

The principle of morality (administrative, tax and "public") in the Brazilian Federal Constitution of 1988

*Demetrius Nichele Macei**

*Francisco Cardozo Oliveira***

Abstract

This study aims to analyze the issue of tax morality and ethical (or unethical) attitudes identifiable in the tax legal relationship, considering the performance of duties in its two faces, the public (tax authority) and the private (taxpayer). The work approaches the aspects of Tax Justice, Equity and Fair Tax, inspired by the teachings of Klaus Tipke, leading to the confirmation that a tax is sustainable not only when it respects the ability to contribute, but also when the society accepts it as legitimate and necessary, even in a context of high tax burden. Thus, for this to occur is fundamental that the State manifests an ethical posture in dealing with taxpayers and with the resource's application, whether in order to legitimize this conduct or to inspire the taxpayers to adopt the same behavior, assuming that their misconduct (tax evasion) is a direct reflection of the State posture.

Keywords: Fiscal Legitimacy. Sustainability. Tax Justice. Taxation.

Recebido em: 25/09/2018 | Aprovado em: 28/11/2018

<http://dx.doi.org/10.5335/rjd.v32i3.8911>

* PhD from PUC/SP. Professor of the Master Program in Business Law and Citizenship at Unicuritiba, Curitiba, PR, Brazil. E-mail: demetriusmacei@gmail.com

** PhD from UFPR. Professor of the Master Program in Business Law and Citizenship at Unicuritiba, Curitiba, PR, Brazil. E-mail: xikocardozo@msn.com

Introduction

The legal conjuncture we are experiencing has never been so fertile for a discussion about this matter. Jurists and philosophers debate – together and mixed – the role of ethics and morals in Law. Some of them understand that, because these two elements are *out* of the Law, these philosophical institutes do not interest the jurists and judges. Others cannot separate things.

From ancient times to the present, long before the discussions on the systems of laws, Constitutions, Judiciary and even the State, as we know it today, philosophy had already debated the theme of Ethics. In his famous book "Nicomachean Ethics," Aristotle had already talked about themes such as the virtues of man, vices, and how all this culminates in justice - the mother of virtues. According the most famous Greek of today, along with Socrates and Plato: equality means treating equally the equals and unequally the unequals, in the measure of their inequalities.¹ Many say, and I reaffirm, there is nothing new after Aristotle.

Law, as a set of legal norms is nothing more than rules of coexistence adopted by a people, in a certain place and time that were "elevated" to such a degree of importance, that its non-compliance came to be watched and controlled by the State. So at this very moment, Morals becomes Law. However, with this phenomenon of transition, it is Morals effectively separate from the Law?

Classical doctrine (Hans Kelsen, for example) states that nothing out of the positive legal system, controlled by the State, concerns Law. For this doctrine, the judge who *departs from* the Law to decide a case encourages baseless decisions, and the worst, turns them unpredictable, offending what jurists most fear: Legal Certainty.

The set of rules and principles relating to the matter of taxes has been the concern of the science of tax law, whether by the aspect of its institution by the Legislative Branch, or by its collection exercised by the Executive Branch (Public Administration).

The Brazilian Federal Constitution² - from which come, expressly or implicitly, all these rules and principles - reveals in its Tax System a delimited set of rules directed to the Legislative Branch since it is the responsible for the institution of taxes. Such norms are called the "Limits to the Power to Tax" of the State. This constitutional position reveals the result of an important historical evolution related to the collection of citizens' taxes: the Sovereign Power.

Initially, the conqueror of lands and maintainer of the armies represented this power, but modernly, a representative elected by the people (*res publica*) manages the public patrimony – this figure, throughout history, has always had the prerogative of requesting part of the property of private individuals for their domains.

The institution and collection of taxes have improved over the centuries, bringing important guarantees to the taxpayers and to the State. However, as regards the satisfaction of the credit, the doctrine still diverges about the role of tax in society. Ives Gandra da Silva Martins³ defines the tax as a "norm of social rejection, with greater destination for the maintenance of the holders of power, and a great instrument for the exercise of power by these, with some positive side effects in favor of the people, when there is some return in public services" (free traslation). On the opposite side, Ricardo Lobo Torres⁴ defines tax payment as a *fundamental duty* of the citizen, guided by the principle of group solidarity, by the ability to contribute and the purpose of obtaining revenues for public needs.

In Brazil, once adopted the "Ability-to-Pay" principle, the one who reveals more wealth must contribute more to the State, whilst the one with less economic ability, on the other hand, contributes less or with nothing.

