Law Department

In Redistributive Taxation We Trust

Some Elements for a Democratic Theory of Tax Law

AGUSTÍN JOSÉ MENÉNDEZ

LAW No. 2000/1

EUI WORKING PAPERS

EUROPEAN UNIVERSITY INSTITUTE

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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BADIA FIESOLANA, SAN DOMENICO (FI)

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© 2000 Agustín José Menéndez
Printed in Italy in February 2000
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

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In redistributive taxation we trust

Some elements for a democratic theory of tax law

Agustín José Menéndez, European University Institute (Florence)[1]

ABSTRACT

The argument moves from the justification of the general obligation to obey the law to that of the general obligation to pay taxes (it is argued that with some exceptions, tax scholarship has played down the importance of this question) by means of describing the peculiarities of the latter in reducing the cognitive, motivational and organisational demands that plague general practical discourse. This leads to the conclusion that we can consider the tax system as an autonomous subsystem within the larger legal one, and that the justification of the general obligation to pay taxes depends on three pillars. Those are the participation of legal subjects in the making of tax norms, the substantive correctness of such norms and the guarantees concerning their application. After a section devoted to a case study on the development of general principles of tax law by the Spanish Constitutional Court (that gives a sense of the specific problems at stake), I move to the enumeration of a set of liberal principles of tax law that would render legitimate a tax system if it shaped by them and correspond to the basic and aforementioned three sources of legitimacy. The essay is articulated around three basic methodological choices, summarily explained and defended in the second section: ethical constructivism (following Rawls and Nino, and also Habermas), deliberative democracy (basically following Nino, Cohen and Estlund) and post-positivism (on the basis of Alexy's work and that of MacCormick and once again Nino).

1. The Tax Crisis and the Need for a Democratic Theory of Tax Law

§1. If there was a place and a time at which the obligation to pay taxes was generally believed to be a legitimate one, that would be the Western World[2] at the middle of this century. That was the golden era of *easy finance* (cf. Brownlee, 1996). The major crisis brought about by the Great Depression and the Second World War had led to the emergence of activist states everywhere (se Milward, 1984). Private freedoms were seen as dependent on the action of the state, which was now becoming a major

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[1] This paper is a partial outline of my Ph.D. dissertation. Special thanks to Robert Alexy, Francisco Laporta and Álvaro Rodríguez Bereijo, external members of the examining jury, who made challenging suggestions partially reflected in this essay. Many thanks to Jacques Ziller, who has supported the present publication. Once again, special thanks to Massimo La Torre, for the paper and for the long walk in Bologna, a freezing afternoon of December. The present publication would not have been possible without the always superb Marlies Becker. Many thanks to Elena and Sergio, for reading the text.

[2] This is understood as referring to the countries which were to become founding members to the OECD, the Organisation for Economic Cooperation and Development, when it was constituted in 1961.

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economic actor. It did not only provide basic public goods, but also implemented redistribution policies, aimed at mitigating economic hardship, so that all could regard society as a cooperative venture. Moreover, it was assigned a major role in the active management of the economy, as the guardian of basic macro-economic goals like full employment and low inflation. All such activity was funded by a revamped tax system. Not only the size and tasks assigned to the tax system had grown, but the tax mix had been radically changed. The system had moved from a real to a personal basis. If real taxes like excises or sales taxes constituted the main component of the tax system in the old days of *laissez-faire*, they were to be replaced by personal taxes of the kind of the income, the corporate or the estate tax. That meant that the tax burden was to be graduated according to the personal circumstances of each taxpayer. *Ability to pay* emerged as key factor in determining how much each individual should contribute to the public treasury, in the same way that it became relevant in determining how much she should receive from it in the form of public expenditures, (in-kind benefits or money transfers). This major transformation was facilitated by the long cycle of economic expansion that followed the Second World War, and by the feeling of solidarity derived from mobilisation for war.

However, it was not long before the tax storm began to gather. Available quality data (see Schneider, 1997) on the size of the shadow economy in OECD states indicate that the latter has been on the rise since the late fifties. That means that, from such a moment, an increasing proportion of economic activities that qualify as tax bases escape control of tax authorities and do not contribute to the pool of common resources in spite of being called to do so. The trend has strengthened with the passing of time. It is important to notice that tax evasion is essentially a secretive action, and as such, it is more destabilising than forms of protest that put forward an alternative political conception of taxation (e.g. civil disobedience) (Arendt, 1972). In such a context, one can no longer assume that all citizens accept that they have a compelling obligation to pay taxes.

§2. Why is this so? Two main hypothesis have been offered as an explanation of the phenomenon, namely, the theories of the fiscal crisis

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and of the increased opportunities for evading taxes derived from globalisation. Let's analyse them and explain why they are unsatisfactory.

First, the advocates of the theory of the fiscal crisis argue that we are undergoing a *crisis of reproduction of the tax system* (cf. O'Connor, 1973). For them, modern capitalist economy tries to achieve two conflicting goals at the same time, namely ensuring that profits are kept high for capitalists and purchasing legitimacy for public institutions. This leads to structural public deficits, or what is the same, it pushes public expenditure beyond the revenue collected through the tax system. The issue of public debt is only a temporary solution. At times of economic crisis, debt grows exponentially and the crisis unfolds.

Without denying the descriptive power of this theory in some respects, the fact is that it does not correspond exactly to what we are going through. Twenty five years after the canonical statement of the fiscal crisis thesis by O'Connor, it is a fact that the tax system keeps on being able to transfer a major share of private economic resources to the system of public finance. Shrinking tax bases are still to be translated into shrinking revenue. This is so because the tax burden placed on the official economy has augmented in order to compensate the loss of revenue derived from the growing shadow economy. Thus, the crisis is not a matter of falling tax revenues but of uncontrolled and unprincipled transformation of the structure of the tax system.

Second, we find authors that explain the tax crisis in terms of increasing opportunities to evade taxes and get away with it brought about by economic globalisation (see, among others, Tans and Parthasarathi, 1993). The argument goes that the reduction of the pulls and levers in the hands of the state to control the economy (among which, the key power to control the flow of capitals) would have increased exponentially the chances to evade taxes. When we couple such factual record with a Hobbesian understanding of public reason (which assumes that individuals are self-interested maximisers, cf. §10), we have a bold theory. Evasion, reformulated as non-compliance, is a matter of opportunities to do so in a painless way. The more chances individuals have to evade, the more they will do it. If technology and the complex set of developments labelled as

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economic globalisation have increased the aforementioned opportunities, it is evident why the shadow economy is on the rise.

Without denying that some of these arguments are far from being implausible, it is possible to contest that they provide an adequate explanation of the tax crisis. It suffices to point that it predates the emergence of large-scale opportunities for tax evasion provided by globalisation. As already indicated, the black economy started to grow significantly back in the late fifties, well before most of the opportunities to evade provided by the complex phenomenon of globalisation were available to taxpayers. Moreover, it is just not possible to establish any link or proportion between factors relevant in assessing the existence of opportunities to evade taxes (like the degree of openness of the economy) and the size of the black economy. So not even the empirical data are favourable to the advocates of the globalisation thesis when they are closely inspected.

A democratic theory of law offers a different interpretation of these facts. It departs from the assumption that individuals are not only able to act on the basis of prudential reasons, but also capable of being motivated by normative ones, or what is the same, by their conception of *what is right*. Under this different light, the tax crisis can be explained as a *legitimacy crisis*. Taxpayers evade taxes because they no longer find sufficient reasons to ground their tax obligations. In turn, this can be considered as a direct consequence of the *divorce* between the constitutional design of the tax system (which, in general terms, has not been altered) and the reality of its implementation (dramatically transformed by the tax crisis), mediated by an increasingly incoherent set of tax norms.

§3. Although a complete explanation of the tax crisis requires spelling out its social, economic and legal causes, it is argued that a key factor is the failure of legal dogmatics to reconstruct purposive tax law, or what is the same, to *theorise meaningfully* the tax law of the activist (and democratic) state.

One could say that legal dogmatics is, in a sense, a sort of lens that allows us to make sense of the congeries of legal norms that surround us,

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so that we can understand their rationales and use them. If a legal theory was just a pair of glasses and we could see without them, what we call law would look as a chaotic set of norms and principles. Quite probably, we will not be able to make heads or tails of such amorphous set[3]. On such a basis, we can say that what legal operators do (especially legal theorists and other dogmatics) is to elaborate on the cognitive instruments with which to make sense out of such morass of heterogeneous pieces, thus rendering them ready-made components for our practical reasoning, and more specifically, for our *legal reasoning*. The main tool in the hands of legal theorists is the *concept of law* and the companion idea of the legal system (cf. Bengoetxea, 1994). However, neither norms nor legal concepts are elaborated out of love or deference towards the cognitive tools of the theorists, but they respond to social interests and conflicts. Law is a purposive order (cf. MacCormick, 1997, esp. at 1054). In that respect, it can be seen both as a mirror of social transformation and as an active agent contributing to it. The cognitive tools with which lawyers and theorists construct and reconstruct legal norms are clearly influenced by the principles and values that underpin social arrangements. The idea of the paradigm of law, as the "image of society inscribed in the legal system" (Habermas, 1996b, 771) is quite handy to give an account of such interrelation. Paradigms can be described as sets of principles that program law, and that allow, among other things, to make sense of legal norms and to orient legal interpretation, both in easy and hard cases. Even if they are quite flexible, there are times at which the speed at which law changes is higher than the capacity of absorption of the prevailing paradigm. In such circumstances, we are witness to the demise of a certain way of understanding law[4] and the search for a new one.

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3 NB the difficulty involved in this mental exercise, as even in this example we have no alternative but to define the field and describe it with terms already elaborated by legal dogmatics.

4 In legal systems that have quite centralised mechanisms for surveying and monitoring the interpretation of and adjudication on legal norms (like Constitutional Courts), the paradigmatic shift gets reflected in the repeated giving of judgments that break new ground and cannot be accommodated in the old one. The concatenation of several of such judgments indicates the demise of the old paradigm, but they tend to be less determinant concerning the articulation of the new one.

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Although it is far from clear when the formal paradigm of law became a rather pool tool with which to argue in legal terms about taxes[5], it is clear that at some point between the end of the last century and the Second World War it became plainly unrealistic to make legal tax arguments based on the formal paradigm of tax law, which conceptualised public expenditure as something akin to the expenses shared by any community of private owners[6]. Similarly, it was clear that the question of who should pay taxes and how much should each individual pay could no longer be kept isolated from the general question concerning the legitimacy of private property, the societal obligation to take care of the victims of brute bad luck or those who could not make ends meet needs within existing socio-economic arrangements. In a few years, most Western countries had approved some types of *progressive* income, corporate and estate taxes. Once the new *tax mix* was part and parcel of the law, the strategy to consider each of its components as an *anomaly* was bound to fail. This opened up the opportunity and gave rise to the need of elaborating a new conception of tax law which could take into account the *social principles* underlying the enactment of new tax norms. But to do so, tax dogmatics would have needed to put into question its own methodology, and the foundations of its academic autonomy. Instead, most scholars sought refuge in formalism (cf. Livingston, 1998; the question is dealt in general terms- that is, without focusing specifically on tax law- in Ackerman, 1984a). This explains why what was an opportunity ended up becoming a danger. The fixation with technical tax questions gave rise to a normative vacuum which has contributed to the erosion of the limited basis of legitimacy of the tax system. In some cases, instead of exposing the dogmatic and ideological foundations of the formal paradigm of tax law, the move resulted in the infusion of new strength on the *authoritarian*

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5 Cf. my paper on "Three Paradigms of Tax Law", unpublished, on file with the author.

6 Several metaphors of taxation as a proxy of price have been put forward. Hume compared taxes with the costs of a ditch spread among the owners of the neighbouring meadows, Smith with the costs of paying for a lighthouse, and some Italian treatises on public finance compared them with the losses in certain kinds of shipping contracts (*lex Rhodia de jactu*).

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approach to taxation[7]. The danger was not diminished by the general prominence of prescriptivist conceptions of law and of positivism as a general philosophical doctrine.

It is for these reasons that the tax crisis is to be overcome, to a certain extent and within certain limits, by means of renovating the effort at elaborating a conceptual and normative map of tax law in the activist state.

§4. If the diagnosis is right, what we need is a *democratic* theory of tax law that allows us to reconnect tax norms with general principles that guarantee the legitimacy of the system as a whole. The present essay aims at offering some of the elements necessary in order to build such a theory. To put it in a different way, thinking tax law democratically requires revising the conception of taxation (hammering in the idea that tax law is law), the analysis of the different tax relationships (which includes not only the vertical institutionalised relations deriving from specific tax norms, but also horizontal ones which relate all members of a political community and justify public expenditure), and the principles of taxation which program concrete tax norms (which should be related to a complex conception of legitimacy). The whole reflection is to be seen as a reworking of the question of legitimacy of tax law.

§5. This makes advisable to revisit some of the basic issues that have occupied tax law dogmatics by the hand of a critical citizen always ready to ask questions about the justification of her obligations, the paramount of which is, for our present concern, to pay certain amounts of money. That constitutes a sort of reversal of the basic intuition of legal realism. Instead of attempting to describe law as it looks to the eyes of the bad man who cares of nothing but prudential reasons, we will try to keep company with the reasonable citizen. This requires that we face the basic problem of the justification of the tax system. Answering this question requires us to move from the single to the plural. The argument goes that the main source of legitimacy is to be found in the fact that tax norms have been produced in a democratic way (in fashionable terms, by *we the people*), or to put it in

7 Cf. "Three Paradigms of Taxation", fn 5.

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slightly different words, that positive tax law is democratic and *that* makes it legitimate. This requires explaining in what sense and for which reasons only democracy fills the justificatory gap (or at the very least minimises it), due to the conflict between our will to autonomy and the need of partially heteronomously produced action-norms (i.e. law) in order to achieve cherished but complex social goals, like providing financing for public expenditure, which is what taxation is mainly about. But this is coupled with standards of substantive correctness of the content of tax norms and principles guaranteeing the adequate application of tax in concrete circumstances. That leads to a *complex theory of legitimacy of tax law*.

Far from being an indictment of technical analysis of tax law *per se*, the democratic theory of tax law aspires to complement it. It sees itself as building upon the major efforts undertaken by tax law dogmatics. Any summary account of the evolution of tax law makes clear to us the difficulties derived from the backward state of the discipline before concepts such as tax event or even tax rate became common currency. Instead of rejecting classic tax dogmatics, it is interested in bringing to the surface the concept of taxation and of the tax relationship that are hidden in technical constructions. It aims not at demolition, but a reconstruction that renders visible the ultimate political character of tax law.

2. Basic choices and an articulated defence against objections

§6. Thinking tax law *democratically* is a project based on three methodological choices. Namely, ethical constructivism as a metaethical theory, deliberative democracy as the normative model of common action-norms written in the language of law, and post-positivism as legal theory.

Ethical constructivism is associated to two basic premises. First, that it is possible to argue in a rational manner about practical questions, or more precisely, to provide an inter-subjective justification of the assertions which we make on such matters. Second, that the relevant criteria for this purpose are provided by the practice of moral deliberation itself, that is, by the pragmatic assumptions which we make every time that we enter into

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practical discourses. Habermas provides us with a canonical statement of the yardstick against which moral judgments on action-norms are made:

> "Just those action norms are valid to which all possible affected persons could agree as participants in rational discourses" (Habermas, 1996a. 107).

Inter-subjective standards of practical argumentation prove an essential tool to dispel the claims of the different kinds of moral scepticism. But once we take into account basic facts of human life, we realise that our practical reasoning cannot proceed only on the basis of moral reasoning. We need to find *procedures* not only to deliberate about practical problems, but also to decide them in an *authoritative* and *conclusive* manner. That explains the emergence of law as the grammar in which common action-norms are drafted. However, the mere fact of positing such norms gives rise to a burden of justification, that requires transforming standards of moral correctness into criteria of legal correctness. That results in the ideal of *deliberative democracy*. It basically claims that

> "[O]nly those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted", (Habermas, 1996a, 110).

Finally, post-positivism can be seen as the legal theory that *comes naturally* after the previous two choices. It can be described with the help of four basic premises. First, that law is a complement of morality. As just indicated, the latter cannot discharge on its own the tasks of conflict-solving and co-ordination of action in complex modern societies. There are two main reasons that call for morality being complemented by law. On the one hand, there are many instances in which it does not have enough resources in order to determine what is the right course. That is due to the fact that the principle of universalisability is the main and almost exclusive operational criteria of moral reasoning. On the other hand, it makes considerable epistemological, motivational and organisational demands upon individuals (Habermas 1996, 118). Second, law is characterised by its

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autonomy *vis-á-vis* morality and general practical reasoning. Legal norms provide reasons that pre-empt reference to moral or general practical reasons. That can be seen as a direct consequence of the functional requirements that motivated looking for a complement to morality (cf. Hart, 1982, 253; Raz, 1985, 299, 304; Postema, 1996, 82). Third, law is to be conceptualised as a special case of general practical reasoning. This indicates that the legitimacy of law is somehow borrowed from morality[8]. However, that does not mean collapsing law into general practical discourse, but only that the legal norm can be justified under the limiting conditions proper of the legal institutional framework. Fourth, law is mainly a matter of practical and not of theoretical reason. Legal facts are not merely brute facts, and legal norms might not be sufficient in themselves to determine what is the right legal answer (Nino 1991a, 248 and Habermas 1996a, 107).

§7. These choices are far from being exempt from challenge. A general theory of democratic tax law that presupposes the possibility of making heads or tails in practical matters (ethical constructivism), a criterion of legitimacy of common action-norms (deliberative democracy) and the autonomy of law as a social system, but whose legitimacy is borrowed from morality (post-positivism) is deemed to be controversial. Assaults would come from the many different variants of anti-normative thinking (moral emotivism, communitarianism, forms of Hobbesian practical reason, of which *utilitarianism* is the classic one) and from legal theories that defend a strong autonomy thesis of law *vis-à-vis* morality. Let's briefly consider them and explain how they can be proven inferior alternatives to our choices.

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[8] Cf. (Alexy, 1989, 16): "Legal discourse is a *special* case because legal argumentation occurs in the context of a number of limiting conditions. In particular, one must include here its statute-bound character; its necessary regard to precedents; its involvement with doctrinal studies as developed through an institutionally organised profession of academic lawyers, as well as- and this of course is not true for academic legal discourse- its subjection to the requirements of procedural ordinances and regulations. The claim to correctness involved in the assertion of any legal statment is the claim that, subject to the constrains set by these limiting conditions, the assertion is rationally justifiable". Cf. also (MacCormick 1992) and (Nino, 1995).

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§8. Moral emotivism undermines any attempt at constructing a general theory of democratic tax law by means of challenging the possibility of making any meaningful normative judgment. The emotivist states that moral judgments are merely emotive utterances, disconnected from any objective conception of truth or correctness, and which, at most, can be linked to a notion of authenticity, or personal coherence (Foot, 1995 offers a clear outline of *moral emotivism*).

There are five main grounds on which to reject the plausibility of moral emotivism. First, it is against what is implicit in the practice of moral reasoning. Namely, when we enter practical deliberation, we raise claims to the correctness and justifiability of our statements. This can be further considered by exploring the pragmatic assumptions we make in such a context (cf. Nagel 1997a, 117). Second, it does not explain why we associate moral judgments with obligations, something that is peculiar of normative discourse when confronted with other linguistic utterances in which we express our feelings (Habermas, 1996d, 336-7). Third, it blurs the distinction between the justification and the explanation of a given norm (Nino, 1985, 126). Fourth, it seems to assume that the only criteria of correctness in practical matters must be based on the so-called *correspondence* theory of truth, or what is the same, in a correspondence between moral judgments and external reality. This does not take into account that we can cash objective for intersubjective acceptance, and truth for correctness without major loss (Rawls 1993, 110). Fifth and finally, it incurs in a self-contradiction, to the extent that any form of moral scepticism can be reinterpreted as a moral claim itself (*that there are no objective moral claims*), the assertion of which implies a pragmatic endorsement of the basic assumptions of practical deliberation (Dworkin 1996, 88; Nagel, 1997a, 128).

§9. Communitarianism contests the general theory of democratic tax law on the basis that any practical argument about taxation must be based on traditionally accepted norms or values. As a metaethical standing, it can be seen as the dilution of critical into positive morality, or the claim that

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moral correctness must be defined by reference to local practice[9]. For practical purposes, we can consider two different variants of the theory.

According to the *strong* one, moral reasoning is permeated by local practice in a double sense. First, moral subjects are constituted as such through social interaction within a community. It is through education that we acquire the capacity to pass moral judgments, and it is also through socialisation that we learn substantive moral criteria that constitute the building blocks of our moral judgment (MacIntyre, 184, 10). Second, moral debate is necessarily framed by a thick conception of the good, so that it proceeds in an *hermeneutic* way. The possibility of conflict and disagreement is tamed by the tradition in which we have been socialised (Sandel, 1982; Sandel, 1996).

This *strong* version can be challenged in the following way. First, the idea that we are socially equipped with standards of moral judgment is true, but it is not less true that we can use our moral judgment in order to put received criteria into question and to endorse new ones. The reflexivity of practical reason allows us to transcend socially transmitted moral criteria (Kymlincka, 1989, 254; MacCormick 1997a, 105; Nino 1989a, 177). Second, it does not explain how normative dialogue can take place between people with different conceptions of the good. It stands against plausible claims like the fluidity of cultural affiliations (Waldron, 1995). Thus, it is in serious difficulties in order to explain how we can change our convictions by means or borrowing arguments from other traditions, or how moral change is possible within the tradition itself.

The *weak* version argues that the choice for practical reason (instead of competing ways of providing for conflict-solving and co-ordination within a given society) is based on traditional, not on normative arguments. Any answer to it needs to take into account that we cannot have resort to higher moral principles in order to explain the choice for practical

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[9] The term *communitarianism* is a generic label applied to several authors who have addressed a number of variegated criticisms to liberal political theory. This makes the label a negative one, defined to a certain extent by reference to the target of criticism, namely the work of John Rawls and other liberals such as Ackerman, Dworkin, Nagel or Habermas. For our present purposes, the main representatives of communitarianism are Michael Sandel, Alisdair MacIntyre, Charles Taylor, David Miller and to a certain extent, Michael Walzer.

