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Prohibition To The Confiscation Effects On Brazilian Tax Law

Proibição Dos Efeitos Da Confiscação No Brasil Lei De Imposto

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RESUMO

O principal objetivo desta pesquisa é analisar o princípio que proíbe a imposição de impostos com efeitos de confisco, de acordo com a Constituição Federal de 1988 - Artigo 150 (IV). Embora os legisladores possuam a capacidade de criar impostos, é preciso levar em consideração os limites legais, aqueles estabelecidos no Texto Constitucional relacionados ao exercício desse poder tributário. O princípio do imposto de "não confisco" é um desses limites - que, estando profundamente relacionado a outros princípios constitucionais, entre os quais destacam a igualdade e a capacidade de pagamento - , impede a imposição de impostos que, sendo onerosos demais, desencorajam, prejudicar ou, em circunstâncias extremas, impedir o exercício dos direitos fundamentais do cidadão, especialmente aqueles relacionados à liberdade e aos direitos de propriedade. A implementação do princípio que proíbe a instituição de impostos com os efeitos do confisco depende da análise de cada caso concreto, pelo judiciário, respeitando os direitos fundamentais do contribuinte.

Palavras-chave: Lei de imposto. Princípio. Efeito Confisco. Limites.

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ABSTRACT

The main objective of this research is to analyze the principle that prohibits the imposition of taxes with the effects of confiscation, according to the 1988 Federal Constitution - Article 150(IV). Although law makers possess the aptitude to create taxes, one must take into consideration the legal limits, those being laid down in the Constitutional Text related to the exercise of this taxing power. The principle of "non-confiscation" tax is one of these limits – which, being deeply related with other constitutional principles, among which highlight the equality and ability to pay – prevents the imposition of taxes that, being too onerous, come to discourage, harm or, in extreme circumstances, prevent the exercise of the citizen's fundamental rights, especially those related to freedom and property rights. The implementation of the principle that prohibits the institution of taxes with the effects of confiscation depends on the analysis of each concrete case, by the judiciary, respecting the fundamental rights of the taxpayer.

Keywords: Tax Law. Principle. Confiscation Effect. Limits.

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1. Introductory Considerations On The Right To Property

The right to property, which is one way of manifesting the right to freedom[3-4], is protected by the Constitution section 5(XXII), which, imperatively, requires that "the right to property is guaranteed", being assured to the owner, the right to "… use, enjoy and dispose of the thing, and the right to reclaim it from the power of whoever unjustly possesses or holds it", according to the Civil Code Section 1228.

The concept of property, which it is worth stressing, is a fundamental right, human or natural[5], however it is not unchangeable; for its content, in fact, varies according to the historical context in which a particular society is inserted.[6]

In Rome, conceived as an individual, perpetual, and almost absolute right was the property. The Roman formula *dominus est utendi actque abutendi re sua quatenus iuris ratio patitur* teaches us such lesson, which according to Héctor Villegas: extends to the owner the right to use, enjoy, dispose, and also abuse it, according to their free will. In other words, to the owner, the widest right that one can have over a thing is guaranteed.[7]

By the Middle Ages, the "...overlapping of various properties focusing on a single good..."[8] was consecrated, until the establishment of the concepts of individualism and liberalism - due to the French Revolution. In the 1789 Declaration of the Rights of Man and of the Citizen, those both ideas are expressed, prescribing in article 17 that "... property is an inviolable and sacred right." This conception of the right to property is rooted in natural law, bringing the idea that such an institute would be inherent in human nature itself and, therefore, preexisting to the state "… by the simple fact that it is in man's nature the need to take possession of the goods of life, take ownership of things and, consequently, opposing their property to others."[9]

However, the concept of the right to property has significantly changed over the years, regarding both the extent of what is meant by "property" and the individual exercise of that right.

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[3] The claim to immanent durability of the right to property allows one to deduce the partial ideals of legal certainty: by protecting the patrimonial sphere, making it an exceptionable rule only through the observance of rigorous procedure and the occurrence of serious preconditions, the 1988 Federal Constitution obliquely protects the reliability and calculability of the legal system: *citizens, knowing that they have such a right as an unrestricted rule can plan their own activities with greater autonomy, transforming this right into a means of achieving freedom*. (Ávila, 2011, p. 216).

[4] By the advent of the Fiscal Rule of Law, the tribute rises from the self-limitation of liberty: the social contract reserves a minimum of freedom unreachable by taxation, guaranteed through immunities and privileges mechanisms, which are transferred from the clergy and the nobility to the citizen; but the state is allowed to exercise tax power over the not excluded portion by the constitutional pact, which concludes that freedom itself institutes the tax. Thus, the tax is the price of freedom, because it serves as an instrument to distance man from the state, enabling him to fully develop his potential in the public space, without the need to deliver any permanent service to Leviathan. On the other hand, it is the price for state protection embodied in public goods and services, such that no one should be deprived of a portion of his freedom without the counterpart of the state benefit. (Torres,1995, p. 3-4).

[5] Torres (2005) 158.

[6] However, there is no fixed, static constitutional concept of property, and fundamentally legitimate not only the new definitions of content but also the setting of limits to guarantee its social function. Although not open, the constitutional concept of property must necessarily be dynamic. (Mendes & Branco, 2011, p. 379).

[7] Belisario Villegas (1994) 221.

[8] Fachin (1998) 15.

