is a law that [women over 45 are liable to pay income tax]"* (if all adult persons are liable to pay income tax, not just women over 45).

213 Which formed the basis of Raz's 'Sources Thesis': ibid, 220, 222.

214 Which may be a legal norm which is a duty-imposing norm or power conferring norm, or a law which is not a legal norm at all: see below.

215 Raz, Bentham and Kelsen may differ as to whether a descriptive formulation is "complete". The answer as to which formulation is correct is a function of the individuation of norms, which is outside the scope of this thesis, which confines itself to individuating taxation as a distinct area of (duty imposing) law.

Unlike Bentham and Kelsen, who both identify particular "sanctions" in their respective canonical formulations of particular laws, Raz does not need a "sanction" to deliver a complete propositional description of a "complete" law, presumably on the basis that a complete law may guide behaviour without a sanction. This, as demonstrated below, is what makes Raz's individuation technique superior to those of both Bentham and Kelsen. Rather, for Raz, any obligations which arise by application of a particular law are simply part of the description of "that law". So, for example, in relation to monetary consideration payable by an acquirer who has accepted delivery of goods or services under a contract for a stipulated money consideration, the obligation to pay the consideration price is not any sort of "sanction" (assuming a voluntary, arm's length bargain), since both the acquirer and seller have adopted a valorisation of the goods or services which leaves neither (in their respective eyes) better off, since both parties consider (on this assumption) that the goods or services are sold for what they are worth (ignoring bad bargains). Neither party would consider, as a matter of normal parlance, that either the delivery of goods or services (by the seller) or payment of the consideration price (by the acquirer) was a "sanction". And the legal material which comprises enforcement mechanisms for breach (say a failure to pay the consideration price) is not necessary to describe the "complete" law of contract so far as the obligation of the acquirer to pay the consideration on delivery of the relevant goods or services is concerned. The acquirer will understand that he has a legal obligation to pay the consideration price without needing to know about the legal consequences of breach of that obligation.[216] This is true whether the legal consequences for breach of the obligation to pay are stipulated in the contract itself (and so form part of the bargain between acquirer and seller) or are imposed by statute (which statute might apply to all late payments, including those owed to the State for, say taxes, or specifically

[216] Even accommodating OW Holmes' "Bad Man" theory; the presence and nature of a sanction for non-payment goes to the strength (not the presence) of the legal obligation.

to late payments payable under a private law contract). There are, in either case, two separate legal norms, the first which imposes the obligation, the second which imposes a distinct obligation if the first obligation is breached. This point is discussed further below, in comparing the Razian individuation technique to that of each of Bentham and Kelsen.

Raz accepts that the principles of individuation which ultimately yield the proposition that "there is a law that p" are necessarily 'vague [since there] cannot be a clear-cut theory of choosing between different theories'.[217] Raz's 'aims and principles guidelines'[218] are (in relation to positive guidelines) that the propositions yield an articulation which is simple, where the identification is easy to discover and does not contain too large an amount of material and (in relation to negative guidelines) do not deviate too much or without sound reasons from ordinary usage, are not overly repetitive, and avoid redundancy. Raz's objective, as observed above, is to achieve self-contained divisions in 'a rational way … without combining unrelated ideas [or dividing related ideas] in one law'.[219]

The very process of the individuation of separate laws 'make clear important connections between various parts of the legal system'[220] and 'isolate features common to many laws thereby making clear certain connections between groups of laws'.[221] In other words, the individuation of legal material reveals the structure of a legal system by revealing the "connections" amongst the individuated separate laws. So, for example, those separate laws which classify rights and duties by reference to religion will help to identify the structure of the legal system by allocating such laws to religious courts.[222] 'The typology of laws reflects the linguistic conventions governing the use of the individuating operator and illuminates our

217 Raz, *Concept of a Legal System* (no 150) 146.
218 Ibid, 141-146.
219 Ibid, 144.
220 Ibid, 145.
221 Ibid, 145.
222 Raz, *Concept of a Legal System* (no 150) 146.

conception of the structure of the law.'[223] It may be added that only properly individuated legal material is the subject of any normative assessment of whether the legal rights or duties revealed by the individuation exercise are "good" or "bad" by reference to either legal or extra-legal considerations.[224]

Raz shows that the principles of individuation affect the very pattern of the legal system itself. Separate complete laws (both duty imposing and power conferring legal norms and laws which are not norms) will have either "internal relations" or "external relations" to each other.

"Internal relations" amongst separate laws are only made possible after the process of individuation has taken place.[225] It is the pattern of internal relations which gives the legal system its internal structure.[226] An internal relation arises when (if and only if) one law is a condition for the existence or affects the meaning or application of another law.[227] Internal relations may be sub-divided into "regulative relations" (where the exercise of power may give rise to particular duties, whether in private law and in public law),[228] or "genetic relations", whereby the law may be entrenched (made "resistant to change")[229] by reason of its internal relationship to another law (say one statute is entrenched in its application by another),[230] so that the "operative structure"[231] of the legal system may be identified, that is, the structure of a

223 Ibid, 223.
224 For example, whether it is "good" or "bad" that contractual terms may compel payment of the consideration price upon delivery, before assessment of their quality by the acquirer.
225 Ibid, 141.
226 Ibid, 224.
227 Ibid, 224.
228 That is, a non-conferring private power (say to contract) or legislative power may, upon the exercise of either power, give rise to duties: ibid, 162-163, 164.
229 Ibid, 184.
230 Ascertained by the date of creation, the function of the general authority of the law-making body, the nature of the law-creating body's particular authority to create particular laws, the reasons given to justify that law, how that law is modified or appealed and facts which may modify or appeal that law.
231 Ibid, 185.

momentary legal system[232] at any given moment is ascertained by the effect of one separate law on another.

"External relationships" are relationships between laws which do not depend on each other and varies with social consequences (so that for example a tax on unbuilt property will have an external relationship with a (separate) law which provides a tax exemption to a building society).[233]

To revisit Raz's statement that "Legally you owe me £5", Raz would identify the act situation which attracts an obligation for a debtor to pay £5 to a creditor (say the debtor acquires £5 worth of goods from the creditor and the £5 was the consideration payable). Raz would then apply the legal norm "debtors must pay lawful debts to creditors in full" to articulate a logically true legal proposition by means of Raz's individuating operator: "There is a law that where a person acquires goods from a seller, the acquirer must pay the seller the acquisition price, here £5". As to the creditor's rights of enforcement if the debtor fails to pay (to raise enforcement proceedings and perhaps to exact interest for late payment, or penalties) these are also easily formulated in Razian canonical form "there is a law that [a creditor may raise enforcement proceedings for an action on a debt and may, depending on the terms of a particular bargain, exact interest and penalties]". On the basis that there are two distinct legal norms (the obligation to pay and the sanction if there is breach of that obligation), the legal norm relating to rights of enforcement and sanctions has an internal ("regulative") relationship to the legal norm which imposes the obligation to pay. This is true whether the enforcement and sanction are part of the contractual terms between seller and buyer (and so part of their bargain) or imposed by separate legal material (say a statute, whether the statute applies to all late payments, including, for example, taxes, or only to private contracts). The Razian

232 Ibid, 185.
233 Ibid, 224.

individuating technique thus describes the legal obligation to pay £5 whether or not a breach occurs, that is, there is no need to accommodate any reference to the creditor's enforcement rights to the £5 if the debtor does not pay to describe the obligation of the debtor to pay £5 on delivery of the relevant goods or services.

It may be controversial as to whether there is one legal norm or two, that is, whether the "natural" unit of legal material is to articulate the obligation and enforcement rights as separate "complete" laws or distinct "complete" laws and jurists may argue as to the correct conclusion. But the legal *consequences or content of rights and duties*, as expressed in Raz's canonical formulation of the legal material which means that the debtor who accepts delivery of goods has an obligation to pay the seller-creditor £5 (and the creditor has enforcement rights) remain identical, whether the legal *character* of that legal material (relating to the obligation and enforcement) is properly viewed as being part of one "complete" law or two (and Raz's individuating technique is sufficiently flexible to yield a "natural" unit of legal material whether or not the legal consequences of a breach by the debtor is included in the canonical description of the obligation to pay £5).[234]

Raz provides his own summary of the principles of individuation:

(i) rules may be duty-imposing or power-conferring rules;

(ii) both duty-imposing rules and power-conferring rules are legal norms (these are not dependent on sanctions or other consequences);[235]

(iii) several other types of laws may exist which are not norms;[236]

---

234 Contrast both Bentham and Kelsen: see below.

235 See page 224-225.

236 Ibid, 224, Footnote 20; Raz accepts that Honoré (*Real Laws* (no 156)) identifies correctly at least four categories, being (1) existence laws, which create or destroy legal entities (such as a "fee simple"), (2) rules of inference, (3) categorising rules and (4) rules of scope and demarcation (Honoré (no 156) 115):

(iv) all non-norm laws are internally related to legal norms (that is, non-norm-laws are dependent on norm-laws for their condition or existence (or vice versa), or affect the meaning or application of a norm law whether through a regulative relationship, a genetic relationship or are, together with the norm-laws, part of a single operative structure); and

(v) these principles may conflict, that is legal rules may conflict; Raz is careful to distinguish conflict with contradiction – the resolution of a conflict does not mean there was never a contradiction.[237]

Raz's process of individuation, if successful, thus yields "complete", "natural" units of legal material, each mutually exclusive to the other, which have at their respective cores, "act-situations" which are subject to the particular application of the relevant legal material. These natural units may be duty imposing or power conferring legal norms, or, perhaps, non-norm laws, in either case each natural unit being related "internally" or "externally" to others. As shown below in Section V, Raz's approach to describing the legal material of a legal system is, at least in relation to duty imposing laws, very close indeed to the approach of both Bentham and Kelsen (although Raz is seemingly unaware of this, in relation to Kelsen's approach) and also invulnerable to the criticisms of the type made by Honoré and Dworkin set out above.

Honoré's two other categories of "position specifying rules" (which specify rights liabilities as a function of status) for example the rights of a fee simple owner and directly normative rules (see Honoré (no 156) 116-117) are, for Raz, duty-imposing or power-conferring.

[237] Ibid, 225, Footnote 21.

Raz's notion of individuation materially identical to Bentham and Kelsen for duty imposing legal norms

Bentham's notion of individuation: also based on norms (but exclusively on norms) and sanctions

To take Bentham first, Bentham's objective is to convert the expression of those legal terms which stand for 'fictitious entities',[238] which are 'linguistic shorthand',[239] which occupy only a 'linguistic reality' and organise them into propositions which reflect 'real entities' which relate to acts of the will and acts of the body and their consequences.[240] So, for Bentham, the process of individuation is the application of 'rules that single out one specimen of a certain kind from another, and that identify the same one as recurring or appearing again'.[241] For Bentham, individuation may be "individual" (that gives a proper name and substance to the subject of scrutiny, for example "Europe") or "generic" which endows the subject of scrutiny with objective features, so that the subject of scrutiny may contain any number of individuated subjects, such as a "continent"). Like Raz, Bentham takes take existing legal material and seeks to present that material in a form which reveals rights and obligations (unpacking legal rhetoric, "shorthand", along the way). There is no "metaphysical" component to Bentham's analysis which Honoré can object to. To be sure, Bentham's underlying assumptions and articulation of that legal material, in particular that every norm is a duty imposing "norm" is vulnerable to criticism as unrealistic and distortive but the Benthamite formulation yields, at least in relation to duty imposing laws, the same substantive obligations for the same act-situations as the Razian individuation technique, so as to distinguish (individuate) different areas of law in the same way as Raz.

---

238 Such as "liberty", "power", "duty" and "right".

239 Jeremy Bentham, *"Bentham on the Individuation of Laws"* in MH James (ed), "*Bentham and Legal Theory"*, Northern Ireland Legal Quarterly [1973] Volume 224 No 3, 91-93.

240 Jeremy Bentham, *"On Laws in General"* in *Collected works of Jeremy Bentham* (H.L.A. Hart (ed), OUP 1970) 251-252.

241 *Bentham on the Individuation of Laws* (no 239) 92: this process is distinct from any process of taxonomy ("designation" or "classification") which applies rules that '… single out elements in reality as being of the same kind, that identify recurring things of the same kind'.

For Bentham, famously, every law is a norm, prescribing certain behaviour, so as to give rise to duties.[242] And a Benthamite duty only arises if backed by a sanction.[243] Thus, contrary to Raz, Bentham's individuation technique needs to identify a specific "sanction" as part of any description of the "linguistic reality" of individuated legal terms and further, leaves no room for non-norm laws. But for Bentham, like Raz, every act situation is at the core of a specific law. Further, for Bentham, a proper description of a legal system does not admit of a conflict of laws.[244] Finally, for Bentham the individuated form of a law was a function of the rhetoric of the relevant legal material (so that legal norms which direct that "a man should do A" and separately that "a woman should do A" are two separate laws, whereas a law which directs that "all persons should do A" is one single law).

Turning now to Bentham's technique of individuation, Bentham presents the law in anatomical form. Each law, reflecting a duty imposing norm, is described by Bentham as comprising a directive part[245] (expressing the legislature's wish) and an "incitative" or sanctional part (being "cominative" in the case of a punishment and "invitative" in the case of a reward).[246] This Benthamite formulation of an individuated law, as observed above, gives rise to obligations which are materially identical to those of Raz's individuating operator, at least for duty imposing legal norms, for any particular act-situation. Raz's illustrative statement "Legally you owe me £5 [as consideration for goods or services delivered]" would be formulated by Bentham as having a directive part (you, the debtor should pay £5 to the creditor to whom you have the payment obligation, on delivery of the relevant goods or services) and a sanctional

242 Jeremy Bentham, *The Limits of Jurisprudence Defined* (Charles Warren (ed), Columbia University Press 1945) 55; Bentham, *On Laws in General* (no 240) 249.

243 Which may be legal, political or moral: Bentham, *On Laws in General* (no 240) 68-70, 248; Bentham, *Limits of Jurisprudence* (no 242) 157.

244 Whereas Raz considers that contradictions may well arise but may be resolved: see above.

245 Bentham, *On Laws in General* (no 240) 133-148, cited in MH James (ed), *Bentham and Legal Theory* (no 239) 98.

246 The strained meaning of "sanction" so as to include a reward anticipates the vulnerability of the Benthamite directive/sanctional analysis to the accusation of being inflexible and distortive.

(cominative) part which provides that "if you do not pay £5 to the creditor, the creditor shall take enforcement proceedings to retrieve payment, perhaps with interest". Bentham's directive part is materially identical to Raz's individuating operator formulation, in that the obligation to pay contractually stipulated monetary consideration on the delivery of goods or services is embedded within that directive part. And Benthams's sanctional or cominative part is equally identical to what would be Raz's formulation of the creditor's enforcement rights; the only (of course fundamental) analytical difference between Raz and Bentham is that Raz has the option of formulating the obligation to pay and enforcement mechanisms as either one or two "complete laws", whereas Bentham is necessarily committed to describing the creditor's enforcement rights as forming part of the same "complete" law as the debtor's obligation to pay £5 to the creditor, since, otherwise, there would be no "sanction" to give content to Bentham's sanctional part of the Benthamite "complete law". If the prospective breach was ignored, the Benthamite directive part of the relevant duty-imposing law would become unintelligible; the directive part would read "If you contract to acquire goods or services you must [at least in English private law] oblige yourself to pay a consideration price [here £5]". The sanctional part would be "You must pay that consideration price [of £5]" which cannot be described as any sort of "sanction" at all. Any description of an obligation to pay consideration as a "sanction" (of any type, legal or non-legal) is wholly unconvincing; such an obligation is not a "sanction" but a quid pro quo for the goods or services acquired, to complete a bargain. Bentham's approach thus requires the identification of a sanction of a prospective breach which neither party intends and which may well never happen to formulate an obligation to pay £5 as consideration. Bentham's approach thus may well yield a "natural" unit of legal material for, say an obligation subject to criminal sanctions (since the criminality of any breach arises

from the nature of the sanction which labels the breach as "criminal"[247]) but far less convincingly so in relation to an obligation to pay contractual consideration for the delivery of goods or services. Raz's more flexible individuating technique (which accommodates an internal relationship between two separate "complete laws", one relating to the obligation and the other, that relating to remedies for breach, contingently dependent on its application on the breach of the former) is thus, at least to this extent, superior to that of Bentham (and also to that of Kelsen, see below). However, it is also important to note that the legal content of both the obligation to pay contractual consideration and the remedies available for breach is identical on the Razian and Benthamite formulations. Both the Razian individuating operator and the Benthamite directive/sanctional analysis look at the same legal material (the contract in relation to the obligation to pay the consideration for goods or services and either the contract or a separate statute to identify the remedies for breach) and identify the same legal duties relating to both the obligation (delivery of the purchase price) and remedies (the imposition of interest, penalties, etc). Thus, in relation to duty imposing laws, a single act-situation (at least in the contractual example discussed here; the point is further developed in Section IV in relation to other types of monetary obligations) gives rise to identically articulated legal duties (and co-relative rights), whether a Razian or Benthamite formulation is applied.

Kelsen's individuation technique: Kelsen's treatment of norms yields the same juristic answer as Raz and Bentham

For Kelsen, "the rule of law" is a hypothetical judgment attaching certain consequences to certain conditions".[248] A legal rule, for Kelsen, is '… the norm created by the legal authority to regulate human behaviour, and as an instrument used by legal science to describe positive

247 It is the fact and nature of the sanction (a criminal conviction), not any alleged "purpose", which differentiates a criminal breach from a civil breach, say a civil penalty; see below in the discussion of Kelsen's individuation technique.

248 Kelsen, *General Theory of Law* (no 155) 45.

law – [which] is the central concept in jurisprudence'.[249] Critically, Kelsen answers the questions of identity and membership of a legal system (which legal rules belong to a particular legal system) through the identification of his "basic norm", being the exclusive source of the powers from which all other laws of the system are enacted: 'That a norm belongs to a certain system of norms…can be tested only by ascertaining that it derives its validity from the basic norm constituting the order'.[250] A legal system comprises those rules enacted through the exercise of powers conferred directly or indirectly by this one basic norm. 'All norms whose validity may be traced back to the same basic norm form a system of norms, or an order.'[251] Thus the basic norm provides a "chain of validity" for all legal norms which depend ultimately on the basic norm for their normative quality.[252]

Kelsen's canonical form for a law is 'If A is, B ought to be'.[253] "A" represents the conditions (a "delict") to which a sanction (B) attach.[254] Without a sanction, there is no delict ('there is no delict in itself').[255] And for Kelsen, a sanction is a coercive act (made by a sanction-applier) directed against the individual who behaves so as to trigger the conditions inherent in A.[256] Furthermore, the sanction is imposed on the person who has committed the delict by a sanction-applier who has permission[257] to apply that sanction (who may or may not be subject to a separate sanction if he fails to apply it). So the formulation and the content of a law is

---

249 Ibid, 50.

250 Kelsen, *General Theory of Law* (no 155) 111. Kelsen is clear that any enquiry as to why the basic norm exists is a separate sociological question: Hans Kelsen, *The Communist Theory of Law* (Fred B Rothman & Co 1988) 143.

251 Kelsen, *General Theory of Law* (no 155) page 111

252 The "chain of validity" terminology is that of Raz, *Concept of a Legal System* (no 150) 97-109. This chain of validity is essentially a "genetic" (internal) relationship between the basic norm and the particular legal norm under scrutiny. It is, therefore, unfair of Raz to criticize Kelsen as excluding the very notion of internal relationships amongst laws, so that 'every…law is logically entailed by the basic law [norm] and adds nothing to it': Raz, *Concept of a Legal System* (no 150) 118). Rather the criticism ought to be that Kelsen contemplates only one sort of internal (genetic) relation as juristically important.

253 Kelsen, *General Theory of Law* (no 155) 46.

254 Ibid, 51.

255 Ibid, 51.

256 Ibid, 53.

257 For Kelsen, the term "ought" may be any of "is required to be", "is permitted to be", or "is empowered to be": Hans Kelsen, *Pure Theory of Law* (Max Knight (tr), first published 1934) 5.

ascertained, for Kelsen, by identification of the permitted sanction (B) and the trigger conditions for that sanction (A). And a Kelsenian duty is a duty to avoid triggering the conditions inherent in A and thus avoid the permitted sanction B: 'An individual is legally obligated to the behaviour the opposite of which is the condition of a sanction directed against him'.[258]

At first sight, Kelsen's formulation of a law, predicated on the notion of the juristic formulation (and thus the content) of a particular law being a function of a permitted sanction and duties being a function of a juristic obligation to avoid a permitted sanction, seems far removed from both Raz's individuated "natural units" of legal material organised by the individuating operator and Bentham's individuated law (comprising a directive part and a sanctional part). However, further analysis shows that Kelsen's juristic analysis is indeed much closer to that of Raz and Bentham then first sight might suggest and indeed Raz himself seems to have realised.

Kelsen's formulation of particular legal material describes that legal material as having the same legal content and consequences, although not the same legal character, as yielded by the individuation techniques of Raz and Bentham. Kelsen's analysis of Raz's "legally you owe me £5 [as consideration for goods or services delivered]" statement would be "If you conclude a contract to acquire goods for £5 and I deliver those goods, the obligation to pay me £5 [the conditions inherent in A] is, if you fail to pay, subject to a permitted sanction (in the hands of the sanction-applier) of enforcement proceedings (an action to enforce a money debt by means of a Court Order), perhaps with penalties and interest for late payment [the sanction B]". The "permission" to the sanction-applier to apply a sanction which, absent breach, would not be permitted to be applied to an actor who has complied with his legal duties, is necessary for a complete Kelsenian formulation of the obligation. Alternatively, Kelsen would formulate the

[258] Kelsen, *General Theory of Law* (no 155) 59.

duty to pay £5 as "Legally, you have a duty not to fail to pay me the £5 you owe me, so as to avoid the sanctions which a sanction-applier would then be permitted to fix on you." The Kelsenian formulation takes the obligation to pay the £5 consideration as a condition inherent in giving rise to a duty not to fail to pay that contractual consideration [the £5 consideration is not a sanction])[259] and a permission to a sanction applier to fix a sanction on the debtor who fails to pay £5 to the creditor. The sanction of enforcement proceedings which arises only if the £5 consideration is not paid explains the nature of the payer's Kelsenian legal duty in relation to the £5 as a duty not to fail to pay £5 which arises from an act situation of having accepted delivery of goods under a contract which specifies payment of consideration of £5 (not, as Raz would have it, the duty to pay £5 as being the primary obligation of a complete law, arising from an act situation of having accepted delivery of goods under a contract). To this extent, Kelsen's identification of a (permitted) sanction as a necessary feature of every canonical description of a complete law attracts the same criticisms as those made in relation to Bentham, in that it forces attention to be extended to a potential breach by a debtor to explain the juristic nature of a debtor's obligation which he has every intention of paying. But, as with Bentham, Kelsen's canonical formulation identifies the same legal obligations as Raz in relation to the obligation to pay contractual consideration (the obligation to pay £5 on the delivery of goods or services) and on breach (an obligation to pay interest, penalties etc).

What the analysis of each of Raz, Bentham and Kelsen shows is that despite the differences between Raz on the one hand and Bentham and Kelsen on the other as to the need to identify a "sanction" in any individuated canonical formulation of legal material, the expositions of the

---

259 This explains what is otherwise a puzzling formulation by Kelsen that concluding a contract is as much part of a delict as the breach triggers a lability: Kelsen, *General Theory of Law* (no 155) 53. The (pre) conditions inherent in any delict (A), in contradistinction to the sanction (B), which is imposed in response to the breach of a duty, must include all of the conditions which give rise to a permission to a sanction-applier to fix a sanction on a person who commits a delict. Without a contract there can be no breach and no permission to fix a sanction for that breach. The description of the conclusion of a contract as part of a "delict" is odd but there is no distortion of the content of substantive rights and obligations in any given act situation: see Section IV below.

analytical formulations of legal material of each of Raz, Bentham and Kelsen, for duty imposing norms, show that each of them arrive at identical analyses of the legal content and consequences of the legal material which applies in a particular act situation. In relation to a contract to acquire goods for £5, an obligation to pay £5 in consideration arises on delivery of the goods. As a matter of characterisation, while Raz treats the obligation to pay the £5 as a primary obligation, Bentham and Kelsen treat this obligation as giving rise to a duty not to fail to pay the £5 (failure to pay would give rise to enforcement sanctions). In each case the content and consequences of the act situation (the conclusion of a contract for the sale and acquisition of goods for £5) gives rise to an obligation to the acquirer of the goods to pay £5 to the seller-creditor).

Section IV below revisits the individuation techniques of Raz, Bentham and Kelsen to demonstrate that each of them accurately (and each of them in a manner similar to each of the others) describes the legal content and consequences of legal material in the context of duty imposing norms relating to different types of monetary obligation and successfully distinguishes each type of monetary debt from the others. And each of Raz, Bentham and Kelsen escapes the criticisms of individuation of the types made by Honoré and Dworkin. Section IV lays the foundation for the presentation in Chapter 3 of an individuated notion of a tax obligation as a type of monetary debt which each of Raz, Bentham and Kelsen would, in applying their respective individuating techniques, successfully differentiate from other monetary debts.

Section II. The distinction of personal rights and obligations on the one hand and property rights and obligations on the other

Monetary liabilities are generally personal liabilities, not property obligations. It is necessary to distinguish the two, especially as philosophers have often confused them, certainly in the

context of taxation.[260] There is a 'general assumption that there is a sharp and functional divide between property and obligation'.[261] Indeed, the law of property and the law of obligations are thought to be mutually exclusive: '[t]he idea is based on the proposition that rights in rem are property rights and rights in personam, that correlate with obligations, are personal rights and not property rights'.[262]

Personal and property categorisation individuated as remedies

The distinction of personal and property rights and obligations, subjected to Raz's principles of individuation, is to distinguish against whom remedies lie. In other words, the "personal" or "property" nature of rights is to identify the class of persons who owe a particular duty to a particular person by reason of duty imposing norms: 'Exigibility is demandability. Against whom can rights be demanded?'[263] Put another way, a personal obligation affects wealth, or patrimony. A personal obligation does not attach to specific property. Thus Raz's individuating operator would formulate a property right as "There is a law that [this particular right, say a right to exclusive occupation] attaches [to this particular item of property and may be exercised against any other person in relation to this item of property]". Bentham's directive part of a Benthamite law would say "You (everyone) must not encroach on the right-holder's exclusive occupation of [this particular item of property]". Kelsen would advise all persons to forbear such an encroachment (and that all persons have a duty to do so) on pain of suffering a permitted sanction. Birksian exigibility and demandability (rights) are converted into a Razian right (demanded of the whole world) and a Benthamite and Kelsenian duty (owed by the whole

260 See Chapter 5.

261 Sarah Worthington, *"The Disappearing Divide Between Property and Obligation"* in *The Impact of Aligning Legal Analysis and Commercial Expectation"*, Texas International Law Journal 42(3) 917, 919 ("Property and Obligation").

262 John Tarrant, *"Obligations as Property"* (2011) UNSW Law Journal, Volume 34(2) 677 ("Obligations as Property").

263 Peter Birks, *Unjust Enrichment* (2nd edition, OUP 2005) 28.

world). In all three cases the content and consequences of the property/personal distinction are articulated as who is subject to the right of exclusive occupation.

It is convenient to examine the nature of property rights, personal rights, property obligations (as correlative duties to property rights) and personal obligations as (correlative duties to personal rights) in that order.

Property rights

A property right is a "real right", being 'a right in or over an identifiable asset or fund of assets'.[264] Such a real right can be generally asserted against third parties and survive the bankruptcy of the obligor.[265] Such real rights are 'good against the world' and 'multital'.[266]

For the orthodox[267] jurist, the notions of transferability and excludability are considered to be cumulative, necessary conditions for rights to be "property" rights over an identifiable asset. Holders of property rights must be able to '…transfer their rights [in an identifiable asset], and…exclude third parties from interfering with their rights [in that asset].'[268] These conditions of property rights also determine the nature of the correlative duties/obligations to property rights, and whether such duties/obligations are "property" duties/obligations or not. Excludability looks to the effect of the right-holder's exercise of his rights against third parties. A resource (an asset or fund of assets) is "excludable…only if it is feasible for a legal person

---

264 Roy Goode, *Goode on Commercial Law* (Ewan McKendrick (ed), 4th edition, Penguin Books 2010) 28 ("*Commercial Law*").

265 Ibid, 28.

266 Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook (ed) Greenwood Press 1978), 111-14 ("*Judicial Reasoning*").

267 See variously, Peter Benson *"The Philosophy of Property Law"* in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 751, 769-770; Lawson and Rudden, *The Law of Property* (3rd edition, OUP 2002) 14; Clarke and Kohler, *Property Law* (CUP 2005) 157-159, where only very limited qualifications, relating to communal property, status rights, and appurtenant rights are made to the proposition that 'alienability is an inherent characteristic of private property interests' (at 159).

268 Sarah Worthington, "The Disappearing Divide Between Property and Obligation" in The Impact of Aligning Legal Analysis and Commercial Expectation", Texas International Law Journal 42(3) 917, 920 ("Property and Obligations"); the 'twin attributes of transferability and excludability': Kevin Gray, *"Property in Thin Air"* CLJ Vol.50: 252, 301, 302 ("Property in Thin Air").

to exercise regulatory control over the access of strangers to the various benefits inherent in the resource."[269] The essence of property is that it is contingent upon the moral agent's right (exclusively) to determine the use of a "thing".[270] Excludability, as the touchstone of what is a "property" right, permits the expansion of the category of property rights to power relationships, "legally endorsed concentration of power over things and resources", beyond assets with a quality of "thinglikeness."[271]

The condition of transferability is more controversial. Certainly, it has some judicial endorsement: a "property" right must be "definable, identifiable by third parties, **capable in its nature of assumption by third parties**, and have some degree of permanence or stability."[272] But transferability of itself is not obviously anything more than a useful crosscheck of whether rights are "property" rights. Once a right-holder establishes the scope and nature of his rights of exclusion over an asset, the question of whether or not the right-holder has the legal ability to transfer that asset to another does not further serve to answer questions about the identity of the asset subject to property rights. If the assignee of a transferred asset has the same rights of excludability as the assignor, that which has been transferred is clearly a "property" right; but the absence of a right to transfer an asset does not obviously deprive an agent from "property" rights in that asset. The quality of non-assignability may be simply a feature of the specific asset in question (say non-assignable shares, which may yield dividends).[273]

---

269 Gray, *Property in Thin Air* (no 268) 268. Put another way, 'the right to property is the right to exclude others from things which is governed by the interest we have in the use of things', James Penner, *"Misled by Property"* (2005) Canadian Journal of Jurisprudence, Vol XVIII (No1) 71, 75-83 ("Misled by Property").

270 Penner, *Misled by Property* (no 269) 75, 76.

271 Gray, *Property in Thin Air* (no 268) 295, 297, pointing out that the terminology of "thinglikeness" was originally used by Frederick Pollock and Frederic Maitland, *The History of English Law* (2nd edition, London, 1968), Volume 2, 125.

272 *National Provincial Bank v Ainsworth* [1965] AC 1175, 1247G-1248A, per Lord Wilberforce, emphasis added; see also *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, per Blackburn J.

273 Restrictions on testamentary powers are irrelevant. Scots Law provides for surviving spouses and children to obtain a proportion of the value of heritage ("real property" in England) or moveables ("personalty" in England) from the estate of the deceased ("legal rights" and "prior rights": Succession (Scotland) Act 1964, ss.8-10, 11). No-one would say that the deceased did not own all of the heritable

Personal rights

By contrast, a purely personal right is "one which does not involve the delivery or transfer to the obligor of an identified asset or funds of assets but is to be satisfied by the obligor's personal performance in some other way, such as the payment of a debt or damages from his general assets."[274] The distinction is between "what I *own* and what I *am owed*".[275] Personal rights are thus "only good against the obligor" and "paucital".[276]

Property or Real rights: correlative obligation in rem

A real property right in rem in an identifiable asset entails a correlative duty in rem, that is, a duty which relates to the identifiable asset in which the right in rem is held. This is often expressed as a duty of non-interference, which correlates to the right-holder's right of excludability. A right in rem entails a correlative duty of non-interference in rem for the whole world. That duty survives transmission of the asset by the right holder to a third party and becomes owed by the world to the assignee right-holder.[277]

Personal rights: correlative duty in personam

A duty/obligation to perform personal services as the correlative obligation to a personal right is not attached to any *asset*. Indeed it is the personal performance of services for the obligor which may be enforced, not rights over an asset.[278] This is obvious for, say, obligations owed by an employee to work under a contract for services.[279]

---

and moveable estate at the time of death. The necessity of the right-holder of a putative "property" right being able to transfer his rights in order for the right to be "property" has been rejected by at least some but not on these grounds. See Gray, *Property in Thin Air* (no 268) 289 and James Penner, *The Idea of Property in Law* (OUP 1994) 126.

274 Goode, *Commercial Law* (no 264) 30.

275 Roy Goode, *"Ownership and Obligation in Commercial Transactions",* LQR 433, 1987:103 ("Ownership and Obligation"); Goode, *Commercial Law* (no 264) 30-31.

276 Hohfeld, *Judicial Reasoning* (no 266) 69-74.

277 Penner, *The Idea of Property in Law* (no 273) 84; Tarrant, *Obligations as Property* (no 262) 688.

278 Tarrant, *Obligations as Property* (no 262) 688

279 Notions of self-ownership are irrelevant here. Even if the provision of services by the obligor is somehow properly seen to be the delivery of "property" as a function of self-ownership, the obligor must himself

Section III. Money debts: creditor rights are "property" rights but debtor obligations are personal obligations (and not property obligations)

Having distinguished property and personal rights and obligations, (anticipating the purely monetary nature of an obligation to pay tax, which is made out in Chapter 3) further analysis demonstrates that money debts yield an asymmetry which permits a creditor to have "property" rights but confines the debtor's obligations to being "personal" obligations only.

Debts

A monetary obligation has been defined as "… an obligation (a) whose subject matter is the payment of money (whether fixed at the outset or subsequently ascertained prior to the date on which performance is due), (b) which cannot become impossible to perform,[280] (c) which is capable of bearing interest[281] and (d) to which the principle of nominalism is capable of application".[282] "In principle … a valid tender is made by unconditionally offering to the creditor the amount due in legal tender, or otherwise in compliance with the terms of the contract."[283]

Examination of the respective rights of creditor and debtor reveals that money debts may well give rise to a "property" right for the creditor but that the debtor's correlative obligations might not be "property" obligations.

---

perform the services in question; rights of ownership in an asset separate to his own body, talents and personality are unaffected.

280 For example, if one currency ceases to exist, the theory of the "recurrent link" will provide, almost always, for the conversion of the promised sum expressed in the extinct currency into a corresponding sum expressed in the new currency.

281 Whether or not interest is actually charged.

282 F. A. Mann, *The Legal Aspect of Money*, (5th edition, OUP, 2005) 90, paragraph 3.08; the principle of nominalism is discussed below.

283 Mann, *The Legal Aspect of Money* (no 282) 163-164, paragraph 7.09.

A money debt is a "right [of a creditor] to demand payment of money [from the debtor] at a stipulated time".[284] The sum owed may be specific and certain, or liquidated.[285] Money debts may be "gain-based", or "non-gain-based."[286] Gain-based debts are quantified by reference to a notion of some illegitimate gain on the part of the defendant whose obligation to pay money to the claimant is established, generally on the basis of unjust enrichment at the claimant's expense.[287] Non gain-based debts quantify the defendant debtor's obligation by ascertaining an amount due which is calculated in some other way, either by contract (say a loan agreement), trust or statute (such as a taxing statute).

Creditor's rights which are a right in rem

Certain creditor's rights, both for gain-based and non-gain based debts may constitute "property", being a right of the creditor to an *identifiable monetary asset* (here termed "proprietary debts"). For example, a defendant's wrongful disposition of a claimant's property gives rise to a claim as the beneficiary of a constructive or automatic resulting trust. Likewise, where monies are lent for a specific purpose, which ultimately fails, the borrower holds the advanced sums on resulting trust for the lender.[288]

Debtor's obligation where the creditor has a right in rem is a "property" obligation

So far as the debtor of such proprietary debts (gains or non-gains based) is concerned, it is the debtor's property subject to the property claim which is at stake. Indeed, a proprietary claim against a particular money asset cannot be asserted against one who no longer has the money.[289]

---

284 George Bell, *Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence* (7th edition, T & T Clark 1870) II, 15 ("*Commentaries*").

285 Mann, *The Legal Aspect of Money* (no 282) 87. The money debt may arise either as a matter of contract in the classical sense, or in the form of executory obligations, say the obligation to pay the purchase price of goods: Ibid, 88.

286 This useful terminology is that of Goode, *Commercial Law* (no 264) 490-496.

287 Ibid, 491.

288 A "Quistclose Trust": *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

289 *Bishopsgate Investment Management Limited v Homan* [1995] Ch 211.

Creditor's rights which do not give a right in rem may still be "property"

However, non-gain debts consisting of claims to money conferred on the claimant by assent of the defendant, usually under a contract, are merely personal rights held by the creditor: the claim here is for personal performance (payment of the debt) against the debtor's general assets (here termed "personal debts").

A creditor's rights against a debtor for a personal debt may have the quality of "property" in the hands of the creditor. A creditor's *right* to be paid in satisfaction of money debts may well amount to "property" in the creditor's hands, by forming part of the creditor's "useable wealth".[290] Penner treats personal debt claims as "second order" property rights: Such rights satisfy the excludability condition: they cannot be destroyed, damaged or otherwise interfered with by anyone.[291] While a creditor has no rights in the property of the debtor,[292] the creditor's rights of non-interference in his "property" is nevertheless a right to non-interference of the debtor's "wherewithal".[293] The property nature[294] of a chose in action, such as a debt, arises because the personal qualities of creditor[295] and debtor are irrelevant.[296] For Penner, a debt claim is a "special or compromised [form] of property just to the extent that the personal quality of the relationship is capable of reasserting itself, so that the right does not appear to be just a right to a share of some property, but rather a right that [the debtor]…perform services to a particular standard."[297]

---

290 A widely accepted notion of property: Worthington, *Property and Obligations* (no 268) 916, 919.

291 Penner, *The Idea of Property in Law* (no 273) 128, 129.

292 Ibid, 129.

293 Ibid, 129

294 It might be best viewed as a right ad rem, that is a right to delivery of currency or other form of payment, which is not protected by equity and remains a personal right: Goode, *Commercial Law* (no 264) 29.

295 Which might relevantly be a whole mixture of attributes: honesty, being organised over monetary affairs and creditworthiness to take three.

296 At 130, at least until enforcement, when the personal qualities of both debtor (such as his personal wealth) becomes highly relevant. In other words, a debt is a "thing" because of the 'personality poverty of its content' (Ibid, 131), although remedial rights against the debtor become personality rich in relation to the wherewithal of the debtor (ibid at 131, 132).

297 Ibid, 132.

The property nature of a creditor's rights to payment of a personal debt has been recognised in case law: a debt owed by a bank "constitutes a chose in action, which is a species of property";[298] a "common law debt, albeit not assignable, was nevertheless property".[299]

Debtor's obligation under a personal debt is not a "property" obligation

So much for rights. A debtor's *obligation* to pay a personal debt is not a property obligation. The debtor may continue to exercise all of his rights of excludability (and transferability, where solvent[300]) against all the assets he owns in the face of his obligation to pay a sum of money to his creditor. The debtor's ownership of property is not affected by his obligation to pay the debt. Money may, of course be the subject of property rights, in that money assets may be owned and transferred.[301] The point made here is that an obligation to pay money is an obligation to deliver money, whether funded by one's own resources, or borrowed, or, indeed, gifted from another. A debt obligation is not an obligation which attaches to any item (including money) owned by a debtor. Put another way, "Property frequently acts as a synonym for wealth. In that usage property includes obligations. In the stricter sense in which there is a tacit contrast between property and obligations the law of property is the law of rights *in rem*."[302] Where a creditor has no rights in rem as regards the assets of a debtor, there is no property obligation on the part of the debtor.

Equally the debtor's inability to pay does not absolve him from the debt.[303] The debtor may fund payment of the debt by any means, for example by a gift. In this case, there is no

---

298 *Lipkin Gorman v Karpnale Limited* [1991] 2 AC 548, 574, per Lord Goff; see also *Yanner v Eaton* (1999) 201 CLR 351, 388: 'a right to sue for a sum of money is a chose in action, and it is a propriety right'.

299 *Yanner v Eaton* (1999) 201 CLR 351, 388. The reference to the irrelevance of assignability is instructive, in the light of the criticisms made above of assignability as a necessary juristic condition for a creditor's rights to be "property".

300 See below for insolvent debtors and creditors' rights in security.

301 See Section IV below.

302 Peter Birks, *Unjust Enrichment* (2nd edition, OUP 2005) 29.

303 *Universal Corp v Five Ways Properties Ltd* [1978] 3 All ER 1131. Particular types of so-called "non recourse" or "limited recourse" loans are not relevant here, as these "loans" depend on specific contractual provisions.

connection between a debtor's property and his obligations at all. The creditor, for a personal debt, never had rights in the debtor's property.

The nature of rights in security does not undermine the observation that a creditor's rights do not give rights to "property" obligations for a debtor of a personal debt. Such rights are additional rights of a creditor.[304] Rights of security holders (say of a mortgage of English real property) to prevent transfers of otherwise transferrable secured assets are temporary rights which do not affect enjoyment of the fruits of the secured asset in the hands of the owner-mortgagor. Any access to the benefits of the secured asset for the security holder are entirely contingent on the default of the debtor and the terms of the security, and disappear when the debtor pays the debt due.[305]

The asymmetry of the nature of creditors' rights and debtors' obligations has been recognised. It has been observed that "[t]he right to be paid is a property right, and thus legitimately falls within the law of property, and the obligation to pay forms part of the law of obligations. To include the right to be paid as part of the law of property does not cause the distinction between property and obligations to collapse."[306] In describing the expansion of the notion of "property" to include creditors' rights, Worthington notes that a creditor may assign his rights, but a debtor may not assign his obligation.[307] However, the writer is not aware of any analysis which expressly observes that a debtor's *specific* property rights (of excludability and transferability)

---

304 There are statutory provisions (on which creditors, among others, may rely) which, for example, unwind transactions undertaken by an insolvent debtor, including the payment of debts, transactions made at an undervalue which leave the insolvent's estate short of funds to pay creditors (Insolvency Act 1986 ("IA"), ss.239, 339). But such provisions are functionally rights in security and do not undermine the observation that creditors of personal debts do not have rights which amount to property obligations for the debtor.

305 Even if, say, rents on real property are secured in favour of a creditor, in the absence of a trust in favour of the creditor, the debtor owns the rent.

306 Tarrant, *Obligations as Property* (no 262) 687, 688, terming obligations which are not property obligations. "obligations in personam". But Tarrant does not explain why an obligor may have an obligation in personam, rather than a "duty in rem" (a property obligation), by reference to the debtor's rights of excludability and transferability in his assets.

307 Worthington, *Property and Obligations* (no 268) 920, observing that the assignability of creditors' rights permitted such rights to constitute property.

are not qualified by a creditor's rights for a personal debt. This observation is critical when considering why a tax claim does not amount to the expropriation of a taxpayer's property. It is also convenient to note that while a personal debt might affect the overall value of a taxpayer's worth (in that, say, a company may be valued in net terms, after deduction of tax liabilities) this does not affect the proposition that the taxpayer's property is unaffected by a personal obligation to pay a debt.

Section II and Section III together establish that monetary debts are generally (ignoring proprietary debts) personal liabilities and not property obligations (albeit a creditor's rights may constitute a form of "property"). We now turn to the individuation of different types of (personal) monetary debt.

Section IV. Application of the principles of individuation to different types of money debts

Having identified money obligations as personal, not property, obligations (in contradistinction to a right to the payment of money, which may be a property right), in Section II and Section III, Section IV revisits the techniques of individuation of each of Raz, Bentham and Kelsen discussed in Section I, which describe, in different ways, legal material as reflecting norms, to demonstrate how each of their respective techniques successfully distinguish money obligations from property obligations and also convincingly distinguish different types of money obligations from each other. Section IV also demonstrates that the individuation techniques of Raz, Bentham and Kelsen are closer to each other, at least in relation to legal obligations, than perhaps any of them appreciated. Section IV further explicates these individuation techniques using the language of "capacity."

