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EPIEIKEIA OR "BETTER JUSTICE": FORMALISM IN TAX LAW REVISITED

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ABSTRACT

For Aristotle, "the essence what is equitable is that it is an amendment of the law, in those points where is fails through the generality of its language". The application of legal rules produces appropriate (just) results in the majority of cases, but not in all. When its application would lead to injustice, a legal rule can be defeated by equity.

The idea of *epieikeia* (equity) sheds light on the modern discussion about the nature of legal rules, the distinction between rules and principles, and mechanisms of adjudication.

This idea is also relevant in the tax law domain. In this area, the dominant theoretical position is legal formalism, with its focus on (strictly conceived) legal rules in legislation and in the application of the law. The Aristotelian reflection on *epieikeia* poses challenges to this traditional view: legal rules are deficient, and thus, as demonstrated, so is the formalistic approach to tax law. In particular, the equitable resolution of a tax dispute can be achieved through alternative dispute resolution methods: on the basis of a consensus between a taxpayer and a tax authority that is not strictly based on a legal rule.

KEYWORDS

Equity, justice, tax law, alternative dispute resolution, tax disputes

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INTRODUCTION

In the *Nicomachean Ethics*, Aristotle famously discussed equity (*epieikeia*), stating that "the essence what is equitable is that it is an amendment of the law, in those points where is fails through the generality of its language". Legal rules are formulated in general terms, and while their application render appropriate (just) results in the majority of cases, this is not true in all cases. Aristotle advocates departing from a legal rule when its application would lead to an undesirable (unfair) outcome.

As Shanske puts it, "Aristotle's account of equity has been received into the legal tradition many times and this reception is ongoing today"[1]. The purpose of this article is to show how the notion of *epieikeia* today invites us to revisit the traditional formalistic outlook on tax law and, in particular, supports the alternative (consensual) resolution of tax disputes.

The analysis unfolds as follows. I begin by outlining the idea of *epieikeia* as propounded by Aristotle. I then comment on the relationship between legality and equity and pinpoint three aspects of *epieikeia* that stand out from the perpective of legal philosophy. Finally, I show how equity considerations cast doubt on traditional formalistic viewpoint on tax law and speak for an alternative resolution of tax disputes.

For stylistic reasons, the term *epieikeia* is replaced below by its widely used equivalent: equity[2]. However, the reader is asked to understand the term in its Aristotelian sense, as explained in section 2: not to burden it with connotations alien to it.

The following analysis is theoretical and therefore, for the most part, abstract; the Polish law provisions are cited for illustrative purposes only.

1. ARISTOTELIAN *EPIEIKEIA*

Aristotle discusses *epieikeia* (equity) in *Nicomachean Ethics*[3] (Book V, Chapter 10) and *The Rhetoric* (Book One, Chapters 13 and 15)[4] [5].

[1] Darien Shanske, "Four Theses: Preliminary to an Appeal to Equity," *Stanford Law Review* 57 (2005): 2053.
[2] In the literature, however, it is argued that the general meaning of the term is "adequacy" or "appropriateness", i.e., the ability to do the right thing at the right time (Francesca Piazza, "Dire e Fare la cosa giusta. L'*epieikeia* in Aristotele": *passim*; in: Cristina Rossitto, ed., *Studies on Aristotle and the Aristotelian Tradition* (Lecce: Edizioni di Storia della Tradizione Aristotelica, 2011) or "fair-mindedness" (Lawrence B. Solum, "Equity and the Rule of Law," *Nomos* 36 (1994): 124).
[3] Aristotle, *Nicomachean Ethics*, translated by Frank Hesketh Peters (London: Dryden House, Trench, Trűbner § Co, Ltd, 1906).
[4] Aristotle, *The Rhetoric*, translated by Sir Richard Claverhouse Jebb (Cambridge: Cambridge University Press, 2014).
[5] The concept was not new in Greek law; for historical and linguistic connotations of the terms *epieikeia* and *epieikes* as "appropriate to circumstances", see Edward Harris, "How Strictly Did the Athenian

In *Nicomachean Ethics*, the gist of equity is encapsulated in the following passage:

> Every law is laid down in general terms, while there are matters about which it is impossible to speak correctly in general terms. (…) When, therefore, the law lays down a general rule, but a particular case occurs which is an exception to this rule, it is right, when the legislator fails and is in error though speaking without qualification, to make good this deficiency, just as the lawgiver himself would do if he were present, and as he would have provided in the law itself if the case had occurred to him (…). And the essence of what is equitable is that it is an amendment of the law, in those points where the law fails through the generality of its language.[6]

Aristotle then compares the special-case law, the "decree", to "the leaden rule employed in the Lesbian style of masonry", which "has not fixed shape but adapts itself to the outline of each stone, so is the decree adapted to the occasion"[7].

It is clear from this passage that law is "general"; in modern terms, we may say that it consists of legal rules: the concept of a rule implies the infinite number of applications to similar cases. However, the generality (universality) of law, understood as consisting of legal rules, occasionally renders inappropriate results, either because the results are unsatisfactory (they are "unjust") or because there is no result at all, as the particular case was unforeseen by the legislator and is not directly covered by the rule.

Aristotle does not blame the legislator for such "errors"; he ultimately attributes them to "the nature of the thing", for "the matter of practical affairs is of this kind from the start". This observation should be linked to his recognition that, in the practical sphere, "we must be content if we can attain to so much precision as the subject before us admits of (…)"[8] and that prudence (*phronesis*) "deals with ultimate [particular] facts which cannot be scientifically proved, but are perceived by sense"[9].