This contributory capacity aims to satisfy, in the first place, the Constitutional Principle of Tax Equality, arising from the Principle of General Equality, which consists of treating equally the equals and unequally the unequals, in the exact measure of their inequality. This 'measure of inequality', in tax terms, is precisely the Ability to Contribute. The only form allowed by the Constitution for the legislator to discriminate one person from another, when collecting taxes, is in accordance with the economic capacity of each one.

That is why in Brazil we do not have a "Bank Tax" or a "Hats Factory Tax", for example. There is a common sense that banks have above-average profitability, and that any business related to the trade of hats, in a time when people no longer wear such garments, is going to bankrupt.

There are loss-making banks, though. A quick consultation about the financial institutions, which are regularly under the intervention of the Central Bank, is enough to prove it. A little more rare, but present, is the fact that some hat factories are highly profitable. Just browse the list of suppliers of great brands of French or Italian fashion clothing for women, for example.

Simply because it is impossible to conclude that banks are always profitable and the factories of hats, always unprofitable, is that the taxation falls on the income of each of them, independently of their business activity, through the collection of the Corporate Income Tax⁵. If there is no income, there is no ability-to-pay. In addition, concerning the income, increase in assets, to better serve the Ability-to-Pay Principle, the legislator is authorized to tax progressively, that is, to raise the tax rates even more in those cases where the income is even higher.

Taxation, however, does not come exclusively from income. Usually it focuses on consumption, turning difficult the satisfaction of the ability-to-pay principle. Take ICMS⁶ (Tax on Circulation of Goods and Transportation and Communication Services), a state tax, and IPI⁷ (Tax on Industrialized Products), a federal tax, as two Brazilian examples of taxes on which the contributive capacity of the citizens is theoretically irrelevant. The form found by the legislator to guarantee the principle was the adoption of a technique called selectivity of the commodity or product in light of its essentiality. By such a rule, - or principle for some -, taxation is more burdensome on items considered superfluous and supposedly consumed by people of greater economic capacity than those essential items supposedly consumed by the entire population.

Many other taxes whenever possible must satisfy the aforementioned Ability-to-Pay principle. Their disrespect, in any case, offend, nullifies or even leads to the inverse effect of the generation of income by the taxpayer, causing poverty. When taxation is high enough to provide weak and, therefore unstable patrimonial growth of the natural or legal person, this is detrimental. The maximum limit of the ability to contribute is reached when not only is the wealth is exhausted by the excessive tax burden, but also when the taxpayer has to discard part of its base assets to pay the tax debts generated by their activity. It is called the confiscatory effect of taxes, which is also forbidden by the Federal Constitution.

In an elementary way, the disrespect of the ability to contribute makes the taxation unsustainable. By annulling the wealth of the citizen, the State will have no alternative but to interrupt the collection of taxes and to support itself in other forms (issuance of currency, issue of securities of public debt, etc.) that would, eventually, exhaust its own survival capacity.

Sustainability, an expression commonly used to refer to the environment, brings the clear idea that the exploitation of natural resources cannot be lim-

itless because these same resources are finite. It means that the limitation of resources imposes a restriction for the exploitation and, considering that, humanity intends to subsist eternally through its future generations, such resources must also be eternal. The formula for this complex equation is 'sustainability', insofar as the withdrawn resources must be constantly replenished, in the same, or desirably, largely than they are withdrawn from the environment.

The "sustainable taxation" would then be, in a more elementary idea, the preservation of the source of the tax resources (the taxpayer); giving it continuous conditions to maintain its capacity to produce wealth, since such wealth is the taxation source.

Much is discussed about the so-called "Ideal Tax". For some, it is the tax demanded in an absolutely equal way, that is, the single tax would better serve the tax purposes, since all contribute to the same measure for the cost of the State. On the other hand, it does not take into account the ability of each to contribute. The rich contributes in the same extent as the poor; the subsistence minimum of the poor is not taken into consideration. The Income Tax⁸ serves the ability to contribute well, but inhibits the generation of new income and creates a certain disincentive in the citizens to continue producing wealth. Even though taxation on consumption is less perceived, it does not satisfy the 'ability-to-pay', as well. In all cases, the granting of exemptions and tax benefits is undesirable, as it overtaxes some to the detriment of others. But in a Welfare State, in which the least privileged are supported by the State, the exemption has the effect of distributing income, insofar as the State provides services to all, but only those who have the conditions pay for the Services, and the rest of the cost also falls on them indirectly.⁹

Whatever the tax in question, regardless of the fulfilment given by it to the economic capacity of the taxpayer, incontrovertible fact is its compulsory character. For the tax system, it does not matter what the taxpayer wants, since the obligation to pay taxes stems directly from the law.