Examples of different types of money debt

It is convenient to take different types of money debt and then apply the individuation techniques of each of Raz, Bentham and Kelsen to these different debts, to show that not only do each of their respective techniques (which are materially identical, at least in relation to legal obligations, in their reliance on the description of laws as reflecting norms) successfully distinguish money obligations from property obligations but also convincingly distinguish each type of money debt from all of the others.

A money debt may arise (1) as consideration payable for the delivery of goods or services, where monetary consideration is specified as payable under the contract once the goods or services are delivered; (2) as an obligation to pay a civil penalty; (3) as an obligation to pay a criminal fine and (4) as an obligation to pay damages in tort.[308] a taxation obligation is also a money debt, as observed in Chapter 1 and Chapter 3 applies the conclusions reached in Chapter 2 to taxation. Each of these obligations is, of course, the result of the application of a duty-imposing law (or, at least, a law which imposes obligations if one wishes to avoid the language of "duty-imposing").

Raz, Bentham and Kelsen are materially identical (and correct) in their conclusions on the individuation of different types of money debt

For duty-imposing laws, the canonical form articulated by Raz, with Raz's individuating operator, Bentham and Kelsen are materially identical in articulating the substantive obligations of the debtor.

Raz's individuating operator

To take Raz's individuating operator first, each of the liabilities to pay money as consideration for goods or services, a civil penalty, a criminal fine and tortious damages reflect different legal

[308] And an obligation to taxation is a distinct category of obligation, which is discussed in Chapter 3. It may be that there are other types of monetary obligation but none spring to mind.

norms, in that the legal material in each case is most aptly described as giving different directions[309] as to behaviour.

The obligation to pay consideration reflects a legal norm that once goods and services have been delivered and a contractual obligation arises, "there is a law that the consideration which is payable under a contract for the sale and acquisition for goods or services must be paid and delivered to the payee [at the time specified in the contract]." The civil penalty and criminal fine each reflects very different legal norms: say a monetary penalty arises by reason of a breach of a specific statutory duty, say by reason of a taxpayer including a deliberate inaccuracy on his tax return which leads to an insufficiency of tax as declared on the taxpayer's return.[310] The individuating operator would describe the obligation as a function of two quite separate norms: first, that "there is a law that a taxpayer must complete his tax return free from, inter alia, deliberate inaccuracies"; second: "there is a law that if a taxpayer includes a deliberate inaccuracy on his tax return, which leads to an insufficiency of tax, he must pay a monetary penalty." As for the criminal fine, suppose (counter-factually) that the deliberate inaccuracy in a tax return is a criminal offence, not a civil wrong. Raz's individuating operator would again identify two separate norms: the first norm is identical to that which governs the circumstance had the inaccuracy led to a civil penalty, "there is a law that one must complete his tax return free from, inter alia, deliberate inaccuracies;" The second norm is different to that which operates for civil penalties and distinguishes civil penalties from criminal fines: "there is a law that if a taxpayer includes a deliberate inaccuracy on his tax return, which leads to an insufficiency of tax, one must suffer a criminal conviction and one must pay a monetary fine." In the case of both the civil penalty and the criminal fine, the second norm has an internal (regulative) relationship to the first norm and gives the legal character to the first norm. The

309 Except the norms embedded in civil penalties and criminal fines, which both prohibit behaviour but have different legal consequences on breach.

310 Under Finance Act 1998, Schedule 18, paragraph 18.

presence of the criminal conviction to which the criminal fine is fixed is what converts the monetary payment from a civil payment into a criminal fine. So unlike the case of monetary consideration payable under a contract, attention should be paid to the legal consequences of a sanction in order to individuate civil penalties from criminal fines. The second norm glosses the first, although the second norm is a distinct norm to the first.[311] The same analysis is valid in relation to damages for tortious acts, say for negligent driving which causes harm to another. Raz's individuating operator would say: first, "there is a law that one must exercise reasonable care whilst driving" and second, "there is a law that if one does not exercise reasonable care whilst driving and one's driving causes harm to another, one must pay damages to that other person." The first norm, being rooted in notions of reasonableness developed in the common law of tort, distinguishes tortious duties from the specific statutory duty in the Finance Act 1998, Schedule 18 (and from the counter-factual criminal statutory obligation in the case of the hypothetical criminal fine discussed above). The second norm (by reason of the gloss conferred upon it by the first, tort-rooted norm) is thus distinguished from the civil penalty and criminal fine (as well, of course, from the obligation to pay monetary consideration which arises from the application of two quite different norms).[312]

---

311 Although if the two norms were amalgamated in the respective cases of the civil penalty and criminal fine, the distinction would be even clearer: the civil penalty would be articulated as a legal norm which reads: 'there is a law that a taxpayer who completes a tax return which includes a deliberate inaccuracy, which leads to an insufficiency of tax must pay a monetary sum', whilst the criminal fine would be framed as 'there is a law that a taxpayer who completes a tax return which includes a deliberate inaccuracy will be convicted of a crime and must also pay a monetary sum'. The contingency of the application of the second norm makes a two-norm formulation more convincing than an amalgamated version. The second, contingent, sanction-applying norm could be either criminal or civil in its legal effect, which suggests that the first norm is a distinct norm in itself, being a duty-imposing norm independent of any civil or criminal sanction. It might also be said that the second norm, directing the payment of damages, computed on a compensatory basis also distinguishes tortious damages from a civil fine but it is conceivable that a civil fine may be computed on some sort of compensatory basis (say to cover the costs of rectifying the deliberate error, in the example given here and to compensate for the loss of any tax caused by that error), which makes the method of calculation less reliable as an individuating factor.

312 Thus tortious damages are individuated and distinguished by the gloss given to the second norm by the first norm to which it has a Razian internal regulative relationship, whereas a civil penalty and criminal fine are each individuated and distinguished from each other and from tortious damages by the gloss put on the first norm by the second (contingent) sanction -applying norm. But in all of these cases the

In each of the latter three cases, the first and second legal norms have a Razian internal relationship, in that the application of the second legal norm (which articulates the legal obligation to pay money) is contingent on the breach of the duty to observe to first legal norm (do not complete a tax return with a deliberate inaccuracy, do not park in a private car park, do not drive without reasonable care). And critically, in all four cases, the monetary obligation is, for the reasons discussed in Section II and Section III, a personal (not a property) obligation.

Turning to Bentham, Bentham's individuation of each of the different types of money debt yields the same answer as that of Raz individuating operator (in that different types of monetary obligation may be identified and distinguished from each other).

Taking the same examples of consideration, a civil penalty for the inclusion of a deliberate inaccuracy in a tax return, a criminal fine and tortious damages as were discussed in relation to Raz's individuating operator, in relation to monetary consideration for goods or services, as already observed above, Bentham would identify and articulate the directive part of the relevant legal material as imposing a duty to pay contractually stipulated consideration and the sanctional (cominative) part as an obligation to enforcement proceedings if the obligor does not pay in time (thus necessarily accommodating a potential breach of an obligation which Raz's individuating technique need not). For the civil penalty, Bentham's directive part would articulate the taxpayer's duty to complete his tax return free of deliberate inaccuracies which cause an insufficiency of tax; the sanctional part comprises the obligation to a monetary penalty for breach of the duty imposed by the directive part. The directive and sanctional parts thus reflect distinct legal norms, which Bentham would articulate in exactly the same way as would Raz individuating operator. The same analysis holds good for the criminal fine (the directive part commands one not to park in a private car park; the sanctional part imposes both a

individuation exercise is successfully undertaken by ascertaining the content of the relevant (internally related) norms.

conviction and fine if the duty imposed by the directive part is breached). The same is true in relation to the tortious damages: the directive part of the legal norm imposes a duty to exercise reasonable care in driving, the sanctional part imposes a monetary obligation in damages if that duty is breached. Finally, the same (important) observation as made above in relation to Raz for all four monetary obligations, that these liabilities are, on the analysis in Section II and Section III, personal, not property, liabilities is true for the Benthamite formulations of the respective money liabilities.

The only difference between Bentham and Raz is the conceptual drive to identify a sanction on the part of the former, which, as observed above, necessitates the inclusion of a potential breach by a debtor to yield an intelligible canonical descriptive legal norm of an obligation to pay money which arises whether there is a breach of any legal norm or not. However, it bears repetition that the nature of the obligation to pay a particular monetary sum is readily identified (and distinguished from other types of monetary obligation, which may be for identical amounts) on the basis of Bentham's individuation technique and yields the same ultimate description as that of Raz.

Finally, in relation to Kelsen, the application of Kelsen's canonical formulation of "If A is, B ought to be",[313] whereby "A" represents the conditions of a delict to which a sanction (B) attaches,[314] gives rise to the same differentiation of monetary obligations inter se, as that arrived at by Raz's individuating operator and Bentham's directive/sanctional approach.

Consideration payable under a contract for goods or services would be represented by "if one concludes a contract and one accepts delivery of the goods or services specified under the contract, then one should pay the consideration so specified, failing which one will be subject

313 Kelsen, *General Theory of Law* (no 155) 46.
314 Ibid, 51.

to enforcement proceedings, which, if raised by the seller, court officials are permitted to apply and enforce." Thus Kelsen's sanction is the permission afforded to a sanction-applier to apply a sanction to a defaulting party who has failed to pay the contractually stipulated consideration. The Kelsenian duty is to avoid failing to pay the consideration so as to attract what would otherwise be a permitted sanction (of enforcement proceedings). In relation to the civil penalty, imposed by FA 1998, Schedule 18, paragraph 18, Kelsen's canonical formulation would be "If one completes a tax return which contains a deliberate inaccuracy which, in turn, leads to an insufficiency of tax, one should pay a [specified] penalty, which the tax authority would now be permitted to impose." The duty is to avoid including a deliberate inaccuracy in to a tax return (to avoid the permitted penalty which arises if that duty is breached). The criminal fine Kelsenian formulation would be "If one parks in a private car park, one ought to be convicted and to pay a fine (which the authorities would now be permitted to fix)." The duty here is to avoid parking in a private car park to avoid the conviction and to avoid the permitted fine. The combination of conviction and fine is what yields the content of the legal norm and distinguishes the criminal fine from the civil penalty (rather than a mere label of "criminal fine" or "civil penalty"). And as regards the obligation in tort for driving without reasonable care, Kelsen would say "If one drives without reasonable care and one causes harm to another, one ought to compensate that other person in monetary damages (for which the other person is permitted to raise an action, the enforcement of which is permitted in the hands of authorised officials). The Kelsenian duty is to avoid the contingent permitted sanction. As with Raz and Bentham, the different types of monetary obligation are perfectly intelligibly individuated and distinguished from each other on Kelsen's canonical formulation (and again, as with Raz and Bentham, the liabilities are personal, not property liabilities for the reasons given in Section II and Section III). And as with Raz and Bentham, Kelsen restricts himself to the organisation of existing legal material and does not engage in any "analytical metaphysics".

Three points emerge from the exposition of the respective individuation techniques of Raz, Bentham and Kelsen. First, for each of Raz, Bentham and Kelsen, even if (co-incidentally), in the examples of monetary liabilities discussed here, the monetary liabilities are for exactly the same amount for each of the consideration, the civil penalty, the criminal penalty and tortious damages, the legal norms taken together which articulate the obligation in each case are completely different. The norms in play in relation to the obligation to pay contractual consideration are self-evidently different to the norms concerning the civil penalty, the criminal fine and tortious damages and have been discussed above. In relation to the latter three liabilities, the individuation of each obligation from the others results from a recognition that one or other of the directions[315] to (1) behave in a particular way (do not complete a tax return which includes deliberate inaccuracies/do not drive without exercising reasonable care) or (2) suffer a sanction if the first direction is breached (civil penalty/conviction plus criminal fine/tortious damages) is different from the others. So, in distinguishing the civil penalty for an improper tax return from a criminal fine, while the first direction (do not complete a tax return which includes deliberate inaccuracies) is identical for both a prospective civil penalty or a criminal fine, the second direction (the sanctions which arise on breach) are different for the civil penalty (a monetary fine alone) and a criminal fine (a conviction and a monetary payment). And in distinguishing a civil penalty from tortious damages the first direction for the civil penalty (complete a tax return free from deliberate inaccuracies), and the second direction, in relation to tortious damages (do not drive without reasonable care) are very different,[316] even though the computation of the *quantum* of the sanction may be identical. This is the case whichever individuating formulation of Raz, Bentham or Kelsen is used. Second, the legal material which provides that the obligation is monetary obligation (the contract, in

315 "Direction" is a neutral term to accommodate two Razian norms and one composite Benthamite or Kelsenian norm.

316 Which would be the case even if the completion of an improper tax return were a tort, since the statutory duty would have a completely different legal archaeology to the common law tortious duty.

relation to the consideration payable, the relevant statutes which impose civil penalties or criminal fines and the statutes and case law which calculate the quantum of tortious damages) is the sole source of defining the nature of the relevant obligation under scrutiny. This leads each of Raz, Bentham and Kelsen not only to differentiate different monetary liabilities inter se in substantially the same way but to articulate the same legal duty for each of the monetary liabilities (payment of contractual consideration, payment of a civil penalty or criminal fine, or tortious damages) for any particular act-situation, which is a strong indication that (at least for duty imposing laws) the individuation exercise is neither distortive nor any sort of misconceived essentialist endeavour. The Razian explanation (by way of the individuating operator) of the duties as the effect of the internal relationship between two norms, the Benthamite directive/sanctional analysis which yields a single composite norm and the Kelsenian canonical formulation which effectively takes a Benthamite composite norm but calls the sanction a "permission" to apply a sanction are each a further step to describe the individuated duties at a higher level of abstraction to then permit a normative legal or extra-legal (say moral, or political) assessment of the duties, now exposed to analysis. Thus the criticisms of both Honoré and Dworkin are shown to be mistaken, not only in the case of their attack on Raz but in relation to any general attack on the individuation exercise (so Bentham and Kelsen escape any such criticism also). Third, each of the respective formulations of Raz, Bentham and Kelsen of the different types of monetary obligation permits a normative assessment of each particular obligation in the light of the juristic and philosophical nature of money. Chapter 3 demonstrates that money dilutes role responsibility (and the obligation to pay money is generally an obligation to deliver money, howsoever lawfully obtained out of one's own resources, borrowings, gift etc), which means that the individuated formulations of, in particular, the obligation to pay civil penalties criminal fines or tortious damages becomes an obligation to deliver money (and no more), which, in turn, exposes a pressing need to locate

the obligation at either the deliberative stage or the executive stage of the decision making process. If a taxpayer, or reckless driver, knows his rich aunt will satisfy all of his monetary liabilities, what is *juristically* wrong with him locating the decision of how to complete his tax return or how to drive at the deliberative stage of the decision? The monetisation of liabilities (which makes the residual commodity nature of money very visible: see Chapter 3) shows that Razian "prohibited/permitted" distinction is porous (and may also reveal the effectiveness of monetary liabilities as a sole sanction). This important observation is made possible only by the examination of the juristic and philosophical nature of money and then subjecting an individuated formulation of a monetary obligation (in the light of the nature of money itself) to normative assessment.

Of course, the observations just made above have been limited to norms which impose obligations. And the observations made here do not (at all) defend the very different general jurisprudence positions of each of Raz, Bentham, or Kelsen. Certainly, the respective approaches of Bentham, to force all legal material, whether duty imposing or not, into a notion of a duty-imposing norm and that of Kelsen, which holds that all legal norms do indeed give rise to duties but because (and only because) the "if A, B ought to be" formulation is properly viewed as a permission to apply a sanction, so that a "duty" arises as a product of this permission, that is, to avoid giving rise to the conditions which permit a lawful sanction to be applied, may self-evidently be criticised as distortive in the manner of Honoré,[317] discussed in Section I above.

However, what the application of the individuation methodology of each of Raz, Bentham and Kelsen to the monetary liabilities described above reveals is that the respective money liabilities are distinct in juristic nature, whichever individuation technique is deployed (so

[317] Tony Honoré, '*Real Laws*' in P.M.S. Hacker and Joseph Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press, 1977).

individuating these liabilities, albeit not the legal norms). Thus an appeal to legal norms (in the three different ways employed by Raz, Bentham and Kelsen) succeeds in individuating distinct types of monetary liabilities and to identify these respective labilities as emerging from different areas of law (by reason of yielding different legal norms alone). It is, therefore, unfair to criticise individuation techniques which appeal to legal norms on the basis that it is "grotesque to assimilate legislative powers to criminal laws."[318] Identification of the specific norms at play ensures that legal material which reflects a particular legal norm, which applies to a particular act situation, is not "assimilated" into a description of legal material which reflects a different legal norm (and applies to a different act situation).

Indeed, increased attention to the content and nature of particular legal norms which serve to articulate the canonical forms of legal material yielded by the Razian individuating operator, the Benthamite directive/sanctional analysis and Kelsen's canonical formulation exposes the redundancy of any appeal to any extra-legal motivational forces to distinguish different types of legal obligations. Further, such increased attention to the content and nature of particular legal norms explain otherwise frustrating observations which are made without analytical foundation, such as in the Australian case of *R v Barger*[319] where Isaacs J observes: *The difference between a pecuniary penalty and a tax is that the former is the sum required in respect of an unlawful act, and the latter is the sum required in respect of a lawful act.*" No explanation is offered as to what is either "lawful" or "unlawful."

Indeed, Raz himself neglects the importance of paying attention to the particular norms in play in any act situation to explain the juristic nature of particular norms. In dealing with normativity of legal rules, Raz distinguishes between sanctions which are mere "consequences of behaviour" (such as taxes) and sanctions which set a standard, such as a parking fine. For

---

318 HLA Hart, *The Concept of Law* (3rd edition, OUP, 2012), page 31.

319 (1908) 6 CLR 41.

Raz there is a different motivational force, since the latter sets the standard by treating a particular activity (parking) as "prohibited" rather than "permitted". For Raz, the standard is obtained (that is, an activity is ascertained as "prohibited" or "permitted") by sources other than legal material (such as superstition, self-interest or merely common belief).[320]

Raz's search for a "standard" to describe an activity as "prohibited" or "permitted" must be a search for a type of juristic quality, not merely a description of how any particular moral agent will perceive a particular activity (so that the decision to engage in it or not will enter either the deliberative stage or the executive stage of the decision making process). After all, as Hart observes, some may consider criminal fines as mere "taxes".[321] Raz's distinction of activities as "permitted" or "prohibited" must thus be a product of the individuating operator. In other words, normativity is a product of individuation, not subjective extra-legal considerations.

In fact, there is no need for Raz to appeal to different motivational forces of parking fees, taxes on the one hand or parking fines or criminal sanctions on the other. The different juristic quality is easily ascertained by identifying the legal norms at play in each. In relation to a parking fee, the legal norm at play is "if one parks in a particular place, one ought to pay a certain sum of money as consideration for the parking services supplied" (so the fee is consideration for services). Raz's individuating operator can easily accommodate this norm (which applies to the act situation of parking in a car park for which there is a charge) by articulating that "there is a law that [if one parks etc]". There is, to be sure, a second contingently applicable legal norm which is "if one does not pay one's parking fee, one may be compelled to pay it, perhaps with interest and penalties" but this (at least for Raz) is a separate legal norm which applies to a separate act situation (failure to pay consideration). And in the case of a parking fine, there

320 Raz, *Concept of a Legal System* (no 150) 234, which presumably inform either the deliberative stage or the executive stage of the decision process, depending on the nature and strength of the particular motivational forces in play.

321 Hart, *The Concept of Law* (no 318) 39.

are, as observed above, quite different legal norms at play. The initial legal norm at play is simply "one should not park (at all) in a particular place"; the second (contingently applicable) legal norm which may be triggered is "if one parks illegally one is subject to a conviction and (therefore) a criminal fine". The individuating operator easily organises this different legal material which applies to a different act situation (illegal parking), without any reference to extra-legal motivational forces at all. Of course, the prospect of attracting different sanctions may well have very clear motivational legal and extra-legal consequences for an actor (the attraction of a civil penalty may well have different repercussions to a criminal conviction or criminal fine), which would enter a decision making process at either the deliberative stage or the executive stage, depending on the particular consequences which a sanction attracts but the point made here is that the juristic differentiation of "prohibited" and "permitted" activities is achieved by the process of individuation, not by any appeal to extra-legal factors.

And exactly the same is true of Kelsen. Kelsen does himself a disservice in suggesting that "[The] difference between civil law and criminal law is the difference in the character of their respective sanctions. If we consider only the outward nature of the sanctions, we cannot, however, find any generally distinguishing characteristics."[322] Kelsen observes that a civil sanction involves the deprivation of economic possessions, while a criminal fine does the same.[323] Laying aside the misconception that a monetary fine deprives anyone of "possessions", it is quite true, as observed above, that the "character" of a criminal fine is determined by the conviction which clothes the breach of a legal norm as "criminal". However, Kelsen appeals to the different "purposes" of the sanctions to differentiate them: for Kelsen, the fundamental difference is the "purpose" of the respective sanctions; a criminal sanction seeks retribution or deterrence (through, say, fines), whereas civil sanctions seek reparation.[324]

322 Kelsen, *General Theory of Law* (no 155) 50.
323 Ibid, 50.
324 Ibid, 50.

The purpose of a sanction is not a reliable indicator of the nature of the legal norm it attaches to. Both a criminal fine and a civil penalty may have a purely deterrent function. And Kelsen's own canonical formulation of "if A, B ought to be" would, as has been demonstrated above, without any appeal to the "purpose" of any sanction, perfectly adequately distinguish civil and criminal sanctions (say the tax penalties and the fines discussed above, where the respective sanctions have different legal consequences: the penalty is exclusively a monetary charge, whereas the criminal fine is a monetary charge plus a conviction which may well have distinct legal consequences, such as in job applications where exclusion of convicted criminals is permitted in the relevant employment legislation, or in family proceedings, where criminal convictions may have a legal impact in a child custody case), without any need for an appeal to the purpose of sanctions.

It follows that certain criticisms of Kelsen are unfair and misconceived. Hart's criticism of Kelsen[325] that Kelsen's canonical formulation is unable to distinguish criminal fines and taxes ("Both when the individual is taxed and when he is fined the law's provisions when cast into Kelsenian canonical forms are identical") is simply wrong; there are different legal norms at play in each case, which Kelsen's canonical form would identify.[326] And a separate criticism by Raz of Kelsen,[327] that Kelsen's canonical form is deficient, in that it drives Kelsen to the suggestion that any permission to apply a sanction gives rise to an obligation to avoid that sanction, which, in turn leads to the counter-intuitive conclusion that one should avoid undertaking taxable activities (to avoid the sanction of taxes), is also unfair. Raz describes this criticism as "… only the other face of Hart's criticism [discussed above] …". Raz's criticism is itself undermined by the same response as made above to Hart's criticism. Taxation, on

325 Hart, *Kelsen Visited 10 UCLA L. Rev 709*.

326 That Kelsen successfully distinguishes different types of monetary obligation has been demonstrated here. That each of Raz, Bentham and (contrary to Harts criticism) Kelsen distinguishes taxation from all other types of monetary obligation is demonstrated in Chapter 3.

327 Raz, *Concept of a Legal System* (no 150) 88.

Kelsen's canonical formulation, is not the same "sanction" as a criminal fine. The Kelsenian formulation of the act situation relating to a taxable activity is "if one engages in [a taxable activity], a charge to tax arises and the tax authorities are permitted to enforce that tax charge." There is a single canonical formulation of the legal norm which applies to the taxable act situation. Whereas in relation to a criminal fine, say in relation to parking in a private car park, there is a very different formulation, in that the relevant legal material yields the legal norm "one must not park in a private car park", which in turn produces the Kelsenian formulation "if one parks in a private car park, the authorities are permitted to fix a fine." That the tax charge may amount to the same figure as the fine is juristically irrelevant (as is an observation that a fee to park legally in a car park may be the same figure as a fine for parking illegally in a private car park). Once the legal material which gives rise to a legal norm is identified, different legal consequences in different act situations may be easily identified.

This exposition of the principles of individuation of each of Raz, Bentham Kelsen demonstrates that the proper identification of the relevant legal norm permits an accurate individuation of different areas of law, certainly so as to distinguish money debts from property obligations and different types of money debt from each other.[328] It is precisely because the respective individuation techniques of Raz, Bentham and Kelsen are different that it is indeed a useful cross check to establish that all of them succeed in differentiating personal obligations from property obligations and different types of monetary debts from each other. Importantly, there

---

328 The identification of the particular legal norms at play in each act situation is a superior method of individuating different areas of law and distinguishing different legal modes with the same objective, say, disincentivisation, to other methods which make the same 'consequences of behaviour/standard setting' distinction as Raz. See, for example, John Coffee *"Does 'Unlawful' Mean 'Criminal': Reflections on the Disappearing Tort/Crime Distinction in American Law"* (1991) Boston ULR 193, 194, where Coffee concludes that conventionally, '…tort law prices, while criminal law prohibits…', so that the criminal law is engaged only if the price exacted by tort law is insufficiently prohibitive, in a sort of continuum. But an observation that many different legal modes may have an identical (disincentivising) objective is not to say very much (see Chapter 1). The juristic question which requires to be answered is 'how do we know which legal mode we are dealing with [here, tort or criminal law]?', which can be answered most efficiently by identifying the particular legal norms which yield the particular legal mode to govern a particular act situation.

is no need to commit to one individuation technique in particular to be confident that the distinctions made between personal obligations and property obligations and different types of monetary debts are sound in principle, although, as observed above, Raz's technique is not distortive in the manner of Bentham or Kelsen, which makes it superior to those of the latter. As stated in the introduction of Chapter 2, the objective of Chapter 2 is not to individuate legal norms by identifying which is the correct formulation of the particular legal norm embedded in the different types of money obligation discussed here but rather to individuate an area of law (taxation, which is undertaken in Chapter 3) by demonstrating that all of the individuation techniques deployed in Chapter 2 succeed in revealing a tax obligation to be a personal (not a property) monetary obligation, which is distinct from all of the other monetary obligations discussed here. Chapter 2 provides the analytical basis for this exercise by deploying the individuation techniques to distinguish non-tax monetary liabilities inter se.

Alternative formulation of Razian individuation in the language of capacity and role responsibility

In fact the analysis of these different types of liabilities discussed here may also be analysed in terms of role responsibility or "capacity". The obligation of a purchaser of goods and services to pay contractual consideration arises qua "purchaser", ascribed to all in the role or "capacity" of "purchaser". A civil obligation to a penalty arises in the capacity of (in the case of a tax penalty discussed above) a careless (or worse) taxpayer. The criminal fine arises in the capacity of an "offender [who parked in a prohibited private car park]". The distinction between the recalcitrant taxpayer who completes an inaccurate tax return and the criminal illegal car-parker lies in the particular sanction applied to each of them; the respective roles or capacities are distinguished by the respective sanctions. There might have been a criminal sanction imposed on the taxpayer and a civil penalty imposed on the illegal car-parker. But both have the capacity of a person who find themselves in a particular act-situation, that is, behaved in a particular

way and thus acquired a particular role or capacity. Similarly, the obligation to pay damages in tort arises qua "tortfeasor, [who failed to keep to the standard of care required of a driver and thus also behaved in a particular way]".[329] The role or capacity of "driver" attracts obligations which arise at common law (as to a duty of care, the standard of care, etc) and a sanction which seeks to compensate an injured party, so that both the context of the role itself and the sanction applied to a tortfeasor distinguishes the latter from a person who incurs a civil penalty or a criminal fine. Thus role responsibility ascribes legal obligations to the various roles (capacities) of the agents who find themselves in the different act situations described here and visits particular liabilities on the occupiers of those roles where those duties are breached. In other words, role responsibility (or "capacity") offers a method of individuation.

Whether purely monetary obligations are articulated as a function of a Razian, Benthamite or Kelsenian canonical formulation, or in a language of capacity and role responsibility, the limitation of certain obligations to money debts dilutes responsibility, given the nature of money. In assessing normativity, if the fulfilment of a monetary obligation makes one juristically "whole", the distinction between Raz's deliberative stage and executive stage becomes far more porous. If a driver chooses to drive consistently negligently and cause harm, only to be juristically proper by paying damages in full upon each finding by a court of negligence, that driver locates the care of his driving (that is, the decision to drive carefully) firmly at the deliberative stage of any decision.[330] Of course, to the extent that an obligation is not confined to a purely money obligation (as with a criminal conviction which accompanies a fine), an agent has very different considerations, the juristic consequences of a criminal conviction (say the consequent prohibition against applying for public sector employment) may

329 Here one parts company with Kelsen who distinguishes the different liabilities by reference to the "purposes" for which the sanction is imposed.

330 Raz himself considered that an employer's obligation for the torts of an employee entered the deliberative stage of an employee's decision as to behaviour: Raz, *Concept of a Legal System* (no 150).

well serve to inform normativity in a different way than if an obligation were purely monetary. But the point remains that to the extent that an obligation is monetary, responsibility is confined to the delivery of money (perhaps gifted or borrowed), which observation highlights money's commodity nature.

Section V. Conclusions

Chapter 2 provides the juristic tools (the principles of individuation by reference to legal norms) to arrive at a juristic definition of a tax obligation. In the light of the (self-evident) distinction between personal and property rights and obligations, this Chapter contributes to existing literature by exposing money obligations as purely personal (not property) obligations. Further, in analysing the individuation techniques of Raz, Bentham and Kelsen, Chapter 2 concludes that each of them allows for the distinction of money obligations from property obligations and different types of money obligations from one another. Although the technique of individuation is the mere methodology used to identify and distinguish tax law in Chapter 3, Chapter 2 makes a contribution to existing literature by demonstrating that, at least in relation to duty imposing laws, the individuation techniques of each of Raz, Bentham and Kelsen serve to distinguish money debts from property obligations and different types of money debt from each other in materially the same way, in that each of their respective techniques rests on the same legal norms (an observation not made in existing literature). Chapter 2 also contributes to existing literature by showing that certain criticisms of Kelsen in particular are misconceived. Chapter 2 thus provides the analytical foundation to yield an individuated juristic definition of an obligation to taxation (as a personal, not a property, purely monetary obligation) and the conclusions as to the efficacy of taxation in fulfilling a variety of functions and also consequences for notions of responsibility in the light of a tax obligation being confined to a monetary obligation.

CHAPTER 3: AN INDIVIDUATED NOTION OF TAXATION AND ITS JURISTIC CONSEQUENCES

Introduction

Chapter 3 describes the components ("the anatomy") of a charge to taxation (Section I) and then individuates taxation (whether "direct" or "indirect") to distinguish a tax obligation from other monetary liabilities, being monetary consideration for goods or services, civil penalties or criminal fines (Section II). An individuated obligation to taxation is an exposure to a claim for monies from a tax raising body by an assertion of taxing jurisdiction which of itself exposes a person to a claim for tax, which claim is thereafter computed and collected, this claim being a personal obligation and not a property obligation (Section III). This analysis has a hard-edged importance. Section III applies the individuated notion of taxation to National Insurance Contributions and to the Enablers Provisions to conclude that the former is a "tax", whereas the latter is not, with important consequences for the relevant limitation period for National Insurance Contributions and Parliamentary procedure for the Enablers Provisions. Section IV performs the important exercise in confirming that the individuated notion of taxation delivered in Chapter 3 is consistent with the authorities of the United Kingdom courts and also the European Court of Human Rights in relation to Article 1 of Protocol 1 of the European Convention of Human Rights. Section V presents brief conclusions.

Section I. The anatomy of a charge to taxation and the distinction between direct and indirect taxes

Income Tax, Capital Gains Tax, Inheritance Tax and Value Added tax are all uncontroversial[331] examples of "taxation" and particular provisions of these (assumed) taxes are analysed in this section. In order to conduct an intelligible analysis of taxation, it is critical to identify the juristic components of a charge to tax, for it is the scrutiny of these components which reveals the juristic nature of taxation.

A charge to tax arises by identification of a taxable person ("the tax unit"), the computation of the taxable amount, the setting of tax rates and the timing of when the obligation to pay tax arises. This analytical structure holds good for all types of taxes, at least in the context of the UK Tax Code (examples are taken from, although not restricted to, income tax, a gifts tax (inheritance tax, "IHT") and VAT, an indirect tax.

The taxable person: "the tax unit"

First, a tax code must identify the person subject to its tax jurisdiction ("the tax unit"), which, as observed below, is generally to establish sufficient connecting factors between a person and a taxing body by way of the application of notions of "residence" (a combination of physical and legal characteristics which connect a person to a particular jurisdiction and give rise to "tax residence", which, in turn, legitimises the taxation of that tax resident's worldwide income and gains) and "source" (whereby the location of particular profits mean that a taxing body considers that a sufficient connection is established so as to legitimise tax of those profits, irrespective of residence).[332] A tax unit as specified by a particular tax or by a tax code

---

331 See variously, Tiley, *Revenue Law* (no 7); Natalie Lee et al, *Revenue Law: Principles and Practice* (34th edition, Bloomsbury 2016); Keith Gordon et al, *Tiley & Collison's UK Tax Guide 2018-19* (LexisNexis 2018).

332 See Chapter 1 above and see, for example, the Income Tax (trading and Other Income) Act 2005 ("ITTOIA 2005"), section 6(1) (a charge to income tax on trades, wherever undertaken, by a United

generally may reflect social attitudes. So a wife's income was treated as belonging to her husband (and the husband was taxed on the aggregate income) until 1990.[333] And certain persons or entities may be exempted from a charge to tax by reason of some approved feature they possess. So charities are exempt from taxation on chargeable gains.[334] Or a tax unit may represent a mechanism to ease tax administration. For example, the trustees of a settlement are treated for Capital Gains Tax purposes as a single continuing body of persons, irrespective of the retirement or assumption of particular trustees.[335] The definition of a tax unit is a vital component of a tax charge. If a person is not a tax unit (because the principles of residence and source do not apply to establish sufficient connecting factors between that person and the taxing body, or because a particular person or body, such as a charity is exempted from the status of a tax unit) there is no charge to tax, whether or not that person engages in an otherwise taxable activity. This observation establishes that a tax obligation is not a function of undertaking a particular activity to make that activity a "taxable" activity but rather, a tax obligation is an obligation which arises *by reason of the assertion of taxing jurisdiction* and the consequent cumulative application of the relevant provisions which establish a person to be a tax unit, the separate establishment of a tax base and the application of a tax rate.

The tax base

Second, the tax code must define the tax base (i.e. define the nature and quantum of those transactions and receipts it wishes to tax and allowable deductions from taxable receipts to

---

Kingdom tax resident and on trades in dealing with or developing United Kingdom land, for non-United Kingdom tax residents). Inheritance Tax ("IHT") effectively charges by reference to domicile and source, in that IHT is chargeable on "transfers of value" (broadly, gifts) but for non-United Kingdom domiciled persons, IHT is chargeable only on transfers of value of United Kingdom situs property: Inheritance Tax Act 1984 ("IHTA 1984"), section 6. Even in relation to inheritance tax, tax residence is relevant, in that tax residence in the United Kingdom for seventeen years out of twenty deems a person to be domiciled in the United Kingdom: IHTA 1984, section 267(1)(a).

333 Separate taxation of husbands and wives was enacted for years of assessment after 6th April 1990: Income and Corporation Taxes Act 1988 ("TA 1988"), section 279, Finance Act 1988, sections 33-35, Schedule 3.

334 Taxation of Chargeable Gains Act 1992, ("TCGA 1992"), section 256.

335 TCGA 1992, section 69(1).

yield a taxable amount). The tax base is the product of those provisions which measure the amount to be taxed. The computation is triggered by a taxable event and then a computation of a taxable amount (less any allowable deductions) must be made. So income tax is charged upon the undertaking of a trade, on trade profits (receipts from the trade, less allowable deductions),[336] on property income (be it income from a 'UK property business'[337] or an 'overseas property business'[338]) and on savings and investment income (interest is taxable,[339] as are dividends[340]). Profits ("capital gains") on the disposal of non-trading assets are taxable.[341] IHT is computed on the value transferred by those within the scope of this tax (that is "tax units" as defined for Inheritance Tax purposes), broadly on the amount by which the donor's estate is diminished by the gift.[342] VAT arises on the supply of goods and services[343] and is the paradigm example of an indirect "consumption tax", measured by reference to expenditure.[344] Taxable receipts and relievable expenditure[345] may be measured on, say, a cash basis (that is, on cash amounts actually received and expended)[346] or, perhaps, by tracking accounting treatment.[347] Certain types of receipt may be treated more favourably than others. So dividends received by one company within the charge to Corporation Tax from another such

336 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005") section 5.

337 Being 'every business which [a] person carries on for generating income from land in the United Kingdom': ITTOIA 2005, section 264(a).

338 Being 'every business which [a] person carries on for generating income from land outside the United Kingdom': ITTOIA 2005, section 265(a). The taxation of a property business is made on the same basis as those of a trade: ITTOIA 2005, section 272(1).

339 ITTOIA 2005, section 369.

340 ITTOIA 2005, section 383.

341 TCGA 1992, section 1(1), section 2.

342 IHTA 1984, section 3.

343 VATA 1994, section 1(1).

344 See Directive 2006/112/EC ("the Principal VAT Directive"), Article 1.2, which expressly articulates the consumption-tax nature of VAT.

345 So in relation to a computation of trading profits, the accounting profits must be adjusted to exclude relief for any expenses which are not incurred "wholly and exclusively" for the purposes of the trade, which excludes relief for clothing which, although of a particular style required for professional purposes, also "provides warmth and decency" for the "benefit and advantage of [a] taxpayer as a living human being": ITTOIA 2005, section 25, section 34, *Mallalieu v Drummond* [1983] STC 665, 670, 674, per Lord Brightman.

346 For example, see *Willingale v International Commercial Bank Ltd* [1978] STC 75, on the taxation of discounts, dealing with provisions now repealed.

347 See, for example, the Corporation Tax Act 2009, section 46 for trading companies.

company are (broadly, subject to certain exceptions) free from tax (but there is no deduction from taxable profits for the dividend-paying company),[348] whereas the payment of interest on a loan between two such companies attracts a charge to Corporation Tax in the hands of the recipient (and the paying company may, again subject to certain exceptions, obtain a deduction from its taxable profits).[349] This is the case even if, as a matter of commercial substance, the dividends represent a finance charge for both the payer and the recipient (say because the recipient had simply chosen to fund the payer by way of a preference share subscription, rather than by an advance of loan capital.[350] It is also convenient to note here that taxable receipts may be imputed, irrespective of whether actual receipts (let alone a profit) are realised: so transactions between 'connected persons'[351] are treated as taking place at "market value".[352] So a gift by a sister to a brother of a valuable property worth, say, £1 million is treated, for Capital Gains Tax purposes, as yielding taxable capital receipts of £1 million to the donor sister. Critically, the computation of the tax base only becomes a relevant exercise if there is a tax unit who is subject to a tax charge in respect of it. Thus the identification of a tax unit and the calculation of a tax base are each a necessary component of a tax obligation but neither is a sufficient component for an obligation to tax to arise. Equally the identification of a tax unit and the computation of a tax base (subject to the application of a relevant tax rate) are together sufficient conditions for a tax obligation to arise. This observation makes good the proposition that taxation cannot be aptly described as any sort of charge on an activity itself (a proposition made stronger when the observation that the parties to a transaction may fundamentally affect the computation of the tax base, so that the same transaction by a single transferor of an asset

348 Corporation Tax Act 2009 ("CTA 2009"), section 931A, section 931B, section 931D.

349 CTA 2009, Part 5.

350 Certain provisions may apply to treat dividends as interest for tax purposes but only in very specific circumstances: CTA 2009, Part 6, Chapter 6A.

351 As defined in TCGA 1992, section 286 (very broadly, close relatives and those in particular commercial relationships).

352 TCGA 1992, section 17; "market value" is broadly the price paid by a hypothetical willing purchaser who buys from a willing seller: Ibid, section 272.

may yield a quite different taxable amount if the transferor disposed of the asset to his brother (deemed to be made at market value) than if the same transferor had disposed of the asset to his spouse (no-gain-no-loss),[353] which underscores the point that taxation is not a charge on an activity as such but rather the identification of an ultimate debtor whose debt is quantified by (1) being encompassed within the notion of a tax unit and (2) only having his tax base computed (which tax base is dependent upon specific factors such as the identity of the counterparty to a transaction).

Tax rates

Third, the tax code must then set the tax rate, which may be a flat rate, a proportional rate or a progressive rate (where the proportion of tax increases with income).[354] The UK Tax Code provides for certain thresholds, so that for example, income from otherwise taxable activities below a "Personal Allowance" is not taxable at all, or chargeable gains of amounts below the "Annual Exemption" are free from Capital Gains Tax.

Timing as to when a tax obligation arises: when a tax obligation is crystallised

Fourth, the tax code must provide for the time at which a charge to tax and the obligation to pay that tax arises. a tax obligation (a liability to tax) crystallises only once a tax unit has been identified, the tax base has been computed and the proper rate of tax has been applied.

Once the claim has arisen, the tax code must then specify when it must be paid. A taxpayer is required to notify HMRC of, for example, an income tax liability and make a self-assessment[355] of the taxpayer's obligation, subject to modifications and assessments by HMRC (subject to various time limits). The income tax due is payable in the January which follows

353 TCGA 1992, Section 58.

354 J. A. Kay and Mervyn King, *The British Tax System* (5th edn, OUP 1980) 12 (see pages 39-41 for discussion on progressivity).

355 That is, a taxpayer's own computation of his tax obligation: see TMA 1970, section 7, section 8 and section 9, in relation to income tax.

the taxable period for which the income tax has been computed (the "year of assessment", which runs from 6th April to 5th April each year).[356] The assessment and enforcement of the tax debt is each distinct from the obligation arising by reason of an assertion of taxing jurisdiction. Put another way, the lawful claim for payment (which arises on the application of the series of sets of provisions discussed above) is distinct from having made any demand or assessment: '**Obligation does not depend on assessment. That, ex hypothesi, has already been fixed.** But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.'[357] Thus a tax obligation (an obligation to pay a lawful claim on the part of the Crown) is calculated and arises on the application of the series of sets of provisions which identify the tax unit, compute the tax base and set the tax rate. The tax is payable on a date specified by statute as a separate matter.

Enforcement and compliance provisions

Fifth, the tax code must provide the taxing authority with powers to ensure collection and enforcement.[358]

A tax obligation under the UK Tax Code is payable in Sterling

It is convenient to observe at this stage that, while there is no specific provision in the UK Tax Code that a tax obligation must be paid in sterling, this is tolerably clear as a matter of authority.[359] A tax charge, so far as levied by the United Kingdom Parliament is concerned, is

---

356 TMA 1970, section 59BA(5).

357 *Whitney v IRC* [1926] AC 37, 52 (emphasis added), per Lord Dunedin; see also 57 per Lord Wrenbury; *Whitney v IRC* was endorsed by the Supreme Court in *R (Derry) v HMRC* [2019] 1 W.L.R. 2754.

358 Frans Vanistandael, *"Legal Framework for Taxation"* in *Tax Law Design and Drafting* (no 112) 17, 63; see also Burns and Klever *"Individual Income Tax"*, in *Tax Law Design and Drafting* (no 112) 495.

359 Certainly the computation of the tax obligation must be carried out in sterling: *Bentley v Pike* [1981] STC 360, 364j, per Vinelott J; *Capcount Trading v Evans* [1993] STC 11, 24 per Nolan LJ; *Goodbrand Loffland Bros North Sea Inc* [1998] STC 930, 932h-j, per Millet LJ.

enforceable as a debt due to the Crown.[360] Corporation Tax profits (profits made by United Kingdom tax-resident companies) are expressly calculated in Sterling.[361] And HMRC have the power (but not the obligation) to accept an Inheritance Tax payment in the form of property, rather than money, which implies a default obligation to pay tax in money.[362] It is against this (critical) notion of a tax obligation as a monetary obligation that the anatomy of a charge to tax must be viewed. The identification of a tax unit and the computation of a tax base (having applied the relevant tax rate) gives rise to a monetary (Sterling) obligation for the person subject to the relevant provisions. It is also convenient to observe at this stage that, although a tax obligation must be paid in money (Sterling, under the UK Tax Code), a tax obligation is payable irrespective of whether a taxpayer has sufficient monetary assets to meet that obligation; not only might the tax base yield a taxable amount (say by reference to the application of the market value provisions, such as TCGA 1992, section 17 discussed above), so that the obligation itself is computed without the need for the taxpayer to have received money in a particular transaction but even if a taxpayer has spent his receipts, the tax obligation remains, of course payable. Furthermore, there is no provision in the UK Tax Code which requires a tax unit to pay a tax obligation out of his own resources (that is, his own monetary assets). A tax unit may borrow monies from a third party to pay his tax obligation (thus transferring the obligation from one owed to a tax collecting body to a lender) or, indeed, be gifted the monies by another to pay the tax obligation. Thus a tax obligation affects wealth, or patrimony but does not attach to specific property.