[9] Goldschmidt (2003) 37.

Concerning the first aspect, it is noteworthy that the term property now includes not only movable or immovable property but also other equity values[10], such as "... mortgages, pawns, bank deposits, wage claims, shares, equity interests, patent, and trademark rights, etc."[11] In other words, rights related to the intangibility of asset value rather than the material thing itself.[12]

It is worth mentioning that Francisco Campos had already defended the necessity of interpreting the right to property to a greater extent, under the 1946 Constitution[13]:

> The expression - property – used by the Constitution Article 141(§16;§18), must be understood in all its breadth, or as comprising all things or utilities which may be either privately appropriated privately or constituted as an object of a right. The concept of property is coextensive with that of patrimony, which means that property is the right that we have over the goods, material or immaterial, which constitute our patrimony.[14]

The second aspect concerns the limitations on the exercise of this right, which has the objective of promoting the general welfare - and not just that of the owner. This refers to the "social function" as an essential element of the right to property, which is referred to in our Constitution Article 5(XXIII).[15-16]

Despite the evolution of the property concept, as well as its social function, the fact is that such a right has never been absolute, intangible and unrestricted (not even by the Declaration of the Rights of Man and of the Citizen), due to the existence of taxation, as a

[10] This transformation is verified especially from the 1919 Weimar German Constitution. As Mendes & Paulo (2011) pointed out: the right to property started to cover not only the ownership of movable or immovable property but also other patrimonial values, including the various situations of patrimonial nature, arising from relations of private or non-private law. (Mendes & Branco, 2011, p.364).
[11] Mendes & Branco (2011) 365.
[12] When one speaks of the right to property as the object of a constitutionally guaranteed, it does not mean that is the right of ownership over each specific asset what is being protected. In fact, we are facing an institutional court guarantee, which protects not only (or not so much) the legal position of those who are already owners, but the enduring of the property institution, in an objective sense. The focus of such protection is not the domain as a set of the owner's powers, but the intangibility of the equity value. (Naveira de Casanova, 1997, p.35).
[13] Article 141: The Constitution assures the Brazilian and foreign residents in this country the inviolability of rights concerning life, liberty, individual security, and property, in the following terms: … §16 – The right to property is guaranteed, except in cases of expropriation due to the public necessity or utility, or for social interest, through previous and fair monetary compensation. In the case of imminent danger, such as war or internal commotion the competent authorities may use private property, whether it is for common good, under the condition of further compensation. …§18 – Industrial and commercial brands have the right to property assured, as well as to exclusive commercial name usage.
[14] Campos (1956) 54.
[15] The Article 5(III) prescribes: "XXIII – property shall observe its social function" in a clear intention to link private property rights to the realization of values related to the public interest. Similarly, one could notice the Article 170(III), *in verbis*: "The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: … III - the social function of property;".
[16] Regarding the limitations imposed by the Constitution to the right to property, it is worth mentioning the expropriation (Article 5.XXIV and Article 182. §4.III), the request for the use of private property, in case of imminent public danger (Article 5.XXV), which reveals the change of perspective concerning the right to property, from an individualist conception, related to the 1789 Declaration of the Rights of Man and of the Citizen, to a common good conception, after the development of the so-called doctrine of the social function of property. (Fachin, 1998, p.19).

legitimate (*a priori*) state intervention over private property – viewed as a necessary burden to ensure its own protection by the state.[17]

Nonetheless, whether the right to property may be subject of restriction by the state – through the exercise of tax competence[18] (or tax power) [19], one cannot forget José Roberto Vieira's lesson: "Power is demonic... for it bears within itself the germ of its own degeneration, unless it suffers limitations"; and such limitations "... live in the Constitution, which is the exorcist of what might exist as demonic in power."[20]

In other terms, the limits of the Constitution must always be present in the tax legislator's activity. Hence, when a tax is demanded or created, the principle that prohibits taxation with confiscation effects is precisely one of these barriers, and since it is directly related to the preservation of property rights, cannot be overcome.

2. The Principle Of Prohibition To The Effects Of Confiscation: Relations With The Right To Property And The Constitutional Provision

The prohibition to confiscation effects in the tax sphere has a close and direct relation to the right to property. It proves to be a brake to the tax competence exercise as it gives greater protection to the taxpayer's assets. One of the co-authors has sustained such argumentation:

> Inscribed in the Federal Constitution Article 150(IV), the principle of non-confiscation prohibits usurping, simulating to tax or sanction the taxpayer's assets... Taxation or tax penalty cannot harm private property to the point of endangering it. More technically, they cannot assume confiscatory features.[21]

In agreement with the prior opinion, Maurício Dalri Timm do Valle adds "The prohibition to confiscation is linked to the defense of the right to property."[22]

The same Article 150(IV) of the Federal Constitution outlines that the "use a tribute for the purpose of confiscation" is prohibited for political persons. Therefore, such principle impedes creating and requiring taxes which, in such a serious way, prevent or hinder the exercise of the fundamental rights and guarantees established by the Constitution by its individuals.

