

Fair Taxation and Corporate Social Responsibility



KARINA KIM EGHOLM ELGAARD, RASMUS KRISTIAN FELDTHUSEN,
AXEL HILLING AND MATTI KUKKONEN (EDS)

Fair Taxation and Corporate Social Responsibility

Ex Tuto
PUBLISHING
www.extuto.com

Karina Kim Egholm Elgaard, Rasmus Kristian Feldthusen, Axel Hilling
and Matti Kukkonen (eds)
Fair Taxation and Corporate Social Responsibility
First edition, first imprint

This book is published in November 2019 by Ex Tuto Publishing A/S. Design and typesetting by mere.info A/S which has used LibreOffice for Linux and the typefaces Baskerville Original and Cronos designed in 2000 and 1996 by František Štorm and Robert Slimbach, respectively. TOVE MØGELVANG-HANSEN has proofread the manuscript. The book is printed in Denmark on Munken Pure 120 g/m² by Narayana Press, and the binding is carried out by Buchbinderei S.R. Büge GmbH. We have made this book from FSC-certified paper to support sustainable forest management.

The publication is peer-reviewed.

Copyright © 2019 the editors and authors
Printed in Denmark 2019
ISBN 978-87-420-0025-0

Ex Tuto Publishing A/S
Toldbodgade 55, 1.
DK-1253 København K
www.extuto.com



Published with support from
Nordic Tax Research Council

FairPublishing

Outline Contents

1. Conference Report: Fair Taxation and Corporate Social Responsibility	1
<i>Vidya Kauri, Law360</i>	
TAXATION AND CSR IN PERSPECTIVES	17
2. Tax Avoidance and Corporate Irresponsibility – CSR as Problem or Solution?	19
<i>Professor Jeremy Moon & Associate Professor Steen Vallentin, Copenhagen Business School</i>	
3. Tax Transparency – How to Report Responsible Choices	53
<i>Associate Professor Axel Hilling, Lund University, & EU Affairs Senior Project Manager Lorena Sorrentino, CSR Europe</i>	
TAXATION AND CSR IN PRACTICE	79
4. Tax Incentives for Charities in the European Union – Integration or Segregation?	81
<i>Professor Dr. Sigrid Hemels, Erasmus University Rotterdam/Lund University</i>	
5. Why Social Responsible Corporations Should Take Tax Seriously	103
<i>Professor Hans Gribnau, Tilburg University/Leiden University</i>	
6. Can Corporations Contribute to Sustainable Development by Paying Taxes?	161
<i>PhD Researcher Ave-Geidi Jallai, Tilburg University</i>	

CSR AND TAXATION IN REGULATION **199**

**7. Corporate Social Responsibility and Taxation in Regulation
– The EU Perspective** **201**

Professor María Amparo Grau Ruiz, Complutense University of Madrid

**8. Taxation, General Anti-Avoidance Rules and Corporate
Social Responsibility** **227**

*Professor Peter Koerver Schmidt & Professor Karin Buhmann,
Copenhagen Business School*

Chapter 5

Why Social Responsible Corporations Should Take Tax Seriously

Professor Hans Gribnau, Tilburg University/Leiden University¹

Summary: *Tax systems biased to the powerful and wealthy (corporate) citizens contributed to economic stagnation, increasing inequality of income and wealth, and erosion of social cohesion, democratic legitimacy and public trust. Therefore taxes are not just a technical, be it economic or legal, affair but an expression of deep social and moral values. Why and to what extent requires the foundational nature of taxes corporations to see paying a fair share of taxes as one of their main social responsibilities? Corporations bear co-responsibility for the tax system. Paying taxes is a moral obligation to society.*

According to a more substantive conception of tax, CSR and taxes should not be seen as substitutes rather than complements. CSR corporations should abstain from minimalist, irresponsible tax behavior since they voluntarily accept ethical obligations that entail going beyond what

1. Professor of Tax Law, Fiscal Institute and Center for Company Law, Tilburg University; Professor of Tax Law, Leiden University, The Netherlands. The author can be reached at J.L.M.Gribnau@tilburguniversity.edu.

is required by the law. Corporations' substantive and procedural (transparency) legal obligations thus require a moral interpretation.

1. Introduction

For a long time, taxation was a subject that drew little media attention. Society did not really take an interest in tax, and left it to tax specialists. Few people were interested in that boring very technical and obscure thing called tax. As a result, there was a disconnection between tax specialists and the world outside the tax universe. Quite a few tax advisors were constantly looking for opportunities the tax system might offer their clients rather than focusing on compliance. Thus very expert wealthy (corporate) taxpayers could structure their affairs so as to minimize their tax liability. Occasionally the media gave some of these taxpayers a dressing down but quickly returned to business as usual. There was little awareness that a fair tax system is a crucial basis for a flourishing society.

Those days are definitely gone. As a consequence of the financial crisis and austerity measures public and political attention became focused on the massive tax revenues losses as a result of prevailing aggressive tax planning practices. Several tax-related scandals and leaks (e.g., Luxleaks, Panama Papers and Paradise Papers) got much media coverage. Consequently, public trust in the (international) tax system has been negatively impacted.² That is very unfortunate since taxation provides government with revenue to pay for all kinds of public goods and services which benefit the citizens, firms and other organizations and society at large. Moreover, taxation is an important

2. The distrust between the various stakeholders (international organizations such as OECD and EU, tax authorities, ministries of Finance, politicians, multinational companies, tax advisors, non-governmental organizations, citizens, and so forth) 'negatively affects the trust which public opinion has in the international tax system'; S. Douma, *Miscommunication and Distrust in the International Tax Debate* (Deventer: Wolters Kluwer, 2018), p. 9. See also J. Freedman, 'Restoring Trust in the Fairness of Corporate Taxation: Increased Transparency and the Need for Institutional Reform' in S. Goslinga, L. van der Hel-van Dijk, P. Mascini & A. van Steenbergen (eds), *Tax and Trust: Institutions, Interactions and Instruments* (The Hague: Eleven International Publishing, 2018), pp. 122–126.

means of redistribution of income and wealth. The tax system is also used to create a good investment climate in order to attract businesses and economic activities. These functions of the tax system may contribute to a society with e.g. healthy institutions, good infrastructure and macroeconomic environment, highly educated people (employees) and consumers with great purchasing power which enables business to thrive. These functions and the deep values they promote seem, however, to be taken for granted in the western world.

Taxpayers not paying their share shift the burden to other members of society and free ride since they do benefit from public goods without contributing to the necessary revenue. This is a well-known argument why taxpayers should pay their fair share of taxes. However, more recent research shows that there is more at stake. Renowned scholars like Piketty and Mounk show that due to economic stagnation and lower tax revenues, partly caused by preferential tax regulations and aggressive tax planning, economic equality has increased at the detriment of social cohesion and democratic legitimacy, but also diminishing public trust and contributing to societal and political polarization. Many people believe that the tax system is biased in favour of powerful and wealthy (corporate) citizens, who moreover game the tax rules, to the detriment of other, less powerful members of society. Hence, taxation is connected to economic, societal and political developments that threaten societal and political stability—thereby eroding the very basis for doing business. The integrity of the tax system is thus of huge importance to society and to businesses. As Corporate Social Responsibility (CSR) regards the responsibility of enterprises for their impact on society, thereby fulfilling the expectations of the public, have even more reason not to erode the integrity of the tax system.

From this follows the research question: why and to what extent requires the foundational nature of taxes viewed in the light of recent economic, societal and political developments corporations to see paying a fair share of taxes as one of their main social responsibilities?

This research question determines the structure of this paper which deals with various issues which subsequently have to be ana-

lysed in order to answer the research question. Therefore the remainder of this chapter is structured as follows. Section 2 presents the various functions of taxation in order to show the many ways tax supports society and enables (corporate) citizens to prosper. Taxation thus appears to embody important values such as liberty, solidarity and autonomy. Taxes are paid to the state, but we pay taxes to sustain and enhance society. Section 3 deals with the dynamics of corporate tax planning partly due to an outdated international tax system and the attempts by legislators and other parties to reverse the system and the way it is used for the better. Next, after an intermediary conclusion (section 4), an analysis of developments such as economic stagnation and increasing inequality of income and wealth shows they are linked to taxation. Taxation appears to embody even more fundamental values such as social cohesion, democratic legitimacy and public trust which are necessary ingredients for a flourishing society and well-functioning market (section 5). Then it is argued that paying taxes is a moral obligation to society which implies the need for a moral interpretation of legal obligations. Taxpayers may opt for structuring their affairs tax efficient way but CSR firms should abstain from irresponsible tax behaviour (section 6). Lastly, some concluding remarks will be made.

The contribution of this paper is a reflection on the genuine importance of taxes for a flourishing society. Scholarly analyses of recent economic, societal and political developments are used in order to show what the foundational nature of taxes requires of businesses—especially those which engage in CSR. The paper thus aims at enhancing our understanding of paying taxes as obligations to society—even though they are payments to the state. The various, that is, economic, political, legal, social and moral aspects of tax and the deep values involved point at the need for a thick conception of tax rather than a conception which reduces tax to its economic or legal aspects. As to methodology, this research combines various disciplinary perspectives: using arguments and insights from tax law, political economy, political theory, and business ethics.

2. Functions of taxation

The connection between taxation and democracy is well known. Taxation needs democratic legitimacy, i.e., the consent of parliament, which represents the citizens: no taxation without representation. Parliament's consent with tax legislation provides government with the indispensable statutory basis to interfere with the liberties of the citizens. This makes taxation a political affair.³ The actual use of taxation by politicians to achieve different goals in the recent past may explain why tax has been increasingly politicised.

But what are the goals of taxation? Taxes enable government to enhance deep moral and values such as liberty, autonomy, equality and solidarity.⁴ Taxes are employed to enhance these values in three different ways, since taxation carries three functions, viz. the budgetary, redistributive and regulatory function.

It goes without saying that taxation is an important instrument to collect money for the treasury, which enable government to provide the public with all kinds of public goods and services. This is the primary, budgetary, function of taxation: to finance goods provided collectively. The legal system, for example, protects property rights and provides a framework for the functioning of society and economy—enforcing contracts supports markets. Taxes are also used to pay for other public goods such as defence, health care,⁵ public education, infrastructure for transport and communications, social security and disability support. Many of these public goods are prescribed by economic and social rights enshrined in constitutions of

3. For the (corporation) tax system as essentially a crystallisation of the political process, see J. Snape, *The Political Economy of Corporation Tax: Theory, Values and Law Reform* (Oxford/Portland: Hart Publishing, 2011).

4. Cf. S. Stjernø, *Solidarity in Europe: The History of an Idea* (Cambridge: Cambridge University Press, 2005), p. 325: 'In modern society this means to use politics as an arena and to be willing to uses taxes and governmental institutions to share and redistribute.'

5. Cf. T. Piketty, *Capital in the Twenty-First Century* (Cambridge (Mass.) & London: The Belknap Press of Harvard University Press, 2014), pp. 91–92: In all developed countries at least half of the cost of health is paid for by taxes, even in countries that rely mainly on private insurance like the United States.

democratic countries.⁶ Moreover, the state fosters innovation, encourages investment, boosts worker productivity, and stimulates the efficient use of scarce resources.⁷ Furthermore, through a wide range of activities the social welfare state tries to create substantive freedom and equality for its citizens. In terms of sustainability, taxes are crucial for achieving Sustainable Development Goals (SDGs) that are aimed at achieving a better future.⁸ Taxes are a critical resource to help reach these goals, such as ending poverty, developing infrastructure or reduce inequality, requires enhanced public goods, public services and investment.⁹ Of course, the tax burden has to be fairly distributed among (corporate) citizens.¹⁰ It has to be decided how much each citizen has to pay.

In practice it takes just a small step to use the tax system to redistribute income and wealth.¹¹ Therefore, the second function of a tax system is the redistributive function, ‘aimed at reducing the unequal distribution of income and wealth that results from the nor-

6. These rights are sometimes referred to as ‘second generation’ human rights; A. Neyer, *The International Human Rights Movement: A History* (Princeton/Oxford: Princeton University Press, 2012), p. 62.

7. S. Holmes & C. Sunstein, *The Cost of Rights. Why Liberty depends on Taxes* (New York/London: W.W. Norton & Company, 1999), p. 75.

8. The right to development, which is inherently international in character, is considered a ‘third generation’ human right; Neyer 2012, pp. 62–63.

9. M. Sepúlveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’, (2014), <https://www.ms.dk/sites/default/files/filarkiv/dokumenter/a_hrc_26_28_eng.pdf>; H. Gribnau & A.-G. Jallai, ‘Sustainable Tax Governance and Transparency’ in S. Arvidsson (ed), *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (London: Palgrave Macmillan 2018a), pp. 337–369; also published as TLS research paper. Available at: <<https://ssrn.com/abstract=3273553>>; A. Mumford & Å. Gunnarsson, ‘Sustainability in EU Tax Law’, *Intereconomics* (2019) 3.

10. Cf. The B Team, ‘A New Bar For Responsible Tax: The B Team Responsible Tax Principles’, 2018, p. 1: ‘fairer, more transparent tax systems, should be supported and upheld by business.’

11. Adam Smith already saw a wide range of activity for government. For him, distributive justice ‘is both an act of private and public responsibility,’; J.R. Weinstein, *Adam Smith’s Pluralism: Rationality, Education, and the Moral Sentiments* (New Haven & London: Yale University Press, 2013), p. 197.

mal operation of a market-based economy.¹² Thus the tax system is used to put the abstract ideal of distributive justice in practice. Solidarity with other members of society entails supporting individuals and groups that have less in a communal effort by sharing and redistributing. The notion of redistributive justice entails that society is seen as responsible for the condition of the less well of and capable of changing it. In many countries, redistribution is based on a set of constitutional social rights.¹³ Redistributive justice calls on the state—as an intermediary—to guarantee that ‘everyone is supplied with a certain level of material means.’¹⁴ Well-known examples are welfare payments and free health care. It was not until the end of the nineteenth century that ‘the notion of tax solidarity’ or ‘tax as redistribution’ gained currency.¹⁵ Rosanvallon argues that the subsequent redistributive revolution stemmed from the context of World War I. The common experience of suffering in war and commemoration of sacrifice restored the idea of a community and a sentiment of equality which helped ‘to pave the way to greater solidarity.’¹⁶ The income tax then ‘became gradually a universal tax with a redistributive purpose.’¹⁷ Thus, liberty and autonomy were paired with solidarity and (substantive) equality, by distributing the tax burden over citizens according to a conception of distributive justice. Especially the goal of the income tax is seen as reducing the unequal distribution of income within a society by redistribution. Levelling income by fiscal means is of course an important legitimacy test for government, because some will claim that for example progression rates are con-

12. R.S. Avi-Yonah, ‘The Three Goals of Taxation’, *Tax Law Review* 60 (2006–2007), p. 3.

13. Cf. Piketty 2014, p. 481: ‘Modern redistribution, as exemplified by the social states constructed by the wealthy countries in the twentieth century, is based on a set of fundamental social rights: to education, health, and retirement.’

14. S. Fleischacker, *A Short History of Distributive Justice* (Cambridge (MA) & London: Harvard University Press, 2004), p. 4.