Aristotle explains the notion of equity further in Chapters 13 and 15 of *The Rhetoric*. In the first of these, against the background of a reflection on justice and the classification of various kinds of it, he observes that equity is "a kind of justice, but goes beyond the written law" and that "[t]his margin is left by legislators, sometimes voluntarily, sometimes involuntarily; involuntarily, when the point

Courts Apply the Law? The Role of Epieikeia," *Bulletin of the Institute of Classical Studies* 56 (2013); Francesca Piazza, *supra* note 2; Michael Pakaluk, "Epieikeia in Aristotle's Nicomachean Ethics," *Aevum Antiquum* 9 (2009)); for nineteen aspects of *epieikeia* (the concept of equity) classed under six categories see Darien Shanske, *supra* note 1, 2068–2078.

[6] Aristotle, *supra* note 3, V.10.1137b4-6.
[7] *Ibid*., V.10.1137b7.
[8] *Ibid*., I.3.1095a1.
[9] *Ibid*., VI.8.1142a9.

escapes their notice; voluntarily, when they are unable to frame a definition, and it is necessary to lay down an absolute rule, but not really possible to lay down more than a general rule (…) for life would be too short for a person who tried to enumerate the cases"[10]. According to Aristotle, where "it is impossible to be definite, yet necessary to legislate, one must speak generally (…)"[11].

Citing examples from what we now call criminal law, Aristotle postulates that equity serves to "excuse human failings"[12], i.e., he sees it as an instrument of leniency. Interestingly, he believes that equity invites us "to desire an appeal to arbitration rather than to a law-court, - for the arbitrator looks to equity, the jury-man to justice"[13].

These passages can be interpreted as providing either a narrower notion of equity (linked only to cases where written law is too rigid and uncompromising and therefore has to be discarded to achieve "better justice") or as an example of the practical operation of equity.

In Chapter 15, Aristotle looks at equity precisely from the perspective of rhetoric ("accusation or defense"), observing that "[i]f the written law is adverse to the case, we must rely on the universal law, and on the principles or higher equity or justice"[14] – and insists that the judge decide the case not "simply" following "the letter of the written law" but taking into account "equity and the universal law" that are – as opposed to written laws – eternal and immutable[15]". Here Aristotle allows for the possibility that the written law is unjust because its wording does not correspond to its true purpose or is ambiguous.

The recurring theme of these passages from *Nicomachean Ethics* and *The Rhetoric* is that equity is a correction device to written laws where they fail (in the interpreter's opinion) to render just results because of their universality (generality).

2. LEGALITY AND EQUITY

Aristotle appreciates positive (written, statutory) law. He considers it desirable that there be rule of laws, not of men[16], as Vega argues, the Stagirite puts forward "the

[10] Aristotle, *supra* note 4, I.13.1374a13-14.
[11] *Ibid.*
[12] *Ibid.*, I.13.1374b17.
[13] *Ibid.*, I.13.1374b18-19.
[14] *Ibid.*, I.15.1375b3-4.
[15] *Ibid.*, I.15.1375b6.
[16] Aristotle, *supra* note 3, V.6.1134a5.

postulate of law as a system of general, positive rules conceived as the essential instruments for the public organization of the polis"[17].

In *Politics*, Aristotle claims, in Scalia's words, that "personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement"[18]. Aristotle therefore advocates the rule of law.

In *The Rhetoric*, Aristotle comments on the division of work between the legislator and the decision-maker in the adjudication process (the judge). "[I]t is most desirable that well-drawn laws should, as far as possible, define everything themselves, leaving as few points as possible to the discretion of the judges"[19]. Yet "the decision of the lawgiver concerns no special case, but is prospective and general"[20]. Finally, he attributes to the legislator the task of providing written laws (legal rules) and leaves to judges the task of ascertaining facts of the case and applying legal rules to the facts[21]. Legal rules are not self-executing; the judge (the decision-maker) executes them, giving "flesh" to the letter of the law; occasionally, it will only be for him to qualify or restrict their application.

There is a duality in Aristotle's appraisal of legal rules: he sees both their strength and their weakness, so he does not admit any hegemonic position to them[22].

Equity does not constitute a normative system alternative to legal rules. "Aristotle does not introduce the unwritten laws, divine law, or the concept of natural law (…)"[23], since "epieikeia is not an appeal to extra-legal factors or to a higher standard of justice that transcends the written law"[24]. Equity is not opposed to legality (to the observance of written "laws"). It is the value of wise interpretation and application of written legal rules. Equity does not form a separate system of substantive rules: it is rather a way of thinking and acting in the role of the decision-maker (the judge). Equity is therefore internal to law[25].

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[17] Jesus Vega, "Legal Rules and Epieikeia in Aristotle: Post-positivism Rediscovered": 173; in: Liesbeth Huppes-Cluysenaer and Nuno M.M.S. Coelho, eds., *Aristotle and the Philosophy of Law: Theory, Practice and Justice* (Dordrecht: Springer, 2013).
[18] Antonin Scalia, "The Rule of Law and a Law of Rules," *The University of Chicago Law Review* Vol. 56, No. 4 (1989): 1176.
[19] Aristotle, *supra* note 4, I.1.1354a7.
[20] *Ibid*., I.1.1354b7.
[21] Similarly, Samuel Hurri, "Justice Kata Nomos and Justice as Epieikeia (Legality and Equity)": 152; in: Liesbeth Huppes-Cluysenaer and Nuno M.M.S. Coelho, eds. *Aristotle and the Philosophy of Law: Theory, Practice and Justice* (Dordrecht: Springer 2013).
[22] An interesting context is provided in Book 3 of the Aristotle's *Politics*: in the discussion on whether "best man" or law should rule; Aristotle, *Politics*, trans. Benjamin Jowett (Kitchener, Ontario: Batoche Books, 1999), 51–80.
[23] Edward Harris, *supra* note 5: 29.
[24] *Ibid*.: 33.
[25] "When a litigant used an argument based on *epieikeia*, he was not asking the court to reject the written law but to demonstrate that his case was an exception to the general rule, one in which other legal considerations should take precedence. An argument from *epieikeia* was not an appeal to extra-

Equity is "doing justice in particular cases under appropriate circumstances"[26] or "the practice of doing particularized justice, when the just result is not required by, or is contrary to, the result required by the set of applicable legal rules"[27]. For Aristotle, "the defect lies not in the law, nor in the lawgiver", but "in the nature of the subject-matter"[28], and it is fair to say, in its application; "[t]he law is none the less correctly laid down"[29]. Therefore, if there can be a tension between legality and equity, there is definitely no *hiatus* between them. Equity leads to the best version of legality.

