

Private Property and Constitutional Limits on the Taxing Power: An Overview of the Prohibition on Confiscatory Taxation in the Brazilian, German, Spanish, Argentine, and Mexican Legal Orders

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Abstract

This paper examines the constitutional prohibition on confiscatory taxation in Brazilian law as a limit on state taxing power. Using doctrinal and comparative analysis, it explores the principle's connection to property rights, the ability-to-pay principle, and minimum subsistence. The study finds that this prohibition, while explicit in Brazil's 1988 Constitution, is a common feature across the German, Spanish, Argentine, and Mexican legal systems, where it is protected either explicitly or implicitly through fundamental rights.

Keywords

Prohibition on Confiscatory Taxation, Ability-to-Pay Principle, Minimum Subsistence, Brazilian Federal Constitution, Tax Equality (Isonomy)

1. Introduction

It is understood that the constitutional prohibition on confiscatory taxation, set forth in Article 150, IV of the Brazilian Federal Constitution, plays a central role in limiting the State's taxing power. Recognized as a fundamental constitutional right, it not only protects taxpayers' property from abusive tax exactions but also ensures that taxation respects the ability-to-pay principle and does not encroach upon individuals' minimum subsistence.

In a legal order composed of norms that comprise both rules and principles, analysis of the prohibition on confiscatory taxation is carried out in harmony with

other constitutional commands.

Chief among these are the principles of tax equality (isonomy) and ability to pay, which operate as essential benchmarks for the interpretation and application of the tax system, as well as for the pursuit of tax justice.

In this regard, the primary criterion of justice is equality, which, in tax matters, is governed by the principle of ability to pay. The concept of equality permeates the entire legal system and is regarded by many as its most fundamental principle.

Equality (isonomy) may be understood in a dual sense. When referring to material or substantive equality, it signifies the desirable equitable treatment of all individuals, ensuring them equal access to the benefits of life. Formal equality, in turn, expresses the legitimate distinctions permitted to the legislator, that is, those equivalences or disparities enshrined in law.

The notion of equality lies at the very core of the ability-to-pay principle, rendering the two inseparable. It may be asserted that the ability-to-pay principle operates as a sub-principle, or as a derivation of the broader principle of equality, radiating its effects throughout the entire legal system.

Furthermore, the principle of ability-to-pay is expressly enshrined in Article 145, §1 of the Federal Constitution, which provides that “*whenever possible, taxes shall be personal and shall be graded according to the taxpayer’s economic capacity(...)*”. (Brazil, 1988; Federal Constitution of 1988)

This principle serves as the guiding criterion for calibrating the tax burden with respect to taxes. Accordingly, their gradation must take into account circumstances related to the taxpayers themselves, as the subjects to whom the tax obligation is imposed (Costa, 2022: p. 57).

This dissertation examines the legal underpinnings of the constitutional prohibition on confiscatory taxation and its interplay with other constitutional tax principles, with the aim of advancing a clearer and more comprehensive understanding of taxpayer safeguards under Brazilian law.

This study also undertakes a comparative-law analysis of the protection of private property and the constitutional limits on the taxing power in Brazil, Germany, Spain, Argentina, and Mexico.

2. Preliminary Considerations on Principles

Given the scope of this paper, it does not purport to exhaust the many doctrinal views on norms, rules, and principles. Its aim, rather, is to synthesize the most relevant conceptions on the subject so as to furnish a sound theoretical foundation for the analysis that follows.

The primary objective of this compilation is to provide a comprehensive, well-substantiated framework to serve as the foundation for discussion and deeper analysis of the chosen topic. By adopting this approach, the study aims to clarify and organize the key concepts, thus enabling more systematic advances in the field.

In this light, the study opens with an examination of the legal order, conceived

as a hierarchy of interconnected norms. Within this structure, inferior norms derive their validity from superior ones, culminating in the Constitution as the supreme norm and ultimate source of validity (Carrazza, 2024: p. 35).

This hierarchy means that a norm is valid only if it accords with superior norms. The Constitution, as the supreme norm, legitimizes inferior norms and sets the fundamental principles and rules that organize the legal order. Understanding these relationships is therefore essential to grasp the system's coherence and effectiveness.