15. Pierre Rosanvallon, *The Society of Equals* (Cambridge (Mass.) & London: Harvard University Press, 2013), p. 166.

16. Rosanvallon 2013, p. 186.

17. Rosanvallon 2013, p. 187.

trary to the principle of equality while others will strongly defend the opposite view.

However, nowadays the budgetary and the redistributive functions seem to be overshadowed by the third function, the instrumental or regulatory function. Taxation is widely used to steer taxpayers' behaviour for example to enhance economic growth.¹⁸ In the regulatory state, taxation is one of the favourite instruments to steer the flow of events. From this perspective, taxation in the regulatory state increasingly relies on rules to encourage citizens to act in ways deemed desirable by the state—and to (financially) discourage other types of behaviour. Citizens' behaviour is not modified by command and prohibition (control) regulation like for example criminal law, but rather by 'voluntary' choices incentivized by the financial impact of behavioural changes. Thus taxation has become an instrument for micromanaging the choices of taxpayers. Examples of tax incentives from Dutch tax law are tax reductions for commuting by bike, employee's training, day-care centres, production of Dutch movies, research and development, ecologically sound investments and hybrid and electric cars and the letting of rooms by private persons.

The regulatory function has also an international component. Many states try to compete with their tax system in order to attract businesses and economic activities from other states which contribute to the state's overall economic environment, for example by low corporate income tax rates, and incentives for innovation and investment. States see corporation tax as an important instrument in this bid for economic activity—resulting in a fierce tax competition among states, a specific kind of regulatory competition.¹⁹ Tax compet-

18. For Avi-Yonah (2006–2007) the third function regards the regulation of private economic activity. However, in my view the instrumental or regulatory function aims to change behaviour in more domains of human life, for instance environment, culture and health; J.L.M. Gribnau, 'Legislative Instrumentalism vs. Legal Principles in Tax Law, Legislative Instrumentalism vs. Legal Principles', *Rivista di Diritto Tributario Internazionale*, 2012/3, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=244503818>.

19. Cf. Piketty 2014, p. 496: 'the recent rise of tax competition in a world of free-flowing capital has led to an endless race to the bottom, leading, for example, to cuts in corporate tax rates and to the exemption of interest, dividends, and other

itiveness is thus conceived in narrow manner, focusing on tax legislation that keeps marginal tax rates low,²⁰ rather than as a tax system ‘that is appropriate to enhance productivity and economic welfare and that contributes to raise living standards at a sustainable level and rate.’²¹ This is particularly true in Europe, where states have been for a long time struggling to achieve a coordinated tax policy.²² The tax legislature seduces taxpayers to behave according to his ends and thus creates a good deal of tax planning.²³ Of course, pressure groups

financial revenues from the taxes to which labor incomes are subject.’

20. P. Valente, ‘Competitive Taxation and Tax Competition: The Winner Takes it All?’, 4 March 2019, <<http://kluwertaxblog.com/2019/03/04/competitive-taxation-and-tax-competition-the-winner-takes-it-all/>>, referring to K. Pomerleau, S. Hodge & J. Walczak, ‘International Tax Competitiveness Index 2017’, *Washington Tax Foundation* 2017.
21. Valente 2019. For a broader definition, see S. Matthews, ‘What is a Competitive Tax System?’, *OECD Working paper*, Paris: OECD’s 2011, <https://www.oecd-ilibrary.org/taxation/what-is-a-competitive-tax-system_5kg3h0vmd4kj-en>, p. 3 refers to the World Economic Forum, that defines ‘competitiveness’ as ‘the set of institutions, policies and factors that determine the level of productivity of a country.’ Subsequently, twelve pillars of competitiveness are distinguished: institutions, infrastructure, macroeconomic environment, health and primary education, higher education and training, goods market efficiency, labour market efficiency, financial market development, technological readiness, market size, business sophistication, innovation. At page 10 it is argued ‘if the competitive pillars of an economy are strong, it is generally more able to impose corporate income tax without discouraging investment.’ Cf. S.M. Kimelberg & E. Williams, ‘Evaluating the Importance of Business Location Factors: The Influence of Facility Type’, *Growth and Change* 44 (March 2013) 1, pp. 92–93: Most of the research devoted to identifying and explaining the factors that determine where companies locate tends to fall into two categories. First, studies that measure the influence of a specific factor or set of factors on firm location decisions. Examples include studies of the impact of taxes, subsidies, and incentives; environmental regulations; quality of life and amenities; labour costs; and transportation and access. Second, there are studies that explicate the location decision process for a specific business or industry (e.g. biotechnology firms; companies in the automobile sector; call centers; and high-tech firms).
22. Cf. C. Pinto, *Tax Competition and EU Law* (The Hague/London/New York: Kluwer Law International, 2003).
23. Tax incentives to support Corporate Social Responsibility is another option; F. Perrini, S. Pogutz & A. Tencati, *Developing Corporate Social Responsibility: A European Perspective* (Cheltenham: Edward Elgar, 2006), p. 38. This fits well with

seek to create and preserve tax favourable tax incentives (‘expenditures’) in the form of tax exemptions—attempting to shift the burden of taxation to other taxpayers. They may also try to obtain preferential treatment, for example tax breaks for an industry, at the cost of the principle of equality.

More generally, the regulatory use of tax for non-tax goals often causes a shift in the distribution of the tax burden amongst taxpayers which may violate the underlying value of everybody paying a fair share.²⁴ Hence, the regulatory function may even go at the expense of the redistributive function.²⁵ This shows that the regulatory function of taxation also affects the distribution of the tax burden, which inevitably raises questions of the fairness thereof. Unsurprisingly, philosophers Murphy and Nagel argue that taxes are the most important instrument ‘by which a political system puts into practice a conception of economic or distributive justice.’²⁶ They are not solely a method of payment for government and public goods and services as shown above. Murphy and Nagel subsequently add: ‘That is why they arouse such strong passions, fuelled not only by conflicts of economic self-interest but also by conflicting ideas of justice.’ Some recent developments have exacerbated these conflicts, arousing passionate public debates: globalisation, the financial crisis,²⁷ aggressive tax planning practices to name but a few. The next section sketches the

other proposals. Greider, for example, proposes ‘that corporation taxation could be refashioned, so that tax liabilities might be reduced for those that adhere to higher social or environmental standards’; W. Greider, ‘The Future Is Now’, *The Nation* 26 June 2006, <<http://www.thenation.com/article/future-now>>, pp. 23–26.

24. Cf. Piketty 2014, p. 496: ‘the recent rise of tax competition in a world of free-flowing capital has led many governments to exempt capital income from the progressive income tax.’
25. A.L. Campbell, ‘America the Undertaxed: U.S. Fiscal Policy in Perspective’, *Foreign Affairs* 91 (2012), p. 106. S. Steinmo, ‘The Evolution of Policy Ideas: Tax Policy in the 20th Century’, *British Journal of Politics and International Relations*, 5 (2003) 2, p. 225. See also Oxfam, ‘An Economy for the 1%: How privilege and power in the economy drive extreme inequality and how it can be stopped’, 210 *Oxfam Briefing Paper*, 18 January 2016, pp. 4–7.
26. L. Murphy & T. Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002), p. 3.

dynamics and logic tax planning and the public and political response. The changing global tax and regulatory landscape is evidenced by investors' and multinational corporations' growing awareness of the need for tax transparency and more generally good (or sustainable) tax governance.²⁸

3. The dynamics and logic of corporate tax planning

3.1. Gaming the system

For one thing, the public outcry over the aggressive tax planning practices of multinational corporations (MNCs) revealed the failure of the international tax law system. These enterprises made adroitly use of the outdated international tax system by engineering their way around the rules. The basis for the current international tax regime was developed back in the 1920s. It suited the economic realities characterised by bulk trade and bricks-and-mortar industries. However, a century later these economic realities have changed radically. The system was increasingly challenged by developments and changes such as globalization, European integration, deregulation, privatization, the rise of multinational enterprises, e-commerce, and intangible assets. As a result, the international tax regime, the aggregate of the international tax systems of states, 'has become unfair for it is outdated, flawed, and arbitrary.'²⁹ The globalizing economy thus provided many tax planning opportunities.

27. The taxation of the financial sector does not appear to be one of the major culprits contributing to the crisis, although it has played 'a secondary role, albeit a possibly decisive one in some circumstances', for example by creating negative incentives, favouring risk, J.S. Alworth & G. Arachi, 'Introduction' in J.S. Alworth & G. Arachi (eds), *Taxation and the Financial Crisis* (Oxford: Oxford University Press, 2012), p. 3.

28. For example, Principles for Responsible Investment (PRI), an organisation which has worked with global investors on corporate tax responsibility since 2015, published guidance for (institutional) investors: *Evaluating and Engaging on Corporate Tax Transparency: An Investor Guide*, 2018; <<https://www.unpri.org/esg-issues/governance-issues/tax-avoidance>>. This guide serves as an investor tool for engagement with companies on greater tax disclosure (transparency)—advancing appropriate tax governance.

Thus globalisation has had a major impact on tax planning which is increasingly based on global arbitrage of tax rules.³⁰ Taking into account that, from an economic perspective, taxes are a significant cost item for businesses, the effects of globalisation on the taxation of multinationals are twofold. On the one hand, there are the demands for efficiency—usually lowering taxes and minimizing regulatory demands on corporations willing to locate (or stay).³¹ Tax cuts and deregulation were mantras of free-market economics.³² On the other hand, nowadays, international tax planning is crucial in the operation of a multinational corporation. Due to the more aggressive management of costs, tax came to be regarded as costs which should be minimized (alternatively, corporate income tax can be seen as a distribution out of profits³³). In the late 1990s, corporate tax departments even became innovative profit centres,³⁴ rather than ‘a manager of public obligations’, Braithwaite says.³⁵ In short, multinationals

29. M.F. de Wilde, *‘Sharing the Pie’ Taxing Multinationals in a Global Market* (PhD-thesis, Erasmus University Rotterdam, 2015), p. 15.

30. For some causes of tax avoidance, see J. Shaw, J. Slemrod & J. Whiting, ‘Administration and Compliance’ in: *Dimensions of Tax Design: The Mirrlees Review*, Edited by Institute for Fiscal Studies (IFS) (Oxford: Oxford University Press, 2010), pp. 1150–1152.

31. The deregulatory movement accounted in part for rising inequality; see F. Bourguignon, *The Globalization of Inequality* (Princeton/Oxford: Princeton University Press, 2015), pp. 94 et seq. Cf. R.B. Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (New York: Knopf, 2007), pp. 65–70.

32. Unfortunately, free-market economics is a rather disappointing affair. Cf. H.J. Chang, *23 Things They Don’t Tell You About Capitalism* (London: Allen Lane, 2010), p. 243: ‘Indeed, during the last three decades, the increasingly influence of free-market economics has resulted in poorer economic performances all over the world.’

33. See R. Knuutinen, ‘Corporate Social Responsibility, Taxation and Aggressive Tax Planning’, *Nordic Tax Journal* (2014) 1, pp. 50–51.

34. K.J. Crocker & J. Slemrod, ‘Corporate Tax Evasion with Agency Costs’, *Journal of Public Economics* September 2005, p. 89(9–10), pp. 1593–1610.

35. J. Braithwaite, *Markets in Vice: Markets in Virtue* (Oxford [etc.]: Oxford University Press, 2005), p. 139. Cf. C. Garbarino, ‘Aggressive Tax Strategies and Corporate Tax Governance: an Institutional Approach’, *European Company Finance Review* 8 (2011) 3, p. 278.

have long learned to use ‘fancy financial techniques for moving income around, in ways to reduce their tax liabilities’.³⁶

Traditionally, in an international context companies may engage in tax planning in order to avoid double taxation resulting from the lack of coordination in the international tax system. However, tax planning practice has undergone an explosive development since the 1970s. Tax planning became more aggressive with increasingly ingenious structures being developed to bypass the intended effects of tax law. This was a global phenomenon. ‘The ethos at the time was to avoid as many taxes as possible’, the economist Stiglitz observed.³⁷ A whole industry engaged in devising schemes and arrangements with the dominant purpose of avoiding tax. Tax planning became an extreme form of legal engineering: the inconsistencies and loopholes of legal systems are exploited to provide perfectly legal benefits.³⁸

Some kinds of firms are more likely to be aggressive tax avoiders. Of course, corporations that are more profitable have greater incentives to reduce their corporate taxes. Capital intensive enterprises may have greater tax avoidance opportunities and enterprises that are more leveraged also tend to engage in aggressive tax planning. Other firm characteristics that are positively correlated with avoidance include having more international activities, being a large firm, having high R&D expenditure and being technology intensive,

36. J.E. Stiglitz, *The Roaring Nineties: A New History of the World's Most Prosperous Decade* (New York: Norton Stiglitz, 2003), p. 244; cf. D.L. Bartlett & J.B. Steele, *The Great American Tax Dodge: How Spiraling Fraud and Avoidance are Killing Fairness, Destroying the Income Tax, and Costing You* (Berkeley/Los Angeles/London: California University Press, 2002).

37. Stiglitz 2003, p. 129.

38. A. Elbra & J. Mikler, ‘Paying a “Fair Share”: Multinational Corporations’ Perspectives on Taxation’, *Global Policy* 8 (2017) 2, p. 183 argue that corporate structures and strategies are substantially influenced by the national institutional contexts of their operations. This also goes for US based MNCs like Google, Apple, Amazon and Starbucks that control the markets in which they operate at home and abroad. ‘Their desire to minimise the tax they pay, in pursuit of short-term profitability and shareholder value, is a reflection of their home state’s institutional preferences.’

having a lower return on asset and spending less on advertising.³⁹ Quite surprisingly, aggressive tax planning may also be related to a firm's degree of corporate social responsibility. High CSR firms that strategise to lower tax costs may be partly doing so for the benefit of society—or so it is thought. Their goal may be 'to participate in charitable giving, and in some instances, it may be socially acceptable to reduce the tax expense/payment.'⁴⁰ However, even if the corporate charitable contributions equal the lower tax costs, the democratic and societal duty to pay tax is violated. It looks like setting your own tax rates and priority of public goods as well.

Tax avoidance is by no means a recent invention. In 1944, legal philosopher H.L.A. Hart viewed a return to the Bar with disgust, one reason being 'the profoundly anti-social or at least a-social character of my sort of work (tax evasion and the like)'.⁴¹ Since the 1970s, however, creative compliance in tax matters has become increasingly more aggressive, partly due to globalisation and the exponential growth in complexity of tax laws. For some taxpayers the pervasive complexity of tax law offers opportunities to deploy tax minimization techniques to shift their burden of taxation to others; for these taxpayers, complexity provides opportunities for aggressive tax planning. They often do so by financial engineering, exploiting the complexity of the body of rules by contriving complexity themselves. Often, a tax liability is avoided 'by financial engineering to create new products that have never been conceived by the law.'⁴² This is a

39. C. Brooks, C. Godfrey, C. Hillenbrand & K. Money, 'Do Investors Care about Corporate Taxes?', *Journal of Corporate Finance* 38 (2016), p. 219.