Besides, once again, we highlight an argumentation already published by one of the co-authors over this matter:

[17] In this respect, it is perfectly possible to locate the tax […] as a limit to the right to property. Since the tax is inherent to an economic system based on the recognition and protection of private property rights, as we indicated earlier. (Naveira de Casanova, 1997, p.72).
[18] Whether high or low, taxes are a constitutional means to appropriate private property without fair compensation. (Einsestein, 1983, p.10).
[19] Fonrouge (1970) thought the concept of tax power as political person's aptitude to, in the exercise of sovereignty, create tributes. In his own words: The taxing power consists of the power to apply contributions (or to establish exemptions), that is, the power to sanction legal norms from which it derives or may derive, in charge of certain individuals or certain categories of individuals, the obligation to pay a tax or to respect a tax limit. It is, in short, the power to charge. (Fonrouge, 1970, p. 290).
[20] Vieira (1999) 2.
[21] Carrazza (2010) 198-200.
[22] Valle (2016) 468.

> The principle of non-confiscation, with the provision in the Federal Constitution Article 150(IV), according to which it is forbidden to "use a tribute for the purpose of confiscation" – prohibits the simulation of taxing to usurp taxpayer's assets. Thus, tax laws cannot compel taxpayers to collaborate beyond public spending.[23]

In Brazil, when the 1988 Constitution promulgation occurred, this constitutional principle came to be expressed in its wording. However, it does not mean its omission in the previous constitutions as it had been implicitly consecrated, especially in the provisions guaranteeing the right to property.

The 1824 Constitution Article179 (XXII) [24]-[25] guaranteed the right to property and, in Article 179(XX)[26], the prohibition of property confiscation (from which one could extract the prohibition of confiscation effects) as well.

The first Republican Constitution, written in 1891, guaranteed the right to property (Article 72.§17[27]) fully, which, in the context of taxation, meant that the none state action could violate this individual guarantee.

The prohibition of taxes with confiscatory effects was also implicit in the 1934 Constitution Section 113(17)[28], which dealt with the right to property. Moreover, Section 133(29) prohibited the application of confiscation penalty[29].

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[23] Carrazza (2019) 91.

[24] "Artigo 179. A inviolabilidade dos Direitos Civis, e Politicos dos Cidadãos Brazileiros, que tem por base a liberdade, a segurança individual, e a propriedade, é garantida pela Constituição do Imperio, pela maneira seguinte. ... XXII. É garantido o Direito de Propriedade em toda a sua plenitude. Se o bem publico legalmente verificado exigir o uso, e emprego da Propriedade do Cidadão, será elle préviamente indemnisado do valor della. A Lei marcará os casos, em que terá logar esta unica excepção, e dará as regras para se determinar a indemnisação".

[25] T.N. The writing of the text of the Constitution of 1824 is in Old Portuguese and its free translation would be in the following terms:
"Article 179. The inviolability of Civil Rights, and Politics of Brazilian Citizens, which is based on freedom, individual security, and property, is guaranteed by the Constitution of the Empire, as follows. ... XXII. The right to property is guaranteed in its entirety. If the legally verified public good requires the use and use of Citizen Property, he will be previously compensated of its value. The law will mark the cases in which you will only have to make this exception and give the rules to determine the compensation. "

[26] "Art. 179. ... XX. Nenhuma pena passará da pessoa do delinquente. Por tanto não haverá em caso algum confiscação de bens, nem a infamia do Réo se transmittirá aos parentes em qualquer gráo, que seja".
"Article 179. ... XX. No penalty will pass from the person of the offender. Therefore, in no case will any confiscation of property be made, nor will the infamy of the Royal be transmitted to relatives in any form whatsoever.

[27] Article 72. The Constitution assures Brazilian and foreign residents in this country the inviolability of rights concerning liberty, individual security, and property, in the following terms: … §17 – The right to property is fully guaranteed, except in cases of expropriation due to the public necessity or utility, or for social interest, through previous compensation.

[28] Article 113. The Constitution assures Brazilian and foreign residents in this country the inviolability of rights concerning liberty, subsistence, individual security, and property, in the following terms: … 17) The right to property is guaranteed, which cannot be used against social or collective interest, in the terms of the law. Expropriation for necessity or public utility shall be made in accordance with the law, upon prior and fair compensation. In the event of imminent danger, such as war or internal commotion, the competent authorities may use private property to the extent required by the public good, subject to the right to further compensation.

[29] Article 113(29) prescribes: There shall be no penalty of banishment, death, confiscation, or perpetual character, saved, in the case of the death penalty, the provisions of military law in time of war with a foreign country.

In Section 185 of referred Constitution there was a quantitative limit related to tax increases. This provision was: "At the time of the increase, no tax may be raised beyond twenty per cent of its value".[30]

In commenting on the article in question, Pontes de Miranda argued that such prohibition was directed at the tax legislator, who could not raise taxes in an excessive way to the point of causing surprises and serious disturbances to taxpayers:

> Against the evil of raising taxes excessively, causing surprise and, therefore, serious disturbances to industry, commerce, agriculture, and individuals in general, Section 185 opposed the upper limit of 20% of the increase. That means: the increase per year.[31]

The 1937 Constitution Section 122(14) also implicitly banned the effect of confiscation on tax law through the guarantee of property rights.[32] One may say the same about the 1946 Constitution, which, not only protected the right to property (Section 141.§16[33])[34], as also prohibited the confiscation of property (Section 141.§31[35]).

The same prohibition to confiscating taxes was implied in the 1967 Constitution Section 150(§22)[36-37] - which guaranteed the right to property – and in the original wording of Section 150(§11)[38], which prohibited the confiscation of property, admitting the exception of forfeiture penalty in cases of damage to the Treasury.