However, further study of the phenomenon of taxation reveals that, contrary to what may seem, its compulsion is not the essential element for the payment of taxes by citizens. The history of civilization shows a number of situations in which the taxation considered "very high" caused revolutions and the rupture of the existing structure. It is necessary that the society is conformed, accepts or at least supports the collection. That is: the society must accept this

collection peacefully and the more just it seems to it, the more it will be conformed.

Qualify taxation as high is a relative concept. Objectively low taxation can be considered high if the Collection State does not have the legitimacy to collect it. The reciprocal is also true. In Brazil, the term "high tax burden" is used based on how much its revenue represents in the Gross Domestic Product (GDP) of the country. It should be noted that the ability-to-pay principle among us does not take this index into account. It is only possible to invoke the offense at the ability-to-pay principle if this or that tax, individually considered, was imposed or increased without observing it.

An example of this would be the excessive increase in the rate of taxes levied on the sales of companies of a commercial nature, which usually have a reduced margin of profit; the Contribution for Social Security Financing of supermarkets is an example of it. Any small increase in this rate exercises influence on profit and loss. In this particular case, it is possible to sustain the offense to the aforementioned principle even before an "almost imperceptible" increase in terms of percentage.

In another example, instead of increasing the tax of the supermarket, another tax is created, also incident on the billing, with the same rates, inclusive. Strictly speaking, such institution, individually considered, would not be able to offend the Ability-to-Pay principle, but the total tax burden generated for that company surely compromises its ability to pay taxes.

From a strictly legal and positive point of view, if the population agrees with the constitutional rules of institution and collection of the taxes, it does not matter their own judgment on the taxation (if it is fair or unfair, for example).

It is true that the law does not expressly authorize the compulsory transfer of wealth from the rich to the poor, nor authorizes that some people render services to others absolutely free, but even so, the State manage situations such as these, through the collection and the destination of taxes.

Citizens, aware of this forced "distribution of income", admit it based on a social contract that each society have to establish its laws and regulations of coexistence. Law, then, as a set of legal rules of coexistence among human beings, will also regulate through laws the way in which this phenomenon will occur in an orderly manner.

The State, therefore, has the legitimacy to distribute income and, strictly speaking, its success in this task depends directly on the strict compliance of such rules. This theoretical and isolated linkage of legality prevailed until the end of the twentieth century and can be verified in two different situations.

On one hand, obliging the Collection State to submit to the empire of the Constitution and the rule of law, for the institution and increase of taxes and as a vehicle of its institution, besides working for the collection and inspection of the taxes established by the law, respectively. On the other hand, taxpayers, based on the same principle of legality, and on the right to freedom, property and autonomy of the will, began to manage their businesses in order to minimize the incidence of taxes, seeking to avoid that the taxable event occurs in the manner prescribed by law.

With support in the principle of legality, taxpayers, especially companies, started to carry out the so-called "tax planning". Also called "tax avoidance", this practice aims to minimize or even completely prevent the occurrence of the hypothesis provided by law, in a lawful manner.

The IRS, seeking to limit this practice to the maximum extent, under the justification that the conduct was contrary to the collecting interests of the State, initially promoted changes in the legislation in order to limit it, insofar as it became aware of a new practice. Then, by means of the so-called economic interpretation of the taxable event, the State began to disregard acts or legal transactions tending to "dissimulate" the occurrence of the taxable event.

The aforementioned change in the interpretation of tax planning occurred through the inclusion of a new text in the National Tax Code (the sole paragraph of article 116)¹⁰, allowing such disregard from the administrative agent. This disregard, however, according to the same legal provision, could only be implemented through procedures established in ordinary law. Two years after publication, the Federal Government intended to regulate the new prerogative of the administration through Provisional Measure nº 66/2002¹¹. However, subject to harsh criticism, the Provisional Measure issued was rejected - in this regard - by the National Congress.

The paradox lies in the fact that, even without regulation, and therefore unable to produce the intended effects, this change in the National Tax Code caused a rupture in the system.

This is because tax inspection, gradually supported by the Administrative Tax Courts, began to adopt alternatively the so-called "form abuse theory" or

"indirect legal business". This theory is supposedly inspired - in the tax field – in the German doctrine of interpretation of the tax-triggering event, to determine the meaning and scope of the acts or legal business practiced by the taxpayers, thus privileging the substance over the form.