Such an interplay between equity and legality assists the reader in understanding Aristotle's remarks on the relationship between equity and justice. He comments that the two "do not seem to be absolutely identical, not yet generically different"; that equity is "a sort of justice", "it is better than one kind of justice"; "[w]hat is just (…) and what is equitable are generically the same, and both are good, though what is equitable is better"; finally, that "though what is equitable is just, it is not identical with, but a correction of, that which is just according to law"[30]. In this context, "justice" in the strict (or narrower) sense means "legality" under written legal rules, whereas "justice" in the broader sense also includes equity, as (one could venture to say) legality *par excellence*.

There are three aspects of Aristotelian equity illuminating the process of interpretation and application of legal rules, and speaking to the modern-day discussion of the nature of law.

3. LIGHTS AND SHADOWS OF LEGAL RULES

The very concept of a rule (be it legal or other-than-legal) implies a repetitive, potentially infinite number of applications to similar cases, individuated on the basis of the features on which a given rule is predicated. Legal rules apply to a category of cases; it is about universals and not particulars. As put by L. Wittgenstein: "The use of the word 'rule' and the use of the word 'same' are interwoven. (…)"[31].

The generality of legal rules should not be arbitrary: rules should be based on properties of a situation determined on the basis of justification. Again, according to

legal considerations but to a general principle of justice implicit in the written laws" (Edward Harris, *supra* note 5: 35). For Vega "epieikeia is not about a sort of absolute external correction of the law, as traditionally understood by the natural law theories. It remains instead internal to the law, as an institutional principle that governs its development – even a universal principle, as Aristotle suggests in the Rhetoric" (Jesus Vega, *supra* note 17: 197).

[26] Lawrence B. Solum, *supra* note 2: 120.

[27] *Ibid*.: 123.

[28] Aristotle, *supra* note 3, V.10.1137b4.

[29] *Ibid.*

[30] *Ibid*., V.10.1137b2-3.

[31] Ludwig Wittgenstein, *Philosophical investigations*, trans. Elizabeth Anscombe (Oxford: Blackwell, 1998), § 225.

Wittgenstein, it is not the linguistic formulation of a rule but the recurrent and consistent practice of its application that determines the criteria (corresponding with the properties on which a legal rule is predicated).

Legal rules are formulated in general terms, and it is where their strength and weakness lie. To use the phrase of Frederic Schauer (the author of a book providing an apology for rules), rules are "entrenched generalizations"[32]. Every legal rule has (or should have) a rationale ("the evil sought to be eradicated or the goal sought to be served"[33]), and yet when it is applied, it is usually applied "as is", without the decision-maker analysing the rationale. In all standard situations, the decision-maker does not analyse the case in light of the rationale of a legal rule being considered, but through features of the situation, deciding whether they correspond with a hypothesis of a legal rule. Shiner calls this feature "the opacity of rules to their justification"[34].

Legal rules are useful in regulating social relations precisely because they can be applied in such a way – this makes them practicable and just (in the sense of formal justice, i.e., formal equality: rules are applied indiscriminately to a category of objects and subjects). At the same time, such application may prove deficient. There will be situations where their application, although justified by the adequacy between their hypothesis and features of the situation, proves to be contrary to the rationale of a legal rule, underlying its adoption, or otherwise inappropriate (unjust).

Aristotle stresses the inevitability of cases of inadequate application of legal rules, regardless of how intensive legislator's efforts will be. A good legal rule produces good (justified, fair) results in the majority of cases, but not in all. Aristotle postulates departure from a legal rule in exceptional circumstances "just as the lawgiver himself would do if he were present, and as he would have provided in the law itself if the case had occurred to him". Such a departure can take place in two possible ways: either by acting in the silence of a rule (*praeter legem*) or by acting in defeat of the legal rule (non-application of a legal rule *sensu stricto*; *contra legem*).

In other words, legal rules are defeasible, which means that in exceptional circumstances, they should not be applied and are not applied, however, without losing general validity. "Rules have exceptions incapable of exhaustive statement (…). A rule that ends with the word 'unless…' is still a rule"[35]. It is not wise to strive

[32] Frederic Schauer, *Playing by the rules. A philosophical examination of rule-based decision-making in law and in life* (New York: Oxford University Press, 1991), *passim*.
[33] *Ibid.*, 26.
[34] Roger A. Shiner, "Aristotle's theory of equity," *Loyola of Los Angeles Law Review* 27(4) (1994): 1246.
[35] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press,1961), 136. On defeasibility of rules see Bartosz Brożek, *Defeasibility of Legal Reasoning* (Kraków: Zakamycze, 2004).

to put endless qualifications in the formulation of rules. It is better to allow for the possibility that in certain circumstances (specific and yet unspecified in advance, i.e., upon the enaction of a rule, not expressed in the rule formulation) a legal rule will not be applied although the conditions for its application are fulfilled – in light of the wording of the legal text.