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reason understood as ethical constructivism does (this will imply falling prey to a sin of self-reference), but that, instead, we need to show that it can be better grounded than any other alternative (Nino 1989b, 85-86). A possible argument could be the following. First, rational agreement and the conception of the person as reasonable are goods of such special kind that they should be seen as part of the conception of the right, and not as particular goods, equal to many others (Alexy 1994, 142). Second, we have to take into account that once we enter the practice of deliberation and we make an assertion, we presuppose the validity of assertion rules and we raise a claim to correctness concerning our assertion. This, in its turn, implies that we raise a claim to justifiability, which places upon us the duty of justifying what has been asserted, or else to provide reasons justifying the refusal of such reasons. At such point, we can see that we are within the argumentative circle, and that we have to accept other participants as equals for the purpose of the discussion, assuming a potentially universal circle of participants and recognising the right of all to participate in deliberation (Alexy, 1996). Third, entering into the practice of deliberation is to be defended with a two-pronged argument. On the one hand, it corresponds to the most universal form of life. As Alexy asks: "Is there any point in a form of life in which we do not assert things?". On the other hand, even if we do not sincerely believe in the point of practical reason, the sheer number of people that opt for it constitute a strategic reason to at least pretend to accept it (Alexy, 1996).

§10. Hobbesian practical reason is a generic name which refers to normative arguments that presuppose that individuals are actors with a stable set of preferences, who apply their factual knowledge in order to maximise their function of individual well-being (e.g. utility). For such theories, practical reason is not a matter of deliberation, but of aggregation of preferences (cf., among others, Buchanan and Tullock, 1962; Olson, 1965, 15-6). When applied to tax matters, Hobbesian practical reason tends to picture taxpayers as individuals who experience compliance with tax norms as a cost, so that they would not comply if they were ensured that they could get away with it, namely, that not paying will not have as a

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consequence being punished. It is only fear of the sanction that moves people to pay their taxes (Allingham and Sandmo, 1972; Yitzhaki, 1974).

This form of moral scepticism can be challenged on three basic grounds. First, it is not possible to explain a good deal of human action as motivated by the pursuit of self-interest. This is the case when our well-being is dependent on that of somebody else or when we are committed to a certain course of action, even if that leaves us worse off (Sen, 1978). Moreover, we cannot explain much of political behaviour in such terms (why should people care to vote when their doing so implies a cost that is superior to the benefit derived from the infinitesimal influence they can exert on the final outcome?) (Lewin, 1991, chapter 3). In what concerns taxation, it pictures individuals as schizophrenics with incompatible preferences in matters of taxation *and* public expenditure. That is not only counter-intuitive, but it is clearly rebuffed by qualitative data obtained making the question in a way that allowed people to present their preferences in a related or simultaneous way (Confaloneri and Newton, 1995). Second, it is hard to explain how tax systems can be stable in the long-run, if they are merely based on coercion and self-interest. That is so because any legal obligation that institutionalises a complex web of non-institutional duties (like the general obligation to pay taxes) is quite fragile to high-levels of non-compliance. That means that facts have an incidence over the *normative* force of the obligation (i.e., if most people do not pay their taxes, the normative reasons for complying with the obligation get weakened and eventually vanish). Under such circumstances, only a more complex picture of motivation can explain how tax systems are stable in the long run. In relation to obligations like that of paying taxes, coercion discharges a triple function. Namely, it avoids that people who are willing to contribute are discouraged from doing so by the sense of hopelessness on social co-operation, it offers additional motivation to people willing to contribute but whose will might not be strong enough to do what they think right (akrasia), and it provides reasons to comply to those only moved by prudential ones (free-riding). Third, it cannot explain the present evolution of tax systems. The Hobbesian explanation of the tax crisis as a matter of increased opportunities to evade the tax burden cannot explain why the shrinking of the tax base is a phenomenon that predates the

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opportunities associated to the globalisation of economies and the reduction of capital controls and other devices that allowed a tighter control of tax evaders (cf. §2).

§11. The last and clearly not least objection that can be raised against a democratic theory of tax law is that it is not legal. This is the same as saying that it might be relevant in normative terms, when deciding how the tax system *should* look like, but that is something completely different from reasoning within the domain of the existing tax system (Hart 1958, 599). This kind of objection presupposes a strong differentiation of law and morality as two different domains within practical reason. It corresponds to what we could label as the *strong autonomy thesis*. In more precise terms, it can be said to refer to the hypothesis that the determination of whether a norm is recognised as legally valid proceeds without any reference whatsoever to its *moral correctness*. In negative terms, it can be seen as a repertory of arguments against the special case thesis, which was considered as central to the post-positivist approach to legal theory characteristic of this essay.

In order to defend it, it is advisable to distinguish two aspects of the special case thesis. On the one hand, it is associated with a conceptual connection between law and morality. On the other hand, it is related to a (limited) normative connection between law and morality.

§12. The partisans of the strong autonomy thesis argue that an adequate description of law requires keeping it fully separate from general practical discourse. This is so for the very same reasons on the basis of which post-positivists propose law as *the* complement of morality. If the tasks of conflict-solving and co-ordination cannot be discharged by morality and we need to complement it with law, it will be plainly unintelligent to make legal norms dependent on moral concepts, because then we will have not solved the problem (Hart, 1958, 614; Raz, 1979, 86). However, it has been argued that the fact that the legal system necessarily makes a claim to correctness of the normative solutions that it provides implies a weak conceptual connection (at the systemic level) between law and morality

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(Alexy 1994, 41ff). This claim is quite modest, because it only requires that all legal systems raise the claim, not that they actually redeem it.

Moreover, it seems just not possible to undertake moral reasoning without the assistance provided by the rules of general practical reasoning. This is reflected in the role of rules of general practical reasoning within legal reasoning. The latter are diffusely permeated by the former. Following Neil MacCormick, we can say that the norms of sound reasoning (which in most cases are non-positive) are contained by any legal system (MacCormick 1992, 120-1). Alexy has tried to make an enumeration of such norms[10]. This phenomenon is more noticeable when legal reasoning is about legal principles in hard cases. In those cases, it becomes clear that the fact that a principle is positivised does not necessarily imply that it ceases being a moral or political principle. We can say with Alexy that the opposite is closer to truth: the positivisation of principles brings into the law a critical dimension (Alexy 1998).

Moreover, it is also the case that the strict separation between law and morality can only be kept by either depicting discourses of application of law (adjudication) as mechanic or by means of marginalising them. The strong autonomy thesis tends to exclude judicial reasoning from legal reasoning (Raz 1998a, 4). However, two arguments can be invoked against such move. First, judicial argumentation plays an essential authoritative role in relation to other kinds of reasoning about law (Postema 1996, 99-102). Second, the possibility of drawing a clear line between the two depend on the possibility of distinguishing once and for all law-creating and law-applying functions of legal operators entrusted the task of adjudicating on legal conflicts, something which does not seem to be possible (Postema 1996, 110).

§13. In normative terms, the partisans of the strong autonomy thesis argue that keeping law strictly separate from morality serves three main

[10] Cf. (Alexy 1989,284-5): "General practical reasoning may be required (1) in the justification of the normative premises necessary to satisfy the different argument forms; (2) in justifying a choice between different argument forms leading to different results; (3) in the justification and testing of propositions of legal dogmatics; (4) in justifying any cases of distinguishing or overruling and (5) directly in justifying statements used in internal justification".

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purposes. First, it avoids giving a blank cheque to positive legal systems. If we describe law as *somehow* dependent on morality, there might be an opportunity for officials to argue that law should be obeyed not only because it is law, but because it is morally sound, thus deterring people from passing a fresh moral judgment on the legal system and the concrete legal norms (Raz, 1986, 89; MacCormick, 1981, 161-2; MacCormick, 1985, 10-1). Second, it makes clear that there is no need of *positivising* the contents of positive morality. By avoiding the characterisation of law as the *longa manus* of morality, we increase the chances of social respect of personal moral choices, or what is the same, of personal autonomy (Hart, 1963). If law and morality are different entities, whether certain moral practices should be reinforced by legal protection is a question to be decided on its own merits. Third, it avoids widespread lack of compliance with the law on the basis of a direct moral assessment of its norms. The strict autonomy of law and morality implies that the question whether to obey the law is one which involves factors beyond a direct assessment of the right course of action in moral terms (Raz, 1979; Gans, 1992).

However, it can be argued that there are good reasons for not keeping completely isolated law and morality due to the need of justifiability of the law in general, and because a complete isolation leaves us unarmed before cases of extreme injustice.

It has been granted that the drafting of common action-norms in the grammar of law reduces the cognitive, organisational and motivational deficiencies of the language of morals. However, it is not the case that general legal norms can completely eliminate them. This is due to at least two reasons. First, that law is formulated in natural languages, characterised by different phenomena that render necessary creative interpretation in order to determine the concrete consequences of a norm in a specific context. Second, that the aspiration of legal norms to turn themselves into public reasons for action makes it necessary to formulate them in general terms, so that they can be sufficiently versatile as to govern action in different factual circumstances. The formulation of norms that are applicable to most cases requires paying the price of vagueness or obscurity in some contexts of application. If this is so, then some cognitive, organisational and motivational deficiencies remain, and they

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need to be sorted out through the process of application of norms. That in its turn implies that such process reopens the question of justification of norms, to the extent that it is a creative activity, even if in a quite limited sense, due to the massive amount of normative material that surrounds indeterminacy in a concrete context of application of the norm[11]. At such point we are confronted by the need to find arguments that justify the creative activity. Some strategies are clearly bound to fail. On the one hand, participation is ruled out because the paradigmatic form of application, judicial adjudication, is an authoritative phenomenon (and there are very good reasons for it remaining so). On the other hand, the so called situation sense or the sense of appropriateness need to be rejected because they cannot be connected to public standards of justification. It is only by means of placing judicial reasoning within the larger domain of practical reason that we can find a solution. The creative activity of the judge derives its legitimacy from resort to general practical reasoning within the institutional context of legal reasoning. What the judge adds to the norm must be justified in the name of substantive correctness (Alexy, 1997).

Finally, denying a normative connection between law and morality leaves us unequipped to deal with cases of extreme injustice. Once we adopt a point of view internal to the legal system in question, like that of somebody trying to work out the legal consequences as a committed legal operator, we realise that the issue is an extremely important one. That is especially so if we place the question within the framework of the so-called transitory justice, or the problem of how to deal with wicked legal systems. By means of allowing a thin normative connection between law and morality that allows us to deny the legal condition to extremely unjust norms, we will have produced a deterrent for the hypothesis that a wicked legal system gets installed and legal officials are confronted with the application of such wicked legal norms (Alexy, 1994; Nino, 1996b). They will know that when their acts are scrutinised after the return to democratic normality, the argument that they were just applying the law will not be available to them as an excuse. By limiting the direct connection to those cases of extreme injustice we can avoid the problems associated to the

[11] See fn 8.

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controversy concerning criteria of moral correctness. If there is something that can be affirmed assertively in moral matters it concerns extreme evil, something that is granted even by *die-hard* moral sceptics.

3. The normative argument

§14. The task that we set ourselves at the outset of this research was to think tax law *democratically*. We said that to do this we need to revise the idea of taxation that we have in mind when we participate in discourses on tax law, the kinds of relationships that the approval and collection of taxes gives rise to, and the principles which articulate specific tax norms into a system. That is, we have to reconsider the conception, the structure and the general principles of taxation.

This is what we are about to do now. This section of the essay combines descriptive and normative elements. It proceeds to reconstruct the structure of the obligation to pay taxes, on the basis of how it is structured in really existing tax systems. The fact that the analysis has an empirical basis justifies that I talk of a reconstruction. At the same time, an eye is kept on the need to redeem the claim to legitimacy of tax systems.

The strategy is the following. First, we try to determine what is peculiar about the obligation to pay taxes when compared to other legal obligations (or what is the same, to *determine what is peculiar of taxes operating as a system)*. Second, we put forward the set of tasks the discharge of which should be assigned to the tax system (that is, we determine *what should the tax system be in charge of doing*). Third, we consider why it is the case that the obligation to pay taxes needs to be justified by reference to a complex, not a simple, theory of legitimacy (or what is the same, *we will determine how a justification of the obligation to pay taxes would look like*). Fourth, it will be argued that the legitimacy of taxes needs to be grounded on the argument that tax system is structured according to a certain set of general legal principles. This moves us quite naturally into the next section of the essay, which is the reconstruction of the reasoning of constitutional courts (the Spanish one) in tax matters. By means of referring legitimacy to a set of governing legal principles, we require of a democratic theory of tax law to get engaged not only in the

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enumeration of such principles, but to get concerned about the juridification of standards of taxation in the activist state (Escribano, 1988). At such point we will be able to understand why our present task builds upon the effort of a certain sector of tax law dogmatics to affirm *tax law as law*. The apparent tautological character of the statement is refuted when one considers the implications of certain conceptualisations of the tax phenomenon as non-legal or metalegal[12]. Affirming the legal character of taxes is far from futile. Not only a tax system that could be mapped according to general legal principles would elicit spontaneous compliance on the side of taxpayers, but it will be one within which legal reasoning would be far easier.

A) The Structure of the Obligation to Pay Taxes

§15. Taxes are one of the basic institutions of modern legal systems. In spite of that, it is highly frequent to think of tax norms as peculiar, different or even abnormal norms. This section aims to show that there is something substantive to such an argument, but that it is not what usually underlies the case for the special character of tax norms. Thus, I do not stress the non-legal or metalegal character of tax norms on the basis of economic, political or sociological arguments, but I stress their peculiar legal features. In the following paragraphs it is claimed that all genuine peculiarities of tax norms derive from the fact that we can make full sense of tax norms only if we consider them as part of the set of all tax norms, or what is the same, the tax system, and if we consider the latter within the wider framework of the system of public finance, which includes also the norms governing public expenditure. This does not go against the legal substance of tax norms, but it allows us to see the double-folded character of the obligation to pay taxes, which is placed in-between the abstract duty

[12] And of legal theory in general. "[I]n earlier times, the state, that is the power which issues commands and inflicts punishments, was hardly supposed capable of making law. It could conduct a campaign, levy a tax, remedy a grievance, but law was supposed to be in a somewhat different sphere. Law was a sacred custom; the state might administer or enforce or codify it; but legislation, the creating or altering or annulling of law, was conceived as a very high power, rarely to be used, and concerning which it was doubtful who possessed it", Seeley, *Introduction to Political Science*, p.145, quoted by (Waldron 1999, 5).

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of solidarity and the institutional and consequently specific obligations created by tax law. By exposing the existence of both horizontal and vertical relationships at the core of any obligation to pay taxes, we will be in a good position to offer an explanation of the role played by coercion in democratic tax law without making of force an essential component of legal norms. It will also help us understanding why legal dogmatics has been quite at unease when reasoning with tax norms (for example, why the issue of interpretation of tax norms has been so controversial).

§16. Any meaningful argument about tax norms cannot proceed unless it makes reference to the tax system as a whole. The rationale of each tax norm can only be determined by reference to the tax system. It is the latter, and not each single tax norm, that discharges meaningful tasks. Moreover, a complete understanding of taxes requires connecting the tax system to the system of public expenditure, or to put it in different terms, to reconnect the two limbs of public finance. The question *why tax?* needs to be answered by reference to the existence and implementation of a program of public expenditure. It is only as a cog in the tax machinery that we can make sense of specific taxes.

This boils down in practical terms to the premise that we need to analyse concrete tax norms as part of the purposive unit which the tax system is, and moreover, as part of the one of the two limbs of the system of public finance. If we move back to our original research question (remember, that was the question formulated by our companion, the reasonable citizen: *Why should I pay my taxes*?) it justifies that we fragment the question into two. First, whether we have a general obligation to pay taxes, that is, whether we are obliged to the tax system as a whole, and only then, second, whether we have an obligation to pay some specific tax. That is, it justifies that we subject the legitimacy of specific tax obligations to the condition that there is a general obligation to pay taxes[13].

[13] The legal character of tax law explains why this general question is in its turn framed and conditioned by the more general one of whether there is a general obligation to obey law. On this, more *infra* (§57).

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§17. The obligation to pay taxes is at the cross-roads of two kinds of relationships. On the one hand, it presupposes a *horizontal relationship* which relates all members of a given political community. The fact of sharing a set of interests and a set of norms for conflicting-solving and the organisation of coordination implies mutual duties and obligations. Those related to economic resources can be referred to an abstract duty of solidarity in economic, social and political matters (Rawls, 1971, 106; Koller, 1992). On the other hand, the general obligation to pay taxes refers to manifold specific obligations with the help of which the abstract duty is given an stable and institutional format. Societal arrangements in which there is no need of institutionalisation of moral obligations might be conceivable, but we have already rehearsed the case for making of law the *complement* of morality (see §13). In such a context, the set of tax norms (the tax system) can be seen as part of one of the alternative ways of institutionalising the abstract duty of economic solidarity, *a system of public finance*. In such a context, the tax system can be seen as a complex mathematical formula which translates for each individual the generic duty to share the burdens which derive from the existence of a political community into specific legal obligations expressed in monetary terms.

The proof of this duality can be found in the "law of communicating tax vessels". In spite of the fact that tax evasion seems to entail just a loss of revenue for the Treasury, the fact is that taxes not supported by evaders will end up on the shoulders of law abiding taxpayers either in the form of higher taxes or poorer public services. Lack of compliance with bilateral obligations ends up affecting others through the horizontal relationship that ties together all members of a given political community.

The acceptance of this dual character has important consequences, of which three seem to me the most relevant ones. First, it shows the inadequacy of any conception of the obligation to pay taxes which portrays it as merely bilateral. Specific tax obligations, which are effectively bilateral, cannot be explained less justified if not by reconnecting taxation and expenditure. This brings back into the picture the duty of solidarity. Second, it offers an adequate standpoint from which to offer an explanation of the emergence and the tasks to be assigned to the tax administration. The active position of the *Fiscus* just gives an institutional

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format to the manifold active positions characteristic of the horizontal relationship which is related to the duty of solidarity. Far from being a blank cheque, this argument provides a good standpoint for a democratic theory of tax law that subjects the Tax administration to the basic governing principle of protecting the interest of all taxpayers in a fair way. Third, it can be used in order to recycle some basic tax concepts which might be loaded of connotations proper of undemocratic conceptions of tax law. That is the case of the concept of tax sovereignty (Rodríguez Bereijo 1976, 234).

§18. The preceding paragraph follows a line of argumentation quite similar to the one used when explaining the relationship between law and morality (see §13). However, the *peculiarity* of tax norms can be render more specific by analysing the peculiar form in which they discharge some of the general tasks characteristics of legal norms.

Firstly, it reduces *cognitive demands* characteristic of non-institutional duties. By means of rendering the obligation certain, it provides a criteria of coordination of all members of the political community in order to achieve the complex social goal of collecting the revenue needed to finance the system of public expenditure. To understand this, it suffices to guess what would happen in the absence of the tax system. We can imagine the insurmountable difficulties that we will face when calculating how much we should contribute to the pool of common resources. With the help of such thought experiment, we can realise that the tax system constitutes a necessary metric for measuring what we due each other. Tax norms (like all coordination norms) do not only give institutional format to morally correct norms, but they break moral ground and determine the morally right distribution of the financial burdens derived from the existence of the political community (Honoré, 1992).

Second, it monetarises the background duty, or what is the same, it translates the background obligation into specific obligations consisting in the transfer of economic resources. This reflects the increasing permeation of the principle of division of labour in societal organisation. Monetarisation presupposes the existence of money as the metric of exchange of economic resources, while at the same time depending on the

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existence of public institutions specialised in collecting revenue and in applying it to public needs.

Third, it quantifies each specific obligation according to the logic of distributive justice. This is done by means of selecting the economic or legal phenomena that are considered to betray an ability to pay and on the basis of which individuals can be called to share the burdens derived from the existence of the political community. The ability to pay betrayed by such tax events is refined by reference to a series of objective and subjective circumstances that reduce or increase the effective ability to pay, and a tax rate (that can be proportional or progressive) is applied in order to calculate tax liability. This option is related to the fact that the two branches of public finance, that is public expenditure and taxation, are connected at a systemic level, and not at the level of each piece of taxes or item of public expenditure.

Fourth, it cancels any potential contextual connotation of the duty. Non-institutional duties (like the kinds that are part and parcel of the horizontal dimension of the obligation to pay taxes) tend to be associated with ethical, face-to-face relationships. By means of translating them into institutional specific obligations, they are severed from such connections (Habermas, 1996a, 448)[14].

§19. One of the implications of the previous characterisation of the obligation to pay taxes is the move of coercion from the core to the periphery of the tax relationship. The not too infrequent equation of taxation with coerced payments (cf., for example, Giannini, 1956, 148-9) reflects in an inadequate and misleading way the rôle played by coercion in tax law.

The main objection to a prescriptivist characterisation of taxes is that if its advocates were right, we could hardly explain how citizens might see themselves not only as addressees but also as authors of the law. However, if the latter must be a basic tent of any theory of tax law that pretends to

[14] "Law functions as a kind of transmission belt that picks up structures of mutual recognition that are familiar from face-to-face interactions and transmit these, in an abstract but binding form [i.e. norms], to the anonymous, systematically mediated interactions among strangers".

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stand by the adjective democratic (see §16). To that we can add some other objections. First, that a prescriptivist concept of taxation will not be of much help in distinguishing taxes from robbery. If law and taxes were just a matter of coercion, there would not be much of a difference between the request of payment made by an agent of the Revenue and the threat from a gangster (a classic test in legal theory; see Kelsen 1979, 22). Second, this points to flaws characteristic of all prescriptivist legal theories. They have a major difficulty in explaining how law, which is expected to tame and control force, could have been originated by force alone. After all, why should people accept the founding act of force as something which should rule out force? (De Jasay, 1998, chapter 1). Third, a prescriptivist conception will reduce tax relationships to the bilateral one between the tax authorities and the taxpayer, something which has already been proved to be clearly inadequate.

Those are good reasons to affirm that taxes are not just a matter of coercion. However, it will be plainly wrong to say that coercion has nothing to do with taxation. It is clear beyond any doubt that it plays a relevant role in relation to all legal norms, and to tax norms in particular. But such role is not constitutive but auxiliary. It contributes to the stability of tax law by means of giving a helping hand in overcoming *hopelessness*, or what is the same, the feeling that complying with tax law is pointless because even if I do, many others will not (Lewinsohn-Zamir, 1998). Thus, we can distinguish three main roles of coercion as auxiliary to the stability of the tax system. First, it ensures compliant citizens that recalcitrant taxpayers will be kept to a minimum. By promising to force to pay those who do not comply, it reassures spontaneous law-abiding citizens that the goal of collecting revenue will be achieved in a fair way. Second, it provides additional motivation to comply to those who might not find sufficient force of will in order to bridge the gap between normative judgment and action. That is, coercion minimises the impact of weakness of will, or akrasia. Third, it provides prudential reasons for action to those who would not be moved by any kind of moral consideration to pay their due in taxes.

The characterisation of coercion as auxiliary and not as constitutive of taxation seems at first glance a purely theoretical concern. However,

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opting for one or another characterisation has many practical implications. A prescriptivist conception of taxation underlies the tendency to see the tax administration as a purely coercive apparatus, severed from its role as representative of the interests of all taxpayers. This position favours the acceptance of the different privileges attributed to tax authorities and the consequent curtailment of taxpayers' rights. Similarly, a prescriptivist conception constitutes the theoretical basis from which to argue that any obligation to pay a specific tax only arises after the tax administration acts in a formal way. This goes against the democratic tendency to portray tax law as a law mainly applied to taxpayer, who tax themselves both in the sense of giving themselves tax laws and assessing their own tax liabilities on the basis of such laws (Russo, 1994).