Thus, based on this line of reasoning what became important was not the legal form of the business anymore, but the real purpose of the business, or even if the tax planning purpose is to save taxes, although it seems redundant. Even if the business is performed perfectly, fulfilling the legal form established, the administrative authority can disregard such planning, imposing the tax collection, as if the legal form adopted had never existed, at least for tax purposes.

Take, for example, those corporate merger cases in which one particular establishment is sold to another because it has tax credits that the seller cannot take advantage of in their normal business. Well, the merger will produce its natural effects since it is in full compliance with the current legislation. However, it may be disregarded by the tax authorities, which will eliminate the tax effect resulting from the universal succession - typical in the case of incorporation - for the simple fact that there would have been no other purpose (negotiable, competitive, for example) to justify, in their view, the incorporation.

This subject is the object of a great controversy among the current doctrinaires, who debate to what extent this conduct is in harmony with legality. It happens, however, that the strict compliance with the legal rules also by the IRS is no longer sufficient for the taxation to occur in a legitimate way. The German jurist Klaus Tipke¹² points out that the attitude of taxpayers is a reflection of the example of State conduct. If the State establishes and collects taxes fairly and properly applies the proceeds from it, the taxpayer also undertakes to do his part. The reciprocal is also true. It is the bad example of the State, according to the author, that causes the taxpayer to misbehave. According to him: "*La mayoría de los ciudadanos se comportan con un asombroso respecto a la ley, aunque carezcan de conocimientos legales, si las leyes son claras y el interesado está habituado a ellas.*"¹³

Studies and opinions like this are not limited to European Law. North-American studies demonstrate the importance of ethics in their legal relationships. Patricia H. Werhane¹⁴, in analyzing the US experience in the financial market, concluded the absolute importance of ethical conduct, not only for investors and financial institutions, but also for government regulatory agencies.

She says: "Most people, most institutions, and even most politicians and governmental officials are decent, well-meaning people. Ethical issues sometimes occur not because people are evil or even greedy, but because the way in which their view a situation belies its ethical import."¹⁵

The exercise of the State power to tax, therefore, must consider aspects such as the justification and the purpose of taxation, the social character of the tax, and must be observed under the Tax Justice point of view. In this context, strict legality will be the place for investigations in the field of ethics and politics, which will allow the issuance of judgments about how the Tax Law should be.

The fiscal power legitimacy, in the Democratic State of Law, is obtained through the parliament gathered in assemblies based on the principle of consent. The individual, in turn, has duties to the community, beyond which the free and full development of their personality is not possible. In the exercise of these rights and in the enjoyment of these freedoms no one is subject except to the limitations established by law, created exclusively to promote recognition and respect for the rights and freedoms of others and to satisfy the just requirements of morality, public order and welfare in a democratic society. This statement is taken from Article 29 of the Universal Declaration of Human Rights¹⁶, fully applicable in the field of Tax Justice.

It is evident that when tax inspection values the conduct of the taxpayer, even when strictly licit, but contrary to the interests of the State, it is labeling the conduct of unethical, unjust to the collectivity.

The relationship between law and morality is intimate. Insofar as the science of law assumes the positivism and its various theoretical aspects, institutes distance themselves, and even though they coincide with their ideals (from the prevalence of good over evil, right over wrong, fair over unfair) the form of manifestation of both is different. For the positivists, the Law is amoral. It is not up to the magistrate to question whether the law prescribes correctly the conduct or not. Respected the rules for the institution of the laws, it is up to the legislator to only change the text of the law, adapting it to the concept of right or wrong adopted by the society at that moment and space, after all *non omne quod licet honestum est*.

The discussion becomes more relevant when the legislator recognizes Morals as a legal institute to be respected objectively. This is what happens in the Brazilian Constitution. Article 37 of the Federal Constitution establishes that

the Public Administration must obey the "principle of morality". When, then, would such a norm be offended? Is this rule only addressed to the Executive Branch (Public Administration) or also to the legislator? Considering the principle of tax legality, would be possible to admit morality in the tax field?

There are few studies on the subject in Brazil. Antônio José Brandão¹⁷ demonstrated that morality was first juridicized through Civil Law, in the evolution of theories of *abuse of rights*, *illicit enrichment* and of the so-called *natural obligation*. Equivalent to this, in Administrative Law, the institute of morality has penetrated the development of the Abuse of Power Theory from which it derives the concept that administrative morality is the "set of rules of conduct drawn from the inner discipline of administration".