4. DISTINCTION BETWEEN RULES AND PRINCIPLES

Equity can be related to the modern distinction between legal rules and legal principles. The founding father and leading figure in the conceptual invention of "legal principle" is Ronald Dworkin[36]; the idea has been further developed (with modifications) by, among others, Robert Alexy, Aleksander Peczenik and Hans Gribnau.

As opposed to a legal rule, a legal principle (i) does not have a binary characteristic: it is not that it is either satisfied or not satisfied – it can be satisfied to a degree; (ii) it is of variable significance (in Dworkin's account, legal principles have "the dimension of weight or importance"). For each legal principle, there is a corresponding value, and it is the role of a legal principle to uphold and promote the its realisation, to the maximum extent given all circumstances of the case. There can be conflicts between legal principles potentially applicable in a given case; in the event of such conflicts, legal principles should be "balanced" so that each of them is satisfied to the maximum extent justified by the circumstances.

In the present context, it is important to note that legal principles are invoked to justify the non-application of legal rules in particular circumstances; they are therefore a defeasibility instrument. A legal principle is a legal norm that intervenes where a legal rule (or the collection of legal rules) by itself is deficient: it either does not produce a certain result (e.g., where there is a gap in the law or where two legal rules conflict) or produces a result that is unsatisfactory[37].

Equity and legal principles share the following common characteristics:

(i) the role of the "correction devise" – equity/legal principles remedy the dissatisfactory operation of legal rules by preventing the application of a legal rule where it would lead to injustice;

(ii) moral dimension – the dissatisfaction with the standard operation of legal rules as applied to a particular case has a moral aspect – such application is perceived as unjust; a legal principle is an abstraction and rationalisation of a

[36] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).
[37] Consider the original example of R. Dworkin: the verdict in the Rigs v Palmer case where the "automatic" application of a legal rule would be blatantly unjust.

sentiment of moral aversion, then (secondarily) elevated to the rank of a legal norm;

(iii) particularity of application – it is the application to a particular set of circumstances that calls for the intervention of equity/legal principle; equity considerations and legal principles defeat the application of a legal rule in the given case without nullifying the validity of such rule;

(iv) *a posteriori* origin – equity considerations/legal principles are forged in the context of the given case (*ad casum*) and conceptualised (theoreticised) *ex post*[38];

(v) controversial status within the realm of law – it is disputable whether they belong to the realm of law or not (the answer depends on the determination of the boundaries of law)[39].

Because of this shared profile, legal principles can be regarded as a modern incarnation and theoretical elaboration of the Aristotelian equity.

5. ADJUDICATION

The notion of equity sheds light also on adjudication. As Shiner puts it, "Aristotelian claim that attention to the particular case is the essence of adjudication"[40]. According to Harris, "in both discussions [i.e., in *Nicomachean Ethics* and *The Rhetoric*], Aristotle locates the need for *epieikeia* in the same place, the area where the general rule contained in a written law must be applied to a particular case"[41].

Particularism is the characteristic of equity[42]. Adjudication is the process of deciding specific cases; it is the exercise in the concrete and not (or not only) in the abstract. In this process, the application of a legal rule is appraised *ad casum* in a given case and against its specific circumstances. "Equity is the Aristotelian virtue that represents the exercise of making such tailormade, particularized judgments"[43].

A large part of the process of adjudication consists of establishing the facts of the case and finding the "fit" between the facts thus established and legal rules. As the passage from *The Rhetoric* quoted above shows, Aristotle recognises the task of

[38] I posit here that legal principles are derived from particular cases and are only "discovered" in this way, to be then referred to and projected onto other cases. Admittedly, this is not so for Ronald Dworkin; his judge Hercules is more of a theoretician than *ad casum* adjudicator. "Dworkinian "equity" is not focused on the unique facts of the particular case"; Hercules need not be sensitive to facts of particular cases (…)" (Lawrence B. Solum, *supra* note 2: 128).
[39] Consider the polemic between Dworkin and H.L.A. Hart over the status of legal principles; the hesitative position as to their legal or extra-legal status is so tellingly expressed in the words of Aristotle cited above (for discussion Jesus Vega, *supra* note 17: *passim*).
[40] Roger A. Shiner, *supra* note 34: 1259.
[41] Edward Harris, *supra* note 5: 31.
[42] Lawrence B. Solum, *supra* note 2: 124.
[43] Roger A. Shiner, *supra* note 34: 1252.

the judge in that vein. The movement of thought between facts and law in order to find the proper "fit" between them and be able to justify the decision is at the heart of the adjudication process. This process does not lend itself to any automatisation; it is the faculty of judgment, which consists in referring of what-is-particular to what-is-general ("bonding")[44]. The ability to deliver good (just) verdicts is a skill one acquires over time, a competence built up incrementally through legal training and practice, and an aspect of practical wisdom. "Practical wisdom consists generally in judging correctly about the particular case when, because of the "matter" of practical judgment, there are no absolutely universal truths to determine judgment as to what shall be done. Equity consists also in correct judgment about a particular case in the face of an absence of universal truth"[45]. Solum calls this necessary set of character traits "judicial wisdom" – "the particular adjudicatory form of the intellectual virtue of *phronesis*, or practical wisdom", "practical wisdom relevant to judging" – and states that "an excellent judge can discern those situations in which a departure from the letter of the law is consistent with its spirit and hence with the rule of law"[46]. Judicial virtues, indispensable in and for equitable adjudication, are acquired by habit.

In Aristotle's metaphor of the "leaden rule" of Lesbian constructors, we can see how a just verdict is delivered only if it is appropriate to the adjudicated case and "gives justice" to it. "Mechanical jurisprudence", consisting in the algorithmic application of legal rules, should never happen as it would be unjust. Moreover, the purely logical operation of subsuming facts to legal rules does not exhaust the process of adjudication.