§20. On the basis of the characterisation of taxes which we have just put forward, we can offer a good explanation of why tax law seems so difficult to argue in normative terms about tax law. To put it differently, we can explain the opacity of tax norms towards the background duties that justify them. This is so because taxation and expenditure are connected only at a systemic level. This explains why each concrete or specific tax norm is severed from an specific rationale. This leads to the wrong conclusion that they lack any meaningful rationale. The contrary conclusion is, however, the correct one. We can check the legitimacy of specific tax obligations by reference to the general obligation to pay taxes or with the help of relative (in the sense of comparative) or absolute standards (see §66 and ff). Tax norms, and not the tax system as a whole, might be opaque towards the background duty (the duty of solidarity) which justifies the collection of taxes.

In the next paragraph we will have the chance to consider a further factor which increases the opacity of specific tax obligations, namely the plurality of tasks which are entrusted to the tax system as a whole, and which are discharged selectively through specific tax norms which might look like lacking a coherent purpose.

B) The tasks assigned to the tax system

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§21. The previous sections consisted in a reconstruction of the structure of the obligation to pay taxes in Western tax systems. It was intended as a piece of interpretive theory, "which begins with our actual practices and tries to read these in their best light" (MacCaffery, 1994b, 289)[15].

But a democratic theory of tax law cannot be interpretive all the way down. Remember that we set as our main purpose "to reconnect tax norms with general principles that guarantee the legitimacy of the system as a whole" (see §4). This requires that we put forward a normative argument concerning the tasks that the obligation to pay taxes should be assigned in a democratic polity. As the reader might have already guessed, this is related to the big debate on tax matters, namely the issue whether the tax system should be in charge of financing a very limited set of public goods (as liberists pretend) or whether it should provide enough revenue to redistribute economic resources and be of help in the management of the economy (the claim of liberals).

The present section is structured in three different parts. First, a detailed account of the both the liberist and the liberal conceptions of taxation is provided. It presents the reader with the reasons why they model taxes on market prices (liberists) or prices plus insurance (liberals). Second, the basic normative premises on which the liberist rests its case are challenged. It is argued that its argument is highly unsatisfactory, and that there are good reasons to prefer the liberal conceptualisation of taxation as price plus insurance. Third, the liberist canon of tax justice is scrutinised. The triad of principles of which it is composed (generality, equality and legal security) is found to be far from self-evident. It is further claimed that liberals can offer a different and preferable interpretation of such principles, thus undermining the liberist conception of taxation.

a) The stakes: the liberist and the liberal conception of taxation

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[15] Interpretive theory is closely related to Rawls' move in *Political Liberalism*. See (Rawls, 1993, 8): "We collect such settled convictions as the belief in religious toleration and the rejection of slavery and try to organise the basic ideas and principles implicit in these conceptions into a coherent political conception of justice. These convictions are provisional fixed points that it seems any reasonable conception must account for. We start, then, by looking to the public culture itself as the shared fund of implicitly recognised basic ideas and principles".

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§22. Liberists argue assertively that taxes should be an expedient to collect the revenue needed to finance the most basic public goods. Those are defined in technical terms as the goods characterised by joint and non-excludable consumption. Taxes should not be used for other purposes, like collecting revenue for the provision of other goods. The underlying principle is that of *tax neutrality*, that is that the tax system should interfere "as little as possible with the ordinary decisions that individuals would make in the investment and consumption of their capital and labour" (Epstein 1986, 55).

This conception of taxation is anchored to a theory of the division of labour between public and private order in which the latter is considered to be the basic building block of society. The spontaneous ordering resulting from the interplay of private forces (the self-regulating market) is the best ground on which to build up a social order. This argument is supported on a variety of reasons. Some are prudential, like the statement that a self-regulating market maximises a given standard of individual or social utility (this constitutes the case for the market of classic economics). Others are historical and evolutionary, like the claim that the private order is the outcome of a process of social evolution, and that its norms reflect the cumulative wisdom of a long learning process (Hayek, 1976). Finally, some author ground the primacy of private ordering in normative terms. Their argument goes that the market allows people to co-operate with each other through voluntary exchanges, that is contracts. Because contracting is free (individuals are expected to have other partners with which to make contracts) and not coerced, any contractual exchange constitutes a positive-sum game, in which both parties gain (Friedman, 1962, 13). Although the liberist argument is only complete if we consider the different ways in which it can be supported, it seems to me that both evolutionary and prudential arguments are parasitic on normative ones. For such reason, I will focus in the next paragraphs in such kind of arguments.

These premises explain why liberists assimilate taxes to market prices under non-market conditions. Taxes should be limited to operationalise the basic principle which underlies market prices, namely

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the commutative principle, when it comes the time of paying for goods of joint and non-excludable consumption.

This implies that the shape of the tax system must roughly correspond to the one that will result from the following two operations. First, we select a proxy of demand. This tends to be income measured in monetary terms, either as accretion -that is, what the taxpayer earns in a given period of time- or consumption- how much she spends in a similar period). Second, we determine the tax burden to be supported by each taxpayer by means of determined the fixed proportion of the proxy that should be contributed to the common pool of resources.

The resulting tax system would be up to the task of collecting the revenue needed to finance a limited set of basic public goods. Any further extension would lead, according to liberists, to an infringement of individual rights, because it will coerce individuals into non-desired exchanges (Epstein, 1982; Epstein, 1986).

§23. Liberals counter-argue that taxes should be entrusted a manifold of tasks, and that they should not be limited to collect the revenue needed to provide the most basic public goods.

This premise is the result of endorsing a very different conception of the relationship between public and private orders. For liberals, the public and not the private order is the basic building block of a society, and consequently, of any socio-economic arrangement. Any market transaction, even if based on the free will of each of the parties, presupposes a set of public norms which constitute its normative framework. The legitimacy of private ordering is anchored to the political constitution, which is expected to program the basic structure of the socio-economic order.

On such premises, taxes cannot be a mere alternative to market prices when it is not possible to implement through the latter the commutative principle. Taxes must be a central institution of any political community, playing a key role in the quest for its legitimacy.

This implies that they cannot be distributed by means of sorting out how much the individual has spent in public goods. Their distribution needs to take into account their basic role in purchasing legitimacy for the

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socio-economic arrangement as a whole. For such reason, liberals conceptualise taxation as price plus insurance against certain risks implicit in the endorsement of market socio-economic arrangements, namely economic deprivation, bad luck and being subject to force in economic relationships. This implies that when allocating the tax burden, we cannot rely exclusively on ability to pay in monetary terms, and that the burden cannot be fixed to a proportion of the economic capacity of each taxpayer. Progressivity (in different measures and extents) is justified by reference to the different rationales of the insurance component of taxation.

b) What is wrong with the liberist conception of taxation

§25. The liberist conception of taxation depends on their mapping of the relationships between public and private order. At the very least, we can put forward three reasons why the latter is not to be accepted.

First, the liberist argument can only be upheld if we grant that it is acceptable to isolate the justification of the tasks that should be assigned to the public order from the topic concerning the fairness of the original acquisition of holdings, the rules of transfer of rights and the rules concerning the rectification of illegal transactions. If the liberist is ready to open to question the latter issue, then she will play to some degree into the hands of her liberal critics (to paraphrase Ryan, 1999)[16]. To put it differently, liberist can only defend the legitimacy of spontaneous private order if they convince us that it is appropriate to stop questioning the fairness of the pattern of distribution of economic resources *as it stands*. But if she does not so, we are bound to pose question like the effect that the injustice of the original allocation of rights might have upon the fairness of the present allocation of rights, or the consequences which certain norms for the transfer of rights (inheritance laws) might have on those who have been denied any participation in natural goods or, to give

[16] See Ackerman (1989,11): "We are trying to locate the place of the market within a discursive theory of political justification. We are considering whether market forms of coordination can plausibly allow liberals to deny dialogue the fundamental plane accorded it by the supreme pragmatic imperative. The answer is no so long as the marketeer is prepared to concede that we may appropriately question each others' entitlement to the bargaining chips we bring to the bargaining table"

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just another example, the cumulative effects of bilateral transactions on individual opportunities.

If we accept that we have to take seriously these questions, then a liberal theory which makes provision for redistribution at the constitutional level (that is, at the level at which rules of the economic game are drafted) is not only as procedural as Nozick's *Anarchy, State and Utopia*, but it is much better equipped to deal with the basic normative challenges which we face. That is so because the liberal argument purchases legitimacy for the whole socio-economic arrangements.

Second, the liberist case depends on a narrow definition of what amounts to coercion. Their definition of the latter is based on a sharp differentiation in naturalistic terms between action and omission. Liberists limit coercion to any positive action by some concrete individual which impinges on our liberty. This is said to be supported by common sense: to positively do something and not to do anything cannot be the same.

No matter its intuitive appeal, this argument is flawed. For a theory of action cause cannot be just a matter of positive action. What really matters when deciding whether we are before the cause of something is the pattern of behavioural expectations regarding action *and* omission. We are all familiar with instances in which we find justified our expectation that somebody does something, so that her failure to do so is ascribed causal consequences. The typical example is the crime of omission of help, included in most Penal Codes. That means that the judgment on causation is not only factual but also, and mainly, *normative* (Nino 1989a, 335). That is, the ascription of consequences to a given action or omission is a normative question. If that is so, the clear-cut distinction between action and omission must be considered inadequate. Thus, the second element of the liberist isolation strategy falls down.

Third, individual autonomy is not something pre-given, a sort of natural right that individuals bring with themselves at birth, but a distributive good, something that all of us make possible by a mutual recognition of the autonomy of others. That makes clear that our autonomy is dependent on its recognition by others. My autonomy is rendered possible by the restriction of the autonomy of others. This does not amount to a *communitarian* argument. It merely claims that not only social or

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positive rights, but the more traditional freedom or negative rights come at a price, namely the collective resources needed to defend it[17]. This challenges the liberist argument that grounds private order on the spontaneous interaction of individuals (which come at no cost) and transfer to public order all restrictive features (because it will be costly, and will require being financed through taxes). But the liberist is wrong because any social and economic interaction presupposes mutual recognition by all participants, something which implies a normative order which reflects the mutual restriction of the scope for action of each individual in order to ensure the autonomy of all. That implies a priority of public order (Gerstenberger 1998).

To this objection we can add a second one. Individuals are purposive beings who are concerned not only with the abstract scope of their autonomy, but also with what they can do with it. For this last reason, the liberal argument that we should not only protect the possibility of bargaining and exchanging goods, but also ensure access to a minimum set of economic resources is more appealing than the liberist one.

c) What is wrong with liberist's principles of tax justice

§25. The second limb of the argument against liberists challenges their own discourse on the normative principles of taxation. Liberists define tax justice by reference to three basic principles: generality, equality and legal security. They claim that only their concept of taxation gives them due respect to such principles. However, the liberist argument is open to criticism to the extent that there are different ways of conceptualising the abovementioned principles, some of which might prove to preferable to the liberist ones. Let us move to the substantive aspects of this controversy.

§26 Liberists define the principle of generality of taxation as the one which states that both the facts to which normative prescriptions are applied and the addressees of the norms should be defined in abstract terms

[17] See (Holmes and Sunstein, 1999,22): "Focusing exclusively on the budget is also the simplest way to draw attention to the fundamental dependence of individual freedoms on collective contributions managed by public officials".

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(Buchanan and Congleton, 1998, 56). In their understanding, generality safeguards impartiality. If law is addressed to particular individuals and/or it deals with particular facts, it is likely that the decision will not be impartial and, consequently, it will be unacceptable from the moral point of view. The not so hidden implication of this conception of generality of taxation is the proscription of any form of redistributive taxation, as it will result in the taking away of the property of the few for the benefit of the many[18].

However, it is far from clear whether this conception of generality is sound. Liberists seem to accept that it provides an institutional form to the requirements of impartiality. If that is so, we could wonder whether there are not different ways (other than the liberist) of interpreting the principle of generality so that it would better guarantee the impartiality of taxes. Thus, we could trust the function of guaranteeing impartiality to procedures instead of substantive checks on the content of norms (Günther, 1995, 43).

This will imply asking ourselves which procedures of norm-making better guarantee the enactment of impartial norms, or to put it differently, which procedures of deciding about norms have an in-built tendency to lead to the enactment of impartial norms. Under such light, the liberal argument is weightier: we should prefer procedures that guarantee that different perspectives are duly taken into account, thus contributing to guarantee impartiality. The law which is the outcome of a deliberative procedure is shaped by such regulative ideal, but it is not necessary general in the liberists' formal sense.

Moreover, the liberal conception of generality is to be preferred to the liberist one to the extent that only the former can explain how a phenomenon so central to law as legal adjudication can proceed

[18] Cf. Von Mises (1966, 807): "Taxes are necessary. But the system of discriminatory taxation universally accepted under the misleading name of progressive taxation of income and inheritance is not a mode of taxation. It is rather a mode of disguised expropriation of the successful capitalists and entrepreneurs. Whatever the government's satellites may advance in its favour, it is incompatible with the preservation of the market economy. It can be at best considered a means of bringing about socialism", and Hayek (1960, 314): "Even if progressive taxation does not name the individuals to be taxed at a higher rate, it discriminates by introducing a distinction which aims at shifting the burden from those who determine the rates onto others".

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impartially. To explain why this is so we need to consider two basic premises. First, that legal adjudication is a bounded exercise in practical reason. The judge has to decide in accordance with the legal system as it stands and judicial precedents. But because legal norms cannot contain specific solutions to all concrete cases to which they are applicable (this is due to their aim to be of general application and to the fact that they are drafted in human/natural languages), legal adjudication is a creative activity, even if in a bounded and marginal sense. Second, that the judge is fully placed in a concrete context. He does not only know the parties to the case, but also the likely consequences of deciding one way or another. If that is so, the creative element of legal adjudication is highly disruptive to the liberist. This is a major argument against their conception of generality. This is even more so if one takes into account that liberists tend to argue that judge-made law is the most legitimate source of law (Leoni, 1991, is paradigmatic; but see also Hayek, 1976 and Posner, 1981).

§27. We now move to the second basic liberist principle of taxation, equality. This basically entails that one and the same set of laws should be applicable to all those subject to a given legal system. Liberist equality excludes any kind of differentiated treatment whatsoever.

This principle has been further refined in its application to both taxation and public expenditure by James M. Buchanan and Roger Congleton. On the spending side of the public finance equation, it means that public goods should be available to all citizens under the same conditions[19]. On the income or taxation side, their argument is the following. First, it could be argued that the most intuitive pattern of distribution of taxes which would comply with equality would be a per head (poll) tax (Buchanan and Congleton, 1998, 93). That is so because we have established that all should have equal access to publicly provided goods. However, the fact is that because such goods are provided whether we desire them or not, we cannot discriminate, like in market conditions,

[19] Buchanan and Congleton (1998, 44): "A generally available good or service may be valued differentially by separate persons and for either or both of these reasons. Generality is violated, however, when, as, and if access to the good or service is denied, thereby forestalling any possible evaluation"

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whether all want public goods with the same intensity. Second, and on such a basis, we have to substitute the poll tax for a different kind of tax which reflects better the individual demand of public goods. The argument goes that willingness to consume public goods can be reputed to be proportional to income measured in labour time[20]. This implies that the effective amount to be paid in taxes should be calculated by applying a constant rate to all tax bases (Buchanan and Congleton, 1998, 94). Third, they put forward their concrete institutional solution, which is to collect a flat-rate tax on income.

As it was the case with the principle of generality, the liberist is in trouble once she is forced to recognise that there can be different (and even better) ways of understanding what the principle of equality requires in tax matters.

Liberals start by putting forward a different conception of equality. It can be argued that treating all equally is not a matter of giving to all exactly the same treatment, but giving a treatment suited to the relevant objective circumstances of each individual. Equality will not only allow for differentiated treatment, but will prescribe it when there are relevant objective circumstances to do so (Laporta, 1987).

This alternative conception of equality has immediate consequences for the design of the public finance system. On the public expenditure side, it allows for provision of public goods according to needs (although universality must be preserved for the most basic public goods). On what regards taxation, its consequences are three-folded. First, it goes against the liberist claim that a poll or per head tax can be seen as an intuitively acceptable pattern of taxation. Second, it offers arguments for measuring the economic base on which each taxpayer will be called to contribute to the common pool of resources (the *tax base*) in terms other than monetary ones. Equal tax treatment might require taking into account some objective factors (like personal handicaps, family obligations or source of income) which might affect the economic ability which each individual derives

[20] Buchanan and Congleton (1998, 46): "In the political enterprise, broadly considered, persons may be deemed to be treated in accord with the generality norm when their coerced exactions in payment for sharing do not depart significantly from equality in the labour time required to meet these exactions"

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from her monetary income. Third, it constitutes a good reason for advocating the application of a progressive rate over the tax base in order to calculate the final tax liability, in order to reflect the basic intuition that the economic capacity which an individual can derive from income tends to increase in proportional terms as we go down in the income scale[21]. This argument is placed on a more substantive basis by referring to the three rationales for redistribution, namely insurance covering the risks of economic deprivation, mental and physical handicaps and being subject to force in economic relationships.

The liberal can further claim that she does not only have an alternative but a superior conception to the liberist one. The whole liberist case seems to be based on the contrast between the *intuitive* character of their conception of tax equality (proportionality) and the *controversial* character of the liberal one (progressivity)[22]. The latter is said to be highly arbitrary because there is no rational way of opting for one or another progressive rate structure. However, one could ask what is so appealing about proportionality? The liberist claims that it has the advantage of constraining all to pay taxes at the same rate, so it has an in-built tendency to avoid confiscation through taxation. However, that is not so clear. First, it is far from clear whether it is intuitive that all should pay taxes in the same proportion. It could be argued that people find more intuitive that people pay according to their means, for example. Second, most liberist, including Buchanan and Congleton, assume that the poll tax would be the intuitive tax to be applied if it was not for the fact that people would have a differentiated willingness to consume public goods. However, this betrays that they are assuming the answer before offering an argument for it. That is so because only if we limit the public finance system to the provision of a very limited set of public goods it makes sense to claim that all should

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21 Knight, 1967 makes clear that the soundness of such intuition does not depend on the possibility of making interpersonal comparisons of utility, as some liberists seem to imply (cf. Hayek, 1960, 309). It just presupposes that we can establish an intersubjective currency for measuring economic ability, and that we find a rough correlation between income level and ability derived from it.

22 See Hayek, 1960, 314: "It is the great merit of proportional taxation that it provides a rule which is likely to be agreed upon by those who will pay absolutely more and those who will pay absolutely less and which, once accepted, raises no problem of a separate rule applying only to a minority".

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pay the same because all consume all taxes. Third, all proposals for proportional taxation are combined with the exemption of a certain amount of income, in the name of ensuring that the a given amount of income is exempt from taxation. That is, up to the given level of income, individuals pay at a zero rate. But there is no agreement on which should be the level of exemption. So the fixation of such level is as equally arbitrary as the fixation of the structure of the progressive tax rate. What this betrays is the distrust of liberist towards political argumentation, which they equate with manipulation. On such point, we can refer back to our arguments against Hobbesian practical reason (cf. §10).

§28. We still have to review the third principle that the liberists include in their canonical formulation of tax justice, namely *legal security*. It prescribes that tax norms should be prospective in their operation, that they should constant in time and that they should be formulated in a clear language.

Much of this formulation is to be praised, and it will be so when considering the set of liberal principles of taxation. The difference between liberists and liberals in this matter is not so much a matter of principle, as a matter of the use at which the general principle is put. More specifically, liberists tend to invoke it against tax reform aimed at putting the tax system in line with the liberal understanding of tax equality (if the latter already underlies positive tax law, the principle of legal security is invoked against it and for reform towards the liberist ideal). The liberist argument goes like this. A liberal tax system breaks apart with the idea of formal equal treatment and prescribes taxing individuals differently according to objective criteria. This is undermines legal security, because it disrupts behavioural expectations, it introduces complexity and it renders less clear tax law.

The liberist understanding of the principle of legal security can be challenged on several grounds. First, the liberist offers a mechanicist view of legal security. It might be better to interpret it as commanding not the formal achievement of simplicity, but the substantive transparency of the legal system. It could be argued that legal security is not just a matter of knowing which norms are applicable to our course of action. For a

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democratic citizen, who is both the subject and the author of the law, the interest extends not only to knowing what the norm prescribes, but also to understand its underlying reasons, to *make sense of it* (something which is highly valuable when participating in deliberation and decision-making on the norms themselves). This, in its turn, facilitates the self-assessment of tax liabilities by citizens, which must be the standard way of implementation of the tax system in a democracy. Second, the value of legal security must be related to a substantive conception of personal autonomy, thus extending its breadth and scope and balancing its concrete prescriptions in order to take account not only of the bounded need to know tax norms in advance, but also to ensure the preconditions of meaningful citizenship.

d) The positive case for redistribution

§29. The last part of the present argument (which tasks should be assigned to a democratic tax system?) consists of a set of arguments for assigning the tax system the tasks of ensuring a certain level of redistribution of economic resources among the members of the political community and for considering the tax system as one of the pulls and levers to which the community can resort in order to manage the economy[23].

However, there are several reasons which render advisable focusing exclusively on the first question. Two of them seem sufficient to justify limiting our research in such a way. First, there is a community of purpose between the two tasks. To the extent that in both cases we need to justify a conscious intervention upon the distributional outcomes of market ordering, we would need to put forward similar arguments. After all, the basic intuition is the same: that we can improve upon spontaneous order as a socio-economic arrangement. Second, the need to keep within manageable bounds the present research.

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[23] For the idea of macro-economic management of the economy, cf. Musgrave (1959, 22ff), where he introduces the "stabilisation branch" of the economy. He develops the Keynesian insight that "a free economy, if uncontrolled, tends towards fluctuations in prices and employment; and apart from relatively short-term swings, maladjustment of a secular sort may lead to unemployment or inflation".

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Having said that, it is acknowledged that there are tensions between the achievement of overall fairness in the design and implementation of the tax system and its use as a tool for the management of the economy. Striving to accomplish one of these tasks might be counterproductive for the other. To ease these tensions, a democratic theory of tax law would do well to look for inspiration in the work of authors like Henry Simons. His proposal to manage the economy with the help of changes in tax rates but not on tax bases could be regarded as a precious insight on the road to a workable solution (Simons, 1946).

§30. At any rate, the justification of assigning to the tax system the task of ensuring a certain level of redistribution of economic resources among the members of the political community is built around the conception of taxes as *price plus insurance*. This means that there are different rationales for taxing, reflected in the binomial character of the conceptualisation. Moreover, it is further argued that under the general title of redistribution, we can differentiate some more specific tasks that the tax system is called to discharge. Those are insurance against economic deprivation, against brute bad luck and against being subject to force in economic relationships.