---

360 TMA 1970, section 67, section 68 (which applies to certain specified taxes but which are generally imported in statutes which impose other taxes).

361 Corporation Tax Act 2010 ("CTA 2010"), section 5(1); contrast the Stamp Act 1891, section 122, under which Stamp Duty may be paid in a foreign currency.

362 Inheritance Tax Act 1984 ("IHTA 1984"), section 230(1).

Formal and effective incidence of taxation

The monetary nature of a tax obligation leads to a distinction between the "formal" and "effective" incidence of tax. The "incidence" of a tax obligation is the location of the person, the tax unit, natural or legal, who bears the obligation "the actual legal obligation"[363] to pay that particular tax charge. The formal incidence of an obligation to tax is easy to identify. The person from whom a tax charge will be collected will be identified as the tax unit by the relevant charging provision in the tax code.[364] However, the effective incidence of a tax charge may be radically different from its formal incidence. The effective incidence 'identifies those who are, in the end, the people who are out of pocket as a result of the imposition of the tax'.[365] The location of the effective incidence of a tax charge may be very different to the location of its formal incidence. So an employee who demands a particular net of tax salary might, if he has sufficient bargaining power, compel his employer to pay a larger gross sum, so that the tax burden of meeting the net of tax sum falls on the employer.[366] Thus, wherever the formal incidence of a tax obligation may lie, a taxpayer who is formally a tax unit may effectively contract out of the burden of a tax obligation if his bargaining power permits him to do so and pass the burden of that tax obligation onto another.

This observation has profound implications for taxation as a juristic concept, since the prospect of a transfer of the location of the effective incidence of tax is only possible because of the monetary, personal nature of a tax obligation. This distinction between the formal and effective incidence of a charge to taxation is only possible by reason of an obligation to taxation being a money obligation and particularly not a property obligation. The burden of a claim on any

363 Kay and King, *The British Tax System* (no 354) 6.

364 So the person receiving or entitled to trading profits will be liable to income tax on those trading profits: Income tax (Trading and Other Income) Act 2005 ("ITTOIA 2005"), section 8.

365 Kay and King *The British Tax System* (no 354) 6.

366 Suppose a tax rate on employment income of 40%. The employee wants a net of tax salary of £120 per annum. To achieve this the employer must pay a salary of £200 per annum. The tax cost ("effective incidence") of £80 per annum is effectively borne by the employer.

property of the addressee could not be transferred for the very simple reason that no-one else has the property over which the claim is made. This point is the foundation of the distinction between "direct" and "indirect" taxation presented below.

Quite separately the prospect of a shift in the effective incidence of taxation shows how a claim for tax on a taxpayer takes its measure (computes the tax base) from activities which have taken place *before* the charge to tax is quantified. Put another way, taxation presupposes activities (governed by their own distinct legal regimes) to have taken place and assumed juristic relevance before taxation has any juristic relevance. Taxation has nothing to say about the juristic nature or substance of these logically prior activities.

Direct and indirect taxes

The monetary nature of a tax obligation which gives rise to a distinction between the formal and effective incidence of tax and the consequent ability of a formal taxpayer to transfer the burden of the tax obligation establishes a further distinction between "direct" or "indirect" taxes. John Stuart Mill distinguishes "direct" and "indirect" taxes as follows:

> A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the *expectation and intention* (emphasis added) that he shall indemnify himself at the expense of the other: such as the excise or the customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.[367]

Mill's distinction between direct taxes and indirect taxes has judicial endorsement, where the vires for levying tax was restricted to "indirect" taxes.[368] Examples of direct taxes are income

---

367 John Stuart Mill "*The Principles of Taxation"* in *Principles of Political Economy with some of their Applications to Social Philosophy* (7th edition, WJ Ashley 1909), Book V, Chapter 3.

368 *Bank of Toronto v Lambe* [1887] 12 AC 575, *Brewers & Maltsters of Ontario v Attorney-General for Ontario* [1897] AC 231 discussed in *Charles S Cotton v The King* [1914] AC 176 at 192, 193 per Lord Moulton; *Re Eurig* (no 51), paragraphs [25]- [26] at 579-580.

tax, capital gains tax and corporation tax. VAT is a classic "indirect" tax, where the burden is borne by the ultimate consumer, who is outside the chain of production and distribution.[369] Most forms of product taxation are indirect taxes. That is not to say that the burden of a "direct" tax, such as income tax, cannot be shifted. Quite the contrary. The dividing line between direct and indirect taxes is porous. As observed above, in relation to employees shifting the burden of income tax on to employers, the burden of a tax charge of a "direct" tax may be shifted.[370] The status of a tax as "indirect" will be a function of the "expectation and intention" of the legislator, as opposed to the parties to a transaction, which may or may not be easy to determine. Again, the very distinction between direct and indirect taxes is only possible by reason of the prospect of the formal and effective incidence of an obligation to tax being different, which in turn is a direct function of an obligation to taxation being a money (and not a property) obligation.[371]

The discussion of the anatomy of a charge to taxation and the distinction between direct and indirect taxes (itself an expression of a distinction between the formal and effective incidence of taxation) demonstrates that taxation is a monetary obligation which is personal to the identified tax unit (the burden of which may be shifted) and not a property obligation, certainly not an obligation on any specific items of property of the tax unit.[372]

---

369 'The basic principle of the VAT system is that it is intended to tax only the final consumer. Consequently the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him.': C-317/94 *Elida Gibbs Ltd v Customs and Excise Commissioners* [1996], paragraph [19].

370 A more prosaic example of the shifting of the burden of a direct tax is a tax indemnity or warranty, where, if called upon, the indemnifier suffers the burden of that tax.

371 Again, this feature of a tax charge is developed in Chapter 3.

372 Not even a property obligation in respect of monetary assets held by the tax unit, since the tax unit may borrow the monies to pay a tax obligation or have the relevant sum gifted by another. This point is examined further in Chapter 2 and in Chapter 3.

Section II. The individuation of a tax obligation

Raz's individuating operator, Bentham's directive/sanctional analysis and Kelsen's canonical formulation all successfully distinguish a tax obligation from other monetary liabilities

A preliminary but critical point is that a tax obligation has in Section I, been demonstrated to be a monetary obligation and thus, on the basis of the analysis of Chapter 2, Section II and Section III, a tax obligation is not a property obligation.

Further, the application of each of Raz's individuating operator, Bentham's directive/sanctional approach and Kelsen's canonical form to a charge to tax distinguishes a tax obligation very clearly from other money liabilities of the types discussed in Chapter 2, in a perfectly straightforward way.

To revisit the anatomy of a charge to tax, discussed in Section I, a tax unit within the taxing jurisdiction of a tax imposing body is subject to a money obligation (in Sterling, so far as the UK Tax Code goes) which is due as a debt to the Crown.[373] As observed in Section I, a tax obligation arises only when the taxing jurisdiction of a taxing body has been (lawfully) asserted over a person (the putative taxpayer), to establish that there is indeed a tax unit subject to tax, that the exercise of calculating the tax base and the application of a lawful tax rate become relevant and that a lawful claim to tax arises for the tax raising body. It is important to recollect the observation in Section I that a tax obligation cannot be said to arise by reason of the undertaking of a "taxable activity" (or otherwise subject to the calculation of the tax base) of itself. The person who undertakes that activity may not be a "tax unit" (for example they may be an exempt charity), or the transaction may not yield a taxable amount because of the identity

[373] TMA 1970, section 67, section 68. Considerations which are relevant to "common law taxes" of the type which arose in *Aston Cantlow* are addressed separately in Section I.

of the parties.[374] However, once the provisions which identify a tax unit, compute the tax base and set the tax rate are applied to yield a tax obligation, there is no other condition which needs to be satisfied for that amount to be due as tax. The aggregate application of the relevant series of sets of provisions *alone* (in the sense of being necessary and sufficient conditions) give rise to the tax obligation without the application of any further legal material. That obligation falls to be paid on a specified date[375] (for income tax, in the January following the year of assessment[376]). This observation makes the individuation of taxation and the distinction of taxation from the other types of monetary liabilities identified in Chapter 2 straightforward.

Taxation distinct from monetary consideration for goods or services ("user charges")

Raz's individuating operator would identify the legal norm in play as "there is a law that: if a person is within the notion of a tax unit, who has undertaken a taxable activity[377] so as to yield a taxable amount and is subject to a particular tax rate, that person should deliver the amount of money lawfully demanded [the amount being determined by the lawful application of the charging computational provisions which establish the tax base]." It is the application of the entirety of the sets of provisions, triggered by the assertion of taxing jurisdiction which identifies a tax unit (and assesses, for example, whether the tax unit is exempt from tax), computes the tax base and sets the rate of tax which together determine the timing of the crystallisation of a tax obligation and gives rise to a lawful claim to tax on the part of the Crown. It is the *aggregate application of the relevant series of provisions after the initial exercise of taxing jurisdiction which of itself* creates the lawful claim to tax and hence a (personal,

---

374 For example, a no-gain-no-loss transaction between spouses living together: TCGA 1992, section 58, which transaction would require the computation of the tax base (net taxable receipts, producing a profit or loss) for individuals who were not spouses living together within section 58.

375 The date on which payment is due is separate to the obligation arising, as discussed in Chapter 1: *Whitney v IRC* [1926] AC 37, 52, per Lord Dunedin; 57 per Lord Wrenbury; *R (Derry) v HMRC* [2019] 1 W.L.R. 2754.

376 TMA 1970, section 59BA(5).

377 Or is otherwise subject to a calculation which yields a taxable amount (say in the case of a wealth tax, where the taxable amount is simply a function of a measure of assets over liabilities, so that the notion of a "taxable activity" as the foundation of the computation of the tax base is inapt).

monetary) tax obligation. Each set of tax provisions which identifies the tax unit, computes the tax base and applies a tax rate reflects (in Razian terms) component parts of the legal norm which gives rise to a monetary obligation.[378] The identification of a tax unit reflects a non-norm law ("there is a law that a person who is within the taxing jurisdiction is putatively subject to tax"[379]), as does the computation of the tax base ("there is a law that a tax unit, once identified, must compute his net taxable amount") and the application of the proper tax rate ("there is a law that an identified tax unit, having computed the net taxable amount, must apply the proper tax rate to yield the amount of tax due to the taxing body"). Once these three juristic components are applied to a person, that person is subject to a lawful claim to tax (subject to a tax obligation), which is expressed as a distinct legal norm which expresses a taxpayer's obligation to tax in the form of a legal norm ("there is a law that an identified tax unit, whose taxable amount has been lawfully computed to ascertain the tax base, to which taxable amount the proper tax rate has been applied, must pay the sum due as tax to the taxing body"[380]). The content of this legal norm (which confers the status of a debtor upon an identified tax unit whose tax base has been computed and a tax rate applied) is self-evidently distinct from the Razian legal norm which identifies an obligation to pay contractual consideration ("there is a law that where a purchaser has acquired goods or services under a contract, he must pay the contractually stipulated consideration").[381]

---

378 Since none of the sets of provisions in identifying a tax unit, computing a tax base or applying a tax rate is intelligible by itself, they are properly viewed as component parts of a single legal norm, not internally related separate legal norms; at most each set may be a non-norm law.

379 By reference to tax residence or source; tax jurisdiction itself comprising a non-norm law (since the legal material which determines whether a person is within a taxing body's jurisdiction does not, of itself, yield a duty) which is internally related to the other non-norm laws which together produce a legal norm that the taxpayer must pay a monetary sum in tax.

380 Even absent any assessment or demand: see above.

381 Individuation by reference to the content of legal norms differentiates different areas of law, whereas individuation by reference to the structure or logical form of a norm would individuate legal norms, which exercise is outside the scope of this thesis.

The individuation formulations of both Bentham and Kelsen would yield the same distinction between taxation on the one hand and an obligation to pay the consideration for goods or services on the other. Bentham's formulation of the "complete" tax law would be "a person within the jurisdiction of a legislative authority must (1) identify whether he is a tax unit (or exempt from tax) and if so (2) calculate his tax base and then (3) apply the proper tax rate and (4) pay monies lawfully due from him, by reason of the exercise carried out at (1), (2) and (3) alone" (the directive part), the incitative part being "failing which, the taxpayer will be liable for the payment of the tax, together with interest, penalties etc". Since the obligation to pay tax is a component of the directive part of the Benthamite law, the Benthamite law is incomplete without reference to the sanctional part, relating to interest and penalties if the taxpayer does not pay his tax.[382] And Kelsen would individuate taxation in canonical form that "if a person is identified as a tax unit, which tax unit is subject to the computation of a tax base, so as to yield a taxable amount, which taxable amount is subjected to a proper tax rate, so as, in turn, to give rise to a lawful claim for monies is made by a tax collecting authority, the agent subject to that demand must pay by reason of that claim alone, failing which a sanction applier may enforce payment, together with interest and penalties against the tax unit" (the Kelsenian sanction being the enforcement proceedings for the tax, whereas penalties, interest etc. for non-payment of the tax would be the subject of a quite separate norm, albeit part of the same Kelsenian law, in that a permission to fix a sanction is a necessary part of a Kelsenian law). Both the Benthamite and Kelsenian formulations arise from the application of legal norms

382 Which attracts the same criticism as to the Benthamite requirement to find a "sanction" in relation to the individuation of taxation as was made to the individuation of other monetary debts, in particular an obligation to pay consideration for goods and services, discussed in Chapter 2. The same observation applies to the Kelsenian canonical formulation: see below.

which are different to those identified in Chapter 2 as imposing a duty to pay monetary consideration for goods or services.[383]

Tax and "user charges"

Despite the obvious conceptual divide between a tax obligation an obligation to pay consideration for goods or services, much attention has been paid in case law and in literature to the distinction of taxation from consideration for goods or services (so-called "user charges"). The distinction will be important if a body has power to set "user charges" but not "taxes". The proposition that a charge for goods or services is not a tax is obvious and is readily made good by the individuating techniques of each of Raz, Bentham and Kelsen discussed in Chapter 2 and above in this Chapter, which simply identify the different legal norms at play in these two different act situations (the acquisition of goods or services on the one hand and the identification of a tax unit, the calculation of the tax base and the setting of a tax rate to give rise to an obligation to pay a monetary sum, on the other). The proposition has unsurprisingly been endorsed by authority[384]. The identification of the different legal norms which are reflected in the respective formulations of Raz, through Raz's individuating operator, Bentham's directive/sanctional analysis and Kelsen's canonical formulation make any exercise of conceptually distinguishing taxation from consideration payable for goods or services (user charges, in the latter case) as part of an express definition of tax wholly redundant. However, as indicated in Chapter 1, an express distinction between taxation and so-called "user charges" has been included in certain definitions of taxation and this has led to unnecessary

---

383 Bentham would formulate the legal norm stipulating that contractually due consideration must be paid as (1) a directive part that one should pay contractually stipulated sum as consideration and (2) a sanctional part referring to enforcement if there is a failure to pay; Kelsen's formulation would be that "If there is a contract which stipulates a contractually agreed consideration and this is not paid, then permitted enforcement proceedings ought to be raised." The analyses in Chapter 2, Section I and Section II preclude a tax obligation being a property obligation; see Section III below (this also holds true for a Razian analysis).

384 A charge is for services (and not a tax) if provided to the individual who pays for them directly: *Re Tax on Foreign Legations and High Comrs' Residence* [1943] SCR 208 (Can).

complications in arriving at a juristic definition of taxation. The conceptual problems arise for two reasons. First, a loose notion of "services" has led to taxation being viewed as (always) a charge for services from the tax-imposing body, with, therefore a conceptual necessity to identify when a charge is sufficiently connected to services to deprive the charge of the status of taxation and confer upon that charge the status of a "user charge". Second, there is a confusion between the exercise of identifying the mere labelling (by a body which seeks to levy a payment) of a charge as a fee for services, where this labelling does not reflect economic reality (and the charge is correctly described as a charge to tax) and an exercise in which precise criteria are applied to a charge to ascertain whether that charge is a charge for services (a user charge) or a charge to tax.

In relation to taxation always being a charge for services (so that some dividing line must be found between taxation and user charges), the problem arises from observations such as those made by the Australian High Court in *Air Caledonie v Commonwealth*: [385]

> [In] one sense, all taxes exacted by a national government and paid into national revenue can be described as "fees for services". They are fees which the resident or visitor is required to pay as the quid pro quo for the totality of benefits and services which he receives from governmental sources.

Even if taxation to raise revenue to pay for public goods can be aptly described as a payment for "services" (the provision of those facilities which society needs in order to survive, which is not an everyday use of the term "services"), the other functions which taxation seeks to fulfil, redistribution, dis-incentivisation (and incentivisation) of particular activities, economic tools and the funding of governmental commercial activities (which may compete with private enterprise, who are subject to the relevant taxes) cannot be described as "services" at all.

[385] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, paragraph 11.

There is no identifiable receipt by the taxpayer. Thus any definition of taxation which has a premise that taxation as a fee for any sort of service is mistaken.

Separately, the search for some precise criteria to identify a user charge (which cannot, therefore, be a tax), as opposed to specifying criteria to ascertain when an alleged charge for consideration for services is, in substance, not that at all but rather a tax charge, is deep-rooted in the existing literature and some Commonwealth case law. In Bowler Smith and Ostick's article "*Towards a Classification of the Central London Congestion Charge as a Tax*",[386] the authors survey the literature on the distinction between user charges and taxes and say: '[A] payment is typically classified as a user charge if it is made voluntarily, exhibits an identifiable service, is proportionate to the service provided, generates revenue and is hypothecated and has a regulatory purpose'.[387]

The suggestion that the location of a charge in one or other category of "tax" or "user charge" is any sort of necessary exercise to identify a "tax" is mistaken.

Of course, in order to be consideration for a "service" provided to the payer of money, the "service" must be identifiable. This is to say nothing at all. If there is no definable "service", monies cannot be a charge for any "service". To define a "user charge" in contra-distinction to taxation is not only a redundant exercise (given that taxation is easily individuated by a reference to relevant legal norms) but misconceived in its methodology. In their reference to a user charge being made "voluntarily" (again in contra-distinction to taxation), Bowler Smith and Ostik appeal to the notion of taxation being "compulsory" beyond the notion of being simply enforceable. This appeal to the notion of "compulsion" is erroneous, for the reasons given in Chapter 1 (in particular, the obligation to pay consideration is itself enforceable and

386 Mark Bowler Smith and Huigenia Ostik in "*Towards a Classification of the Central London Congestion Charge as a Tax*" [2011] BTR 487.

387 Ibid, 489.

"compulsory" but only if the acquirer has contracted to buy the goods or services and a putative taxpayer is entirely free to decide to undertake taxable activities or not, in the same way as deciding to acquire services or not, so that user charges and taxation are both "compulsory" or "voluntary" in exactly the same way). Indeed, it has been said that 'the fact that there [is] some practical compulsion as to the use of [the] services cannot alter the character of the charge if it is otherwise a fee for service'.[388] An analysis based on "compulsion" also leads to absurd and unprincipled distinctions. Bowler Smith and Ostick say that driving to London is not merely "voluntary" for the United States Ambassador because he or she may need to travel by car for security or other reasons.[389] This, however, implies that the Congestion Charge is a "tax" on the United States Ambassador but a "user charge" on a private person, with no ambassadorial duties, who may happily travel around Central London by Tube, by bus, or indeed by walking. A distinction or concept of individuation which classifies laws differently relative to the person they affect is arbitrary and unprincipled. As for hypothecation, if Bowler Smith and Ostik are suggesting that taxation cannot be hypothecated and retain its status as taxation, there is no basis for this in principle or authority. In principle, there is nothing to prevent a taxing body earmarking particular tax receipts for a particular purpose; in the United Kingdom, as observed in Chapter 1, Parliamentary sovereignty entails this to be the case. And there is no authority cited by Bowler Smith and Ostik, from any jurisdiction, that holds (or suggests) that hypothecated tax receipts lose their status as tax receipts. Finally, any distinction between taxation and obligations which serve a "regulatory" purpose makes no sense. Taxation has a heavily regulatory role as a tool of economic management when used as a disincentive against certain activities, or, indeed, as an incentive. Excise duties on alcohol and tobacco have a regulatory purpose (to discourage drinking and smoking) but are nonetheless taxes because of

388 *Airservices Australia v Canadian Airlines International Limited* [1999] HCA 62, 202 CLR 133, per Gaudron J at paragraph 133.

389 Bowler Smith and Ostik (no 386).

that. Neither would they lose their status as "taxes" if the receipts were hypothecated towards, say, the treatment of alcohol abuse.

The reference by Bowler Smith and Ostik to a user charge being 'proportionate to the service provided' (and if not, the payment is a "tax") is equally misconceived. An overpriced service is simply that. If a supplier of services exploits market conditions to charge more than he otherwise would be able to, there is no juristic reason to suggest that the additional consideration charged is transmogrified into a "tax." If a greengrocer charges £10 for an apple, the £10 is "for" the apple, even if the cost of the apple is £0.20 for the greengrocer. And a charge for the use of a swimming pool for an adult which is greater than that for a child makes no difference to the juristic nature of the charge as consideration for services.

The question arises as to why, given the conceptual redundancy of distinguishing taxation from user charges, the sort of exercise undertaken by Bowler Smith and Ostik is undertaken at all. The answer may well be found in cases such as *Homebush*, discussed in Chapter 1, where the compulsory acquisition of flour at a low price and the grant of an option to the forced seller to re-acquire that flour at a higher price was, in substance, simply a method of extracting cash from the seller. The acquisition mechanism was a mere device to extract money. Thus the payments on the exercise of the options to re-acquire the flour were not consideration for the flour but rather taxation. This type of reasoning is unexceptionable. *Homebush* simply establishes a proposition that devices to extract cash will not be respected and the monetary nature of the (here forced) transaction will be subjected to the application of the relevant provisions in the light of its true nature.[390] Factors such as economic compulsion exerted upon

[390] The CJEU adopts a similar approach in identifying prohibited 'charges with equivalent effect [to unlawful customs duties]' under TFEU, Article 28, where charges (for example for public health inspections) which are imposed for the "general interest" cannot, according to the CJEU, '…be regarded as a service rendered to [an] importer such as to justify the imposition of a pecuniary charge': *Bresciani Administrazione Italiana delle Finanze* (Case 87/75, paragraph [10] of the judgement of the Court). Using the analysis adopted in this thesis, a charge imposed not as a quid pro quo for services but rather imposed on an importer "in the general interest", is not consideration for services (and not paid in that

parties to engage in a particular transaction (and the absence of any commercial relationship between the costs of acquisition on the part of an alleged seller and receipts extracted by that alleged seller) may well expose the nature of a transaction as a cash extraction mechanism, merely disguised (as in *Homebush*) as an acquisition and re-sale. What the approach in *Homebush* does not, on its terms, establish, or even concern itself with, is the need for any necessary or sufficient criteria for services which are supplied and payments made for those services for the relevant payments to be treated as consideration for services (user charges) and not as taxation. However, in *Re Eurig Estate*,[391] the Canadian Supreme Court held that an *ad valorem* probate fee was a tax rather than a fee for services, because of 'the absence of a nexus between the levy and the cost of the service'. If the Canadian Supreme Court had been simply saying that the absence of any commercial explanation of the seeming disconnect between the relevant payments and the cost (to the service provider) of provision of the services, served to suggest that the payments were not, in truth, payments exacted for the provision of services, this reasoning would, again, be unexceptionable. But the Canadian Supreme Court is saying something radically different. The Canadian Supreme Court is saying that where there is no commercial explanation ("nexus") between the cost of the services and payments, the payments cannot be payments for services and must be a tax. This reasoning is mistaken. First there is no reason (at all) in principle why a service provider cannot provide an over-priced service (especially, indeed, if the service provider is in a monopolistic position). The charge of, say, £10, rather than £1, for a lottery ticket is not, it is submitted, a tax because the cost of provision of a lottery ticket may be far less than £10. Or if an entertainer charges very high prices for a performance where the costs of the performance are low, the charge is not a tax (unless it is suggested that the only feature of this example which prevents the entertainer's fees from being

capacity) but rather a monetary sum demanded from an importer qua importer: the demand is made in reality by reason of the import, not as consideration for inspection services).

391 [1998] 2 SCR 565.

a tax is that the entertainer is not a public body, which has been demonstrated in Chapter 1 to be wrong, both in principle and as a matter of Australian authority). Second, the proposition that if a payment is not a user charge, that payment must be a tax, is a non sequitur. A charge which is not a user charge may be one of several types of money debt, as explored in Chapter 2. It seems however, that notions of "compulsion" and an approach which distinguishes tax and user charges on the basis of the relationship of charges for services and costs of the service provider are entrenched in Commonwealth case law: In *Air Caledonie v Commonwealth*,[392] the Court observed

> [I]f the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value for what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax. [393]

These observations are, as demonstrated here, redundant. However, in the United Kingdom case law which considers the meaning of the term "tax" , the conclusions of the Court in each and every case may be explained on the basis of taxation that a tax unit has been identified, that the tax base is computed and the tax rate is applied to produce a monetary amount due in tax, without any need to appeal to specific criteria to identify "user charges", to, in turn, exclude such user charges from a notion of tax. Thus, as a matter of the UK Tax Code,[394] "taxes" are properly defined as the obligation which arises as the result of the application of the series of sets of provisions (starting with an assertion of taxing jurisdiction) which, in turn, alone yield an amount payable to the tax collecting body (without any reference to an exclusion for "user charges").

---

392 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462.
393 Ibid, paragraph 6.
394 See also below in relation to common law taxes.

Tax and civil penalties

Distinguishing taxation from civil penalties is equally as easy as distinguishing taxes from monetary consideration for goods or services, by means of each of the Razian formulation of taxation, the Benthamite formulation of taxation and the Kelsenian formulation of taxation by comparing the legal norms which inform taxation to the legal norms which inform the formulation of an obligation for a civil penalty, say for completing a tax return with a deliberate inaccuracy. As observed in Chapter 2, an obligation to a civil penalty would be articulated by Raz as "there is a law that one must complete a tax return free of deliberate inaccuracies, [failing which one must pay a monetary sum]".[395] Bentham's directive/sanctional formulation would articulate the civil penalty obligation as "one must complete a tax return free of deliberate inaccuracies, otherwise there is a sanction of a monetary payment". Kelsen would describe the legal norm at play as "If one completes a tax return which includes a deliberate inaccuracy, the tax raising body is permitted to fix a monetary penalty on the person who completed that return".

Now take a disincentive which dissuades the employment of child labour. A disincentive which reflects a legal norm that "one should pay a sum of money to a particular body if one employs labourers under 14" is a very different legal norm to a legal norm which says "if one employs labourers under 14 one must pay a sum of money to a particular body but one is exempted from this obligation if one does not know that certain labourers are under 14 and one believes that the relevant labourers were 14 or over".

The first legal norm is a tax, measured by reference to the disincentivised activity (or employing child labour). Raz's individuating operator would articulate a legal norm that "there is a law that for every child under 14 employed by an employer, the employer must pay [a particular

[395] As observed in Chapter 2, Raz may well formulate the sanction as a separate legal norm to the obligation to complete a tax return free from deliberate inaccuracies.

percentage of his profits, or, perhaps, a fixed sum]". Bentham would construct a directive part which reads "you must pay [a specified sum, calculated in a particular way, which is the function of the application of a particular rate] if you employ a child under 14" and a sanctional part which reads "if you do not pay the specified sum you will be subject to enforcement proceedings, together with interest and penalties". And Kelsen would extract a permission that "if an employer employs a child under 14, the employer attracts an obligation to pay [a specified sum]; if there is a failure to pay, then a sanction applier is permitted to raise enforcement proceedings and exact interest and penalties". In each case, the tax unit is identified (the employer who employs children under 14). The tax base computes the sum of money due from the employer by reference to an economic activity (the provision of employment, where the employee is under 14). The tax (if it is not a flat rate tax, say, a fixed sum payable by the employer per under 14 child employed) will be the product of a tax rate applied to the sum computed as the tax base.

The second legal norm is a penalty, not a tax; the requirement of knowledge on the part of the employer that an employee is under 14 as a necessary condition for the obligation to arise (and the exemption from obligation for innocent employment of child labour) exposes the second legal norm as a prohibition against knowing behaviour rather than the computation of an amount due by reference to that activity of providing employment. Legal and extra-legal consequences will flow from whether an actor is seen to have attracted a cost of an activity (a tax) or suffered a sanction for deliberate behaviour (a civil penalty), those consequences, in turn, leading to the actor informing the Razian deliberative stage or the executive stage of his decision-making process.

Put another way, the first legal norm is perfectly properly expressed as an obligation to pay money in the capacity of debtor alone, upon tax jurisdiction being asserted over a tax unit (upon

the obligation arising, irrespective of whether a demand or assessment is made), albeit that the quantum of the debt is measured by reference to the age of the debtor's workforce and the application of a rate to yield a final amount due. The second legal norm is only convincingly expressed as imposing a monetary obligation on *behaviour*, that is, on a person in the *capacity* of an employer who *deliberately* employs child labour (which obligation is removed if there was no relevant knowledge). Particularly if the monetary obligation is imposed irrespective of how long the child is employed for, since this strengthens the connection between the lability and knowing behaviour (knowing employment of child labour) and weakens the connection between the obligation and the computation of a tax base to which a tax rate is applied.[396] This latter capacity indicates the obligation to be a penalty, in the sense of the imposition of a cost on deliberate behaviour, not a tax which computes an amount due, which amount is merely measured by reference to a taxable activity.[397] The United States Supreme Court held this distinction to be good on precisely this basis, in the context of a charge on employers (of 10% on their net profits for a year) if the employers were discovered to employ children under the age of 14, holding that such a charge (described as a "tax" in the Revenue Act of February, 24, 1919,[398] Title XII, as a "Tax on the Employment of Child Labor", enacted by Congress) was, in fact, a penalty which could only be imposed by the State of North Carolina and not a "tax" which could be imposed by Congress:

> The amount [of the monetary obligation] is not to be apportioned in any degree to the extent or frequency of the departures [of permitted employment], but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only when he knowingly departs from the

.[396] Although this aspect is not conclusive, since a tax obligation may be for a fixed amount; see above.

[397] The notion of strict obligation does not affect this analysis. Strict obligation imposes a sanction in different act situations; the sanction applier simply does not want to have to demonstrate "deliberateness"; the act of itself attracts a sanction. To that extent, strict obligation circumvents questions of proof. Whether the imposition of a sanction should be viewed as damages or a penalty (assuming no criminal conviction) can only be ascertained by identifying the legal norms which attract the strict sanction.

[398] C. 18 40 Stat. 1138

> prescribed course that payment is to be exacted. *Scienter* is associated with penalties, not taxes.[399]

The content of the relevant legal norm was ascertained by the scrutiny of the relevant legal material (the statutory provisions), which was sufficient to permit the relevant legal norm to be constructed as "there is a law that you should not employ knowingly children under 14, otherwise you will be subject to a monetary charge", which formulation exposes the nature of the charge to be a penalty, not a tax. There is no need, contrary to the approach of Kelsen, to refer to the purpose or function of the sanction (the obligation to pay 10% of a year's net profits) as such or, contrary to the approach of Raz, to extra-legal considerations to reveal the juristic nature of the charge. Indeed, a scrutiny of the nature or purpose of the sanction (the 10% charge) would not reveal the juristic nature of the charge, since the nature or purpose of the 10% charge (the disincentivisation of child labour) is a description made at too high a level of abstraction, which does not distinguish between a penalty and a tax.[400]

Tax and criminal fines

Taxation is also easily distinguishable from criminal fines or penalties, since the respective liabilities arise from the application of quite separate sets of legal norms. There is no need to expressly exclude criminal fines from a definition of taxation. Each of Raz, Bentham and Kelsen would agree, as demonstrated below. A single act situation may attract the application of multiple sets of legal norms (any conflict having to be resolved to exclude a contradiction in the application of the respective sets of legal norms). So an act situation (say a negligent misrepresentation) which induces the conclusion of a contract may also attract the application

399 *Bailey v Drexel Furniture Co*, 259 US 20 (1922) at 35, Chief Justice Taft.

400 See Chapter 2. Put another way, individuation by reference to the nature and purpose of a sanction ignores the modal nature of law and particular areas of law. The functional objective sought by a penalty or a tax may well be the same. For exactly the same methodological approach but one which yielded that answer that a charge was "tax" and not a "penalty", see *National Federation of Independent Business v Sebelius* 567 US 519 (2012).

of those legal norms which govern reasonable standards of behaviour in tort. And an act situation which breaches legal norms which prohibit certain behaviour, so, upon breach, as to attract criminal sanctions, may also attract the application of the legal norm which imposes a tax obligation. So profits from illegal gaming are subject to income tax on trading profits;[401] the legal norms which clothe particular act situations (splitting profits on machines used for gaming) with criminality[402] are distinct from the legal norms which impose taxation (being a demand for money, that demand being computed on some intelligible basis).[403] And the demand for taxation, being a lawful demand for money, from a person within the taxing jurisdiction of the tax-imposing body, does not connote any contradiction between the legal norms which confer the status of criminality upon an activity and the legal norm which imposes an obligation to pay money upon a lawful demand calculated by reference to profits arising from that criminal activity. In Razian terms, there is no internal or external relationship (and no inconsistency)[404] between the relevant criminal laws and the relevant taxation laws.

> The question is really whether as a matter of construction [the notion of taxable profits from a trade is] to be cut down by an overruling consideration that the trade is tainted by illegality…The Revenue, representing the State, is merely looking at an accomplished fact. It is not condoning it; it has not taken part in it; it merely finds profits made from what appears to be a trade, and the Revenue laws happen to say that the profits made from trades have to be taxed, and they say "Give us the tax." It is not to the purpose…to say: "But the same State that you represent has said that they "are unlawful""; that is immaterial altogether and I do not see that there is any contact between the two propositions….It is said… "Is the State coming forward to take a share of unlawful gains?" It is mere rhetoric. The State is doing nothing of the kind; they are taxing the individual with reference to certain facts. They are not partners; they are not principals in the illegality; they are only taxing

401 *Mann v Nash* 16 TC 523.

402 (1) the use of automatic machines for gaming is prohibited; (2) any breach of this prohibition is liable to attract conviction as an offence (see 527), per Rowlatt J.

403 A lawful demand for money calculated on the profits of a criminal activity must be satisfied upon being demanded.

404 The same is true in respect of the Benthamite directive/sanctional approach and the Kelsenian canonical formulation.

> a man in respect of those resources…it is only rhetoric to say that they are sharing in his profits.[405]

The recognition of distinct sets of legal norms at play is inherent in the judgment of Mr Justice Rowlatt in this passage, while also convincingly explaining why there is no value-laden contradiction of a State holding an activity to be unlawful, while taxing the profits from that activity.[406]

As observed in Chapter 2, a criminal monetary fine is distinguished from a civil monetary penalty because the sanctions are different: a criminal fine which arises by reason of a breach of a legal norm (to revisit Chapter 2, a breach of a prohibition to complete a tax return free of deliberate inaccuracies) is joined to a criminal conviction; a civil penalty imposes the monetary sanction alone. A fortiori a tax obligation is entirely distinct from a criminal fine. The Razian individuating operator which articulates the legal norms relevant to taxation ("there is a law that a tax unit, whose taxable amount has been lawfully computed to ascertain the tax base, to which taxable amount the proper tax rate has been applied, must pay the sum due as tax to the taxing body") is wholly distinct from the Razian individuated criminal fine ("there is a law that one should not do [X]; if one does [X], one is subject to criminal conviction and a monetary exaction"). Bentham and Kelsen would each find the distinction equally simple. For Bentham the directive/sanctional analysis of taxation ("a person within the jurisdiction of a legislative authority must (1) identify whether he is a tax unit (or exempt from tax) and if so (2) calculate his tax base and then (3) apply the proper tax rate and (4) pay monies lawfully due from him, by reason of the exercise carried out at (1), (2) and (3) alone" (the directive part), "failing

405 *Mann v Nash* 16 TC 523 at 530-531.

406 Of course, the relevant taxation laws may choose to reflect particular legal norms which exclude criminal activities and their receipts; so criminal activities, such as the importation of counterfeit banknotes, which are prohibited throughout the European Union and cannot, therefore '…be marketed and integrated into the economy of the [European Union]' are not subject to customs duties or VAT, since these EU taxes apply only to activities (and receipts) which may be so marketed and integrated: *Witzemann v Hauptzollamt Munchen-Mitte* (Case C-343/89), paragraphs 12, 18 of the judgment of the CJEU.

which, the taxpayer will be liable for the payment of the tax, together with interest, penalties etc" (the sanctional part)) is distinct from the formulation of a criminal obligation ("a person must not undertake an act of [X]" (the directive part), failing which that person is subject to a criminal conviction and payment of monies" (the sanctional part)). Kelsen's individuated tax obligation ("if a person is identified as a tax unit, which tax unit is subject to the computation of a tax base, so as to yield a taxable amount, which taxable amount is subjected to a proper tax rate, so as, in turn, to give rise to a lawful claim for monies is made by a tax collecting authority, the agent subject to that demand must pay by reason of that claim alone, failing which a sanction applier may enforce payment, together with interest and penalties against the tax unit") is also self-evidently different to a Kelsenian formulation of a criminal fine ("if a person does [X], a sanction applier is permitted to fix a criminal conviction on that person and also compel a payment of monies").[407]

Once it is appreciated that the relevant legal norms, whether governed by a Razian individuating operator, a Benthamite directive/sanctional analysis or a Kelsenian canonical formulation, organise the legal material which give rise to a tax charge (by identifying a tax unit, establishing a tax base and by setting a tax rate) are distinct from that legal material which imposes a criminal fine, so that these distinct categories of legal material yield distinct legal norms,[408] any need to expressly exclude consideration given for goods or services, or civil

---

407 The Kelsenian formulation of taxation incorporates permission of enforcement of the payment of the tax if not paid. The permission given to the tax collecting authority to enforce payment of the tax is what gives rise to the duty to pay the tax, which exposes the unfairness to Kelsen of Hart's criticism that Kelsen's individuation technique fails to distinguish between a tax and a criminal fine, dealt with in Chapter 2, which observation can also be said of Raz's criticisms of Kelsen, also dealt with in Chapter 2. Raz's criticism of Kelsen, that Kelsen's canonical formulation leads to the absurd conclusion that one has a duty to avoid taxable activities, so as to avoid the sanction of taxation, is misconceived, for the reasons given in Chapter 2: on a proper appreciation of the Kelsen canonical formulation, the duty is not to avoid undertaking taxable activities, the duty is to pay the tax when demanded.

408 The legal norms which give rise to a tax charge may express disapproval of the criminality of certain activities, despite the criminality and tax obligation being the functions of two separate sets of legal norms; so expenditure incurred for an illegal activity (payment of a parking fine) is not a deductible expense from the taxable profits of a trade: *CIR v Alexander von Glehn* 12 TC 232. But this observation does not affect the proposition that criminality and a tax obligation arise from different legal norms (and may thus arise in respect of the same act-situation).

penalties, or criminal fines, disappears. These latter monetary liabilities are the product of the application of different sets of legal norms, of the types discussed in Chapter 2.

The exposition of criminal law and taxation as the product of different sets of legal norms also exposes the fallacy of any distinction of these two areas of law by reference to their respective effects on behaviour and autonomy, or their respective purposes, in particular with any appeal to the harm principle.[409] Chapter 1 has already shown that taxation may be imposed as a disincentive to particular activities. Chapter 2 demonstrated that civil penalties and criminal sanctions depend on the application of legal norms which apply if (and only if) a prior legal norm (a duty imposing prohibition) is breached[410] and that this prior norm is identical whether the contingent norm, which applies on the breach of the prior norm, imposes a civil penalty[411] or a criminal sanction.[412] Civil penalties, taxation and criminal fines may all have the same purpose and do the same work. This observation merely reinforces the nature of taxation (and indeed civil penalties and criminal fines) as legal modes, which seek to fulfil functions which may be fulfilled using any one of several available legal modes. After all, the state might expend the proceeds of taxation and fines on the same object.[413] What distinguishes taxation from civil penalties and both from criminal fines is the content of the specific legal norms at play in respect of each act situation.

It is worth discussing these other methods of distinguishing taxation from criminal fines to highlight why they are less convincing than an examination of the content of specific legal norms. Taking first a distinction based on the effect of criminal fines on the one hand and

---

409 Different extra-legal consequences may flow from the imposition of a criminal fine to those of a tax charge; a guest at a dinner party may well be ostracised if he is convicted of employing child labour, as opposed to paying additional tax. But such extra-legal considerations are not needed to distinguish criminal fines from a tax charge.

410 Say a prohibition against parking in a private car park.

411 Say a monetary (civil) fine.

412 Say a conviction and a monetary (criminal) fine.

413 The distinction between funding a state interest and a sanction for wrongdoing is obvious.

taxation on the other on an agent's behaviour and autonomy, it has been said that criminal penalties and taxation are distinguishable on the basis that criminal penalties are a form of coercion, which violate the independence (and thus dominates and disrespects) the coerced individual; furthermore a criminal penalty is global and indiscriminate,[414] whereas tax, on the other hand, is "diffuse", leaving taxpayers with a range of valuable options (and thus not global and indiscriminate).[415] But any disincentive, in so far as it identifies an activity which is penalised, is a form of "coercion", although the strength and effect of that coercion is of course a function of the legal mode used to implement a particular disincentive. Taxation, or even a civil fine, may only enter an agent's decision whether or not to undertake the disincentivised activity process at the deliberative stage, whereas a criminal fine may persuade an agent to conclude that he will not pursue an activity.[416] And a disincentive in respect of an activity is none the more "global" or "diffuse" whether that disincentive is a civil penalty, a criminal fine or a tax obligation, so the effect of all of these legal modes on autonomy is identical. Thus any appeal to the scope ("global" or "diffuse") of a monetary obligation will not convincingly distinguish a tax charge from a criminal fine.

A distinction based on the purpose of criminal fines by contrast to the purpose of taxation fares no better to separate criminal fines from taxation. It has been said that, unlike criminal law, taxation is not a form of retribution or a utilitarian welfare-consequentialist notion of punishment. Tax, it is said, does not deprive a citizen of his normal rights; neither is it a

414 Joseph Raz, *The Morality of Freedom* (OUP 1986) 420, 418. It is a pity Raz did not apply Raz's own principles to individuation and refer to particular legal norms to distinguish taxation from criminal fines, rather than focus on the scope of criminal provisions.

415 John Stanton-Ife "*Must We Pay for the British Museum? Taxation and the Harm Principle*" in *Philosophical Foundations of Tax Law* (no 4) 35, 54, 55.

416 But a criminal fine may be dismissed by an agent as a mere "toll" similar to a tax, in the manner described in *AG v Harris*, supra at 91; indeed if the criminal fine is small, there is scope to '…laugh at the law, and say that [one is] immune from its restraints so long as [one pays a] recurringly small price for [one's] immunity'. This sentiment (which perhaps mistakenly ignores the consequences of a criminal conviction) is explored further in Section IV in discussing the effect of the monetisation of liabilities on responsibility.

violation of an individual; it is not established by trial; it is not in any sense the deprivation by recognised legal authorities; that is why the construction of statutes strictly and presumption against the criminalisation of a particular activity is not required as a demand of tax justice, in contradistinction to criminal justice.[417] But a disincentive seeks to affect autonomy whatever the nature of the legal mode in question. The (only) purpose of any legal mode used as a disincentive is to dissuade a particular individual for pursuing a particular course of action he would otherwise have undertaken. The imposition of the disincentive is a "punishment" (whether of a greater or lesser strength), which is identical in nature, albeit not in strength or effect (as observed in Chapter 2, a criminal conviction may have a far greater effect, both legally[418] and extra-legally[419], than a tax charge), whether the disincentive is a tax charge, civil penalty or a criminal fine. It follows that an appeal to the effect upon behaviour and autonomy will not distinguish taxation from a criminal fine any more than an appeal to the scope of a monetary obligation.

Neither is an appeal to the harm principle a convincing basis to distinguish taxation and criminal fines. Criminalisation has been described as a function of a "positive case to warrant criminalisation" (harm to others, offence to others, immorality and harm to self).[420] Feinberg summarises the "harm" principle as follows: 'It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost or other values'.[421] This formulation of the legitimacy of the

---

417 See John Rawls "*Two Concepts of Rules in Action*" in H.B. Acton, *The Philosophy of Punishment* (St. Martin's Press 1969) 111-112.