40. F. Huseynov and B.K. Klamm, 'Tax Avoidance, Tax Management and Corporate Social Responsibility', *Journal of Corporate Finance*, Volume 18, Issue 4, 2012, p. 825.

41. N. Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford [etc.]: Oxford University Press, 2004), p. 112.

42. J. Braithwaite, 'Rules and Principles: A Theory of Legal Certainty', *Australian Journal of Legal Philosophy* 27 (2002), p. 58, and Braithwaite 2005, p. 148; he continues: 'Financial engineering is just a newer modality of a long tradition of multinational corporations who have the capacities to escape liability, and also of individuals who have the money to pay for artful advice.' Cf. H. Gribnau, 'The Integrity of the Tax System after BEPS: A Shared Responsibility', *Erasmus Law Re-*

far cry from any conception of self-restraint—or (corporate) responsibility, for that matter.

3.2. Profitable formalism

A fundamental feature of the rule of law is the protection and enhancement of legal certainty. The need for certainty in the application of laws argues for a fully specified system of rules.⁴³ But a rule-based legislative strategy has its drawbacks: some taxpayers perceive it as invitation to game the rules. Braithwaite argues that command and control regulation with precise and narrowly drawn rules leads to a cat-and-mouse legal drafting culture—of loophole closing and reopening by creative compliance with expanding interaction costs of drafting new rules and engenders a ‘structurally inegalitarian form of uncertainty’ (with redistributive effects). The rich ‘deploy legal entrepreneurship to make the law uncertain in practice.’⁴⁴ This gaming the system results in uncertainty ‘that is structurally predictable by features of power in society rather than by features of the law.’⁴⁵

Taxpayers who engage in such behaviour make creative use of the many loopholes or mismatches in the international tax system while (strictly) complying with the letter of the law (that is, applying black letter law⁴⁶). As the European Commission, for example, stated: ‘some taxpayers may use complex, sometimes artificial, arrangements which have the effect of relocating their tax base to other jurisdictions within or outside the European Union.’⁴⁷ Multinational corpora-

view 10 (2017a) 1, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3026295>.

43. R.E. Goodin, *Political Theory and Public Policy* (Chicago: University of Chicago Press, 1982), p. 64.

44. Braithwaite 2005, p. 147. Cf. IFF Research, *Researching the Drivers of Tax Compliance Behaviour among the Wealthy and Ways to Improve It, HM Revenue & Customs Research Report 537* (London: IFF Research, 2019).

45. Braithwaite 2005, p. 148.

46. D. Harnett, ‘The Link between Taxation and Corporate Governance’ in W. Schön (ed), *Tax and Corporate Governance* (Berlin/Heidelberg: Springer-Verlag, 2008), p. 5.

47. European Commission, ‘Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion’, COM (2012) 722 final, December 2012, p. 6.

tions construct complex business structures in the global market that are extremely difficult to understand and evaluate by tax officials. Thus, the ‘real morals of the tax avoidance industry’ seems to have become: ‘No matter what tax legislation is in place, the accountants and lawyers will find a way around it. Rules are rules, but rules are meant to be broken’.⁴⁸

Again, these taxpayers assisted by their advisors stay within the boundaries of the letter of the law.⁴⁹ However, the letter of the law may diverge from the spirit of the law. Indeed, as Shaviro maintains: ‘At a certain point, although it is hard to say exactly where, aggressive planning merges into outright cheating.’⁵⁰ Tax planning is indeed a matter of degree, we all have to plan our taxes, and most of us all like not to pay too much and prefer a tax-efficient way. But massive and often artificial tax planning, playing with the rules and not or hardly motivated by business purposes (apart from obtaining advantageous tax positions), goes far beyond that.

Creative compliance plays with the rules, escaping the intended impact of the law. Taxpayers engaging in creative compliance are driven by a rule-focus: tax rules are seen as instruments to eliminate or reduce their tax liability. Complex and unclear rules are carefully studied to be gamed with by businesses. In an international context multinational companies nowadays exploit ‘areas where several tax systems must interact and the scope for tax arbitrage, playing the

48. P. Sikka, ‘Dodgy Taxes’ [letter to the editor], *The Guardian* March 20, 2004, quoting Moore Stephens (tax partner).

49. Here the term ‘letter of the law’ does not refer to literal interpretation of the law but is rather used as shorthand with regard to tax planning techniques that exploit the technicalities or differences between tax systems by making use of ‘a bewildering variety of techniques (e.g. multiple deductions of the same loss, double-dip leases, mismatch arrangements, loss-making financial assets artificially allocated to high-tax jurisdictions)’; P. Piantavigna, ‘Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic Discrepancies’, *World Tax Journal* 9 (2017) 1, p. 52.

50. D.N. Shaviro, *Corporate Tax Shelters in a Global Economy: Why They Are a Problem and What We Can Do about It* (Washington D.C.: The AEI Press, 2004), pp. 24–25.

rules of one system off against another, is considerable'. This rule-focus crowds out ethics. Moreover, law and morals are seen as distinct entities.⁵¹ Thus, creative compliance uses formalism to avoid legal control, for example, a tax liability. Taxpayers may comply with the letter of the law, while totally undermining the rationale behind the words.⁵² Because rules can be under- or over-inclusive, they are less than perfectly fitting generalizations, they can sometimes yield outcomes other than those that would be indicated by direct application of the rationale or justification lying behind the generalization.⁵³ However, even with rules which are perfectly fitting generalizations, the most precise rule is potentially imprecise 'as a consequence of our imperfect knowledge of the world and our limited ability to foresee the future'.⁵⁴ This is the open texture of law, which is distinct from vagueness: the most precise term may turn out to be vague when confronted with a case unanticipated when the term was defined. These largely inevitable phenomena make it possible to evade the spirit of the law through loopholes or creatively interpreting its requirements to avoid substantive compliance.

Creative compliance may involve different types of tax avoidance or even tax evasion— avoidance being legal tax planning which can be fully disclosed to the tax administration and evasion being the illegal form of avoidance.⁵⁵ Unfortunately, there is no consensus

51. H. Gribnau, 'Corporate Social Responsibility and Tax Planning: Not by Rules Alone', *Social & Legal Studies*, 24 (2015) 2, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610090>.

52. D. McBarnet, 'When Compliance is not the Solution but the Problem: From Changes in Law to Changes in Attitude' in V. Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Aldershot: Ashgate Publishing, 2003), pp. 229–230.

53. F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991), p. 36. Cf. H. Gribnau & S. Dusarduijn, 'Principles-based Legislation in Context: A Dworkinian Perspective', research paper, <<http://ssrn.com/abstract=3262168>>.

54. Schauer 1991, p. 36.

55. A. Hilling & D.T. Ostas, *Corporate Taxation and Social Responsibility* (Stockholm: Wolters Kluwer, 2017), p. 145 argue that 'when it comes to ethics and tax behavior, there seem to be strong arguments for minimizing the distinction between tax avoidance and tax evasion, although there is a clear legal distinction.'

about the meaning of these two concepts and other concepts like ‘tax mitigation’, which may refer to ‘forms of tax activity that Parliament would have intended to let stand or even to encourage.’⁵⁶ In a U.S. context the term ‘tax shelters’ is used which is difficult to define. The Taxpayer Relief Act of 1997 provides a definition: any partnership, entity or plan or arrangement if a significant purpose of such partnership, entity or plan or arrangement is the avoidance or evasion of Federal income tax.’ According to Kolb, tax shelters can be grouped into three broad categories: legitimate tax shelters (comparable to tax mitigation), grey area tax shelters, and abusive tax shelters.⁵⁷ These terms all have a normative dimension.

From a (neo-institutional) economics perspective descriptive terms, such as ‘tax minimization’ and ‘effective tax planning’, may be used. Garbarino defines tax minimization as ‘the reduction of explicit taxes with the aim of maximizing after-tax-returns, without considering other dimensions of the transaction or business problem.’ Implementing tax minimization strategies may, however, introduce non-tax costs which have to be taken into account. Hence, he defines the broader concept of effective tax planning as ‘a strategy which encompasses not only explicit taxes, but also implicit taxes as well as other non-tax costs that arise in a world of costly contracting.’⁵⁸

56. Z.M. Prebble & J. Prebble, ‘The Morality of Tax Avoidance’, *Creighton Law Review* 43 (2010) 3, p. 705. The terminology in use is indeed by no means unequivocal,; see for example C. Öner, ‘Is Tax Avoidance the Theory of Everything in Tax Law? A Terminological Analysis of EU Legislation and Case Law’, *EC Tax Review* 2018/2.

57. D.L. Korb, ‘Shelters, Schemes, and Abusive Transactions: Why Thoughtful U.S. Tax Advisors Should Tell Their Clients to “Just Say No”’, in W. Schön (ed) 2008, pp. 290–292.

58. Garbarino 2011, pp. 282–283. Non-tax costs are ‘direct costs, the cost of risk, the risk of sanctions, disclosure costs, and agency costs.’ Implicit taxes are ‘taxes that are paid indirectly in the form of lower before-tax rates of return on tax-favored investments’; here, Garbarino cites M.S. Scholes, M.A. Wolfson, M. Erickson, E.L. Maydew & T. Shevlin, *Taxes And Business Strategy: A Planning Approach* (Upper Saddle River: Prentice Hall, 2005), p. 2.

Here, I use the concept of tax avoidance in its widest sense, comprising ‘all arrangements to reduce, eliminate or defer a tax liability.’⁵⁹ To my mind, aggressive tax planning is an extreme form of tax avoidance.⁶⁰ According to the European Commission, aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability.⁶¹ The Commission subsumes under the term aggressive tax planning the excessive use of the opportunities to reduce the corporate tax burden. In a later report it is rightly argued that while ‘it is theoretically possible to draw a line between acceptable tax planning and aggressive tax planning, the boundaries will in reality be somewhat blurred.’⁶²

Note, that the term ‘aggressive tax planning’ is thus not reduced to tax aggressiveness defined as ‘engaging in a tax-related activity that uses ambiguity in the tax law and which is unlikely to survive a challenge by the authorities.’⁶³ The latter conception of ‘aggressiveness’ represents a very legalistic understanding. However, there surely are

59. J. Freedman, ‘Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle’, *British Tax Review* (2004) 4, pp. 335–336.

60. Garbarino 2011, p. 278 defines ‘aggressive tax strategies’ from a corporate governance perspective (more specifically, principal-agent approach) as ‘the behaviour of tax managers who reduce the corporate tax burden to advance their own interests, creating a tension between managers and shareholders.’ To my mind, it is rather about a tension between managers and the long-term interest of the corporation, whereas the interests of all stakeholders, including society at large, should be taken into account.

61. European Commission, ‘Recommendation on Aggressive Tax Planning’, C (2012) 8806 final, 6 December 2012. <http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/tax_fraud_evasion/c_2012_8806_en.pdf>.

62. European Commission, ‘Aggressive Tax Planning Indicators. Final Report, Taxation Papers’, TAXUD/2016/DE/319, FWC No. TAXUD/2015/CC/131, Luxembourg: Publications Office of the European Union 2017, p. 23. This report presents some firm behavior on a continuum of tax aggressiveness which highlights the difficulties of defining sharp boundaries of aggressive tax planning. The continuum ranges from activities, ‘which are clearly in the spirit of the law e.g. claiming tax credits or using loss carry forwards etc., to behavior which is clearly illegal, i.e. tax evasion’; <http://ec.europa.eu/taxation_customs/taxation/index_en.htm>.

aggressive tax structures that survive a challenge by the authorities, and therefore comply with the law, which are nonetheless perceived as morally unacceptable. Legal conduct can infringe on ethical standards. Strict (‘aggressive’) legal compliance is not by definition ethically sound behaviour (see section 6.2).

Those who engage in aggressive tax planning manipulate the legal system in order to minimize their tax liability as far as possible. The phenomenon of ‘stateless income’ is a well-known example.⁶⁴ Aggressive tax planning takes advantage of the law’s adherence to formality at the expense of the substantive value of distributive justice and, in doing so, ‘it exploits the values of the rule of law itself.’⁶⁵ These taxpayers make excessive use of their right (liberty) to structure their affairs in a tax-efficient way—within the limits set by law. They have the resources to hire technical tax expertise which enables them to determine the amount of taxes they are willing to pay. This flies of course in the face of the ideal of democracy, as Piketty points out. ‘No one has the right to set his own tax rates.’⁶⁶

Thus, the moral dimension of tax planning comes to the fore. Aggressive tax planning cannot be reduced to an economic and legal affair since it is a moral affair as well. Playing deftly around the legal rules, based on a narrowly defined cost-benefit analysis, goes at the expense of the integrity of the tax system and the moral values it represents. It adversely impacts government revenue and its capacity to support society with public goods and also shifts the tax burden to other members of society. Aggressive tax planning is the very nega-

63. Brooks, Godfrey, Hillenbrand & Money 2016, p. 223 referring to D.A. Guenther, S.R. Matsunaga, B.M. Williams, ‘Tax Avoidance, Tax Aggressiveness, Tax Risk and Firm Risk’, *Working Paper. Lundquist College of Business* 2013, p. 4; <<https://pdfs.semanticscholar.org/e846/bdc88e7ab10ca9860b1324d469f8fbd2a704.pdf>>.

64. D. Kleinbard, ‘Through a Latte Darkly: Starbucks’ Stateless Income Planning’, *Tax Notes* 24 June 2013, pp. 1517–1518.

65. R. Prebble & J. Prebble, ‘Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study’, *Saint Louis University Law Journal* 55 (2010), p. 45.

66. Piketty 2014, p. 522.

tion of the notion that powerful (corporate) citizens should take their obligations to society seriously.

3.3. Tightening regulation and more transparency

More recently, there is some evidence of increased concerns amongst companies about aggressive tax planning. This reflects the changing views on tax avoidance of various stakeholders and their subsequent actions. In the post-Enron era with new regulations, the accounting and reporting of corporate income tax has received increased scrutiny by all kinds of stakeholders. In the wake of the 2008 financial crisis, tightening government budgets, higher taxes for SMEs and other (non-corporate) taxpayers, and increasing economic inequality brought corporate tax planning practices further to the fore. Public hearings got much media attention.⁶⁷

The successive G20 leaders' summits, the OECD's reform programme to combat base erosion and profit shifting (BEPS) by multinational companies,⁶⁸ and the European Commission Anti-Tax Avoidance Package (ATAP) followed by the Anti-Tax Avoidance Directive (ATAD) brought regulatory improvements in order to ensure more responsible fiscal behaviour of both governments and multinationals.⁶⁹ These improvements include mandatory disclosure of

67. Cf. Margaret Hodge (chair Committee of Public Accounts): 'We are not accusing you of being illegal; we are accusing you of being immoral; in UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs: Annual Report and Accounts 2011–12. Nineteenth Report of Session 2012–13 Report, together with formal minutes, oral and written evidence (The Stationery Office Limited, 2012), Q 485, p. 40, available at <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/716.pdf>>.

68. Base erosion and profit shifting is a particular form of aggressive tax planning; see Hilling and Ostas 2017, pp. 46–54.

69. See OECD, *BEPS Action Plan* (Paris: OECD, 2013), and Communication from the Commission to the European Parliament and the Council, 'Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the EU', 28 January 2016, COM(2016) 23 final; <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0023&from=EN>>, and Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, L 193/1.3.