The train of reasoning departs from the characterisation of the obligation to pay taxes as grounded on two kinds of relationships (cf. §17). Taxes do not only imply a vertical relationship between tax authorities and individual taxpayers, but they are the product of the horizontal relationships of mutual obligation which exist among all members of a given political community.

If that is so, it is not difficult to realise why we should conceptualise taxes as a peculiar kind of insurance. That is so because any insurance relationship, even the one underlying private insurance contracts, has a similar structure[24]. The main peculiarities of the insurance rendered possible through taxation is that it is public. Thus, the institutions that

[24] To the obvious vertical relationship between the insured individual and the company providing insurance services we have to add a horizontal one between all those who subscribe the same kind of insurance policy. Because insurance is based on the

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organise the sharing of risks are public in the sense that they are not moved by the will to make a profit, but by the goal of achieving the most efficient institutionalisation of the obligation. Moreover, the decision concerning the constituency of risk sharers and the risks to be shared are political and are not left to private willingness to contract.

§31. Before dealing in some detail with each of these three rationales, it is important to add a *de minimis* argument for the inclusion of some progressive taxes in the tax mix, which should be accepted even by liberists.

Let us assume for the sake of the argument that the tax system as a whole should be neutral towards the pattern of distribution of economic resources resulting from the interplay of market forces. Even in that case, the tax system should include some progressive taxes. That would be so to the extent that it included other taxes which were regressive. That is the case with ordinary consumption taxes, and in general with all *real* taxes, that is, those which in which the personal circumstances of the taxpayer are not taken into account in the determination of the tax burden. So progressive taxes would be needed to compensate such kind of taxes, because in any other case the overall goal of tax neutrality could not be achieved.

This argument can be found in authors like Seligman, who distrusted other rationales for progressive taxation (Seligman, 1909).

It must be said that the present argument is very relevant as a guide to constitutional adjudication. The constitutional mandate of progressivity of the tax system (contained in the Italian and the Spanish Constitution, among others) could be interpreted as precluding any tax reform which could be proved to lead to a regressive pattern of taxation[25].

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laws of big numbers, we can see the private company as the provider of a given service, consisting in the organisation of the putting in common of risks among all those insured.

[25] This argument could be criticised on account of its *abstract* character. It is true that the weakening of active income policies has rendered enormously complex the phenomenon of economic inequality in Western societies, and it also true that the attempt to achieve manifold goals through the tax system has made things even more complex. However, it seems to me that it is still correct to analyse the distributional impact of taxes by reference to the income level of each taxpayer.

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§32. Let us focus on the three rationales for defending a certain degree of redistribution of economic resources among the members of the political community and on the implications that each of them has for the tax system.

The first rationale for redistribution is freeing members of the political community from economic deprivation. This requires ensuring that everybody has access to a minimum set of economic resources, more precisely those which will keep her as a full citizen. The rationale is closely related to the idea of a socially guaranteed minimum income (and related concepts like citizenship income or demo-grants).

Insurance against economic deprivation can be defended on different grounds. Two are the most frequent ones. On the one hand, it could be based on an appeal to the dignity of human beings. In such a case, we have resort to a substantive conception of individual rights. More specifically, we would put forward the argument that in order to be of value, autonomy needs to imply not only a certain scope for action, but also access to a minimum set of material resources. On the other hand, we could defend this rationale on the basis that it is necessary to ensure that the distribution of power and resources does not affect the chances of each individual contributing at any stage of deliberation and decision-making on common action norms. It goes without saying that this rationale presupposes that we accept that deliberative democracy is the standard of legitimation of common action-norms.

The implications of insurance against deprivation for the structure of the tax system are basically two. First, income below the socially defined minimum should be exempt from taxation. This requires not only abstaining from burdening such income with personal taxes, but also imagining mechanism for restituting those falling beyond the minimum income the amounts pay on account of all kinds of taxes (like sales taxes). Second, that the whole structure of the tax system be such that it collects enough revenue to finance the provision of basic goods and the transfer of

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economic resources to individuals falling beyond the minimum income so that they reach it[26].

Before moving to the next rationale, it must be said that insurance against economic deprivation requires the tax system to be mildly progressive. The concrete intensity of the mandated progressivity would depend on the inequality of access to economic resources within the given society. At any rate, it could be said that if this would be the only rationale for insurance, one could not find much to object to a liberist program, to the extent that it included a demo-grant and exemption from taxes for individuals whose income falls behind a given amount (Buchanan and Congleton, 1998).

§33. The second rationale for redistribution is insurance against brute bad luck. The latter refers both to concept of handicaps which can be blamed on inheritance or unforeseen events beyond the control of the individual.

The whole argument for this second rationale presupposes that access to economic resources should not be affected by factors which are arbitrary from a moral point of view (Rawls, 1971, 72). That is, our lot should not be determined by causes which cannot be blamed on us. But let us analyse this argument in some more detail.

A good deal of differences in the development of basic abilities and skills can be traced back to the random distribution of natural primary goods (the talents with which we are endowed). In turn, this has a distinct impact on the lot of primary goods (according to Rawls, 1971, 62, the things that every rational human being is presupposed to want) is allocated by market forces. However, we should consider that a basic problem with translating this institution into some concrete norm is that it is extremely difficult to determine whether and to which extent a given distributive pattern is determined by luck or by individual effort. The fuzzy character of the distinction implies that if we extend the practical consequences of the intuition too far, we might end up nullifying the scope for individual

[26] The transfer itself could be implemented through the tax system itself, for example by completing mechanisms like the Earned Income Tax Credit of US legislation.

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responsibility for one's own actions, which must be one of the other basis of distributive justice (Dworkin, 1981, 311; Nagel 1997b, 313).

It is for such reason that we should distinguish two different questions under this heading. First, we could affirm that physical and mental handicaps are a matter of brute bad luck. Only in a few marginal cases they can be seen as the outcome of personal choice (for example, that could be argued if they are result of the practice of certain kind of sports or from a negligent behaviour of the accident, such as driving under the effects of alcohol). On such a basis, there are very good normative reasons for transferring resources to those suffering such handicaps, so that we mitigate the effects that they have upon their lives.

Second, we have reasons to be sceptical on what concerns redistribution to compensate the random distribution of natural talents. In spite of Rawls' argument that distributional inequalities which can be traced back to the natural lottery of talents are only justified if they result in an improvement of the worse-off, it has already been argued that separating the wheat (inequalities which can be really blamed on genetic lottery) from the chaff (inequalities which must be blamed on individual decisions) is extremely difficult. For such a reason, we could abstain from supporting redistribution on such a basis, and limit the role of genetic lottery to reinforce the case for insurance against being subject to force in economic relationships (Dworkin 1981, 314).

§34. The third and last rationale for redistribution is insurance against being subject to force in economic relationships. The basic intuition is that any social system, and more specifically its socio-economic arrangements, need to be acceptable to all those who are affected by it.

We could ask ourselves if this is not already achieved by insuring people against economic deprivation by ensuring them access to a minimum set of resources. The answer must be that the two questions are different. The first rationale for redistribution is blind to the reasons why a certain person falls behind the minimum income line. This might be due to a lack of endowments, to bad luck or just to wrong choices. Either on a normative or prudential basis, we consider that all should be lifted above deprivation, so that they can continue to be full citizens. Our choices

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should determine our lot except in the case in which they lead us to extreme poverty. Insurance against deprivation is a safeguard of last resort, that is complied with a very minimum set of resources. The present rationale is interested in ensuring that all have a stake in social cooperation, that all can be convinced that they benefit from the socio-economic arrangements in place. It requires that all have access to a minimum set of opportunities, that all can profit from natural goods and from the economic surplus that is left by previous generations. The basic intuition at work is that all should be given the opportunity to decide their chances without being determined by economic force and that by doing that possible, the tax system purchases legitimacy for the socio-economic arrangements as a whole. This corresponds to the basic insight which underlies Rawls' difference principle (Rawls, 1971, 60)[27] , but it is probably better articulated in Dworkin's argument for progressive income taxation as insurance (Dworkin, 1981, 312ff), MacCaffery's case for progressive consumption taxation (MacCaffery, 1994a; MacCaffery, 1994b) or Ackerman and Alstott's plea for a one-shot payment to all citizens (Ackerman and Alstott, 1999). A main difference with the first rationale is that it must be sensitive to individual choices, so that it does not ensure against our own decisions.

This rationale calls for a more intense redistribution than the previous two. The more unequal a given society, the more strong the pattern of redistribution should be. Indicators like the Gini coefficient, however imperfect they might be, could be seen as an adequate guide in determining the concrete intensity of redistribution which is required.

§35. Before moving to the next section of this essay, it needs to be said that the mere fact that redistribution is based on three different rationales, each of which calls for a different intensity in the transfer of economic resources, adds a further reason to the residual opacity of the tax system. The different and sometimes even conflicting logic of each rationale

27 "Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be at everyone's advantage, and (b) attached to positions and offices open to all"

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renders difficult to guess the specific goal which is pursued through a concrete tax norm.

C) An argument for the legitimacy of the obligation to pay taxes

§36. The previous steps in company of the reasonable citizen have allowed us to offer her an account of the structure of the obligation to pay taxes and of the tasks that it is entrusted by a democratic legal system. But our reasonable citizen is perfectly entitled to ask once again *Why should I pay my taxes?* At this point we realise that not only tax theory has been poor in analysing its object, but that it has not been generous in providing reasons why people should comply with their tax obligations. Figuring out why this question was not considered as relevant could be a research subject of its own, but it might suffice to point the following two ideas. First, that within the *formal paradigm* of tax law, justification was referred to the allegedly *natural economic laws*. Taxation was an appendix of free markets, in trust of collecting revenue with which to finance a limited range of public goods. Second, that within the material paradigm of tax law, the question was nullified by the grounding of the obligation in the state's sovereignty, a black box in which it was possible to include all questions for which there was not a satisfactory theoretical answer. To this we can add the general positivist climate. This was quite inimical to all research questions of a normative character. It was only with the publication of Rawls' major work, *The Theory of Justice*, that the pendulum swung back to normative research.

The turn that my argument takes at this point is the following. First, to revisit some arguments that have been made by public finance or tax law scholars. The idea is to have a fresh look upon some ideas that have been put forward in contexts very different from the one characteristic of the present research, but which might provide part of the answer we will for if placed within our agenda of research. More specifically, I will reconsider Wickell's theory of procedural legitimation of tax law, the causal doctrine of taxation, that at its best linked legitimacy with the substantive content of tax norms, and finally, the *taxing process* theories, that were concerned about the legitimacy credit to be gained from ensuring that the process of

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implementation of tax norms was surrounded by a series of guarantees. Second, to recombine the insights provided by such theories with the help of the structure of the justification of the general obligation to obey the law. That is, keeping in mind the insights provided by these theories, I will try to reconstruct the legitimacy puzzle and to make a case for the general obligation to obey the law. Third, to adapt such argument to the more specific case of the general obligation to pay taxes. At such point, I will move to the next section, in which this general argument will be kept in mind when dealing with the jurisprudence of the Spanish Constitutional Court on tax matters, a source of empirical evidence concerning the obligation.

a) Some incomplete theories of the legitimacy of taxes

§37. Knut Wicksell departed from the basic insight that the simplistic reduction of democracy to majority rule tended to result in tax exploitation of minorities. This moved him to elaborate a procedural theory of legitimacy of taxation, which is structured around three basic elements. First, decisions concerning taxation and public expenditure should be taken simultaneously, or what is the same, any spending decision should come hand in hand with the corresponding tax measure which would provide the revenue needed to finance such expenditure (Wicksell, 1958, 94). Second, all such decisions should be adopted by approximate unanimity (Wicksell, 1958, 92). Third, formal equality in the patterns of distribution of taxation can be transcended if an agreement is reached. This implies the possibility of rewarding minorities by means of approving public expenditure that will come at a reduced or zero cost for them (Wicksell, 1958, 89 and 94). This was seen as a way to expand public intervention beyond the tight limits set by the formal paradigm of tax law.

From the standpoint of a democratic theory of tax law, the argument is not completely satisfactory. The criticism of simple majoritarianism is not supplemented by an emphasis on deliberation or the exchange of reasons and arguments before effective decision-making. In this sense, it is only an incomplete move in the right direction. This, in its turn, is not unrelated to his deep moral scepticism, which leads him to consider

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participation as the exclusive potential source of legitimacy (disregarding substantive correctness and guaranteed implementation as alternative sources of legitimacy). However, Wicksell's argument furnishes us quite interesting insights. Even if partial, his departure from simple majoritarianism points to the need of overcoming exclusive reliance on majoritarian and representative democracy. Moreover, his strategy for overcoming tight limits to public expenditure by means of a bargained pattern of taxation suggests the need for substantive criteria governing tax distribution.

§38. The *causal doctrine of taxation* applied the civilian concept of cause (taken from private law, and quite close to its common-law counterpart of consideration) to tax relationships. Their main advocates were Oreste Raneletti and Benvenuto Grizziotti. Their main concern was to set limits to the *power to tax*. They aimed at a concrete determination of when there was and there was not an obligation to pay taxes (Grizziotti, 1951, 301).

These authors distinguished, following private lawyers, two different concepts of cause. First, they argued that the *ultimate cause* of taxation was the provision of public goods and services by the state. From such a premise, it was derived that taxes were justified if there was a systemic equivalence between revenue collected and public expenditure effectively realised. But because no strict implication was derived at an individual or taxpayer level, the only thing that could be claimed on such a basis was that taxes should be used to finance public expenditure and not for any private purpose (Raneletti, 1974, 798). Second, they claimed that the *immediate cause* of taxation was the economic capacity of the taxpayer (Raneletti, 1974, 798; Grizziotti, 1929, 177; Pugliese, 1937, 100; see also De Marco de Viti, 1928 and Berliri, 1945). This seemed a more promising concept for deriving operational limits to the power to tax of the state *vis à vis* each taxpayer. However, these authors left the concept of economic capacity as an abstract one, and they did not provide an adequate operationalisation of its legal consequences.

As a result, the move did not bring about much in the form of criteria for determining the fairness of concrete taxes. Moreover, its exclusive concern for the *substantive* component of legitimacy left it

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without arguments to prefer democratic deliberation and decision-making on taxes. It is not infrequent to read references to the sovereignty of the state as precluding further research, occasionally accompanied of theories of *virtual* representation or even of the reference to elites as arbitrators able to overcome the short-sightness of ordinary citizens.

However, the basic legacy of this theory is the concept of economic capacity as a possible criterion of legitimacy of taxation, and the more basic insight that the fairness of the content of tax norms might contribute to the case for the legitimacy

§39. Next, we have to consider theories that anchor legitimacy to the process through which taxes are implemented. In such respect, we have to consider first those authors who articulated their conception of taxation around the application to their subject matter of the principle of separation of powers in tax matters. They made clear that one should distinguish between the power to create tax norms and the power to implement tax norms (Hensel, 1956, 5; Nawiasky, 1982, 29). By doing so, they pretended to avoid the most obvious authoritarian consequences of founding the obligation to pay taxes on sovereignty. This was done by means of the confinement of sovereign power to the drafting of legal tax norms and subjecting the activity of the tax administration to the full force of the law, giving rise to a wide array of individual rights) and to make room for full-blooded rights next to tax obligations.

Such move broke ground in the same direction as Wickell's procedural theory, but its advocates failed to realise two of its shortcomings. First, that they did not get rid of sovereignty as the foundation of the obligation to pay taxes, but they only limited its potential negative effect. Even if this can be seen as an strategy to subject tax authorities fully to the rule of law, it does not curtail at all the discretionality of the legislator to select tax events and tax rates. In the absence of a convincing theory of procedural legitimacy, the threat posed by sovereignty as the grounding of taxation is not dissolved, but only kick one step upwards in the argumentative chain.

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§40. The same basic intuition underlies the so called *taxing-process theories*. Their advocates have stressed the importance of the implementation process for the tax system. They have pointed to the potential source of legitimacy to be found in the guarantees which surround such process.

The main risk posed by taxing-process theories is that their focus stresses considerably the bilateral aspects of the tax relationship, so that they run the risk of marginalising the horizontal relationships which confer legitimacy and obligatory character to taxes. To this we have to add that when they are combined with a functional approach, they might end up offering a new rationale for traditional privileges of the tax administration, some of which might not be easily justified by reference to the just mentioned horizontal relationships that are presupposed by any specific legal obligation.

However, it is clear that they can be considered as a useful reminder of the importance of the different procedures of implementation of tax norms. Taxing process theories provide an anti-formalistic standpoint from which to realise their importance, and consequently, that of tax authorities themselves. To this we can add that its advocates have tended to stress the importance of the purposes for which the tax system is programmed. This is reflected, for example, in their insistence on the exchangeability of different tax procedures in order to achieve a certain purpose.

b) The structure of the General Obligation to Obey the Law

§41. These different approaches offer precious insights with which to make a case for the legitimacy of the general obligation to pay taxes, but they are not sufficient in themselves to forge a coherent argument. It is for such reason that get some additional inspiration in order to make a full case for the obligation to pay taxes. It seems to me that in order to do so, the best thing to do is to have a close look at the structure of the argument for a general obligation to obey the law. That is so because, at the end of the day, all tax norms are legal norms, and consequently, we can say that the general obligation to pay taxes constitutes a specific instance of the general obligation to obey the law.

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A Functional Understanding of the General Obligation to Obey the law

§42. The first thing that we should do is to clarify why we are trying to determine whether there is a general obligation to obey the law or not. This implies three basic questions, namely 1) considering the function of the general obligation within practical reason; 2) stressing that it is to be understood as a moral, not a legal obligation; 3) defining in what sense it is a general *but* defeasible obligation.

The general obligation to obey the law is to be understood as an ancillary instrument of practical reason. More specifically, it allows us to avoid going through the same steps of reasoning each and every time that we come across what looks to us as an unjust norm belonging to a legal system considered, as a whole, to be just (Rawls, 1964, 7). The general obligation to obey the law structures our reasoning in such circumstances in two steps. First, we analyse whether there is or there is not a general obligation to obey the law. Second, we confront the concrete value and obligatory character of the specific norm taking into account the value we attribute to the existence of a legal system as such. This understanding of the obligation characterises it as a practical device in order to improve our practical reasoning. From the collective standpoint, it enhances the smooth performance of its functions by the law (i.e. its role as the complement of morality in discharging the tasks of conflict-solving and social co-ordination). It is necessary to add that the question whether there is a general obligation to obey the law is the same as whether authority (exercised through the grammar of law) is legitimate. The main difference is that of the standpoint from which we formulate the question. Namely, that of the individual itself (on what concerns the general obligation to obey the law) or that of the legal system as a whole (regarding the determination of the legitimacy of authority) (against, Copp, 1999:10ff).

The general obligation to obey the law is a moral not a legal obligation (Gans, 1992, 5). On the one hand, the question whether there is a legal obligation to obey the law is highly tautological. All legal systems implicitly or explicitly claim that the addressees of its norms should comply with them. On the other hand, and more to the point, law is not a

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source of ultimate reasons for action. Only moral reasons can be such (Nino, 1993, 811). This implies that there is no need to define the question in the terms that law itself might put it. As it was argued when describing the general assumptions of post-positivism, all legal systems make a claim to correctness, which can be specified into three basic sub-claims. First, they make a claim to normativeness, or what is the same, they pretend to be taken as a system for guiding action and not only as a system of knowledge. Second, they rise a claim to reasonableness, or what is the same, they pretend to take into account all reasons relevant to the specific context of action. Third, they put forward a claim to peremptoriness, or what is the same, they require their addresses to guide their action exclusively on the basis of what is legally prescribed as a reason for action (Ródenas, 1996, ??). This last element has created lots of problems to those trying to argue for a general obligation to obey the law, as we will see in some paragraphs. By means of making clear from the outset that the obligation is a legal, not a moral one, we can find a good reason to pay more attention to the function we assign to the obligation within our practical reason than to the way in which the legal system itself characterises it (Soper, 1986).

The obligation must be seen as a general one. This is so for two main reasons. First, law makes sense only as a system and not as a heterogeneous amalgam of norms. Only by means of having a look at the whole set of norms structured as a system we can fully grasp the functions they discharge and the values they further. Law is not a seamless web, but we cannot understand it if we do not frame norms within a system (Kelsen, 1945, 3; Bengoetxea, 1994). Second, we need to structure our reasoning with the help of generic duties. Our moral powers are limited, and for that reason we need to exercise them with this help.

Finally, the obligation must be seen as defeasible. This constitutes the most controversial part of the argument, to the extent that it determines the way in which we conceptualise the relationship between the general obligation to obey the law and other obligations.

There are good arguments not to characterise it either as a prima facie or as an absolute reason. On the one hand, It can't merely be a *prima facie* reason. The general obligation must go beyond the mere gatekeeping

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of the moral agenda if we want it successfully to save us from repeated reasoning and if we want it to enhance the smooth discharge of conflict-solving and social coordination through law. On the other hand, it can't be an absolute reason, because in such a case it would cease being an auxiliary of practical reason and become an alternative to it.

The concept of exclusionary reason, as developed by Raz (Raz, 1975; Raz, 1986), fits better in the functional description of the general obligation to obey the law. Raz's argument can be structured in three basic steps. First, the case for the obligation includes reasons beyond the specific content of legal norms related to the systemic functions performed by law and not the specific moral value of concrete norms (i.e., it must be as a *secondary reason*). Second, the affirmation of a general obligation to obey the law implies a framework of decision which excludes the weighing and balancing of the relevant reasons to each concrete circumstance. Third, if one of the exceptional kinds of reason is applicable to the case at hand, the general obligation to obey the law ceases to be applicable.

This promising concept has been further refined by Chaïm Gans (Gans, 1986). He shares with Raz the view that the general obligation to obey the law must be seen as a secondary reason, that is, as a reason that refers to the value of having rules independently from the content of such norms. A main difference between the two authors is that Gans puts forward a conception of the obligation to obey which allows for its inclusion in the usual weighing and balancing of reasons. He argues convincingly that we cannot have a complete list of all the reasons that might defeat the general obligation to obey the law. If that is so, it is preferable that we conceptualise the obligation as a two-pronged test. First, we would periodically consider whether there is a general obligation to obey the law. Second, we will consider in a concrete context whether there is an obligation to obey a concrete norm. The outcome would be considerably determined by the answer to the first question, but even in the case of an affirmative answer, the individual would have to eventually weight the value of such obligation against other relevant reasons that might point in an opposite direction. Gain's argument is convincing if we endorse a functional understanding of the general obligation to obey the law.