The "human factor" is inseparable from the process of adjudication and is ineliminable from it. The role of a decision-maker (a judge) is crucial, as it is he/she who applies the "leaden rule"' and delivers a verdict. Legal rules are not self-executing, not only in the trivial sense (the necessity of a law-applying agent to apply the law), but also because they have to be applied wisely, i.e., in particular, not applied where it would lead to injustice. The parties to the dispute also have a role to play, as they can put forward arguments concerning how legal rules are measured against the facts of the case and what is "equitable" in the case at hand.

[44] I allude to Kant, for whom law and medicine where disciplines in which the better our "power of judgment", the more competent we are – and "(…) the power of judgment is the faculty of subsuming under rules, i.e., of determining whether something stands under a given rule (*casus datae legis*) or not" (Immanuel Kant, *Critique of pure reason*, trans. by Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1998), A 133/B 172); importantly, for "a physician, a judge or a statesman" the power of judgment is "sharpened" in "adequate training" provided "through examples and actual business" (*ibid.*, A 134/B 173). Interestingly, in his discussion of *epieikeia*, Solum also uses the comparison between a judge and a doctor (Lawrence B. Solum, *supra* note 2: 134; without reference to I. Kant).

[45] Roger A. Shiner, *supra* note 34: 1258.

[46] Lawrence B. Solum, *supra* note 2: 120–121.

Characteristically, in *The Rhetoric* equity is described in the context of a trial, with a party forwarding various arguments based on equity.

Let us now look at the traditional viewpoint on tax law and see how it can be tested against equity considerations.

6. FORMALISM IN TAX LAW

In the traditional view, tax law is a domain of strict observance of legal rules. According to the universally accepted maxim, there is no taxation without a statute (*nullum tributum sine lege*). There has to be statutory basis for tax to be imposed since tax imposition is reserved to the Parliament (as expressed in the *dictum* "no taxation without representation" originating from the *Magna Carta*).

Formalism in tax law identifies the rule of law with the rule of legal rules, derived directly from legal provisions included in a statute. According to the principle of statutory regulation of taxation (the so-called "principle of statutory exclusivity" or "the legality principle in tax matters"), which is enshrined in Articles 217 and 84 of the Polish Constitution, tax obligation is fully determined in and by a tax statute (as regards its object, subject, tax base and tax rate, and tax exemptions), i.e., by legal rules provided for in the statute.

As is commonly believed, this principle demands that drafting of tax rules be specific (so that legal rules determinative of taxation are clear, unequivocal, and not giving space for discretion of decision-makers) and their interpretation be narrow (strict or literal). According to the position of the so-called tax exceptionalism in tax law, these requirements are held to a higher standard than in law in general.

It is the position of legal formalism; one could say it is "rule-centered" or "rule-oriented". Formalism in the tax law enactment and interpretation is, or has been, a canonical position of scholarship and courts in many jurisdictions, such as Australia, Belgium, Brazil, Canada, Croatia, Finland, Germany, India, Ireland, Italy, Poland, Portugal, Serbia, South Korea, UK and US[47]. The observance of the rule of law tends to be identified with formalism.

7. THE CHALLENGE OF EQUITY

The recognition of the value of equity poses a challenge to this traditional outlook on tax law.

[47] Based on the respective country reports in: Michael Lang, *et al*., eds., *GAARs – A Key Element of Tax Systems in the Post-BEPS World* (IBFD: Amsterdam, 2016). See also Robert van Brederode and Richard Krever, eds., *Legal Interpretation of Tax Law* (Amsterdam: Kluwer, 2014).

7.1. LIMITED TRUST IN LEGAL RULES (THEIR WRITTEN FORMULATION)

Formalism is "rule-oriented", whereas equity considerations show intrinsic limitations of legal rules. Legal rules are Janus-faced, i.e., they carry with them the potential for injustice. Tax exceptionalism does not guarantee that this domain is an exception to what Aristotle observed, and that it can escape the "fate" of formalism. Conversely, the weakness of legal rules cannot be overcome because it lies in their very structure, i.e., in that they are general.

The deficiency of tax law provisions is often attributed to the incompetence of empirical legislators. This view is simplified. The legislator (imperfections and acts of incompetence notwithstanding) cannot be held entirely accountable for what is an inevitable "part and parcel" of written law. Postulates that legal rules are better drafted are to no avail; there will always be cases where their application produces injustice through overinclusiveness or underinclusiveness (as in Schauer's words). "More of the same", i.e., the enactment of more legal rules to compensate for deficiency of those already in force, is not a perfect solution. With new legal rules complexity ensues, without the corresponding benefit of the collection of legal rules being proof to injustice which their administration can engender[48].

Legal rules are not sufficient to ensure just outcomes in tax cases. Typically, equity is allowed in adjudication in tax matters under the name of legal principles. As posited above, legal principles are generalisations (elaborations) of the sentiment of dissatisfaction when confronted with the automatic application of legal rules – secondarily theoreticised into norms. Such is, for example, the origin of the principle of proportionality or the principle that no one should benefit from illegal act committed.

Legal principles – viewed as legal norms – are constructed as universalizable, i.e., as legal norms. In MacCormick's words, "[e]quity cannot be understood […] as something particular by contrast to the universality of justice"[49]. As observed by A. Scalia, "the establishment of broadly applicable general principles is an essential component of the judicial process"[50]. When equity is conceptualised in legal principles, it gains universalisability; it is because fairness requires that decisions, along with their justification, be universalisable (i.e., guarantee similar application of legal norms to similar cases)[51].

[48] "The more general the rule, the greater is the tendency to error. But, on the other hand, the more guarded, qualified, and restricted the rule, the greater its complexity and the difficulties of its application" (Roscoe Pound, "Decadence of Equity," *Columbia Law Review* Vol. 5, No. 1 (1905): 21).
[49] Jesus Vega, *supra* note 17: 199.
[50] Antonin Scalia, *supra* note 18: 1185.
[51] Consider the precepts of inner morality of law in L. Fuller – generality of legal rules (norms) among them.