(potentially) aggressive or abusive tax transactions, arrangements or structures, the automatic exchange among EU member states of information about this kind of cross-border arrangements and country-by-country reporting.⁷⁰ These measures are aimed at creating a minimum standard that will make it possible to put a halt to excesses of tax planning. Thus, states can be seen as collaboratively creating and improving legal regimes or systems by taking away inconsistencies and loopholes—‘for the benefit of society as a whole’.⁷¹ This improved tax system entails diminished opportunities to engage in tax avoidance.

Better tax laws thus enhance moral behaviour. Since tax law can be seen as codified public morality, that is, the obligation to contribute to society by paying tax, an improved international tax system secures a higher level of public morality. A better system of tax rules indeed secures higher compliance with the moral norm of fair play, entailing that citizens pay their taxes,⁷² and a level playing field), thus assuring society that all members of society, including the very expert, powerful members pay their fair share.

It is, however, not only tightening regulation that increased concerns amongst companies about aggressive tax planning. Corporate awareness of the social relevance of tax, the wish for good relationships with the tax authorities, alignment with the underlying business

70. OECD, Mandatory Disclosure Rules, Action 12—2015 Final Report, *OECD/G20 Base Erosion and Profit Shifting Project* (Paris: OECD Publishing, 2015), <<http://dx.doi.org/10.1787/9789264241442-en>>, Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018L0822>>; see F. Cachia, ‘Tax Transparency for Intermediaries: The Mandatory Disclosure Rules and Its EU Impact’, *EC Tax Review* 27 (2018) 4, pp. 206–217.

71. S. Douma, *Legal Research in International and EU Tax Law* (Deventer: Kluwer, 2014), at 41. Cf. S. Douma, *Legal Research in International and EU Tax Law* (Deventer: Kluwer, 2014), p. 41.

72. J. Rawls, ‘Legal Obligation and the Duty of Fair Play’ [1964] in J. Rawls, *Collected Papers* (Cambridge (MA) and London: Harvard University Press, 1999). See H. Gribnau, ‘Voluntary Compliance Beyond the Letter of the Law: Reciprocity and Fair Play’ in B. Peeters, H. Gribnau & J. Badisco (eds), *Building Trust in Taxation* (Cambridge: Intersentia, 2017), Peeters, Gribnau & Badisco (eds) 2017(b).

and worries about reputational risk in case of a (perceived) breach of legal requirements account for some companies shifting away from a focus on taxation as an opportunity for shareholder value creation.⁷³ Thus, concerns with reputation both within the organization and as perceived by the ‘public’ become very important. The media play a particularly striking role in this respect.⁷⁴ NGO’s such as Tax Justice Network, ActionAid and Oxfam are adding to a sense of urgency.⁷⁵ Their campaigns portrayed corporate aggressive tax planning as a failure of democratic governance, reflecting an unfair distribution of power, income and wealth in society.⁷⁶ The OECD urges corporate boards to ‘proactively develop appropriate tax policy principles.’⁷⁷ In recent years many organizations, such as Vereniging van Beleggers voor Duurzame Ontwikkeling (VBDO)⁷⁸ and Global Reporting Initi-

-
73. Henderson Global Investors Tax, ‘Risk and Corporate Governance: Findings from a Survey of the FTSE 350’, 2005; <http://www.henderson.com/global_includes/pdf/sri/tax_paper.pdf>; J. Freedman, ‘The Tax Avoidance Culture: Who Is Responsible? Governmental Influences and Corporate Social Responsibility’, *Current Legal Problems* 59 (2006), pp. 381–382, and A. van Eijdsden, ‘The Relationship between Corporate Responsibility and Tax: Unknown and Unloved’, *EC Tax Review* 2013-1.
74. E. Mulligan & L. Oats, ‘Tax Risk Management: Evidence from the United States’, *British Tax Review* (2009) 6, pp. 680–703.
75. C. Peters, ‘Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs’ in Peeters, Gribnau & Badisco (eds) 2017.
76. A. Elbra & J. Mikler, ‘Paying a “Fair Share”: Multinational Corporations, Perspectives on Taxation’, *Global Policy* 8 (2017) 2, p. 181.
77. OECD, *Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011), p. 61. Subsequently it is argued that a ‘comprehensive risk management strategy that includes tax will allow the enterprise to not only act as a good corporate citizen but also to effectively manage tax risk, which can serve to avoid major financial, regulatory and reputation risk for an enterprise.’
78. Vereniging van Beleggers voor Duurzame Ontwikkeling (VBDO), ‘Tax Transparency Benchmark 2018’, 2018, <<https://www.vbdo.nl/wpcontent/uploads/2018/11/TaxTransparencyBenchmark2018-1.pdf>>.

ative (GRI)⁷⁹ are developing standards for tax transparency and, more generally, good tax governance.⁸⁰

In this way, civil society is trying to change the climate within which corporate tax governance takes place, ‘pressing arguments through media, as well as annual general meetings and lobbying other shareholders.’⁸¹ Civil society is a driver, as campaigner, influencer, and orchestrator, to transform the nature of business. Mulgan calls this a broader process of ‘civilization’: ‘making business more civil in character, in terms of values, methods and organizational forms.’⁸² Companies are responding to the pressure exercised by civil society, the media and politicians. A group of multinational corporations, the B-team, have teamed up and developed a set of principles ‘that offer a clear framework for responsible tax practice.’⁸³ Thus, tax transparency is on the agenda of MNCs’ stakeholders, for investors, businesses, and policymakers are steadily taking steps towards more public disclosure of multinational corporations’ country-by-country reporting of tax information.⁸⁴ Consequently, good tax governance takes into account the interests of a wide range of stakeholders and may even become an opportunity for shareholder value creation.

79. Global Reporting Initiative (GRI), ‘Disclosures on tax and payments to government’, 2019, <<https://www.globalreporting.org/standards/work-program-and-standardsreview/disclosures-on-tax-and-payments-to-government/>>.

80. This may also promote consistent reporting. For instances of opportunistic tax reporting, see K. Holland, S. Lindop & F. Zainudin, ‘Tax Avoidance: A Threat to Corporate Legitimacy? An Examination of Companies Financial and CSR Reports’, *British Tax Review* (2016) 3, pp. 310–338.

81. G. Mulgan, *The Locust and the Bee: Predators and Creators in Capitalism’s Future* (Princeton/Oxford: Princeton University Press, 2013), p. 191.

82. Mulgan 2013, p. 192.

83. The B Team 2018, p. 4. See further A.-G. Jallai, ‘Can Corporations Contribute to Sustainability by Paying Taxes?’, Chapter 6 in this volume.

84. Financial Accountability and Corporate Transparency Coalition, ‘Trending Toward Transparency: The Rise of Public Country-by-Country Reporting’, 23 April 2019; <<https://thefactcoalition.org/wp-content/uploads/2019/04/Trending-Toward-Transparency-April-2019-FINAL.pdf>>. For a comprehensive examination of the link between corporation tax payments and financial performance in the UK, see Brooks, Godfrey, Hillenbrand & Money 2016.

4. Interim conclusion

The foregoing shows some aspects of taxation which explain its foundational nature—which is too often taken for granted. Taxation sustains human beings living and cooperating peacefully—enabling them to prosper in society. Various fundamental human values are enhanced by taxation.⁸⁵ Taxes are payments to the state, but they are paid to support society. For a long time both states and certain groups of taxpayers, among which multinationals, have been neglecting the foundational nature of taxation by hollowing out the integrity of the tax system. States were too much focused on the regulatory function of tax at the expense of a fair distribution of the tax burden. Tax law-making, however, should be a matter of impartial and transparent balancing of the different interests involved and tax laws should be applied in a fair, consistent and transparent way. Wealthy taxpayers and multinationals for their part gamed the (international) tax system, minimizing their tax liability.

The current public indignation over tax planning practices of (corporate) taxpayers who deftly play around the rules involves the moral judgement that the principle of fair play is violated. Fair play here embodies the social norms of doing one's part and complying with the law—not being reduced to calculating, minimalist compliance. Taxpayers that do not pay their fair share shift the tax burden to less expert and calculating taxpayers. Aggressive tax planning practices shift the tax burden to society, putting pressure on government's provision of public goods and are not exactly conducive to the ethical ideal reduced economic inequality. This accounts for the often-times emotional response of the public faced with austerity measures. The public response shows the need for renewed reflection on these functions of taxation and the deep values they promote—and therefore also on the way powerful taxpayers use the tax system.

85. Cf. J. Stiglitz, *The Roaring Nineties* (W.W. Norton & Company: New York, 2003), p. 177: 'Every tax system is an expression of a country's basic values—and its politics. It translates into hard cash what might otherwise be simple high-flown rhetoric'.

There is even more reason for renewed reflection on the values involved in taxation and the notion of tax itself. Taxpayers that shift the tax burden to less expert taxpayers contribute to increasing income and wealth inequality. Recent research in the field of political economy and political (democratic) theory by leading scholars shows that inequality of income and wealth impairs trust in government and democracy. There is massive research done in this field. I have probably put only a scratch on the surface of this material but it convincingly shows that a tax system that favours the rich and powerful (corporate) citizens and aggressive tax planning lead to economic stagnation and lower tax revenues which partially explain the increase in inequality of income and wealth. These developments in turn contributed to the erosion of fundamental societal, political and democratic values. Unsurprisingly, these scholars see taxation as one of the instruments to remedy these kinds of ills. Analysing their arguments may well further our inquiry into the nature of taxation.

5. Taxation's impact on society and democracy

5.1. Piketty: taxation, equality, social cohesion and democracy

One such scholar, of course, is economist Thomas Piketty. In *Capital in the Twenty-First Century* he analyses data to uncover the long-term evolution of equality (among his sources of information are tax records). He shows the rise of extreme inequality of income and wealth since the 1970s.⁸⁶ Piketty points at the advent of 'supermanagers', largely an Anglo-Saxon phenomenon, that is, 'top executives of large firms who have managed to obtain extremely high, historical unprecedented compensation packages for their labor'.⁸⁷ Tax reform

86. Piketty uses the words 'capital' and 'wealth' interchangeably. Moreover, and more importantly, one of his points of departure is that 'capital is not an immutable concept: it reflects the state of development and prevailing social relations of each society' (47).

87. Piketty 2014, p. 302. Cf. B. Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Cambridge (Mass.) & London: The Belknap Press of Har-

by Margaret Thatcher and Ronald Reagan reduced the marginal tax rates for upper-income individuals. Their policies ‘served to redistribute the tax burden in a regressive direction.’⁸⁸ Due to these cuts in top tax rates in the 1980s senior managers increased their effort to get higher remuneration or bonuses.⁸⁹ This provides a negative spillovers since the increase in managerial pay has to be set against ‘the smaller amount paid out to shareholders, which—if in the form of lower dividends—means lower tax revenue.’⁹⁰ Moreover, this kind of excessive remuneration is often dependent on the profits the corporations make.⁹¹ Thus managers are incentivized to engage in aggressive tax

vard University Press, 2016), p. 187: ‘In the new capitalism, rich capitalists and rich workers are the same people’. He argues that the social acceptability of the high incomes is enhanced by the fact that rich people work unlike rentiers.

88. R.K. Roy & A.T. Denzau, *Fiscal Policy Convergence from Reagan to Blair: The Left Veers Right* (London: Routledge, 2004), p. 67.

89. In 2009 Piketty argued that the inequality had exploded in France over the last ten years, one of the causes being the ‘same phenomenon as in the United States. Executives take control and vote themselves exorbitant incomes unrelated to their productivity (which is unobservable by definition), encouraged by repeated tax cuts’; T. Piketty, ‘Profits, Wages, and Inequality’ in T. Piketty, *Why Save the Bankers? and Other Essay on Our Economic and Political Crisis* (Boston & New York: Houghton Mifflin Harcourt, 2016), p. 30.

90. A.B. Atkinson, *Inequality: What Can Be Done?* (Cambridge (Mass.)/ London: Harvard University Press, 2015), p. 186. Cf. Piketty 2014, pp. 508–512.

91. Managers are often considered agents whose function is to maximise shareholders’ value (instead of the long-term best interests of the company). However, the myopic shareholder value maximisation approach has a logic of its own. B.M. Friedman, ‘Two Roads to Our Financial Catastrophe’, *New York Review of Books*, 29 April 2010, p. 27: ‘The traditional notion of corporate governance exercised by a board of directors, acting in the interests of the stockholders, has long been a fiction for many firms. [...] The current crisis has helped demonstrate the extent to which this particular fiction has ceased to be useful. With an ever greater fraction of many corporations’ stock held by owners who are either small in scale or passive in their approach, share-owners have become in management’s eyes merely another source of funding: like the firm’s bondholders, but perhaps more of a nuisance.’ In the same vein, Republican Robert Monks: ‘There should be no doubt [...] that accountability to ownership in the United States is a polite fiction’, quoted in C. Derber, *Corporation Nation: How Corporations Are Taking Over Our Lives and What We Can Do About It* (New York: St Martins Press, 1998), p. 145. See, however, the recent (American) Business Roundtable Statement on the purpose of a corporation (August 2019). This statement is signed by 181 CEOs who

planning strategies, since these are deployed to maximize net profits after tax by achieving a very low effective tax rate.⁹² Again, this results in lower tax revenue.

Whilst the top-earner's share of national income has steadily increased, in contrast, at the bottom of the hierarchy, low skilled work is poorly paid in the United States, low paid workers having markedly lower standards than low paid workers in other affluent economies.⁹³ The resulting inequality has an economic impact since the increase of economic inequality hampers economic growth. He shows that the increase in inequality in the US was accompanied by a rather slowly growing economy, resulting in virtual stagnation of the purchasing power of the lower and middle classes in the United States (and thus contributing to its financial instability).⁹⁴ 'It is hard to imagine an economy and society that can continue functioning

commit to generating long-term value for shareholders and to transparency and effective engagement with shareholders; <<https://opportunity.businessroundtable.org/ourcommitment/>>.