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Some Theories for and against the general obligation to obey the law

§43. Philosophical anarchism can be seen as an outgrowth of the assumption of a strong conception of individual autonomy (understood as the capacity to give oneself rules in practical matters), something characteristic of any kind of critical morality. It is for such reason that law is suspect. It seems to rule out individual autonomy; law pretends that we comply with its norms independently of what our judgment may be (whether we like it or not). Law claims that in order to achieve its basic goals, it should prevent individuals from acting on the basis of reasons falling outside its domain. Put in such terms, we can come to the conclusion that either we are autonomous or we obey the law (Wolff, 1976:18). Thus, accepting the existence of a general obligation to obey the law is tantamount to throwing away our moral powers. This is justified either in theoretical terms or inductively by disregarding the existence of any acceptable foundation for the obligation to obey the law (Simmons, 1979).

However, there are at least three main weak points in the argument of the philosophical anarchist. First, they assume a flawed conception of autonomy. For the philosophical anarchist, autonomy is of a piece. She does not differentiate between the exercise of autonomy in questions like the conception of the good life and the working out of reasonable norms for conflict-solving and achieving social co-ordination. But we should differentiate (Habermas, 1995, 15; Habermas, 1996a, 121). Moreover, their concept of autonomy is simply untenable, because it could be invoked against any procedure to decide on common-action norms. Because a strong concept of autonomy will reject that we can bind ourselves for the future, it will make necessary agreeing each and every time that we need to achieve co-ordination. It is for such reason that it is more convincing to differentiate private from public autonomy, and to define the latter as sharing the authorship of such rules, or what is the same, as participation in terms of equality and symmetry in the processes of deliberation and decision-making that lead to the enactment of the rules, plus taking seriously the character of the issues at stake (Christiano, 1996). Second,

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they rely on an extremist understanding of what is implicit in the general obligation to obey the law. What the law requires from us is not to relinquish our moral judgment, but merely the modest adaptation of our external behaviour to legal norms. Moreover, it does not need to be an absolute one, for the reasons put forward before. Third, their argument is associated with a prescriptivist conception of law. We need to realise two things. On the one hand, some of the functions played by law (like the coordination of action in order to achieve complex social goals) will be needed even in a brave new world from which coercion would be completely absent. On the other hand, sanctions are mainly addressed to the co-operative citizen, to ensure that her readiness to comply with the law will meet similar compliance by other citizens (that is, the threat of coercion mainly helps avoiding hopelessness, not free-riding) (Rawls, 1971, 267-8; Lewinsohn-Zamir, 1998).

Even if flawed, philosophical anarchism provides some insights that should be retained. First, they call our attention to the irreducible individual character of morality. Second, they make clear that law and morality cannot be reduced to each other (something congenial to the characterisation of the relationship between the two according to post-positivism). Third, their arguments make clear that an absolute or exception-less obligation to obey the law can't be justified.

§44. We have already dealt with communitarianism as a general normative theory. The general standing of communitarianism was considered and discussed when analysing different objections to the project of laying the basis of a democratic theory of tax law (cf. §9). However, it is necessary to offer a brief description of how such general arguments are applied to the specific question of the obligation to obey the law.

For communitarians, the essence of politics itself implies that there is an obligation to obey the law. Political membership is not a voluntary. It is more properly described as a constitutive relationship, akin to familiar ties. Because membership and role taking are essential on the definition of our identity, we should regard the ensuing obligations as also partially

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defining our identity. *Denying the obligation to obey the law is tantamount to denying ourselves.*

We are ready to raise several objections to this understanding of political obligations and specifically of the obligation to obey the law. First, we have already dealt at large with the flaws implicit in the communitarian conception (cf. §9). Second, the characterisation of political obligations as akin to kinship relationships proves essential in coming to the conclusion that there is always an obligation to obey the law. The way in which this conclusion is arrived at is clear, but it is not sot why we should affirm the premise. Why should we see political relationships as another kind of kinship relations?. Third, the insight that political interaction is a matter of role-taking may be accepted, and even considered as illuminating, but it is far from clear why we should argue from it that the content of each role is something that is defined in advance and cannot be subject to critical review and transformation by individuals (Simmons, 1996).

A positive Argument for the General Obligation to Obey the Law

§45. The positive argument for the general obligation to obey the law is two-folded. First, I put forward to basic insights that set limits to what is to be justified. Second, I argue the case for the obligation to obey the law as a complex theory of legitimacy. That builds on insights provided by several theories (like philosophical anarchism or the associative theory of political obligation) but proceeds to articulate a complex theory of political obligation.

§46. The first limb of a positive case for the general obligation to obey the law is constituted by two arguments that limit the scope of what is to be justified. As indicated, they do not furnish us with a complete argument for the justification of the obligation to obey the law, but they limit the breadth of the justificatory argument by means of giving an account of the setting in which political questions emerge and of the choice of the form of law as the medium to deal with them. It is claimed that (1) politics is not something voluntary, and consequently it is not open to our will to choose

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whether or not write our common action-norms following the grammar of law; (2) the concept of autonomy in public affairs needs to be distinguished from the concept of autonomy in private matters. This implies that we need to justify the content of legal norms, but not the fact that we solve conflicts and achieve co-ordination through legal norms. The *substance* and not the *form* of law is what is to be justified. Similarly, the fact that political autonomy is something substantially different from private autonomy implies that we cannot face the problem of the obligation to obey the law as if it were a matter of giving moral norms to oneself. When dealing with such questions, we need to take into account that we need law as a complement of morality, and that such need must change the way in which we assess its legitimacy.

§47. We are not free to decide whether we enter or not the realm of politics. We are not free to decide whether we do or do not want to have action-norms in common with others. That is so because *once we have a web of common interests with others, we should not retreat from politics* (Dewey, 1984). If it was possible to withdraw society and inhabit our own particular Waldens, we will be free to enter or not into political relations with others. But once such option is simply not available, we are bound to share a political sphere with others. Repeated interaction will make clear that conflicts and failures in mutually beneficial co-operation are unavoidable unless we adopt common action-norms. This implies that it is not the option for common action-norms that needs to be justified, because that is simply something unavoidable. What has a normative relevance is the way in which such norms are decided and implemented and what is their content .

The fact that the decision to deal with certain matters in a political way and that the set of matters which should be dealt with in this way are not open to our choice in a normative relevant way has some implications. The most relevant one is that it would be self-contradictory to conceptualise autonomy as a matter of unrestrained self-legislation. We need to draw a line between *public* and *private* autonomy. The former is to be conceptualised as participation in the collective process of deliberation and decision-making (Habermas, 1995, 15).

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A further remark. Saying that we cannot simply withdraw from politics, or that entering into political relationships with others is not something that we can choose or reject is not the same as prescribing active political participation in representative institutions or affirming that political action constitutes a superior form of life. Similarly, it does not preclude the question of legitimacy from arising. It only limits the object in need of justification. In other words, the fact that we cannot opt out politics does not mean that we have to accept and comply with whatsoever common action norms.

§48. We are already familiar with the difficulties derived from structuring political interaction with exclusive resort to moral norms. Law is *the* basic institution which helps overcoming such problems (cf. §6). This allows us to claim that the form of law is unavoidable. That does not imply that any legal norm must be obeyed, but only that the question whether there is a general obligation to obey the law must be attentive to the conditions limiting general practical reasoning that law imposes in order to fulfil the basic tasks assigned to it *and* the ways in which the legal system evolves in time.

This can be further explained with the help of two claims. First, that drafting common action-norms with the help of the grammar of law implies delimiting a domain within general practical reasoning to which several limiting conditions apply. Conclusiveness, for example, comes at a price. This must be taken into account when assessing the degree of legitimacy of the legal system. It is necessary to interpret law's claim to correctness as taking into account this limiting conditions (Cf. fn. 7). Second, the legitimacy of any present legal system is something that must be decided taking into account in a relevant manner the extent to which it has been a means for increasing its own normative legitimacy, and to which it continues to be so. To put it in different terms, to what extent it constitutes a means for improving the normative quality of common action norms (Rawls, 1964, 15; Nino, 1990).

These two conditions set limits to what is to be justified. They can be seen a clarifying preface to a full theory of the justification of the

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obligation to obey the law. However, it should be obvious that the legal form can be instrumentalised in ways that render it illegitimate. The sheer possibility of this happening justifies the need to consider a positive argument for the obligation to obey the law. Even if we acknowledge that politics is unavoidable, and that we need the grammar of law in order to write common action norms, legal norms are still in need of justification. Overcoming the uncertainty characteristic of moral argumentation requires moving away from moral deliberation, thus making law independent from fully rational unanimity among all those involved. It is not difficult to understand how addressees of the law might perceive it as an authoritative and coercive social order.

Different sources of legitimacy: Participation, Substantive Correctness and Guaranteed Implementation

§49. If we want to argue for the existence of a general obligation to obey the law, the addressees of the law need to be offered reasons to see themselves not only as subjects but also as authors of the law.

We need to learn from the failure of philosophical anarchist and communitarianism (in the guise of *associative theories of political obligation*) that such an argument needs to consider to the two sides of autonomy. On the one hand, it is necessary that autonomy is based on the idea of giving a fair chance to individuals to present their own arguments and account of their interests to others within the process of common will-formation and to have a chance to influence the process itself. This is associated in the following argument with *deliberative democracy*, a form of democracy that organises both deliberation and decision-making according to the principles of equality and symmetry. It gets reflected in the first pillar of legitimacy, or legitimacy through participation. On the other hand, it is necessary to supplement this with arguments that render clear that *deliberative democracy* has a propensity to achieve correct outcomes, according to procedure-independent standards. Legitimacy can only be achieved if deliberation and decision-making takes place within institutions that have an epistemic privilege, or that have a tendency to get the correct solution in political terms. Only in that way we can satisfy the

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individual interest in opting for a system of common action-norms that tends to get at the correct result. This is related to the second pillar of legitimacy, or legitimacy through substantive correctness. A dualist model of democracy, which distinguishes between constitutional standards and ordinary legal norms, ensures such substantive correctness by means of establishing a series of principles which restrain the scope of possible common action norms to be elaborated at the legislative level (Ackerman, 1984b). Such principles contribute to the legitimacy of positive law by means of ensuring a minimal degree of substantive correctness to such norms. Once we realise that there are several reasons why the legitimacy gap reappears at the level of application of norms, we will understand that a third pillar, that of legitimacy through guaranteed implementation, needs to be added to the previous two.

§50. The basic intuition of all contractarian political theories is that consent to a given legal norm bridges the gap between the heteronomy of the norm (whose formulation would have been the same even if the individual to which is now applied had opposed to it) and autonomy as a regulative ideal.

The democratic theory of law proceeds to cash consent for participation in deliberation and decision-making about legal norms in terms of equality and symmetry. This is said to be a valid transformation to the extent that three conditions are met. First, that the individual is given an equal right to participate in deliberation and decision-making. Second, that the democratic procedure shows an in-built tendency to select the right solution, or what is the same, deliberative democracy proves to be a political form privileged in epistemic terms. Third, the legal system is conceived as reflexive. The procedure of decision on common action-norms is seen as endless, and the norms themselves open to reformulation. Let's consider them in more detail.

First, it is argued that the individual is to be given a right to participate in the procedures of deliberation and decision-making about legal norms. Any legitimate procedure for writing common action norms must combine both dimensions. On the one hand, deliberation is necessary to revise and transform individual preferences. Thanks to it, we confront

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the interests of others, we cross-examine the reasons that we have in support of our claims, and we analyse those that underlie alternative arguments. On the other hand, we need some form of authoritative decision-making. That is so because there is no guarantee that unanimous agreement will come about spontaneously at the end of the discussion. That is due not only to the far from ideal conditions in which individuals are always placed (we have no unlimited time and resources at our disposal before deciding), but also to the limits of our moral powers, to the so-called burdens of judgment (Rawls, 1993, 56). In such context, respect for the autonomy of all those individuals affected must be seen as a scarce good. The fair solution is not to get rid of authoritative decision-making by means of requiring unanimity for adopting common action-norms, but to give to everybody an equal chance to participate in deliberation and to influence decision-making. This is done by means of organising deliberation and decision-making in terms of equality and symmetry.

Second, the option for deliberative democracy vis-à-vis majoritarianism as a standard of legitimacy betrays an interest in getting at substantive correct decisions. This is so to the extent that it presupposes transcending the mere aggregation of interests. Under such a view, politics is oriented towards the achievement of a certain outcome, not just to strategic bargaining among individual interests. The complex theory of legitimacy moves from such observation to the claim that if we show that procedures of deliberation and decision-making on common action-norms have a propensity to get at correct solutions (correctness being defined in political terms), we will foster the case for the legitimacy of legal norms. Doing so requires offering evidence that democratic decisions tend to be correct more frequently than those taken with the help of any other political procedure. A weak form of the Condorcet theorem could suffice (Nino, 1996). We could point to the fact that if voters have a better than average propensity to choose the correct solution, the bigger the size of the constituency, the more chances that the democratic solution will be the right one. By means of making people move beyond their prepolitical interest, and to adopt a political standpoint, deliberation improves the individual propensity to vote for the right decision.

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It is necessary to insist that correctness is understood in political and legal, not moral terms. On the one hand, we are concerned with the problem of drafting common action norms with the help of the grammar of the law, or what is the same, with the determination of what norms would be reasonable to adopt in order to deal with basic social conflicts and to coordinate action in order to achieve complex social goals. On the other hand, we take on board the limits intrinsic to the form of law, and especially, of its systemic character. That means that we are not only interested in the correctness of each legal norm in itself, but also in the value to be derived from the existence of a legal system through which we can solve conflicts and achieve social-coordination.

Third, a further argument for cashing consent into an equal right to participate in deliberation and decision-making is the reflexivity of the legal system. A legal system which has an in-built tendency to get at correct solutions will not be right all the time. For such reason, we should consider that legal norms fix common action norms for the time being, but that at the same time they can be the object of a new process of deliberation and decision-making, within which their value will be limited to that of setting the agenda, but from which they can emerge amended or derogated. The reflexivity of law binds the open-ended character of practical argumentation by means of fixing normative results and by means of structuring the procedure through which the contents themselves can be subject to review.

§51. The second limb of an argument for the general obligation to obey the law is substantive correctness. A democratic theory of tax law cannot trust the justificatory work exclusively to the conceptualisation of consent as participation in terms of equality and symmetry in the *deliberation about* and *decision-making on* common action-norms for two basic reasons. First, it might be the case that the right to participation in deliberation and decision-making is distributed in a far from equal way, or it can be the case that it is not clear whether the conditions needed to affirm the epistemic privilege of democracy are met. Second, individuals affected in a relevant way by common action norms might be prevented from participating in the process of deliberation and decision-making

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through which they are enacted even if they would like to be part to them. That can be due to several reasons. There are people that lack the capacity to intervene, like children or mentally handicapped adults. But we can also observe that some people are deprived of the material resources required to make a meaningful contribution to the political process. In some societies (if not all) there are minorities which are discriminated against; one of the possible variants of racism is to create obstacles (legal or social) for the participation of the minority in the political process. Finally, even if a political community maintains a liberally oriented immigration policy and allows new settlers to have access to citizenship, there are always limits (if only time limits) to full political participation on the side of immigrants. To this we will add the unavoidable character of authoritative adjudication on the normative consequences of legal norms in concrete contexts of application, something that makes necessary the resort to substantive correctness as a source of legitimacy. In all those cases in which participation cannot do the work, we have no alternative but to ground the legitimacy of a norm in its *content*, in its substantive correctness.

§52. The democratic theory of tax law has resort to two basic sets of standards of correctness, namely basic rights and fairness. The former can be seen as absolute criteria, while the latter is mainly relational. This means that basic rights can be invoked by any individual without any need of grounding her claim on the effective protection of such rights to other citizens. Legal norms can only be considered as legitimate if they protect the basic rights of all citizens. On the contrary, fairness is a standard for the allocation of burdens and benefits among individuals. From its definition, we can derive that its invocation requires completing the argument with reference to the actual burdens imposed and benefits enjoyed by other individuals.

What is peculiar to the democratic theory of law is that it pretends to derive standards of substantive correctness from the same thin substantive conception that justifies the major role played by participation (conceptualised as equal right to participation in the related processes of deliberation about and decision-making on common action-norms) in its general theory legitimacy of the legal system. This implies making clear

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how we can move from such conception of the right to the two basic sets of substantive correctness, namely basic rights and standards of fairness.

§53. On what concerns basic rights, we could argue that when we enter a political discourse leading to a decision on common action norms, we make certain pragmatic assumptions concerning the deliberative context itself. Those are, among others, the claim to equality, freedom from force and universalisability. However, that observation is not enough, because such assumptions are limited to the context of deliberation, and it is not obvious that they should bind us also in the context of action. If we want to justify basic rights, we need some further links in the argument.

Alexy offers one possible solution (Alexy, 1996). It goes as follows. If we participate sincerely and seriously in political discourse, we will be interested not only in grasping correct solutions for the sake or pleasure of it, but we will do so with a view of drafting norms through which it would be possible to discharge the tasks of conflict-solving and the achievement of co-ordination. In brief, we will see deliberation and decision-making as practical and not merely intellectual enterprises. If that is so, we could extend the reach of the pragmatic assumptions implicit in entering discourse. It could be argued that we assume an interest in the autonomy of all participants in discourse not only to the extent that they are engaged in such intellectual endeavour, but also in a full sense, which extends to the sphere of action. This leads to embrace a general right to freedom as a basic legal norm, from which we can derive a catalogue of public, private and social rights, which could operate as criteria for determining the substantive correctness of legal norms. This is complemented by a further argument. Even if the participant is not sincerely interested in the full autonomy of the individual, she needs to pretend to be so for the prudential reason that only by means of pretending to be he can maximise her utility. For the utility-maximiser, discourse is a far cheaper technology of domination than naked force. Of course, if she has to pretend, she has to pretend to accept the implications of a committed participation, including basic rights. And of course they might backfire on her unconstrained search of maximisation of utility.

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Two further strategies for linking pragmatic assumptions of discourse and a catalogue of basic rights can be enumerated. First, Habermas argues that the drafting of common action norms with the help of the grammar of the law necessarily leads to the recognition of a certain set of rights. The idea is that the liberal principle of legitimacy (the *discourse principle*), when tailored to the kind of needs tackled by law as a social order, gives rise not only to deliberative democracy, but also to a system of rights, including private, public and social rights. Second, one could argue that if deliberative democracy is not only a legitimate form of political arrangement, but the only satisfactory institutionalisation of moral discourse in the political realm. From this we could argue that deliberative democracy can only work if basic public, private and social rights are recognised (Habermas, 1996, chapter 3).

§54. Fairness checks the distributional component of all legal norms. The drafting of common action-norms implies the allocation of burdens and benefits, if only because the stabilisation of society as a cooperative venture with the help of legal norms is a distributional affair, one from which the just mentioned burdens and benefits cannot but derive.

The standard of fairness or fair play argues for a basic equivalence between burdens and benefits, which can be requested from an individual if a minimal degree of participation of the individual in the drafting of common action norms is satisfied (Hart, 1955, 61; Rawls, 1971, 112). It is important to notice that participation is satisfied if the individual has received a roughly fair share of the benefits ensuing from having common action norms, and if she can be said to have accepted such benefits. This a condition that can be satisfied by a weaker form of consent that the one associated to legitimacy through participation. For example, one could argue that acceptance of the benefits, even if unconscious of the relationship with costs, could be enough to justify the obligation.

§55. The third limb of a theory of complex legitimacy deals with the processes through which legal norms are applied. The legitimacy gap of democratic law reopens at this stage for the simple reason that general legal norms cannot fully spell out the pattern of conduct which they require

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in all the occasions in which they are to be applied (cf. §13). That is so for two basic reasons. First, we have resort to general norms as guides of conducts in order to reduce the burden imposed upon our moral powers. However, their vocation to be of general application implies that norms need to be drafted in a way that does not exhaust all relevant circumstances in the context of application. Second, law is conveyed in natural languages, and for very good reasons. That means that it shares with them the phenomena of ambiguity, lack of precision, etc.

For these two, and probably for other reasons, interpretation, understood as a creative enterprise, is unavoidable. But the creative jump required to move from the general formulation of the norm to the determination of its consequences in a concrete context necessarily reopens the question of legitimacy. Of course, it is necessary to add that, if the general norms can be seen as legitimate, the legitimacy gap related to application of such norms is narrower. After all, any application of the law is surrounded by a massive amount of (for-the-time-being) norms with clear consequences in concrete circumstances and by judicial precedents which might shed light on the determination of the consequences of the legal norm in the concrete context in which we are.

§56. The democratic theory of tax law must have something to say concerning the way in which the application of law should proceed. However, it must take on board the functional reasons for which it tends to have the shape it does in legal systems. Namely, while application in a wide sense is something that is done by citizens themselves, the achievement of conflict-solving and coordination through law makes completely necessary the existence of an authoritative form of application, the arch-type of which is judicial adjudication. Courts are called to decide disputes concerning the meaning and normative consequences of a norm when that is necessary in order to avoid a breakdown in the functioning of law. For such reason, it is unavoidable that at the end of the day, judicial application is an authoritative phenomenon.

In terms of legitimacy through guaranteed implementation, this means that the redemption of the claiming to legitimacy of a judicial decision is something that needs to be based on an appeal to substantive

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correctness. It is always possible to organise the judicial process in such a way that a certain legitimacy is gained through participation (by means of ensuring as wider participation in the process as it is feasible to do), but the main work remains to be done by an appeal to substance and not to procedure

Taking Stock for the General Obligation to Obey the law: The Structure of a Complex Theory of Legitimacy.

§57. The reader has been exposed to a general (and abstract) argument concerning the general obligation to obey the law. The purpose was to articulate a case for the more specific obligation to pay taxes. Remember that we took stock of some insights provided by tax law and public finance scholars. Among them, we studied in some detail Wicksell's procedural theory, the causal theory of taxation, the application of the principle of separation of powers to tax matters and the *taxing-process* theories. They provide us with some fragmentary insights with which to build a full argument for the legitimacy of the obligation to pay taxes. But we need to organise such insights somehow. To do so, we had a look to the structure of the general obligation to obey the law. We learnt two basic things. First, that the case for a general obligation to pay taxes must be articulated as a complex one. The tax system can tap on three different sources of legitimacy, namely participation, substantive correctness and guaranteed implementation. Second, that the problem must be solved in three steps. On the one hand, we need to determine whether there is a general obligation to obey the law. On the other hand, we need to determine whether there is a general obligation to pay taxes. Finally, we have to face the concrete factual and normative questions posed by each specific tax, keeping in mind the solutions provided to the first two questions.

To conclude this section, it is convenient to say that the case for a general obligation to pay taxes must be easier to make than the one for the general obligation to obey the law. That is so because the obligation to pay taxes is mainly a pecuniary obligation. The burden with which the individual is encumbered is limited to the payment of a given amount of

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money[28]. That means that taxes interfere in a limited way with personal freedom, something which cannot be said of all legal norms.