Norms, Rules, and Principles

A legal norm is a command issued by the State to its members: it may impose a duty (an order to be complied with), forbid conduct (a prohibition to be obeyed), or confer a liberty or authorization, permitting one to act or to refrain from acting (Becho, 2015: p. 149).

However, norms are not identical to the verbal formulations found in statutes, decrees, or other legal texts. They are distilled from those formulations through an interpretive operation carried out by the officials who interpret and apply the law (Schoueri, 2023: p. 40).

German jurist Robert Alexy contends that legal norms are the genus of which rules and principles are species. Rules are norms that prescribe definitive duties: they state exactly what must be done and thus operate as conclusive commands. Accordingly, a rule is either satisfied or violated, and it is applied by subsumption, i.e., by matching the facts to the rule's conditions (Cardoso, 2016: p. 142).

Principles, by contrast, are optimization mandates: they require that a value or state of affairs be realized to the greatest extent possible, given the factual and legal constraints at hand. They thus express general, abstract duties whose definitive content is fixed only after assessing the facts and the governing law in the concrete case. When principles conflict, they are applied through balancing (weighing) under the proportionality postulate (Alexy, 1999: pp. 74-75).

Although legal norms may look identical externally and in form, their internal structure differs in important ways. Those structural differences allow some norms to be classified as rules and others as principles (Becho, 2015: p. 326).

Confronted with a conflict between fundamental rights, Alexandre de Moraes endorses the principle of practical concordance (harmonization). This technique requires the interpreter to coordinate the competing legal interests, proportionally narrowing the scope of each so as to avoid the total sacrifice of either right—a method suited to conflicts between principles (Moraes, 2023: p. 42).

Robert Alexy, however, maintains that in some cases one fundamental right must yield to another. This does not render the subordinated right invalid; rather, the interpreter must examine the facts of the case and conduct an appropriate balancing to determine which right takes precedence in the concrete circumstances (Moraes, 2023: p. 42).

In this context, principles orient the legal order as a whole, functioning as car-

dinal points of reference. They are indispensable to understanding and systematizing a coherent legal order. To disregard them, if not impossible, would unravel the system, given their central role in the interpretation and application of norms (Becho, 2015: p. 327).

Regarding the interrelation between norms, rules and principles, and the constitutional text, Roque Antonio Carrazza maintains that the Constitution is not merely a *lex superior*; it is the matrix of all normative expressions of the State. It not only regulates the procedures for producing legal norms but also sets the fundamental principles and substantive limits that constrain the content of future legislation (Carrazza, 2024: p. 39).

3. The Prohibition on Confiscatory Taxation

The constitutional prohibition on confiscatory taxation operates as a limit on the taxing power and as a safeguard of both individual and collective rights (Becho, 2015: p. 402).

The principle serves as a safeguard for taxpayers against state power, aimed at preserving the right to property, a fundamental right secured by Article 5 (XXII) of the Brazilian Federal Constitution. Its explicit constitutional entrenchment in 1988 strengthened the protection of property (Filgueira & Valadão, 2020: pp. 1-2):

Art. 150. Without prejudice to other guarantees secured to the taxpayer, the Union, the States, the Federal District, and the Municipalities are forbidden to:

(...)

IV—use tax with a confiscatory effect. (Brazil, 1988; Federal Constitution of 1988)

Luis Eduardo Schoueri links the principle under examination to the prohibition of excess (*proibição de excesso*), requiring an inquiry not only into whether one taxpayer is being more heavily burdened than another, but also into whether the tax burden exceeds what is necessary to achieve its legitimate purpose.

Confiscation is an indeterminate legal concept, and its interpretation or application may present challenges in identifying specific confiscatory situations. Some indications can be observed, however, such as when a tax measure effectively annihilates property or renders its intended use or purpose meaningless.

In this regard, Moschetti argues that taxation must conform to the principle of private property protection. He also offers guidance on identifying confiscatory effects, emphasizing that each case must be assessed individually to determine whether taxation has reached the point of violating property rights. According to the author, no absolute threshold can be established, as there are intermediate zones of doubt in which legislative discretion should prevail; however, there must also be a maximum limit, beyond which the confiscatory nature of taxation and the violation of the constitutional protection of property become undeniable.