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[30] According to Goldschmidt, the 1934 Constitution was: the closest our constitutional history has ever come to expressing the principle of non-confiscation prior to the 1988 Federal Constitution's promulgation. That is because in the 1934 text objective parameters for characterizing the confiscation effect of taxation were established. (Goldschmidt, 2003, p.47).

[31] Pontes de Miranda (1936) 558.

[32] Article 122. The Constitution assures Brazilian and foreigners residing in this country the inviolability of rights concerning liberty, individual security, and property, in the following terms: …14) The right to property is fully guaranteed, except in cases of expropriation due to the public necessity or utility, or for social interest, through previous compensation. Its content and limits shall be defined in the laws governing its exercise.

[33] Article 141. By this Constitution, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security, and to property, on the following terms: §16 - The right to property is guaranteed, except in the cases of expropriation due to the public necessity or utility, or for social interest, through previous and fair pecuniary compensation. In the case of imminent danger, such as war or internal commotion, the competent authorities may use private property, whether it is for common good, under the condition of further compensation.

[34] It is important to highlight 1946 Constitution Article 147 for its social welfare concern: Social welfare will condition the use of the property. The law may promote a fair distribution of the property, with equal opportunity for all, with respect to the provisions of article 141(§ 16).

[35] §31 - There shall be no penalty of banishment, death, confiscation, or perpetual character, saved, in the case of the death penalty, the provisions of military law in time of war with a foreign country.
The law shall provide for the kidnapping and forfeiture of property, in the case of unlawful enrichment, influence, or abuse of office or civil service, or employment in a local authority.

[36] Art. 150. The Constitution assures Brazilian and foreigners residing in this country the inviolability of rights concerning life, liberty, security, and property, in the following terms: ... § 22 - The right to property is fully guaranteed, except in cases of expropriation due to the public necessity or utility, or for social interest, through previous compensation, subject to the provisions of article 157(§1º). In the case of imminent danger, the competent authorities may use private property, whether it is for common good, under the condition of further compensation.

[37] It is worth mentioning that, in the 1967 Constitution, the right to property is bound to the social function compliance. Such provision is in article 157(III): The economic order aims to fulfil social justice, based on the following principles: […] III - the social function of property.

[38] §11 - There shall be no penalty of banishment, death, confiscation, or perpetual character, saved, in the case of the death penalty, the provisions of military law in time of war with a foreign country.

From the beginning of the military regime, in 1964, the Constitution started to suffer modifications by amendments and institutional acts, which affected even the issue of criminal confiscation.[39]

On September the Fifth of 1969, the Institutional Act number 14 modified Section 150(§11) of the 1967 Constitution, turning legal assets confiscation, and also loss, in situations of "…external adverse psychological war, or revolutionary or subversive, in terms of the law".[40] However, the right to property stayed unchanged, which is why, even though the mitigation of the prohibition on criminal confiscation, the implicit prohibition on the use of confiscating taxes within the tax scope remained unscathed.

After the Constitutional Amendment n.1 of October the Seventeenth, 1969, the prohibition on the use of taxes with confiscatory effects remained implicit, since both the right to property as well as the prohibition of criminal confiscation continued to be guaranteed by Article 153 and its paragraphs 22[41-42] and 11[43], respectively. In this sense, Aliomar Baleeiro interpreted the principle of equality[44] – Section 153(§1º) – in alignment with the prior parts, as a way to defend the implicit prohibition of a tax system with confiscation effects:

> Among the legal effects of Article 153 (§§1,11,22) is the prohibition of confiscatory taxes – understood as those that absorb a considerable part of property value, annihilate the company or prevent the exercise of lawful and moral activity. From this point of view, that provision is part of the political and economic system of the Constitution, which guarantees the right to property, except for expropriation through prior and fair cash compensation (Section 153.§22).[45]

Regardless the word "confiscation" had been deleted from 1967 Constitution Section 153(§11) by the Amendment n. 11, of October 13th, 1978, the prohibition of taxes with confiscatory effects remained implicit in the Constitution provision of the right to property.

The law shall provide for the kidnapping and forfeiture of property, in the case of unlawful enrichment, influence, or abuse of office or civil service, or employment in a local authority.

39 Notably, the matter concerning criminal confiscation, alongside the right to property, serves as an interpretation that the effect of tax confiscation has always been prohibited.

40 This is the new wording of the Article 150(§11): There shall be no penalty of death, perpetual, banishment, or confiscation character, saved in the case of external adverse psychological war, or revolutionary or subversive, in terms of the law; which shall also provide for the kidnapping and forfeiture of property, in the case of unlawful enrichment, influence, or abuse of office or civil service, or employment in Public Administration, either direct or indirect.

41 Art. 153. The Constitution assures Brazilian and foreigners residing in this country the inviolability of rights concerning life, liberty, security, and property, in the following terms: ... § 22. The right to property is guaranteed, except in the case of expropriation due to the public necessity or utility, or for social interest, through previous and fair pecuniary compensation, subject to the provisions of article 161, allowing the expropriated to accept payment in the form of public debt, with an exact monetary correction clause. In the event of imminent public danger, the competent authorities may use the private property, provided to the owner for subsequent compensation.

42 The social function, as a limit to right to property, came to be in Article 160(III): The economic and social order aims to fulfil national development and social justice, based on the following principles: […] III - the social function of property.