4. Contextualising the case for the general obligation to pay taxes by reconstructing the reasoning of the Spanish Constitutional Court

§58. The present section constitutes a further wagon in the argumentative train of this essay. Up to now, the reader has been offered (1) a description of the peculiar structure of the obligation to pay taxes in contemporary Western tax systems, (2) a *normative case* for assigning three basic tasks to the tax system (the collection of the revenue necessary for the provision of public goods, financing redistribution and being a tool for macroeconomic management), (3) the abstract structure of the case for the general obligation to pay taxes, on the basis of what was learnt from the structure of the case for the general obligation to obey the law. It is now the time to turn to a more empirical kind of research, and more specifically, to a reconstruction of the jurisprudence of the Spanish Constitutional Court on tax matters. The present section analyses the sixty plus cases dealing with tax matters decided by the referred court in its almost twenty years of activity. This will allow us to render specific the argument, by coming in touch with the peculiar problems which arise in the three dimensions of legitimacy of a tax system (i.e. political participation, substantive correctness and guaranteed implementation) (cf. Escribano, 1988). At the same time, the analysis is conducted with the help of some of the conceptual and normative tools developed in the previous sections (for example, the cases are classified by reference to the three different pillars

[28] The obligation to pay taxes gives rise to some obligations which have a different object. Tax doctrine refers to the *general obligation to collaborate with the tax administration*, the whole set of formal duties. Among those, we can refer to the obligation of self-assessment of tax burdens or the provision to the tax administration of the relevant data to proceed to such assessment, the keeping of proper accountability, the withdrawal at source of amounts of money (typical in the case of employers), and many others. The general obligation to collaborate with the tax administration is ancillary to the general obligation to pay taxes. This amounts to no denial of its importance. It is granted that the way in which these obligations are organised might be decisive in order to determine whether the tax system is or is not legitimate.

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of legitimacy, and in the case of substantive correctness, taking into account the relational and absolute dimensions of such pillar). Thus, at the same time that we *contextualise* the argument, we come to understand the underlying logic which allows to read in a coherent way judgments which apparently decided unconnected and highly technical cases.

§59. The basic interpretative hypothesis is that we can distinguish two main periods, which roughly extend to each of the two decades of constitutional adjudication here considered. In the first period, the Court would have worked out a material reading of the general principles of taxation contained in article 31 of the Spanish Constitution. The judgment rendered in case STC 76/90 contains the basic formulation of such paradigm. It constitutes the crystallisation and at the same time the station *terminus* of such line of jurisprudence. In the second period, the Court would have proceduralised its reading of general principles of taxation. This turn is still in progress, and some of its implications have not fully unfolded yet, but it has been given a concrete formulation in judgment STC 182/97. The change of trend can be explained by four basic factors. First, the dysfunctional consequences ensuing from the material reading of tax principles. The Court could be seen as engaged in a self-learning process concerning its decisions on matters like division of labour between the Budget Act and ordinary tax statutes, the limits to retroactive taxation or the privileges of the tax administration. Second, a change in the self-perception of the role to be performed by the Court. After a decade of political and constitutional transformation, the Court started to deal with the problems characteristic of a mature Rechtsstaat. That observation is extensive to tax matters, regarding which the *transition* witnessed the forging of a modern tax system. Third, a slight change in the constitutional ethos, related to the accession to the European Communities and the latter signature of the Maastricht Treaty. This might have favoured more liberal readings of the economic constitution and a new balance between markets and public institutions. Fourth, the renewal in the composition of the Court, which led to the retirement of the most influential members of the *García-Pelayo* Court (the original set of twelve judges).

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A) Legitimacy through participation

§60. The main operationalisation of the democratic principle in contemporary tax systems is the *principle of legality of taxation*. The Spanish Constitutional Court has oscillated between the interpretation of the principle as associated with the requirement that taxes should be approved by popular representatives (*No Taxation without representation*) and a more radically democratic understanding, which is first anchored to the contractarian ideal of consent, and only in a second instance translated into majoritarian endorsement of representative institutions. That basically corresponds to the basic hypothesis advanced in the previous paragraph. This is reflected in the rationales of two judgments characteristic of the *material* and the *procedural* understanding. In judgment STC 19/87, the Court asserted the unconstitutionality of a full delegation to *ayuntamientos* (local councils) of the power to fix the rates of certain local taxes. Such institutions are insufficiently *representative*, even if they are the ones closer to the citizen. Because the principle of legality is anchored to the idea of representative democracy, it is constructed as requiring the unity of the legal system and the equality of the fundamental legal positions of citizens. In judgment STC 185/95, the Court characterised approval by a Law of Parliament as a functional equivalent of individual consent to pecuniary obligations. Though parts of the decision are conveyed in the language of coercion and consent, it gives logical priority to individual participation in the drafting of tax norms as the basic source of legitimacy for the tax system.

§61. Notwithstanding the relevance of the general understanding of the principle of legality, a democratic theory of tax law is especially interested in analysing the *specific problems* of operationalisation of the principle of legality in tax matters. Reading cases allows us to realise that there are at least four basic sets of questions that are quite peculiar to tax law.

First, a well-known specificity of tax legality is the bifurcation of the *réserve du loi* in this province of law. From liberal revolutions onwards we find both Budget Acts and ordinary tax statutes. While the latter are in charge of the definition and characterisation of specific taxes, the former

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symbolises the systemic connection between the two hands of public expenditure, namely taxation and expenditure. Moreover, it has been frequently used to introduce temporal reforms in the structure of specific taxes, under the argument that doing so was required by the financial or even general economic policy. From the standpoint of legitimacy, the main problem is the procedure through which the Budget Act is approved. On the one hand, initiative corresponds to Government. The executive maintains a basic active position throughout the whole procedure, while Parliament plays a minor role and has limited chances to amend Government's proposals. On the other hand, the Budget is a multipurpose statute, packed with very different norms aiming at very does many things at disparate goals. This reduces the guarantees ensuing from monitoring by representative institutions. It also diminishes the chances that its norms are right in terms of substantive correctness. Finally, the Budget has a limited validity in time; if changes are always introduced through it, even if they are intended to be permanent, legal security will be endangered.

Second, the division of labour between statutes and statutory instruments. The complexity of modern taxes requires extensive legislation, the full elaboration of which exceeds the capacities of representative institutions. The understanding of the principle of legality of taxation as requiring the exhaustive regulation of tax matters by statutes would imply the risk of overloading the capacity of representative institutions. This makes clear that the issue is a matter of working out the inner limits of political participation as a source of legitimacy.

Third, the division of labour between statutes and decree-laws. As was indicated, there are functional requirements which explain why morality cannot discharge on its own the basic tasks of conflict-solving and social coordination (cf. §6). This requires recruiting law as its complement. The latter reproduces moral deliberation in a bounded way which allows its achieving of legitimacy compatible with authoritative and institutional decision-making on common action-norms. However, there are instances in which the formulation of legal norms is so urgent that the reproduction of the basic conditions of moral deliberation, even in a bounded way, would be too cumbersome and would frustrate the whole purpose of deciding on common action-norms. This requires working out

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expedients that allow the enactment of tax norms in a completely authoritative way, proceeding to check their legitimacy through the establishment of material limits to their possible content and forms of *a posteriori* validation.

Finally, tax laws make clear that we find mismatches between the constituency of those called to participate in the elaboration of laws and those to whom they would affect. This is the result of the need to conciliate *legitimacy through participation* (which calls for an unlimited number of political communities, defined in attention to the precise circle of those affected by common action norms) and the requirement of *feasibility of political institutionalisation* (which requires reducing functioning institutions to a limited number. and *political institutionalisation*). This demands an imaginative construction of the procedural requirements associated with the principle of legality.

§62. On what regards the division of labour between the Budget Act and ordinary tax statutes, the Spanish Constitutional Court has translated the question of legitimacy in the issue of which contents are mandatory, prohibited or permissible (and under which conditions) to the Budget Act.

Four premises are well-settled in the doctrine of the Court. First, that the Budget Act is a law in the full sense of the word. That notwithstanding, it is a quite peculiar act of Parliament, given the specialities of its procedure and its limited validity in time. Second, that certain contents are mandatory. These are the estimates of revenues, expenditures and tax benefits. Any piece of legislation which pretends to be the Budget must contain them. Third, that the Constitution envisages the use of the Budget as a tool of macroeconomic policy, so that it is possible to include in it, within certain limits, norms to such effect. Fourth, taxes cannot be created in the Budget Act. It is only possible to modify their legal regime if this is specifically foreseen in a *substantive tax law*.

Beyond these premises, the Court is less at ease. The basic interpretative hypothesis (*the paradigm shift*) is specially applicable here. The Court had a hard time at working the contours of this uncharted constitutional territory. Moreover, it has reviewed quite extensively its

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own jurisprudence. Thus, we can distinguish three main lines of interpretation in the body of relevant cases.

In a first series, of which it is representative the case decided by judgment STC 27/81, the Court offered a *material* understanding of the division of labour between the Budget Act and ordinary tax statutes. It did so to the extent that it offered an extensive interpretation of the contents which could be contained in the Budget in attention to its prominent role as a tool of macroeconomic policy. Thus, it established two basic things. First, that the reference to *a substantive tax law* authorising the modification of tax norms by the Budget Act should be interpreted as related to any statute other than the Budget Act that lays out the substantive elements of the tax in question (cf. STC 27/81, par. 3). Second, it added to the constitution-based classification of contents of the Budget Act (mandatory, permissible and prohibited contents) a new category, namely that of norms aimed at the *mere adjustment to the reality of the situation* of tax norms. That was to be *always* permitted (cf. STC 27/81, par. 3). This was interpreted by Governments as a sort of wild card that would allow to include any content whatsoever in the Budget Act.

A second series of cases corresponds to the ones decided by judgments STC 126/87 and STC 65/90. The Court started to move away from a fully materialised understanding of Budget Acts. First, it offered a general definition of permissible contents. It stated that the Budget Act could contain provisions that, not being properly budgetary ones, have an incidence over the income and expenditure policies of public institutions or in a way influence it. Second, it established some clauses of material limitation. On the one hand, it asserted that the inclusion of merely permissible contents in the Budget Act cannot lead to the distortion of the basic content of such piece of legislation (STC 126/87, par. 5). On the other hand, it made clear that the fact that certain provisions are included in the Budget Act does not mean that they cannot be regulated later on by an ordinary statute (STC 126/87, par. 5). Finally, the inclusion of norms with a limited validity in time is clearly adequate, but the repeated inclusion of such clauses might lead to keeping way substantive issues from Parliamentary debate (STC 134/87, par 6; STC 65/90, par 3).

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The third series reflect the move towards a *procedural* understanding of the division of labour, openly sensitive to the difficulties related to democratic participation in the making of Budget Acts. In the cases decided by judgments STC 76/92, STC 195/94 and STC 178/94, the Court quashed some provisions of different Budget Acts according to a more articulated view on the limits to legislation through the latter kind of acts. The Court reinterpreted the constitutional clause devoted to the Budget as embodying the principles of legality as self-government and legal security. Accordingly, it interpreted that the possibility of including norms in the Budget other than those constitutionally mandated or permitted was subject to two conditions. First, that there must be a *direct relationship* between the norms and income and expenditure decisions which are characteristic of the Budget or with the basic lines of economic policy, for the implementation of which the Budget is a tool (STC 76/92, par.4). Second, that it must be possible to see them as a *necessary complement* to the better understanding and the more efficient implementation of the Budget and of the economic policy of government (STC 76/92, par. 4).

Even if this interpretation is sound, there have been many oscillations in the jurisprudence of the Court. For the sake of completeness, it is necessary to refer to the reader the case decided by judgment STC 61/97, which gave green light to the extension of a time limit for the consolidation of the Act on Urban Planning, undertaken through a clause of the Budget Act for the fiscal year of 1992. It seems problematic to make this fit into the *procedural* understanding of the division of labour, despite the fact of it having been decided quite recently. Similarly, the Court asserted a quite peculiar view of the application of its doctrine to the Budget Acts of the *Comunidades Autónomas* (autonomous regions or states). In judgment STC 116/94, it was argued by the majority of the Court that such budgetary instruments were exempt from the material limits just described. Although to a limited extent, the Court seems to be moving away from such decision in judgments STC 174/98, STC 208/98 and STC 130/99 (putting itself in line with the dissenting opinion of some judges to judgment STC 116/94). This would render the

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case for a procedural interpretation of its jurisprudence more complex, but not weaker.

§63. The Court has dealt in some cases with the division of labour between statutes and statutory instruments. In judgments STC 37/81 and STC 6/83, the Court has established that it must be the exclusive competence of statutes to enact taxes (or what is the same, to bring new taxes to the legal world) and to determine the tax burden to be borne by each taxpayer. The latter implies the statutory determination of the tax event, the definition of taxpayers and the fixation of tax rates. Statutes can recruit statutory instruments to complement the regulation of a given tax, if an only if statutes themselves lay out the substantive regulation of the tax in such a way that it can be seen as a program or framework which the latter.

§64. The power of the executive to enact decree-laws is conditioned by the Spanish Constitution (article 86) both in material and in procedural terms. The Constitution excludes the regulation of certain matters by such a legal source (specifically, the rights, duties and liberties of citizens), it requires the concurrence of certain circumstances (an extraordinary and urgent necessity) and it conditions the permanent validity of its regulation to the endorsement within a month by Congress. The jurisprudence of the Court revolves around the way in which the material limits on decree-laws must be interpreted in tax matters.

In a first series of cases, the Court argued that the problem of drawing the line between statutes and statutory instruments could be assimilated to the question of division of competences between statutes and statutory instruments. The most clear formulation of such doctrine can be found in judgment STC 6/83.

But the Court has reconsidered its own argument from judgment STC 23/93 onwards. It now argues that the value at stake in both cases is the same (we could say that this is no other than political participation as a source of legitimacy) but that each problem is specific enough as to merit a differentiated treatment. In the referred judgment and in STC 182/97, the Court took the view that the question whether the material limits were or

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not respected must be decided taking into account whether or not there is massive support for the measure in question. The dissenting opinion of judge Cruz Villalón to judgment STC 182/97 offers us a more adequate standpoint for a procedural understanding of such limits. His argument is two-folded. First, to prove the extraordinary and urgent necessity of the decree-law it is necessary to show that it is not possible to achieve the goal that is aimed at through ordinary legislative procedure and that the decree-law is an efficient expedient to do so. Second, the respect of basic rights, duties and liberties must be translated in tax matters into the requirement that tax norms issued by a decree-law should not affect the position of taxpayers in a relevant manner. This might be further specified by analysing the impact of the decree-law on the tax mix and on the relational position of the taxpayer *vis-à-vis* other taxpayers.

§65. Finally, the Spanish Constitutional Court has also dealt in different occasions with the problems associated to the need of combining legitimacy through participation and the requirement of feasibility of political institutionalisation.

The Court interpreted as an aspect of the *réserve du loi* the procedural peculiarities to which is subject the enactment of tax norms which have an incidence on the peculiar fiscal and economic regime of the Canary Islands (judgment STC 35/84). The norms at stake allow a more intense participation of the political institutions of the said *Comunidad Autónoma*. This must be interpreted as a departure from a homogenising understanding of the principle of legality in taxation. It reflects the peculiar socio-economic conditions in which the inhabitants of the islands live and the need to give them a more intense stake in the enactment of the norms which affect it.

Notwithstanding such decision, the Court has been less open to the delegation of the power to fix tax rates to *ayuntamientos* (local councils). The Court argues in its judgments STC 179/85 and STC 19/87 that a full devolution of such power would endanger the unity of the tax system and the substantial equality of taxpayers. This betrays a material conceptualisation of tax law, to the extent that the problem is considered as a matter of vertical and horizontal equality among taxpayers, and not as a

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matter of legitimacy through political participation, or more specifically, a matter of division of labour among democratic political institutions, and consequently, between different normative acts.

B) Legitimacy through substantive correctness

§66. When we considered the role played by substantive correctness within the case for the general obligation to obey the law, it was already remarked that there are two main kinds of standards of substantive correctness: relational and absolute ones (cf. §51-2). The latter ones are related to the concept of fundamental rights, which were said to be derived from the pragmatic assumptions made each time that we enter practical discourses. They are referred as absolute standards because they can be invoked by taxpayers without making any reference whatsoever to the circumstances of other taxpayers. Relative standards are based on the principle of fairness or fair play. They are labelled as relational because their application is ground on a description of the position in which other taxpayers are placed or the way in which they are treated.

§67. The *Tribunal Constitucional* has come across a number of cases in which several problems are posed concerning the substantive standards which should govern the peculiar tasks performed by the general obligation to pay taxes. Namely, the monetarisation of background duties and their translation into specific tax obligations (selection of tax bases) and the allocation of the ensuing burden according to the principles of distributive justice (measuring subjective individual ability to pay).

Like it was the case when dealing with the principle of legitimacy through participation, a democratic theory of tax law is especially interested in analysing the *specific problems* of operationalisation of standards of substantive correctness in tax matters.

First, we need to consider the problems related to the objective selection of tax bases. In what concerns relational standards, we need to determine which economic events are considered to betray an ability to pay. More specifically, we should determine (1) whether and when flows of income or flows of income and manifestations of wealth are to be

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regarded as tax bases; (2) the exemption of certain tax bases on the basis that the person to which they can be attributed falls behind the level of the *subsistence income*; (3) whether and when the pursuit of non-revenue purposes through taxation has a negative impact upon the correct selection of tax bases. Regarding absolute standards, we should consider the objective and subjective links which should be required in order to attribute a certain tax base to a given taxpayer (something which refers to the use of fictions and presumptions in the assessment of tax bases and to phenomena of joint and several liability in tax matters).

Second, we need to deal with the problems associated with the assessment of the ability to pay of each taxpayer (that is, the tailoring of tax liability to the personal circumstances of the taxpayer). In relational terms, we need to consider (1) the list of factors compiled by the tax system itself in order to graduate tax liability accordingly; (2) the shape which the overall tax burden must assume (the principle of progressivity of taxation). In absolute terms, we come to terms with the interdiction of takings through taxation.

Third, we face some of the requirements derived from the principle of legal security, and more specifically, the limits placed on the retroactive enactment of tax norms.

a) General remarks on relational standards of substantive correctness

§68. The Court has been engaged in determining the general meaning of *relational* standards of substantive correctness in tax matters (and more specifically, of the principle of tax equality). This was necessary in order to interpret substantive norms, and also in order to determine whether or not appellants should be given access to the *recurso de amparo* (i.e., the only appeal by means of which individuals can bring their case before the Constitutional Court according to Spanish law).

First, the Court has stated that tax equality must not be interpreted in a formalistic way, as mere equality of treatment, but as the requirement of *reasonableness* of the treatment given to each individual. That is the same as saying that people should be treated equally unless there are objective reasons to differentiate. Such understanding is related to the use of the

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principle of *proportionality* as a basic constitutional standard (cf. Alexy, 1992, 111). This comes quite naturally in the interpretation of a constitutional text which contains articles like section 9, paragraph 2[29], and constitutes a further piece of evidence of the material turn given to tax norms by the Court in its first decade of activity.

Second, the Court has contrasted the general principle of equality (formulated in article 14 of the Constitution[30]) with the principle of tax equality (contained in section 31, paragraph 1 of the fundamental law). While in a first series of cases, the relation between the two is conceptualised in terms of an opposition between the formality of the general principle of equality and the materialised character of tax equality (like in judgment STC 8/86), the Court has moved to see the principle of tax equality as a sort of specification of the general principle of equality (judgments STC 209/88 and STC 134/96).

b) Monetarising background duties or determining tax bases

§69. The Court has offered quite oracular definitions of the basic principles which should govern the definition of tax bases, or what is the same, the procedure by means of which economic events that betray an ability to pay are selected and the obligation to contribute to the common pool of resources is attached to their realisation. Thus, we find ability to pay defined as "the logical requirement that wealth should be looked for where it is to be found"[31]. It is only by means of considering more detailed relational and absolute standards that we can offer a picture of what it is required by such principle (Escribano, 1988).

Relational Standards

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29 "It is the responsibility of the public powers to promote conditions so that liberty[Liberty] and equality of the individual and the groups he joins will be real and effective; to remove those obstacles which impede or make difficult their full implementation, and to facilitate participation of all citizens in the political, economic, cultural, and social life".

30 "Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance".

31 Cf. Judgment STC 27/81, par. 4.

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§70. It has been argued that no taxation should be requested when the individual to which tax bases are attributed has no economic means at her disposal to pay the relevant tax. The lack of such means is not to be equated with full destitution, but with falling behind a socially defined minimum.

Several judgments of the Court have made clear that it considers constitutionally sound to tax not only income (or the flow of economic resources accruing or being spent by an individual) but also wealth (or the stock of capital)[32]. However, this requirement has been interpreted only according to a material understanding of tax law. Both in judgment STC 37/87 and STC 186/93, the Court reviewed the constitutionality of taxes which had non-revenue purposes, and considered more specifically whether they could be said to infringe the principle of ability to pay. The Court rejected a formal understanding of the tasks to be discharged by the tax system and considered that the tax was constitutionally sound. This implied rejecting that ability to pay was to be interpreted as a proxy of willingness to pay regarding very basic public goods. What is relevant to our present purpose is to consider the way in which the argument was constructed. That is so because the *Tribunal Constitucional* argued that there was no conflict between ability to pay at the cases at hand because the tax events (property of land) betrayed a *potential* ability to pay in most cases. This is a highly contestable statement. To prove that, It suffices to consider that it can justify taxing when no real income has accrued to the tax payer. If the case was to be decided by a Court more favourable to a procedural understanding of tax law, it might make an explicit argument concerning the justifiability of taxing wealth to the extent that it is not exploited. It could be based on the peculiarity of private property over land, and on the increased sensitivity that a democratic legal system should show towards past injustices in the allocation of property in land. Even if income is not obtained, it is clear that the taxpayer will have wealth at her disposition.