In a modern conception, Maria Sylvia Zanella di Prieto points out, administrative morality has ceased to be an internal matter only to be subject to the control of the judiciary in examining cases of abuse of power, in which the agent acts within the law, but with bad intention. Much of the administrative doctrine, in identifying the bad intentions of the agents, understands that there is in fact a vice to one of the elements of the administrative act, the purpose. Thus, based on this justification they consider the act invalid, for its disrespect with the legality principle.

Alongside those who see greater breadth in the principle of morality is Marçal Justen Filho, who calls it "Principle of Public Morality", giving amplitude to all those who exercise the public function, including the legislator, in the exercise of the legal function, since, according to him, the vice of the administrative act does not disappear when accepted by a law.¹⁸

Klaus Tipke¹⁹ dedicated himself to the subject in his work, which became an obligatory reference for scholars on the theme: "Tax Morality of the State and Taxpayers". The author emphasizes that not only must the collection of the tax pay attention to moral precepts, but it must also be observed by the legislator, the judge and even by the taxpayer.

The Brazilian National Tax Code is permeated with aspects related to morality. Take, for example, the article 118 of the CTN. The Complementary Law states that the legal definition of the tax-triggering event is interpreted in isolation from the legal validity of the acts effectively practiced by taxpayers, liable parties, or third parties, as well as the nature of its object or its effects. Such provision is often expressed with the Latin expression *non olet*.

Thus, when a certain income derives from an illicit act (drug trafficking, for example), the person applying the Income Tax law must abstain from this criminal act and concentrate on income, by its collection. And, the same happens in relation to the illegal exercise of regulated professional activity. A false lawyer may have to pay the Service Tax²⁰ on his "legal" service, by virtue of this same legal provision.

This, in short words, is nothing more than Law considering the Morals, because it would not be "fair" to collect the tax from the one who acts in legality by dismissing those who do not do it. It is the same case with Equity.

The CTN in its article 108 states that, in the absence of express provision, the competent authority to apply tax legislation must use equity to integrate, that is, to fill loopholes in the law.

Further on, the article 172 of CTN, in which the object is the "pardon" of the tax, states that the law may authorize the administrative authority to grant, by reasoned order, total or partial remission of the tax credit, applying considerations of equity, in relation to the personal or material characteristics of the case.

For Alípio Silveira²¹, equity has the following functions: (i) compliance with contractual provisions and customary practices; (ii) the interpretation of the sources of Law, with the predominance of its purpose over its text, based on the most benign and human interpretation, among the various possible interpretation of a text; (iii) the adaptation of the legal rule to the circumstances of a particular case; (iv) the integration of loopholes in the legal rules; and (v) in the decision outside the legal rules.

In essence, equity reveals itself by four functions: (a) equity as a method of interpretation of the legal rule; (b) equity as a method of integration of the legal rule, in filling loopholes; (c) equity as a method of controlling the validity of the legal rule; and (d) equity as method of decision, regardless of the existence of any legal rule.²²

Luciano Amaro²³ argues that article 108, in the National Tax Code would apply to any "enforcer of the law", "any person who has the duty to identify the applicable law to a given situation ". Marciano Seabra de Godoi²⁴ states, in agreement with the previous author, that the Bill of the National Tax Code in its original wording would refer to the "competent administrative or judicial authority". However, in its final draft, it was decided to exclude mention of the Judiciary Branch.

In relation to this fact, the author states that the exclusion would be a mere "ellipse". This is because "it would not make sense that the IRS was bound to apply the law in one way, and the taxpayer or the judge should (or could) apply it in a different way." Still, in a historical analysis, Aliomar Baleeiro²⁵ recalls that before "Brazilian tax laws and regulations often recognized equity in interpretation, but reserved it to the Minister of Finance in the exemption of the fines. The CTN has extended it to any "competent authority." He concludes: "The tax authority [is] the addressee of art. 108 of the CTN, and also the judge of the tax case (...)". In the same sense, Ricardo Lobo Torres²⁶ defends that the methods of integration of article 108, apply to all classes of interpreters: the judge, the administrator and the citizens.

In conclusion, it is possible to see that equity can and should be applied by the Judiciary and Executive Branch, without distinction. By doing this, they are in fact, deciding outside the legal rule. And what "external" rule is that? The moral rule is the only plausible answer.

There is no doubt, therefore, about the possibility of applying Morals in Law, whether in the administrative or judicial sphere, in Tax Law.

The merely collecting posture of the state, for example, reveals offense to "Public" morality - in the wise words of Marçal Justen Filho, already mentioned - insofar as it does not meet the objectives of equality between taxpayers and the social aspects of taxation. And here it is not only a matter of clearly separating the "fiscal" taxes from "extra-fiscal" taxes.