92. Remuneration and corporate governance may be determinants of (aggressive) tax planning; see for example M.A. Desai & D. Dharmapala, 'Corporate Tax Avoidance and High-Powered Incentives', *Journal of Financial Economics* 79 (2006); M.A. Desai & D. Dharmapala, 'Tax and Corporate Governance: An Economic Approach' in W. Schön (ed) 2008; Garbarino 2011, Huseynov & Klamm 2012. However, caution should be exercised in interpreting for example corporate governance factors on the valuation of aggressive tax planning since tax aggressiveness is sometimes quite narrowly defined as engaging in a tax-related activity which is unlikely to survive a challenge by the authorities—not exactly a definition which allows for a strong ethical component (or going beyond compliance with a black letter application of the tax law).
93. K.L. Schlozman, H.E. Brady & S. Verba, *Unequal and Unrepresented Political Inequality and the People's Voice in the New Gilded Age* (Princeton/Oxford: Princeton University Press, 2018), pp. 192–193. Importantly, they add that 'taxes are not especially redistributive in the United States.'
94. This does not only go for the US. See M.P. Keane & E.S. Prasad, 'Poland: Inequality, Transfers, and Growth in Transition', *Finance & Development*, 38 (2001) 1, who compared countries of Eastern Europe and the former Soviet Union. They concluded that a deep social divide (that is, significant increase in income inequality and poverty due to a lack of generous social programs) tended to hamper the economy; <<https://www.imf.org/external/pubs/ft/fandd/2001/03/keane.htm>>.

indefinitely with such extreme divergence between social groups.⁹⁵ But there is more to it. According to Piketty, rising inequality will also impact confidence in democracy: 'arbitrary and unsustainable inequalities [...] radically undermine the meritocratic values on which democratic societies are based.'⁹⁶ Moreover, when government collects less tax there is less money to spend on public good and services.⁹⁷ Hence, the quality of public services is at stake, which in turn adversely impacts government's capacity to raise taxes: 'poorly functioning public services undermine confidence in government, which makes it more difficult to raise taxes significantly.'⁹⁸

Piketty's book got much praise, but of course was also met with criticism. I will not deal with this criticism, since one of the aims of this paper is to show the wider social and moral meaning of taxation—which is not targeted by Piketty's critics.⁹⁹ And this is exactly what Piketty does. Piketty taxation is connected to fundamental societal and economic issues. Taxation is often seen as a technical matter. However, reducing tax to technicalities removes notions of moral purpose and even altruism from one of the fundamentals of public life. For Piketty, indeed, 'it is preeminently a political and philosophical issue, perhaps the most important of all political issues.' He goes on to argue that taxes make society possible and may well enhance social

95. Piketty 2014, p. 297.

96. Piketty 2014, p. 1. W. Streeck, *How Will Capitalism End?* (London/New York: Verso, 2016), pp. 20–21 connects this to the liberalization of markets. He argues that 'the decades of neoliberal progress' showed a gradual erosion of the postwar standard model of democracy. 'Coupled to state-managed capitalism, democracy functioned as an engine of economic social and progress. By redistributing parts of the proceeds of the capitalist market economy downward, [...] democracy provided for rising living standards among ordinary people and thereby procedural legitimacy for a capitalist market economy.'

97. Cf. Bourguignon 2015, pp. 93–94 with regard to serious cuts in social programs in the United Kingdom and Sweden. However, in the majority of OECD countries social spending has tended to increase due to for example a growing ageing population and worsening employment situation.

98. Piketty 2014, p. 491.

99. For a 'reply to critics', see T. Piketty, 'Putting Distribution Back at the Center of Economics: Reflections on Capital in the Twenty-First Century', *Journal of Economic Perspectives* 29 (2015) 1, pp. 67–88.

cohesion.¹⁰⁰ Without taxes, ‘society has no common destiny, and collective action is impossible.’¹⁰¹ Therefore taxes are not just a technical, be it economic or legal, affair.

Piketty calls for higher taxes as a means to regulate global capitalism and the inequalities it generates. To his mind, a progressive global tax on capital would be ‘the ideal policy for avoiding an endless inegalitarian spiral and regaining control over the dynamics of accumulation.’¹⁰² The purpose of this capital tax is not only to stop the indefinite increase of inequality of wealth, but also ‘to impose effective regulation on the financial and banking system in order to avoid crises.’¹⁰³ To achieve this twofold purpose, Piketty maintains, the global capital tax should provide clarity ‘about who owns what assets around the world’. This clarity promotes democratic and financial transparency. The democratic importance of transparency lies in its ability to generate information about the distribution of wealth which enables governments, international organizations, and statistical offices to generate reliable data about the evolution of wealth over the globe. Reliable data is an indispensable source of knowledge for democratic scrutiny. Without such data no informed and rational democratic debate is possible.¹⁰⁴ Again the larger meaning of taxation, going beyond its highly technical character, shows. As shown above, it is a way of requiring all citizens to contribute to the financing of public expenditures and projects and to distribute the tax burden fairly as possible, but ‘it is also useful for establishing classi-

100. See also J.E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (New York and London: W.W. Norton and Company, 2012), pp. 64–64, Milanovic 2016, pp. 214–218, and M. Schratzenstaller et al., ‘EU Taxes as Genuine Own Resource to Finance the EU budget: Pros, Cons and Sustainability-oriented Criteria to Evaluate Potential Tax Candidates, FairTax’, Working Paper Series 3, 2016, pp. 42–43.

101. Piketty 2014, p. 493.

102. Piketty 2014, p. 471. He continues: ‘As I have already noted, the ideal policy for avoiding an endless inegalitarian spiral and regaining control over the dynamics of accumulation would be a progressive global tax on capital. Such a tax would also have another virtue: it would expose wealth to democratic scrutiny.’

103. Piketty 2014, p. 518.

104. Piketty 2014, pp. 518–519.

fications and promoting knowledge as well as democratic transparency.¹⁰⁵

Although Piketty proposes a global wealth tax to diminish inequality, he is acutely aware that it is not only taxation that can fix the problem. He explicitly acknowledges for example that governments should tackle the issue of education which is a major cause of unequal distribution. 'Over a long period of time,' he writes, 'the main force in favor of greater equality has been the diffusion of knowledge and skills.'¹⁰⁶ Broad segments of the population having access to high-quality professional training and advanced educational opportunities fosters social mobility. He is, however, not overly optimistic in this respect: there is no easy way to achieve real equality of opportunity in higher education.¹⁰⁷ So taxation alone cannot do the trick; it should not be seen in isolation but as part of a comprehensive reform to enhance more equality.

5.2. Mounk: taxation, public distrust, and polarization

For quite some time, democracy has been voicing concern about democracy. Even in countries where democracy had been long established and seemed secure, to some democracy was 'in crisis, or at least severely strained by a decline in the confidence of citizens that their elected leaders, the political parties, and government officials could or would cope fairly or successfully with issues like persistent unemployment, poverty, crime, welfare programs, immigration, taxation, and corruption.'¹⁰⁸ Lack of responsiveness of the government to the interests, needs, and preferences of its citizens, may threaten democracy. Taxation is one of the issues of concern. It is not the only one, but it is definitely an important one and connected to many other issues.

105. Piketty 2014, p. 12.

106. Piketty 2014, p. 22.

107. Piketty 2014, p. 486. M. Savage a.o., *Social Class in the 21st Century* (Pelican Books, 2015), pp. 222 et seq. adds a caveat: more higher education doesn't necessarily mean more equality.

108. R. Dahl, *On Democracy* (New Haven and London: Yale University Press, 2000), p. 2.

Recently, the political scientist Yascha Mounk elaborated on Piketty's statement that taxation is perhaps the most important of all political issues, in particular by connecting taxation to trust in government and democracy. For him, taxation is a means to increase trust, since trust in politics is rapidly dwindling and democracy is wilting away.¹⁰⁹ He advocates a reversal of existing tax policies in order to restore trust in government and democracy and renew civic faith. He analyses two core components of liberal democracy that are increasingly at war with each other: liberalism safeguarding individual rights versus democracy focusing on the popular will. Another political scientist, Fareed Zakaria, already pointed at this tension between liberalism and democracy. He argued that democracy as such is not concerned with protecting the rights of the individual; while liberalism exactly advocates individual liberty (freedom from interference by others) requiring legal arrangements to guard individual rights.¹¹⁰ Mounk contends that due to authoritarian strands of populism liberal norms such as a free press, due process, transparency, tolerance and civil liberties are under pressure. Political opponents are readily imagined as enemies of the nation whose right may be restricted. The result is the rise of illiberal democracy, or democracy without rights (he mentions e.g. Poland and Hungary¹¹¹). At the same time undemocratic liberalism (or rights without democracy) is on the rise: the legislature has lost much of its former power to institutions like 'courts, bureaucrats, to central banks, and to international treaties and organizations alienating many voters from politics'.¹¹² The problem of their role is their unrepresentative character.

109. Y. Mounk, *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Cambridge (Mass.) & London: Harvard University Press, 2018).

110. F. Zakaria, *The Future of Freedom. Illiberal Democracy at Home and Abroad* (New York/London: Norton, 2003); for some criticism, see J. Ober, *Athenian Legacies: Essays on the Politics of Going Together* (Princeton/Oxford: Princeton University Press, 2005), pp. 92–127.

111. Cf. P. Ther, *Europe since 1989: A History* (Princeton/Oxford: Princeton University Press, 2016), pp. 158–160. See also Freedom House, *Freedom in the World: Democracy in Retreat* (2019), p. 36 (with regard to international institutions); <<https://freedomhouse.org>>

112. Mounk 2018, pp. 14 and 59.

Menz links this to neo-liberalism's preference for technocratic governance by experts—related to its implicit contempt for mass democracy and its excesses.¹¹³ Governance through regulation (and often, through deregulation) proceeds by involving technocratic independent governance bodies dominating core policy domains outside the remit of democratically accountable institutions.

Mounk does not seek to oversimplify matters as he readily acknowledges that the history and operation of technocratic institutions is quite complicated. For one thing, we inhabit an extremely complex world with a large range of issues the regulation of which often requires considerable technical expertise. Moreover, 'counter-majoritarian institutions like constitutional courts do have a proud record of protecting individual rights [...] and independent institutions have historically proven very important in keeping democracy on an even keel.'¹¹⁴ However, independent institutions are under threat. For example, illiberal rulers in dozens of countries around the world use court packing to virtually silence an important constitutional check on their executive power which may contribute to democratic breakdown.¹¹⁵ According to Levitsky & Ziblatt, these kinds of institutional checks and balances are endangered by intense political polarization causing the unravelling of basic norms of mutual tolerance and institutional forbearance (or restraint).¹¹⁶

113. G. Menz, *Comparative Political Economy: Contours of a Subfield* (Oxford: Oxford University Press, 2017), p. 257. See also Y. Papadopoulos, *Democracy in Crisis? Politics, Governance and Policy* (London/New York: PalgraveMacmillan, 2013) who argues that democracy has become hollowed out as a means of popular governance. Parliamentary institutions are marginalized partly due to 'technocratization' and judicialization (increased influence of courts on policy-making) of political decisions, advocacy groups gaining influence, cooperative governance, claimant groups, and transnational rule-makers.

114. Mounk 2018, p. 98.

115. S. Levitsky & D. Ziblatt, *How Democracies Die* (New York: Crown Publishers, 2019), p. 188.

116. Levitsky & Ziblatt 2019, p. 102: 'Mutual toleration refers to the idea that as long as our rivals play by constitutional rules, we accept that they have an equal right to exist, compete for power, and govern', and p. 106: institutional forbearance means 'patient self-control; restraint and tolerance [...] For our purposes institutional forbearance can be thought of as avoiding actions, that while respecting

Moreover, powerful lobbies advocating wealthy and corporate taxpayers' interests often successfully attempt to redirect public policy and influence legislation.¹¹⁷ For one thing, MNCs are able to organize production on a global scale. This places national economic systems in competition with each other vying for MNCs goodwill—in order to attract foreign investment. This increased MNCs' bargaining power vis-à-vis governments so that 'taxation, employment, education and infrastructure policies are often formed according [MNC] needs.'¹¹⁸ In this way they are frustrating the second goal of taxation, which rests according to Avi-Yonah on the conviction that 'extreme concentrations of power resulting from extreme concentrations of wealth in the hands of private individuals who are unaccountable to the majority is an unhealthy phenomenon in a democracy.'¹¹⁹ According to Nobel-laureate Stiglitz this kind of 'rent seeking takes the form of exploiting taxpayers.' This exploitation is sometimes 'best described simply as giveaways', that is, 'pure transfers from the rest of the population to corporations and the wealthy.' Government often responds to lobbying by subsidizing corporations ('corporate wel-

the letter of the law, obviously violate its spirit.'

117. Cf. T. Hamburger & M. Gold, 'Google, once disdainful of lobbying, now a master of Washington influence', *The Washington Post*, 12 April 2014: Google was second only to General Electric in corporate lobbying expenditures in 2012 and fifth place in 2013. It 'is financing research at universities and think tanks, investing in advocacy groups, and 'funding pro-business coalitions cast as public-interest projects.' O. Jones, *The Establishment. And How They Get Away with It* (London: Penguin Books, 2015), p. 79 says that it is not just ideology and self-interest that makes politicians 'natural champions of the wealthy' since they spend much of their time in 'the company of private interests and their professionalized, slick lobbying teams' rather than hearing critics of the practices of business. He quotes a MP saying: 'politicians have voluntarily given the power of policy-making 'over to corporations and then facilitated the corporations' capture of power as well.'
118. A. Dignam & M. Galanis, *The Globalization of Corporate Governance* (New York/London: Routledge, 2016), p. 134.
119. R.S. Avi-Yonah, 'Why Tax the Rich? Efficiency, Equity, and Progressive Taxation', *The Yale Law Journal* 111 (2001–2002), p. 1413; cf. L. Wijnvliet, *Tax Tectonics. Well-being and Wealth Inequality in relation to a Shift in the Tax Mix from Direct to Indirect Taxes* (Ph-D thesis, Tilburg: Tilburg School of Economics and Management, 2018), pp. 417–419.

fare'). Many of the subsidies are buried in the tax code 'loopholes, exceptions, exemptions, and preferences [that] reduce the progressivity of the tax system and distort incentives.'¹²⁰ In doing so powerful lobbies seek preferential treatment, undermining the democratic legitimacy of the political decision-making process and its outcomes.¹²¹

Mounk argues that the influence of the rich and powerful over public policy,¹²² the revolving door between lobbyists and legislators, and the tight links between politics and industry had a large impact on the government's ability to deliver for ordinary people, since 'the living standards of ordinary people have, in many North American and western European countries, been stagnating for decades.'¹²³

This public policy could come about only by manipulating public opinion. McCaffery argues that in the United States, beginning

120. Stiglitz 2012, pp. 272–273.

121. J. Mikler, *The Political Power of Global Corporations* (Cambridge/Medford: Polity, 2018), p. 126.

122. Cf. Milanovic 2016, pp. 189–211. Claiming the authority of economics, oftentimes superficial economic arguments are used to influence public policy. Using basic economic textbook models and principles, though the underlying assumptions virtually never hold true in the real world, to explain all social phenomena contributes to the domination of the wealthy by providing an interpretative lens 'that justifies their preferred policies and the inequality generated by those policies'; J. Kwak, *Economism: Bad Economics and the Rise of Inequality* (New York: Pantheon Books, 2017), p. 184. In fact, this 'economism' neglects or even denies that such interpretative framework 'implies a certain set of value judgments and policies [...] serving the existing social order' (p. 7).

123. Y. Mounk, 'How populist uprisings could bring down liberal democracy', *The Guardian*, 4 March 2018, <<https://www.theguardian.com/commentisfree/2018/mar/04/shock-system-liberal-democracy-populism>>. Austerity measures may also impact the generosity of social assistance benefits. For example, in many OECD countries, there is a widening gap between social assistance benefits and average wages which might increase inequality between the lowest and the average income groups; see J. Wang & O. van Vliet, 'Social Assistance and Minimum Income Benefits: Benefit Levels, Replacement Rates and Policies across 26 OECD Countries, 1990–2009', *European Journal of Social Security* 18 (2016), 4, pp. 333–355, and O. van Vliet & J. Wang, 'The Political Economy of Social Assistance and Minimum Income Benefits: A Comparative Analysis across 26 OECD Countries', *Comparative European Politics* 17 (2019) 1, pp. 49–71.

with Ronald Reagan in 1981 public opinion was manipulated in order to get a public finance system in place that ‘is in conflict with both the public good and with the prevalent democratic preferences.’¹²⁴ The result was a budget deficit and a tax system with only moderate levels of progressivity while various taxes were more regressive. Political rhetoric was rewarded over substance leading to ‘dramatically less redistribution than the people themselves wanted.’¹²⁵ Unsurprisingly, this policy did not enhance trust in politics.