Hence, the conclusion reached by Ricardo Lobo Torres, who argues that, rather than adopting an absolute measure, it is more appropriate to apply the principles of reasonableness, suitability, and economic efficiency, meaning that taxation

should correspond to the State's minimum necessary needs to serve the maximum share of the public interest. This approach requires recognizing the differences among various types of taxes, thereby modulating their potential confiscatory effects, as well as considering the country's economic context, which, depending on conditions of war or peace, growth or recession, influences the assessment of what constitutes the annihilation of property (Schoueri, 2023: pp. 204-209).

Alexandre de Moraes defines confiscation as "an act of public authority declaring the seizure, adjudication, or loss of a taxpayer's property without just compensation." He explains that the constitutional rule follows from the legal nature of a tax, which is not a sanction for unlawful conduct; taxation may not operate punitively (Moraes, 2023: p. 1039).

Even so, he maintains that the constitutional prohibition on confiscatory taxation extends to tax penalties, which must satisfy reasonableness and proportionality.

The theory of confiscation, especially confiscation through taxation, must be measured against the constitutional right to property: if expropriation without just compensation is inadmissible, then appropriation through abusive taxation is likewise impermissible (Coêlho, 2016: p. 416).

The author further teaches that confiscation through taxation occurs indirectly, when the amount of the tax is so burdensome that it consumes the income or property, resulting in the taxpayer losing or tending to dispose of their assets.

Finally, the tax legislator's activity must conform to the limits imposed by the Constitution. The prohibition on confiscatory taxation is one such insurmountable constraint on the creation and imposition of taxes, as it is intrinsically tied to the preservation of the right to property (Carrazza & Barreni, 2019: p. 34).

Confiscation and the Right to Property

In tax terms, confiscation may be understood as the total or excessively onerous transfer of the taxed wealth from the taxpayer to the State. To be sure, all taxation entails a transfer of wealth, the object of the exaction, from private to public hands; what renders a levy confiscatory is the magnitude of that transfer, such that it becomes intolerable or disproportionate (Becho, 2015: p. 402).

However, that transfer must not wholly strip the underlying asset of its value or so undermine the taxpayer's property right as to render it unviable. The State may not pursue revenue in a manner contrary to the interests of its citizens, who are constitutive participants in the social order.

Luís Roberto Barroso notes that in Brazil, the right to property has been recognized since the first Constitution of 1824. The social function of property, however, was introduced only in the 1934 Constitution; every subsequent charter has incorporated that principle (Barroso, 2024: p. 235).

The 1988 Constitution advanced this approach by specifying objective criteria for the social function of property, rural and urban alike, and by articulating its minimum content. In particular, Article 186 sets out the criteria for the social

function of rural property, while Article 182 addresses urban property.

The current Constitution treats property both as a fundamental right (Article 5) and as a principle of the economic order (Article 170).

The Constitution provides for confiscation only in Article 243, which mandates expropriation without compensation of properties where the illegal cultivation of psychotropic plants or the exploitation of slave labor is found. It also directs that assets seized as a result of these activities be confiscated.

In this vein, Regina Helena Costa observes that, given the strong protection accorded to the right to property in our legal order, confiscation is a sanctioning measure and is admitted only exceptionally (Costa, 2022: p. 114).

Roque Antonio Carrazza emphasizes that the concept of property has undergone significant transformations over time, both in what counts as property and in how the right is exercised. Property now encompasses not only movable and immovable assets but also other patrimonial interests such as mortgages, pledges, bank deposits, wages, shares, and corporate holdings (Carrazza & Barreni, 2019: p. 31).

In this way, the prohibition on confiscatory taxation operates as a limit on the exercise of taxing competence, enhancing protection for the taxpayer as the passive subject of the obligation. By forbidding the usurpation of property, the principle bars the creation and enforcement of excessively onerous levies that would frustrate or impede the exercise of the Right to Property, a fundamental constitutional safeguard (Carrazza & Barreni, 2019: pp. 34-35).

4. Delimiting Criteria

4.1. Ability-to-Pay Principle

Closely linked to tax equality (isonomy) and the ability-to-pay principle, the prohibition on confiscatory taxation functions as a fundamental guarantee with full normative force and immediate applicability¹.