As a result, legal principles, known from justifications of decisions of tax authorities and verdicts of tax courts, are tantamount to equity "fossilised" , i.e., systematised into legal norms. The universality of legal principles does not entail that they can be applied algorithmically or mechanically; the living source of them is equity, as a sense of "proper judgment" entertained in individual cases.

In "hard cases", it is common in contemporary legal discourse (both theoretical and practical, including the case-law of the Court of Justice of the European Union) to speak about balancing legal principles. Yet the act of balancing is not performed with any exactitude; no sensible calculus for such balancing can be invented[52]. The balancing act means no more than discussing which principle should prevail and why it should prevail.

The metaphor of balancing values on scales can be misleading if we imagine an electronic scale instead of a traditional one (ordinary balance beam scales, as in the image of Temida)[53]. There is no metric of "balancing legal principles", and in fact none is needed. We have to side with Peczenik, who claims: "I do not believe that even the best philosophical minds ever can succeed in creating a calculus which precisely determines the content of weighing"[54].

7.2. OPEN AND RICH TOOLBOX OF LEGAL INTERPRETATION

We should invest hope for justice not in legal rules themselves (their formulation in statutes), but in what we do with legal rules, i.e., how we "play by" and "play with" them. Equity analysis is consequential for legal interpretation (interpretation of tax law provisions), both for its methodology and for its position within the process of adjudication.

Reflection on equity inspires open, holistic or creative methodological approach to the interpretation of legal text. As Aristotle himself puts it, when a legal rule is defective we should act as "the lawgiver himself would do if he were present". We are therefore invited, in the name of equity, to correct the law, or rather, to correct the outcome of the linguistic reading of a legal rule contained in

[52] Alexy's Weight Formula was an attempt at inventing such calculus; however, it was demonstrated by Brożek that this attempt failed (Bartosz Brożek, "The Weight Formula and Argumentation": 319-332; in: Georg Pavlakos, ed., *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007)).

[53] Sylwia Wojtczak, *The Metaphorical Engine of Legal Reasoning and Legal Interpretation* (Warsaw: Beck, 2017), 61-62: "Originally, the metaphor (...) JUDGING [L] IS WEIGHING/BALANCING" referred to weighing in hands or weighing by ordinary beam scales, which served at the source domain in the metaphorical process. It is worth noticing that weighing in hands or weighing by a beam scale is a method of comparison which in fact does not assume or demand aby abstract cardinal unit of measurement. It is the technological change that exerted pressure in the source domain that brought into the target domain the idea of exact measurement by more complicated instruments with precise division indicators, gauges, etc.".

[54] Aleksander Peczenik, *On Law and Reason* (Berlin-Heidelberg: Springer, 2009), 80.

the text of a statute. It is a conventional matter if we call such corrective input of a decision-maker legal interpretation or creation of the law ("interstitial" legislation).

In this passage from Aristotle, the figure of the legislator is invoked – not empirical legislator but rather rational legislator. The linguistic reading of the legal text is the starting point for interpretation, but it should not be its "last word". The text of a statute should be examined from various points of view. As postulated by Aristotle, for equity, we should "consider the legislator and his meaning, rather than the law and its letter; the moral purpose rather than the action; the whole, rather than the part (…)"[55]. It is the "spirit" and not the "letter" of law that should be followed; a legal rule should be viewed from multiple angles and in multiple contexts to expose its "real" sense.

The ultimate goal of legal interpretation should be to "make the most" of legal rules: to realise their potential for delivering just outcomes. The resulting law should be "the best possible" given constraints, and while the wording of the legal text is among such constraints, it is not absolute as a limiting factor. When we claim that a legal rule can be defeated, it means that its formulation (wording) can be ignored, if ignoring it is justified.

Equity in tax law should not be contrasted with legality – "equity, by making explicit a qualification intender or understood, but not expressed, in the formulation of a general rule of law, rather than abolishing confirms this rule"[56]. "The technical and the discretionary" elements of justice are combined[57] with the ultimate goal to find the best possible solution to the case at hand.

Finally, the position of legal interpretation is not dominant in the adjudication process. In the application of legal rules, the focus should not be exclusively on legal interpretation ("the glass bead game" of arguments concerning the normative content of a legal rule) as adjudication is much more than that. In this process, pertinent facts are ascertained, the "fit" between them and legal rules is established, and the outcome is appraised in terms of values (represented in the legal discourse by legal principles). It is not adequate to this practice to describe all or majority of the process under the label "legal interpretation" or to see legal interpretation as the only possible source of controversy.

[55] Aristotle, *supra* note 4, I.13.1374b17-18.
[56] Wolfgang von Leyden, "Aristotle and the Concept of Law," *Philosophy* 42, No. 159 (1967): 8.
[57] Roscoe Pound, *supra* note 48L 20.

7.3. ANATOMY OF (TAX) JUSTICE

Justice is not (or not necessarily is) secured by formalism. Justice is multifaceted as value[58]. In the tax law context, the following aspects of justice are typically distinguished:

(i) justice as legality (it is just that legal rules are observed);

(ii) justice as formal equality (it is just that like cases are treated alike);

(iii) justice as substantive equality (distributive justice; it is just that everyone is taxed according to the distributive principle, where the popular competing principles are: the ability-to-pay principle and the benefit principle).