418 Say as a legal bar to obtaining certain employment.

419 Say by giving rise to social exclusion.

420 Feinberg "*The Moral Limits of the Criminal Law*" (1984-1987): Volume 1; "*Harm to Others*" (1984); Volume; "*Offences to Others*" (1985); Volume 3; "*Harm to Self*" (1986); Volume 4; "*Harmless Wrongdoing*" (1988). (Feinberg himself, in common with other liberal philosophers, endorsed only the first two grounds).

421 "*Harm to Others*" (no 420) 26.

criminalisation of particular acts has been treated as giving rise to a positive claim (the prevention of harm to others, whether or not the conduct is likely to be harmful of itself) and, further, an instrumental, rather than act-centred notion, which means that a taxable act need not itself be harmful, or even that it risks causing harm).[422] Thus, it is said, taxation is shown (by being outside the scope of the harm principle) to a different technique to criminalisation since it leaves a greater scope for voluntary action.

The harm principle does not, in fact, succeed in distinguishing taxation from criminal fines. The very notion of tax as a disincentive pre-supposes that the disincentivised activity is causing "harm", however identified and defined. Criminalisation reflects a choice of sanction for the breach of a prior legal norm, as shown in Chapter 2. That prior legal norm may have been the subject of an internal punitive relation to a sanction which was a tax charge or a civil penalty, without changing its own nature at all. The harm principle, in asking whether a criminalised act is harmful (so to do that act is to breach a particular legal norm which prohibits that particular act) may equally ask, of that same harmful, prohibited act, whether a breach of that legal norm should be "punished" by a charge to tax or a civil penalty. The harm principle cannot, therefore distinguish taxation from a criminal fine.

On the other hand, an appreciation of the content of the specific legal norms at play in relation to any act situation readily distinguishes criminal fines from other types of monetary obligation. Taxation as the function of the legal norm that one should pay a lawful demand for money where the lawfulness of the demand arises by reason of the demand alone (the quantum of the

422 Simester & Sullivan's Criminal Law Theory and Doctrine, Simester, Spencer, Stark, Sullivan and Virgo at 660-661. Stanton-Ife op. cit 54, 55. Feinberg "*The Moral Limits of the Criminal Law*" (1984-1987): Volume 1; "*Harm to Others*" (1984); Volume; "*Offences to Others*" (1985); Volume 3; "*Harm to Self*" (1986); Volume 4; "*Harmless Wrongdoing*" (1988). (Feinberg himself, in common with other liberal philosophers, endorsed only the first two grounds).

demand being lawfully computed) successfully distinguishes taxation from criminal fines in a way which the alternative bases discusses here do not.[423]

Taxation and an obligation to pay tortious damages

It is obvious that the Razian formulation of taxation, the Benthamite formulation of taxation and the Kelsenian formulation of taxation all comprise legal norms which are distinct from those legal norms which establish any duty to pay damages in tort. The Razian formulation for a tortfeasor would narrate that "there is a law that if one is [say negligent], one must pay damages [calculated so as to compensate the injured party]". Bentham would articulate a directive norm "one should not behave negligently" and a sanctional part which provides that "if one breaches the norm which prohibits negligent behaviour, one must, as a sanction, pay damages", whereas Kelsen would treat the damages as a permitted sanction which the sanction applier may (or ought) to apply in the case of a negligent tortfeasor. The expression of the content of the legal norms giving rise to an obligation for tortious damages by each of Raz,

423 Hart comes tantalisingly close to recognising the individuation of different laws by identification of the legal norms which give rise to different duties (and different sanctions for the breach of different duties). In *"The Concept of Law"* (no 318) 39, Hart observes: '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. What differentiates these ideas is that the first involves, as the second does not, an offence or breach of duty in the form of a violation of a rule set up to guide the conduct of ordinary citizens.' Had Hart recognised that the money loss of a fine is not the "same" money loss as a tax (because the co-incidence that there are two payments, perhaps of the same amount, does not make the payments the "same", any more than these two payments are the "same" as the payment of monetary consideration of an amount equal to both of them), that the fine accompanies a conviction, whereas a tax does not and this difference reflects the operation of two quite different sets of legal norms, Hart would not have made the mistaken accusation of Kelsen's canonical formulation, at least of duty imposing laws, which are discussed above. Such a realisation would also have been perfectly consistent with his observation (ibid) that 'Taxes may be imposed not for revenue purposes but to discourage the activities taxed, though the law gives no express indication that these are to be abandoned as it does when it 'makes them criminal'. Conversely the fines payable for some criminal offences may, because of the depreciation of money, become so small that they are cheerfully paid. They are then perhaps felt to be "mere taxes".' It may be added that fines which are funded by others (where there is no restriction on such funding) may not only make a criminal "cheerful" but have the profound implication upon notions of responsibility discussed in Chapter 2 and, in relation to taxation, in Section IV of this Chapter 3. For a much earlier observation which mirrors that of Hart (which indeed reflects the unnecessary appeal to motivation to distinguish tax and criminal fines in the manner of Raz and is exposed to the same criticism) see William Paley, *The Principles of Moral and Political Philosophy* (first published 1785, Liberty Fund Inc 2002) 445: '[Vices] themselves cannot be taxed, without holding forth a conditional toleration of them as to destroy men's perception of their guilt; a tax comes to be considered as a commutation…'.

Bentham and Kelsen is wholly different to the legal norms which expresses a tax obligation discussed above.

Norm language may be replaced by the language of "capacity" to individuate taxation

The language of "capacity" also permits a tax obligation to be individuated and thus distinguished from other money debts. A person who is within the taxing jurisdiction of a tax-imposing body and triggers the application of charging provisions which establish the tax base for a particular tax is "a taxpayer". In the case of a person liable to pay a consideration for goods or services, that person has the capacity of an "acquirer". In the case of a civil penalty, a person has a capacity (in the example of completing a tax return) of "a taxpayer [making a tax return]".[424] In the case of a criminal fine, the payer has the capacity (on conviction) of an "offender", whereas in the case of someone liable to pay damages, that person has the capacity of a "tortfeasor". These are not mere labels which self-servingly distinguish different types of payment without a sound juristic analytical frame. Rather, the distinctions made on the basis of "capacity" reflect the difference in the content of duties imposed by role responsibility in relation to each role in which a person finds himself. Expressed in the language of capacity, a tax obligation may be expressed as " an obligation to pay money, that is, the capacity of a debtor, for the sole reason of being a "tax unit", a person who is within the taxing jurisdiction of a tax-imposing body [the computation of the obligation, the tax base, being made by the charging provisions in respect of the activities which triggered their application and the application of a relevant tax rate]". This is in contra-distinction to the "acquirer of goods or services" who must pay the consideration, "one who has breached a norm by doing a prohibited act [whether so as to incur a penalty or criminal fine]" or a "tortfeasor" who has breached a specific legal norm, say not to behave negligently. Role responsibility attributes an obligation

[424] Which is a different capacity to a taxpayer [who is in the course of triggering the application of charging provisions].

to all persons who are within a particular taxing jurisdiction to make the money payments demanded of them by the body who has that taxing jurisdiction.

Taxation Individuated: Taxation is an obligation which arises by reason of the application of the provisions which identify a tax unit, establish a tax base and set a tax rate of themselves, so that a taxpayer attracts the status of a debtor by reason of these provisions of themselves (and no other juristic reason)

The application of the individuation techniques of each or any of Raz, Bentham or Kelsen (or a technique which appeals to "capacity") permit that individuated, norm-based description of taxation to be articulated, for all taxes, as "a personal, monetary obligation on the part of an identified tax unit, to pay a lawfully computed sum of money to a tax collecting body where the provisions which identify the debtor (the tax unit), establish the tax base (taxable sums, less allowable deductions) and set a tax rate and nothing else (that is, the taxpayer need not have received any consideration, nor have breached any legal norm) create the obligation (that is, these provisions of themselves give rise to a tax obligation)".[425] This individuated formulation accommodates not only taxation's modal nature (and the diverse functions which taxation may seek to fulfil[426]) but also the prospect of a "common law" charge to taxation, which although self-evidently rare, since the lawfulness of a demand for money simpliciter is rare, is not only conceivable but has been acknowledged by the Court of Appeal in *Aston Cantlow*, discussed in Chapter 1 (although of course the enforcement and compliance provisions may well be entirely different since the tax obligation might not be an obligation due to the Crown). And importantly, this formulation of the law of taxation acknowledges that the juristic process of identification of the tax unit (by defining the connecting factors which establish tax jurisdiction), the computation of the tax base, the setting of the tax rates and enforcement and

425 The self-assessment regime in relation to the United Kingdom Tax Code, discussed above, does not undermine this proposition. an obligation on a tax unit to compute the tax money debt (which creates an enforceable demand) arises on the application of the charging provisions to that tax unit which establish the tax base.

426 See Chapter 1.

compliance procedures all apply to taxation, irrespective of which particular function taxation seeks to fulfil, thus securing the status of the law of taxation as a single coherent complete law, in the Razian sense, despite the modal nature of taxation and taxation's diverse functional goals. The formulation is consistent with Raz's guidelines for individuation, in that it is relatively simple, easy to discover, does not contain too large a volume of legal material and avoids redundancy. Put another (Razian) way, this individuated formulation of a tax obligation organises a set of related ideas as to a tax unit, a tax base and tax rates, (together with provisions relating to compliance and enforcement of money debts).[427] Indeed, taxation has been described in almost precisely these terms, although clearly not sufficiently often so as to make the individuated description of a tax obligation orthodoxy.[428] First in *Pryce & Ors v Monmouthshire Canal and Railway Companies*[429], the Lord Chancellor (Cairns) observed that

> …as there was not any a priori obligation in a subject to pay any particular tax, nor any antecedent relationship between the taxpayer and the taxing authority, no reasoning founded upon any supposed relationship of the taxpayer and the taxing authority could be brought to bear upon the construction of the [taxing] Act, and therefore the taxpayer had a right to stand upon a literal construction of the words used [in a particular taxing Act].[430]

Putting to one side the connection made by the Lord Chancellor between the nature of taxation and the literal construction of tax statutes, the dictum clearly exposes a tax charge as arising by reason of a demand for money after the tax unit has been identified, the tax base established and a tax rate set and nothing more (that is, there is no need to satisfy any further condition to levy a tax demand from the taxpayer who has become, by reason of the application of these provisions, a debtor). Second, taxation has been described in a manner consistent with the

427 See Chapter 1 and Joseph Raz, *The Concept of a Legal System* (OUP 1980) 141-146 and 144 in particular.
428 Hence the misconceived definitions of taxation discussed in Chapter 1 and the confusion of taxation liabilities and property liabilities, discussed in Chapter 4.
429 1878 LR 197
430 At 202-203.

individuated notion of taxation delivered here, not by reference to legal norms but by reference to the nature of money and the historical relationship of taxation and markets:

> The government of the day obliges certain selected persons to become its debtors…This procedure is called levying a tax, as the persons thus forced into the position of debtors to the government must in theory seek out the holders of the tallies or other instrument acknowledging a debt due by the government…credits and debts preceded markets and indeed, created the need for markets. The primordial debt is the tax obligation, which then creates the incentive for private credits and debts, and then for markets.[431]

Of course, different taxes have different charging provisions and different tax bases. But this is neither here nor there. Just as the legal norm which applies to establish an obligation to pay consideration for goods or services is the same legal norm which applies whatever the particular goods or services may be, a civil penalty (that is, a monetary obligation which is imposed without an accompanying criminal conviction) arises by way of the application of that same legal norm which applies irrespective of which particular behaviour attracted a particular civil penalty, a conviction plus criminal fine becomes payable on any number of different breaches of legal norms which prohibit particular behaviour and tortious damages are payable whatever the particular instance of negligence (or negligent driving) causes damage to another person, different tax bases arise as the product of different sets of charging provisions for different taxes but all of these charging provisions give rise to a debt, due to the Crown, under the UK Tax Code, which debt is enforceable by reason of the lawfulness of the demand for money alone (the amount ascertained by the charging provisions). Finally, this individuated notion of taxation is wholly compatible with the proposition that a taxing jurisdiction must be lawfully asserted (for example, so as to be consistent with the vires of the taxing body and with international law obligations, such as, for the present, European Union Law).

---

[431] AM Innes, "*What is Money*" (May 1913) Banking Law Journal 377 at 398, citied in David Fox and Wolfgang Ernst (ed) *Money in the Western Legal Tradition: Middle Ages to Breton Woods* (OUP 2016) 639.

Examples of monetary demands: application of the individuated notion of taxation

It is fruitful to take two different examples of a monetary demand made under statute to ascertain their status as a "tax" or "not a tax" using the individuated notion of taxation developed in Section II, to see whether the answer in each case is convincing or counter-intuitive.[432] The objects of scrutiny are National Insurance Contributions and the "Enablers Provisions" in Finance Act (No2) 2017 ("FA(No2) 2017"). The application of the individuated notion of taxation developed here concludes that National Insurance Contributions are indeed "taxes", whereas the monies collected under the Enablers Provisions are not.

National Insurance Contributions are "taxes"

The decision of the Outer House in *Metal Industries (Salvage) Ltd v Owners of the S.T. Harle*[433] holds that National Insurance Contributions, at least in France (for the purpose of ascertaining whether, as a foreign revenue law, any claim to such was enforceable in Scotland) are indeed "taxes" or, at least are of a "like" nature, albeit assuming that Scots Law applies in the same way as French Law. The reasoning is unsound, for the reasons given below; however, the

---

[432] Incidentally, the Central London congestion Charge is clearly a "tax": the Greater London (Central Zone) Congestion Charging Order 2004, Article 4(1) (not actually cited by Bowler and Ostik (no 386)) states that 'a charge [of an amount determined under the Order]…is imposed…in respect of each charging day on which a relevant vehicle is used or…kept on one or more designated roads at any time during charging hours'. Article 4(1) identifies the debtor (taxpayer), the tax base (the taxable event being the use or keeping of a "relevant vehicle" on a "designated road") and the tax rate (the quantum is determined by other provisions). There is no question of any service provided in consideration. The obligation arises by reason of the lawful demand alone (triggered by the taxable event of the use or keeping of a relevant vehicle on a designated road). No other legal consequence which attaches to the act-situation of the use or keeping of relevant vehicles suggests that the legal norm in play is a prohibition against such usage or keeping of relevant vehicles. Neither is that usage or keeping of relevant vehicles any sort of tort, so the obligation to pay does not arise on the breach of any legal norm. The Central London Congestion Charge fits easily into the Razian formulation of "there is a law that one must pay a sum of money by reason of the lawfulness of the demand for that money alone". Equally the Benthamite directive/sanctional analysis would formulate Article 4(1) as "you should pay the quantified charge when demanded, otherwise you will have enforcement proceedings and possible interest and penalties raised against you", whereas the Kelsenian canonical formulation would yield this articulation: "the sanction applier is permitted to raise enforcement proceeding and possibly interest and penalties if you do not pay the lawfully demanded sum specified by Article 4(1)". Put another way, the capacity of someone liable under Article 4(1) is that of a debtor alone, not that of someone who must pay for goods or services, or someone who has breached a legal norm (and thus subject to a penalty, criminal fine or to a claim for damages).

[433] 1962 SLT 114.

conclusion that National Insurance Contributions are a form of "taxation" is correct and is consistent with the individuated notion of taxation set out above. It is this proposition which is made good below.

The categorisation of National Insurance Contributions as being, or not being, a "tax" has the very practical consequence that, in England, the Limitation Act 1980, section 37(2)(a) exempts the recovery of any "tax or duty" from its provisions, in particular section 9(1), which provides that an action for the recovery of any debt must commence within six years from when the cause of action accrues. Thus, if National Insurance Contributions are not "taxes" for the purposes of section 37(2)(a) of the Limitation Act 1980, the provisions of the Limitation Act, apply rather than those of TMA 1970 which have specific (different) time limits for amendments and discovery assessments to be made.[434] The distinction between an obligation to a "tax" and to a "non-tax" obligation is even starker in Scotland where for non-tax liabilities, the prescription (limitation) period is twenty years.[435] Despite the decision in *Metal Industries (Salvage) Ltd v Owners of the S.T. Harle*, orthodoxy seems to be that National Insurance Contributions are not "taxes".[436]

Orthodoxy is, however, incorrect. National Insurance Contributions fall squarely within the individuated notion of taxation delivered in Section II. an obligation to pay National Insurance Contributions (of any description: see below) is properly articulated, using Raz's individuating operator, as a legal norm that "there is a law that where a tax unit has been identified as sufficiently connected to a taxing body so as to fall within the taxing body's jurisdiction, a tax

434 Which, in turn, depend on whether an enquiry has been raised into a self-assessment return.

435 Prescription and Limitation (Scotland) Act 1973, section 7 ("the long negative prescription").

436 For example, see Andrew McGee, *Limitation Periods* (6th edition Sweet & Maxwell 2010) 586, paragraph 27.011.

base has been computed and a tax rate applied so as to yield a taxable amount due from that tax unit, that tax unit must pay that taxable amount".[437]

The Social Security Contributions and Benefit Act 1992 ("SSCBA 1992"), Section 1, provides that, broadly, National Insurance Contributions finance benefits which are payable out of the National Insurance Fund[438] and also go towards the cost of the National Health Service.[439]

That National Insurance Contributions fund the payment of contributory benefits[440] and contribute towards the cost of the National Health Service is merely to say that National Insurance Contributions are hypothecated (at a relatively high level of abstraction, since they fund all of the benefits which are payable out of the National Insurance Fund and the National Health Service). There is no reason in principle (and no authority to suggest) that hypothecation denatures an obligation from being a "tax" obligation, so that such hypothecation, in the case of National Insurance Contributions, are neither here nor there. This observation is, of course, distinct from any discussion as to whether a monetary charge is consideration for goods or services.

As demonstrated below, an obligation to pay National Insurance Contributions is a monetary obligation. Thus, in the absence of hypothecation having any conceptual relevance to the identification of an obligation to pay National Insurance Contributions as a "tax obligation" or some other type of monetary obligation, the only other juristic feature of an obligation to pay National Insurance Contributions is that entitlements to benefits from the National Insurance Fund depend on certain "contribution conditions" being satisfied[441] which gives rise

437 *Mutatis mutandis* for the Benthamite Directive/sanctional analysis and the Kelsenian canonical form.
438 Section 1(1)(a).
439 Under Section 162 of the Administration Act: Section 1(1)(b).
440 Exclusively so, such benefits may not be funded out of "*other public money*" (Section 1(1)(a) of SSCBA 1992).
441 SSCBA 1992, Section 21.

to the prospect of whether an obligation to pay National Insurance Contributions is analogous to an obligation to pay a form of monetary consideration for the provision of services (benefits from the National Insurance Fund, or from the National Health Service), albeit on a compulsory basis. The short answer is "No".

Of the different types of National Insurance Contributions, only two, "Class 1" and "Class 2" confer any entitlement to benefits (because of the satisfaction of the contributions conditions in SSCBA 1992, Section 21). The other "classes" of National Insurance Contributions, Class 1A, Class 1B, Class 3, Class 3A and Class 4 do not confer any entitlement to any sort of benefit out of the National Insurance Fund at all.

Class 1 National Insurance Contributions are payable by employed "earners" and employers. Employed earners pay "primary" National Insurance Contributions[442] and employers pay "secondary" Class 1 contributions.[443] The quantum of Class 1 primary and secondary National Insurance Contributions is calculated by reference to "earnings".[444] The rates of National Insurance Contributions are applied by reference to a statutory formula.[445] Thus, in respect of primary Class 1 National Insurance Contributions, there is an identified tax unit (employed earners[446]) a computed tax base,[447] and includes the application of various rates. This is a classic formulation of a "taxation" obligation. What, however, of the contributions conditions in SSCBA 1992, Section 21? The following points may be made: first, in respect of the benefits payable out of the National Insurance Fund, an employed earner may not receive any of these

442 SSCBA 1992, Section 6(1)(a).
443 Ibid, Section 6(1)(b), Section 7.
444 Defined in SSCBA 1992, Section 3(1).
445 SSCBA 1992, Section 5, Section 6, Section 6A, Section 8 (in respect of primary contributions), Section 9, Section 9A (in respect of secondary contributions).
446 SSCBA 1992, Section 3, Section 6 for employed earners and primary contributions and Section 7, in respect of employers and secondary contributions.
447 Section 6, Section 6A, Section 8 for primary contributions and Section 9, Section 9A for secondary contributions.

benefits at all, except the State Pension.[448] The only benefit which will inevitably accrue to a payer of National Insurance Contributions is the State Pension, provided a person lives long enough to claim the pension. But there can be no conceptual attribution made of any particular National Insurance Contribution payments to the funding of a State Pension, as opposed to other benefits (and *a fortiori* to the financing of the National Health Service). Thus in no intelligible sense is the payer of National Insurance Contributions in an apt situation analogous to that of the purchaser of goods or services. Put another way, the contributions conditions in SSCBA 1992, Section 21 are not part of the Razian "complete" law which articulates the nature of an obligation to pay National Insurance Contributions but rather they form a separate legal norm which stipulates that benefits out of the National Insurance Fund, which are subject to contributions conditions, will not be paid unless those contributions conditions are satisfied. A Razian formulation which articulates an obligation to pay Class 1 National Insurance Contributions as "there is a law that one must pay primary contributions, or secondary contributions, as the case may be, as a compulsory payment for certain benefits out of the National Insurance Fund which may or may not be payable and the ultimate payment of the State Pension" is not an accurate description of the obligation for primary contributors and secondary contributors of Class 1 National Insurance Contributions, where the aggregate contributions fund different types of benefit and also the National Health Service. At most the Razian individuating operator would, if the contributions conditions in SSCBA 1992, Section 21 were to be incorporated into the legal norm which describes an obligation to pay National Insurance Contributions as "there is a law that one must pay National Insurance Contributions (primary contributions, or secondary contributions, as the case may be), which contributions

[448] The National Insurance Fund yields the following benefits: Employment and Support Allowance; Incapacity Benefit; Invalidity Benefit; Jobseekers Allowance; the State Earnings Pension Scheme (for fully funded Class 1 contributors from 1978 to 2002); the UK State Pension; Unemployment Benefit; Widowed Mother's Allowance; Widowed Parent's; Widow's Pension; Sickness Benefit (these being the benefits for which the contributions conditions must be satisfied).

will finance certain benefits which may or may not be payable to the payer and also finance a State Pension, which will be payable to the payer and the National Health Service, which will be available to the payer to use, or not, as the payer chooses". But this is simply a (cumbersome) way of expressing the hypothecation of a monetary receipt, which has nothing to say about whether the obligation to pay that monetary sum is a "tax" or not.

The same analysis holds true for Class 2 contributions, which arise as an obligation for a fixed sum for "self-employed earners", where the self-employed earner has profits[449] above a threshold,[450] for each week that the self-employed earner is in work.[451] The tax unit is identified (the "self-employed earner");[452] the tax base is computed.[453] The only benefits to which a payer of Class 2 National Insurance Contributions would be entitled are the Employment and Support Allowance (but not a Jobseekers Allowance) and the State Pension. The same analysis as to why the contributions conditions specified in SSCBA 1992, Section 21 do not render the obligation to pay Class 1 primary or secondary contributions as consideration payable for services (the payment of benefits) holds good for the same reasons in respect of Class 2 contributions.[454]

So far as Class 1A National Insurance Contributions are concerned, these are payable in respect of benefits in kind and do not confer any entitlement to benefits at all and thus (despite the hypothecation of the receipt of Class 1A National Insurance Contributions) cannot be seen to be anything other than a "tax" obligation.[455] Similarly, Class 1B contributions relate to certain PAYE settlements concluded by employers and do not attract any entitlement to any benefits

449 "Relevant profits": SSCBA 1992, Section 11(1)-(3).
450 The "Small Profits Threshold": Ibid, Section 11(4).
451 Section 11(2).
452 Section 11(1).
453 As a fixed sum per week of self-employed work: Section 11(2); the fixed-sum major of the Class 2 National Insurance Contributions obligation means that there is no relevant "rate" which need be applied.
454 For an employer, qua secondary contributor, the analogy would be the payer of compulsory monetary consideration for services (benefits) provided to an employee.
455 SSCBA 1992, Section 10 – Section 10ZC.

at all. Thus Class 1B contributions are also "tax" liabilities.[456] In relation to Class 3 National Insurance Contributions, these are voluntary contributions which increase an entitlement to the State Pension and thus do not represent any form of "obligation" and are irrelevant to the analysis[457] and Class 3A contributions are voluntary contributions for those who have reached the State Retirement Age before 6th April 2016, so long as the payments have been made between 12th October 2015 and 6th April 2017.[458] Like Class 3 contributions, Class 3A contributions do not represent any form of "obligation" and are irrelevant to the categorisation of National Insurance Contributions as "tax" liabilities or otherwise. Finally, Class 4 contributions are payable in respect of a proportion of profits of self-employed persons which are '… derived from the carrying on or exercise of one or more trades professions or vocations …'[459] which are payable '… in the same manner as any income tax which is, or would be, chargeable in respect of those profits …'.[460] Class 4 contributions do not attract any entitlement to benefits from the National Insurance Fund.[461] an obligation to pay Class 4 National Insurance Contributions is clearly a "tax" obligation for the same reasons as those discussed above in relation to Class 1 and Class 2 National Insurance Contributions.

The observation that 'the distinction between taxation and insurance contribution is that taxation is or should be related to assumed capacity to pay rather than to the value of what the payer may expect to receive, while insurance contributions are or should be related to the value of the benefits and not to the capacity to pay'[462] is not an adequate explanation as to why National Insurance Contributions (in particular Class 1 and Class 2) are not liabilities to "tax". The reference to "benefits received", insofar as it is a reference to hypothecation, is irrelevant.

456 Ibid, Section 10A.
457 Ibid, Section 13 – Section 14.
458 Ibid, Section 14A – Section 14C.
459 Ibid, Section 15(1)(a).
460 Section 15(2).
461 SSCBA 1992, Section 15, Section 18A.
462 Social Insurances and Allied Services (Cmd 6404 (The Beveridge Report) paragraph 272).

As for taxation having a necessary connection to the "capacity to pay", no such necessary connection exists, particularly since taxation, in its mode or nature, may well be fixed at rates which those subject to it would find difficult to pay (especially if taxation were designed as a social disincentive, for instance). It is, therefore, misconceived to consider National Insurance Contributions as anything other than "taxation" in a classic sense.

That an obligation to pay National Insurance Contributions is indeed a tax obligation has been observed as long ago as 1982.[463] The basis of objections to NIC being a "tax" appears to be the absence of any connection between the payment of National Insurance Contributions and any entitlement to resultant benefits.[464] Such an analysis establishes that an obligation to pay National Insurance Contributions are not any form of compulsory involvement in the acquisition of insurance premiums (or any analogous transaction) but it requires the analysis of Chapter 3, Section I and an individuated notion of taxation to establish why an obligation to National Insurance Contributions is indeed a tax obligation. It follows that the orthodox traditional approach which treats an obligation to pay National Insurance Contributions as falling outside a "tax" obligation is incorrect (with, for example, the limited but potentially far-reaching consequence that limitation periods in England which apply to "taxation" would apply to National Insurance Contributions liabilities).[465]

---

463 David Williams, *Social Security Taxation* (London, Sweet & Maxwell 1982).

464 Thus Williams observes that if National Insurance Contributions were indeed a compulsory payment of insurance premiums, one would expect that (i) all payers of contributions would be entitled to benefits (ii) only those who paid National Insurance Contributions would be entitled to benefits and (iii) all such benefits would be funded out of the pool of contributions (paragraph 1-30, page 20). Williams, observes, however, that (i) not all contributors are entitled to benefits (paragraph 1-32, page 20-21); (ii), there are potential recipients of benefits who have not made any contributions (paragraph 1-33 to paragraph 1-34, pages 21-22) and (iii), there are many benefits which are financed out of general taxation, rather than the National Insurance Fund (paragraph 1-31, page 20) and (iv) general taxation contributes to benefits payable out of the National Insurance Fund (paragraph 1-35, page 22-23).

465 The mere labelling of a charge as a "tax" or "not a tax" is irrelevant. So taxpayers cannot attract favourable tax treatment by labelling a part-instalment of a purchase price as a "premium": *Prudential plc v HMRC* [2009] STC 2459. It has never been suggested that labelling should be conclusive if so pleaded by the Crown.

Penalties for enablers of defeated tax avoidance arrangements

The "enablers provisions" contained in the Finance (No 2) Act 2017 ("F(No 2)A 2017"), Schedule 16, despite being contained in a Finance Act, are, on the other hand, "penalties" and not any form of "tax".

The target of the enablers provisions is "abusive tax arrangements",[466] which are, in turn, defined as arrangements which

> … having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements … [and] … they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances.[467]

As to the "circumstances" which are relevant, the substantive (or intended) results of the arrangements are compared and contrasted to the "policy objectives" of the relevant tax provisions, whether the substantive or intended result '… involves one or more contrived or abnormal steps, and … whether the arrangements are intended to exploit any shortcomings in those provisions'.[468]

The notion of an "abusive tax arrangement" is thus intended to capture the sort of contrived strategy whereby, for example, a taxpayer pays an additional "premium" for an acquired insurance policy, merely to partially surrender that policy so as to extract the return of an amount equal to that premium, in circumstances in which, although the taxpayer has not suffered any economic loss at all, the relevant provisions in TCGA 1992 produced a computational capital loss.[469] However, it is noteworthy that the entry and implementation of

---

466 F(No 2)A 2017, Schedule 16, paragraph 2(1).

467 Ibid, paragraph 3(1), (2).

468 Ibid, paragraph 3(3).

469 *Mayes v HMRC* [2011] STC 1269; *Mayes* was cited as an example of the sort of (successful) abusive tax arrangement which the "general anti-avoidance provisions" contained in FA 2013, Part V, Schedules 43-43C (and the National Insurance Contributions Act 2014, Section 10) were designed to counteract, in the

such an "abusive tax arrangement" is neither tortious, nor criminal. The penalty contained in F(No 2)A 2017, Schedule 16 is, as demonstrated below, a sanction imposed for the breach of a statutorily created civil offence, which is predicated on notions of "reasonableness" and an assessment of whether an arrangement involves 'one or more contrived or abnormal steps'.[470]

A penalty arises if a person ("T") has entered into an "abusive tax arrangement" and that tax arrangement is "defeated".[471]

To take the notion of a "defeat" of an "abusive tax arrangement" first, put short, a "defeat" arises where a "relevant tax advantage" is "counteracted"[472] and that "counteraction" (in the sense of the tax advantage being denied to T) is "final".[473] Thus where HMRC make an adjustment or raise an assessment to "counteract" a "tax advantage" which is the result or intended result of an "abusive tax arrangement", a "defeat" will arise either if T (the taxpayer who entered into the abusive tax arrangement) simply concedes that the tax advantage does not arise (with or without negotiation, or litigation), or fails in litigation (whether at the stage of the First-tier Tribunal, the Upper Tribunal, the Court of Appeal/Inner House or the Supreme Court: it is irrelevant that T may succeed at one or more of these stages if the "final" decision of the courts holds the tax advantage not to arise, which results in a "defeat" for the purposes of Schedule 16, paragraph 5, paragraph 6). Indeed, if T is advised by one adviser to enter an arrangement which is an "abusive tax arrangement" and subsequently advised by a second, different adviser, that T should simply concede "defeat", it is the first tax adviser who, as discussed below, will be subject to penalties.

---

absence of the application of specifically targeted anti-avoidance provisions preventing such an unintended tax advantage from arising.

470 F(No 2)A 2017, Schedule 16, paragraph 3(2), (3).

471 Ibid, paragraph 1(a), (b).

472 By means of an adjustment of T's self-assessment return (ibid, paragraph 5) "Condition A"), or an assessment made by HMRC (ibid, paragraph 6, "Condition B").

473 Ibid, paragraph 5(1)(d), paragraph 6(1)(c).

Turning to the persons who are subject to a penalty under F(No 2)A 2017, Schedule 16, the specified persons are those who fall into one or more categories of "enablers", the most relevant category for present purposes being a person who is a "designer" of the "abusive tax arrangement".[474] A "designer" is a person who '… in course of a business carried on by that person [is] to any extent responsible for the design of … the arrangements, or … a proposal which was implemented by the arrangements',[475] where the advice either "suggested" the arrangement or an "alteration" to the arrangement with a view to secure the tax advantage which was expected to arise from the "abusive tax arrangement",[476] in circumstances where the person knew or could reasonably have been expected to know that the advice would be or was likely to be used in the design to the "abusive tax arrangement".[477] A "designer" would therefore include all or any tax advisers who were instructed to deliver tax advice on an "abusive tax arrangement", who gave advice which sought to secure the tax advantage which the "abusive tax arrangement" was intended to achieve (whether or not the tax adviser was under a professional duty to deliver such advice). The taxpayer himself (T) is expressly excluded from the penalty.[478]

The quantum of the penalty is, effectively, the fees obtained for the delivery of advice by a "designer" within paragraph 8.[479]

The "penalty" in F(No 2)A 2017, Schedule 16 cannot be described as a "tax", on any view. The person subject to a penalty (here the "designer", who is the subject of attention) is defined not by reference to juristic or personal attributes which make it legitimate for a taxing body to

474 Ibid, paragraph 8. Other "enablers" are 'managers of [abusive tax] arrangements' defined in ibid, paragraph 9; marketers of arrangements defined in ibid, paragraph 10; "enabling participants", defined in ibid, paragraph 11 and "financial enablers" defined in ibid, paragraph 12.
475 Ibid, paragraph 8(1).
476 Ibid, paragraph 8(2), (3).
477 Ibid, paragraph 8(4).
478 Ibid, paragraph 13.
479 "Relevant consideration": ibid, paragraph 15(2).

assert jurisdiction over him, but rather by reference to the very behaviour (the delivery of advice relating to an "abusive tax arrangement") which the enablers provisions seek to disincentivise. Thus there is no "tax unit" being defined in F(No 2)A 2017, Schedule 16, paragraph 8, in its definition of a "designer" but rather the identification of a person who has engaged in particular behaviour. It is the behaviour which is the target of the definition of the person who is a "designer" and nothing else. And the computation of the amount due as a penalty under the enablers provisions[480] is, quite simply, the consideration obtained for giving the advice which is thought to be disincentivised. In other words, it is the amount obtained for the provision of services which is confiscated from the "designer", where the "designer" has knowingly engaged in the disincentivised behaviour. Thus the computation of the penalty[481] identifies and penalises (by confiscating the whole of the consideration obtained by the "designer", in delivering the advice for an "abusive tax arrangement") but only if the designer knowing gives such advice., which has the purpose of "improving" a (lawful but "abusive) tax avoidance scheme.

It follows that the penalty arising under the enablers provisions does not fit into the formulation where the sum due is described, by way of the Razian individuating operator as "a tax unit [identified by reference to attributes which give rise to a sufficient connection between the tax unit and a taxing body] is subject to the computation which yields a tax base (calculated by a rate of tax)".[482] It is particular behaviour which is targeted, not the identification of a tax unit within a taxing jurisdiction whose monetary obligation is to be computed. Even the definition of the person subject to a penalty is defined by reference to behaviour (a "designer" of an "abusive" arrangement). The Razian individuating operator would formulate the enablers

480 The "relevant consideration".
481 Under ibid, paragraph 15.
482 Or any alternative formulation yielded by the Benthamite directive/sanctional analysis, or the Kelsenian canonical formulation.

provisions as "there is a law that one must not deliver advice so as to suggest, or improve (in the sense of making an unintended tax advantage more likely),an "abusive tax arrangement"; otherwise any consideration obtained for such advice will be confiscated".[483] This is particularly so when the "designer" knowingly delivers such advice.

What these case studies reveal is that a "tax" obligation may be easily identified (whether or not it is labelled as a tax obligation) and distinguished from penalties. There is no need to expressly exclude civil penalties or criminal fines from any definition of taxation, provided there is an adequate juristic definition of taxation in the first place.

Section III. A Tax Obligation is not a Property Obligation

As has been made clear above, at least in the context of the UK Tax Code, a claim for taxation is a species of money debt claim, which is not any sort of claim over the taxpayer's property (his pre-tax profits or otherwise). First, the amount taxable is not in any sense necessarily an amount over which a taxpayer has property rights. A charge to tax may arise irrespective of whether a taxpayer subject to that charge has property. So, as observed in Chapter 1, taxable receipts to calculate the tax base of traders are computed by reference to accounting treatment, not monetary receipts.[484] And deeming provisions may impute receipts where there are no receipts at all. Indeed, a taxpayer's inability to pay is irrelevant to his obligation to pay tax.[485] Neither can a tax obligation be explained as a property obligation by reference to property held at some particular time, albeit that a taxpayer must find different property (money) to pay his tax obligation when this falls due. As with other types of monetary liabilities, at least in so far as the UK Tax Code is concerned,[486] the monetary tax obligation may be funded in any (lawful)

483 And *mutatis mutandis* for the Benthemite and Kelsenian formulations.
484 Corporation Tax Act 2009, section 46.
485 *Re Toshoku Finance UK plc* [2002] STC 368 (HL).
486 See the discussion of compliance and enforcement provisions of the UK Tax Code in Chapter 1.

way, whether out of the taxpayer's own monetary resources, borrowings or by way of gift (or indeed by passing the burden on to customers, which is the very essence of an indirect tax), with the delivery of the required amount of money exhibiting money's commodity nature.[487] It follows that a tax obligation is not a property obligation but a personal obligation (being an obligation to deliver money to satisfy that obligation).

A tax imposing body has no property interest in monies paid by a taxpayer to another

One useful (and conclusive) cross check on the non-property nature of tax liabilities is the absence of any property interest on the part of the tax-creditor in the monies transferred by a taxpayer who has a tax obligation, to a transferee, who has no obligation in respect of the transfer-taxpayer's tax obligation.

A tax obligation does not create any trusts in favour of HMRC in the amount of a taxpayer's tax obligation. So a taxpayer may do what he chooses with moneys representing an amount due in taxation: In *Attorney-General v. Antoine*[488] the taxpayer used monies representing an amount that should have been paid to satisfy a Pay As You Earn ("PAYE") obligation,[489] without any legal impediment:

> … Her only authority for not paying her employees in full is the statute and the [PAYE] Regulations made under the statute. What she did with the amounts and how she dealt with the money is neither here nor there. She was not obliged to set aside actual money or to keep it in specie. She might have drawn from the bank such a precise sum as would enable her to pay each and every one of her employees' net amount of the weekly wages less the appropriate deduction of tax under the tables. She was not bound to go through the form either of having the money or of doing anything with it. She might have dealt with it by the simple process, as I illustrated in the course of the argument, of paying over what the employee was entitled to receive apart from deduction of tax. If one can imagine the case of anybody

487 See Chapter 2.

488 31 TC 213.

489 An employer who deducts amounts under the PAYE Code in respect of an employee's tax obligation has a primary tax obligation to pay this amount under the UK Tax Code (although the payment by the employer of course satisfies the employee's tax obligation): See the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"), Part 11 (sections 682-712) and the Income Tax (Pay As You Earn) Regulations SI 2003/2682.

> receiving 21s. a week, all she had to do was to hand him a sovereign. She need not have had a shilling at the pay table-she need not of necessity have had a shilling in her possession otherwise than at her bank. In these circumstances I am completely at a loss to understand the argument that the total of the deductions in any one week could be said to be at the risk of the Revenue because she chose to put the relevant number of shillings, or whatever the items were, in a bag and put the bag in a safe. It is not suggested that the Revenue knew anything at all about that. I am dealing with a case in which it was not suggested that they were parties in any way to this method of dealing with the money**.** *It was not money ear-marked or held in such a way that it would be a breach of her duty to them if she subsequently took the money out and used it for her own purposes. She was just as free to deal with it as the old ladies would have been free in the old days who used to put the church collection money in one purse and the money for the butcher or baker in another.*[490]

The point has been consistently endorsed: '…Money collected as value added tax, though expressly added to the invoice as value added tax, is not thereby impressed with any trust in favour of the commissioners…'.[491]

Withholding Taxes

Withholding taxes are taxes imposed on the recipient of monies which statute requires the payer to withhold at source (so that the payer behaves as a tax collector). The payer may well have a primary obligation to account for the amount statutorily required to be withheld at source but the amount paid accounts for the tax which the tax raising body considers the recipient ought to bear. Primary examples in the UK Tax Code include the PAYE provisions[492] and the requirement of the payers of certain types of interest[493] to deduct tax at source. Deduction of tax at source does not import any notion of a proprietary obligation in respect of a tax

---

490 Per Croom-Johnson J at 219, emphasis added.

491 *In re John Willment (Ashford) Ltd* [1980] 1 W.L.R. 73. See also *Sargent v Customs and Excise Commissioners* [1994] 1 W.L.R. 235 'The tax when collected from the customer by the supplier or his agents is not impressed with any trust in favour of the commissioners…' and *21st Century Logistic Solutions Ltd v Madysen Ltd* [2004] STC 1535 at [19]: '… The VAT element in the price paid for a supply is not held on trust by the supplier for HMCE. A taxable supplier's only material obligations under the VAT legislation are to account for VAT at the end of each accounting period and to keep proper records. The use of the VAT element of sale proceeds on some purpose other than payment of VAT due to HMCE is therefore not unlawful.'

492 Discussed above, in relation to *Attorney-General v. Antoine.*

493 Income Tax Act 2007 ("ITA 2007"), section 868, section 874.

obligation. The payer must withhold a sum of money. The payer has an obligation to HMRC (under the UK Tax Code) to pay that amount. But the payer has the same obligation in relation to that amount as the debtor of any money debt, that is to deliver monetary assets equal to the specified amount, (precisely because there is no trust imposed in favour of HMRC in respect of monies withheld to satisfy a tax obligation). This is the import of *Attorney-General v Antoine.* As for the payee, the payer's statutory obligation to withhold tax at source has nothing to say about the juristic nature of the payee's tax obligation. If the payer does not withhold tax at source, the payee will not have paid his tax obligation (via the withholding mechanism) and the payee will (subject to time limits) be liable to assessment on his receipt. That obligation will be satisfied by the delivery of money (however financed) as for any money debt. So taxes withheld at source do not at all affect the analysis that a tax obligation is a personal monetary obligation, not a property obligation.

A Word on a Tax Creditor's rights

The asymmetry of property rights which may be held by a creditor of a money debt and the absence of any property obligation on the part of a debtor was discussed in Chapter 2. The monetary nature of a tax obligation as indistinguishable from other money debts is confirmed by a brief consideration of the creditor's rights in respect of a tax obligation, which (contrary to the views of some) demonstrates that a tax creditor does indeed have property rights in a tax claim, in contra-distinction to the purely personal monetary obligation of a taxpayer-debtor, which has been discussed above. This analysis also reinforces the observation made in Chapter 1 that taxation need not be paid to a public body.

Looking first at a tax creditor's rights, contrary to the conclusions of both Markby[494] and Raz,[495] the executive (here HMRC) does indeed have property "rights" in a tax claim. Markby

494 William Markby, *Elements of Law* (5th edition, Clarendon Press Oxford 1996) 93-94.
495 Raz, *The Concept of a Legal System* (no 424) 31-32.

considers that a "right" cannot be enforced by the person who claims to hold that right, so that private law rights which are enforceable by sanctions imposed by, say, a State, have no analogue in the powers exercisable by the State itself:

> [T]he citizen … can only exercise and enjoy [his right to recover his debt] at the will and pleasure of another, namely, the Sovereign who conferred it upon him. The Sovereign power, on the other hand, which imposed the tax or fine, is also the power which enforces it. Moreover, the right to payment of a debt, which is possessed by the citizen, is not only dependent on the will of another for its existence and enjoyment, but it is limited by that will; and nothing but the external Sovereign power can change the nature of the legal relation between debtor and creditor. Whereas in the case of a tax or fine, although the Sovereign has expressed in specific terms, therefore for the moment limited, the duty to be performed towards itself, it follows from the nature of sovereignty that by the sovereign will the duty maybe at any moment change … It is impossible to conceive of a right of so fluctuating a character … because we cannot conceive of a right as changing with the will of its holder.[496]

While the distinction between a "right" which has a defined scope (by reference to the limited occasions a sanction may be imposed to enforce it) and a "power" which is theoretically undefined because the holder of that power may simply alter the scope of that power at any time is perfectly intelligible, this distinction does not exclude the creditor's part of a tax claim, in the hands of the holder of that tax claim, from this notion of "rights".