43 Article 153(§11): There shall be no penalty of death, perpetual, banishment, or confiscation character, saved in the case of external adverse psychological war, or revolutionary or subversive, in terms of the law; which shall also provide for the kidnapping and forfeiture of property, in the case of unlawful enrichment, influence, or abuse of office or civil service, or employment in Public Administration, either direct or indirect.

44 Article. 153. [...] § 1º All persons are equal before the law, without any distinction of sex, race, work, religious belief, or political conviction. The law shall punish racism.

45 Baleeiro (1997) 565-566.

Nonetheless, the prohibition of the confiscatory effect on tax matters received a place in the legal wording only in 1988, when the so-called *Citizen Constitution* was promulgated, specifically in the already mentioned article 150(IV). Even so, as the brief constitutional history above, the principle has always been used, even in an implicit interpretation.

3. Prohibition To Confiscation Effects In European Constitutions (Germany, Spain, And Italy) And In Latin American Constitutions (Argentina, Paraguay, And Peru)

The principle of *non-confiscation* is also present in European and Latin America Constitutions – either explicitly or implicitly. In this current analysis three European and three South American countries were selected: Germany, Spain and Italy; Argentina, Paraguay and Peru. This selection, however, does not imply that other countries from these regions do not apply the principle in study.

In Germany, there is no express provision prohibiting confiscated taxes. However, the Federal Constitutional Court recognizes the need to impose limitations on the exercise of tax competence – including the stipulation of quantitative limits to the overall tax burden. Such interpretation is based on the principle of equality (Article 3)[46] and the right to property (Article 14)[47].

In addition, there is a decision of the German Federal Constitutional Court, delivered on June the Twenty-Second, 1995, which stated that the sum of taxes borne by the taxpayer cannot exceed half of his income. Regarding this, Stephen Horvath's comment is valuable:

> ... it can be said that the German Constitutional Court understands that, given article 14(2) of their Fundamental Law ..., heritage serves both private purposes and the common welfare. Thus, the wealth tax can only be added to others that record income (remembering here the Court's understanding of the impossibility of recording the *substance* of equity) if the overall tax on potential income corresponds approximately a 50% apportionment of public burdens between the Administration (the State) and the taxpayers, thereby respecting the principles of equality and economic capacity. The High Court insists on the need to evaluate economic assets and rights *in their entirety* and according to their ability to generate income.[48]

In Spain, the prohibition of taxation with confiscatory scope is expressly provided in the 1978 Constitution Section 31(1), as follows: "Everyone shall contribute to sustain public expenditure according to their economic capacity, through a fair tax system based on the

[46] "**Article 3 [Equality before the law].** (1) All persons shall be equal before the law. (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. (3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability."

[47] "**Article 14 [Property – Inheritance – Expropriation].** (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that deter-mines the nature and extent of compensation. Such com-pensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

[48] Horvath (2002) 141.

principles of equality and progressive taxation, which in no case shall be of a confiscatory scope."[49]

The requirement of taxes with confiscatory effects is forbidden in the Italian law, implicitly in the Constitution Article 23 (legality)[50] and 53 (contributory capacity) [51]. Together, these provisions protect the right of property, which is guaranteed by article 42[52] of the Major Law of Italy.

Through Francesco Moschetti's lessons, it is possible to identify in the mentioned article 23 the "... freedom and individual property guarantee", that is, "... a principle of purely formal justice". Whereas, in the article 53 of the Italian Major Law, one can verify "... a principle of sustainable justice" that "... acquires great importance in the Taxation as exponent norm of the fundamental criteria of justice and rationality taxes".[53]/[54]

In Latin America, Argentina's 1853 Constitution resembles the above-mentioned cases of the German and Italian constitutions; and also the situation of Brazilian constitutions prior to 1988. In other words, it is possible to identify the prohibition of taxing with confiscation effects both in the articles 14[55] and 17[56], which are related the right to property. Rodolfo Spisso argues about the article 17 in these terms:

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[49] The Spanish constituent used the word "reach", while the Brazilian mentioned the word "effect". However, these are words that reveal the same intention: to prevent taxes from reaching the level of unbearable, generating the same effects that confiscation would generate.
[50] "Article 23. No obligation of a personal or financial nature may be imposed on any person except by law."
[51] "Article 53. Every person shall contribute to public expenditure in accordance with their capability. The tax system shall be progressive."
[52] "Article 42. Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognized and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all. In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest. The law establishes the regulations and limits of legitimate and testamentary inheritance and the rights of the State in matters of inheritance."
[53] Moschetti (1980), 58-59.
[54] According to Moschetti (1980) 295-297: One must not reduce the right to property protection to the expropriation protection, in the strict sense. That is why it would be, thus, illegitimate - in contrast to article 42, first and second paragraphs - a tax law that culminated in the suppression of private property or in prevention of its survival, or either emptying it of its essential content, or limiting it by mere hostility and regardless of the reasons provided in the second paragraph (144). Private property must remain as an essential institution of our system. Therefore, it cannot be eliminated or reduced to a symbolic function, despite the fiscal intervention. The limit to indiscriminate taxation, in the protection of property, is also found in article 53, which links the taxing power not only with the taxable event but also to the maximum amount of the tax. The subsection "in reason" implies that the tax can detract only part of the capacity, without reaching the exhaustion of it. The statement that there must be "a tax system" is better harmonized with the maintenance in the Italian Republic of a private economic organization rather than with its elimination. In fact, in a state where the economy was entirely public, the need for a system of taxes would be meaningless. Since they are justified as rights to freedom, speaking of solidarity duties would even lose sense. Economic solidarity demands wealth diversity. Naturally, a case-by-case judgment basis will be necessary to analyze whether the tax has violated property rights. Thus, it is not possible to establish an absolute measure of this violation. There are intermediate areas in which it may be doubted whether it has existed or not and in which the legislator must be free. On the other hand, it also must be admitted that there is a maximum limit, where it cannot be denied the cancellation and violation of the institution protected by article 42.
[55] "Article 14. All inhabitants of the Nation enjoy the following rights, in accordance with the laws that regulate their exercise, namely: of working in and practicing any lawful industry; of navigating and