With respect to taxes, Regina Helena Costa views the prohibition on confiscatory taxation as an outgrowth of the ability-to-pay principle, which requires that taxes be graduated according to the taxpayer's economic capacity (Article 145, § 1). It thus operates as one of the limits that ability to pay imposes on fiscal pro-

¹As a rule, the norms that embody democratic and individual fundamental rights have immediate efficacy and applicability, operating on two distinct yet complementary planes: vertical efficacy (State-individual) and horizontal efficacy (individual-individual). This arrangement seeks to prevent unconstitutional abuses and excesses both in state action and in private and social relations. In Brazil, the Supreme Federal Court has embraced these two planes of efficacy for fundamental rights and guarantees, understanding that, as provided in Article 5, § 1, of the Federal Constitution, the provisions defining fundamental rights and guarantees are of immediate application. The constituent legislator imposed no condition or restriction on their immediate efficacy. Moreover, since there is no constitutional impediment to the "radiation" of fundamental rights into non-vertical legal relationships (State-private party), it follows that the provisions defining fundamental rights and guarantees apply to any legal relationship—public, mixed, or private (horizontal efficacy). Thus, the fundamental rights safeguarded by the Constitution bind not only public authorities but also private relations (Moraes, 2023, pp. 39-40).

gression, alongside the preservation of other constitutional rights (Costa, 2022: p. 114).

Moreover, taxes must be imposed with reasonableness so as to preserve free enterprise, a pillar of the Democratic State governed by the rule of law. This functions as a condition of normative validity: legal norms may not unduly restrict the freedom to engage in lawful economic activity (Carrazza, 2024: p. 107).

A tax is confiscatory when it disregards the ability-to-pay principle, for example, when the tax base is defined so broadly that it overshoots the measure of the taxable event as set by the incidence rule. Likewise, it is impermissible to subject the same economic event to multiple levies whose combined burden deprives the taxpayer of minimum subsistence.

In the same vein, Renato Lopes Becho maintains that both the prohibition on confiscatory taxation and the ability-to-pay principle are instruments for achieving fiscal justice (Becho, 2015: p. 420).

Under current Brazilian tax law, there is no fixed quantitative threshold for identifying confiscation, a stance that Misabel Derzi deems appropriate, since “various circumstances can influence what counts as confiscatory” (Schoueri, 2023: p. 205).

In the same vein, Renato Lopes Becho explains that what counts as confiscatory taxation can vary over time and depends on economic conditions external to tax law. This supports the axiological reading of the prohibition, given that a hallmark of values is their incommensurability (Becho, 2015: p. 423).

Despite this, the doctrine strives to establish some parameters. Gerd Willi Rothmann understands that confiscation occurs when taxation absorbs ‘the totality of the taxpayer’s assets or income’. Outside of this scenario, there is no defined mathematical criterion to determine the percentage from which the imposition of taxes would be considered confiscation. In this context, the analysis of economic capacity is crucial to determine the boundary that distinguishes legitimate taxation from unconstitutional confiscation (Schoueri, 2023: p. 205).

Therefore, through the analysis of each concrete case, considering the principles of equality, ability-to-pay, the social function of property, and the dignity of the human person, there will be sufficient elements to determine whether a tax has exceeded the limits of confiscation. In this scenario, the Judiciary, when invoked, has the power to declare the unconstitutionality of the law that instituted that tax (Carrazza, 2024: p. 109).

Thus, the principle of non-confiscation constitutes one of the limits imposed by contributory capacity on fiscal progression, alongside the protection of other constitutional rights against tax excesses (Costa, 2022: p. 114).

The ability-to-pay principle is constrained by two external constitutional limits of mandatory observance: at one end lies the minimum existential threshold, and at the other, the prohibition of confiscation. As expressed in doctrine, “taxable capacity begins beyond the minimum necessary for a dignified human existence and ends at the point where taxation destroys property.”

The minimum existential threshold provides immunity from taxation, as it denotes the absence of any presumptive indicator of income or wealth. In contrast, the prohibition of confiscation functions as the upper boundary of the taxpayer's contributive capacity, ensuring that taxation does not deplete income or property, thereby protecting private ownership and preserving the sustainability of taxation as an instrument for the maintenance and development of the State (Oliveira & Borges, 2016: p. 186).