In concluding that a tax creditor has no rights (because the power to collect the tax is effectively at the absolute will of the tax collector), Markby ignores the separation of powers. In the context of the UK Tax Code, the duty to pay taxes is not within the province of HMRC but rather in the hands of the legislator (Parliament). Thus so far as a taxpayer and HMRC are concerned, as the debtor and creditor of a tax obligation, the obligation (duty) of a taxpayer to pay tax is not aptly described as a duty which "may at any moment change", at least so far as HMRC are concerned. Indeed, Raz, who agrees with Markby that a Sovereign cannot hold

[496] Markby, *Elements of Law* (no 494) 31-32.

"rights" because such Sovereign "rights" are within the exclusive and complete control of the Sovereign,[497] himself observes[498] that it may be that even a person who is subject to a duty, the scope of which is within the "exclusive and complete" control of the counter-party, is "relatively immune" from the latter's interference, since considerations such as cost, legislative time and public opinion may all militate against such a change in scope.[499] But, says Raz, "rights" acquired by "facts" rather than from sources comprised of legal material cannot be "rights" within a proper juristic meaning of the term, for essentially the same reasons as Markby: 'having legislative power acquired by facts excludes having legislative rights'. This is because 'rights serve to distinguish behaviour which is legally permissible or effective from behaviour which is not'.[500] But again, an observation that Parliament cannot have rights (because of a notion of continuing sovereignty) does not mean that HMRC, as a government agency, cannot have rights. This is what explains the notion of vires and the limits of a duty to pay tax, which does not extend to taxation levied *ultra vires*. So there is no absence of a "right" on the part of a creditor as the correlative of a taxpayer's duty to pay taxes, to distinguish a tax debt from any other type of monetary debt.

The property nature of a tax creditor's right to collect the money due from a taxpayer is made even clearer when the prospect of assignment of that right is contemplated.

From the perspective of a taxpayer who has a creditor's right to repayment of tax, it is clear following that a taxpayer is entitled to assign its claim for repayment of VAT.[501] This mirrors the types of money debt discussed in Chapter 2, where a creditor has a property right (and the prospect assumes a property right held by a tax creditor, otherwise there could be no debt to

497 Raz, *The Concept of a Legal System* (no 424) 31.
498 Ibid, 31.
499 Ibid, 31-32.
500 Ibid.
501 *Midlands Co-Operative Society Ltd v The Commissioners of HMRC* [2008] EWCA Civ 305.

assign). So far as the prospect of a tax imposing body assigning the right to payment of a tax obligation is concerned, the notion is not fanciful. In the United States, the Internal Revenue Service ("IRS") has assigned its right to collection of certain overdue federal tax debts to four private contractors. The programme, authorised under a federal law enacted by the United States Congress, enables these designated contractors to collect, on the government's behalf, outstanding inactive tax receivables.[502] It is submitted that it is not possible for HMRC to assign any right of tax collection without further legislative authority, since TMA 1970 requires payment of taxes to be paid to HMRC, thus specifying the identity of the creditor of tax debts, with specific statutory enforcement powers, importing an element of delictus personae into a tax obligation. But there is no constitutional principle to prevent Parliament from enacting a statutory regime similar to that of the United States to permit such an assignment. Thus a taxpayer would be paying monies raised as tax to a non-public body (which may use those monies how it likes). The point made here is that such a prospect (which has come to fruition in the United States) results in tax monies being potentially payable to non-public bodies (with no statutory power to raise taxes), which when combined with the analysis of *Aston Cantlow* in Chapter 1, means that any definition of taxation which confines the notion of taxation to monies raised by or payable to public bodies as a matter of general principle is unsustainable.

A contrast between a tax obligation and compulsory purchase

Yet another way to expose the distinction between a tax obligation and a property obligation is to contrast a tax obligation with a compulsory purchase of property. Penner[503] provides a comprehensive contrast between the conceptually (and mutually exclusive) notions of expropriation of property and a money debt claim for taxation. For Penner, expropriation is a

---

502 Authorized under a federal law enacted by Congress in December 2015; Section 32102 of the Fixing America's Surface Transportation Act ("FAST" Act) requires the IRS to use private collection agencies for the collection of outstanding inactive tax receivables.

503 Penner, *Misled by Property* (no 269) 75-83 80.

forced sale of precisely identified property 'not a claim for any amount of value', because 'that property is what the expropriating authority wants'.[504] Consequently, the question of compensation at least arises: '…it is analytic of expropriation that it can be compensated, so that it is true by definition that the person who is compensated can wind up with the same wealth following expropriation as before it'.[505] Expropriation is a claim by the expropriator to a particular asset already owned by someone else.[506] Finally expropriation must identify a particular individual as the owner of the specific property subject to the expropriation claim.[507]

By contrast, taxation is not a "forced sale". The state supplies services at the behest of the population. It is legitimate to demand payment to fund those services.[508] There is no question of "compensation" for the payment of taxes: '[t]he whole point of taxation is to transfer wealth to the taxing authority. It would be nonsense for the taxing authority to return an equivalent amount in compensation, for that would defeat the whole point of the exercise'.[509] This approach has judicial endorsement: *MacCormick v FCT*.[510] It is easy to agree with Penner that the notion of taxation as a form of compulsory purchase is unintelligible, which provides further confirmation that a tax obligation is not any sort of property obligation at all. Penner's analysis simply confirms the observations made in this Section of Chapter 3 by reference to the funding of tax liabilities, the absence of any property rights for a tax imposing body in a taxpayer's monies paid over to another, withholding taxes and the prospect of an assignment of a tax creditor's rights.

---

504 Ibid, 80.
505 Ibid, 79.
506 Ibid, 80: '[e]xpropriation can only take place in respect of property one already has…'.
507 Ibid, 81, in contrast to taxation which is 'individual taxpayer independent'.
508 Ibid, 83-84; this is analogous to a committee deciding to spend money after a majority vote. It has already been observed above that tax to finance services is distinct from a charge for services and that tax may well serve other functions. Penner's point that there is no "compensation" as a quid pro quo for taxation remains good whatever function is served by taxation.
509 Ibid, 79.
510 (1984) 158 CLR 622, 640.

Common law taxes

All of the points made in Chapter 3 are made in the context of taxes imposed under the UK Tax Code. But these points apply equally to the type of common law tax discussed in *Aston Cantlow*. As pointed out by the Court of Appeal, the obligation was personal, not a property obligation (the title to the property which specified the obligation merely provided the mechanism by which the obligation was imposed). A tax unit was identified (the owner of a particular property), the tax base established (the amount required to repair the Church property).[511] The compliance and enforcement mechanisms are of course different to taxes imposed by statute but the point remains that if the notion of "tax" requires to be construed and applied, the individuated notion of taxation delivered in Chapter 3 may perfectly intelligibly yield a charge made under common law.

Section IV. Treatment of the term "taxation" in the authorities

The United Kingdom domestic case law

If the notion of "taxation", as a matter of the domestic United Kingdom case law, was different to the individuated notion of taxation set out above, that individuated notion would have to be modified, so as to represent a correct description of the "complete law" of taxation, for the purposes of the United Kingdom Tax Code. As it happens, the authorities, in the conclusions of the relevant United Kingdom domestic case law, if not always in the rhetoric or reasoning, are consistent with the individuated notion of taxation set out above, namely that taxation is a purely personal, financial obligation which may be individuated in Razian form on the basis that 'there is a law that one should pay a tax obligation which arises by reason of the

[511] Which quantification meant that the notion of a tax rate was redundant.

identification of a tax unit, the establishment of a tax base and the setting of a tax rate alone, which together confer the status of a debtor on the taxpayer'.

To distinguish the United Kingdom case law which, one way or another, has some relevance to the notion of "taxation" from the case law which discusses "taxation" in the context of Article 1 of Protocol 1 of the European Convention of Human Rights ("ECHR"), the former is referred to as 'the domestic United Kingdom case law'.

United Kingdom domestic case law offers little guidance on the juristic meaning of "taxation"

The term "taxation" has not been analysed with any coherence in the authorities. And, as discussed in Chapter 1, the law of taxation and the notion of "taxation" in particular are under-theorised. Snape suggests[512] that the notion of "tax" has been addressed in a number of authorities.[513] In fact only three of these authorities concern the meaning of the term "tax" (two of these cases are in the context of a private law instrument in each case, a lease: *Brewster v Kidgill* and *Baker v Greenhill*; the third, *IRC v Oce van der Grinten*, concerns the meaning of "tax" in UK Tax Code). A further authority, not citied amongst the cases referred to by Snape, which does address the notion of taxes (or, at least, the term '[sums] payable in respect of taxes or other charges of a like nature…'[514]) is *Metal Industries (Salvage) Ltd v Owners of the S.T. Harle*,[515] although the analysis is not enlightening. To these authorities should be

---

512 John Snape, *The Political Economy of Corporation Tax: Theory, Values and Law Reform* (Hart 2011) 135, footnote 35.

513 Namely, in *Brewster v Kidgill* (1687) 88 ER 1239; *Baker v Greenhill* (1842) 114 ER 443; *Coltness Iron Company v Black* 1 TC 287; *Bowles v Bank of England* [1913] 1 Ch 57; *Attorney-General v Wilts United Dairies*, supra; *Ormond Investment Company v Betts* 13 TC 400; *Scott v Russell* 30 TC 394; *Congreve v IRC* [1976] QB 629;; *Daymond v South West Water Authority* [1976] AC 609; *IRC v Oce van der Grinten* [2000] STC 551; *Aston Cantlow* (Snape wrongly refers to *Aston Cantlow* as overruled by the House of Lords: see the discussion in Chapter 1 as to why this is incorrect, at least in relation to the meaning of "tax"). *Partington v Attorney-General* (1869-70) LR 4 HL 100 is also considered below for completeness.

514 Foreign Judgments (Reciprocal Enforcement) Act 1933, section 1(2)(b).

515 1962 SLT 114.

added, of course, *Aston Cantlow*,[516] discussed in Chapter 1. There are thus five authorities altogether which address the notion of "tax" as part of the ratio. Certain of the other authorities yield (not always illuminating) observations about the features of taxation, although not as part of any ratio which yields the meaning of the term "tax" (*Coltness Iron Company v Black*; *Congreve v Home Office; Daymond v South West Water Authority*). And the other cases cited by Snape are no more than illustrations of the principle that without the necessary vires, the Crown cannot impose any monetary charge (whether a "tax" or any other type of financial imposition: *Bowles v Bank of England; Ormond Investment Company Limited v Betts*; *Attorney-General v Wilts United Dairies*; *Scott v Russell*). *Partington v Attorney-General* has nothing to say about tax at all, other than an endorsement of the literal approach to taxing statutes criticised above.

Turning to the five authorities in which the notion of "tax" was central, in *Brewster v Kidgill*, the question was whether the assignee of the rights of a tenant, who had an obligation to pay a rent charge '… without any deduction or abatement of tax, charge or payment out of, for or concerning the said rent' had to pay free of future "taxes". The answer was "Yes". The Court observed that '… When "taxes" are generally spoken of, *if the subject matter will bear it*,[517] it shall be interpreted as Parliamentary taxes given by the Crown'.[518] The Court continued that '... When taxes are generally spoken of, they are to be understood as the highest and most eminent sort of taxes, those in aid of the Crown.'[519] The contra-distinction was with taxes 'improperly called taxes, as rates for the church and poor, sewers'.[520] *Brewster v Kidgill* is thus authority for the proposition that taxes are "generally" statutory ("Parliamentary") taxes

516 *Aston Cantlow and Wilmcote with Billesley Church Council v Wallbank* [2002] STC 313 (EWCA) ("Aston Cantlow").
517 Emphasis added.
518 *Brewster v Kidgill* (1687) 88 ER 1239, 1239.
519 Ibid, 1239.
520 Ibid.

but only if 'the subject matter will bear it', that is, the Court expressly left room for other types of "taxes" (including common law taxes, as endorsed in *Aston Cantlow*: see Chapter 1 and further below). In *Baker v Greenhill*, a lessee paid rent and had also made a payment which arose from a common law obligation to repair a bridge, which common law obligation had been codified in statute.[521] The lessee considered that he was not liable for the payment to repair the bridge but the lessor relied on a clause in the relevant lease which provided that rent should be paid free of '… land tax and all other taxes and deductions whatsoever, either Parliamentary or parochial, taxed or imposed'.[522] The landlord's argument was, therefore, that the common law obligation for bridge repairs was a "Parliamentary tax", so that when the lessee paid rent, the lessee must pay an amount equal to the aggregate of the rent and the obligation, so that the rent was "free" of the bridge repair obligation. Denman CJ held that the relevant obligation was not a "Parliamentary tax" on the basis that the common law obligation had already been imposed, prior to the enactment of the relevant statutes, which merely supplied a more convenient mode of raising the necessary funds.[523] This meant that the lessee should not have paid the amount representing the bridge repairs obligation and was entitled to recover it. *Baker v Greenhill* is nothing more than authority for the proposition that a common law obligation which is codified does not become a "Parliamentary tax", in the context of a lease.[524] And in *IRC v Oce van der Grinten*, to avoid economic double taxation, on the payment of a dividend from a UK company to the Netherlands parent of that UK company, the UK Tax Code conferred a tax credit on the recipient Netherlands parent company but retained a right to

521 *Baker v Greenhill* (1842) 114 ER 443, 464-466.
522 Ibid, 463.
523 Ibid, 470.
524 *Baker v Greenhill* is weak authority for the proposition that the notion of common law taxes was implicitly endorsed by the Court, as the codification of the existing common law obligation was said to not result in a "Parliamentary" tax, which suggests that the Court acknowledged that the common law obligation indeed imposed a "tax". However this is an ancient judgment which is analytically light and concerned the obligation of the tenant and not, in any sense, the juristic notion of taxation.

charge UK tax[525] on an amount equal to the amount of the dividend plus the tax credit less 5%. The 5% abatement of the tax credit was '… in substance a reduction in what the parent gets compared to what it would have got if there was no abatement. … As a result of the abatement the Crown ends up with more money and the taxpayer less … Most people would call the difference a "tax" and I do too.'[526] In other words, there was a financial liability in the hands of the dividend-paying UK company under the UK tax code which might have been reduced by a tax credit but, to the extent it was not so reduced, resulted in a charge to "tax". This analysis is unexceptionable. The charge to ACT was made under the UK tax code and was a "tax" on any view. The increase in the charge to ACT (by reason of the abatement of the tax credit) resulted in a higher charge to "tax". Thus *Oce van der Grinten* does not advance the notion of what a tax is at all. Further, in *Metal Industries (Salvage) Ltd v Owners of the S.T. Harle*,[527] the Outer House of the Court of Session had to address the question of whether compulsory contributions by an employer in respect of state schemes for health insurance and family benefits were properly categorised as a foreign revenue, or fiscal obligation (and thus unenforceable in Scotland in a claim for preferential ranking in a multiplepoinding by the French Government, on the basis that '…no state will act as a tax gatherer for another or permit its courts to be used for that purpose…'[528]). Observing that the status of the contributions as a tax or otherwise depended upon '…the substance of the claim as viewed by a Scottish Court applying Scots Law'[529], so that the observations made by the Outer House are relevant generally to the UK Tax Code, Lord Cameron held that the contributions were '..nothing more

525 In the hands of the dividend-paying UK company, the tax was known as "Advance Corporation Tax" ("ACT").

526 Per Jacob J at 960.

527 *Metal Industries (Salvage) Ltd v Owners of the S.T. Harle* [1962] SLT 114 (*"Metal Industries"*).

528 Per Lord Cameron at 116, citing *Government of India v Taylor* [1955] AC 491; the position is, of course now different for EU Member States.

529 Since conflicts of law principles required the *lex fori* to determine the issue: *Metal Industries* (no 527) 116.

nor less than taxes or at least charges or impositions of a like nature…'.[530] Lord Cameron reached his conclusion on the basis that the payee was effectively the French Government, the charges were levied under Government authority, the levies were compulsory and the charges were state-administered, the charges being '…compulsory contributions levied by state organisations, both of which come under the authority of a minister, and which are contributions due by employers in respect of state schemes for health, insurance and family benefits…'.[531] Lord Cameron effectively applied, therefore, the four stage test adopted in Canadian jurisprudence criticised in Chapter 1 ('(1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose')[532]. However, as observed above, Lord Cameron expressly reserved his position as to whether the charges were "taxes" or 'charges or impositions of like nature', so *Metal Industries (Salvage) Ltd v Owners of the S.T. Harle* cannot be taken as any sort of binding authority on the juristic attributes of a "tax", quite apart from the decision of the Court of Appeal in *Aston Cantlow* which endorses the notion of a common law tax. And the charges would certainly be captured as "taxes" on the individuated notion of taxation delivered in Section I, on the basis that the charges were monetary sums imposed on the employers which arose by reason of the lawful demand alone (so that the capacity of the employers was that of a debtor alone).

What emerges so far is that the cases which address the notion of "tax" as part of their respective ratios say virtually nothing about the juristic attributes of a tax obligation. None are inconsistent in their ratios with the individuated notion of taxation set out in Section I. All of these cases concerned a monetary obligation and a demand for payment of that money.

---

530 Which meant that the charges were unenforceable under general conflicts principles and were outside the scope of the Foreign Judgments (Reciprocal Enforcement) Act 1933, section 1(2)(b).

531 *Metal Industries* (no 527) 117

532 *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357, per Duff J at 363.

There is no indication in any of these authorities that the monetary demand was made of the debtor in any other capacity than that of debtor. In *Baker v Greenhill*, the demand was not made of the tenant to the lease qua tenant as part of the quid pro quo to enjoy the leased subjects but rather as an obligation to pay for repairs to the bridge (as in *Aston Cantlow*, where the obligation was not imposed qua owner to enjoy quiet possession of the property but to pay for the repairs to the Church property). In both cases, the title to the property did not determine the capacity of the debt-obligation but rather was the mechanism by which the obligation was imposed. None of these cases expressly confines the notion of taxation to a demand by a public body or one which applies monies for public purposes. *Brewster v Kidgill* leaves open the notion of a common law tax, without saying anything at all about what a "tax" might be. The same is true of *Baker v Greenhill*. *IRC v Oce van der Grinten* says little more than that a mechanism which reduces a tax relief leads to an increased charge to "tax", whereas *Metal Industries (Salvage) Ltd v Owners of the S.T. Harle* applies the four stage Canadian *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* test but only to reach a conclusion that the application of that test yields a charge which may be a "tax" or perhaps a charge of a "like nature".

Turning to *Aston Cantlow*, as already observed in Chapter 1, the Court of Appeal (undisturbed by the House of Lords) held (as part of the ratio of the Court of Appeal's decision) that the notion of taxation accommodated a common law charge. And the Court of Appeal's conclusion, that the obligation imposed a tax, not an incident of property ownership, at paragraph [40] of the judgment of the Court of Appeal, is clearly correct. The obligation did not relate to the property owned but to an entirely different property, that belonging to the Church. And although the Court of Appeal did not put it in these terms, as observed above, that the relevant obligation was contained in the title to the property did not make the obligation a property obligation; the title was, as observed above, merely the means by which the common

law obligation was imposed. The analogy drawn by the Court of Appeal to council tax, which equally did not arise in the hands of a person unless that person had some sort of interest in real property is therefore apposite (and correct).[533] Thus *Aston Cantlow* is not only the most recent authority concerning the meaning of "taxation", it is the most satisfying, revealing as it does, the distinction between a monetary personal obligation and a property obligation, while accommodating the prospect of a common law tax, all of which is consistent with the individuated notion of taxation set out in Section I.

Turning to the authorities which offer observations as to the nature of taxation, albeit not as part of any ratio, in *Coltness Iron Company v Black*, the issue was whether the cost of sinking a mine was a capital expense, nothing more. The observation of the Court that '… the effect of those framing a taxing Act is to grant to Her Majesty a revenue …'[534] does not give any content to the meaning of the word "tax". The fact that an obligation to pay arises and is paid (and therefore confers a "revenue") was not only irrelevant to the question as to whether the expenditure in question was a capital expense or on revenue account, but also does nothing to explain how the "revenue" provided to the Crown differs from other types of "revenue" which arise in different situations (such as a criminal fine). In *Congreve v Home Office*,[535] the Court of Appeal held that there was no vires[536] to permit the Home Office to revoke existing licences, acquired at £12, in order to be able to issue new licences for £18 and equally no vires to refuse an application for a licence at £12, albeit that the applicant for the licence had an existing licence, as yet unexpired, so that the applicant could acquire a new licence at £12, rather than for £18, had the applicant waited for the existing licence to expire. There is, quite simply, no mention of the notion of "tax" in the judgments of either Lord Denning or Lord Justice Roskill.

---

533 In fact, this reasoning replicates that of Lord Denning in *Congreve v Home Office*, in relation to an obligation to pay a television licence fee: see below.

534 Lord Blackburn at 316.

535 *Congreve v Home Office* [1976] QB 629.

536 Under the Wireless Calligraphy Act 1949, Section 11(4).

However, the observations of Lord Denning that the licensing power, in respect of televisions, imposed a financial obligation on the owner of a television, while not forming part of the ratio, suggests that a TV licence is indeed a tax, on the individuated notion of tax formulated in Section I above. Lord Denning observed that the owner of a television had property rights in that television, including a right to view programmes as an incident of those property rights, so that the licensing power was one which 'invades a man in the privacy of his home and it does so for financial reasons so as to enable the Minister to collect money for the revenue'.[537] If this description of the licensing power is correct, then the obligation to pay a TV licence fee is indeed one which arises in the capacity of a debtor alone, in that it is the lawfulness of the demand which, of itself, creates the financial obligation, which means, in turn, that the licence is indeed a "tax".[538] Be that as it may, *Congreve* cannot be viewed as authority for any notion of the term "tax" or "taxation". *Daymond v South West Water Authority* is interesting as the House of Lords divided on the basis of two quite different formulations of the legal norm which arose from the proper construction of the Water Act 1973, section 30. The issue was whether a person who was unconnected to the water system was liable to be subjected to water charges. The majority held "no"; the minority held "yes". The Water Authority had power, under section 30, to '…fix, and to demand and recover such charges for …services performed, facilities provided, or rights made available…as they think fit…[and] shall have regard to the cost of providing those services, providing those facilities or making available those rights'.[539] The minority, Lord Wilberforce and Lord Diplock, considered that the legal norm in play was a charge for a lawful demand for monies, which monies were applied to fulfil the statutory obligations of the Water Authority to provide 'services [etc]'. So a complaint by the subject

537 *Congreve v Home Office* (no 535) 649.

538 A contrary view would be that the obligation to acquire a licence in fact qualifies the property rights of the owner of a television, so that those property rights are only made whole upon the acquisition of a licence.

539 Section 30(3), (4).

of a demand who was unconnected to the water that he was unconnected to the drainage system and therefore was outside the scope of the class of persons subject to a lawful demand was irrelevant: '…an objection by an individual ratepayer that he gets no ersonal or specific benefit from [a wide range of services which had a "local purpose of a public nature"], though commonly made and understandable enough, is not consistent with the system. You cannot object to paying rates because you are childless or because your street is unlit or because your street gets flooded when it rains.'[540] The Razian legal norm derived from section 30 by the minority was, therefore, 'there is a law that you must pay water service charges, whether or not you personally benefit from the use to which the monies you pay are put'.[541] Lord Wilberforce derived this formulation of the relevant legal norm by reference to the relevant legal material (the text of section 30, the fact that section 30 replaced a system of general rates in the General Rates Act 1967 which raised monies for services with 'a local purpose of a public nature'[542] and that there might be some benefit from the services in question to even those who were unconnected to the water system as the reception and disposal of foul water made the area 'more salubrious and pleasant'.[543] This notion of an obligation arising by reason of a lawful demand for monies simpliciter (irrespective of any specific benefit arising from a particular application of the monies demanded) is precisely the individuated notion of taxation set out in Section I and aptly described as '…rating or local taxation' by the other member of the minority, Lord Diplock.[544] The majority gleaned a very different legal norm from the text of section 30, however. There was no inference, according to the majority, that the Water Authority had inherited the powers of the predecessor rating authority, so any analogy of the

---

540 *Daymond v South West Water Authority* [1976] AC 609, per Lord Wilberforce at 634D-E.

541 And mutatis mutandis for the Benthamite directive/sanctional analysis and the Kelsenian canonical formulation, which would refer to enforcement proceedings if the charges were not paid.

542 Ibid, 634A

543 Ibid, 634A.

544 Ibid, 646C.

water charges to rates was mistaken.[545] The relevant legal material, the text of section 30, did not yield the proposition that '…benefit was the test of chargeability'[546] (thus sidestepping any enquiry as to whether the Appellant received any indirect benefit, despite being unconnected to the water system), which left the text of section 30 to deliver the legal proposition that '…[the Water Authority] can charge only those who avail themselves of its services, facilities and rights'.[547] Put another way, the connection between an obligation to a charge and the provision of services by the Water Authority '…looks like [section 30 contemplated] a commercial bargain in respect of particular services performed, facilities provided or rights made available'.[548] The charges were not '…what is in truth a tax, namely an impost under the head of services, facilities and rights, upon persons who do not directly receive such advantages'.[549] The legal norm the majority derived from section 30 was 'there is a law that if (and only if) you directly receive actual services from the Water Authority, you must pay charges fixed by the latter (that is, effectively consideration for services received)'.[550] The minority and the majority seem to have an identical analysis as to the nature of a "tax" (the imposition of a monetary obligation where the obligation is not a function of goods or services received); it is the organisation of the relevant legal material into the form of a legal norm (the construction of section 30, in the light of its legislative history) which divided them. *Daymond* illustrates the importance of the capture of legal material into legal norms to reveal (in that case) the scope and nature of particular duties (to pay monies to the Water Authority), although of course, neither the decisions of the minority, nor the majority, were expressed in those terms. *Daymond* also reveals a notion of "tax" (a monetary obligation which is distinct from a charge

545 Ibid, Viscount Dilhorne at 641A.
546 Ibid, Viscount Dilhorne at 641C; the minority would probably agree.
547 Ibid, Viscount Dilhorne at 640G
548 Ibid, Lord Kilbrandon at 650H-651A.
549 Ibid, Lord Kilbrandon at 651C; see also Lord Edmund-Davies at 657D.
550 Bentham would articulate a directive element that "you must pay for water charges received" and a sanctional element that the payment would be enforced if not paid. Kelsen would articulate the enforcement of the sanction for non-payment as a permission to the sanction applier to apply enforcement proceedings.

for services which confer a direct benefit to the recipient) which is consistent[551] with the individuated notion of tax set out in Section I, although it bears repetition that *Daymond* is not any sort of binding authority for the meaning of the term "tax".

Turning to the cases in which the only question was one of vires, *Bowles v Bank of England* established the unremarkable proposition that tax cannot be levied until there is legislative authority to do so (and, prior to the enactment of the Provisional Collection of Taxes Act 1968 was not authorised by a resolution of the Committee of the House of Commons for ways and means), which proposition does not tell us what a "tax" is. *Ormond Investment Company v Betts* is even less helpful. Lord Buckmaster opined that tax is '... kindred to the creation of a penalty or the establishment of a crime'[552] which was irrelevant to the issue in question (the tax treatment of foreign dividends) and for the reasons given in Chapter 1, demonstrably wrong. Other than this the only observation of any juristic relevance was in relation to the 'cardinal principle relating to Acts that imposed taxation upon the subject, a principle well known to common law and that has not been or ought not to be weakened, namely, that the imposition of a tax must be in plain terms', which observation is irrelevant to the juristic attributes of taxation.[553] And in *Scott v Russell*, the only comments relating to "tax" are those which echo the notion that there must be clear and plain authority to impose tax, before an obligation occurs.[554] In *Attorney-General v Wilts United Dairies*, the Court of Appeal held that there was no vires to charge a licence fee for the right to distribute milk. That was the beginning and the end of the matter. The case is thus analogous to *Congreve v Home Office* and does not take the

---

551 Although the individuated notion of taxation set out in Section I is more precise, in that it distinguishes a tax obligation from all other types of monetary obligation and property obligations, by drawing attention to the obligation arising from the lawfulness of the demand for money from a properly assessable tax unit alone.

552 *Ormond Investment Company v Betts* 13 TC 400, 426.

553 Ibid, 425, echoing the observations of Lord Blackburn in *Coltness* at 316, Lord Atkinson at 434 and Lord Wrenbury at 438.

554 Ibid, Lord Simonds at 424.

matter of what is, or is not, a "tax" any further at all. Indeed the notion of "tax" is not mentioned at all in *Attorney-General v Wilts*, any more than it was in *Congreve v Home Office*.

This survey of the domestic United Kingdom case law shows that the individuated notion of tax submitted as the correct juristic description of a tax obligation is, at its lowest, consistent with authority, at least in England. This individuated notion of tax is also consistent with Australian authority, albeit not with Canadian authority, as demonstrated in Chapter 1.

Case law concerning Article 1 of Protocol 1 of the ECHR consistent with taxation as a personal monetary (not a property) obligation

Case law on Article 1 of Protocol 1 of the ECHR, concerning primarily, but not exclusively, retrospective tax legislation, provides support for the individuated notion of taxation set out in Section I in a different way to the United Kingdom domestic case law discussed above. Whereas the United Kingdom domestic case law offers little in providing a theoretical basis for arriving at a juristic notion of taxation (but is, in its conclusions, consistent with the individuated notion of taxation set out in Section I), the case law on Article 1 of Protocol 1 relating to retrospective taxation (both of the European Court of Human Rights and the United Kingdom courts) exposes the distinction between a notion of taxation as a purely personal monetary obligation and taxation as a claim on property or possessions. The European Court of Human Rights has consistently endorsed an approach which acknowledges the purely personal, monetary nature of a tax obligation. The United Kingdom case law on Article 1 of Protocol 1 is more ambivalent in its reasoning in certain cases but reaches (in every case) a conclusion which is consistent with the notion of taxation as a personal monetary (and not a property) obligation.

Article 1 of Protocol 1 provides:

> … Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public

> interest and subject to the conditions provided for by law and by the general principles of international law. … The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions and penalties.

The case law of the European Court of Human Rights relating to taxation and Article 1 of Protocol 1, in defining what constitutes a relevant "possession", provides (albeit implicit) confirmation, not only of the purely personal monetary nature of an obligation to taxation but also that a claim to taxation is not a claim which interferes with proprietorial interests in money but rather a claim to require a taxpayer to deliver money (howsoever sourced). The distinction is important, indeed critical. As has been demonstrated in Chapter 1 and Chapter 2, a claim for the satisfaction of any right to money, as regards a creditor who makes a claim against a debtor, is a claim for the delivery of money, so that money retains a reducible commodity nature. That the money (in the absence of specific provision, whether as a matter of private law or by statute) may be sourced in any lawful way by the debtor, including borrowings, or gifts, reinforces this proposition. Chapter 3, Sections I, II and III have confirmed that this proposition is also good as respects a tax obligation. It follows that a breach of Article 1, Protocol 1 ought not to be predicated on the notion of any interference with proprietorial interests in specific monetary assets, at least as regards taxation. A taxpayer is being asked to procure the delivery of money (which would include money paid by another who agrees to satisfy the taxpayer's obligation), not to deliver money, which at the time that the taxation obligation must be discharged, belongs to him.[555]

[555] Indeed a taxpayer may ask a third party to satisfy the taxpayer's tax obligation, albeit that may, in turn, raise questions as to the taxation of that settlement in the taxpayer's hands.

The European Court of Human Rights case law, on Article 1 of Protocol 1 of ECHR: consistent with taxation being a personal, monetary (not a property) obligation

The European Court of Human Rights has consistently treated the relevant "possession", for Article 1, Protocol 1 purposes, as the right to a particular tax treatment. Thus, in the case of retrospective legislation, the relevant issue in each case is whether that particular right, to a particular tax treatment amounted to a relevant "possession" (and even if it did whether the deprivation of that "possession", in the form of retrospective legislation which removed the prospect of a particular tax treatment, in the hands of a particular taxpayer, and replaced it with another was nevertheless proportionate and within the margin of appreciation conferred on signatory States).

In *A, B, C and D v the United Kingdom*,[556] FA 1978, Section 31 was enacted to deny a deduction for trading losses which arose under an avoidance scheme, involving partnerships dealing in commodities futures, so as to create artificially generated trading losses. FA 1978, Section 31 applied to any scheme of arrangement after 6th April 1976, so that this provision was retrospective in the sense of having an effect on a consummated transaction which occurred prior to its enactment. Cases, prior to the enactment of the 11th Protocol to the ECHR, were considered by the European Commission of Human Rights, before proceeding to the European Court of Human Rights.[557] The Commission of Human Rights concluded that

> … The applicants' tax liabilities for the relevant year had not been settled before Section 31 was applied to them and especially that the applicants' claim relates to their entitlement to have an artificial loss, incurred in a non-commercial venture, taken into account in reducing their existing tax liabilities which in themselves they did not dispute … Taking these factors into account, together with the explanation which the United Kingdom Government provided when Section 31 was enacted to the effect that retrospection was necessary if this form of avoidance was to be effectively prevented, the Commission concludes that the application of Section 31 to

556 Application No 8531/79, reported in (1981) 23 DR 203.

557 After enactment of the 11th Protocol, all cases proceeded directly to the European Court of Human Rights.

> the applicants was not excessive having regard to the provisions of Article 1 of the First Protocol of the Convention.[558]

Thus the object of scrutiny was not any proprietorial interest in monetary assets but rather an 'entitlement to … an artificial loss' (that is, to a particular tax treatment). It was this *entitlement to a particular tax treatment* (not proprietary rights to monetary assets) which was the relevant "possession".[559] This is consistent with the nature of a tax obligation (and generally most monetary liabilities) being an obligation to deliver money, lawfully obtained (whether out of one's own resources, or by borrowing, or with the benefit of a gift). In *Voggenberger Transport GmbH v Austria*[560] the question as to whether a retrospective withdrawal of a tax exemption (and whether the aim pursued by the relevant legislation and the width that the margin of appreciation afforded to signatory States) was considered in relation to, again, the applicant-taxpayer's *right to a particular tax treatment* (that is the application of the exemption from road taxes) and the Commission '… seems to have been particularly influenced by the fact that the company was aware that it had to pay road taxes in advance, and that these road taxes were subject to subsequent review [so that] … the company had to take into account that the final amount of tax might be higher than its original estimate'.[561] In *NAP Holdings UK Limited v United Kingdom*,[562] in rejecting the taxpayer's argument that FA 1988, Section 115 should have had retrospective effect (because it returned the law to that which most taxpayers had thought was the case, prior to the decision of *Westcott v Woolcombers Limited*),[563] the European Court of Human Rights again scrutinised the right to a particular tax treatment, in

---

558 Application No 8531/79 (no 556) 209.

559 And to which questions of proportionality were addressed. Ibid.

560 Application No 21294/93.

561 Baker, "*Retrospective Tax Legislation and the European Convention on Human Rights*" [2005] BTR 1 at 4 summarising the ECHR tax case law: *Voggenberger* would not have come to the writer's attention without Baker's summary. Baker does not discuss these cases in the context of their relationship to the juristic nature of taxation, (Baker rather analyses the extent to which the European Court of Human Rights endorses retrospective legislation).

562 Application No 27721/95.

563 [1986] STC 182.

the hands of the applicant-taxpayer, in assessing the margin of appreciation of the UK Government, not any *proprietorial* right to particular monetary assets. Further, in the National and Provincial *Building Society, Leeds Permanent Building Society and Yorkshire Building Society v United Kingdom*,[564] retrospective legislation preventing building societies from bringing claims similar to that of the *Woolwich Equitable Building Society*[565] considered the relevant Article 1, Protocol 1 "possession" to be the right to a claim in restitution, which had been struck out by the retrospective legislation in question. It was not a case in which a proprietorial interest in monetary assets was the relevant "possession".

In *M.A. and 34 Others v Finland*[566] the retrospective legislation in issue subjected profits on the exercise of stock options to income tax (at higher rates), rather than to capital gains tax, which change was adopted on 21st November 1994, so as to apply to any stock option profits which arose on an exercise or assignment of the stock options as from 16th September 1994, where the issuing company had permitted early exercise or assignment of the stock options, so as to have those profits which arose on early exercise, or assignment, taxed to (lower) capital gains tax (which permission had been given as originally the change from income tax to capital gains tax was to take place only as from the exercise of stock options from 1st January 1995).[567] The Court held that

> … The fact that the legislation applied retroactively in the applicants' case [does not] constitute per se a violation of Article 1 of Protocol 1, as retrospective legislation is not as such prohibited by that provision. The question to be answered is whether, in the applicants' specific circumstances, the retrospective application of the law imposed an unreasonable burden on them and thereby failed to strike a fair balance between the various interests involved.[568] … The Court considers that the applicants did not have an

564 Application Nos 21319/93, 21449/93 and 21675/93.
565 [1990] STC 682.
566 Application No 27793/95, followed by the European Court of Human Rights in SB & Others v Finland (Application No 30289/96).
567 In other words the variation which permitted early exercise or assignment were designed to defeat the prospective change in tax treatment.
568 The Court's approach mirrors that of Fuller to retrospectivity in Lon Fuller, *The Morality of Law* (New Haven and London, Yale University Press 1964).

> *expectation protected by Article 1 of Protocol 1* that the tax rate would, at the time when they would have been able to draw benefits from the stock option program according to the original terms of the program, i.e. between 1st December 1998 and 31st January 2000, be the same as it was in 1994 when the applicants subscribed the bonds. The Court does not exclude that the situation might have to be assessed differently, had the law applied (which it did not) even to cases in which the exercise of the stock options was possible before 1st January 1995 according to the relevant terms and conditions of the stock option programs in question. In such a situation, in which the applicants did not find themselves, taxation at a considerably higher rate than that in force on the date of the exercise of the stock options could arguably be regarded as an unreasonable interference of expectations which interference was prohibited by Article 1 of Protocol 1.

Thus the Court distinguishes between stock options issued on terms that they could be exercised early (where early exercise would be before any change in tax treatment), which gave rise to a particular expectation on behalf of the option holders and stock options which had to be varied to accommodate early exercise, or assignment, where the expectation that the tax rate on profits arising from early exercise, or assignment, which were permitted only by a variation of the transfer of the stock option. The former expectation may well be protected by Article 1, Protocol 1, whereas the latter was not. In both cases it is the expectation as to tax treatment that was the relevant "possession", not a proprietorial interest in money.[569]

More recently, the European Court of Human Rights held in *Kopeckŷ v Slovakia*[570] that, for the purposes of Article 1, Protocol 1, a "possession" can be an existing 'asset or a claim'; the "claim" was not merely the existence of a "genuine dispute" or "an arguable claim" but rather 'where the proprietary interest is in the nature of a claim it being regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it'.[571] Thus, insofar as the relevant possession is an "expectation", it must, seemingly, be sufficiently uncontroversial that the case law (or,

569 As pointed out by Baker, "*Retrospective Tax Legislation"* (no 561).
570 (2004) 41 EHRR 944.
571 Paragraph [52].

presumably, if clear enough, statutory provision) is "settled". As it happens, the European Court of Human Rights held that a claim for restitution of confiscated coins (the confiscation occurring upon the conviction of an offence), which would have to be established by judicial proceedings, was insufficiently established so as to qualify as an "asset" (and therefore as a "possession") for Article 1, Protocol 1 purposes.[572] The nature of the expectation is, therefore according to the European Court of Human Rights, one which is, by and large uncontroversial so as to qualify for a "possession". Thus the expectation of a tax treatment must be sufficiently uncontroversial so as to qualify as a "possession". As a final example of the expectation approach, in *NKM v Hungary*[573] the European Court of Human Rights upheld that a Hungarian civil servant had a legitimate expectation, sufficiently juristically grounded, that she would receive a statutory guaranteed payment, so that a 98% tax rate on part of her severance pay was confiscatory and deprived her of a "possession" (her legitimate expectation).

The consistent approach of the European Court of Human Rights that the relevant Article 1, Protocol 1 "possession" is an expectation to be taxed in accordance with ECHR rights, not a proprietorial interest in money (after all, as set out in Chapter 1, a taxing authority, in common with most money creditors, is unconcerned, except in specific "non-recourse" circumstances, whether a debtor has money or not). This approach is wholly, in turn, consistent with the individuated notion if taxation set out in Section I.

United Kingdom case law on Article 1 of Protocol 1 of ECHR: conclusions (but not the reasoning) consistent with taxation as a personal(not property) monetary obligation

By contrast to the case law of the European Court of Human Rights, the approach of the United Kingdom cases veers between treating the Article 1, Protocol 1 "possession" as a right to monetary assets and an expectation of a particular tax treatment, without any principled basis

572 Paragraph [58] of the judgment of the Court.
573 [2013] ECHR 430.

for the former.[574] In *R (Huitson) v HMRC*[575] FA 2008, Section 58 contained a retrospective element which denied the claimant, according to the claimant's case, double taxation relief. The Court of Appeal held that the claimant did not have a sufficiently established claim to tax relief to give rise to any legitimate expectation which would attract protection under Article 1, Protocol 1. In *Huitson*, it was the expectation which was the alleged "possession" for Article 1, Protocol 1 purposes:

> … The nature of the "claim" asserted has to be examined. The "claim" to tax relief under the double taxation agreement is one which has neither been accepted by HMRC nor has it been made out in any tribunal of courts. All that has been established is the existence of a genuine dispute about whether the scheme based on the claim for tax relief under the double taxation agreement worked.[576]

This approach reflects that of the European Court of Human Rights in the cases discussed above.

In *R (ToTel Limited) v First-tier Tribunal Tax Chamber (HM Treasury interested party)*[577] the question was whether the obligation to pay assessed VAT, as a precondition of bringing an appeal against a VAT assessment contravened Article 1 of Protocol 1. The High Court[578] assessed the nature of the "possession" as, in effect, the substance of the dispute:

> In the present case the [High Court] cannot identify … [a right to claim deduction of input VAT as legitimate expectation of obtaining the effective enjoyment of a property right which amounted to a possession]. Whether or not the claimant has complied with all the conditions for claiming input tax is the substantive issue between the claimant and the Commissioners. Until

---

574 Although *Aston Cantlow* applied the HRA 1998, *Aston Cantlow* is not considered further in this section of Chapter 3, as it has already been observed above that *Aston Cantlow* distinguishes between a monetary personal obligation and a property obligation (at paragraph [40] of the judgment of the Court of Appeal. There is no further analysis in *Aston Cantlow* which contributes to the discussion of the cases concerning Article 1, Protocol 1 developed in this section of Chapter 3. It is suffice to say *Aston Cantlow* is consistent with the individuated notion of taxation set out in Section I.

575 [2011] STC 1860.

576 Per Mummery LJ at paragraph [69], with whom Sullivan and Tomlinson LJJ appeared.

577 [2011] STC 1485.

578 The decision was reversed on other grounds by the Court of Appeal: [2013] STC 1557.

> that issue is resolved it is difficult to see how the claimant can have a legitimate interest which could amount to a property right.[579]

Thus *ToTel* adopts the same approach as *Huitson* (and is consistent with the approach of the European Court of Human Rights) that the relevant "possession" is the expectation of a particular treatment (in the case of *ToTel*, a right to deduction of input tax) and it is the juristic solidity of this expectation which was to be scrutinised as to whether it did or did not amount to a relevant "possession" for Article 1, Protocol 1 purposes.

However, in *APVCO 19 Limited and Others v HM Treasury and Another*,[580] the Court of Appeal identified the proprietary right to money as the relevant "possession" and asked whether this proprietary right was a relevant "possession" for Article 1, Protocol 1 purposes. Lady Justice Black observed that it was the nature of this proprietary right to money which was treated in a "subtly different"[581] manner by each of Lord Justice Vos and Lord Justice Floyd, in their respective enquiries as to whether there was a relevant Article 1, Protocol 1 "possession".

> The routes by which Floyd LJ and Vos LJ conclude that the appellants have failed to establish that an A1P1 claim are, I think, subtly different. Vos LJ focuses on whether the money can be said to be a possession. In essence, he considers that the fact that, at the relevant time (namely at the time of the legislative changes), it was impressed with an arguable claim by HMRC prevents this. Floyd LJ focuses on whether, assuming the money is properly classed as a possession, the appellants have been deprived of it, and concludes that they have not established this. If they are right in their argument about the efficacy of their scheme, they have indeed been deprived of it by the legislative changes; if not, they were going to lose it anyway by operation of the existing statute. Arguably being right is not sufficient to establish the required deprivation.