32 See judgments STC 37/87 and STC 186/93.

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§71. The Court has elaborated some more specific relational standards concerning the determination of tax bases. We can refer to four main cases decided in the last decade, which reflect the procedural emphasis on individual rights and the need of checking whether the public interest justifies curtailing such rights. Those cases concerned (1) the criteria according to which income derived form personal labour and capital gains is to be distributed among the tax bases of the different members of the family unit. The problem derived from the different criteria of allocation prescribed in each case. While income derived from personal labour was imputed to the physical earner, the regime of capital gains was dependent on the regime of marital property which the coupled had opted for. If they had chosen the *régimen de gananciales* (or joint property), they could split the proceedings of such source of income among the two. Why capital gains should be splitted and capital gains not? The Court found such criterion acceptable to the extent that it reflected the peculiar nature of each source of income[33]; (2) criteria of deduction from income derived from entrepreneurial, artistic or professional activities of the amounts paid to other members of one's own family unit on account of their provision of services or in the context of a labour relationship. The Income Tax Act limited deductions to either the market value of services or goods, or to the average wage paid to all other employees, or if there were none, the legally established minimum wage. The problem derived from the different treatment given to amounts paid to members of one's own family unit and strangers. The Court found that the limits to deduction of wages were not proportional to the objective pursued by the norms, namely, the repression of tax evasion[34]; (3) criteria of deduction from income derived from real estate property of the amounts invested in the acquisition or renovation of the said property. The alleged discrimination concerned the different regime which was applicable depending on whether the house was or was not the domicile of the taxpayer. In case that it was not, the limit of the deduction was determined by reference to the collateral established in the lease contract. The Court found this ceiling reasonable (as it aimed at a sound constitutional goal) and proportional. However, a dissenting opinion

33 Cf. Judgment STC 146/94, par. 5.

34 Cf. Judgment STC 146/94, par. 6.

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challenged the decision of the Court[35]; (4) criteria of qualification as income of certain public and private grants. The problem was that public grants were excluded from the Income Tax Base, while private grants were subject to the tax. The Court argued that such different treatment was justified to the extent that it reflected the differences in the legal regime of each of them. However, in *obiter dicta*, the Court hinted at the reconsideration of its doctrine if it was proved that specific private grants were subject to the same regime characteristic of the public ones[36].

It has also dealt with problems of equality deriving from the gradual application of certain tax norms. In judgment STC 8/86, it was decided that the principle of equality could be balanced with the functional requirements which could recommend a gradual application of tax norms. The Court asserted that this would be so to the extent the criteria for the gradual application of the norm were objective and rendered explicit why it was not possible or desirable to apply the new norm to all taxpayers at once.

Finally, the Court has also decided some cases dealing with the trade off between *fiscal federalism* (or in terms more correct within the Spanish constitutional setting, the attribution of the power to tax to the *Comunidades Autónomas*) and *tax equality*, in its two dimensions of horizontal and vertical equality. The Court stroke a balance between the two in judgment STC 150/90. It argued that the Constitution requires not an absolutely homogeneous equality among Spaniards, but equality *concerning the essential conditions for the exercise of rights and freedoms*. It presupposes that the assumption by the *Comunidades Autónomas* of different powers and competences will lead to their making use of them in different ways. This might result in a different mix of tax burdens and public services.

Absolute standards

35 Cf. Judgment STC 214/94, par. 6 and dissenting opinion of judge Gabaldón López.

36 Cf. Judgment STC 214/94, par. 8.

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§72. The principle of *ability to pay* implies some absolute standards that protect individuals from being called to contribute in certain forms and extents to the common pool of resources. The *Tribunal Constitucional* has dealt with two of them, namely the interdiction of defining tax bases on the basis of fictions or presumptions and the requirement of a sufficient personal link between the taxpayer and the tax event in order to ask her to bear the ensuing tax burden.

§73. The Court seems to have endorsed the principle that tax bases must be defined by reference to inter-subjective factual criteria and not be merely based on estimations or fictions not contrasted in factual terms. In the case decided by judgment STC 221/92, the Court considered the taxation of capital gains derived from the transfer of real estate property. The basic underlying question was whether it was adequate or not to calculate the tax burden by reference to a purely *nominal* tax base or it would be mandatory to take into account factors like inflation that could lead to a radically different estimation of the tax base. Although the argument of the *Tribunal* seems far from satisfactory, it seems to have endorsed the abovementioned principle. The weakness of its train of reasoning revolved around accepting that a series of discretionary mechanisms left in the hands of government were enough to ensure that the tax base would be adjusted in such a way as to reflect the real *ability to pay* of the individual.

Additionally, the Court has stated that tax liability must be based on the existence of a personal link between the taxpayer and the tax event which triggers tax liability. The two judgments which established the unconstitutionality of obligatory joint reporting of income in the case of spouses (judgments STC 209/88 and STC 45/89) made clear that tax liability is an individual affair, so that collective or joint liability can only be established on the basis of objective reasons.

c) Allocating the tax burden according to the principles of distributive justice

Relational Standards

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§74 The Constitutional Court has dealt with different cases concerning the graduation of the tax burden with reference to the personal circumstances of the taxpayer. The fact that it did not come across such problems until the saga of cases concerning the effects of its own judgment STC 45/89, declaring unconstitutional some norms of the Income Tax Act, explains why all of them seem to reflect a procedural understanding of tax law.

§75 The Court has made three general statements on the matter and it has decided two cases, in which it dealt with the constitutional soundness of more specific tax norms. Among the general statements, (1) The Court asserted that no case can be substantiated on the basis of the difference between the tax burden which fell on the same taxpayer before and after the enactment of a new tax regime[37]; (2) It claimed that the only relevant term of comparison is the *legal* tax burden supported by different individuals. No argument can be made on the basis of the shifting of the tax burden in economic terms[38]; (3) It stated that it is simply not possible to ground a case on a very detailed consideration of the distributional effects of a given tax norm[39].

The more specific questions are the following. First, the Court considered whether it was sound to fix a ceiling on the expenses which could be deduced from the gross income derived from personal labour. Though the ceiling was based on a statistical projection, the Court argued for its constitutionality on the basis of the reasonability of the amount[40]. Second, it determined whether it was fair to exempt from the tax basis the income derived from some pensions on account of the handicaps suffered by the beneficiaries only when they were insured under the general regime of the *Seguridad Social* (Social Security) and not when they were public servants subject to a specific insurance regime. The Court found this clearly unconstitutional, and argued that the lack of a terminology which allowed to refer with the same name to two identical cases could not be an

37 STC 27/81.
38 STC 197/92.
39 STC 111/91.
40 STC 214/94.

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obstacle to the application of the principle of tax equality on what regards the allocation of the tax burden according to criteria of distributive justice[41].

§76 The Constitutional Court has not yet faced any case in which it was claimed that the relevant tax norm infringed the principle of progressivity (which is enumerated among the canons of tax justice in article 31 of the Constitution). In spite of claims to the contrary of some scholars, it seems possible to affirm that the Court could render the principle operational and review the constitutionality of the norm accordingly.

Not only it is the case that constitutional reasoning has allowed to render more specific tax principles which were said to lack any *legal* meaning (like the principle of *ability to pay*[42]), but also that the Spanish Constitutional Court has been ready to make use of statistical arguments in order to offer an interpretation of some tax principles and norms[43].

The challenge before the Court of the recent Income Tax Act might constitute an occasion for a first analysis of the matter by the *Tribunal Constitucional*. The democratic theory of tax law, by means of offering a normative argument for assigning to the tax system the task of collecting the revenue needed to insure individuals against deprivation, bad luck and force in social and economic relationships, is prepared to analyse the different requirements of progressivity made by each rationale and to offer arguments for giving a certain shape to the overall tax pressure.

Absolute Standards

§77. The number of cases dealing with absolute standards that govern the distribution of the tax burden according to the logic of distributive justice is quite limited. As a matter of fact, we have to refer exclusively to the doctrine of the *interdiction of takings through taxation* in judgment STC 150/90. The Court argued that the tax system as such could not deprive the

41 STC 134/96.

42 Cf. ESCRIBANO (1988).

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individual of all her income. Moreover, it seems to have extended this argument to each specific tax. In the case at hand, the Court argued that a marginal rate of 100% in the Income Tax would clearly amount to takings through taxation.

d) Retroactivity of tax norms

§78. The Court has asserted that the Constitution does not contain any specific norm banning the retroactive amendment of tax norms. That implies a clear move away from the formal paradigm of tax law, which assimilated the latter to criminal law, to the extent that both of them constituted paradigmatic manifestations of the *sovereignty* of the state. However, that does not mean that there are no constitutional limits to retroactive tax norms, only that those would be basically the same which apply to all kinds of retroactive legislation[44], adapted to the specificity tax norms.

The body of cases on this matter has rendered clear three basic things. First, that it is necessary to interpret the requirements ensuing from the constitutional principle of legal security (among which, the non-retroactivity of laws) in a systemic way, so that they must be weighted and balanced against each other. Second, that the clause (*the non retroactivity of provisions which restrict individual rights*) must be constructed as referring to fundamental and not to vested rights. This rules out any interpretation of the principle which would constitute a serious impingement upon tax reform. Three, that the principle must be operationalised by means of distinguishing different degrees of retroactivity. On the one hand, no constitutional objection could be made to new norms aiming at a prospective regulation of tax matters. On the other hand, we should distinguish two different degrees of retroactivity

[43] Cf. STC 126/87 (statistical argument used by the Court in order to calculate average tax burden of gambling activities) or STC 214/94 (statistical estimation of average expenses incurred by employees).

[44] Cf. section 9, paragraph 3 of the Constitution: "(3) The Constitution guarantees the principle of legality, the normative order, the publication of the norms, **the non-retroactivity of** punitive **provisions** which are not favourable to, or **which restrict**

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among tax norms which have an impact on previously constituted legal acts or relationships. Thus, we have cases of *retroactivity in the first degree*, in which the legal relationship or act affected by the norm had been completed. In those cases, only exceptional circumstances could allow the retroactive application of a tax regime. Additionally, we have cases of *retroactivity in the second degree*, in which the legal relationship or act affected by the new tax regime had originated before the said norm was approved, but at such moment in time it was still producing certain legal effects. In these cases, the acceptability of retroactive tax legislation is a matter of weighing and balancing the constitutional values at stake.

What can be observed is that the weighing and balancing of the reasons for and against the constitutionality of retroactive tax norms has been different in each of the two periods distinguished by the basic interpretative hypothesis (that is, the *paradigmatic shift*)[45]. This can be shown by means of comparing the train of reasoning of the Court in judgments STC 126/87 and STC 173/96, and also by means of taking notice of the dissenting opinions to judgment STC 182/97.

First, we can state that the facts and norms which were under discussion in the cases decided by judgments STC 126/87 and STC 173/96 were almost the same. But while in the first case the Court considered the retroactive increase of the tax on gambling machines as constitutionally permitted, it declared it unconstitutionally in the second. The analysis of the reasoning of the Court in each case is quite illustrative of the different emphasis put by the material and the procedural understanding of taxation on different factors. (1) Regarding the *predictability of the retroactive increase*: In the first case the increase was said to be predictable because it was not the first time that a retroactive increase had taken place and because the tax regime of gambling machines was still more benign than the general one applicable to gambling activities. In the second case, the Court found the increase unpredictable; in spite of the repeated criticisms based on the alleged privileged treatment of gambling machines, there was no hint of a tax increase at sight; (2) Concerning the *goal* which was

individual rights, legal security, and the interdiction of arbitrariness of public powers". The relevant norm is highlighted in bold typeface.

[45] Cf. §56.

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pursued through retroactively increasing the tax, the Court accepted that in the first case the norm aimed at achieving a higher degree of tax justice, while in the second it considered that it was mainly intended to deal with the social negative effects of widespread gambling. The latter goal might justify an increase of tax rates, but not in a retroactive way; (3) On the timing of the reform, the Court found sufficient in the first case that it was approved in the same fiscal year to which it would apply (relating this to the question of when the tax was due, or what is the same, when one could consider complete the tax event that triggers tax liability), while it did not even consider such extreme in the second, arguing instead that the legislator had had time to deal with the problem in a more adequate way.

Second, several judges argued against the constitutional acceptability of the retroactive increase of the Income Tax in those cases in which it implied retroactivity in the first degree (judgment STC 182/97). Although the majority of the Court endorsed the measure, the argumentation of dissenting judges can be clearly placed within the *procedural* paradigm of tax law.

C) Legitimacy through guaranteed implementation

§79. It seems to be the case that the third pillar of legitimacy, the one related to the guarantees that surround the application of tax norms, is the one which presents a lesser degree of specificity (this means that any argument must be framed in a general theory of legitimacy through guaranteed implementation, that is, a theory which refers to the legal system as a whole. The specialities are limited to those deriving from the fact that tax law reflects with special intensity the problems associated to those norms whose implementation is mediated by public institutions (like the tax administration) and which are said to reflect with special intensity the *public interest* (like tax norms).

What can be said at a general level is that this is the area in which constitutional arguments tend to be thinner, something that might be explained by the traditional fixation with procedural and substantive criteria and by the assumed technical character of the procedures and techniques through which taxes are implemented.

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The *Tribunal Constitucional* has become more active on this front as of late. While judgment STC 76/90 reflects the "homologation" of such privileges within the material paradigm of tax law (in spite of the fact that it contains some hints at a procedural understanding), judgment STC 23/97 can be seen as reflecting the need of filtering privileges through constitutional reasons. It is argued that such privileges need to be subject to a two-folded test. First, they must be oriented towards the protection of a constitutional value, and second, they must be proportional in a large sense (something which triggers the triple test of proportionality[46]).

§80. As it has been indicated by reference to the previous two pillars of legitimacy, a democratic theory of tax law is especially interested in analysing the *specific problems* of operationalisation of the principle of guaranteed implementation in tax matters.

More specifically, we will consider in the next paragraphs the need of modulating the application of procedural guarantees characteristic of penal procedures to tax assessment procedures. Their applicability is conditioned to the specific nature of taxes. And we will also review some of the traditional privileges granted to the tax administration in order to ensure an efficient discharge of its tasks, like the power to search private homes and premises or the favourable conditions under which it is obliged to honour its debts.

Differentiating between penal and tax laws, specifically in relation to procedural guarantees

§81. Further evidence of the rejection of the formal paradigm of taxation by the *Tribunal* is constituted by its unwillingness to extend in an unqualified way the procedural guarantees characteristic of criminal procedures to tax assessment procedures.

Instead, the Court subjects their application to a double condition. First, the exercise of the *ius puniendi* of the State might have an actual or potential impact on the procedure. Second, even if the guarantee is applied, its breadth and scope is to the adjusted to the specific nature of tax norms

46 Cf. Alexy (1992:111).

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and relationships (which is considerably different from that of penal laws and relationships).

This general premise can be derived from the many cases in which the Court had to decide on the applicability or not of concrete guarantees to tax procedures.

A positive answer was given in the following cases: (1) the responsibility for the infringement of tax norms cannot be strict or objective (tax liability must be based on a subjective link that allows to blame that concrete individual for the infringement of the tax norm[47]); (2) the burden of proof cannot be shifted against the taxpayer [48]; (3) the deed of inspection (the document in which the competent agent of the Tax inspection summarises her findings and eventually proceeds to assess the tax debt) cannot be considered on its own as sufficient evidence of the facts to which it refers [49]. Among the cases in which the extension was denied, we can refer (1) Tax assessment and monitoring procedures need not respect the principle of personal differentiation between the examining magistrate and the judge or court who decides the case[50]; (2) The amounts due on account of taxes can be notified collectively in a limited number of cases; however, the first time that the tax is to be paid it should be notified personally[51]; (3) It is constitutionally sound to condition the mitigation of pecuniary sanctions to an explicit withdrawal from further legal actions (the Court asserted that this was so to the extent that nothing prevented the individual from changing her mind latter, though that this might lead to losing the mitigating benefit)[52]. Finally, we can refer some cases in which the analysis of procedural guarantees was quite peculiar: (1) The application of the principle of equal treatment by the tax administration needs to be substantiated by something more than the mere reference to the fact that others are not being monitored or inspected[53]; (2) The evidence which can be brought before a court cannot be determined according to the

47 Cf. STC 76/90, par. 3.
48 Cf. ATC 3/92.
49 Cf. STC 76/90, par. 7
50 Cf. STC 76/90, par. 7.
51 Cf. STC 73/96, par. 4.
52 Cf. STC 76/90, par. 7.
53 Cf. STC 110/84, par. 2.

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criteria whether a tax related to documents has or has not been paid[54]; (3) The enactment of a new circumstance mitigating or excluding tax liability needs not be taken into account by the judge of appeal. Such task is proper of the judge in charge of the effective execution of the decision or judgment[55]; (4) It is acceptable that special penalties are contemplated for professionals who infringe a reinforced duty to collaborate with the tax administration[56].

Recycling the privileges of the tax administration

§82. The Court has come across many cases concerning the privileges of the tax administration, that is, the special powers which are attributed to it in the name of an efficient discharge of its tasks (like ensuring widespread compliance with tax law). Two main questions emerge from an analysis of such jurisprudence. First, the breadth and scope of the right to physical and informational privacy *vis-à-vis* the tax administration, and second, the privileges granted to the tax administration concerning the payment of debts. The interpretative hypothesis (the paradigmatic shift[57]) is more clearly reflected in the second set of cases.

§83. The specific contours of physical and informational privacy vis-á-vis the tax administration have been considered in two leading cases by the *Tribunal*. In general terms, it has rejected the unlimited character of banking secrecy, characteristic of the formal paradigm of tax law (in which the tax administration was not seen as embodying an interest substantially different from that of private individuals) and it has proceeded to weight and balance the values at stake.

The Court has established two basic premises concerning physical privacy. First, that the granting of a search warrant must not be considered as evidence of illegal behaviour on the side of taxpayer being inspected. If the competence for granting the warrant is attributed to penal judges is not

54 Cf. STC 141/88, par. 6.
55 Cf. STC 62/97, par. 4.
56 Cf. STC 76/90, par. 4.
57 Cf. §56.

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out of a pre-judgment of the liability of the taxpayer, but in order to reinforce the protection of the right to privacy[58]. Second, the search warrant must fully comply with the procedural requirements established in the *Ley de Enjuiciamiento Civil* (the Civil Procedure Act), so that it is clearly unacceptable the issue of vague warrants which do not limit the search in temporal and spatial terms, or which do not indicate the number of officers which are allowed to enter the home or premises[59].

On what regards informational privacy, the Court has made some general considerations and has established two basic conclusions. On the one hand, it has argued that economic transactions are characterised by their transparency, but that an unlimited access to the web of economic data related to a given individual can lead to an infringement of her right to privacy. To the extent that widespread compliance with tax norms can only be ensured by an efficient tax administration that monitors tax compliance, it is possible to argue that the administration can only be efficient if it has access to all relevant economic information. What needs to be done is to strike a balance between the values at stake. On the other hand, the Court has asserted two main principles in order to render more specific the referred weighing and balancing. First, that banking transactions should be open to inspection by tax authorities, but that access should be limited in objective (only some institutions or agents can have access) and subjective terms (only the data of taxpayers which are undergoing a monitoring procedure needs to be provided)[60]. Second, that it is constitutionally sound to require the quotation of a PIN (Personal Identification Number) in all financial transactions to the extent that there are clear criteria of the transactions in which its use is mandatory[61].

§84. A second series of cases in which the Court has come to terms with the need of reviewing the constitutional acceptability of some traditional privileges of the administration concerns the unequal position of the

58 Cf. STC 137/85, par. 3.
59 Cf. STC 50/95, par. 4.
60 Cf. STC 110/84, par. 6
61 Cf. STC 143/94, par. 6.

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taxpayer and the administration on what respects the terms of payment of debts.

In all the relevant judgments, it has been made clear that the principle of budgetary legality curtails the capacity of the tax administration to cancel its debts at the speed which is characteristic of private agents. However, it is also stressed that this cannot be turned into an excuse to justify any delay whatsoever in compliance with its obligations, and even less a definitive default.

Following the interpretative hypothesis (the paradigmatic shift) we can distinguish two different orientations in the body of cases. In a first series of judgments, and outstandingly in judgments STC 76/90 and STC 206/93, the Court justified the acknowledgement of some privileges to the Public Treasury as a debtor. This was argued on the basis of both the different objective consequences ensuing from lack of payment (when the Public Treasury was creditor, the solvency of the state was at stake, something which could not be said when it was debtor) *and* an interpretation of the rationale underlying reinforced interest liability when the Public Treasury was creditor as protecting it against certain subjective attitudes (lack of motivation to comply swiftly, interest in appealing) which were proper of private individuals but not of public institutions. Both rationales correspond to a material paradigm of tax law. In the second series of judgments, and especially in judgments STC 69/96 and STC 23/97, the Court has moved towards a more critical attitude towards such privileges. In both cases, the *Tribunal* argued that it was necessary to interpret that the rationale for foreseeing the payment of a given interest rate was applicable both when an individual or the Public Treasury was the debtor.

D) The general understanding of the tax relationship

§85. To conclude this section, we can contrast the two main lines of jurisprudence which were distinguished in the body of cases dealing with tax law by means of a final comparison, which is confronting the two judgments in which a more synthetic formulation of the general meaning of

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each paradigm is offered, namely judgments are STC 76/90 and STC 182/97.

The first case characterises tax relationships as special relationships of subjection, in which tax authorities are in a position of supremacy and individuals are in a state of subjection. This formulation implies giving a clear priority to the *public interest*, which is supposed to be embodied and defended by tax authorities. This conception is the main justification of the limitation of individual rights in order to ensure widespread tax compliance and more specifically, of the privileges of the tax administration and the basic duties to collaborate with it. In spite of the fact that the choice of the terminology is far from being happy (*the special relation of subjection*), the argument must be seen as the peak of the materialisation of the tax system and not as betraying an authoritative conception of taxes[62]. The second case implies a very different conception of taxation. It brings to the fore the correspondence between rights and duties in tax matters. This implies that tax principles must be seen not only as the source of duties, but also of individual rights which can be invoked vis-à-vis tax authorities. The decision offers a more general formulation to a different way of understanding the tax relationship, which we have seen at work in the reinvigoration of the democratic potential of the principle of legality of taxation (for example, in the redefinition of the division of labour between Budget Acts and ordinary tax statutes), the new characterisation of standards as substantive correctness as individual guarantees (like in the new direction given to the principle of retroactivity) or the filtering of the privileges granted to the tax administration on the basis of its reconceptualisation as the agent of taxpayers.

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62 Cf. STC 76/90. par. 3: "Esta recepción constitucional del deber de contribuir al sostenimiento de los gastos públicos según la capacidad económica de cada contribuyente configura un mandato que vincula tanto a los poderes públicos como a los ciudadanos e incide en la naturaleza misma de la relación tributaria. Para los ciudadanos este deber constitucional implica, más allá del genérico sometimiento a la Constitución y al resto del ordenamiento jurídico que el artículo 9.1 de la norma fundamental impone, una situación de sujeción y de colaboración con la Administración tributaria en orden al sostenimiento de los gastos públicos cuyo indiscutible y esencial interés público justifica la imposición de limitaciones legales al ejercicio de los derechos individuales. Para los poderes públicos este deber constitucional comporta también exigencias y potestades específicas en orden a la efectividad de su cumplimiento por los contribuyentes".

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5. The liberal principles of taxation

A) Legitimacy through participation

a) The democratic potential of the principle of legality of taxation

The principle of legality of taxation can be seen as the traditional way of giving institutional shape to the requirement of equal and symmetric participation in the making of tax norms. A democratic theory of tax law should take care of fostering the democratic potential implicit in such principle.