Moreover, hampered economic growth failed to distribute wealth. This also fuelled distrust, leading to polarization in society and politics. As economic inequality increases, it becomes more difficult ‘to see those on the other side of the aisle as well-meaning individuals who share our goals but differ in what they believe are the best means to reach them.’¹²⁶ As a result, politics becomes more divisive. As Levitsky & Ziblatt argue, slowed economic growth, rising, economic inequality, decreased job security, fewer prospects of upward mobility account for a growth in social resentment. ‘Resentment fuels polarisation.’¹²⁷ Thus social resentment is a driver of the above-mentioned polarization which undermines mutual toleration and restraint in using (political) power. A similar development occurred in Europe, the wealthiest members society not doing their part is a crucial source of social distrust, according to Rosanvallon. This leads to ‘generalized resentment’, especially members of the middle and the working

124. E.J. McCaffery, ‘Behavioral Economics and the Law: Tax’ in E. Zamir & D. Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (Oxford: Oxford University Press, 2014), p. 614.

125. McCaffery 2014, p. 615.

126. K. Payne, *The Broken Ladder. How Inequality Affects the Way We Think, Live and Die* (New York: Viking, 2014), p. 111.

127. Levitsky & Ziblatt 2019, p. 228. Schlozman, Brady & Verba 2018, p. 97 show ‘that the party polarization ‘so evident in Congress has reached down to the level of ordinary citizens.’ Due to this trickle down effect ‘engaged citizens—who are well educated, politically interested, and politically active—are also less centrist in their views.’ For the polarization in East Central Europe, see Ther 2016, p. 157: ‘An amalgam of social inequality, badly paid and insecure jobs [created] a breeding ground for authoritarian right-wing parties.’

classes becoming dissatisfied. Their resentment ‘has fueled the rise of the extreme right in Europe.’¹²⁸

For Mounk, there is an urgent need to reform economic policy, both domestically and internationally, to temper inequality and live up to the promise of the rising living standards—as was the case in the postwar era.¹²⁹ To his mind, taxation is a vital part of the solution: a better tax system will be instrumental to restore trust in politics and democratic institutions (institutional trust). He advocates to raise effective tax rates for rich individuals and big corporations who are ‘equally adept at evading the taxman’—partly by making use of ‘the thicket of absurd loopholes that were deliberately created by the legislature.’¹³⁰ In other words, the tax laws are biased in favour of powerful and wealthy (corporate) citizens who moreover expertly use tax avoidance techniques.¹³¹ Corporations minimized their tax liabilities by engaging in aggressive tax planning practices which resulted in massive tax revenues losses.¹³² Their complete lack of restraint in their tax planning practices violates the unravelling of the norm of corporate forbearance, which can be defined analogous to political forbearance (see above Levitsky & Ziblatt), as avoiding corporate actions,

128. Rosanvallon 2013, p. 275.

129. Mounk 2018, pp. 16–17. On this vision, a more equitable distribution of economic growth, ‘is not just a question of distribution; it is a question of political stability.’ Cf. Levitsky & Ziblatt 2019, pp. 228–231.

130. Mounk 2018, p. 221. He goes on to argue that this is often done in the full knowledge that ‘they will channel even more money to the super-rich: to name but one example, the favorable treatment [created by US Congress] of private jets makes them extremely cheap for corporations to purchase.’

131. Jones 2015, p. 148: ‘For over three decades, MPs have backed the cutting of income tax on the richest, the slashing of corporation tax for big businesses’, and p. 204: ‘Tax avoidance is a symptom of Britain’s profoundly unequal distribution of wealth and power.’

132. M. Gardner, S. Wamhoff, M. Martellotta & L. Roque, ‘Corporate Tax Avoidance Remains Rampant Under New Tax Law. 60 Profitable Fortune 500 Companies Avoided All Federal Income Taxes in 2018’, ITEP Report April 2019; <<https://itep.org/notadime/>>. The report finds that in 2018, 60 of America’s biggest corporations zeroed out their federal income taxes on \$79 billion in U.S. pretax income. Instead of paying \$16.4 billion in taxes at the 21 percent statutory corporate tax rate, these companies enjoyed a net corporate tax rebate of \$4.3 billion.

that while respecting the letter of the law, obviously violate its spirit, causing societal and political polarization. Mounk argues that these (corporate) taxpayers evidently not paying their fair share of taxes does not only impact the integrity the tax system but also the wider political and democratic system. The belief that many Americans such as wealthy people and corporations are not paying their share, and thereby violating a norm of ‘ethical reciprocity’ is profoundly corrosive to the social fabric.¹³³ Indeed, as also Shaviro argues, in order to prevent the risk of system breakdown, ‘dramatic responses may be needed [...] to restore public trust and cooperation.’¹³⁴

Higher tax revenues enable governments to invest in areas like infrastructure, research, education and decent health care—basic elements of the welfare state which enhance (economic) equality. Therefore the (international) tax system should be reformed in order to ensure that ‘both individuals and corporations pay their fair share of taxes.’¹³⁵ A more equitable distribution of the tax burden will thus enhance trust in democracy and political stability.¹³⁶ Again, tax should not be seen in isolation but as part of a comprehensive reform—in order to enhance equality and restore trust in democracy and political stability. Like Piketty, Mounk extends our understanding of the foundational nature of taxation. Though paid to the state, taxes support society in many ways, whereby fundamental social and moral values are involved. No wonder, the German philosopher Peter Sloterdijk recently labelled taxation ‘the moral phenomenon par excellence in our modern state.’¹³⁷ Therefore paying taxes is a moral obliga-

133. V.S. Williamson, *Read My Lips: Why Americans Are Proud to Pay Taxes* (Princeton/Oxford: Princeton University Press, 2017), p. 8.

134. Shaviro 2004, pp. 24–25.

135. Mounk 2018, p. 222.

136. K. Scheve & D. Stasavage, *Taxing the Rich: A History of Fiscal Fairness in the United States and Europe* (Princeton/Oxford: Princeton University Press, 2016) argue on the basis of information collected in twenty countries that governments do not tax the wealthy just because inequality is high or rising. Governments do it when people believe that such taxes compensate for the state unfairly privileging the wealthy (by way of preferential regimes (tax breaks) for the rich).

137. P. Sloterdijk, *Die nehmende Hand und die gebende Seite* (Berlin: Suhrkamp Verlag, 2010). One of the interviews in the book (at pp. 141–145) is titled ‘Taxes are the

tion to society. Hence, there is need for a more substantive conception of tax (taxation) that recognizes its economic, political, legal, social and moral aspects and the deep values involved.

6. CSR, CSI and good tax governance

6.1. Taxes sustain society and market

Hence, paying taxes is one of the obligations of members of society. It a way of supporting society without which the life of man would be, 'solitary, poor, nasty, brutish, and short.'¹³⁸ Moreover, paying taxes is also an expression of solidarity with other members of society—that is a sense of obligation to distant strangers.¹³⁹ Indeed, taxation allows for a redistribution of funds from some people to others through a system of taxation and public spending. However, as shown above, apart from redistribution individuals greatly benefit from a well-functioning society and the market supported and regulated by government which in turn is funded by taxation. This also goes for wealthy individuals and corporations: taxation enables the government to secure the functioning of the market and achieve various public goods and services sustaining society. Taxes are indeed payments to the state for the enhancement of society. Taxation is an institution that powers society. The state takes responsibility for the maintenance of law and order, defines property rights, enforcing contracts, promoting competition, providing a monetary system, fostering innovation, and so forth. 'Many of these services are clearly worth more than the tax dollars to pay for them.'¹⁴⁰

central moral phenomenon of our civilization'; see also Gribnau 2017(b).

138. T. Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* [1651], R. Tuck (ed) (Cambridge, Cambridge University Press, 1991), XVIII, 128.

139. A. Wolfe, *Whose Keeper? Social Science and Moral Obligation* (Berkeley/Los Angeles/London: University of California Press, 1989), pp. 172–173.

140. Kwak 2017, p. 106.

Corporations are members of society and have to do their part.¹⁴¹ Like natural persons, companies engage in different social relationships—that is, relationships to other persons. They entertain relationships with other persons who may be human beings (e.g. employees, consumers), but also with other companies (e.g. investment funds, suppliers). A corporation, a firm or a trust, can be a person in law. Companies can own and dispose of property, they can be insulted, and they can take action.¹⁴² Corporate members have to sustain society by paying their fair share of taxes. A sustainable society and political stability are preconditions for corporations to prosper.

As the economist Chang claims: productivity is in great part due to the political and social system with well-functioning collective institutions. These societies have ‘better technologies, better organized firms, better institutions and better physical infrastructures.’ He quotes the well-known American investor Warren Buffett: ‘I personally think that society is responsible for a very significant percentage of what I’ve earned. If you stick me down in the middle of Bangladesh or Peru or some-place, you’ll find out how much this talent is going to produce in the wrong kind of soil. I will be struggling thirty years later. I work in a market system that happens to reward what I do very well—disproportionately well.’¹⁴³ This goes for both entrepreneurs and corporations. And since taxes make a well-functioning society and the market and social cohesion possible, all (corporate) citizens have to pay their fair share of taxes.¹⁴⁴

141. With regard to overall government tax revenues in the EU calculations shows ‘that the growth of overall EU government revenues from taxes on corporate profits exceeded the growth of general tax receipts’ and that ‘the overall share of taxes from corporate profits relative to GDP remained constant over the past 20 years’; M. Bauer, *Digital Companies and Their Fair Share of Taxes: Myths and Misconceptions*, ECIPE Occasional Paper 03/2018, p. 5; <<https://ecipe.org/publications/digital-companies-and-their-fair-share-of-taxes/>>. See also OECD’s Tax indicator, *OECD Tax on corporate profits, 2019*; <<https://data.oecd.org/tax/tax-on-corporate-profits.htm>>. I am grateful to Edwin Visser for drawing my attention to these data.

142. P. Spicker, *The Welfare State* (London [etc.]: Sage Publications, 2000), p. 13.

143. Chang 2010, p. 30.

Without taxes no successful corporations. The state creates trust on which market transactions depend by legal enforcement of contracts and (intellectual) property rights and fixing market failures active role in managing markets. Moreover, the ‘state’s very visible hand’ takes on risk, shaping and creating new markets, as the economist Mazzucato maintains, ‘the state is a lead risk taker and market shaper’.¹⁴⁵ Of course, the state is expected to receive a return on investments by taxing the resulting profits. Corporations’ aggressive tax planning frustrates this expectation.

As shown above, corporate (aggressive) tax planning practices of corporations met with much public criticism in the aftermath of the financial crisis and times of austerity.¹⁴⁶ This form of tax avoidance appeared to be connected to economic, societal and political developments that threaten societal and political stability. The integrity of the tax system is connected to basic values of a flourishing society and democracy, such as, social cohesion, democratic legitimacy, and public trust. Therefore paying taxes should be part of CSR. Taxes do contribute to the societal good, implying that paying taxes is a moral obligation.

Nowadays corporate tax planning practices are discussed in moral terms. Hence, multinational enterprises as well as financial institutions and (wealthy) individuals should also take time for moral reflection. Many multinational corporations already see paying taxes

144. Cf. T. Paine, ‘Agrarian Justice’ in T. Paine, *Collected Writings*, E. Foner (ed) (New York: The Library of America, 1995), p. 408: ‘Separate an individual from society, and give him an island or a continent to possess, and he cannot acquire personal property. He cannot be rich. So inseparably are the means connected with the end, in all cases, that where the former do not exist the latter cannot be obtained. All accumulation, therefore, of personal property, beyond what a man’s own hands produce, is derived to him by living in society; and he owes on every principle of justice, of gratitude, and of civilization, a part of that accumulation back again to society from whence the whole came.’

145. M. Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (New York (NY): Public Affairs Books), p. 17. For the role of the state as an actor, rather than a neutral empire, see also G. Menz, *Comparative Political Economy: Contours of a Subfield* (Oxford: Oxford University Press, 2017), pp. 241–266.

146. Freedman 2018, p. 124.

as part of Corporate Social Responsibility. Consequently, they'll have to reflect on their tax planning strategy in CSR terms, that is, not only in economic and legal terms but also in ethical terms.¹⁴⁷ CSR regards the responsibility of enterprises for their impact on society.¹⁴⁸ CSR is driven by the idea that corporations should 'serve society not only by creating wealth, but also by contributing to social needs and satisfying social expectations towards business' since 'society gives license to business to operate.'¹⁴⁹ The so-called 'triple bottom line' traditionally distinguishes between the economic, social and environmental impact of the corporation's actions. Thus, CSR can be defined as a manner of doing business that takes into account the triple bottom line. 'A company's approach to this issue will reflect its chosen ethical stance'; i.e., the set of (moral) values and rules of conduct that govern its interactions with other individuals and organizations.¹⁵⁰

It is sometimes argued that CSR firms that 'focus on after-tax profitability may be able to increase social welfare in other ways, such as investment in infrastructure, R&D, and job creation.'¹⁵¹ In other words: Aggressive tax planning should not be seen as irresponsible corporate behaviour because a corporation since a corporation fulfils its obligations to society in other ways. Just two comments on that. First, as argued above due to increased MNCs' bargaining power vis-à-vis government's taxation, employment, education and infrastructure policies are often formed according MNC needs (section 5.2). Arguing that CSR firms may minimize their tax payments in order to increase social welfare in ways they deem desirable and profitable,

147. Gribnau 2015.

148. EU Commission gives this very succinct definition of CSR: 'the responsibility of enterprises for their impact on society'; European Commission (2011), A Renewed EU Strategy 2011–14 for Corporate Social Responsibility. COM(2011) 681 final, p. 6.

149. D. Melé, 'Corporate Social Responsibility Theories' in A. Crane, D. Matten, A. McWilliams, J. Moon & D.S. Siegel (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008), p. 49.

150. D.F. Williams, 'Tax and Corporate Social Responsibility', 2007, p. 1, <http://www.kpmg.co.uk/pubs/Tax_and_CSR_Final.pdf>.