It is known that any "tax tribute" also has extra-fiscal purposes, besides the tax collection. See the aforementioned case of the ICMS, on which by the differentiated rates established because of the essentiality of the product, the legislator also inhibits or stimulates the consumption of certain goods or services. An example is the alcoholic beverages and cigarettes. Equally happens to the *IPI* in relation to these same products. Imagine that the extra-fiscal goal of this tax is successful, that is, everyone stops consuming or producing alcoholic beverages or cigarettes immediately. The extra-fiscal function is achieved, but the fiscal function will be immediately affected, since the revenue from these products in Brazil is large, and governments surely rely on it in their budget, which is a paradox. Therefore, regardless of fiscal or extra-fiscal purposes, the conduct of the State must always privilege moral tax, not simply the tax collection.

Another example is the high complexity of the systematics of certain current taxes (VAT on Sales and certain Services or the Contribution for the Financing of Social Security)²⁷, hindering and distorting almost completely its origin and the constitutional foundation, making it unrecognizable. Such a mutation reveals a performance of the State on the margins of morality, deceiving the taxpayer. Once, when visiting Brazil, said the Spanish jurist Jose Juan Ferrero Lapatzta that it is easier to fish in murky waters, referring to the myriad of current and growing tax rules every day, the perplexity of the citizen before that, who in doubt pays more taxes than it is really owed.

The same happens with the almost annual sequencing of tax amnesties or incentive installments that usually benefit the malicious taxpayers, besides being generally approved at the time of elections. In Brazil, from 1999 to the present, these incentive installments have been popularly known as "REFIS"²⁸ (REFIS 1, 2, 3 and others, municipal REFIS, state REFIS, etc.). With these routine amnesties, many taxpayers no longer pay taxes on a routine basis, knowing that, sooner or later, will come the forgiveness or the moratorium, discouraging those who intend to pay on time. By doing the math, they realize that they have paid more than they could have paid by assuming such flawed conduct.

The so-called "Fiscal War", in which States fight to offer advantageous conditions in spite of neighboring States, acting in flagrant unethical attitude, whether in relation to other State, or to the good faith of the taxpayer. There are many federative states criticizing a neighbor state, but at the same time, establishing - through Decree - incentives and tax benefits of the most creative - in the same way as the criticized does - under the mantle of the Federative Principle, but knowing clearly that their conduct is frontally offensive to Federal Constitution. The taxpayer, who in this case should be mere spectator, bears the financial differences from one state to another, and often acts by taking advantage of credits that have been granted outside the law and ethics, without recognizing the "immorality" of the granted benefit.

The use of subterfuges for the collection of the tax debt is an example. It sometimes is manifested by the improper inclusion of partners in the passive pole of tax executions (by the office of the public prosecutors) without prior administrative proceedings. The administrative authorities do it as a means to coerce the company to pay; and generally, this procedure is accompanied by a tax representation for criminal purposes, in the intent to cause panic at the di-

rectors and partners, once again almost forced to pay, even before any improper or abusive charges.

And the undue tax payments? Why should tax refunds be required expressly by the taxpayer, even in cases where the IRS system, in the constant intersection of information, often identifies the excess? The fair thing for the IRS to do, by the identification of such an occurrence, is officially restore the amount paid the greater, is not it? It may seem absurd, but we must always remember that the State is constantly subject to the principle of legality and also to morality, and should not be surprising to the citizen attitudes such as this, further legitimating taxation.

Regarding this, see an in-depth study published by Marco Aurelio Greco²⁹ that, without prejudice to other approaches and aspects that may be relevant, understands that the IRS in these cases is invested with duties of three different orders, but pointed in the same direction:

- a) *Legal* duty deriving from the legality of the administrative action;
- b) *Moral* duty deriving from the principle of morality legalized in article 37, *caput* of the Brazilian Federal Constitution of 1988, and;
- c) Duty connected to the achievement of the objectives of its *function* in the light of the requirement of the administrative efficiency.

According to Greco³⁰, legality and morality complete each other, being possible to have a moral behavior within the legality, without this becoming an imperative "moralism", from an idealistic conception of standards of conduct, as this would be the shortest way to authoritarianism in any of its many forms.

Therefore, to obey the principle of morality is to see the addressee of the norm; is to take responsibility for them; is not to commit an injustice based on a simplistic invocation of a myopic legalism.