> Our fundamental law protects with greater emphasis and vigor the right to property than the Constitution of the United States, and also than our previous 1819 and 1826 Constitutions. All of them do not demand prior compensation in case of expropriation.

In Spissos's opinion, this express provision for right to property protection "... is sensibly attenuated by the taxes impelled by the State, through which it seizes private wealth". Moreover, "…there must be a limit to this possibility of taxation otherwise the right to property becomes only written words. This limit is given by the non-confiscation principle..."[57]

Argentina's Supreme Court of Justice (CSJN) has already ruled that "... all that exceeds the reasonable limit established by democratic rule of government, which has organized the property with inviolable rights, thus, excluding the possibility of confiscating private wealth – direct or via taxation – is confiscatory". [58] The CSJN has also fixed quantitative limits on taxation – in the cases, for example, of real estate taxes[59], successions, and legal entity income, where the percentage limitation is 33% of the tax burden.[60]

In the case of Paraguay, the 1992 Constitution expressly prohibits confiscatory taxation. It is in Article 181, about tax equality:

> Equality is the basis of the tax. No tax will have a confiscatory character. Its creation and its enforcement [vigencia] will attend to the contributive capacity of the inhabitants and to the general conditions of the economy of the country.

Finally, the 1993 Peruvian Constitution also prohibits the use of confiscated taxes in Article 74[61]. Such restriction is directly related to legality and equality principles.

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trading; of petitioning the authorities; of entering, remaining in, traveling through and leaving the Argentine territory; of publishing their ideas through the press without prior censorship; of using and disposing of their property; of associating for useful purposes; of freely practicing their religion; of teaching and learning."

[56] "Article 17. Property is inviolable, and no inhabitant of the Nation can be deprived thereof except by virtue of a judgment supported by law. Expropriation for reasons of public utility must be authorized by law and previously indemnified. Congress alone imposes the taxes mentioned in Article 4. No personal service can be required except by virtue of a law or a judgment supported by law. Every author or inventor is the exclusive owner of his work, invention or discovery for the term granted him bylaw. The confiscation of property is stricken out forever from the Argentine Penal Code. No armed body may make requisitions, or demand assistance of any kind."

[57] Spisso (2000) 417.

[58] Naveira de Casanova (1997) 233-234.

[59] Regarding the property tax, Linares Quintana (1951) 239-240, reminds us of two important decisions of The Argentine Supreme Court. In the first case, it was decided that: as long as the relationship between the value of the property and the rate of the contribution is reasonable, the confiscatory strike is only admissible if it is shown that the tax absorbs more than 33% of the normal product of the efficient exploitation of the taxed property. In addition, in another opportunity, the Court ruled: the right to property guaranteed by the Constitution is irreconcilable, in ordinary circumstances, with the depopulation by way of tax, of more than 33% of the current utility of a correct exploitation of rural real estate (Linares Quintana, 1951, p.239-240).

[60] In this sense, a CSJN ruling argues: [...] it is worth remembering the guarantee of reasonableness in the exercise of the prerogatives of public authorities and the guideline – since ancient times in terms of real estate taxation (*Fallos: 210: 172; 239: 157*), of inheritance tax (*Fallos : 234: 129*), or income tax (Fallos: 220: 699) - to set 33% as a limit on tax pressure, beyond which the guarantee of the National Constitution Article 17 (*H. 102. XXII. Horvath, Pablo c/ Fisco Nacional. (D.G.I.) s/ ordinario (repetición). Buenos Aires, 4 de mayo de 1995*).

[61] "**Article 74**: Taxes are created, modified, or abolished. Exemptions are granted exclusively by law or by legislative decree in case of delegation of powers, except for tariffs and rates, which are regulated by an executive decree. Regional and local governments may create, modify, and eliminate taxes and rates, or exempt the same within their jurisdiction and within the limits defined by law. In

In general, one could note that these analyzed constitutions relate the prohibition of confiscation effects to a fair tax system, which can only be built respecting citizen's fundamental rights and also the principles of legality, equality, and contributive capacity.

4. The Application Of The Principle Of "Non-Confiscation" By The Supreme Federal Court And The Objective Limit Fixation On Taxing In Brazil

Notwithstanding it is undeniable the existence of taxation limit, the task of identifying such boundaries – regarding the non-confiscatory effect – is not an easy one. The reason for that relies on the fact that recognition depends on the analysis of other aspects, especially the ability to pay.

The great question over this matter, however, is the lack of a standard measure that indicates mathematically contributory capacity. Therefore, only a careful analysis of specific situations will allow us to identify whether taxation has had a confiscatory effect in relation to a specific taxpayer.