579 Simon J at paragraph [122].
580 [2015] STC 2272.
581 Paragraph [80].

Lady Justice Black agreed with both judgments. The Court of Appeal held, subsequently, in *R (Rowe) v HMRC*,[582] that 'in agreeing with Vos LJ on the "possessions" point, therefore, it seems that Black LJ summarised the ratio of the majority decision by saying that because, at the time of the legislative changes, the claimants' money was impressed with an arguable claim by HMRC it was prevented from being a "possession".'[583]

APVCO 19 Limited thus alters the scrutiny of the Article 1, Protocol 1 "possession" from an expectation to be taxed in accordance with ECHR rights to a proprietary interest in monetary assets which may be "impressed" with a claim held by a taxing authority. The rhetoric of this analysis is irreconcilable to the proposition, set out above, that monies are not impressed with any trust in favour of a taxing authority, although the Court of Appeal's analysis is clearly metaphorical. It may well be that the question of whether there is an "expectation" which is sufficiently uncontroversial as to amount to a "possession" capable of protection under Article 1, Protocol 1, which is consistent with the rhetoric and conclusions of the European Court of Human Rights (and the approach of the Court of Appeal in *Huitson* and *ToTel*) would generally (if not always) yield the same answer as whether a proprietary interest in money is impressed with a strong enough claim held by a taxing authority so as to lose the protection of Article 1, Protocol 1, since the juristic solidity of an "expectation" to a particular tax treatment is simply the other side of the coin from the strength of the claim which "impresses" a proprietary interest in money. However, the former approach is far preferable, since, for the reasons given in Chapter 1 and Chapter 2 of this Thesis (as confirmed in relation to taxation specifically in Chapter 3), a creditor's claim to the satisfaction of a monetary debt is not correctly (or sensibly) viewed as any sort of proprietary obligation on the part of the debtor. And a focus on the proprietary interest in money may well give rise to an incorrect analysis. A further point which

582 [2018] STC 462.
583 Paragraph [183] per Lord Justice McCombe.

arises is that if the correct Article 1, Protocol 1 "possession" is an expectation to be taxed in a manner compliant with the ECHR, rather than a proprietary interest in monetary assets, the jurisdiction of the First-tier Tribunal is very different in its assessment of a complaint that a particular tax provision is non-Article 1, Protocol 1 compliant. If the relevant "possession" is an expectation, the First-tier Tribunal has, of course, a duty to construe the relevant tax provision consistently with that expectation[584] (the content of which is informed by notions of the legitimacy of that expectation by reference to notions such as proportionality), so that the First-tier Tribunal would be confronted with having to assess a form of legitimate expectation on the part of the taxpayer (albeit in the ECHR sense, not in any United Kingdom Public Law sense). But if the relevant "possession" is a property interest in money, the scrutiny shifts to the proportionality of the taxing authority's claim (by retrospective legislation or otherwise) to that money, the legitimacy of any expectation on the part of the taxpayer to be taxed in any particular way would be outside the jurisdiction of the First-tier Tribunal and a taxpayer would have to seek a declaration of incompatibility in the High Court. Thus a correct assessment of the nature of a tax obligation (a personal monetary obligation, not a property obligation) has important practical consequences, not merely (important) theoretical considerations.

Nevertheless, the focus of attention remained upon the taxpayer's interest in money in *R (Rowe) v HMRC*. In *Rowe*, the Court of Appeal held,[585] that the object of scrutiny in the exercise to ascertain whether or not there is a relevant "possession" for Article 1, Protocol 1 purposes was a taxpayer's proprietorial interest in monetary assets (cash or credits in bank accounts).[586] *Rowe* concerned Accelerated Payment Notices ("APNs") and Partner Payment Notices ("PPNs"), served by HMRC under FA 2014. The two regimes[587] were designed to 'deprive

584 HRA 1998, section 3; *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
585 See paragraph [161] per McCombe LJ.
586 See paragraph [169].
587 Summarised at paragraph [6] per Arden LJ.

taxpayers of the benefit of the statutory provisions on self-assessment, which is that normally a taxpayer is able to claim the effect of [a] tax advantage [arising from, in particular, avoidance schemes] until any enquiry and subsequent appeal … is resolved'. The Court of Appeal summarises the regime at paragraph [8] where, put short, in relation to arrangements which had been disclosed under disclosure obligations known as "DOTAS"; an APN/PPN have to specify "disputed tax", which the taxpayer was required to pay (prior to any appeal to determine whether that tax was or was not due).[588] Importantly, HMRC are required '… to be positively satisfied on the information [delivered to them under the relevant provisions] that he then has that the scheme is not effective'.[589] Thus an APN/PPN requires a taxpayer who, inter alia, has implemented a scheme which is disclosable under DOTAS, to pay "disputed tax" to HMRC, before the effectiveness of the scheme, or otherwise, has been determined judicially. The High Court, in *Rowe*, had held that there was simply no interference with any "possession" at all:

> … The decision in *APVCO 19 Limited and others v HM Treasury & Another* is binding, clear authority that legislation can remove without any interference with possessions, a taxpayer's argument that had existed previously (that HMRC was not entitled to the money) with the result that tax is payable and the money is in the taxpayer's hands must fund it. In those circumstances it is difficult to see why a different result should follow from the lesser step of legislation requiring the disputed sum to be paid on account of the tax (but without finally determining liability) pending resolution of the dispute.[590]

Lord Justice McCombe disagreed: 'It seems to be a difficult contention, in principle, to say that the cash was not [the appellants'] property or "possessions". It is difficult to see how the State's

---

588 See paragraphs [6]-[9].

589 Paragraph [62] per Arden LJ, by reference to FA 2014, Section 221(3), (4); paragraph [67]; paragraph [75].

590 Paragraph [125] per Simler J [2015] EWHC 2293; the reference to the Article 1, Protocol 1, "possession" being an "argument" available to the taxpayer, although correct in principle, seems to be incorrect as the focus of attention in *APVCO 19 Limited* was, as observed above, a proprietorial interest in money, not any "expectation" (or "argument").

statutory claim prevents the cash being in "possession" of the appellants.'[591] Lord Justice McCombe had previously observed, that

> under the APN/PPN procedures, [the State] simply has a money claim conferred on it by legislation, in anticipation of a possible future tax liability which may or may not be established. It makes no claim whatsoever until the money is taxed. The appellants' money remains their money. It is to turn the matter around 180 degrees to say that it is the appellants who only have a *claim* to keep their money because of the demand made by the State to deprive them of it.[592]

Thus Lord Justice McCombe analyses the Article 1, Protocol 1 application as follows: (i) the appellants in *Rowe* had a proprietary interest in monetary assets; (ii) the APN/PPN procedure, in requiring the appellants to pay "disputed tax" interfered with that proprietary right, in respect of a "future tax liability which may or may not be established"; thus it followed that '… a simple demand by the State to an individual that he/she should pay money, without more, would mean that (pro tanto) the individual's cash and possession was no longer either his/her property or possession for the purposes of [Article 1 of Protocol 1]'.[593] The nature of the "possession" in *Rowe*, therefore, was different to the nature of the alleged "possession" in *Huitson*, and *ToTel* (in these cases, the alleged "possession" being, as observed above, an expectation as to a particular tax treatment). And although the majority approach of the Court of Appeal in *APVCO 19 Limited*, held that '… because, at the time of the legislative changes, the claimants' money was impressed with an arguable claim by HMRC it was prevented from being a "possession",'[594] under the APN/PPN regime, the money claimed by HMRC is not "tax".[595] Lord Justice McCombe observes[596] that in cases such as *APVCO 19 Limited*, the relevant retrospective legislation gave rise to an "unimpeachable" claim on the part of HMRC,

---

591 Paragraph [169].
592 Paragraph [168].
593 Paragraph [170].
594 Paragraph [183] of Lord Justice McCombe's judgment.
595 Under the APN/PPN regime, the money claimed is "disputed tax".
596 At paragraph [184].

which "impressed" any monetary assets in the hands of the taxpayer with a claim for HMRC, stemming from that retrospective legislation but a case where a '… sum may be required to be paid "up front" ', whether or not there is an obligation and whether or not there is even a *claim* to the money as "tax" was '… a rather different situation'. This analysis is difficult to follow. As has already been observed, Arden LJ held that HMRC were required to reach a view as to whether the relevant scheme, disclosed under DOTAS, was effective (so that it was only if this view determined that the scheme was ineffective would an APN/PPN be issued). Thus HMRC had a "claim" that the taxpayer's taxation liability was wrongly self-assessed (and the APN/PPN required the "disputed tax" to be paid "up front"). Thus (any) money in the hands of a taxpayer subject to an APN/PPN was "impressed" with a financial claim of exactly the same juristic nature (that is a lawful demand for money) as the taxpayers in cases such as *A, B, C and D v The United Kingdom,* albeit that the retrospective legislation in *A, B, C and D v The United Kingdom* asked for "tax", whereas the APN/PPN regime asked for a different (lawful) financial payment, namely, "disputed tax". In the case of the APN/PPN regime, the State has made a financial demand upon a taxpayer on the basis of the preliminary view that a particular arrangement undertaken by the taxpayer was ineffective. There is no principled reason to suggest that this preliminary view does not "impress" a taxpayer's monetary assets, any more than a demand for "tax" which quarrels with, one way or another, with a taxpayer's self-assessment of their own tax obligation. Although McCombe LJ did not put it this way, McCombe LJ may have meant that a claim by HMRC for "disputed tax" is not a claim which can be described as one which is to "secure the payment" of taxes (because the "disputed tax" has not yet been assessed). However, any such defence of the approach of McCombe LJ is vulnerable to the observation that the relevant text of Article 1, Protocol 1 does not require that the 'right of a State to enforce such laws as it deems necessary … to secure the payment of taxes …' must do so by defining all protected payments as "taxes". To "secure" the payment

of "taxes", the text of Article 1, Protocol 1 permits a State to enforce 'such laws as it deems necessary', which would include, for example, security arrangements, to which the APN/PPN regime is analogous. Indeed it is difficult to distinguish payments demanded under the APN/PPN regime from VAT, which has to be deposited in court before a VAT appeal may be undertaken, in a controversial area of VAT law, as in *ToTel*, to the payments demanded under an APN/PPN, in relation to an avoidance scheme, disclosed under DOTAS. Had the focus of attention of the Court of Appeal been on the level of the taxpayers' expectation that the pre APN/PPN regime would have continued, so that no tax would be payable on account, even in relation to tax avoidance schemes, disclosable under DOTAS, the answer would be that there was no such protectable expectation. This was, indeed, held by Lord Justice McCombe (but in the context of whether the APN/PPN regime was 'prescribed by law', not whether there was a relevant Article 1, Protocol 1 "possession" in the first place):[597]

> It is untenable to suggest as the appellants did … that, if they had known that participating in the scheme (notifiable under DOTAS) meant that money might be reclaimed from them at short notice prior to assessment, [this] would have made it unlikely that they would have participated. The risk for the taxpayer was whether they would have to repay at all, not when they might have to repay. It was known to them that the matter was not irrevocably closed by the repayments that they received and that provision ought wisely to have been made against a demand that could have arisen at any time.[598]

Lord Justice McCombe's observations were made in the context of, on the assumption that Article 1, Protocol 1 was indeed engaged, that the interference with "possessions" (being the proprietary interest in money) was 'sufficiently foreseeable as to be "prescribed by law", that is, the law was "adequately accessible", "sufficiently precise to be foreseeable in effect" and "not arbitrary" '.[599] Conceptually, these observations are better located in ascertaining whether

---

597 At paragraph [189].

598 The scheme in question was one which had involved partnerships, so as to create losses: see [2018] STC 462 at 463b-e.

599 Paragraph [188].

there is an Article 1, Protocol 1 "possession" at all. To be sure, the degree of arbitrariness (if any) of legislation (in particular retrospective legislation) is relevant, in that, particularly in relation to Article 7 of the ECHR, the features of adequate accessibility and sufficient precision so as to be foreseeable means that 'in the criminal sphere, the [ECHR] allows only a limited scope for retroactive legislation …'. However, the relevant principles as effected in ECHR, Article 7 and do not, it is submitted, play any part in defining the nature of a relevant "possession" for the purposes of Article 1, Protocol 1.[600] The prospect of being required to pay tax on account is juristically relevant as to whether or not there is a "possession", so far as Article 1 Protocol 1 of the ECHR is concerned, or, perhaps, the question of whether any retrospective measure is proportionate. It is not correctly analysed in relation to any question as to whether domestic retrospective law is, or is not, "prescribed by law" for the purposes of the ECHR. If the level of expectation (the strength of the "impression" of any claim by HMRC)[601] would, it is submitted, have prevented what is an unnecessary conceptual confusion.[602] The conceptual confusion in the rhetoric is unfortunate, not only because it can lead to confusion but also because (more importantly) ignores the juristic nature of monetary obligations.[603] In the meantime, the European Court of Human Rights continues to adopt an expectation approach without qualification.

---

600 See the judgment of Lord Reed in *AXA General Insurance Limited v Lord Advocate* [2011] UKSC 46 paragraph [120].

601 Which, for all the reasons given here, is better expressed as to the juristic solidity of any expectation to a particular tax treatment by a particular taxpayer.

602 For an analysis which adopts the "expectation" approach, rather than a 'proprietorial interest in money approach', see *R (Walapu) v HMRC* [2016] 168 to paragraphs [119]-[122] per Green J.

603 In *Reeves v HMRC* [2018] STC 2056 (TCC), HMRC conceded without argument (at paragraph [101] that '… Article 1 Protocol 1 is engaged by [the taxpayer's] right not to be taxed by being deprived of [certain capital gains tax reliefs under TCGA 1992, Section 165, by reason of Section 167] … HMRC accepts that there has been a deprivation of [the taxpayer's] property here, namely a deprivation of the money which [the taxpayer] would have to pay by way of tax on the disposal of his interest [in certain shares] if [the relevant reliefs were not available]'. This concession is contrary to the expectation analysis delivered here and, it is submitted, wrong.

However, the conclusions in these respective decisions, as opposed to the underlying analyses, of the Court of Appeal, both in *APVCO 19 Limited* and *Rowe*, are consistent with an expectation analysis. Indeed, the notion of a property interest being "impressed" with a tax authority's claim is, as observed above, simply the other side of the coin of an "expectation" being frustrated. And the observation of McCombe LJ as to the "foreseeability" of the APN/PPN regime is easily accommodated into an expectation analysis. Thus the approach of the United Kingdom case law on Article 1, Protocol 1, particularly in the light of Huitson and ToTel, 1 may be summarised as consistent with the individuated notion of taxation set out in Section I.

What the survey and analysis of the European Court of Human Rights case law and the United Kingdom domestic case law on Article 1, Protocol 1 demonstrates, is that, at least as a matter of stare decisis, the approach of the European Court of Human Rights is wholly consistent with the individuated notion of taxation articulated in this Thesis; the United Kingdom case law, at least in relation to its conclusions, is also consistent with this individuated notion of taxation, although the rhetoric of the case law (the Court of Appeal in England in particular) is itself inconsistent and at least in part treats monetary obligations as an interference with the proprietary interests of a debtor, in his monetary assets.

Conclusions as to the United Kingdom domestic case law and case law on Article 1, Protocol 1 of the ECHR

Put short, the individuated notion of taxation set out in Section I is consistent with the conclusions of the case law discussed here. Thus the individuated notion of taxation, as a personal monetary obligation (not a property obligation) is demonstrated to hold good not only in principle but also as a matter of United Kingdom domestic case law and ECHR authority (whilst the rhetoric in particular cases decided by the English Courts suggests that taxation interferes with proprietary interests the conclusions in even these cases are consistent with the individuated notion of taxation delivered here).

Section V. Conclusions

Chapter 3 demonstrates that taxation is properly individuated as a purely personal, monetary obligation which arises on the application of provisions which identify a tax unit, establish a tax base and set a tax rate and thus confer the status of a debtor on a taxpayer by reason of their application alone. There is no property obligation on the part of a taxpayer, whose only obligation is to deliver monetary assets to satisfy his monetary obligation. This individuated notion of taxation is distinct from all other types of monetary obligation (user charges, civil penalties, criminal fines and tortious damages) and holds good on the individuating techniques of each of Raz, Bentham and Kelsen. Chapter 3 contributes to existing literature in delivering this individuated notion of taxation as a function of an analytical foundation comprised of the identification of applicative legal norms, which reveals taxation to be a coherent "complete" law, despite its modal nature and diverse range of functions which taxation may seek to achieve. The individuated notion of taxation delivered in Chapter 3 permits taxation to be distinguished from all other types of monetary debt without express exclusion in any definition of taxation. There is no other individuated notion of taxation in existing literature which succeeds in identifying the nature of a tax obligation without the need to expressly distinguish taxation from other types of monetary obligation, particularly civil penalties and criminal fines. Rather there are only the analytically inadequate definitions discussed in Chapter 1 which are deficient for the reasons given in Chapter 1 and are without any considered foundation. Chapter 3 also demonstrates that the individuated notion of taxation as a purely personal monetary obligation is a conclusion consistent with the United Kingdom domestic case law and also Article 1 of Protocol 1 of the ECHR, which further contributes to existing literature, particularly in the case of the latter, by establishing that expectations as to tax treatment (not property interests in monetary assets) may be protected in the First-Tier Tribunal, and need not

be protected only in High Court actions founded on legitimate expectation. The case studies on National Insurance Contributions, and the "Enablers Provisions" contribute to existing literature by exposing important points as to limitation periods, Parliamentary procedure, which issues have not been analytically explored to date.

CHAPTER 4: TAXATION INDIVIDUATED: A PHILOSOPICAL AND JURISITC ASSESSMENT OF TAXATION IN THE LIGHT OF TAXATION'S PERSONAL, MONETARY NATURE

The individuated notion of taxation set out in Chapter 3 is now further scrutinised in Chapter 4. A proper appreciation of a tax obligation requires an analysis of the philosophical and juristic attributes of money (Section I), which may then be mapped onto the individuated notion of a tax obligation to discuss notions of set off, nominalism, retrospectivity and the correct principles of statutory construction (Section II). This in turn permits an analysis of the implications of both the instrumental and commodity features of money and the monetary, non-property, nature of a tax obligation on both the efficacy of taxation in particular contexts and on notions of responsibility (Section III). Section IV presents brief conclusions.

Section I. The Philosophical and Juristic Characteristics of Money

The exercise of defining "money" has been dismissed as "… rather sterile [with] … few implications with the rights of parties to commercial transactions …"[604]. However, institution of money has profound philosophical and juristic[605] consequences and deserves careful study. Money has been defined traditionally as "that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts for payment for commodities".[606]

---

604 Roy Goode, *Goode on Commercial Law* (Ewan McKendrick (ed), 5th Edition LexisNexis UK and Penguin Books 2016) 490, paragraph 17.08.

605 "Philosophical consequences" means consequences which have moral or political content, whereas "juristic consequences" means consequences for other exclusively legal material.

606 *Moss v Hancock* [1899] 2 QB 111 at 116.

Leaving aside, for one moment, the unnecessary restriction on the intentions of the recipient of money (to pay for commodities), this definition of "money" is a useful working definition.

State and societary theories of money, "money" and "legal tender"

It is convenient at this stage to acknowledge the distinction between a "state" theory of money and a "societary" theory of money, which in turn permits a distinction between "money" and "legal tender". The "state" theory of money[607] confers the status of "money" only upon instruments[608] issued under the authority of the state (albeit such instruments may be distributed privately after issue), in contra-distinction to the "societary" theory of money", whereby the notion of "money" takes it meaning from "the usage of commercial life or the confidence of the people which has the power to create or recognise [money]".[609]

Turning to the notion of "legal tender", this is a "… quality conferred by the State on certain forms of the medium of exchange".[610] Thus the notion of legal tender arises only on the state theory of money. Therefore, an instrument may be "money" without being "legal tender". The distinction between assets which may be categorised as "money" and assets which attract the additional juristic status of "legal tender" simply illustrates that the notion of "money" can have very different meanings in different contexts.[611]

The functions fulfilled by money

Georg Simmel, in the only considered treatise on the philosophical nature of money, "*The Philosophy of Money*",[612] considers money to have three functions, a "primary" function as a

---

607 Developed by GF Knapp, *State Theory of Money* (Lucas & Bonar (tr), first published 1924, A Bridged Petition AM Kelley 1973).

608 Assets which fulfil monetary functions may be coins, bank notes or "bank money", being balances held by customers in banking institutions: David Fox, *Property Rights in Money* (OUP 2008) 10-12, paragraph 1.31-1.42.

609 Mann, *The Legal Aspect of Money* (no 282) 23, paragraph 1.97.

610 Fox, *Property Rights in Money* (no 608) 28, paragraph 1.90.

611 A self-evident proposition, observed in Mann, *The Legal Aspect of Money* (no 282) 10, paragraph 1.08.

612 Georg Simmel, *The Philosophy of Money* (David Frisby (ed), Tom Mottonmore and David Frisby (tr), 3rd enlarged edition, Routledge 2004).

medium of exchange[613] and two "derivative" functions, being a mechanism to store and transfer value and, further, to measure value.[614] In fact, the two "derivative functions" distil into the "primary" function; money can only be a "store" of value (or be a mechanism to transfer value), or any sort of measurement of value, insofar as money functions as in a medium of exchange. In other words, the "value" which money might be described as "storing" or "measuring" is the "value" which money has as a medium of exchange, whereby *things other than money* (goods or services) may be transferred or delivered (sold and acquired). Or money may be the measure of the quantity of things other than money which may be sold or acquired. Simmel's two "derivative" functions merely represent (and are better expressed as) the potential of money to function as a medium of exchange, which is money's only function.[615] That money's "store of value" function is merely an articulation of its potential use as a medium of exchange is recognised by at least some commentators.[616] This is not to say that the function of money as a store of value cannot be independently legally significant. Unjust enrichment and tracing both look to an increase in a person's "store of value," measured in money.[617] But without money's sole present function as a medium of exchange, any notion of money having a (potential) "function" of a store, transfer, or measurement of value becomes unintelligible.

Money both an instrument and a commodity

Money comprises assets which are self-evidently instrumental but may also be a "commodity", in the sense of an asset held for its own sake (albeit to eventually operate as a medium of exchange).

---

613 Ibid, 198.

614 Ibid, 156.

615 The same reduction of functions holds true of more recent expositions of the function of money, which mirror Simmel: see Andrew Crockett, *Money: Theory, Policy and Institutions* (7th Edition, Nelson 1979) at page 6 and Mann, *The Legal Aspect of Money* (no 282) 9-10).

616 Fox, *Property Rights in Money* (no 608) 9, paragraph 1.28.

617 Ibid.

At first sight, the commodity nature of money is not at all apparent; the observations made above by Simmel suggest that the function of money is *purely* instrumental.[618] For Simmel, "*... Money, whatever represents it, does not* ***have*** *a function, but* ***is*** *a function.*"[619] Indeed, if money is the *only* medium of exchange, Gardner[620] would describe money as a function, not a mode, in that money is not one mode out of several which may serve as a medium of exchange but rather that any asset which serves as a medium of exchange is "money". And certainly, assets which comprise "money" are clearly instrumental in facilitating the transacting of goods and services between parties who do not wish to barter. Simmel's notion of money as a medium of exchange presupposes that items are capable of having the value measured as against other items. In fact Simmel goes further and suggests that items may *only* have a value measured as against other items, rather than any "intrinsic" value: "Things receive their meaning through each other, and have their being determined by their mutual relations."[621] Valorisation is necessarily, for Simmel, relative and thus "money has acquired the value it possesses as a means of exchange; if there is nothing to exchange money has no value … Money has no place where there is no mutual relationship, either because one does not want anything from other people, or because one lives in a different plane – without any relation to them … and is able to satisfy any need without any service in return."[622]

Money, therefore, for Simmel is *purely* a "tool" since "all economic transactions rest upon the fact that I want something that someone else owns, and that he will transfer it to me if I give him something I own that he wants…the final link in this two-sided process will not always be present when the first link appears…on many occasions I want the object A which A possesses,

618 Simmel would say "primarily" as a medium of exchange, whereas the better view is that this is money's sole function.
619 Simmel, *The Philosophy of Money* (no 612) 169.
620 John Gardner, *Law as a Leap of Faith* (OUP 2014) passim.
621 Simmel, *The Philosophy of Money* (no 612) 129.
622 Simmel, *The Philosophy of Money* (no 612) 156.

but the object for service D which I am willing to give in return does not interest A…intermediate links should be introduced into the chain of purposes, something into which I can change D at any time and which can itself be changed into A …".[623]

In fact, contrary to Simmel's view, the commodity nature of money is part of money's essential nature. This is clear in the light of money's market function (as a deliverable asset: see below) and (separately) by a recognition that money may have an intrinsic value distinct from money's value as a medium of exchange (that is, distinct from the nominal money-value put on the goods or services being sold or acquired by the seller and purchaser). The understanding of the commodity attributes of money, in addition to money's instrumental nature is fundamental not only to a proper understanding of the juristic nature of money debts but to the juristic distinctions of different types of money debt, as exposed by the application of the principles of individuation considered in Chapter 3, (which are revisited in Section V). The dual instrumental and commodity attributes of money also reveal why much, if not all recent philosophical debate about taxation, discussed in Chapter 5, which rests on an alleged connection between property and taxation, is misconceived.

In relation to the market function of money, as a medium of exchange, where goods or services are sold and acquired for money, a purchaser-debtor must ultimately pay money to satisfy his obligations to a seller-creditor. The debtor's obligation is to *deliver something*, namely the relevant assets comprising money, to the creditor and it is this obligation to enforce the delivery of assets comprising money which comprises a monetary obligation.[624] Indeed, without specific contractual or statutory conditions, a creditor is unconcerned as to where the debtor obtain the money to satisfy the debtor's monetary obligation to the creditor from: the debtor

623 Ibid, 210.

624 So for a debtor to incur a new debt, in consideration of being released from the old debt, is not "payment" of the original debt: *Cross v London and Provincial Trust Ltd* 21 TC 705.

may pay out of the debtor's own resources, or the debtor may borrow the money needed to pay the creditor, or the debtor may be funded to pay the debtor's monetary obligation by another person (say by gift),so that it is the (lawful) delivery of monetary assets a creditor wants (and is entitled to), not any call on the debtor's property as such.[625] Money's function as a medium of exchange is predicated on money's nature as an asset which has this sole function, distinct from the functions of the goods and services which are sold and acquired for monetary consideration. Money's market function is distinct from other market mechanisms, such as a regulatory framework which identifies permitted and prohibited transactions, or processes through which permitted transactions must be effected. Thus money is, despite money's instrumental nature, itself the subject of property rights, which operate on the delivery of money. The recipient of money obtains a "fresh indefeasible legal title", if the recipient is a bona fide purchaser for value.[626] And legal title to money passes by simple delivery or transfer (irrespective of the validity of any underlying legal transaction) (the "principle of abstraction to money transfers").[627] The money which is so delivered thus behaves as a medium of exchange in fructifying the sale and acquisition of goods or services (a present function) but also becomes part of the seller-recipient's store of value (reflecting money's potential as a medium of exchange for future transactions). In the latter state (as part of the recipient-seller's store of value) money behaves, both in money's delivery to the seller and in its retention by the seller until its use in a future transaction, as a commodity. The money, as part of the recipient's store of value is owned for its own sake as an asset capable of permitting the owner of that money to effect future transactions (by operating as a medium of exchange in those future transactions), it being irrelevant that the recipient may not know what (if any) those future

625 So that the debtor's rich aunt might pay the debtor's obligation to the creditor who has sold the debtor the goods or services in question. This has particular implications for notions of responsibility, examined below and also in relation to both the efficacy and legitimacy of taxation, examined in Chapter 3.

626 Fox, *Property Rights in Money* (no 608) 19, paragraph 1.61.

627 Ibid.

transactions might be. And this aspect of money's nature, money's capacity to be owned for its own sake, as something deliverable in a transaction where money is used (prior to delivery) in its classic sense as a medium of exchange, which gives money a commodity nature, which commodity nature cannot ever be excised from money which is used as a medium of exchange. Whenever money is used to satisfy an obligation as consideration, that is, as a medium of exchange for goods or services, money must be delivered to the seller-recipient and thus exposes money's commodity nature in every transaction in which money is paid. Thus money has a residual commodity nature even when fulfilling money's primary function as a medium of exchange.

Quite separately, money may have an intrinsic value, consistent with a status as a commodity owned or transferred for its own sake. In order to operate as a medium of exchange, money should, as a function of *a priori* reasoning, have no intrinsic value since, otherwise, it simply cannot operate as a common standard by which different parties undertake the valorisation of the goods or services they wish to buy or sell. As soon as money has an intrinsic value, that intrinsic value must necessarily inform the terms of the contract which the parties are to undertake and distort the price at which goods and services are bought and sold (thereby frustrating the function of money as the instrument by which the transaction can take place). So a £5 note has a legal value of £5, despite the value of the paper being negligible. However, a £1,000 note may have value of more than £1000 as a collector's item.[628] Or a particular monetary asset, say a £5 note, may be the subject of a competition, where a £5 with a particular serial number may win a prize of £1000 for the owner of that £5 note. Here, money clearly transforms from being a medium of exchange to a commodity (or at least increases the

[628] Goode, *Commercial Law* (no 604) 488-489, paragraph 17.06.

commodity element of money's nature and makes it more visible), with an intrinsic value (and thus capable of being owned for its own sake).

The commodity attributes of money are critical to the nature of money and are not (at all) excluded by money's instrumental nature, or vice versa. The fact that a creditor requires a debtor to deliver assets comprising money, to which the creditor obtains title, does not (cannot) deprive money of its instrumental nature. And the rare nature of a £1000 note which gives that £1000 note a value of more than £1000 (or the £5 with a particular serial number which wins the holder a prize of £1000 in a competition) does not (again cannot) deprive the £1000 note or the £5 note of their respective values of £1000 or £5 as (in each case) a medium of exchange which the holders of these notes may exploit to pay for goods or services for £1000 or £5 (rather, the respective holders of these notes may, if acting rationally, exploit the commodity nature of these notes to obtain more than their respective face values as media of exchange). This observation that money has the characteristics of a commodity is true even when considering the home state currency of any particular jurisdiction alone (that is without the distraction of foreign currency considerations, for which see below). Indeed, in the case of the £1000 note and the £5 note with a prize-winning serial number, money behaves as a commodity exclusively, although in each case the respective notes may be used also as a medium of exchange.

That money has an essential commodity nature which is neither excluded by, nor excludes, money's instrumental nature, is particularly visible in relation to foreign currency (that is, in relation to assets which operate as a medium of exchange in jurisdictions outside that of the Court which is considering their status). Foreign currency will necessarily have a value which (at its lowest) may not maintain a fixed relative value to money which operates as a medium of exchange (with derivative functions also) within a particular jurisdiction, so that a foreign

currency will have an intrinsic value; the nominal value of a foreign currency which may be sold or acquired in consideration for a particular nominal value measured in home state currency will rise and fall, depending on market circumstances. For this reason, foreign currency may be the subject of speculative transactions. These are the hallmarks of an asset behaving as a commodity. Of course, foreign currency may also be used as a medium of exchange, whether or not money behaves as a commodity; a trader who trades exclusively in the United Kingdom may pay for goods acquired from the United States in US $. The important point made here is that money (especially but not exclusively foreign currency, as shown above) has essential commodity characteristics[629] but these do not exclude money also operating as a medium of exchange.[630]

However, the capability of money to behave as simultaneously a medium of exchange and as a commodity has not been always appreciated or expressed in case law. So gold coins, such as krugerrands, were held by the Court of Justice of the European Union ("CJEU") not to be "goods" (which term would encompass commodities) within Articles 30-37 of the (then) Treaty of Rome (subsequently Articles 34 to 36 of the Treaty for the Functioning of the European Union ("TFEU")), *by reason of* their being a means of payment (that is, a medium of exchange in South Africa): *R v Thompson*.[631] The CJEU considered that specific provisions

---

629 The commodity nature of money has been recognised at least by some: see David Fox and Wolfgang Ernst (ed) *Money in the Western Legal Tradition: Middle Ages to Breton Woods* (OUP 2016) 28: 'The gathering of evidence that money is fiscally engineered and carries a cash premium ultimately includes academic commentators'. And see Adam Smith "*On Money considered a particular Branch of the general Stock of Society, or of the Expense of maintaining the National Capital*" in *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, Modern Library 1937): 'A prince who shall enact that a certain proportion of his taxes shall be paid in a paper money of a certain kind might thereby give a certain value to this paper money even though the final discharge and redemption should depend altogether upon the will of the prince. If the bank which issued this paper was careful to keep the quantity of it always somewhat below what could easily be employed in this manner, the demand for it might be such as to make it even bear premium, or sell it for somewhat more in the market than the quantity of gold or silver currency for which it was issued.'

630 Although money's commodity characteristics mean that money is capable of behaving as a pure commodity, in the manner described above.

631 Case 7/78, paragraphs [23] to [28] of the judgement of the Court. The decision meant that a prohibition against the import of such monetary assets was outside the protection of the internal market provisions concerning the free movement of "goods".

in Article 106 of the Treaty of Rome, which referred to an obligation on each Member State to authorise payments "connected" to the movement of goods, in the currency of that Member State, meant that any monetary assets which operate as the means of payment for goods, could not be within the scope of the term "goods." Thus, according to the CJEU, krugerrands, despite being, of course, outside the notion of any Member State currency, could be used as a means of payment, meaning, in turn, that Article 106 entailed that krugerrands could not be "goods." A conclusion of the CJEU that monetary assets which are used as a means of payment within Article 106 of the Treaty of Rome means that, as a matter of purposive construction of the Treaty of Rome, such assets could not be "goods" within Articles 30-37, is unexceptionable. But an a priori analysis, independent of the legal context of the exercise to determine whether money may be "goods", which concludes that krugerrands are not "goods" within the internal market provisions simply because the krugerrands are capable of operating as a means of payment (which is the rhetoric of the CJEU) is unsustainable in principle (particularly as the krugerrands were the subject of an importation prohibition, which is only intelligible in the context of a restriction on transactions which are the subject matter of a bargain, not the means of payment from one party to another). Thus, although the conclusion of the CJEU is correct, the underlying analysis is misconceived and fails to recognise a fundamental attribute of money, that of being a commodity as well as a medium of exchange.

Indeed, the distinction between money as a means of exchange and money as a commodity was expressly rejected in *Camdex International v Bank of Zambia* [1997] CLC 741. The issue was whether an obligation to deliver foreign currency was an obligation to deliver a commodity (in which case the right to delivery could not be garnisheed) or whether the delivery obligation gave rise to a debt, being an obligation "*to pay money as a medium of exchange*" (which could be garnisheed). The English Court of Appeal held the delivery obligation to be a debt and not a mere obligation to deliver a commodity"... *Where a contract expressly provides for the*

payment of a sum in a foreign currency, the obligation is a money obligation and breach of it gives rise primarily to a claim in debt, whether the obligation is by way of repayment of money loaned, payment for goods and services or payment for other currencies.". It followed, for the Court of Appeal, that "*Where one party to a foreign exchange transaction performs his obligation and the other does not, I see no reason why the obligation of the latter should not be subject to attachment as a debt ...*"

The proposition that an obligation to deliver foreign currency gives rise to a "debt" is not startling, especially where the foreign currency is not the subject of a particular sale price. However, Otton LJ, in holding the obligation to give rise to a debt, rejected the analysis in Mann*, The Legal Aspect of Money* (5th edition, pages 196 to 199) which distinguished foreign currency as a commodity, where it is "*an object of commercial intercourse*" and money where "*it serves monetary functions*" (that is a means of exchange) (page 191). At page 190, Dr Mann had advanced the proposition: "*If an Englishman*[632] *exchanged francs against pounds sterling in Calais, English courts would not classify the transaction as a sale of English, but as a purchase of French money, the purchase price being expressed in English currency, although at Calais the transaction was certainly regarded as a sale of English money.*"

The analysis set out in Mann is clearly correct in principle. In the United Kingdom, francs would not have been a medium of exchange. So from the perspective of the United Kingdom courts, the Englishman acquires a commodity (francs) which is useful (as a medium of exchange in France). And from the perspective of the French courts, the French currency dealer in Calais sells a commodity (English currency which is not a medium of exchange in France) for francs (a medium of exchange in France).

---

632 By which Mann presumably means a citizen of the United Kingdom.

Lord Justice Otton disagreed with Mann however, observing that: *"On this analysis, from the viewpoint of the Frenchman, francs would be the medium of exchange, and the obligation to pay them a debt, whereas sterling would be the commodity to be delivered, but from the viewpoint of the Englishman, sterling would be the medium of exchange and francs the commodity. This makes no sense at all."* Lord Justice Otton goes on to observe that *"Nor does Dr Mann, at page 197, suggest that a loan of money does other than give rise to a debt, although that is not a transaction that involves using money as a medium of exchange ... It seems to me that whether money is lent or borrowed, whether it is used to buy goods or services, or whether it is exchanged against a different currency, it retains its character as a medium of exchange. In each case the transaction will involve a particular specified currency or currencies. This reflects the fact that there exists different media of exchange, that the relative values fluctuate over time and that for this reason parties to a transaction may be considered to stipulate for a particular currency. The fact that the identity of the currency may be a material feature of the transaction does not translate the currency into a commodity, whatever the nature of the transaction."*

Lord Justice Otton's analysis is self-contradictory and wrong. Laying aside the observation that "it makes no sense" for different jurisdictions to confer or withhold the status of a "medium of exchange" on money debts, depending on whether the currency in question is legal tender in a particular jurisdiction (the sense in this is obvious), Lord Justice Otton initially suggests that money which is lent does not have the character of a medium of exchange but later accepts that money (whether lent or not and for whatever purpose money is used) always "retains" its character as a medium of exchange. In fact money which is lent may be lent to permit the borrower to use that money as a medium of exchange or, perhaps, to exploit that money (if it is foreign currency in the borrower's jurisdiction or some other jurisdiction) as a commodity. The nature of the loan transaction, whereby the borrower must repay the lender an amount

equal to amount borrowed (plus any return) is irrelevant to the instrumental and commodity nature of money, in the hands of a borrower.

In fact, the conclusion of the Court of Appeal (that the right to receive foreign currency could be garnisheed) could have been simply (and correctly) put on the basis that an obligation to deliver foreign currency (where the currency is not the subject matter of a sale and acquisition) gives rise to a debt, despite any commodity attribute of the foreign currency in question. As with the CJEU in *R v Thompson*, the Court of Appeal in in *Camdex International* reached the correct conclusion but on a misconceived basis which obscured the commodity attributes of money. As demonstrated in Section V below, an appreciation of both the instrumental and commodity nature of money is necessary to identify the profound consequences that monetary obligations have for notions of responsibility and the dilution of any commitment on the part of the payer of money to the moral or political goals of either the payee or those that underpin the very monetary obligation itself (in particular relating to taxation, considered in Chapter 3). Before revisiting the principles of individuation in Section V, however, it is necessary to identify the philosophical and juristic features of money (which flow from the dual instrumental and commodity attributes of money) in more detail.

The philosophical attributes of money

Simmel identified six attributes of money: being "fluidity", an "impersonal" nature, an "abstract" nature, "knowability", "potentiality", and (importantly for this Thesis) the dilution of any connection between a payer's personal attributes and commitments on the one hand and those of the payee (or any party with an interest in the payment of money being made) on the other.[633]

[633] Simmel's analysis of money has been put into conceptual "clusters": Gianfranco Poggi, *Money in the Modern Mind* (University of California Press, London 1993).

To take the first five attributes of money (fluidity, an impersonal nature, an abstract nature, knowability and potentiality), together with a further attribute of fungibility, each of these attributes bleeds into the other. And all of these attributes flow from the instrumental nature of money as a medium of exchange and money's residual commodity nature.

"Fluidity", for Simmel, means that money permits access to otherwise unattainable goals:

> [Money] can be transformed into another form of power … My activities and possessions take the form of money value in order to serve my remote purposes. Money is the purest form of the tool … It is an institution through which the individual concentrates his activity and possessions in order to attain goals that he could not attain directly.[634]

Simmel's observation that the "fluid" nature of money gains a money-holder access to goods and services he could otherwise not obtain goes hand in hand with (indeed depends upon) Simmel's second money attribute, money's "impersonal" nature. For Simmel, each member of the "collectivity who receives or spends money implicitly assumes that the whole collectivity takes cognisance of and stands ready to sanction his or her transactions".[635] For Simmel, "… money is a transfer to the achievements of others".[636] And to describe money as "abstract" (in the sense of being independent of goods or services being bought or sold) is to acknowledge that money, for Simmel, "embodies that element of functional things, by virtue of which they are economic. It does not comprehend the totality, but it does comprehend the totality of money".[637] In other words, the payment of money is concerned only with a transfer, in a sufficient quantity, of monetary assets from payer to payee in a particular circumstance when the payer wishes the payee to obtain title to that quantity of money, not of any intrinsic value ascribed to the goods or services by the parties or any other person.[638] Thus money is

634 Simmel, *The Philosophy of Money* (no 612) 210.
635 Poggi, *Money in the Modern Mind* (no 633) 139.
636 Simmel, *The Philosophy of Money* (no 612) 342.
637 Simmel, *The Philosophy of Money* (no 612) 130.
638 This formulation is necessarily convoluted as a payer may pay money to a payee not only in consideration for goods services but in a lending transaction or as a gift.

exclusively quantitative, in that "only when money is transformed into positive values does it become evident that the quantity exclusively determines the importance of money, namely its power as a means".[639]

Simmel's separate attribute of money, that of "knowability" is simply an acknowledgment that money as a medium of exchange has a necessary transparency as to its nature which the goods or services it acquires for the payer cannot (since the nature and any intrinsic value of those goods or services will yield different perceptions to different parties).[640] Indeed, money must necessarily have such qualities so as to prevent money from having any intrinsic value (and thus make it impossible to give rise to a "surprise" or "disappointment"), in order to operate as a medium of exchange. And Simmel's description of money's attribute of "potentiality" is really a repetition of Simmel's notion of fluidity. The prospect of a payer being able to pay money to attain goals otherwise outside the payer's reach presents the holder of money with a choice, a "single incidence of what one might call the metaphysical quality of money; namely to extend beyond every particular use and, since it is the ultimate means, to realise the possibility of all values as a value of all possibilities".[641] The deep connection between fluidity and potentiality is seen by Simmel's own observation that "… a tool will be more significant and valuable … if it has various and extensive uses. At the same time, it must then become more neutral and colourless, more objective in relation to particular interests and more remote from any specific purpose. Money … fulfils this condition perfectly; from this point of view its importance is enhanced. The matter can be put as follows. The value of a given quantity of money exceeds the value of the particular object for which it is exchanged, because it makes possible the choice of any other object in an unlimited area [all of which refers to the fluidity of money]. Of course, the money can be used ultimately only for one of the objects, but the

639 Ibid, 259.
640 Ibid, 244.
641 Ibid, 221.

choice that it offers is a bonus which increases its value [which identifies the attribute of potentiality]."[642]

Each of fluidity, an impersonal nature, an abstract nature (if different to an impersonal nature), knowability and potentiality (if different to fluidity) are attributes which are expected of an asset which operates as a medium of exchange. Each and every attribute serves to explain the features which are (and must) be present for an asset to function as a means of payment independent of the qualities present in a payer and payee.[643] But inherent in each of these features (but not identified by Simmel) is also money's commodity nature. For money to operate as a medium of exchange, a payee must be confident that a payer will deliver monetary assets to the payee, to which the payee will take title. The features identified by Simmel, in other words, are features of *an asset* (a commodity) which will, for payment to occur, be delivered. Thus the features of money identified by Simmel which permit money to fulfil money's instrumental function also necessarily demonstrate that money, on payment by a payer to a payee, is also *necessarily* a commodity.

Before turning to Simmel's observations of money's dilution of any connection between the payer and the recipient (and any commitment by the payer to the goals or objectives of the recipient, or of the community at large, or vice versa) a further attribute of money should be identified at this stage, namely its fungibility, "that is, any unit is legally interchangeable with any other unit or combination of units of the same denominated value [so that, for example] … the loan of money, like the loan of securities or of any other kind of asset, transfers absolute ownership to the borrower, whose obligation is to restore not the identical notes and coins received but their equivalent".[644] As Fox observes, a £1,000 credit balance in a bank account

642 Simmel, *The Philosophy of Money* (no 612) 212.

643 "Potentiality" articulates how money serves to increase a holder of money's store of value in the light of money's contingent application as a medium of exchange.