4.2. Minimum Subsistence

As exposed, the prohibition on confiscatory taxation obliges the legislature to proceed with balance, moderation, and prudence in setting tax burdens, in service of a just tax order. The State must seek an equilibrium point, not always easy to achieve, neither imposing levies so heavy as to bankrupt enterprises, nor so light as to deprive the State of the resources needed to discharge its constitutional duties (Carrazza, 2024: p. 106).

Moreover, the economic resources indispensable to meeting basic needs, the minimum subsistence protected by the Brazilian Federal Constitution, especially Articles 6 and 7, may not be reached by taxation. Those resources must be safeguarded through carefully crafted non-incidence rules or timely deductions, as duly authorized by law (Carrazza, 2024: pp. 106-107).

In this regard, Luís Roberto Barroso teaches that minimum subsistence lies at the essential core of social and economic rights, whose status as genuine fundamental rights, rather than mere policy claims subject to ordinary politics, remains controversial in some jurisdictions. (Barroso, 2024: p. 42).

From this vantage, the ability-to-pay principle must extend across all tax categories: if a taxpayer lacks the minimum subsistence necessary for survival, the State cannot compel contribution to public expenses, even if public services confer benefits. Minimum subsistence and the prohibition on confiscatory taxation together mark the subjective limits of ability-to-pay; it begins only beyond the minimum required for a dignified existence and ends short of the point at which property is effectively destroyed (Schoueri, 2023: p. 201).

In line with Sacha Calmon Navarro Coêlho, who advocates neutral fiscal policy and selective public spending to correct inequalities, the Brazilian State bears an unquestionable duty to provide education, health, and public security to all who need them. Taxpayers have the right to demonstrate inability to pay, and it is for the Legislature to inquire into social and economic realities to meet these demands. Under the broad aegis of the ability-to-pay principle, the Judiciary must review laws and facts to ensure the prevalence of justice and equality (Coêlho, 2016: p. 417).

Recognizing its importance, the constitutional framers expressly entrenched the prohibition on confiscatory taxation in the 1988 Constitution. This does not mean, however, that the principle was absent from earlier charters; it was implicitly present insofar as they safeguarded the right to property (Carrazza & Barreni, 2019: p. 35).

5. Historical Overview of the Prohibition on Confiscatory Taxation in Brazilian Constitutions

Luís Roberto Barroso notes that the right to property has been guaranteed in Brazil since the 1824 Constitution, while its social function first appeared in 1934 and has been retained in every subsequent charter (Barroso, 2024: p. 234).

Roque Antonio Carrazza traces the constitutional treatment of property in Brazil, showing how the concept was progressively incorporated and refined across successive charters (Carrazza & Barreni, 2019: pp. 36-40). In the 1824 Constitution, Article 179 (XXII) guaranteed the right to property, while Article 179 (XX) prohibited the confiscation of assets, barring the State from arbitrarily appropriating citizens' property and thereby reaffirming the protection of personal assets.

The first Republican Constitution, 1891, guaranteed the right to property in Article 72 (§ 17²). In tax matters, this guarantee implied that the State could not adopt measures that would undermine that right.

Cássia Celina Paulo Moreira da Costa argues that from the 1934 Constitution through the 1967/1969 Constitution, Brazilian constitutionalism emphasized the social dimension of fundamental rights, reflecting an interventionist State influenced by the Weimar (1919) and Mexican (1917) charters (Nakagaki, 2010: pp. 42-43).

From the same vantage, Sacha Calmon Navarro Coêlho explains that modern constitutionalism in democracies protects property while conditioning it on the fulfillment of its social function. Taxes are designed to raise revenue without degrading the productive bases from which it is drawn and ideally to foster their growth (Coêlho, 2016: p. 421).

Later on, the 1937 Constitution implicitly prohibited confiscation by guaranteeing the right to property (Article 122, item 14³). By contrast, the 1946 Constitution not only protected the right to property (Article 141, § 16⁴) but also ex-

²Art. 72. The Constitution ensures to Brazilians and to foreigners residing in the Country the inviolability of rights concerning liberty, individual security, and property, on the following terms: § 17—The right of property is maintained in all its fullness, except for expropriation for public necessity or utility, through prior indemnification. Mines belong to the owners of the soil, except for the limitations that may be established by law for the benefit of the exploitation of this branch of industry.