This analysis - which must respect a case-by-case basis (regardless of the prior setting of objective limits) - falls to the Judiciary constitutional competence to, as Stephen Horvath points out, "... give the last word about what the Law is." [62]

The different situations in which the taxpayers find themselves, at least in the current scenario, reveal how inadvisable it is to set quantitative limits before taxation. As 1988 Constitution Article 150(IV) tells us, it is not legally acceptable to confront an equal (or even higher) scope constitutional principle, such as the principle of equality.

The Supreme Federal Court (*Supremo Tribunal Federal - STF*) may even establish criteria to be met for the identification of confiscation purpose, to permit a sort of tribute dosimetry by first instance judges, local courts and treasury administration agents. The setting of a threshold percentage, however, applicable without distinction to taxpayers, does not seem to be the right measure, for the reason stated above.

In the context of strictly tax nature legal relations, a precise rule has been given by the Supreme Federal Court: "The characterization of the confiscatory effect presupposes the analysis of the taxpayer's legal situation". Therefore, it is "...judicially unsustainable to seek shelter in Constitution of the Federative Republic Article 150(IV), regarding the globally considered high tax burden of the country and reflexes in the commerce."[63]

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exercising its taxing power, the State shall respect the principle of the legal reservation and those principles concerning equality and respect for basic rights of the person. No tax shall have a confiscatory nature. Budget Acts and emergency decrees shall not contain provisions on taxes. Laws concerning annual taxes come into force on the first day of January of the year following their enactment. Tax provisions set forth in violation of this article are null and void."

[62] Horvath (2002) 119.

[63] ADI 3144, Relator Ministro Luiz Edson Fachin, Tribunal Pleno, DJe 30/10/2018.

In this respect, one could see the ruling number RE218287[64], which says:

> The burden to point out the peculiarities of the specific case, in order to provide percentage adequacy analysis, set in the legal norm in the light of prohibition to confiscation and contributory capacity clauses, is of the interested party, which did not occur in the present case.[65]

In another ruling (n. RE603191) the Supreme Federal Court declared:

> The constitutional prohibition of confiscatory tax and the need to observe the principle of contributory capacity are issues whose analysis depends on taxpayer's individual situation, mainly due to possibility of making tax deductions, as it happens in income tax.[66-67]

However, the situation is different with respect to fines resulting from tax duties non-compliance. Under these circumstances, Constitutional Court jurisprudence is massive in that the sanction cannot exceed 100% of the amount corresponding to the tax itself.[68]/[69]

On this topic, it is worth mentioning the judgment of the Direct Unconstitutionality Action (ADI) number 551, where Minister Ilmar Galvão stated when analyzing fines established between 200% and 500%:

> The potential confiscation purpose of such fines cannot be apart from the proportionality that must exist between the committed tax violation and its legal consequence, the fine itself.
>
> Thus, it is disproportionate to charge the minimum value of twice the amount of the tax because of non-payment, as it undermines the taxpayer's assets in evident confiscation effect.
>
> In the case of evasion, the same disproportion is found, when the fine cannot be inferred to five times the tax amount, seriously affecting the taxpayer's assets.[70]

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[64] T.N.: Extraordinary Appeal (RE) is the constitutional mechanism for judicial appeals that appeal against the violability of the fundamental precepts and guarantees contained in the Federal Constitution.

[65] RE 218287 ED-ED, Relator Ministro Dias Toffoli, Segunda Turma, DJe 09/08/2017.

[66] RE 603191/MT, Relator Ministro Marco Aurélio, Tribunal Pleno, DJe 02/09/2011.

[67] At the Direct Unconstitutionality Action (ADI) judgment no. 2010, the Supreme Court ruled: The identification of the confiscatory effect must be made according to the total tax burden, by verifying the taxpayer's capacity – considering the amount of his wealth (income and capital) – to support the incidence of all taxes that must paid, within a certain period, to the same political person who has stablished them (the Federal Union, in this case), also conditional upon the assessment of the degree of economic and financial unbearability, the observance by the reasonableness standards intended to counteract any excesses of fiscal order that may be. Interestingly, at that time, when asked what tax, within a global tax system with confiscation, would have a confiscatory effect, Minister Ilmar Galvão stated: If the latter brought this consequence, it was the drop of ' water, and it is unconstitutional. (ADI 2010, Relator Ministro Celso de Mello, DJ 12/04/2002)

[68] Regarding the fines in contrast with 1988 Constitution Article 150(IV), this ADI n. 551 decision, ruled by the Minister rapporteur Ilmar Galvão, must be highlighted: "The Federal Constitution Article 150(IV), prohibits the use of tax with confiscatory effect. That is, the fiscal activity of the state cannot be costly to the point of affecting the property of the taxpayer, confiscating it by way of taxation. Such limitation on the power to tax also extends to fines arising from tax obligations, even if they are not taxable. (ADI 551, Relator Ministro Ilmar Galvão, DJ 14/02/2003)

[69] As for the maximum sum of punitive fines, this Court has held that those exceeding 100% (one hundred percent) of the amount of the tax due are confiscatory. (ARE 1.058.987 AgR, Relator Ministro Luís Roberto Barroso, Primeira Turma, DJe 14/12/2017). Fine set at 100% of the tax amount. Absence of confiscatory character. Precedents (ARE 1.073.192 AgR/PR, Relator Ministro Gilmar Mendes, Segunda Turma, DJe 28/02/2019)