644 Goode, *Commercial Law* (no 604) 489 paragraph 17.06.

"is an indivisible chose in action but the monetary units of value represented by it can be divided into individuated units and distributed to more than one claimant".[645] This is as much a philosophical attribute of money as a legal attribute. It is an extrapolation from money's impersonal (and abstract) nature; the fungibility of money serves to distinguish further the nature of money from the nature of any goods or services sold to an acquirer. The goods and services may well not be at all fungible, whereas the fungibility of money increases money's efficiency as a medium of exchange and demonstrates the separation of money from the goods and services it acquires.

It is important to note at this stage that the all of attributes of money identified by Simmel, together with that of fungibility, serve to increase the autonomy of individuals who are able to pay for goods or services with money and (to that extent) democratisation. In circumstances where the nature of money means that money is accepted as payment independent of the personal qualities of the payer and payee, the payer's increased available access to purchasable resources (as a function of money's fluidity, impersonal and abstract nature, enhanced by money's knowability) increases a payer's access to resources and opportunities and thus his autonomy (as does the potentiality of money, where money is part of a putative payer's store of wealth). And to the extent that a putative payee accepts money as payment independent of the personal qualities of any particular payer, this increases democratisation.[646]

Money's dilution of responsibility

Of all of the attributes of money identified by Simmel, the causal connection between the use of money as a medium of exchange and the dilution of any commitment of the payer to any goals or objectives of the payee (or any other party with an interest in payment being made) is

645 Fox, *Property Rights in Money* (no 608) 25 paragraph 1.80.

646 Of course, external features may constrain both autonomy and democratisation. So a racist supplier of particular goods may refuse to transact with purchasers of a particular ethnicity. But these constraints arise separately from the nature and attributes of money.

the most important for the purposes of this Thesis. The impersonal and abstract nature of money means that the only rational commitment to money can be to its value and function as an instrument.[647] A payer of money is necessarily disinterested in what a payee might do with money once paid, certainly if acting at arm's length, since the very nature of money is to give the payee access to goals selected by the payee (exploiting money's fluidity etc).[648] Money, in fulfilling money's instrumental function as a medium of exchange, once delivered (as a commodity to which the payee takes title), exhausts the relationship between the payer and payee so far as any obligation in respect of the goods or services sold by the payee to the payer[649]: "Money is absolutely detached from the person and completely cuts off from the outset any further consequences. Insofar as one pays with money, one is completely finished with any object …"[650] It is easy to agree with Simmel that the possession of money "affects, shapes and limits the whole person to a much lesser extent as the possession of other goods, such as land, or of specialised labouring of professional skills …".[651] For Simmel, personal skills acquired through learning and practice, or possessions such as a family home, are connected ("fused") far more strongly to the owner of those personal skills or family home than money would be. Neither the personal skills, nor the family home are purely functional in the way that money is purely functional: it is "… only money that we own completely and without reservations; it is only money that merges completely into the function we assign to it."[652] Thus the increased access to goals otherwise unobtainable (which enhances both autonomy and democratisation, as observed above) is, for Simmel, obtained by assets (money) which, because of their purely functional nature, can never be an end in itself, in the way that personal

---

647 This does not mean that money does not behave as a commodity on delivery upon payment but rather that the primary value of money is as a medium of exchange.

648 External constraints, such as a trust as to the use of the money, or moral obligations are irrelevant to this observation.

649 Or perfects any gift of money by a payer to a payee.

650 Simmel, *The Philosophy of Money* (no 612) 376.

651 Poggi, *Money in the Modern Mind* (no 633) 139, 140.

652 Simmel, *The Philosophy of Money* (no 612) 328.

relationships or the ownership of non-functional assets might be and furthermore, may only acquire goods or services which are for sale ("purchasable"): "Money is never an adequate mediator [for example] of personal relationships – such as a genuine love relationship, however abruptly it may be broken off – that are intended to be permanent and based on the sincerity of the binding forces. Money thus serves, both objectively and symbolically, that purchasable satisfaction…" [653] While, as already observed, by reason of the fluidity and impersonal and abstract nature of money, money enhances freedom (a combination of autonomy and democratisation), it can only ever be a means to achieving a non-monetary satisfaction; money is at best a contingent accessory tool to obtain ownership of goods or services which the holder of money really desires: "Money means more to us than any other object or possession … and it means less to us because it lacks any content that might be appropriated beyond the mere form of possession. We possess it more than anything else but we have less of it than all other objects."[654] Indeed, this is what permits the increase in autonomy and democratisation by reason of money's other features mentioned above: "[Money is] by nature a basic democratic levelling social tool that excludes any specific individual relationships."[655]

The democratisation (and autonomy) achieved by the use of money, in particular money's impersonal and abstract nature, separates a monetary transaction from the personal qualities of the parties: "… [The] independence of being from possessing and of possessing from being that is accomplished by money is … illustrated in its acquisition … The peculiarity of money lies in its being acquired by dealing successfully with other objects. The able farmer will produce many goods of the earth, the diligent shoemaker lots of shoes; but lots of money is changed by efficiency in any specific trade. To earn money, therefore, does not require those

653 Emphasis added.
654 Ibid, 325.
655 Ibid, 443.

specific qualities by which the acquisition of other objects is tied to the subject's being."[656] Indeed, "… the whole process of separation between person and object appears predominantly as the differentiation of the person. His different interests in spheres of activity gain relative independence through the money economy … only characterise the effect of money as an atomisation of the individual person, as an individualisation that occurs within the person."[657] Thus an individual acquires several (metaphysical) capacities: the capacity which comprises personal qualities, the ability to make goods or to provide services and as the holder of money and thus the prospective attainer of goals otherwise outside his reach.

This "atomisation" of the individual, effected by the use of money, simultaneously attracts increased autonomy and democratisation and dilutes any connection between the person who pays money for goods and services and the person who receives money for goods and services from the goals of the seller or buyer. This means that Simmel's observation that "the fact that more and more things are available for money and … the fact that money becomes essential and absolute value, results in objects being valued only to the extent to which they cost money and the quality of value with which we perceive them appearing only as a function of their money price"[658] of fundamental and critical importance.

Put short, to the extent that any obligation is monetised, so that the only obligation is to pay money, the obligation is limited to a very particular commitment: to deliver a specified quantity of money. Payment of money, in full satisfaction of a monetary obligation, as observed above, exhausts the relationship between payer and payee. There is no commitment required to the interests of the money-recipient or, indeed, to anyone else. What is "a transfer to the achievements of others" entails a dilution in the commitment to the interests of others. It is

656 Ibid, 307-308.
657 Ibid, 342.
658 Ibid, 279.

this observation which has profound implications on the notion of responsibility. Where the only obligation is to pay money, responsibility is limited to delivering a commodity (which fulfils the function of a medium of exchange). The separation of a monetary obligation from any personal commitment is strengthened by the recollection that for most debts, incurred in any circumstances, without particular contractual or legislative constraints, a debtor may obtain that money from any source whatsoever, whether by borrowings, a gift or out of a debtor's own monetary resources.[659] The observations made here also expose and reinforce the irreducible commodity nature of money, certainly for money liabilities which are not consideration for goods or services. The satisfaction of a monetary obligation for a civil or criminal wrong by the payment of money is to *deliver* monetary assets, which, as observed above, may generally be obtained by any lawful means (out of one's own resources, borrowing, or gift). There is no "transaction" which money is making easier. To be sure, the monetisation of liabilities may be seen to sanitise responsibility by, for example, diluting the notion of uncontrolled retribution (for say, crimes, or tort) but this is merely to say that such a monetisation also dilutes responsibility by the delivery of a commodity (money).

Thus increased autonomy and democratisation achieved by the impersonal and abstract nature of money entails a restricted notion of responsibility where any obligation is restricted to a payment of money alone. In the words of Professor Arthur Nussbaum "… the value of the monetary unit seems to be somewhat disconnected from any object in the real world, or one may say, from materiality."[660] The monetisation of obligations, in other words, dilutes responsibility. "Responsibility" here means "role responsibility", whereby responsibility is a function of the role assumed by an agent or "obligation responsibility", whereby an agent is accountable to the demands of a particular branch of law (for example, criminal law, or tort) or

659 Including the realisation of the debtor's assets.

660 A Nussbaum, *Money in the Law* (Chicago 1939) 5.

morality.[661] The juristic role of an agent obliged to pay money is limited to payment of the money owed and no more. And there is no legal accountability for a debtor who satisfies his debt (moral accountability is, of course, quite another matter; a tortfeasor who has negligently harmed another may well have on-going moral obligations even after having paid damages). Of course, a particular moral agent may be forced to use his own monetary resources to meet a financial obligation and have no prospect of borrowing the relevant monies. The point made here is that the nature of a purely monetary obligation gives juristic permission for that obligation to be satisfied out of the resources of another (or by borrowings), which is not a fanciful prospect, so that where a legal obligation is satisfied by a payment of money, no ongoing juristic responsibility on the part of the payer remains. This observation is particularly stark in the context of tortious damages and criminal fines, which are considered in Section V below. This observation becomes critical when applying the observations and conclusions of Section IV to taxation liabilities in Section V, to reveal a tax obligation to be a monetary obligation (distinct from all other types of monetary obligation) which, due to its monetary nature, may well be inefficient in achieving several of the functions set out in Section I.

The juristic attributes of money

So much for the philosophical attributes of money. The "legal [or juristic] characteristics" of money map very easily onto the nature of monetary assets as a medium of exchange with a residual commodity nature.[662] Money generally has no intrinsic value (unless peculiar circumstances give a particular monetary asset a commodity value, such as the £1000 note and £5 note with a prize-winning serial number discussed above); rather its value stems from the sum, or unit of a kind in which the relevant instrument is denominated. Further, money cannot be bought or exchanged (this observation does not apply to foreign currency); it is received by

---

661 This useful terminology is taken from Christopher Kutz, "*Responsibility*" in the *Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002), Chapter 14, 549.

662 Goode, *Commercial Law* (no 604) 488-489, paragraph 17.06.

a payee, from a payer, in discharge of a monetary obligation, or borrowed or received by way of gift.[663] And money is fully negotiable, in the sense that money assets are effectively bearer instruments, so that the recipient who takes in good faith and for value obtains good title, whatever the title of the payer (even if the latter stole the relevant money instrument).[664] Fresh, indefeasible title passing to a bona fide purchaser for value and the "principle of abstraction to money transfers" are consistent with money's function as a medium of exchange and its abstract nature. The latter two features are consistent with the impersonal and abstract nature of money; ownership of money and access to money's function as a medium of exchange is independent of the personal characteristics of any particular payer.

Legal attributes of money (and consequences for debtor obligations)

There are two further features which inform the juristic quality of both rights and obligations which are peculiar to money debts, being the prospect of set off of money debts and the application of the principle of nominalism.

Set off

Set off" is "… the setting of money cross-claims against each other to produce a balance",[665] which may be made under the Statutes for Set Off 1729 and 1735,[666] or, in England, in equity, where equitable set off may be made in respect of contractual cross-demands. This notion is unintelligible for anything other than money demands, where cross-rights and obligations are expressed in identical units of account. Obligations to transfer property cannot be set off against each other precisely because the subject matter of the respective obligations are not identical in nature. The same may be said of the similar (but distinct) notions of monetary

663 In each case the money remains a medium of exchange, whether actual or potential (in the latter case adding to the recipient's "store of value"). This observation does not detract from money's residual commodity nature, on delivery.

664 Goode, *Commercial Law* (no 604) citing *Miller v Race* [1758] 1 Burr 452.

665 S. R. Derham, *Derham on the Law of Set off* (4th Edition, OUP 2010), 1, paragraph 1-01.

666 For solvent parties; special rules exist where one party is insolvent.

counterclaims, the netting down of damages due to an incidental benefit accruing to the claimant as a result of the defendant's breach, the acknowledgment of payments a claimant may have received from the defendant in an action of unjust enrichment on the part of the defendant,[667] and the right to the combination of bank accounts, whereby a bank or a customer may combine accounts, to produce a single debt.[668] The personal characteristics of each monetary obligor and the preference of one or other obligor for the cross money debts to be paid by the delivery of money[669] are irrelevant to the application of set off, thus providing an illustration of the impersonal and abstract characteristics of money, quite apart from demonstrating that money obligations have juristic features which property obligations cannot contain.

Nominalism

As observed above, the primary (arguably, the sole actual) function of money is to serve as a medium of exchange. The principle of nominalism stems from the peculiarity of those money debts where the "money of account" is different to the "money of payment". In a contract to acquire, say, commodities, for 100 Nigerian dollars payable in UK pounds sterling, the "money of account" is Nigerian dollars but the "money of payment" is UK pounds sterling, that is, the debtor must pay sufficient UK pounds sterling to amount to 100 Nigerian dollars at the due date for payment. Thus, if, at the time of payment, the Nigerian dollar has appreciated as against UK pounds sterling, the debtor must find more UK pounds sterling to satisfy the debt,

667 Derham, *Derham on the Law of Set Off* (no 665) 1-2, paragraph 1-01.

668 Ibid, 6, paragraph 1.12.

669 See for example, *Melham Ltd v Burton* [2006] STC 980, where the House of Lords applied set off in the face of HMRCs' misplaced insistence that a taxpayer company pay Advance Corporation Tax ("ACT") which was immediately repayable, rather than accept that set off applied to extinguish the obligation to pay and repay the ACT.

so that the risk of the depreciation of UK pounds sterling, as against the Nigerian dollar, is with the debtor.[670]

Where the money of account is different to the money of payment, the question arises as to which conversion rate to apply, so as to convert the money of payment into units of account, expressed in the money of account. The answer is found in the principle of nominalism. Nominalism arises from the state theory of money, discussed above, whereby the State "enjoys the right to define the unit of account and to organise the monetary system".[671] It is the "… State [which] establishes a currency and its units of account [which] represent their own independent value in terms of the domestic legal system, regardless of any external factors which may have an economic impact upon their currency".[672] In other words, the State establishes rules which express the money of payment as (State approved) units of account. Thus the intrinsic value of money is rendered entirely irrelevant,[673] since the State establishes the rate at which the money of payment should be expressed as (State approved) units and money of account. So in the example given in *Woodhouse* above, nominalism will provide rules to establish how much UK Sterling (the money of payment) is equal to one Nigerian dollar (the unit and money of account).

While nominalism is orthodoxy, so far as English law is concerned,[674] the principle arises as a the function of the intentions of contractual parties or of legislative intent,[675] rather than emanating from any law of money, public law or public policy.[676] Put another way, the

---

670 *Woodhouse AC Israel Cocoa Limited v Nigerian Produce Marketing Company Limited* [1971] 2 QB 23, 54 per Lord Denning.

671 Mann, *The Legal Aspect of Money* (no 282) 228-229, paragraph 9-05.

672 Ibid.

673 Ibid, 229, paragraph 9-06. That the intrinsic value of money is necessarily nil is debateable; certainly money has a commodity aspect to its nature, as demonstrated above, whether or not money has no intrinsic value.

674 Ibid, 247, paragraph 9.25.

675 Ibid, 243, paragraph 9.23.

676 Ibid, 242, paragraph 9.23.

principle of nominalism determines that, so far as the conflict of laws is concerned, it is for the "*lex monetae*" (ascertained from the contractual intentions of private parties or the legislative intention of any statutory provision which gives rise to a debt) alone to determine what is "legal tender" for the purpose of defining the medium in which a debt expressed in the currency governed by that law can be discharged".[677] The principle is, critically, engaged whether there is any conflict of laws of two jurisdictions or not, so that nominalism entails that "the form in which [payment which can discharge a debt] is to be made must be regulated by the municipal law of the country whose unit of account is in question, and what would or would not be a legal tender must depend upon the law on that subject in force at the time when the tender should have been made".[678] Nominalism has particular consequences for tax liabilities, as set out in Section II. It is convenient to note here simply that, as with set off, nominalism is intelligible as a principle only in the context of money rights and obligations. In an exchange which is a true barter, say a land exchange, there are simply no distinct notions of "money of account" or "money of payment." Thus, as with set off, nominalism provides a strong illustration of the personal (not property) characteristics of money obligations.

Section II. The Juristic Consequences of the Monetary Mapped on to the Nature of Taxation: Set Off, Nominalism and Retroactivity

The monetary nature of a tax obligation gives rise to profound juristic consequences. It is convenient to note at this point that an obligation to taxation, as a personal monetary obligation shares the same characteristics as other monetary liabilities in that notions of set off and nominalism apply to taxation as much as they do to other monetary liabilities.

---

677 Dicey, Morris & Collins, *The Conflict of Laws* (14th edition, Sweet and Maxwell 2006), paragraph 36-009.

678 Ibid, citing *Pyrmont Limited v Schott* [1939] AC 145, at 158.

Set off

Mellham Limited v Burton[679]established that set off may be successfully deployed to resist a claim for the payment of taxes, so that an obligation for ACT was extinguished by a right to repayment of ACT (which only fructified once the initial ACT had been paid). Thus, taxation shows itself to be well within the class of monetary liabilities to which set off, a concept which cannot be coherently applied to property obligations, applies.

Nominalism

As observed in Chapter 1, tax liabilities (at least under the UK Tax Code) must be paid in Sterling, which is the unit of account (and unit of payment of tax liabilities). Nominalism may inform the measurement of a tax obligation quite separately from the rates of exchange which may apply as between Sterling and non-Sterling currency. So, in relation to the acquisition and subsequent disposal of an investment asset, the investment (capital) gain is measured in Sterling (as the unit of account for tax liabilities), ignoring the effect of inflation; the (deductible) consideration paid for the asset is measured by the nominal amount paid at the time of acquisition, as are the taxable proceeds obtained at the time of sale.[680] And any transaction or other event in which the money of payment is not Sterling will attract the principle of nominalism, to calculate the quantum of the tax obligation in Sterling. In the case of investment (capital) assets, an acquisition cost paid in non-Sterling currency (as the money of payment) is valued in Sterling at the time of acquisition, as are the proceeds of sale at the time of disposal.[681] Taxation, it is clear, is no different to any other monetary obligation in that

679 *Melham Ltd v Burton* [2006] STC 980, discussed in Section I.

680 *Secretan v Hart* 55 TC 701.

681 *Bentley v Pike, [1981] STC 360; Capcount Trading v Evans [1993] STC 11; Goodbrand v Loffland Bros North Sea Inc [1998] STC 930,* all discussed in Mann, *The Legal Aspect of Money* (no 282) trading transactions are seemingly immune to this analysis: *Pattison v Marine Midland* [1984] STC 10.

a tax obligation attracts the application of nominalism which could not apply (for the reasons given in Chapter 2) to property obligations.

Taxation and retrospectivity

Much of the analysis in Chapter 1, Chapter 2 and Chapter 3 demonstrates that a tax obligation is a personal monetary obligation and not any sort of property obligation and makes this good by individuating taxation as a distinct and coherent Razian "complete law". Chapter 5 criticises much philosophical thinking for a failure to recognise the nature of a tax obligation and a confusion which treats taxation as a sort of claim on property. However, Fuller, in *The Morality of Law*[682] expressly acknowledges the personal, monetary nature of a tax obligation but mistakenly concludes that this means that taxation can never be retrospective. Fuller's conclusion is simply wrong, as demonstrated below. Nevertheless, an analysis of the juristic notion of taxation in relation to retrospectivity is fruitful, in that it exposes the fallacy of any distinction between "retroactive" and "retrospective" legislation, which has occasionally gained currency.

"Retroactive" and "retrospective" legislation: a distinction without a difference

There has been some sterile and pointless discussion as to the distinction between a "retroactive statute" and a "retrospective statute", in that it has been said that 'a retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective but it imposes new results in respect of a past event …'.[683] The distinction has been widely acknowledged.[684] However, the distinction has been rightly

682 Fuller, *The Morality of Law* (no 568).

683 *Benner v Canada (Secretary of State)* [1997] 1 SCR 358 [40]. A further term for a "retrospective" provision, in the sense used in *Benner* is "quasi-retrospective.": Baker, "*Retrospective Tax Legislation"* (no 561) 1 at 1.

684 Catherine S Boffett (ed) *"Retroactive or retrospective? A Note on Terminology"* [2006] BTR 15 at 18; see also Loomer *"Taxing out of time: Parliamentary supremacy and retroactive tax legislation"* [2006] BTR 64 at 65-67; European Association of Tax Law Professors and Authors ("EATLP") "*Retroactivity of Tax Legislation"* (2010 EATLP Congress Leuven EATLP International Tax Service Volume 9) 43;

criticised as "analytically incoherent"[685] and "illusory".[686] There is, in fact, so far as legal norms are concerned, no intelligible distinction between telling people what to have done in the past (a "retroactive" legal norm)[687] and legal norms which '… affect situations which begin before, but continue after, the [legal change] occurs'.[688] Put another way, contrary to Sampford's suggestion that it is 'theoretically possible' that 'retrospective tax legislation would tell people, not how much tax they will have to pay in the future as a result of [a] new law, but rather how much tax they have to **have paid in the past** as a result of [a] new [tax] law',[689] such a legal norm is not (even) "theoretically" intelligible (or possible). Any legal norm which purports to tell people what to have done in the past is not simply "pointless and absurd"[690] but rather, to be intelligible as an applicable legal norm at all, can only impose a legal obligation as from its enactment, albeit that the legal obligation (be it a present, future or contingent obligation) arises by reference to past actions. Put another way, it is quite simply impossible for a legal norm to travel back in time and impose an obligation or an obligation at a time prior to its enactment, whatever the rhetoric of that legal norm. That an obligation (say, to tax) is measured by events prior to the enactment of the statute and may be couched in language that tax should have been paid in the past, is neither here nor there. To make sense, the legal norm can only impose a present obligation or a future or contingent obligation. So a hypothetical charge to tax, which charges tax in, say, 2013, enacted in 2019, which provides that a tax is to be paid in 2013 and a failure to pay the 2013 tax results in the tax, together with interest and penalties, being payable in 2019, is simply to levy a charge to a monetary obligation in 2019 (albeit that the mis-labelled "interest" and "penalties" are calculated by reference to a figure

---

Charles Sampford, *Retrospectivity and the Rule of Law* (OUP 2006) 17; Driedger, *"Statutes: Retroactive Retrospective Reflections"* (1978) 56 Canadian Bar Review 268, 271, 276.

685 Fisch, *"Retroactivity and Legal Change: An Equilibrium Approach"* (1996-1997) 110 Harvard Law Review 1056, 1069.

686 Graetz, "*Retroactivity Revisited*" (1985) Harvard Law Review Volume [98] 1820, at 1822.

687 Sampford, *Retrospectivity and the Rule of Law* (no 684) 20.

688 Lord Rodger, *"A time for everything under the law: some reflections on retrospectivity"* (2005) LQR 57.

689 Sampford, *Retrospectivity and the Rule of Law* (no 684) 20.

690 Ibid, 20.

which bears the clothing of a 2013 tax). To be sure, the legitimacy, as a matter of morality, or political philosophy, of the rhetoric of such a provision may well be different to a provision the rhetoric of which simply imposes a present obligation at the time of the enactment of a particular statute.[691] But the relevant legal norm can only be intelligibly articulated as one which composes a present obligation to pay money at the time of the enactment of the statute (or attract a contingent obligation at that time, as the case may be).

Two tax provisions, one which would be described as "retroactive", the other as "retrospective", by those who subscribe to the distinction, may be compared and contrasted to reveal that the distinction between "retroactive" and "retrospective" legislation is indeed illusory. First, Finance Act 1978 ("FA 1978"), section 31, on its terms, denied a tax deduction for trading losses created by an avoidance structure using partnerships dealing in commodities *A, B, C and D v the United Kingdom*,[692] Section 31 applied to any scheme of arrangement after 6th April 1976, so that this provision was retrospective in the sense of having an effect on a consummated transaction which occurred prior to its enactment ("retroactive"). But the (only) effect of Section 31 was to impose a present monetary tax obligation as from the date of its enactment for taxpayers to pay a sum of money in tax in respect of the prior tax year in which the avoidance arrangements were implemented, without the benefit of the losses which, at the time at which the avoidance arrangements were undertaken, the relevant legal material (statutory texts and authorities) would have revealed to be available.[693] Second, Finance Act 1996 ("FA 1996"), Schedule 13, imposed income tax treatment on profits arising on certain

691 See in relation to tax liabilities in particular below.

692 Application No 8531/79 (no 556) 203.

693 Although this was arguable: The European Commission on Human Rights considered that the losses were artificially generated which meant that the expectation of their availability for tax purposes was weak: see below. But in any event Section 31 was not amongst the legal material available to consult to ascertain whether the losses were available or not at the time the avoidance scheme was implemented.

securities[694] 'whenever issued',[695] rather than the lower capital gains tax rates which might, in certain cases, applied to such securities at the time of their issue. Schedule 13 would be considered "retrospective" rather than "retroactive" in relation to a security within the scope of Schedule 13, which was issued prior to its enactment. But Schedule 13 would, just like FA 1978, Section 31, impose a present obligation to pay monies by way of tax. To be sure, the tax obligation imposed by FA 1978, section 31 was for a tax year prior to the enactment of section 31, whereas FA 1996, Schedule 13 would impose a tax obligation for a tax year of or subsequent to the time of the latter's enactment but the effect is the same: a tax obligation. It is simply the label put on the obligation (an obligation for a prior tax year in the case of FA 1978, section 31, an obligation for the year of enactment or a subsequent year in the case of FA 1996, Schedule 13) which is different, nothing more. There is no substantive difference, in other words, between so-called "retroactive" and "retrospective" legislation. The only difference is that a retrospective tax may be avoidable depending on its terms (because the event which triggers a tax obligation has not yet occurred at the time of its enactment, although the computation of any eventual tax obligation will include reference to transactions which have already been undertaken), whereas a retroactive tax is not (because the present charge is computed by reference to events which have already taken place). But avoidability goes to the legitimacy of a present obligation, nothing more. There is no useful further juristic distinction between "retroactivity" and "retrospectivity".

The same analysis holds true for so-called "retroactive" criminal liabilities. A 2019 provision which makes, for example, smoking on a train in 2013 a criminal offence (when in 2013 smoking when travelling on a train was not a criminal offence) is only intelligibly applied to an act situation which involves smoking on a train in 2013 as a legal norm which attracts a

694 'Relevant discounted securities'; the terminology for such securities has changed over the years: see now ITTOIA 2005, section 430(1) which refers to such securities as 'deeply discounted securities'.

695 Paragraph 3(1).

criminal sanction as at 2019, which sanction is triggered by a past (then non-criminal) act of smoking on a train in 2013.

It is, therefore, not only sensible but analytically mandatory to adopt the approach of Lord Rodger[696] to use the same term ("retrospective") both for 'changes in the law [which] affects situations before the change occurs and the way in which such changes affect situations which begin before, but continue after, the change occurs'.[697]

Retrospectivity: meaning and normative considerations

The notion of retrospectivity is usefully captured by Sampford[698] as one where 'different legal texts to determine legal consequences at a hearing in the future are not the same as the texts that were discoverable at the time the action was commenced'.[699] Thus the "past" decision might have been different if the actor had predicted the rule change.[700] This notion of retrospectivity holds good for both "retroactive" and "retrospective" provisions, which confirms that the distinction between the two is semantic only.

Such retrospectivity, in the Sampford sense, may occur if a provision is enacted which has effect by reference to past events, or the meaning and effect of a particular provision is, at the time of application to a particular act situation, quite different to its meaning at the time of the enactment of that provision, in that

> … the courts give rulings about the law as it applies to a particular time, while recognising that the law may apply differently in relation to a different time … the courts interpret legislation dynamically in their assessment of movements in public opinion. Thus the courts may give a "contemporary

696 Lord Rodger, *"A time for everything under the law"* (no 688).
697 Ibid, 59.
698 Sampford, *Retrospectivity and the Rule of Law* (no 684).
699 Ibid, 22.
700 Steven Shaviro, *When Rules Change: An economic and political analysis of transitionality and retroactivity* (University of Chicago Press 2000) 26.

> meaning" to certain words, irrespective of whether that would have been the meaning when the [particular provision in a particular [act] was passed.[701]

As to why retrospectivity is generally thought of as repugnant to good legal administration, the analysis is, generally speaking, well-trodden. First, there is both a general and individual interest in the stability of the law. The law has no capacity to guide by applying legal norms to act situations which are 'impossible to foresee'.[702] Second, there is 'something wrong with punishing people for conduct which they engaged in beyond its proscription'.[703] Third, retrospective laws, certainly statutory laws, may be thought of as undemocratic, in the sense that the legislature which has a mandate at a particular time is seeking to impose its will over events which occurred at a time which that particular legislature may well have had no mandate.[704] This "inter-temporal conflict" has been seen as analogous to the conflicts of laws amongst nations.[705] Jurists have assumed a fundamental principle that

> the legal consequences of situations shall be judged according to the law in force at the time. This is part of a wider principle that people should be judged by their contemporaries and by contemporary standards and beliefs, rather than many years later by people with perhaps very different standards and beliefs. One of the aims of laws on limitation and prescription is to help secure this. By contrast, retroactive laws mean that situations are judged by different rules from those people had in mind at the time.[706]

It is equally clear that none of the factors which have just been discussed provide a conclusive reason why legal norms should never be retrospective. With regard to the stability of the law,

---

701 Lord Rodger, *"A time for everything under the law"* (no 688) 74-74; Lord Rodger was quite clear that the change in the meaning of a word by reference to public opinion was a quite distinct process to any application of "public policy".

702 Sampford, *Retrospectivity and the Rule of Law* (no 684) 9, 10.

703 Ibid, 9.

704 Ibid, 68. The same may be said of any attempt to entrench legislation so that it must endure even after the democratic mandate of the enacting legislature has expired.

705 Lord Rodger, *"A time for everything under the law"* (no 688) 61, citing Savigny, "*System des heugigen vomischen Rechts*" (1849) Volume 8, Chapter 2, page 368 et seq; the question of principle is the validity of one act (the legal consequences for an act situation) made under one system judged under a later system (Lord Rodger, op cit 61-62).

706 Lord Rodger, *"A time for everything under the law"* (no 688) 63.

retrospective laws may overcome otherwise obsolete legal norms.[707] It is easy to agree with Fuller that 'if every time a man relied on existing law in arranging his affairs, he were made secure against any change in the legal rules, the whole body of our law would be ossified forever'.[708] Put another way, there is no presumption, political or legal, that the status quo should be shielded from normal legislative change, which is an 'odd claim since people surely expect legislative change'[709]: Indeed, since uncertainty is reflected in both the political and economic processes, there is no reason to suppose that efficiency demands that those who lose by reason of retrospective laws be treated differently when they flow from retrospective changes in the political process which leads to retrospective legal change.[710] And as to any complaint that retrospective laws cannot guide behaviour, as observed in Chapter 2, laws are not always guides to behaviour[711] so that it cannot always be said, using the words of Shaviro,[712] that past decisions might have been different if the rule change had been predicted. Quite apart from the self-evident proposition that retrospective laws may confer benefits, not punishments, it is at least questionable as to whether even duty-imposing legal norms which attract sanctions, if those duty-imposing legal norms are breached, are taken into account by those who deliberately breach them.[713] Lord Rodger is, of course, quite right that this observation should not be taken too far since an observation that those who breach a legal norm may not have accounted for that legal norm in making any decision to breach it does not entail the conclusion that those who breached that legal norm should be subject to a retrospective (different) legal norm than that in force at the time of the sanction applying act. The latter

---

707 Sampford, *Retrospectivity and the Rule of Law* (no 684) 72; Eule, *"Temporal limits on the legislative mandate: entrenchment and retroactivity"* (1987) American Bar Foundation Research Journal 404-409, 457.

708 Lon Fuller, *The Morality of Law* (New Haven and London, Yale University Press 1964) 60.

709 Graetz, *Retroactivity Revisited* (no 684) 1820, 1823.

710 Ibid, 1825.

711 See, in particular, Honoré, *Real Laws* (no 317).

712 Daniel Shaviro, "*When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity*" (University of Chicago Press 2000) at, page 26.

713 Lord Rodger, *"A time for everything under the law"* (no 688) 68, although Lord Rodger stresses that this observation should not be taken too far.

simply does not follow logically from the former. Certainly Graetz's observation, cited above, that legal change ought to be expected does suggest that, at least in relation to certain legal norms, but not all, of course, that legislative change (and indeed retrospective legislative change) may attract different legal consequences to those which presently obtain in respect of certain act situations. In other words, the prospect of (retrospective) legal change is already factored into present behaviour and thus does not offend against good legal administration. So, for example, a retrospective provision which defeats an aggressive tax avoidance scheme may be legitimate on the basis that the prospect of the aggressive tax avoidance scheme succeeding was sufficiently remote and at odds with the conventional dynamics which allocate profits and losses amongst political and economic actors, that the retrospectivity of the relevant anti-avoidance provisions did not offend against good legal administration at all.[714]

As to the "fundamental" presumption that act situations should be governed by the political and legal standards prevailing at the time of the act situation (and the complaint that retrospective laws are essentially undemocratic), acts may be '… so unspeakably bad that they must be regarded as criminal even if there is no specific text making them so. The damage to the public interest if they were to go unpunished is obvious …'.[715]

Application of the analysis on retrospectivity to taxation

Put short, an obligation to taxation, like all other obligations which arise from duty imposing legal norms, may be retrospective in nature, in that a tax obligation may arise as a (present or future, whether fixed or contingent) obligation by reference to past events, in circumstances in which, at the time of the past events, the actor could not have foreseen, by consulting the legal

714 In other words, Graetz would say that the stability of the law was not undermined, since uncertainty of the prospect of success and the distance from the conventional ways of behaving meant that the avoidance scheme was outside the gravity of law's "certainty" (Graetz, "*Retroactivity Revisited*" (no 684) 1825); Lord Rodger may condemn the avoidance as one of those acts which were 'so unspeakably bad' that it was legitimate to impose retrospective legislation to defeat their objectives.

715 Lord Rodger, *"A time for everything under the law"* (no 688) 65.

material available to him at that time, the tax obligation which would be imposed on him by reference to those events in the future. But according to Fuller,[716] a tax obligation can never be retrospective. Contrary to Graetz, who accepts that tax legislation could be retrospective but considers that any objection should stem from 'normative visions of what people should be entitled to expect',[717] Fuller considers that tax laws simply cannot be retrospective: 'We do not … enact tax laws today that order a man to have paid taxes yesterday, though we may pass today a tax law that determines the levy to be imposed on the basis of events occurring in the past'.[718] Fuller, in other words, considers that a tax obligation, however computed, simply cannot be retrospective,[719] since there is simply, always, a present obligation to pay money, however that present obligation is computed.

Fuller's description of a tax obligation implicitly acknowledges that a tax obligation arises only upon a demand for money:

> Contrast with the ex post facto criminal statute a tax law first enacted, let us say, in 1963 imposing a tax on financial gains realised in 1960 at a time when such gains were not yet subject to tax. Such a statute may be grossly unjust, but it cannot be said that it is, strictly speaking, retroactive. To be sure, it bases the amount of the tax on something that happened in the past. But the only act it requires of its addressee is a very simple one, namely, that he pays the tax demanded. The requirement operates prospectively. We do not, in other words, enact tax laws today that order a man to have paid taxes yesterday, though we may pass today a tax law that determines the levy to be imposed on the basis of events occurring in the past.[720]

This assumption is correct, for the reasons given in this thesis. But Sampford is quite correct in considering Fuller to have made a 'ill-thought out distinction' between a supposed

---

716 Fuller, *The Morality of Law* (no 708) 59-61.

717 Graetz, "*Retroactivity Revisited*" (no 684) 1823; for Graetz legislative change (whether retrospective or not) should be assessed by whether this creates surplus or reduces costs (Ibid, 1825), a process which is far from easy, especially in relation to investors who transact in anticipation of a tax change which has been publicised: Vording and Lubbens "*The ECJ, retrospectivity and the Member State Revenues*" [2006] BTR 91, 95-96.

718 Fuller, *The Morality of Law* (no 708) 59.

719 In either the sense of being "retroactive" or "retrospective".

720 Fuller, *The Morality of Law* (no 708) 59.

retrospective criminal statute and a tax statute which, because of the monetary nature of a tax obligation, could not, according to Fuller, be retrospective.[721] The distinction between the computation of a tax charge and the imposition of the obligation to pay a tax charge is a real one.[722] However, it has nothing to say about whether or not a statute has an effect on events which occurred prior to the enactment of that statute. Indeed, Fuller acknowledges that the hypothetical tax statute he considers has exactly that effect, since the tax charge is imposed '…on the basis of events occurring in the past'. And Fuller acknowledges that

> to the ordinary citizen the argument just advanced would probably appear as the merest quibble. He would be likely to say that just as a man may do an act because he knows it to be legal under the existing criminal law, so he may enter a transaction because he knows that under the existing law the gain it yields is not subject to tax. If the ex post facto criminal law is seen as unjust because it attaches a penalty to an act that carried no punishment when it was done, there is an equal injustice in a law that levies a tax on a man because of an activity that was tax-free when he engaged in it.[723]

The comparison of FA 1978, section 31 and FA 1996, Schedule 13 made above demonstrates that there is no distinction between "retroactive" and "retrospective" tax legislation, any more than there is any real distinction between retroactive and retrospective criminal legislation.

In fact, all of Fuller's observations that tax cannot be retrospective are really observations that such retrospectivity is legitimate (and even these are not all convincing). Thus Fuller's observation that 'if business operations are planned in part by taking into account the existing law of contracts, is that law forever immune to change?'[724] is simply a plea as to legitimacy by reference to obsolescence, which may true of a particular provision or not. Fuller's separate rejection of accusation of injustice where tax incentives are retrospectively repealed, which Fuller bases on a supposed impossibility of identification of the purpose of any particular tax

721 Sampford, *Retrospectivity and the Rule of Law* (no 684) 20.
722 See Chapter 3.
723 Ibid, 59.
724 Ibid, 61.

is also only an argument which appeals to the legitimacy of retrospective legislation, not an analysis of whether particular legislation is, in fact, retrospective or not. For Fuller, a tax law which may have served as an incentive, so as to '… induce men to enter transactions of the kind that would realise [non-taxable] … gains',[725] may legitimately be repealed. It is, says, Fuller, a misdescription of any such retrospective repeal to say that '… a tax is later imposed on gains arising from these transactions [and] men are in effect penalised for doing what the law itself originally induced them to do'[726] because, for Fuller, any particular tax may not have had a single purpose:

> One legislator may have favoured a tax for one reason, another for a quite different reason. What shall we say of the tax on alcoholic beverages? Was its purpose to discourage drinking or was it to raise revenue by imposing a special levy on those whose habits of life indicate that they are especially able to defray the costs of government? There can be no clear answer to questions like these.[727]

Fuller's analysis here has nothing to say about whether the repeal of a tax incentive is retrospective or not. And an immediate response to Fuller's notion of the difficulty of ascertaining the purpose of a tax is that many taxes have an express purpose and in any event a quarrel as to the purpose of a tax is irrelevant to a debate as to whether it is legitimate to impose a tax obligation on a taxpayer by reference to legal material not available to that taxpayer at he time at which the taxpayer undertook the activity which gave rise to the tax charge under the retrospective legislation.

Fuller also observes that '… if a tax exemption is granted in favour of certain activities and then later repealed, the test often applied is to ask whether the State can fairly be considered to have entered a contract to maintain the exemption'.[728] This embryonic description of legitimate

725 Ibid, 60.
726 Ibid.
727 Ibid, 61.
728 Ibid, 61.

expectation is predicated on Fuller's perception of a State's position of superior power which 'rests ultimately on a tacit reciprocity'.[729] Again, this observation concerns whether retrospectivity is legitimised, not whether a particular provision is retrospective at all. Thus, Fuller's (correct) distinction between a charge to tax and its computation does not permit a conclusion that a tax charge cannot be retrospective.

The contribution of tax law to any analysis of retrospectivity is to highlight the absence of any analytically sound or coherent distinction between "retroactivity" and "retrospectivity", in particular by exposing Fuller's analysis as misconceived, insofar as it suggested that tax law cannot be retrospective.

Section III. The Implications of the Monetary (Non-Property) Nature of a Tax Obligation on the Efficacy of Taxation and Notions of Responsibility

Taxation imposed as a monetary obligation, rather than a property obligation, certainly contributes to autonomy of the taxpayer, as observed by Simmel in the Philosophy of Money, discussed above. So the substitution of monetary taxation for tithes releases a taxpayer from otherwise burdensome and counter-productive obligations:

> But of all institutions which are…adverse to cultivation and improvement, none is so noxious as that of *tithes*…The burden of the tax falls with its chief, if not with its whole weight, upon tillage; that is to say, upon that precise mode of cultivation which…it is the business of the state to relieve and remunerate…[There is] [n]o measure of such extensive concern…nor any single alteration so beneficial, as the conversion of tithes into corn rents.[730]

729 Ibid, 61, citing Georg Simmel, *A Sociology of Georg Simmell* (Kurt Wolf (tr), The Free Press 1950), *"Interaction in the Idea of Law"* Section 4, 186-189, and *"Subordination under a Principle"* Chapter 4, 250-267.

730 William Paley, *The Principles of Moral and Political Philosophy* (first published 1785, Liberty Fund Inc 2002), 455-456.

However, as with the monetisation of other types of obligation, the separation of an obligation (here to tax) from personhood (and the consequent dilution of certain types of responsibility) brings juristic and extra-legal consequences which are not normatively appealing. The absence of any connection between a taxpayer's monetary obligation and the features of that taxpayer's personhood is illustrated by the decision of the High Court in *Oram v Johnson*.[731] The taxpayer sought to claim as deductible expenditure the value of his labour on improving and enlarging an investment property, valuing his time at £1 an hour. The taxpayer's case failed, on the basis that the notion of deductible "expenditure", in "money or money's worth", in what is now TCGA 1992, section 38, which defines allowable expenditure 'excluded the value of personal labour, since his labour (did not [diminish] his stock of anything by any precisely ascertainable amount'[732] or '…[diminish] the total assets of the person making the expenditure'.[733] The decision makes it clear that the satisfaction of a tax obligation requires "expenditure" in the form of the delivery of monetary assets, which in no sense accommodates the valorisation of the personal attributes (such as skills) or time expended by the taxpayer on the exertion of personal labour. Only money counts in the computation of the tax obligation, not the personal characteristics or labour expended by a taxpayer.[734]

The personal and monetary nature of an obligation to tax has important consequences as to both the efficacy and normative considerations of a charge to tax in taxation's different modes. As observed in Chapter 1, taxation may seek to fulfil a "citizenship" function in cementing a commitment to the community which raises the tax, to finance the provision of public goods, to effect a redistribution of resources, to implement social engineering (in the form of tax

731 [1980] STC 222

732 At 226, per Walton J.

733 At 227.

734 The references to the diminution of "stock" or "total assets" does not suggest that a tax obligation is a property obligation. Rather these references recognise that "expenditure" by a taxpayer diminishes his net wealth ("stock", or "total assets"). The decision reinforces the monetary nature of a tax obligation by confining relief to monetary "expenditure", rather than expanding the term "money's worth" in section 38 to "expenditure of time and labour".

incentives or disincentives), to act as a tool of economic management or to finance government[735] activities.

So far as citizenship functions are concerned, to the extent that taxation may be funded by monies which are borrowed (so that an obligation is owed to a lender-creditor, not to the taxing body), or made out of gifted monies from a person outside the taxing jurisdiction, the monetary nature of a tax obligation means that the citizenship function is simply not achieved. In the case of borrowings, the tax obligation is exchanged for an obligation to a lending creditor and in the case of a gift, the burden of the tax charge falls on the donor, not the nominal taxpayer. Taxation as the monetisation of a citizenship function is thus vulnerable to being both ineffective (since the nominal taxpayer who pays tax out of borrowed or gifted monies may remain entirely indifferent to a commitment to the tax raising body) and losing normative appeal (in that such taxation accepts that any citizenship functions may be sidestepped by taxpayers).