³Art. 122. The Constitution ensures to Brazilians and foreigners residing in the Country the right to liberty, individual security, and property, under the following terms: 14) the right of property, except for expropriation due to public necessity or utility, with prior compensation. Its content and its limits shall be defined in the laws regulating its exercise.

⁴Art. 141. The Constitution ensures to Brazilians and to foreigners residing in the country the inviolability of rights concerning life, liberty, individual security, and property, in the following terms: § 16. The right to property is guaranteed, except in the case of expropriation for public necessity or utility, or for social interest, through prior and just compensation in money, with the exception provided in § 1 of art. 147. In case of imminent danger, such as war or internal commotion, the competent authorities may use private property, if the public good so requires, with the right to subsequent compensation, however, being ensured. § 31—There shall be no penalty of death, banishment, confiscation, or of a perpetual character. Excepted, with regard to the death penalty, are the provisions of military legislation in time of war with a foreign country. The law shall provide for the seizure and forfeiture of assets in the case of illicit enrichment through influence or with abuse of public office or function, or of employment in an autonomous entity.

pressly prohibited the confiscation of assets in Article 141, § 31.

Beginning in 1964, with the onset of the military regime, the constitutional structure was reshaped by amendments and institutional acts, with repercussions for criminal confiscation. Institutional Act No. 14 (Sept. 5, 1969) prohibited confiscation except in cases of adverse external psychological war, revolutionary war, or subversive war, under terms to be set by law. It also authorized the forfeiture of assets for damage to the public treasury or illicit enrichment in the exercise of office, function, or employment in the Direct or Indirect Public Administration (Article 1, § 11) (Carrazza & Barreni, 2019: pp. 36-40).

Finally, the 1988 “Citizen Constitution” expressly entrenches the prohibition on confiscatory taxation (Article 150, IV). As a corollary of the right to property (Article 5, XXII) and in close conjunction with the ability-to-pay principle, it operates as a constitutional limit on the taxing power. The charter thus forbids not only confiscatory taxes but also any confiscatory tax regime, thereby safeguarding citizens (Saraiva Filho, 2021: p. 427).

Furthermore, given that Brazilian legislation does not establish a statutory parameter for determining what qualifies as confiscatory for tax purposes, the Brazilian Supreme Court (*Supremo Tribunal Federal*) has progressively developed jurisprudence delineating the circumstances under which fiscal sanctions and monetary penalties may assume a confiscatory character.

Divided into three categories, the Brazilian Supreme Court has recently adjudicated the types of tax fines and their corresponding maximum percentages. First, as for late-payment fines (*multas moratórias*), imposed solely for delay in the payment of a tax, that is, for failure to pay it at the proper time, the Court, in *Extraordinary Appeal (Recurso Extraordinário—RE) No. 882.461*, recently held that their maximum limit is 20% of the tax liability.

Afterward, with respect to punitive fines, that is, tax penalties imposed in cases of tax evasion, collusion, or fraud (*qualified fines*), the maximum amount shall be 100% of the tax due. Such fines may reach 150% only in cases of recidivism, meaning when the taxpayer repeats the same unlawful conduct. This understanding was established in the judgment of Extraordinary Appeal (Recurso Extraordinário—RE) No. 736.090, rendered in October 2024.

Finally, regarding fines for non-compliance with an ancillary obligation (*multas isoladas*)—such as the failure to issue tax documents—it is important to note that these cases do not involve the nonpayment of tax or the commission of a tax offense, but merely a breach of an ancillary obligation. The matter is currently under review by the Brazilian Supreme Court in Extraordinary Appeal (Recurso Extraordinário—RE) No. 640.452, in which the Court previously considered the thesis that a fine for non-compliance with an ancillary obligation may not exceed 20% of the tax due when there is an underlying principal obligation, under penalty of constituting a confiscatory measure. It remains to be seen whether the Court’s final ruling will uphold this parameter.