[1] The norms that govern the quantification and allocation of the tax burden to individual taxpayers are to be enacted into statutes. More specifically, the tax event, the identification of the taxpayer, tax rates and any other factor relevant in the quantification of the tax burden should be contained in statutes approved by Parliament. The requirement should extend to the basic norms governing tax assessment, compliance and monitoring.

[2] Norms falling under the material scope of principle **[1]** cannot be enacted by statutory instruments [règlements]. Exceptions to this general principle require the weighing and balancing of the requirements ensuing from the principles of self-government and efficiency. More specifically, resort to statutory instruments can be justified by reference to the functional need of avoiding an overload of participatory institutions in matters of detail.

[3] Norms falling under the material scope of principle **[1]** cannot be enacted by decree-laws. Exceptions to this general principle can be accepted only on the basis of an explicit case showing that there are functional needs which require not only complementing morality with law, but that the need of enacting an authoritative and institutional norm is so pressing that the procedural requirements of legislation would frustrate the achievement of the basic tasks of conflict-solving and social coordination in an acceptable manner. This implies that

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arguments should be put forward in order to prove the urgency of enacting the normative contents contained in the decree-law and its effectiveness. Moreover, the decree-law should not affect the basic pattern of distribution of taxation, and more specifically, the basic tax mix.

[4] Participation in the making of tax norms is articulated in two different moments. On the one hand, representative institutions approve specific tax statutes, the content of which is governed by principle **[1]**. On the other hand, they approve periodic (generally annual) Budgets. The latter symbolise the systemic connection between taxation and public expenditure.

[5] The peculiar nature, contents, and procedure of approval of Budgets requires limiting their normative content on tax matters. On the one hand, the basic tasks concerning the quantification and distribution of the tax burden should be exclusive of ordinary tax statutes, according to principle **[1]**. On the other hand, the fulfilment of the tasks of redistribution and management of the economy justifies the marginal amendment of tax norms in the Budget. The Budget is specially apt to fine-tune tax rates.

[6] The mismatch between the constituency of those called to pay taxes and those who have a right to participate in the deliberation and decision-making procedures that lead to the enactment of tax norms needs to be solved, in the case of permanent residents, by means of acknowledging them the aforementioned rights.

This principle is associated to the reconceptualisation of *membership* as plural. We are related in different ways and with different intensities to several political communities. That means that we stand in horizontal relationships giving rise to rights and duties of solidarity with members of different political communities. The fact that we pay taxes in different communities betrays our membership to them. The increasing number of conflicts between tax jurisdictions makes clear the increasing frequency with which individuals are related in economic and political terms to more than one nation-state.

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The principle requires distinguishing different intensities in the degree of our membership and the corresponding requirements in terms of participation.

b) Beyond the principle of legality of taxation

[7] Formal obligations, like obligatory reporting of economic activities to tax authorities, could be transformed into mechanisms of collecting further information on individual preferences concerning public expenditure. A democratic theory of tax law would welcome such kind of development if that it is combined with the provision of comprehensive information on the relations between public expenditure and taxation and if preferences are translated into policies in a way neutral to the ability to pay of taxpayers.

B) Legitimacy through substantive correctness

a) The translation of background obligations into tax duties: objective tax bases

The translation of diffused background obligations into specific duties consisting in the payment of a given amount of money (tax debts) is mediated by the process of selection of tax bases. That is, the tax system determines which events betray an economic might, so that individuals related to them in a relevant manner might be called to contribute to the common pool of economic resources. This is the way in which tax systems determine the *objective ability to pay* of each individual.

Relational Standards

[8] All events that betray an economic might should be considered as tax bases in order to calculate individual tax burdens.

[9] Tax bases should not be limited to events consisting in the flow of income, but should include the possession of wealth or stocks of capital or economic resources.

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This is justified by reference to the potential injustice of the original allocation of property rights or the rules of transfer that allow for the inter-generational transfer of economic inequalities.

[10] The amount of income corresponding to the ***subsistence*** income should be fully exempt from taxation.

This requires that the tax system contains mechanisms through which individuals whose income falls behind the subsistence level of income are restituted the amounts paid on account of any other tax in taxes (that is especially relevant concerning *real* taxes which are not sensitive to the personal circumstances of the taxpayer when determining the tax debt).

To this we have to add that it is necessary to conciliate the requirements derived from substantive correctness and the use of the tax system as a tool for the pursuit of macro-economic goals.

Absolute Standards

[11] Individuals can contest their tax burden when they are called to contribute on account of an event that does not betray an economic might in objective terms.

This principle reflects that a democratic theory of tax law distrusts the use of fictions of presumptions in the definition of tax bases. The proper way for a democratic tax system to proceed is to define and quantify tax bases by reference to public, inter-subjectively defined criteria.

[12] Individuals can contest that they are called to contribute on account of an event for which cannot be attributed in a substantive way to them.

This reflects the need of a sufficient subjective link between a tax event and an individual in order to burden her with the ensuing tax obligation. In practical terms, it implies an interdiction of collective or joint and several liability unless there are good reasons to justify it.

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b) Allocation of the tax burden according to criteria of distributive justice

Another specific task that we consider characteristic of the tax system was to allocate the tax burden according to criteria of distributive justice. This is associated to the functional split between the two hands of public finance (that is, taxation and public expenditure), which leads to the separate resolution of the questions of who should pay taxes and who should benefit from public expenditure.

In more specific terms, it refers to the need of transcending the monetary value of tax bases and the need of tailoring the amounts to be paid by each individual to her effective *ability to do so*. This requires taking into account the personal circumstances of each individual when compared to others according to a relevant set of factors compiled by the tax system itself.

Relational Standards

[13] Overall tax liability should be graduated by reference to the personal circumstances of the taxpayer. That is done by means of taking into account a series of objective factors which operationalise constitutional values of the tax system

[14] Overall tax liability should be graduated according to the individual ability to pay. The overall tax burden should increase progressively as ability to pay does so.

This reflects the assignment to the tax system of the basic task of providing the revenue necessary for redistribution of economic resources in order to insure individuals against economic deprivation, brute bad luck and force in social and economic relationships. This requires giving a progressive shape to the overall tax burden. That does not mean that all taxes should be progressive, but that the tax system as a whole should be so. The concrete tax rates need to conciliate the different intensity of progressivity required by each rationale for redistribution.

Absolute Standards

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[15] Neither the tax system nor specific tax norms should exhaust the economic might of an individual. Whether that is the case is something that should be determined applying the principle of proportionality. It is also forbidden that either the tax system or an specific tax norm discourages economic activity as such (something to be distinguished from given incentives or disincentives to specific economic activities).

c) Legal Security

[16] Tax norms should be drafted as clearly as possible, in order to (1) foster participation in the process of tax making in a meaningful way (*political dimension)* (2) allow for the self-assessment of tax liabilities (*public dimension*); (3) render tax liabilities predictable so that private agents take decisions in full awareness of the tax consequences of their decisions (*private dimension*).

[17] There is no general or unqualified indictment of retroactivity of tax norms. We should distinguish three different cases: First, there is absolutely no limit to the prospective amendment of tax norms (although their sudden and repeated change might pose problems from the standpoint of legal security as a general principle). Second, the modification of the tax regime of legal or economic events which were on the making when the new legislation was enacted requires weighing and balancing the different principles at stake. Account should be taken of the predictability of the change, the legitimacy of the goal pursued through the amendment, the effectiveness of retroactive legislation to such effect and the extent to which the change might impinge upon democratic deliberation or alter the basic pattern of distribution of taxes. Third, the modification of the tax regime applicable to fully completed legal relationships should be exceptional. It should be conditioned to a more severe weighing and balancing of the aforementioned facts

C) Legitimacy through guaranteed implementation

A complete set of principles of legitimacy through guaranteed implementation needs to be established by reference to a *complete* theory of guaranteed implementation of norms. Here the reader might find some principles related to specific characters of tax law.

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[18] The tax administration should be seen as an agent of taxpayers. The public interest it embodies is not merely a revenue interest, but one in the fair application of the tax system. It must be justified by reference to the diffused rights characteristic of the horizontal relationship among taxpayers which is in the background of all tax relationships. The tax administration institutionalises such active position in relation to tax obligations

[19] The implementation of tax norms should be based on the self-assesment of taxpayers.

[20] Tax norms should be interpreted in the same way as ordinary legal norms are.

This constitutes a clear indictment of one of the basic tenets of the prescriptivist theory of tax law. Tax norms are assimilated to penal ones (the prescriptivist does not have much resources in order to distinguish between fines, penalties and taxes), and consequently they are said to subject to *strict interpretation* (*non puto delinquere eum qui in dubiis quaestionibus contra fiscum facile responderit*).

[21] Procedural guarantees applicable to criminal procedures should be applicable to the tax procedures (the procedures through which tax norms are implemented) only to the extent that they might lead to criminal sanctions (even if indirectly through a later criminal procedure) and that they are adequate to the nature of the tax relationship.

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Bibliographical References

Ackerman, Bruce. 1984a. *Reconstructing American Law*. Cambridge and London: Harvard University Press

———. 1984b. The Storrs Lectures: Discovering the Constitution. *Yale Law Journal* 93:1013-72.

———. 1989. Why Dialogue? *Journal of Philosophy*, 86:5-22.

Ackerman, Bruce and Alstott, Anne. 1999. *The Stakeholder Society*. New Haven and London: Yale University Press.

Alexy, Robert. 1989. *A Theory of Legal Argumentation*. Oxford: Oxford University Press.

——— 1992. *Teoría de los Derechos Fundamentales*. Madrid: Centro de Estudios Constitucionales.

———. 1994. El Concepto y la Validez del Derecho. Barcelona: Gedisa.

———. 1996. Discourse Theory and Human Rights. *Ratio Juris*, 9:209-35.

———. 1997. Giustizia comme corretezza. *Ragion Pratica* 9: 103-13.

———. 1998. The Special Case Thesis (Sonderfallthese), paper presented at the conference on *A Discursive Foundation for Law and Legal Practice. Discussing Jürgen Habermas' Philosophy of Law*, Workshop at the European University Institute, Florence (forthcoming, *Ratio Juris*).

Allingham and Sandmo. 1972. Income Tax Evasion: a theoretical analysis. Reprinted in *Neoclassical Economics*. Ed. Martin Rickets, 1:359-74. Aldershot: Elgar.

.Arendt, Hannah. 1972. *The Crisis of the Republic*. New York: Harcourt Brace and Jovanovich.

Bengoetxea, Joxerramón. 1994. Legal System as a Regulative Ideal. *ARSP*, 53:65-79.

Berliri, Luigi. 1945. *La Giusta Imposta*. Collana della Ricostruzione dell'Annuario di Diritto Comparato e di Studi Legislativi, Terza Serie, vol XIX, fasc.3. Roma: Istituto Italiano di Studi Legislativi.

Buchanan, James and Tullock, Gordon. 1962. *The Calculus of Consent. Logic Foundations of Constitutional Democracy*. Ann Arbor: University of Michigan Press.

Buchanan, James M. and Congleton, Roger D (1998); *Politics by Principle, Not Interest. Towards Non Discriminatory Democracy*. Cambridge: Cambridge University Press.

Brownlee, Elliot W. 1996. Ed. *The rise and fall of the era of easy finance*. Cambridge: Cambridge University Press.

Christiano, Thomas. 1996. *The Rule of the Many*. Boulder: Westview Press.

Confaloneri, Maria A. and Newton, Kenneth. 1995. Taxing and Spending: Tax Revolt or Tax Protest? In *The Scope of Government*. Ed. Borre and Scarbrough. Oxford: Oxford University Press.

Copp, David. 1999. The Idea of a Legitimate State. *Philosophy and Public Affairs* 28:3-45.

De Jasay, Anthony. 1998. *Against Politics*. London: Routledge.

De Viti De Marco, Antonio. 1928. *I primi principii dell'economia finanziaria*. Roma: Attilio Sampaolesi Editore.

Dewey, John. 1984. The Public and Its Problems. In John Dewey. *Complete Works, Later works, volume 2 (1925-7)*, 238-372. Carbondale and Edwardsville: Southern Illinois University Press.

Dworkin, Ronald. 1981. What is Equality? II. Equality of Resources. *Philosophy and Public Affairs* 10:283-345.

———. 1996. Objectivity and Truth: You'd better believe it. *Philosophy and Public Affairs* 25:87-139.

Epstein, Richard. 1982. Taxation, Regulation and Confiscation. *Osgoode Hall Law Journal* 20:433-53

———. 1986. Taxation in a Lockean World. *Social Philosophy and Policy* 4:49-74.

Escribano, Francisco. 1988. *La Configuración Constitucional de la Obligación de Pagar Impuestos*. Madrid: Civitas.

Foot, Philippa. 1995. Does Moral Subjectivism Rest on a Mistake? *Oxford Journal of Legal Studies*, 15:1-14.

Friedman, Milton. 1962. *Capitalism and Freedom*. Chicago: Phoenix Press at the Chicago University Press.

Gans, Chaïm. 1986. Mandatory Rules and Exclusionary Reasons. *Philosophia: Philosophical Quarterly of Israel*, 15:373-94.

———. 1992. *Philosophical Anarchism*. Cambridge: Cambridge University Press.

Giannini, Achille Donato. 1956. *I concetti fondamentali del Diritto Tributario*. Torino: Utet.

Gerstenberger, Oliver. 1998. Private Ordering, Public Intervention and Social Pluralism. In Joerges, Christian and Gerstenberg, Oliver (eds.). *Private Governance, Democratic Constitutionalism and Supra-nationalism*. pp. 205-18. Luxembourg: Office for the Official Publications of the European Communities.

Grizziotti, Benvenuto. 1929. *Principii di politica, diritto e scienza delle finanze*. Padova: Cedam.

———. 1951. Le entrate irrazionali. *Rivista di Diritto Finanziario e Scienza delle Finanze* 10:301-12.

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Günther, Klaus. 1995. Legal Adjudication and Democracy: Some remarks on Dworkin and Habermas. *European Journal of Philosophy* 3:36-54.
Habermas, Jürgen. 1995. On the Internal Relation Between The Rule of Law and Democracy. *European Journal of Philosophy* 3:12-20.

———. 1996a. *Between Facts and Norms*. Cambridge, Massachusetts and London: The MIT Press.
———. 1996b. Paradigms of Law. *Cardozo Law Journal*, 14: 771-784.
———. 1996d. On the Cognitive Content of Morality. *Proceedings of the Aristotelian Society*, 96:335-58.
Hart, H.L.A. 1955. Are There Natural Rights. Reprinted in Lyons, David (ed.). 1979. *Rights*, pp. 14-25. Belmont, California: Wadsworth Publishing.
———. 1958. Positivism and the Separation of Law and Morals. *Harvard Law Review*, 71:593-629.
———. 1963. *Law, Liberty and Morality*. Standford: Standford University Press.
———. 1982. *Essays on Bentham*. Oxford: Oxford University Press.
Hayek, Friedrich A. 1960. *The Constitution of Liberty*. London: Routledge, Kegan and Paul.
———. 1976. *Law, Legislation and Liberty*. London: Routledge, Kegan and Paul.
Hensel, Albert. 1956. *Diritto Tributario*. Milano: Giuffrè.
Holmes, Stephen and Sunstein, Cass. 1999. *The Cost of Rights. Why Liberty depends on Taxes*. New York: Norton & Company.
Honoré, Tony. 1992. The Dependence of Morality on Law. *Oxford Journal of Legal Studies*. 13:1-17.
Kelsen, Hans. 1945. *General Theory of Law and State*. Cambridge: Harvard University Press.
———. 1979. *Teoría Pura del Derecho*. México: Universidad Autónoma Nacional de México.
Knight, Frank H. 1967. Laissez Faire: Pros and Cons. *Journal of Political Economy* 75:782-95.
Koller, Peter. 1992. A Conception of Moral Rights and its application to property and welfare rights. *Ratio Juris* 5:153-71.
Kymlincka, Will. 1989. *Liberalism, Community and Culture*. Oxford: Oxford University Press.
Laporta, Francisco. 1987.El Principio de Igualdad: Introducción a su análisis. *Sistema* 3-31
Leoni, Bruno. 1991. *Freedom and the law*. Indiannapolis: Liberty Fund.
Lewin, Leif. 1991. *Self-Interest and Public Interest in Western Politics*. Oxford: Oxford University Press.
Lewinsohn-Zamir. 1998. Consumer Preferences, citizens preferences and the provision of public goods. *Yale Law Journal* , 108:377-406.
Livingston, Michael. 1998.Reinventing Tax Scholarship: Lawyers, Economists and the Role of the Legal Academy. *Columbia Law Review*. 83:365-436.
MacCaffery, Edward. 1994a. The Uneasy Case for Wealth Transfer Taxation. *Yale Law Journal* 104:283-365.
———. 1994b. The Political Liberal Case Against the Estate Tax. *Philosophy and Public Affairs* 23:281-310.
MacCormick, Neil D. 1981.*H.L.A. Hart*. London: Edward Arnold.
———. 1985. A moralistic case for a moralistic law. *Valparaiso University Law Review*, 20:1-41.
———. 1992. Natural Law and the Separation of Law and Morals. In George, Robert P. *Natural Law Theory*, pp. 105-33. Oxford: Oxford University Press
———. 1997. Institutional Normative Order: A Conception of Law. *Cornell Law Review*, 82:1051-70.
MacIntyre, Alisdair. 1984. *Is Patriotism a Virtue?* Lawrence: Kansas City University Press.
Milward, Alan. 1984. *The reconstruction of Western Europe,1945-51*. London: Methuen.
Musgrave, Richard Abel. 1959. *A Theory of Public Finance*. New York: McGraw-Hill.
Nawiasky, Hans. 1982. *Cuestiones fundamentales de Derecho tributario*. Madrid: Instituto de Estudios Fiscales.
Nagel, Thomas. 1997a. *The Last Word*. Oxford: Oxford University Press.
———. 1997b. Justice and Nature. *Oxford Journal of Legal Studies* 17:303-21.
Nino, Carlos Santiago. 1985. *La Validez del Derecho*. Buenos Aires: Editorial Astrea.
———. 1989a. *Ética y Derechos Humanos*. Barcelona: Ariel.
———. 1989b. *El Constructivismo Ético*. Madrid: Centro de Estudios Constitucionales.
———. 1990. La Constitución como Convención. *Revista del Centro de Estudios Constitucionales* 6: 189-217.
———. 1991a. *The Ethics of Human Rights*. Oxford: Oxford University Press.
———. 1993. A Philosophical Reconstruction of Judicial Review. *Cardozo Law Review* 14:799-846.
———. 1995. *Derecho, Moral y Ética*. Barcelona: Ariel.
———. 1996b. *Radical Evil on Trial*. New Haven and London: Yale University Press.
O'Connor, James. 1973. *The Fiscal Crisis of the State*. New York: St. Martin's Press.

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Olson, Mancur. 1965. *The logic of collective action: public goods and the theory of groups*. Cambridge, Massachusetts and London: Harvard University Press.
Posner, Richard. 1981. *Economic Analysis of Law*. Boston: Little Brown.
Postema, Gerald J. 1996. Law's Autonomy and Public Practical Reason. In *The Autonomy of Law*. Ed. Robert P. George, 79-118. Oxford: Oxford University Press.
Pugliese, Mario. 1937. *Istituzioni di Diritto Finanziario*. Padova: Cedam.
Raneletti, Oreste. 1974. Natura Giuridica dell'Imposta. *Diritto e Prattica Tributaria*, serie 1, 45:789-823.
Rawls, John. 1964. Legal Obligation and the Duty of Fair Play. In Hook, Sydney (ed.); *Law and Philosophy*, pp. 3-18. New York: New York University Press.
———. 1971. *A Theory of Justice*. Oxford: Oxford University Press
———. 1993. *Political Liberalism*. New York: Columbia University Press.
Raz, Joseph. 1975. *Practical Reason and Norms*. London: Hutchinson.
———. 1979. *The Authority of Law*. Oxford: Oxford University Press.
———. 1985. Authority, Law and Morality. *The Monist*, 68:295-324.
———. 1986. *The Morality of Freedom*. Oxford: Oxford University Press.
———. 1998. Postema on Law's Autonomy and Public Practical Reasons. *Legal Theory*, 4:1-20.
Ródenas Calatayud, Ángeles. 1996. *Sobre la justificación de la autoridad*. Madrid: Centro de Estudios Constitucionales.
Rodríguez Bereijo, Álvaro. 1976. Introducción al derecho financiero. Madrid: Instituto de Estudios Fiscales.
Russo, Pasquale. 1994. L'Obbligazione Tributaria. In Amatucci, Amadeo (ed.); *Trattato di Diritto Tributario*, vol. I., p. 3-33. Padova: Cedam.
Ryan, Alan. 1999. Please Fence Me In. *New York Review of Books*, Sept. 23, 1999. At http://www.nybooks.com/nyrev/index.html
Sandel, Michael. 1982. *Liberalism and the limits of justice*. Cambridge: Cambridge University Press.
———. 1996. *Democracy's Discontent*. Cambridge, Massachusetts and London: Harvard University Press.
Schneider, Friedrich. 1997. *Empirical Results for the Size of the Shadow Economy of Western European Countries over Time*. Linz: Economics Department of the University of Linz.
Seligman, Edwin R. A. 1909. Progressive Taxation in Theory and Practice. *American Economic Association* Quarterly 9:1-334 (supplement).
Sen, Amartya. 1978. Rational Fools: A Critique of the Behavioral Foundations of Economic Theory. *Philosophy and Public Affairs*, 6:317-44.
Simons, Henry C. 1946. Federal Tax Reform. *University of Chicago Law Review* 14:20-65.
Simmons, John. 1979. *Moral Principles and Political Obligations*. Princeton: Princeton University Press.
Simmons, John. 1996. Associative Political Obligations. *Ethics* 106:247-73.
Soper, Philip. 1986. Choosing a Legal Theory on Moral Grounds. *Social Philosophy and Policy* 4:31-48.
Tanzi, Vito and Parthasarathi, Shome. 1993. *A Primer on Tax Evasion*. Washington: International Monetary Fund Working Paper Series (WP 93/21).
Von Mises, Ludwig. 1966. *Human Action: a treatise on economics*. Chicago: Contemporary Books.
Waldron, Jeremy. 1995. Minority Cultures and Cosmopolitan Alternative; In *The Rights of Minority Cultures*. Ed. W. Kymlincka, 93-122. Oxford University Press.
———. 1999. *The Dignity of Legislation*. Cambridge: Cambridge University Press.
Wicksell, Knut. 1958. A New Principle of Just Taxation. In Buchanan, James M. and Musgrave, Richard A. (eds.). *Classics in the Theory of Public Finance*. London & New York: MacMillan.
Wolff, Paul. 1976. *In Defence of Anarchism*. New York: Harper and Row.
Yitzhaki, S. 1974. A Note on Income Tax Evasion. *Journal of Public Economics* 3:201-2.

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