Admittedly, formalism in tax law, though focused on legal rules, is not indifferent to justice. The first two aspects, manifestations or dimensions of justice (i.e., justice as legality and justice as formal equality) are prominent in the traditional view on tax law. The focus on legal rules promotes the realisation of these two types of justice. If legality is identified with the observance of legal rules (as it is in the formalistic approach to tax law; it is the Aristotelian justice in the strict sense), it immediately follows that legal formalism favours the value of it. Also, the application of legal rules leads to the same (equal) treatment of subjects within the scope of a legal rule (i.e., who are situated in the same/similar position); therefore, it promotes justice as formal equality. Distributive justice is to be secured through the proper structure of legal rules as adopted by the legislator, so that their application renders outcomes in accordance with the accepted formula of distributive justice.

There is a tension between the first two senses of justice and equity[59]. They are not, however, in irreconcilable conflict. Justice-as-legality and justice-as-formal-equality are undeniably valuable, but at the same time barren (as purely formal). They cannot serve as a yardstick for evaluating the substantive outcome of the application of legal rules. Rather, it is the distributive justice that determines whether such an outcome is just.

Yet the substantive formulas of distributive justice (the benefit principle and the ability-to-pay principle) are in conflict. What is more, references to the ability-to-pay principle in the law-making disguise a lack of consensus on how to measure this ability (in particular, how to measure it independently of tax and of income as a legal construct, i.e., by reference to so-called pre-tax income). As a result, it is

[58] See excellent analysis in: Chaim Perelman, *O sprawiedliwości*, trans. Wiera Bieńkowska (Warsaw: Państwowe Wydawnictwo Naukowe, 1959).

[59] See Lawrence B. Solum, *supra* note 2: *passim*, on the tension between the rule of law and equity – the reconciliation is through judicial virtues; John Tasioulas, "The Paradox of Equity," *The Cambridge Law Journal* Vol. 55, No. 3 (1996): 461. One way to deal with the tension would be to treat equity as "asymmetrical", i.e. operating only to the benefit a taxpayer (mitigation and not aggravation). I do not favour such asymmetrical approach.

difficult to state what the demands of justice are in practice, and how they translate into legal rules or into the evaluation of the outcome of the application of legal rules.

Equity is not another aspect of substantive justice; it does not deliver yet another formula for substantive justice to compete with the respective principles of ability-to-pay and benefit. Nonetheless, equity can intervene to enrich the concept of tax justice and its realisation in two ways.

First, in accordance with preceding remarks, equity can inform and enrich the understanding of justice-as-legality. We should allow that legality entails observing legal rules, but read not in their literal meaning and not as "entrenched", but as defeasible (in particular, defeasible under legal principles). The concept of legality is broader than formalistic; it is about *ius*, and not *lex*.

Second, equity invites a decision-maker to look for a solution without relying strictly on any specific formula of substantive justice. This theme is echoed by Chaim Perelman in his eloquent praise of equity. Because *summum ius, summa iniuria*, "whoever loves justice, cannot be satisfied with the strict and blind application of rules stemming from its normative system: he remembers about the arbitrary foundation of his system, which is not, and cannot be, perfect" [60]. As a result, "[p]eople always resort to equity when concurrent application of more than one formula of concrete justice or application of the same formula leads to antinomies, making it impossible to respect the requirements of formal justice. In such cases they make use of equity as the support of justice"[61]. Perelman's point is that every specific formula of justice (distributive justice) is deficient for two reasons. In practice, there will be circumstances in which it will render unjust outcomes. Moreover, there will be competing formulas of substantive justice clashing in real-life cases.

Therefore, considerations of equity help to come to terms with the fact that no formula of substantive justice, including the ability-to-pay principle, is all-encompassing and absolute. Equity does not promote any specific formula of justice, but rather a way of thinking, concretely rather than abstractly, and in reflection on what the desirable outcome of a particular case should be. The concept of equity thus helps to come to terms with the inevitable: that there is no perfect formula of substantive justice; that the ability-to-pay formula, commonly invoked in tax law, is also imperfect. Consequently, equity pleads for non-absolutist and particularised appraisal of the demands of justice.

[60] Chaim Perelman, *supra* note 58, 109 (own translation from Polish).
[61] *Ibid*., 70 (own translation from Polish).

7.4. FOCUS ON ADJUDICATION

The formalistic position with regard to tax law unduly downplays the role of adjudication. The focus on legal rules read in the abstract – and therefore on law-making and not on law-application – largely ignores the dimension of "law in action".

The drama of law application takes place against the particular set of facts of a given case and between people: the decision-maker (the tax authority or the judge) and the party to the tax proceedings (the taxpayer as party to the tax proceedings or the claimant before the tax court). Law is effectively "made" (constructed) in adjudication.

Efforts to eradicate "human factor" from adjudication are pointless or even counterproductive: they allegedly serve the interest of impartiality and fairness, but in fact only disguise the play of arguments and interests, which can backfire and lead to arbitrariness.

Adjudication in tax cases should not be seen as an algorithmic process of applying legal rules to established facts of the case. The process of adjudication can rather be compared to the preparation of a dish from the "melting pot" of various factual and legal elements as its ingredients. The practical wisdom of the decision maker is expressed in his/her act of forging (constructing or "cooking") the outcome of the case out of the ingredients, i.e., the combination of these elements. The methodology of the process is only secondarily presented in the justification of a tax decision or verdict in an orderly, rationalised manner.

The outcome of the case reached "in the context of discovery (heuresis)" is rationalised "in the context of justification", and, to an extent, the process of adjudication can be formalised in this context. Such formalisation, however, inevitably leaves much behind or aside. Importantly, "[t]he lack of a precise account of the mechanism for practical wisdom does not entail that equitable decisions cannot be justified on the basis of public reason"[62]. The fact that we ultimately do not know how the decision-maker (a tax official or a tax judge) decides in the case, i.e., that we do not have insight into his/her reasoning (in the "context of discovery"), does not preclude the decision-maker from delivery of proper justification of his/her decision (in the "context of justification").