6. The Prohibition of Confiscatory Taxation in the Constitutions of Germany, Spain, Argentina, and Mexico

The prohibition on confiscatory taxation also appears in other constitutions, across Europe and Latin America, sometimes explicitly, sometimes implicitly. This study examines two European jurisdictions (Germany and Spain) and two Latin American jurisdictions (Argentina and Mexico).

It bears noting that the doctrine on the prohibition of confiscatory taxation remains under development both in Brazil and abroad. This highlights the importance of examining how different legal systems limit the taxing power to prevent excesses that could compromise the right to property and fiscal justice (Becho, 2015: p. 427).

In Germany, there is no explicit constitutional ban on confiscatory taxation. Even so, the Federal Constitutional Court has derived limits on the taxing power from Article 3⁵ of the Basic Law (equality) and Article 14⁶ (property). These limits include quantitative constraints on the overall tax burden, reflecting a concern to avoid excesses that would compromise equality and property rights (Carrazza & Barreni, 2019: pp. 40-41).

In this sense, although the absolute level of taxation is subject to constitutional limits, those limits are broadly defined. The Federal Constitutional Court held early on that so-called “strangulation taxes,” which leave the taxpayer with no room to sustain their economic activity, constitute an abuse of form and therefore cannot be grounded in legitimate taxing authority.

The Federal Constitutional Court therefore applies a proportionality test. The Court compares the portion of income retained by the taxpayer with the portion appropriated by the State through taxation. Based on Article 14(2) of the Constitution (“Ownership obliges. Its use should also serve the public interest.”), the Court derived the requirement that the total tax burden on income must not exceed a level “close to an equal division between the private and public sectors”, the so-called 50-50 *principle* (Englisch & Kube, 2023: pp. 10-11).

This understanding was consolidated in the 1995 ruling⁷, in which the Court held that the overall tax burden on after-tax assets (“consolidated assets”) must not exceed approximately fifty percent. When extended to taxation and public

⁵Artikel 3 [Gleichheit vor dem Gesetz] (1) Alle Menschen sind vor dem Gesetz gleich. (2) Männer und Frauen sind gleichberechtigt. Der Staat fördert die tatsächliche Durchsetzung der Gleichberechtigung von Frauen und Männern und wirkt auf die Beseitigung bestehender Nachteile hin. (3) Niemand darf wegen seines Geschlechts, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. Niemand darf wegen seiner Behinderung benachteiligt werden.

⁶Article 14 [Property – Inheritance – Expropriation] (1) Property and the right of inheritance are guaranteed. Their content and limitations shall be determined by law. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

⁷Decision of June 22, 1995, 2 BvL 37/92, BVerfGE 93:121-165.

contributions in general, this principle establishes an upper limit of the government's share at roughly fifty percent overall (Arnauld & Zimmermann, 2000: p. 3).

Building on this line of case law, the Federal Constitutional Court has held that a taxpayer's aggregate tax burden may not exceed fifty percent of income, ensuring that the State does not take precedence over the individual in the use and enjoyment of property. This application of the principle is appropriate, as it establishes a threshold beyond which the taxpayer's capacity to generate taxable wealth would be impaired. In practice, the Court applies the so-called *Half-Division Principle* (*Halbteilungsgrundsatz*), under which property taxes may be imposed in addition to income taxes only insofar as the total burden, assessed on a representative basis that accounts for receipts, deductible expenses, and exemptions, remains approximately divided equally between the public and private spheres (Zilveti, 2006: p. 50).

By contrast, Spain expressly prohibits confiscatory taxation in Article 31 of the 1978 Constitution, which provides:

1. Todos contribuirán al sostenimiento de los gastos públicos de acuerdo con su capacidad económica mediante un sistema tributario justo inspirado en los principios de igualdad y progresividad que, en ningún caso, tendrá alcance confiscatorio.

Linking the prohibition on confiscatory taxation to the right to property, it was the Mexican Constitution of 1917 (Article 27) (United Mexican States, 1917) that first constitutionalized the social function of property. The concept gained broader international resonance with the Weimar Constitution, whose Article 153 declared that the use of property must serve the common good (Barroso, 2024: p. 234).

In Latin America, the 1853 Argentine Constitution stands out: the prohibition on confiscatory taxation can be inferred from Articles 14 and 17, which safeguard the right to property, much as in Brazil's pre-1988 charters and in the German and Italian constitutions (Carrazza & Barreni, 2019: p. 43).