If, legally, to wait for the initiative of the taxpayer would be an omission to fulfill the legal duty incumbent on the State, remaining inert in the expectation that the taxpayer takes the initiative is an incompatible conduct with the constitutional guideline that emanates from the principle of administrative morality. Is to impose on the taxpayer an even greater burden, not only of having been burdened with the respective disbursement, but also with the delay in the respective return.

Thus, once the tax authorities have confirmed the existence of an undue payment, the moral attitude to take to the Other (= taxpayer) is to take the initiative to return the sums wrongly collected, concludes Marco Aurelio Greco³¹.

This entire social and legal context leads us to conclude that the State, in a broad way, is subject to observance of the principle of morality and, not rarely, offends it. The greater the offense to the principle of morality less is the legitimacy of the State in demanding this or that conduct of the taxpayer, or even questioning it.

Michel Bouvier³², in dealing with the topic of "fiscal legitimacy", establishes two sets of conditions for the legitimacy of the State to charge a certain tax: political and sociological conditions and legal and administrative conditions. For the fiscal legitimacy under the political aspect, the tax must be democratic, approved in parliament.

Under the sociological aspect, the tax must be fair and necessary. Tax justice as it has been seen, is difficult to achieve by a consensus of what kind of tax to institute (on income or equity, single or variable etc). A single and clear objective criterion was not found to establish an ideal kind of tax. In this sense, Michel Bouvier³³ highlights the three kinds of fiscal justice that exist: a) cumulative justice, in which citizens pay a single quota, without taking into account the economic situation of each one of them; b) distributive justice, in which the one who uses the most of the State must pay more. Such a system is adjusted to the mere collection of fees, and; c) retributive justice, or social justice. This kind of fiscal justice seeks to overtax those who have more capacity, while charging less those who do not, by means of progressive taxation.

In short, sociological legitimacy lies in the intimate sense of each person that the tax is appropriate. The second condition of legitimacy is legal / administrative, which we have been discussing along the article.

Thus, fiscal legitimacy, whether political, sociological, juridical or administrative, is achieved not only by adherence to positive rules, but above all by the observance of ethics. Once ethics is observed, whether in the institution of the tax or in its collection, the acceptance by the society – and the tax collection itself – will naturally occur and be legitimized, independently of the high tax burden related to it.

The courts will conservatively say that if the agents of the State comply with the Law, they cannot be criticized for not adopting criteria that are not expressly written and therefore the Principle of Morality ends up being confused in practice with the Principle of Legality.

Now, to the dismay of the lawyers of the elite, let us say that any President, appoint any friend to be his Minister of State, for the purpose of protecting him from any judge who wishes to arrest him for any crime. Done: we have the per-

fect scenario for the theme. This administrative decision would not necessarily be illegal, or taken at the "legal limit", since the legislation in fact authorizes the head of the federal public administration to appoint ministers of his or her trust. The point is that, here we have a legal act, according to the law, but questionable, very questionable, in regard to aspects such as, objective good faith or ethics. Here we see perfectly a legal but immoral act.

How to affirm that morality is outside the law, if there is a Principle that expressly inserts it in the Constitution? In fact, the courts have never dealt with the issue at all, and are now approaching, sometimes moving away from the issue, without resolving it, under the - ever more fragile - argument that decisions destabilize the safe harbor of laws. Sorry to inform but, in fact, we are no longer governed solely by laws or by the Constitution (Hard Law). There are times – and tributarists confirm it - we have been surreptitiously regulated by decrees, ordinances and normative instructions (Soft Law). Just do not see this trend who does not want to see. Therefore, we think it is time to be humble, but firm, as we have been in dealing with the limits of the law, to study urgently about a minimum moral limit for the Law. Let us once and for all establish the meaning and scope of the Principle of Morality, which is expressly not confused with that of Legality.

O princípio da moralidade (administrativa, tributária e “pública”) na Constituição Federal Brasileira de 1988

Resumo

Este estudo tem por objetivo analisar a questão da moralidade tributária e atitudes éticas (ou antiéticas) identificáveis na relação jurídica tributária, considerando o desempenho de funções em suas duas faces, o público (autoridade fiscal) e o privado (contribuinte). O trabalho aborda os aspectos da Justiça Tributária, Equidade e Justo Imposto, inspirados nos ensinamentos de Klaus Tipke, levando à confirmação de que um imposto é sustentável não só quando respeita a capacidade de contribuir, mas também quando a sociedade o aceita como legítimo e necessário, mesmo em um contexto de alta carga tributária. Assim, para que isso ocorra é fundamental que o Estado manifeste uma postura ética no trato com os contribuintes e com a aplicação do recurso, seja para legitimar essa conduta ou para inspirar os contribuintes a adotarem o mesmo comportamento, assumindo que sua conduta indevida (evasão fiscal) é um reflexo direto da postura do Estado.