During the same judgment, Minister Sepúlveda Pertence acknowledged that, despite the difficulties in identifying what has or does not have confiscation effects, it is safe to say that a fine of two or five times over the tax value would cause this undesirable effect.[71]

Having considered that the tax value is considered as a parameter for setting the fine, Minister Marco Aurélio's words must be mentioned:

> Although the difficulty pointed out by Minister Sepúlveda Pertence exists, when it comes to determinate what is an abusive fine, we have to consider them as ancillary and, therefore, they cannot exceed the principal amount.
>
> In this case, when a fine is fixed in twice the principal amount – which is the unpaid tax – or in five times it, in case of evasion, either the premise above and both reasonability and proportionality principles are forsaken.[72]

At the end of this judgment, the Supreme Federal Court acknowledged the unconstitutionality of fines of 200% to 500%. At other times, the Court dismissed penalties that corresponded to 100%[73] and 300%[74] of the tax value of the tax. On the other hand, the imposition of penalties corresponding to 20%[75], 30%[76], and 80%[77] of the value of the tax charge was considered legitimate.

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[70] ADI 551, Relator Ministro Ilmar Galvão, DJ 14/02/2003.

[71] *I do not know when a tribute or a fine becomes confiscatory; but I certainly know that it is confiscatory and disproportionate a fine of twice the value of the tribute, for the mere delay of its satisfaction, or five times for evasion.*

[72] See ADI 551.

[73] I am aware of the appeal and give you partial approval to uphold the tax executive, except for the fine that, set at no less than 100% of the tax due is confiscatory. I shall reduce it to 30%, which I believe is reasonable for redressing the taxpayer's unpunctuality. (RE 81550, Relator Ministro Xavier de Albuquerque, DJ 13/06/1975).

[74] In the present case, the fine setting of 300% is unreasonable and confiscatory. In the light of the foregoing, I grant the extraordinary appeal in part to set aside the contested decision and return the matter to the Court in order to set reasonable percentages for the tax fines initially calculated at 300% (AgRg no RE 455011, Relator Ministro Joaquim Barbosa, DJ 08/10/2010).

[75] The purpose of the moratorium is to punish the taxpayer who has evaded the payment of a tax, imposing economic damages, while stimulating the payment within the time and manner defined by law. In this case, the appellant was fined 20% of the IPI due. If, on the one hand, this amount is not negligible, on the other hand it is far from being abusive or unreasonable, and no offense should be considered to the principles of contributory capacity and the prohibition of confiscation. (RE 239964, Relatora Ministra Ellen Gracie, DJ 09/05/2003). In the ruling of a extraordinary appeal (n.582461), in which Minister Gilmar Mendes was the rapporteur, the Supreme Federal Court argued: for the moratorium to fulfill its function of discouraging tax avoidance, on the one hand, it cannot be insignificant, but on the other hand, it cannot have an amount that confers a confiscatory characteristic, including making it impossible to collect future taxes. The judgment under appeal is supported by the case law of this Supreme Federal Court, according to which the fine of 20% does not held a confiscatory purpose. (RE 582461, Relator Ministro Gilmar Mendes, DJe 18/08/2011)

[76] The imposition by law of a 30% fine - which is a penalty for non-compliance with the tax obligation - cannot be considered unreasonable and abusively intended, not even that it has a confiscatory effect (RE 220284, Relator Ministro Moreira Alves, DJ 10/08/2000).

[77] See this ruling: "TAX LAW. COFINS. INSTALLMENT. INTEREST. 80% FINE. CLAIMS OF CONFISCATORY EFFECT, USURE, AND DESRESPECT FOR THE PRINCIPLES OF DUE LEGAL PROCEEDINGS AND ISONOMY. Unfounded allegations, in view of the legislation governing the matter, since the commissions imposed on the taxpayer, by means of a letter of formal notice, derive from the fact that it was omitted in the timely declaration and payment of the contribution, setting up the Supreme Federal Court, on the other hand, that the rule of the Constitution Article 192(§3) is not self-applicable. Appeal refused. (RE 241074, Relator Ministro Ilmar Galvão, DJ 19/12/2002).

Given the legal nature and the function of the pecuniary penalty, it seems appropriate that the judiciary imposes objective limits to it. However, the limit of 100% set by the Supreme Court may be considered excessive to punish the taxpayer's unpunctuality, whatever the reason for default may be.

5 Conclusions

The aim of the rule that prohibits the use of taxes with confiscation purpose is ultimate to guarantee the perfect exercise of the right to property and liberty, thus giving effect to the ideals of tax justice.

Although the provision of this principle occurred only with the advent of the 1988 Constitution (article 150.IV), all previous constitutions embraced its implicit interpretation, notably in the provisions of right to property (commonly observed in comparative law).

Regarding its application, it is up to the judiciary, case by case, to analyze the circumstances that characterize the violation, or not, to the rule extracted from the Constitution Article 150(IV) – according to Supreme Federal Court jurisprudence, which, unlike the constitutional courts of countries such as Germany and Argentina, did not set quantitative limits on taxation.

Finally, in situations involving the imposition of fines for non-compliance with tax duties, Supreme Federal Court jurisprudence is unwavering considering that the penalty cannot exceed the amount of tax due by the taxpayer – that is, there is a quantitative limit to penalty payment, which corresponds to 100% of the tax value.

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