[62] Lawrence B. Solum, *supra* note 2: 144.

8. A CASE FOR CONSENSUAL RESOLUTION OF TAX DISPUTES

The insight provided by Aristotelian considerations of equity can be accommodated in the procedural tax law. "[T]he object of law is the administration of justice"[63]. Tax procedure, as any other procedure, is a forum for justice. It is a platform on which a decision-maker (a tax authority) is to adjudicate tax cases in such a way that justice is done.

In a sense, the reception of equity in tax law is always procedural. It takes place in the factual context of the tax procedure, which harmonises with the focus on adjudication that equity inspires. Let us discuss the specific aspect of the presence of equity in the tax procedure, and show how equity justifies the use of consensual (alternative) methods of tax disputes resolution.

Alternative methods of tax dispute resolution, or "tax ADR", are legal procedures, irrespective of the stage (before a tax authority or administrative court in tax matters), whereby a tax dispute between a taxpayer and a tax authority is formally resolved based on consensus between them. In these procedures, the traditional imperative powers of a tax authority may or may not be withheld, depending on the exact structure of the procedure. If they are not withheld, a tax authority is placed in a dual position: one of formal superiority and one of factual parity with a taxpayer (party to the proceedings). The paradigmatic example of the ADR is mediation, i.e., negotiation between a taxpayer and a tax authority with the assistance of a neutral and impartial third party (mediator).

A priori, one can distinguish between two possible senses of the tax ADR application. In the weak sense, they are applied whenever the resolution of the dispute is consensual. In the strong sense, they are applied when the resolution of the dispute is consensual and the resolution is not based on a legal rule.

The traditional formalistic position opposes the application of consensual methods of tax disputes resolution. The resolution of tax cases should be dictated by legal rules, without any margin of appreciation, where the outcome could be negotiated between a taxpayer and a tax authority.

More precisely, the formalistic approach to tax law correlates with the objection to consensual resolution of tax disputes. Technically, the former does not imply the latter; yet in practice, the "rule-oriented" disposition of formalists leads them to believe that there is only "one right answer" in every legal case: there is only one correct resolution of every tax dispute, the resolution is based on the application of legal rules and it is attainable ("doable").

[63] Roscoe Pound, *supra* note 48: 20.

From this perspective, the tax ADR in the weak sense does not logically collide with formalism; but in the formalistic perspective, its application may seem pragmatically pointless (the solution of the "legal puzzle" being ascertainable without the practical effort involved in the tax ADR application; there seem to be nothing to gain from the tax ADR). The tax ADR in the strong sense is, in turn, incongruent with formalism in tax law, i.e., in that the tax ADR in that sense involves (by definition) resolution of the case that is not founded on a legal rule.

Equity speaks for the ADR application in both weak and strong sense. ADR in the weak sense should be uncontroversial. Because legal rules have limitations, because they are defeasible, and because adjudication is an exercise in practical wisdom, tax procedure should be so structured and so applied as to be a forum of discussion between a decision-maker (a tax authority) and a party to the proceedings. Proper space should be provided for a decision maker to understand and appreciate the specificity of the case and for a party to the tax proceedings to present the case in its specificity. Legal decisions should be made after hearing an interested taxpayer as the one who knows the case best and is in a unique position for furnishing the specifics of it. Law is an empirical discipline based on good expert judgment, and Aristotelian equity vindicates the concrete over the abstract. By listening to a taxpayer, a decision-maker can appreciate the concreteness of the tax case and avoid succumbing to formalism. The tax ADR provides such space for discussion.

As for the ADR in the strong sense, with or without a consensual resolution of the tax dispute, legal rules are not self-sufficient in rendering outcome of the tax case, let alone a fair outcome of it. "The rule of law is not a law of rules"[64]. The fact that the resolution of the case is not based on a legal rule, i.e., on its strict application aligned with its wording, does not disqualify the way in which it is decided. Thus, a just and justified outcome of the tax case can be attained through tax ADR in the strong sense.

Reflection on equity therefore leads to the conclusion that the opposition of legal formalism in tax law to the application of consensual (alternative) methods of the resolution of tax disputes is unfounded. In light of equity, tax law is no longer the realm of rigid legal rules. Tax procedure, as an arena of justice, can involve negotiations between a party to the tax proceedings and a tax authority, aimed at establishing the best resolution of the case "all things considered". It is the scene of an exchange of arguments that goes beyond the algorithmic application of legal rules.

[64] Lawrence B. Solum, *supra* note 2: 145.

From a negative point of view, equity considerations are instrumental in dissolving doubts and reservations about tax ADR. The notion of equity elucidates the nature of law, showing that it is not in essence all about legal rules. From a positive point of view, tax ADR creates a forum that allows the case to be appreciated and assessed in its concreteness.

CONCLUSIONS

In this article, the notion of Aristotelian *epieikeia* shed light on tax law formalism. It was shown that equity advocates limited trust in strict application of legal rules in favour of legal principles as defeasibility devises, open and rich interpretation of legal texts, interest in adjudication as irreducible to the application of legal rules, non-absolutist and particularised appraisal of the demands of substantive justice. Finally, equity considerations support flexibility in the resolution of tax disputes, including their resolution through the alternative (consensual) methods.

The interplay between the abstract (universal) and the concrete (particular), the technical and the ethical, the legal text and the facts, interventions of a party involved and discussions with them – this is what law is in the everyday practice of a decision-maker. There is no reason to believe that tax law should, or even can, be the exception.

The findings of this article are, in a sense, not revolutionary. In practice, in our dealings with law and by law, we do not rely exclusively on legal rules; we act in the concrete and not in the abstract; and we examine possible outcomes from different perspectives, including different perspectives of substantive formulas of justice. We "speak prose" all our lives without being aware of it or even denying that we do.

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