Neither is the objective of the financing of public goods, or the funding of non-public-good governmental activities, necessarily indifferent to where the source of financing comes from. Consider a tax charge on tax units which is funded by donors outside the tax jurisdiction (say a non-tax resident parent company). The non-tax resident donor who bears the burden of the tax unit's tax obligation may well have funded the latter out of profits made from activities abhorrent to the tax jurisdiction who fixes a tax obligation on the tax unit. So a company which makes profits from activities which depend on slave labour in jurisdiction X may fund a tax obligation of its subsidiary, a tax unit within the jurisdiction raised by a liberal jurisdiction Y, which liberal jurisdiction cannot refuse to accept payment in satisfaction of the tax obligation

[735] Or non-government activities in the case of a common law tax.

without express prohibition as to how the tax unit funds its tax liabilities.[736] However, as with taxation seeking to achieve a citizenship function, taxation imposed to redistribute resources, or to act as incentive (or disincentive) or used as a tool to manage the economy, is (because the tax may be funded out of borrowings or gifts), rendered potentially ineffective and subject to losing normative legitimacy as a result. In the case of redistribution, resources are being moved from a donor to the recipient in the case of tax being paid out of gifted monies (even in the case of borrowings, the terms of borrowing, being the duration and finance costs of any loan, may mean that the nominal taxpayer is less burdened than if he had had to pay the tax out of his own resources). So any inequality between the nominal taxpayer and the donee of the redistributed resources (which may well be the goal of redistribution, rather than merely to increase the resources of the donee) remains untouched. Similarly, taxation imposed to incentivise or disincentivise particular activities (say to disincentivise the use of polluting vehicles) will have no effect at all (and loses legitimacy) if the tax is borne by a person other than the target of the particular incentivising/disincentivising tax charge. And exactly the same analysis holds true for taxation imposed as a tool of economic management. In each of these latter cases, a taxpayer is juristically whole having paid his tax, howsoever that tax is funded, without any juristic responsibility as to whether the particular objective sought by the imposition of a particular tax charge is achieved or not. A taxpayer may abandon any responsibility to any objective sought by taxation and simply pay his tax. Role responsibility puts no obligation on a taxpayer at all, other than to deliver monetary assets to satisfy a monetary obligation. Put another way, in relation to a taxpayer deciding to undertake a particular course of action which may or may not achieve an objective sought by a tax charge, an obligation to taxation always enters a decision making process at the Razian deliberative

[736] The need for such express prohibitions as to funding tax liabilities strongly illustrates the point made here.

stage, taxation (like all liabilities which have been monetised, where the payment of money is the sole obligation and consequence of the application of a legal norm[737]) never drives an actor to the executive stage of that decision. In relation to taxation, the payment of the sum due in tax (and how to pay that sum) is the only decision which is the subject of the executive stage.

Finally, lest it be said that taxpayers generally pay tax out of their own resources, which means that these observations in relation to the effect upon efficacy and responsibility of the monetary nature of a tax obligation are of little weight, two responses may be made. First, as a matter of principle, the monetisation of liabilities generally and the dilution of notions of responsibility (especially role responsibility) are sufficiently analytically important that the issues raised deserve careful analysis on any view. Second, as to the practical effect of the monetary nature of taxation on the efficacy of taxation the prospect of borrowings or gifts funding tax liabilities is not remotely fanciful. Multinational groups of companies will fund companies within a particular tax jurisdiction from equity finance or loan capital as a matter of course, where the finance may well come from outside the taxing jurisdiction. A company tax resident in the United States (or a tax haven, for that matter) may finance a company which is tax resident in the United Kingdom, to enable the latter to pay its United Kingdom tax obligation (or any other monetary obligation). Depending on where the centre of commercial interests of a particular multinational group lies, such extra-jurisdictional financing may well be the norm, rather than the exception. And for individuals, the financing of an United Kingdom tax resident individual's tax obligation from non-United Kingdom tax resident trustees or family members is a perfectly unremarkable circumstance.

Thus, as in the case of the monetary liabilities discussed above, the purely monetary personal nature of a tax obligation has important an important diluting effect on notions of responsibility

737 So there is no, for example, criminal conviction for the breach of a legal norm.

and commitment to any objectives sought by taxation in any of its modes, as well as on the effectiveness of the charge to tax itself.

Section IV. Conclusions

Taxation (like many other monetised liabilities) dilutes responsibility in certain cases and reveals itself to be vulnerable to criticisms of ineffectiveness, due to its personal monetary juristic nature, which analysis provides a further contribution to existing literature (these important points having received no attention in existing literature). The application of the principles of set off and nominalism reinforce the notion of taxation as a monetary (not a property) obligation, which monetary nature allows a further contribution to be made to existing literature by demonstrating that any perceived distinction between "retroactivity" and "retrospectivity" is indeed illusory. Taxation's modal nature, on the other hand, undermines a common perception that there is a single proper approach to be taken in construing tax statutes (and even more strongly undermines that any such single approach should be "literal" or more "expansive").

CHAPTER 5: ANY DEBATE OVER TAXATION AND PROPERTY RIGHTS IS MISCONCEIVED

Introduction

Chapter 1, Chapter 2 and Chapter 3 have demonstrated that a tax obligation is a personal monetary obligation and not a property obligation (with attendant juristic and philosophical consequences, particularly in relation to responsibility). However, much modern philosophical debate on the justice of taxation treats taxation as a form of expropriation of the taxpayer's property. This focusses on the wrong juristic mechanism. Property law operates at a particular stage of commercial operations, namely on the transaction which generates pre-tax profits and assesses which profits are properly treated as *owned* by the taxpayer; contrast taxation, which applies to pre-tax profits, *once they have arisen and which may well be taxable before they are "owned" by the taxpayer*. To treat tax as an attack on a taxpayer's property rights is to fail to address the correct question.

Chapter 5 considers and analyses selected thinkers and their attitude to taxation. Section I considers Aquinas' notions of just property rights and just taxation. Aquinas' treatment of both reveals a thinker who clearly considers these two notions as separate. Additionally, this very separation demonstrates that it is perfectly possible to reconcile a strong egalitarian agenda (expressed through his idea of heavily burdened property rights[738] which are modified to assist those in need) with minimalist notions of taxation. However, one modern commentator, Finnis,[739] mistakenly considers that egalitarian notions of property rights lead Aquinas to consider that taxation ought to be imposed with a strong redistributive agenda, which

738 To allow those in need to use property, and through alms giving.

739 John Finnis, *Founders of Modern Political and Social Thought: Aquinas, Moral Political and Legal Theory* (OUP, 1998) ("*Aquinas*").

conclusion arises from the very confusion which this paper seeks to dispel between an analysis of a duty which qualifies property rights and a monetary obligation to taxation, which does not. Section II considers two philosophical analyses, one libertarian,[740] the other egalitarian,[741] both of which treat taxation as diluting the taxpayer's property rights (in his pre-tax profits). Neither analysis offers a convincing attack or defence of taxation precisely because both are predicated on a mistaken connection between taxation and the taxpayer's property rights.

Section I. Aquinas and taxation

As demonstrated below,[742] Aquinas had a firm and radical redistributionist[743] agenda. However, for Aquinas, this agenda was not achieved through any notion of taxation. Aquinas seeks to explain why certain obligations as to property use and alms-giving are owed by private individuals inter se. His notion of taxation as an obligation owed to the King/state is quite different. Aquinas' treatment of property and taxation as separate notions provides a concrete analysis of how the two notions can operate independently so as to permit the fulfilment of an egalitarian agenda despite taxation playing a minimalist role. Thus, importantly for this thesis, Aquinas demonstrates a clear understanding that a tax obligation is not a property obligation.

740 Robert Nozick, *Anarchy State and Utopia* (New York 1974) ("*Anarchy*").

741 Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (OUP 2002) (*"Myth*").

742 There is no intention to place Aquinas' thinking in any historical or theological context. Aquinas' observations are taken at face value to illustrate the distinction between money claims and property claims discussed above, no more.

743 Although a Thomist "redistribution" is different to a modern egalitarian meanng. Aquinas did not aspire to a notion of universal equality. Distributive justice yields, for Aquinas, equality of "*geometrical proportion*" (that is, relative equality, so that after alms giving, persons' respective positions in society inter se are maintained: '…a person receives all the more of the common goods, according as he holds a more prominent position in the community': ST II-II Q61, Article 2, Responsio), whereas commutative justice yields equality of 'arithmetical proportion (that is, '…something is paid to an individual on account of something of his that has been received…so that the one person should pay back to the other just so much as he has become richer out of that which belonged to the other': ST II-II Q61, Article 2, Responsio. Thus Aquinas is content that distributive justice maintains different stations in life.

Aquinas' Notion of Property Rights and Aquinas' Redistributionist Agenda

Commonality of use

Aquinas is content that it is 'lawful for man to possess property'[744] the notion of private property[745] being not contrary, but rather an addition, to natural law.[746] However, Aquinas is clear that the use of property is in common:[747] while 'it is lawful for man to possess property', so that man has the 'power to procure and dispense [exterior things/temporal goods]', so far as the use of such goods is concerned, 'they ought to belong not to us alone but also to such others as we are able to succour out of what we have over and above our needs'.[748] The "need" must be strong: it is a question of necessity. Indeed in cases of extreme necessity, even ownership is in common, so that one man may take another's property.[749]

For Aquinas, commonality of use is a function of both commutative and distributive justice, both of which have as their foundation the love of neighbour, which, in turn, is a function of the love of God.[750] 'Love of neighbour and its necessary conditions are matters of precept,[751] which is informed by a notion of equality as "a general form of justice", wherein distributive and commutative justice agree…'.[752]

---

744 ST II-II, Q66, Article 2, Responsio.

745 Aquinas considered that a power to procure and dispense property in respect of property ("exterior things") was the hallmark of a property right: ST II-II Q66, Article 2, Responsio.

746 ST II-II, Q66, Article 2, ad 1: '… The division of possessions is not according to the natural law, but rather arose from human agreement which belonged to positive law … Hence the ownership of possessions is not contrary to the natural law, but an addition thereto devised by human reason.'

747 Referring to Deuteronomy (22:1-4): '[t]he use of things should belong to all in common'.

748 ST II-II Q 32, Article 5, ad 2.

749 ST II-II Q 32, Article 7, ad 3.

750 '*The love of God is the end to which the love of neighbour is directed* [emphasis added]. Therefore it behoved us to receive the precepts not only of the love of God but also of the love of neighbour, on account of those who are less intelligent, who do not easily understand that one of these precepts is included in the other': ST II-II, Q44, Article 2, Responsio.

751 ST II-II Q32, Responsio. Indeed Aquinas recognizes the love of neighbour principle to be the 'end of all commandments': ST II-II Q99, Article 1, ad2, ad3

752 ST II-II Q61, Article 2, ad2, albeit that distributive justice yields, for Aquinas, equality of 'geometrical proportion' whereas commutative justice yields equality of 'arithmetical proportion' (see above).

This notion of commonality of use is a radical justice-producing mechanism: it defines an initial allocation of property rights, which in turn effects a redistributive agenda by permitting the needy to use the property of the rich. But critically, Aquinas considers that justice produces obligations (to allow use of one's property) to private individuals inter se. It is private property rights and obligations which are qualified so as to give rise to duties towards other private individuals. Aquinas is not suggesting that duties as to use arise towards the King.

Redistributive alms giving

Separately from notions of the common use of property, Aquinas considered there to be a duty of alms giving, which was a function of charity.

For Aquinas, alms giving is a moral precept[753] 'Benificence [doing good to someone] denotes an act of charity'.[754] Alms giving may be commanded, and in this way it is reckoned among works of satisfaction for sin, and 'insofar as it is directed to placate God, it has the character of sacrifice and thus it is commanded by religion'.[755]

So far as the substantive obligations of an alms giver are concerned, '…we are bound to give alms of our surplus, as also to give alms to one whose need is extreme…'.[756] However, alms giving is a question of discretion 'according to the various degrees of connection, holiness and utility. For we ought to give alms to one who is much holier and in greater want, and to one who is more useful to the common weal, than to one who is more closely united to us…'[757]

---

753 Precepts being 'about acts of virtue': II-II Q32 Article 5, Responsio. See also ST I-II, Q104, Article 1, ad 3: 'reason…quickened by faith'.

754 ST II-II, Q31, Article 4, Responsio. Thus an outward gift belongs 'in general to friendship or charity … It does not retract from a man's friendship, if, through love, he gives his friend something he would like to keep for himself, but rather does this prove the perfection of the friendship', ST II-II, Q31, Article 1, ad 2.

755 ST II-II Q32, Article 32, ad 3.

756 ST II-II Q32, Article 5, Responsio.

757 ST II-II, Q32, Article 5, Responsio; Article 9, Responsio. The discretionary nature ('[a] matter of private initiative', Todd Meredith *"The Ethical Basis for Taxation in the Thought of Thomas Aquinas"* in *Journal of Markets and Morality* (Spring 2008) Volume 11, Number 1, 41-57, 51 (*"Taxation in the Thought of Aquinas"*) has led at least one commentator (Ibid, 51-53) to suggest that the redistribution of

The requirement to give alms varies according to circumstances, in that the alms giver is required to give a surplus only after he has calculated that which he needs to look after himself, those over whom he has charge, business expenses,[758] ("social station and the ordinary occurrences of life") and debts, which include debts due to the Church or the State. Furthermore, obligations to putative recipients of alms, including even parents, are trumped by 'weightier motives, as need or some other circumstance, for instance the common good of the Church or King'.[759] Indeed, a 'great need on the part of the common weal' is an express exception to the mandate to individuals to retain life's necessities to preserve his and his charges' lives.[760]

The duty to give alms, when set against the background of compulsory common use of property, might be seen as modifying the property rights of putative alms givers. The needs of potential recipients of alms may be sufficiently extreme to demand the use, or, indeed the ownership, of the property of those obliged to give alms (albeit that the duty to permit common use is a function of justice and the duty to give alms is a function of charity[761]). However, the duty to give alms is, like the duty to permit common use of property, a duty imposed on private individuals inter se, although that duty may be mandated by the state. So the duty to give alms cannot be equated to a duty to pay taxes, any more than a duty to permit common use of property.[762]

---

superfluous goods cannot be a matter for "state initiative" (and therefore cannot be a mandate to the state 'to ensure fair distribution through the tax code').

758 ST II-II, Q32, Article 6, Responsio.

759 Ibid, ad 3; see also ST II-II Q32, Article 6, Responsio: '…if a man found himself in the presence of a case of urgency, and had merely sufficient to support himself and his children, or others under his charge, he would be throwing away his life and that of others if he were to give away in alms, what was then necessary to him. Yet I say this without prejudice to such a case as might happen, supposing that by depriving himself of necessaries a man might help a great personage, and a support of Church or State, since it would be a praiseworthy act to endanger one's life and the lives of those who are under our charge for the delivery of such a person, since the common good is to be preferred to one's own.'

760 Ibid.

761 See above.

762 Although see below as to Finnis' contrary conclusion.

Furthermore, Aquinas clearly distinguishes between the obligation to give alms and taxes (monies due to the state for the common good), since the duty to pay monies to the Church or the King expressly, for Aquinas, trumps the duty to give alms (see above). Thus Aquinas makes the very distinction made in this Thesis between a claim to property and a claim by the state for money by way of taxation. Both the duty to allow common use and the duty to give alms are radical distributive measures but are not, for Aquinas, measures which arise from any obligation to the King (and are not effected through taxation).

Aquinas' Notion of Taxes: No Redistributionist Agenda

Whilst Aquinas' notion of property rights was radically redistributive, Aquinas did not seek to support redistribution through taxation. In assessing the nature of a just right on the part of King to tax its subjects, Aquinas observes that it is natural for man 'to be a social and political animal, to live in a group'[763] The welfare and safety of society lies in the 'preservation of unity', called peace, [764] which is the chief concern of the ruler[765] This concern is part of the King's duty to guide his subjects to a good[766] and virtuous life.[767] The ruler must also secure a sufficient supply of 'the things required for proper living'.[768] It is in this context that Aquinas' description of the King's duty that he 'corrects what is out of order and supplies what is lacking and if any of them can be done better he tries to do so'[769] must be viewed.[770]

---

763 This allows each man to assist his fellows, and enables different men to pursue different occupations and make different discoveries. See Thomas Aquinas, *De Regno ad Regem Cypri* (Gerald B. Phelan (tr), I. Th Eschmann OP (revised), Joseph Kenny OP (ed) Toronto 1949) (*"De Regno"*) paragraph 4, 6.

764 Ibid, paragraph 17. See also paragraph 106: '…men form a group for the purpose of living well together, a thing which the individual man living alone could not attain'.

765 Ibid, paragraph 17.

766 '[I]t pertains to the king's office to promote the good life of the multitude in such a way as to make it suitable for the attainment of heavenly happiness, that is to say, he should command those things which lead to the happiness of Heaven and, as far as possible, forbid the contrary', *De Regno* (no 812) paragraph 115.

767 Ibid, paragraph 116.

768 *De Regno* (no 763) paragraph 118.

769 Ibid, paragraph 121.

770 Meredith, *"Taxation in the Thought of Aquinas"* (no 758) 47, suggests that this passage establishes an Aquinan notion of subsidiarity, whereby the king (State) is only engaged '[only] if the correction of disorder or the supplies of life's necessities are done better at state level than at a lower level of

And for carrying out his duties to his subjects, the King is entitled to a "salary", encompassed within the right to takings from his subjects.[771] This salary includes the expenses of carrying out kingly duties, and enables the King to live at the community's expense by making a charge on the business of the community (by taxation[772] or some other form of levy).[773]

Furthermore, a King may take things from his subjects 'in order to secure the common weal';[774] since it 'is no robbery if princes exact from their subjects that which is due to them for the safe-guarding of the common good'.[775] Equally, '…persons in authority who are bound to safeguard justice on earth, are bound to restitution, if by their neglect thieves prosper, because their salary[776] is given to them in payment of their preserving justice here below'.[777]

The subject's monetary obligations to the King which fall into any notion of taxation are thus seen to be the obligations to pay his "salary" and in turn confined to the "expenses" of carrying

---

administration, say at household or individual level: The Thomist state should, as Edouard Crahay argues, do what smaller social units, such as families and business concerns, cannot do for promoting good order in society…' See Edouard Crahay, *La Politique de saint Thomas d'Aquin* (Louvain: Institut Superieur de Philosophie, 1896), 141-143.

771 '[A] revenue established for earthly princes, so that they may live and abstain from despoiling their subjects': Thomas Aquinas *"The Letter to the Duchess of Brabant "On the Government of the Jews""*, in Dyson (ed), *Aquinas: Political Writings* (CUP 2002) (*"On the Government of the Jews"*) 236, 237. Aquinas makes a similar observation on tax as a salary for ministry in his commentary on Pauls' Letter to the Romans: see Meredith, *"Taxation in the Thought of Aquinas"* (no 758) 43**.** On the other hand, **t**he seeking of a ruler's private good is simply unjust: *De Regno* (no 763) paragraph 24. Indeed, Meredith (op. cit 43) seeks to bifurcate Aquinas' notion of tax so as to identify one element as a salary for general administration, governing the realm so as to maintain peace and a second, distinct element, being tax levied for the maintenance of the king (or as a payment for further services rendered, such as upkeep of the roads). Both are "public goods" in the sense used in this Thesis.

772 Of course, the king may exercise compulsory taking-powers for other reasons but these takings would not be a Thomist "tax". Not all compulsory takings by the king from his subjects are "tax": forcible restitution of monies by usurers is not properly described as taxation but may clearly be enforced through compulsory monetary demands: ibid, at 234. This echoes the sort of necessary "public purpose" feature for "taxation" rejected in Chapter 1 above. But notions of Parliamentary sovereignty and common law taxes are fr removed from any Thomist thinking. Sufficient to say that the property money distinction advanced in this Thesis is endorsed by Aquinas.

773 Citing Paul's Letter to the Corinthians (1 Corinthians 9:7), Aquinas observes that 'sometimes it happens that princes do not have revenues sufficient to protect their lands or to perform other tasks which might reasonably be expected of princes; and in such a case it is just that their subjects should be called upon to furnish whatever is necessary to secure the common welfare…'.

774 ST I-II Q105, Article 1, ad5.

775 ST II-II Q 66, Article 8, ad 3.

776 A better translation might be that a king's return from a feudal society is '[like] a salary…' but the point still stands.

777 ST II-II Q62, Article 7, Responsio, emphasis added.

out Kingly duties (the preservation of unity, peace and so on). These are sorts of "public goods" which taxation pays for and this basis of taxation is seemingly uncontroversial for libertarian and egalitarian alike.[778] We have already seen that these money obligations are quite separate from the duty to allow shared use of property and to give alms. And the King's duties seem, for Aquinas, to be fairly minimalist, despite the King's obligation to secure a good and virtuous life for his subjects. Aquinas observes that too beautiful a city dulls the senses,[779] so that pleasures make one 'soft in spirit' (dissolute, lazy).[780] Thus public goods cannot be provided to an extent that leads to dissolution of spirit.[781]

Thus Aquinas' notion of tax as salary plus expenses is not redistributionist. While the obligations to permit common use of property and to give alms clearly serve a redistributive function, these duties do not inform Aquinas' notion of taxation (indeed Aquinas distinguishes these obligations from the obligation to pay taxes). In other words, Aquinas, in qualifying property rights in a radical redistributive way, nevertheless has a minimalist notion of taxation.

Finnis: Aquinas has a strong redistributive notion of just taxation

However, at least one modern Christian writer, Finnis,[782] considers Aquinas' conclusions on the proper role of private property and taxation to betray a redistributive agenda, fructified primarily by a redistributive tax code.[783]

---

778 See above: Nozick is content with taxation paying for public goods, although of course what constitutes legitimate public goods is the subject of a potential quarrel with egalitarians, whereas Murphy and Nagel consider that taxation should of course pay for public goods but also more.

779 *De Regno* (no 763) 144.

780 Ibid, paragraph 147.

781 'It is therefore harmful to a city to superabound in delightful things, whether it be on account of its situation or from whatever other cause…in human intercourse, it is best to have a moderate share of pleasure as a spice of life, so to speak...' Ibid, paragraph 148

782 Finnis, *Aquinas* (no 739).

783 Other commentators disagree. In particular, see Meredith, *"Taxation in the Thought of Aquinas"* (no 758) 41-57.

Finnis observes that, for Aquinas, 'rulers have a responsibility to provide, for each of their subjects, whatever they would otherwise lack to sustain them in their respective conditions and status in life'.[784] Aquinas had observed that '[an] exchange of things is twofold: one, natural, as it were, and necessary, whereby one commodity is exchanged for another, or money taken in exchange for a commodity in order to satisfy the needs of life. Such like trading, properly speaking, does not belong to tradesmen, but rather to housekeepers or civil servants who have to provide the household or the state with the necessities of life.'[785] Finnis further observes that '[m]ore clearly, [Aquinas] goes along with Aristotle's clear and repeated teaching that it is appropriate for the state's rulers and laws to make provision for the fair distribution of goods for use in consumption, so that use be truly "common".'[786]

Finnis concludes from these texts that '[i]n Aquinas' own theory this amounts to saying that the distribution by owners of their superflua is an appropriate subject for legislation…so payment of taxes imposed for redistributive purposes will be a primary way in which owners discharge their duty of distribution'.[787]

Finnis does not define what he means by "tax". It is assumed that he takes a traditional notion of a compulsory levy to pay for state interests. However, Finnis' conclusion that Aquinas considered taxation to be a "primary" way to effect redistribution of wealth is not supported by the texts he refers to. The text quoted by Finnis refers to trade, not to the obligation to pay tax.[788] Aquinas merely identifies not-for-profit trading as appropriate for housekeepers and

784 Finnis, *Aquinas* (no 739) 195, citing ST II-II Q77, Article 4, Responsio.
785 ST II-II Q77, Article 4, Responsio.
786 Finnis, *Aquinas* (no 739) 195, citing ST I-II, Q104, Article 1, ad 1, Q105, Article 2, Responsio, ad 3.
787 Ibid, 195.
788 And reflects a similar observation in *De Regno* (no 763) paragraph 135, where Aquinas, having considered that a city might be self-sufficient for food due to the fertility of its soil, also identifies, as a means to deal with circumstances where a city is not so self-sufficient '…trade, through which the necessaries of life are brought to the town in sufficient quantity from different places'.

rulers (or their civil servants).[789] Meredith is correct to observe that 'the commercial provision of necessary goods by the ruler in the hypothetical event of market failure is still a far cry from redistributive taxation in aid of the poor…it is far from clear that Aquinas has in mind a permanent system of public assistance based on redistributive taxation'.[790]

Indeed, a conclusion that Aquinas considered taxation to be a "primary" mechanism to effect redistribution is inconsistent with Aquinas' notion of "tax" being confined to being a stipend or fee for government (and the minimal provision of public goods at that). Furthermore, the redistributive function effected through forced common use of private property or through alms giving[791] are obligations which arises as a function of the love thy neighbour principle, which is an obligation owed to God and by private individuals inter se, rather than to the King. Even if the King plays a co-ordinating role in enforcing such private obligations, indeed in monetary form, by, say imposing compulsory alms giving, those obligations would not aptly be described as tax liabilities. Such monetary liabilities would not fund *state interests*, but rather the interests of private individuals who have rights correlative to the obligation on others to give alms, which are of the same quality as any creditor who had a right to be repaid a money debt owed by a debtor, which rights are ultimately enforced by the state. Such liabilities are not "tax" liabilities despite being ultimately enforceable by the state. And as observed above, Aquinas himself expressly distinguishes between property obligation as to common use and alms giving on the one hand and taxes on the other: in particular the requirement to give alms occurs only after debts to government and Church have been paid.

---

789 As Meredith observes, 'to the extent that it may apply to present-day civil institutions, this passage establishes a moral framework for public utilities, not for public assistance. It is about water bills, not welfare cheques.' Meredith, *"Taxation in the Thought of Aquinas"* (no 758) 51.

790 Ibid, 48.

791 Whether arising as a matter of commutative or distributive justice.

Thus, Aquinas serves as an illuminating illustration of a thinker who draws a clear distinction between a claim against property (forced common use and a duty to give alms) and a money debt claim for taxation (the obligation to pay the King's salary) and is a concrete illustration of the perfectly intelligible congruity of a radical redistributive notion in respect of property and a minimalist view of the state and taxation. Finnis' conclusions as to Aquinas' notions of taxation confuses a claim over property and a claim for money in the same way as Nozick, and Murphy and Nagel have done, in Finnis' case to lead to an incorrect description of Aquinas' view of the role of taxation.

Section II. Murphy and Nagel v Nozick

Libertarian hostility to taxation as expropriation of property is misconceived

For Nozick, taxation is a qualification of property rights and thus an attack on self-ownership: 'individuals have rights, and there are things which no individual or group can do to them (without violating these rights)'.[792] This protection of rights arises from '…the Kantian principle that individuals are ends not merely means; they may not be sacrificed or used for the achieving of other ends without their consent'.[793] This principle of moral equality confers dignity upon each person and 'allows [persons]…to choose [their] life and realize [their] ends and [their] conception of [themselves]...aided by the voluntary cooperation of other individuals possessing the same dignity'.[794]

For Nozick, property rights are comprised in "an entitlement theory", whereby if it is assumed that everyone is entitled to the goods they currently possess (their "holdings"), a just distribution of property rights arises as a result purely from people's free exchanges. A just

792 Nozick, *Anarchy* (no 740), at ix.
793 Ibid, 30-31.
794 Ibid, 334.

entitlement is a function of the application of three principles: the principle of transfer (whatever is justly acquired may be freely transferred); the principle of just initial acquisition of things which may then be transferred; and the principle of rectification of injustice (how to deal with holdings unjustly acquired or transferred).[795]

Central to Nozick's view of property rights is a claim to self-ownership, which is violated by any Rawlsian demand that goods produced by the talented be used to improve the well-being of the disadvantaged. Such demands 'institute (partial) ownership by others of people and their labour. These principles involve a shift from the classical liberals' idea of self-ownership to a notion of (partial) property-rights in other people.'[796] Thus any demand upon one's labour (or its fruits) is an attack on self-ownership.[797]

Famously, Nozick's logic is that tax reduces the fruits of one's labour, so 'taxation of earnings from labour is on a par with forced labour'.[798] People have property in themselves and their labour, which entails the right to decide what work to do. Accordingly, seizing the results of someone's labour is 'equivalent to seizing hours from him and directing him to carry on various activities'. This process of the state removing the ability of persons to decide what work to do and what to do with its proceeds 'gives [the state] a property right' in the persons so compelled.[799] Therefore, if forced labour to serve the needy is illegitimate, then the seizure of people's goods by means of taxation for that same purpose cannot be legitimate[800] Thus only a minimal state, 'limited to the narrow functions of protection against force, theft, fraud, and

795 Ibid, 160. See Will Kymlicka, *Contemporary Political Philosophy* (OUP 2002) 103-104 for a penetrative summary of Nozick's entitlement theory.
796 Nozick, *Anarchy* (no 740), 172.
797 Ibid, 171, 172.
798 Ibid, 169.
799 Ibid, 171, 172. Nozick simply follows John Locke: paragraph 27, paragraph 140, usefully discussed in John Snape and Jane Frecknall-Hughes "John Locke: Property, Tax and the Private Sphere" in "Studies in the Histories of Tax Law", Volume 8 (ed Peter Harris and Dominic De Cogan, Hart 2017).
800 Ibid.

enforcement of contracts and so on' is legitimate.[801] Any financing of additional state activities involves the coercive taxation of people, violating the principle 'from each as they choose, to each as they are chosen'.[802]

Nozick deploys a "one-step" argument: taxation is illegitimate *simply because* it expropriates the taxpayer's property (and is thus an attack on his self-ownership). But as observed above, taxation does not expropriate or otherwise qualify the taxpayer's property rights in any of his property, in that none of his identifiable assets are subject to a tax claim. None of the "fruits" of a taxpayer's labours (pre-tax profits) are the *subject* of a tax claim, only money, wherever the taxpayer may find it (including inherited funds or a gift from another, that is, "fruits" of someone else's labours). This is true whether or not one accepts Nozick's notion of self-ownership as regards property rights. So Nozick's hostility to taxation cannot legitimately be predicated on a notion of taxation as a claim to a taxpayer's property. Of course, Nozick might well say that even if, juristically, taxation has no connection to expropriating a taxpayer's property (contrary to his thesis), taxation (beyond the financing of public goods) treats people as means not ends by compelling them to participate in the projects of others (redistribution of wealth and other egalitarian objectives); accordingly, juristic distinctions between claims to money and claims against property are irrelevant. But even then Nozick would have to confront the specific nature of taxation (the compulsory funding of state interests) and the various bases on which tax was imposed to demonstrate that one or more of them offended Kantian moral equality and his notion of self-ownership. Laying aside any redistributive objective of taxation, taxation as, say, a tool of social engineering may increase the efficiency of the market place and be closer to the provision of public goods than Nozick might realise. Or taxation as a tool of economic management may increase market efficiency (or ensure its survival): see above.

801 Ibid, ix.
802 Ibid.

A recognition that taxation is a claim to money, not to property, would force Nozick to justify his hostility to one or more of taxation's individuated specific features or bases.

Modern libertarians echo the notion of tax as an appropriation of property. See, for example, Oakshott who regards tax as a transfer of property to the ruler, not merely an adverbial constraint on action, which is legitimised only by "consent".[803]

Egalitarian defence of taxation as part of the system which defines property rights is misconceived

The analysis above demonstrates that an egalitarian need not deny a taxpayer's property rights in his pre-tax profits in order to defend taxation. The justice of a particular feature or legitimising egalitarian basis of taxation is properly assessed against a libertarian argument (say based on self-ownership) by scrutinising taxation's objectives and consequences and submitting these objectives and consequences to normative assessment without any need to refer to the taxpayer's property rights.

However, Murphy and Nagel seek to combat libertarian arguments for a minimalist state and hostility to redistributive taxation by meeting the libertarian on his own ground of taxation-as-an-attack-on property-rights. Thus Murphy and Nagel deny any *property* claims of a taxpayer in his pre-tax profits: '[t]axes must be evaluated as part of the overall system of property rights that they help to create… the target of evaluation must be the system of property rights that they make possible'.[804] Taxes must be evaluated as both legal demands by the state on individuals, and as contributions to the framework within which individuals live.[805] Since private property is a legal convention, partly defined by the tax system, the tax system cannot

803 Michael Oakeshott, "*The Rule of Law*" in *On History and Other Essays* (Indianapolis, Liberty Fund 1999) 178.
804 Murphy and Nagel, *Myth* (no 741) 8.
805 Ibid, 42,

be evaluated by considering its impact on private property as an independent system.[806] Markets depend on and are shaped by the decisions of government (which is in turn dependent on taxes). It is therefore "logically impossible" that people have any kind of entitlement to their pre-tax income. All they can be entitled to 'is what they would be left with after taxes under a legitimate system, supported by legitimate taxation'.[807] Thus taxes are '… essentially modifications of property rights that entitle the State to control over part of the resources generated by the economic life of its citizens …'.[808] Thus '[p]roperty rights are not the starting point of [a discussion about taxes] but its conclusion'.[809]

In summary:

1. Private property (and indeed government, banks etc) is made possible by taxation.

2. Without taxation there would be no private property (or any income or wealth).

3. *Therefore* (to use their precise language) it is logically impossible that people should have any kind of entitlement to their pre-tax income.

4. All that anyone is entitled to is what they would be left with after legitimate taxes.

5. Thus taxes are "essentially modifications of property rights that entitle the State to control over [pre-tax profits]".

Several criticisms may be made of this analysis.

---

806 Ibid, 8.

807 Ibid, 32, 33, so that the 'logical order of priority within taxes and property rights is the reverse of that assumed by libertarianism'.

808 Ibid, 44.

809 Ibid, 10.

As to 1 and 2, it is obvious that taxation is not *solely* responsible for the creation and protection of private property. Taxation cannot therefore have any sort of exclusive claim to defining property rights.

As to 3, Murphy and Nagel commit a "naturalistic fallacy", seeking to derive an "ought" from an "is" by adopting a "but for" test: '…while taxation and the redistribution of wealth may…depend upon the institution of property, the existence of property does not entail any kind of taxation regime or any particular distribution (or maldistribution) of wealth'.[810]

But the most fundamental criticism is made by Penner who observes that Murphy and Nagel make the notion of taxation unintelligible by refusing to acknowledge a prior notion of property rights in pre-tax profits. By contending that *taxation* (ignoring other mechanisms, such as criminal law) cures all injustice in relation to *property* rights in pre-tax profits, Murphy and Nagel 'stray from a discussion of taxation completely'.[811] If tax '… were just part of that milieu of benefits and burdens which go back and forth', the law of taxation is indistinguishable from, say, criminal law, or the law of tort which undo unjust transactions. In other words Murphy and Nagel's analysis of taxation eliminates the very concept and distinct characteristics of tax.[812]

Penner's criticism here echoes the point made above, that different juristic concepts (contract, property, taxation) perform different (perhaps overlapping but nevertheless distinct) roles. To

---

810 James Penner, *The Idea of Property in Law* (OUP 1994) 36-37.

811 Penner, *Misled by Property* (no 269) 71, 80.

812 Ibid, 90. Indeed, Murphy and Nagel seemingly accept this criticism, in criticising Blum and Kalven (*"The Uneasy Case for Progressive Taxation",* University of Chicago Law Review, 1952 Vol. 19: 417-520). Blum and Kalven acknowledge the narrowness of evaluating the justice of taxes by reference to traditional tax equity standards but observe that any discussion of the justice of progressive taxes as simply a discussion about general inequality means that 'we discover that we have lost our topic' Murphy and Nagel riposte that 'what [their] observation shows, of course, is that they were discussing the wrong topic', see Murphy and Nagel, *Myth* (no 741) 132. It is Murphy and Nagel who are discussing the wrong topic (property law, rather than taxation and property obligations, rather than obligations to pay money debts).

treat taxation as defining property rights is to fail to individuate taxation as a particular distributive justice mechanism, without distinguishing its role from that of other juristic mechanisms which are themselves tools of distributive justice.

The criticism of Murphy and Nagel in this Chapter 5 goes beyond those of Penner. Murphy and Nagel mount a "one-step" defence of redistributive taxation by arguing for taxation as a notion which qualifies property rights which leads to the same problem as Nozick's "one-step" attack on taxation. A discussion of the existence of a taxpayer's property rights avoids scrutiny of the nature and legitimising bases of taxation. The debate on a connection between taxation and property rights simply identifies particular ends of corrective justice, assumes that just property rights should accord with those ends, and defines the scope of taxation to ensure that such property rights are correspondingly wide or narrow to accord with those ends. But a debate on the justice of taxation is a debate as to means (modes), not ends. And means which operate at a particular stage of commercial relations. As discussed, taxation has to be placed alongside other means of corrective justice (say contract law). In other words, philosophers must respect juristic notions and their distinctive roles in order to engage in meaningful debate as to their justice. Taxation has a particular role: to tax pre-tax profits on particular transactions, in the hands of particular taxpayers. Taxation does not, for example, seek to achieve fairer employment laws by taxing bad employers more highly than good employers. Taxation does not seek to qualify property rights of taxpayers. So philosophers who consider the justice of taxation by respecting the distinction between money claims and property claims, would serve their own cases better if they transferred their scrutiny from whether taxation is an interference with property rights or not to whether taxation on one or more bases is justified. For example, questions as to whether taxation is only legitimate in a democracy may yield a different answer depending on whether taxation is financing public goods or advancing a particular position of distributive or corrective justice. Analysis of whether taxation does (or ought to) affect

property rights is simply irrelevant, since it simply shifts attention away from taxation towards property rights without addressing the legitimacy of a particular tax charge at all.

Murphy and Nagel are not alone amongst philosophers in trying to combat the self-ownership objections to taxation on Nozick's own terms by seeking to accommodate a claim to legitimate taxation within a notion of just property rights. The issue of taxation has been described by Geoffrey Brennan as the interaction of "just private property rights and democratically made collective decisions [including a decision to tax which] have independent normative force", albeit that there is no presumption that the "private property rights structure is to be lexically ordered above democratic decision-making".[813] As observed in this thesis, this observation is incorrect. The issue of taxation is (in any normative assessment) the legitimacy of a claim upon a tax unit to lawfully find money (from anyone or anywhere) and deliver this money to the claimant. It has also been suggested that "full legal ownership of a thing precludes the legal permissibility of taxation of the use of the thing or the possession or exercise of those rights".[814] Juristic notions are thus effectively ignored and given a "philosophical" definition on the basis that "[the topic of just taxation] … is justice, and that is a moral, not a legal, issue".[815] Nozick's complaint against taxation as an attack on rights of self-ownership is met by the proposition that "… just taxation is compatible with "almost" full ownership of a thing".[816] In other words, the rights of "full ownership" of a "thing" (presumably, although Vallentyne does not state as much, money, or more nebulously, income) is "… weakened to allow expropriation for non-payment of certain taxes"[817] so that self-ownership leads to a right to "control use and the right

---

813 Geoffrey Brennan "*Taxation, Justice and the Status of Private Rights*" in "*Taxation: Philosophical Perspectives*" 60 at 63-64.

814 Peter Vallentyne "*Taxation, Redistribution and Property Rights*" in "The Routledge Companion to the Philosophy of Law" (Taylor & Francis 2015), Chapter 19 291 at 294. See also Vallentyne "*Libertarianism and Taxation*" in *Taxation: Philosophical Perspectives*" 98 which seeks to accommodate taxation in at least certain form of libertarianism by a precise formulation of property rights.

815 Vallentyne, *Taxation, Redistribution and Property Rights* (no 814) 294.

816 Ibid, 295.

817 Ibid, 299.

to transfer" previously "unowned resources" but any "immunity to losses conditional on the payment of certain taxes".[818] In other words, self-ownership, for Vallentyne, entails the proposition that "if one fully owns oneself, one stakes a claim to (and/or mixes one's labor with) unowned resources and one compensates anyone who would be disadvantaged by one's appropriation of those resources, then one fully owns those resources, *except that those rights are subject to expropriation if certain taxes are not paid*".[819] Nozick's notion of "full self-ownership" is conceded but qualified to accommodate the "justice of the tax on the transfer of *external* resources (for example money)"[820] if permitted by a notion of "justice".[821]

Quite apart from the unhelpful side-stepping of juristic concepts of property and taxation, Vallentyne's recognition that taxation entails the transfer of "external resources" (money), rather than making any claim on the personal qualities of a moral agent offers a "moral" solution to a juristic problem which does not exist. Vallentyne's recognition that money is an "external resource" should have led Vallentyne to recognise that taxation does not impinge on self-ownership at all (even if self-ownership were a valid foundation upon which to conduct a normative assessment of taxation). Instead Vallentyne simply concedes self-ownership to entail ownership of the fruits of one's labour but qualifies this latter ownership with a contingent exposure to expropriation if this expropriation is (on some unspecified basis) "just".

Section III: Conclusion

818 Ibid, 300.
819 Ibid, 299.
820 Ibid, 298.
821 Which, for Vallentyne, stems from curing problems of "market failure" (arising from imperfect competition and externalities, where costs or benefits are imposed on individuals without consent, for example, pollution), and access to "non-excludable goods" (that is, "public goods" discussed in Chapter 1), with an appeal also to a combination of paternalistic and redistributive taxation (Ibid, 295).

Philosophers and jurists, whether libertarians or egalitarians, have done any debate as to the legitimacy of taxation a disservice by making a fundamental category error, in treating taxation as a property obligation rather than a purely personal monetary obligation. Not only is a debate which centres on juristic concepts (here "property" and "taxation") misconceived if it gives those juristic concepts mistaken meanings and content, it must necessarily fail to reach an intelligible conclusion, since its subject matter is one which is simply different to that which is in play in imposing (here) the liabilities which are being discussed. The philosophers' debate as to the legitimacy of taxation assumes that a claim to tax is a claim on property, rather than a reply to a question as to the legitimacy of a claim which attacks wealth, or patrimony. The philosophers unsurprisingly deliver a confused response. A puzzling feature of this misconception of taxation as a property obligation is the failure to address the proposition that were the self-ownership-bleeding into mixed labour-theories valid, most items of property reflect the labours of many moral agents, not just the legal owner. Thus monetary profits, reflected in monetary assets (say cash in the bank) of the entrepreneur from his (for example) widget making business are mixed with the labour of the entrepreneur himself (his investment decisions and risk taking), plus the labours of the employee widget makers, plus the labour of those who constructed the infrastructure through which the widgets are advertised and sold, so the relevant property rights in cash profits are not, on any mixed labour theory, only those of the legal owner of the cash representing those profits at all. And to the extent that the State, as a separate juristic person, has labour mixed into the cash-property, the State has property rights which may, it might be supposed, be monetised by taxation. This final point is not to suggest that a tax obligation is indeed somehow a property obligation (it is not) but rather that the debate which makes the assumption that it is has serious flaws even on its own terms.

CHAPTER 6: CONCLUSIONS

"Taxation" is a lawful unilateral claim, which may arise at common law, although overwhelmingly more often under statutory authority. Taxation, like all legal mechanisms, is modal, not functional in nature and has diverse objectives (all of which might be achieved to an extent by alternative legal or non-legal modes). Despite its modal nature, by reason of which taxation may fulfil a variety of social functions, the law of taxation may be individuated as a single, distinct area of law (following Raz, Bentham and Kelsen) to yield a 'unit of [legal] content [which]…contains…legal material independent of the rest and of sufficient interest to deserve singling out as a separate unit…sufficiently simple to be regarded as one unit, one law'.[822]

Taxation's claim is for monies, by way of an assertion of taxing jurisdiction, by any person (not necessarily the "State", however defined, or any other sort of "public body"), which claim gives rise to a personal obligation upon the addressee of that claim, where the debtor has no capacity other than that of a monetary debtor, by reason of that claim. The claim has the components of identifying the putative debtor as a "tax unit" (that is, a person within the taxing jurisdiction of the taxing body), computing the "tax base", (that is, calculating taxable amounts, less deductible amounts) and applying a tax rate (although a fixed sum tax makes the notion of a tax rate irrelevant). It is these three components together (triggered by the assertion of taxing jurisdiction) which give rise to a claim in the hands of a taxing body. The claim is distinct in juristic nature from other liabilities, in particular property liabilities and other types of monetary obligation. In particular a tax obligation does not arise from the breach of any legal norm. Neither does a tax obligation attach to any items of property of a taxpayer. The personal,

822 Joseph Raz, "*Sources, Normativity and Individuation*" in *The Concept of a Legal System* (2nd edition, OUP 1980) 222-223.

monetary nature of a charge to tax provides a useful prism to examine notions of retrospectivity (to show that any distinction between "retrospectivity" and "retroactivity" is misconceived). Further, as a monetary obligation, a tax charge dilutes any role responsibility which may be ascribed to a taxpayer and makes tax vulnerable to a charge of ineffectiveness in certain modes. This thesis makes its claims in the field of general jurisprudence, in that the thesis identifies a juristic notion of "taxation" which transcends particular statutory definitions in particular jurisdictions, or specific statutory contexts within a jurisdiction, albeit drawing most of its examples from the UK Tax Code. The notion of taxation which is identified provides a coherently analysed object of juristic and philosophical study (the later in particular which, as demonstrated in Chapter 5, has hitherto been based upon incoherent notions of taxation (often informed by a misconceived connection between taxation and property).