151. A.K. Davis, D.A. Guenther, L.K. Krull & B.M. Williams, 'Do Socially Responsible Firms Pay More Taxes?', *The Accounting Review* 91 (2016) 1, p. 6.

exacerbates the problem of bending public policies to MNC needs. It will definitely not inspire trust. The same goes for participating in charitable giving, engaging in philanthropy, as a (rather poor) substitute for paying corporate tax (section 3.1). CSR consists of economic, legal, ethical and philanthropic responsibilities.¹⁵² The ethical and philanthropic responsibilities are layered on top of the economic and legal responsibilities. Moreover, CSR corporations voluntarily accept ethical obligations that entail going beyond what is required by the law (section 6.2). In this light, minimizing the legal obligation to pay tax while having made an ethical commitment to go beyond the law, and a fortiori the law's minimum, is not taking an ethically sound stance. Moreover, participating in charitable giving may be a great thing,¹⁵³ but arguing that you minimize your legal obligation to pay

152. A.B. Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders', *Business Horizons* July-August 1991.

153. Or sustainability, for that matter. See for example 'Making Tax Vanish', *Oxfam Briefing Paper* July 2017. This report looks at RB (formerly Reckitt Benckiser), a UK FTSE 100 multinational corporation. Oxfam has made estimates of RB's significant amounts of tax avoided in the period 2013–15. The estimates include RB's restructured transfer pricing model to shift profits and RB's benefits from four individual tax rulings by the Luxembourg government (the 'Luxleaks' scandal—which involved the leaking of confidential tax ruling documents—revealed that RB benefited from these rulings). In its 2016 Annual Report Purpose with a Passion, RB prides itself on its reputation 'for responsible and sustainable corporate conduct' (p. 74); <<http://annualreport2016.rb.com/>>. RB states that it is committed to helping deliver the UN Sustainable Development Goals (see also RB's Sustainability governance and strategy, p. 2; <https://www.rb.com/media/4334/rb_sustainability_governance_2018.pdf>). However, Oxfam (p. 35) argues that these commendable commitments and actions (including hygiene and hand-washing campaigns to prevent diarrhoea in India, Indonesia, Pakistan and Nigeria) are undermined by RB's tax avoidance. 'When governments have lower revenues due to tax avoidance, it is harder for them to fund essential public services for their poorest and most vulnerable citizens.' Thus, while giving money with one hand, RB is taking with the other, for it withholds revenue from governments 'through tax avoidance—revenue that should be used to fund essential services, redistribute unpaid care work and improve sanitation and healthcare.'; <<https://policy-practice.oxfam.org.uk/search?q=Making%20Tax%20Vanish>>. To be fair, RB supports 'the call on governments to take the necessary steps to accelerate public country by country reporting.' (Oxfam 2017, Appendix 2).

tax, that is, in order to participate in charitable giving, seems rather opportunistic juggling with different layers of CSR, that is, elastic ethics. Again, this also boils down to corporate power sidestepping democratic decision-making procedures.

States set the rules of the game and have the primary responsibility to establish a fair and effective system of taxation. They must act responsibly by cooperating to make better rules which prevent aggressive tax planning, and abstain themselves from harmful tax competition. Of course, a better tax system should be based on an impartial balancing of the different interests involved.¹⁵⁴ Corporations are influential actors in the political decision-making process. Multinational corporations should exercise self-restraint when using their power to influence legislators. Indeed, their ‘structural power’, that is their size and economic dominance gives MNCs leverage to organise issues ‘in’ and ‘out’ of politics, and have their interests served even ‘without explicitly making the case for this.’¹⁵⁵ Exercising this power in an irresponsible way may erode legitimacy in respect of their operations.

Thus, the moral obligation to pay tax should become more adequately codified by law. Compliance with an improved set of international tax rules, that is a higher level of codified ethics, will result in more taxpayers paying their share. At the end of the day, however, aggressive tax planning cannot be resolved merely by changing the laws, for all laws can be gamed. Maintaining that better tax governance and compliance is all about changing the laws is a kind of mantra—often bracketed together with the mantra of companies’ duty to maximize shareholder value (see section 6.4; note, that tax planning may not be valued by shareholders¹⁵⁶). One does not need

154. S. Dusarduijn, ‘Trust and Taxation: A Dutch Case Study’ in S. Goslinga, L. van der Hel-van Dijk, P. Mascini & A. van Steenberg (eds), *Tax and Trust Institutions, Interactions and Instruments* (The Hague, The Netherlands: Eleven International Publishing, 2018), pp. 63–85.

155. Elbra & Mikler 2017, p. 185.

156. N.S.A. Wahab & K. Holland, ‘Tax Planning, Corporate Governance and Equity Value’, *The British Accounting Review* 44 (2012) 2, p. 122 conclude for UK firms that ‘tax planning is not valued by shareholders and is in fact value reducing.’

to have a thorough knowledge of tax planning practices to see through this rather simplistic, dogmatic understanding of law and legal interpretation—seemingly congratulating existing aggressive tax planning practices. The rules should be improved, it is said, but rules will inevitably be imperfect, ambiguous, lagging behind societal, economic and technical developments and taxpayers' undesirable use of legislation.

Since a perfect, seamless international tax system is a utopian dream, (corporate) taxpayers will always have some choice regarding the applicable tax rules and interpretation thereof. Freedom of choice, however, entails moral responsibility, and using tax rules is inevitably a matter of exercising that responsibility; therefore, mindset and attitude of (corporate) taxpayers should change.¹⁵⁷ There is no strict separation between law (the legal obligation to pay tax) and morality. To be sure, this position does not require taxpayers to behave in an altruistic way. It requires taxpayers not to exploit the law to minimize their tax payments. All taxpayers bear some responsibility for the integrity of the tax system. An individual cannot of course be responsible for the whole system, but he can act responsibly in order not to erode the tax system.¹⁵⁸ Behaving ethically therefore should be fundamental in all business matters, including lobbying and tax planning practices.

6.2. Need for moral interpretation of legal obligations

Paying taxes is a moral obligation to society. This moral obligation is transformed in a legal obligation by the democratically legitimized tax legislature.¹⁵⁹ However, a perfect institutional determination of what amounts to a reasonable contribution is impossible. Again, perfect legislation foreseeing all possible actions and transactions of tax-

157. D.J. McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability' in D.J. McBarnet, A. Voiculescu & T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007), p. 48.

158. Gribnau 2017a.

159. T. Honoré, 'The Dependence of Morality on Law', *Oxford Journal of Legal Studies* 13 (1993), p. 5.

payers is impossible. Of course taxpayers may arrange their tax affairs in such a way as to achieve a favourable tax treatment within the limits set by law. In many jurisdictions this is settled in case law.¹⁶⁰ However, very expert (corporate) taxpayers are able to bend the seemingly objective and fixed legal obligation to their wills—ending up hardly paying any corporate tax at all. These taxpayers make excessive use of their right (liberty) to structure their affairs in a tax-efficient way—within the limits set by law. They seem to forget that every right or liberty implies responsibility. Hence, conduct that is ‘lawful may be highly problematical from an ethical point of view.’¹⁶¹

Morality can be seen as an informal public system of values, ideals, principles, virtues and rules that guides out behaviour and by which our behaviour is judged.¹⁶² Thus morality covers those practices and activities that are considered importantly right or wrong; the rules and principles that govern those activities; and the values and ideals that are embedded, fostered, or pursued by those activities and practices.¹⁶³ Someone who subscribes to a moral code or standard desires that other members of society generally conform to it.¹⁶⁴ In this vein, paying taxes is a matter of public morality, something we

160. See for example Court of Justice of the European Union (CJEU). Case C-255/02 *Halifax plc and others v. Commissioners of Customs & Excise*, [2006] ECR I-1609, para. 73. The abuse of rights doctrine defines the legal boundaries of this freedom. For recent case law, see the judgements of the CJEU in *N Luxembourg 1 v Skatteministeriet* (Case C-115/16) and in *T Danmark* (Case C-116/16)—both joined cases—on 26 February 2019.

161. L.S. Paine, ‘Managing Organizational Integrity’, *Harvard Business Review*, March–April 1994, p. 109.

162. B. Gert, *Morality: Its Nature and Justification* (Oxford: Oxford University Press, 1998), p. 11. See also H.J.L.M. Gribnau & A.-G. Jallai, ‘Good Tax Governance: A Matter of Moral Responsibility and Transparency’, *Nordic Tax Journal* (2017) 5, pp. 71–74, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3021914>, and H. Gribnau, E. van der Enden & K. Baisalbayeva, ‘Codes of Conduct as a Means to Manage Ethical Tax Governance’, *Intertax* 46 (2018), 5, pp. 392–394, <<https://ssrn.com/abstract=3308122>>.

163. Cf. R.T. De George, *Business Ethics* (Upper Saddle River: Prentice Hall, 1999), p. 19.

164. D. Copp, *Morality, Normativity, and Society* (New York/Oxford: Oxford University Press, 1995), p. 101.

owe others even if they do not agree with our private morality.¹⁶⁵ The hostile public response to multinational corporations' aggressive tax planning practices, blaming them for their irresponsible behaviour, is in line with other reactions to violation of moral standards.¹⁶⁶

The legal system, therefore, itself to be viewed as a system of 'codified ethics', should be supplemented by ethical responsibilities in cases of morality not or inadequately codified by law.¹⁶⁷ Although corporations' economic and legal responsibilities embody ethical norms about fairness and justice, ethical responsibilities go further. Carroll defines ethical responsibilities from a stakeholder perspective; they 'embody those standards, norms, or expectations that reflect a concern for what consumers, employees, shareholders, and the community regard as fair, just, or in keeping with the respect or protection of stakeholders' moral rights.'¹⁶⁸ Ethics precedes law and supplements law. Businesses may interpret and apply the legal system often without the need for ethical considerations. Arranging their tax affairs in order to achieve a tax-efficient treatment will often be morally acceptable. They enjoy a margin of appreciation with regard to tax planning. Therefore they may engage in tax planning except if the impact of their interpretation and use of the rules evidently violates public morality. The point is that legal rules are never exhaustive of morality. There always is a moral residue. Thus, a taxpayer's obliga-

165. R. Kane, *Through the Moral Maze: Searching for Absolute Values in a Pluralistic World* (New York: Paragon House Publishers, 1994), p. 101; T. Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979), pp. 87–88. Cf. Williamson 2017, p. 4: Americans see being a taxpayer as a role worthy of respect. They believe that to be a taxpayer is to be a contributing citizen 'the sort of person who has a right to respect from other citizens and to representation in government.'

166. Cf. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press [1961] Third Edition 2012), p. 180: deviations from moral standards 'meet with many different forms of hostile social reaction, ranging from relatively informal expressions of contempt to severance of social relations and ostracism.'

167. Carroll 1991, p. 41: 'Ethical responsibilities embrace those activities and practices that are expected or prohibited by societal members even though they are not codified into law.' In the same vein, A.B. Carroll, 'A Three-Dimensional Conceptual Model of Corporate Performance', *Academy of Management Review* 4 (1979) 4, p. 500.

168. Carroll 1991, p. 41.

tions to society are not exhausted by legal rules. This moral residue is of special importance to CSR firms since they voluntarily accept ethical obligations that entail going ‘beyond compliance’; these businesses go beyond what is required by the law.¹⁶⁹

It is often said that corporate taxpayers should pay their fair share. Indeed, they have to contribute their share in taxes. However, the ideal of a fair share is too vague, ambiguous and abstract to give clear guidance on the amount of (corporate) tax to be paid by multinational corporations.¹⁷⁰ Moreover, the ideal of a fair share supposes ideal citizens behaving in a morally perfect way. Should CSR companies indeed behave like ideal (corporate) citizens? Should they behave better than the average citizen—who also has a right to arrange his or her tax affairs in such a way as to achieve a favourable tax treatment within the limits set by law? Moreover, what kind of behaviour does this ideal entail? Ideals are the subject of much debate and the same goes for the means (strategy) to realize ideals: consensus is often hard to reach. Given the diverging opinions about what is morally acceptable behaviour, it is better to start with coming to terms with regard to behaviour that is morally irresponsible—behaviour that does not sufficiently take into account the interests of others—bringing (disproportionate) harm to them. In practice it is far easier to agree on evident instances of injustice than on what counts as justice.¹⁷¹

169. Carroll 1991. Voluntary compliance and voluntarily accept ethical obligations are all the more important because law enforcement and prosecution of big companies often is hardly successful—the KPMG case and its millions in fines being an outlier; B.L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Cambridge (Mass.) & London: The Belknap Press of Harvard University Press, 2014), p. 69.

170. See also C. Peters, *On the Legitimacy of International Tax Law* (Amsterdam: IBFD), pp. 297–304; De Wilde 2015, pp. 55, 313–314.

171. A.-G. Jallai & J.L.M. Gribnau, ‘Aggressive Tax Planning and Corporate Social Irresponsibility: Managerial Discretion in the Light of Corporate Governance’, *TLS Working Paper*, 2018b, <<http://ssrn.com/abstract=3119552>>, and A.-G. Jallai, *Good Tax Governance* (PhD-thesis, Tilburg University 2020, forthcoming).

6.3. Voluntary compliance beyond the letter of the law

Minimizing one's tax burden by exploiting the letter of the law resulting in not paying any (corporate) income tax at all is clearly morally irresponsible behaviour. Aggressive tax planning results in dodging one's (financial) obligations to society not taking into account the interests of others. For a CSR corporation, this evidently violates its voluntarily accepted ethical obligations that entail going beyond compliance with the law since it exploits the (letter of the) law. Given the right to structure one's affairs so as not to pay too much tax and a margin of appreciation with regard to the moral acceptability of tax planning a CSR corporation is not required to behave as an ideal member of society, but it should avoid this kind of irresponsible and profoundly unfair tax planning.¹⁷²

Unfortunately, there is no consistent empirical evidence on the relation between CSR and tax payments. An analysis of a sample of 408 publicly listed Australian corporations indicates that higher levels of CSR disclosure are associated with lower levels of tax aggressiveness.¹⁷³ However, there is also evidence that U.S. firms with strong CSR avoid more taxes, which suggests that CSR and taxes act as substitutes rather than complements.¹⁷⁴ This all the more reason to view the payment of taxes as an important socially responsible activity.¹⁷⁵

172. This does not only go for multinational corporations engaging in CSR. Also privately-held small and medium-sized businesses aiming for social sustainability, especially B Corporations (see <<https://bcorporation.net/>> and R. Honeyman, *The B Corp Handbook: How to Use Business as a Force for Good* (San Francisco: Berret-Koehler Publishers, 2014)), should include tax in order to create value for their stakeholders.

173. R. Lanis and G. Richardson, 'Corporate Social Responsibility and Tax Aggressiveness: An Empirical Analysis', *Journal of Accounting and Public Policy* 31 (2012) 1.

174. Davis, Guenther, Krull & Williams 2016, p. 29. One of the reasons may be that (p. 30), 'at least for U.S. public corporations, the payment of taxes is not viewed as an important socially responsible activity by an influential subset of firms' stakeholders.'