Palavras-chave: Justiça Tributária. Legitimidade Fiscal. Sustentabilidade. Tributação.

Notas

- ¹ ARISTOTLE. *The Nicomachean Ethics*. 5 ed. London:Kegan Paul, Trench, Trubner, & Co., 1893. Available at: <<https://oll.libertyfund.org/titles/aristotle-the-nicomachean-ethics>> . Access on 10 jun. 2018.
- ² BRASIL. Constituição da República Federativa do Brasil de 1988. Available at: <http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm>. Access in: 10 jul. 2018.
- ³ MARTINS, Ives Gandra da Silva. Uma teoria do tributo. In: MARTINS, Ives Granda (Org.). *O Tributo: Reflexão multidisciplinar sobre sua natureza*. Rio de Janeiro: Forense, 2007, p. 6.
- ⁴ TORRES, Ricardo Lobo. *Curso de Direito financeiro e tributário*. 7ed. Rio de Janeiro: Renovar, 2000, p. 321.
- ⁵ In Brazil, it is popularly known as “IRPJ”.
- ⁶ Similar to the “VAT on Sales and certain Services”.
- ⁷ Similar to the “Excise Tax”.
- ⁸ In Brazil, it is popularly known as “IR”.
- ⁹ James Marins studied the subject in detail in dealing with the ethical-political foundations of taxation. From this, he drew several conceptions that could also be used to justify the collection of taxes by the State, from the Paul Leroy-Beaulieu Exchange Rate Theory and the Insurance Premium from Montesquieu, to Karl Larenz's Theory of Fair-Law. (MARINS, James. *Direito Processual Tributário Brasileiro*. 4 ed. São Paulo: Dialética, 2005, pp. 129-150).
- ¹⁰ BRASIL. *Lei nº 5.172, de 25 de outubro de 1966*. Denominado Código Tributário Nacional. Dispõe sobre o Sistema Tributário Nacional e institui normas gerais de direito tributário aplicáveis à União, Estados e Municípios. Available at: <http://www.planalto.gov.br/ccivil_03/LEIS/L5172.htm>. Access in: 10 jul. 2018.
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- ¹² TIPKE, Klaus. *Moral Tributária del estado y de los contribuyentes*. Madrid: Marcial Pons, 2002.
- ¹³ Free Translation: “Most citizens behave with astonishing respect for the law, even if they have no legal training, provided that such laws are clear and the subject is accustomed to them.” (TIPKE, 2002, p. 121)
- ¹⁴ WERHANE, Patricia. Ethical issues in financial markets: the american experience. In. ARGANDONA, Antonio (Coord.). *The ethical dimension of financial institutions and markets*. Heidelberg: Springer-Verlag Berlin, 1995.
- ¹⁵ WERHANE, 1995, p. 136.
- ¹⁶ UNITED NATIONS. *Universal Declaration of Human Rights*. General Assembly resolution 217 A of 10 December 1948. Available at: <<http://www.un.org/en/universal-declaration-human-rights/>>. Access in: 10 jul. 2018.
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- ¹⁸ JUSTEN FILHO, Marçal. Princípio da moralidade pública e o direito tributário. *Revista de Direito Tributário*. São Paulo, v. 67, p. 65-79, 1996.
- ¹⁹ JUSTEN FILHO, 1996, p. 63.
- ²⁰ In Brazil, it is popularly known as “ISS”.
- ²¹ SILVEIRA, 1968, p. 372-373, *apud* MOREIRA, Clara Gomes. Equidade como razão de decidir em matéria tributária. *Revista de Direito Tributário Atual*, n. 36, São Paulo, dezembro de 2016, p. 122-140.
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- ²³ AMARO, Luciano. *Direito Tributário Brasileiro*. 17. ed. São Paulo: Saraiva, 2011, p. 236.
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- ²⁵ BALEEIRO, Aliomar. *Direito Tributário Brasileiro*. 13 ed. Rio de Janeiro: Forense, 2015, p. 1.061.
- ²⁶ TORRES, Ricardo Lobo. *Normas de Interpretação e Integração do Direito Tributário*. 4. ed. Rio de Janeiro: Renovar, 2006, p. 98-100.
- ²⁷ In Brazil, they are popularly known as “ICMS” and “COFINS”, respectively.
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- ³⁰ GRECO, 2007.
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