175. R.B. Whait, K.L. Christ, E. Ortas & R.L. Burrirt, 'What Do We Know about Tax Aggressiveness and Corporate Social Responsibility? An Integrative Review', *Journal of Cleaner Production* Vol. 204, 10 December 2018, review extant literature

Indeed, corporations should not go for a minimalistic interpretation of tax laws and treaties. Avoiding irresponsible tax governance, they should supplement the legal perspective with a moral perspective taking into account the interest of society. Tax laws and especially the international tax system inevitably leave room for interpretation and therefore for a minimalist and more liberal interpretations. Minimalist interpretations adversely affect society, distributive justice, social cohesion, public trust, democracy, political stability, and therefore it makes sense to think in terms of ‘the ethics of legal interpretation.’¹⁷⁶ Companies should abstain from morally irresponsible tax planning. Since managers can employ corporate aggressive tax planning to advance their own interests, corporate governance arrangements, such as tax risk management, may be used to limit managerial tax-minimizing behaviour.¹⁷⁷

Thus, substantive good tax governance requires corporations to avoid irresponsible tax planning. Going beyond compliance, however, should also be applied to corporations’ reporting practices. Corporations nowadays face many mandatory tax related disclosure obligations (section 3.3). There is evidence from both the US and the United Kingdom that increased regulation in terms of tax reporting can have a positive impact on company tax compliance.¹⁷⁸ These reporting obligations are mainly obligations to the state. Of course, shareholders also have a strong interest in corporate tax transparency.

with perspectives offered from different disciplines. They find four main themes in the body of academic literature, the nature and purpose of taxation, empirical research, normative views, and theoretical perspectives, and subsequently suggest directions for future research.

176. Hilling and Ostas 2017, pp. 83–89.

177. Garbarino 2011, pp. 299–302. See R. Russo, ‘Risk Management in Taxation’ in M. van Daelen & C. Van der Elst (eds), *Risk Management and Corporate Governance: Interconnections in Law, Accounting and Tax* (Cheltenham: Edward Elgar, 2010), and A. Bakker & S. Kloosterhof (eds), *Tax Risk Management* (Amsterdam: IBFD, 2010).

178. C. Lavermicocca & M. McKerchar, ‘Tax and Tax Compliance Behaviour: Findings from a Study of Large Australian Companies’ in D. Salter & L. Oats (eds), *Contemporary Issues in Tax Research* (Volume 2) (Birmingham: Fiscal Publications, 2016), p. 135.

If shareholders are to be effective monitors and controllers of firms' tax related decisions, Wahab & Holland argue, 'financial reporting and tax regulatory bodies should consider requiring increased tax related disclosures by firms.'¹⁷⁹ Other stakeholders and civil society at large also have an interest in corporations' tax related decisions. Corporations may voluntarily go beyond compliance with legal reporting obligations and report to other stakeholders.¹⁸⁰ Transparency is about making available relevant information to stakeholders with regard to matters that affect their interests. Greater corporate transparency may result in increased corporate accountability within society.¹⁸¹ In this way, tax transparency is primarily a duty to report to society.

One of the most significant procedural elements of CSR being reporting and openness,¹⁸² transparency is a key element of good (or sustainable) tax governance. Transparency and accountability are building blocks of the trustworthiness of an enterprise.¹⁸³ Of course, issuing glossy reports or green-washing—'self-promotion in the guise of transparency'—will not do.¹⁸⁴ Transparency demands that business

-
179. Wahab & Holland 2012, p. 122. They add that the lack of agreement on the boundary between 'legitimate' and 'illegitimate' tax planning may have a chilling effect on shareholders because 'demanding increased tax related disclosure managers are discouraged from pursuing 'legitimate' tax planning activities.' For a discussion whether a national or a universal benchmark can be used to assess the incompatibility of international tax planning strategies with CSR, see L. Cerioni, 'International Tax Planning and Corporate Social Responsibility (CSR): Crucial Issues and a Proposed "Assessment" in the European Union Context', *European Business Law Review* 25 (2014) 6.
180. D. Tapscott & D. Ticoll, *The Naked Corporation: How the Age of Transparency Will Revolutionize Business* (London: Penguin Canada, 2004), p. 22.
181. J. Moon and S. Vallentin, 'Tax Avoidance and Corporate Irresponsibility—CSR as Problem or Solution?', Chapter 2 in this volume; A. Crane, D. Matten & J. Moon, *Corporation and Citizenship* (Cambridge: Cambridge University Press, 2008), pp. 84–85.
182. McBarnet, 2007, pp. 32–37; T. Lambooy, *Corporate Social Responsibility* (Deventer Kluwer, 2010), pp. 32–34.
183. D. Doane, 'Good Intentions—Bad Outcomes: The Broken Promise of CSR Reporting' in J. Burchell (ed), *The Corporate Social Responsibility Reader* (London/New York: Routledge, 2008), p. 248.
184. Tapscott & Ticoll 2004, p. 40.

report meaningfully on the tax aspect of their business operations and strategy, ‘just as it demands that published claims about their corporate responsibility and sustainability should be verifiable.’¹⁸⁵ Tax transparency should include reporting on the management of tax risks.¹⁸⁶ Transparency should be active rather than forced,¹⁸⁷ since good tax governance is based on the intrinsic motivation to be transparent, which goes beyond a mere cost-benefit analysis and mere concern for reputation and market value.¹⁸⁸ Of course, we have to be ‘careful about seeing it as universally good’, as Freedman says. Increased transparency may become counterproductive for example producing a flood of unsorted information or even deliberate misinformation. Therefore, she argues that transparency ‘must be limited to what is practical and shown to be valuable.’¹⁸⁹

Transparency as part of good tax governance should of course be fleshed out in principles or standards for corporate reporting. VBDO provides an example of guiding principles:

1. define and communicate a clear strategy on tax governance;
2. align taxation with the business and tax is not to be regarded as a profit centre by itself;
3. respect the spirit of the law, i.e. tax compliant behavior is the norm;
4. have insight into the management of tax risks;
5. monitor and test tax controls; and
6. provide tax assurance.¹⁹⁰

185. B. Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, 2010), pp. 47–48.

186. See VBDO 2018; VBDO’s fourth good tax governance principle regards reporting on tax risks.

187. Tapscott & Ticoll 2004, p. 23: ‘Forced transparency happens when transparency is done to corporations by stakeholders or the media.’

188. Gribnau and Jallai 2018a, pp. 353–360.

189. Freedman 2018, p. 130.

190. VBDO 2018, pp. 50–51. See also Oxfam 2017, p. 39, PRI 2019 and GRI 2019.

6.4. Voluntary compliance in conformity with the rule of law

Taking into account ethical norms when interpreting tax laws and regulations is an entirely legal and legitimate affair. From a corporate law perspective, managers enjoy discretion with regard to decisions that should be in the long-term interest of the corporation. According to different corporate governance regimes acting in the best interests of the company should be distinguished from maximizing (short-term) shareholder value for example by way of aggressive tax planning. Anglo-American CEOs live in some kind of bubble in this respect. As Mayer argues: ‘UK and US CEOs are unusual in putting shareholders before stakeholders and dividends before employment.’ This is misconceived and damaging, he says, for shareholder value is an outcome, not an objective.¹⁹¹ Corporation’s management is thus under no legal obligation to engage in aggressive tax planning since corporate fiduciary duty does not require so.¹⁹²

Public criticism is levelled at corporations’ aggressive tax planning practices which use formalism and exploit the values of the rule of law. The public outcry regards minimalist compliance which may be legal, but not that ethical. This does not, however, imply that taxation is or should be based on social or (subjective) ethical norms in lieu of the rule of law.¹⁹³ On the contrary, for it is hard to see that

191. C. Mayer, *Firm Commitment: Why the Corporation is Failing Us and How to Restore Trust in It* (Oxford: Oxford University Press, 2014), p. 167. See also C. Hodges & R. Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Oxford/Portland: Hart Publishing, 2017), pp. 114–116. Cf. the Business Roundtable Statement 2019; the signatories commit to move away from shareholder primacy and to lead their companies for the benefit of all stakeholders

192. Jallai & Gribnau 2018b, and Jallai, Chapter 6 in this volume.

193. R.P. Österman, ‘Perspectives on Corporate Taxation from a Sustainable Business Perspective’ in S. Arvidsson (ed), *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (Lund: Palgrave Macmillan, 2018), p. 372, and A. Friese, S. Link & S. Mayer, ‘Taxation and Corporate Governance—The State of the Art’ in W. Schön (ed) 2008, p. 401. See Jallai 2020, section 3.2.3. Cf. M. Blackwell, ‘Conduct Unbefitting: Solicitors, the SRA and Tax Avoidance’, *British Tax Review* (2019) 1, p. 40 arguing that ‘advice on tax planning (aggressive

abiding with a professionally-honest construction of the law's spirit rather than just with the letter of the law may violate the rule of law.¹⁹⁴ Indeed, voluntarily going beyond minimalist compliance with the letter of the law evidently entails a sustainable choice to comply with the law. Avoiding irresponsible tax governance does not amount to paying tax beyond what the (spirit of the) law requires. Thus going beyond strict compliance with the tax law is a matter of exercising economic self-restraint with regard to legal obligations.¹⁹⁵ Of course, 'over-compliance' may be due to risk aversion, for example with regard to detection (audit) or reputational risks. However, over-compliance may also be due to a sense of duty.¹⁹⁶ Still, this over-compliance regards obligations that are interpreted and established in accordance with the rule of law. Hence, the law is the basis and point of departure of going beyond compliance in tax governance.

The same goes for transparency. There are many regulations mandatory disclosure obligations with regard to aggressive tax planning. However, corporations may voluntarily go beyond compliance with legal reporting obligations. Indeed, substantive and procedural rules should be changed, as stated for example in the 2013 OECD-report to the G20: 'Leaders, civil society and everyday taxpayers are renewing demands for greater transparency and [...] changes to the international tax rules to restore fairness and integrity of their tax systems and the global financial systems more generally. The message is clear: all taxpayers must pay their fair share'.¹⁹⁷ However, the demand to restore fairness and integrity also regards enterprises and cannot be reduced to strict rule following (applying black letter law). Good

or otherwise) can be regarded as part of the right to legal advice guaranteed by the rule of law.'

194. Cf. Carroll 1991, p. 45: 'Moral managers want to be profitable, but only within the confines of sound legal and ethical precepts, such as fairness, justice, and due process. Under this approach, the orientation is toward both the letter and the spirit of the law.'

195. For the need for economic self-restraint, see Hilling and Ostas 2017, pp. 90–107.

196. McCaffery 2014, p. 604.

197. Secretary-General OECD, *Report to the G20 Leaders Restoring Fairness to the Tax System* (Paris: OECD Publishing, 2013), p. 2.

tax governance entails voluntarily going beyond these mandatory substantive and procedural tax obligations. Again, transparency should be active. It should be an expression of an internal moral commitment, rather than a calculated response to external pressures.¹⁹⁸

Transparency and openness are important steps towards morally responsible tax planning practices. Voluntarily going beyond mandatory transparency obligations does not violate the rule of law if the privacy of third parties is sufficiently respected.¹⁹⁹ Moreover, transparency is a precondition for accountability and open debate, which also is crucial in creating a better tax compliance environment. A debate promotes a better understanding of factors business take into account in their tax decisions and the moral acceptability of tax planning practices. A fruitful debate is indispensable for developing standards of substantive good tax governance. Tax transparency is a necessary precondition for an informed public debate. In this way, voluntarily going beyond mandatory disclosure obligations may have an educative function. It may promote the general public's understanding of the dynamics of the international tax system and its participants, enhancing tax literacy. As Stevens notes, transparency 'will force all stakeholders in a tax system to answer difficult moral and justification questions about how that system works and the foundations on which it is based.'²⁰⁰ Of course, it will take time for businesses to

198. N. Gunningham, 'Corporate Environmental Responsibility: Law and the Limits of Voluntarism' in McBarnet, Voiculescu & Campbell (eds) 2007, p. 498.

199. Voluntary transparency vis-à-vis tax authorities (but not other stakeholders) is one of the hallmarks of cooperative compliance programmes. Cooperative compliance can be defined as the establishment of a trust-based cooperative relationship between taxpayers and the tax authorities on the basis of voluntary tax compliance leading to the payment of the right amount of tax at the right time. See for example E.A.M. Huiskers-Stoop & H. Gribnau, 'Co-operative Compliance and the Dutch Horizontal Monitoring Model', *JOTA* 2019 5:1, pp. 66–110, <<http://ssrn.com/abstract=3333347>>. There is a CSR element in participating in these kinds of compliance programmes. Such a trust-based relationship. Such a trust-based relationship may result in some participating corporations opting for voluntary compliance beyond the letter of the law.

200. S. Stevens, 'The Duty of Countries and Enterprises to Pay Their Fair Share', *Intertax* 42 (2014) 11, p. 708.

understand the dynamics and boundaries of transparency and to develop the competency and skill required to manage stakeholders' expectations and responses—in short to become literate about transparency.²⁰¹

7. Conclusion

Nowadays taxation is very much in the public eye: increasing media attention is given to tax-related scandals and an increasingly broad array of stakeholders expresses interest in the amount of tax corporations pay. Taxation has been increasingly politicized. Economic, societal and political developments since the 1970s in which taxation played a role show that there is pressing need for renewed reflection on the functions of taxation and the values involved. The chapter considered the research question: why and to what extent requires the foundational nature of taxes viewed in the light of recent economic, societal and political developments corporations to see paying a fair share of taxes as one of their main social responsibilities?

An analysis of the various functions of taxation showed the many ways in which taxation sustains society and (corporate) citizens: no liberty, solidarity or autonomy without taxation. Government provides a framework for the functioning of society and economy supported by taxes. The dynamics of corporate tax strategies appeared to be partly due to an outdated international tax system, while corporate remuneration policies incentivized tax engineering. Tax systems biased to the powerful and wealthy (corporate) citizens contributed to economic stagnation and increasing inequality of income and wealth. The resulting erosion of social cohesion, democratic legitimacy and public trust lead to social resentment and polarization. Taking political economy and political theory on board provides a more comprehensive understanding of the foundational nature of taxation and its meaning for a flourishing society and well-functioning market. Taxation is not just a budgetary matter or a cost item, that is, a technical, economic or legal phenomenon outside the moral domain. Its many aspects, economic, political, legal, social as

201. Tapscott & Ticoll 2004, pp. 40–41.

well as moral, and the deep values involved rather point at the need to employ a thick conception of tax. Taxation is a multifaceted institution that powers human society. Taxation reflects fundamental values that are a vital source in the organization of society, formation of institutions, changes in government and policies that govern people's lives. Therefore taxation being one of the causes of the current major societal and political problems should also be seen as part of their solution.

Legislators and other parties are indeed trying to reverse the international tax system and the way it is used for the better. Corporate taxpayers, however, also bear responsibility for the integrity of the tax system and have rethink the function and values of taxes. Corporations are members of society and have to do their part. They should not erode the tax system. Though paid to the state, taxes support society in many ways, whereby fundamental social and moral values are involved. Therefore paying taxes is a moral obligation to society, which implies the need for a moral interpretation of legal obligations. Taxpayers have the right to structure their affairs to achieve a favourable tax treatment within the limits set by law. However, this right or freedom entails moral responsibility. Therefore compliance with the law does not boil down to whatever has not been strictly prohibited is thereby allowed. Interpreting tax rules is a matter of exercising that responsibility. There is no strict separation between law (the legal obligation to pay tax) and morality.

CSR and taxes should not be seen as substitutes rather than complements. CSR corporations should abstain from minimalist, irresponsible tax behaviour since they voluntarily accept ethical obligations that entail going 'beyond compliance.' Going beyond what is required by the law regards substantive and procedural legal obligations. Tax transparency is a necessary precondition for an informed public debate. This kind of ethically driven over-compliance does not violate the rule of law.