Art. 14. All inhabitants of the Nation enjoy the following rights in accordance with the laws that regulate their exercise; namely: to work and engage in any lawful industry; to navigate and trade; to petition the authorities; to enter, remain, transit, and leave Argentine territory; to publish their ideas through the press without prior censorship; to use and dispose of their property; to associate for useful purposes; to freely profess their religion; to teach and learn.

Art. 17. La propiedad es inviolable, y ningún habitante de la Nación puede ser privado de ella, sino en virtud de sentencia fundada en ley.

Finally, the 1917 Mexican Constitution stands out for providing that private property may be expropriated only for reasons of public utility and upon prior, just compensation. In this framework, Article 27 provides:⁸

The ownership of the lands and waters within the national territory originally belongs to the Nation, which has had and has the right to transfer the ownership

⁸Constitución Política de los Estados Unidos Mexicanos, 1917.

of them to private individuals, constituting private property.

It bears noting that, in general, the constitutions surveyed link the prohibition on confiscatory taxation to a just tax order. As noted, taxation necessarily engages two fundamental rights: property and liberty. The former is directly implicated because a tax is a compulsory monetary exaction imposed by law, which necessarily diminishes the taxpayer's assets, but never to the point of confiscation, as Article 150 (IV) of the Brazilian Federal Constitution makes clear (Costa, 2022: p. 57).

7. Final Considerations

The historical analysis demonstrates that, since ancient civilizations, taxation has always been intertwined with the pursuit of power and wealth, serving as both an economic and political instrument that, at various times, has fueled conflict and domination.

From the era of empires onward, taxation has constituted a decisive variable in shaping the political structure of early and often precarious social organizations, up to the advent of the modern State. From the medieval period to the decline of absolutism, the maxim "*no taxation without representation*" emerged, culminating in the principle of consent, an essential milestone in the political progress of the relationship between the State and the taxpayer-citizen.

Indeed, the lack of transparency in defining the precise boundaries between the principles of ability-to-pay and the Prohibition on Confiscatory Taxation reveals that the fundamental values underlying taxation are not being fully observed.

In the contemporary constitutional state, the prohibition of confiscation reaffirms this democratic commitment. Expressly enshrined in Article 150, item IV, of the Federal Constitution of the Federative Republic of Brazil, this provision seeks to preserve property and individual liberty, functioning as a mechanism of balance between the State's taxing authority and the protection of taxpayers. Although the prohibition of confiscation was only formally incorporated into the current constitutional order, its underlying rationale had long been present in earlier texts and in comparative legal systems, as an expression of the ideal of fiscal justice.

The application of this principle, however, remains challenging. It falls to the Judiciary to define, on a case-by-case basis, when the tax burden becomes so excessive as to constitute confiscation. The difficulty lies in reconciling the State's need for revenue, essential for its maintenance and for financing the common good, with the principles of ability-to-pay and proportionality between taxation and the public benefits it is meant to sustain.

In the Brazilian context, this tension is exacerbated by the regressivity of the tax system, where most revenue is drawn from consumption rather than income or wealth. The result is an unequal distribution of the fiscal burden and an insufficient social return, characterized by low investment in essential areas such as health, education, housing, and sanitation. This distortion shows that confiscation

may manifest not only in the intensity of the tax burden but also in the absence of an equivalent social return, thereby breaking the ethical link between the duty to contribute and the redistributive function of the State.

Thus, the realization of the principle of the Prohibition on Confiscatory Taxation requires more than merely controlling the tax burden: it demands the implementation of a just, balanced, and socially efficient tax model that upholds human dignity and material equality. Taxation, as an expression of social solidarity, must reflect the fair balance between the duty to contribute and the right to live with dignity, the ultimate foundation of a truly democratic tax system.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

- Alexy, R. (1999). Colisão de direitos fundamentais e realização de direitos fundamentais no Estado de Direito democrático. *Revista De Direito Administrativo*, 217, 67-79. <https://doi.org/10.12660/rda.v217.1999.47414>
- Barroso, L. R. (2024). *Contemporary Constitutional Law* (12th ed.). SaraivaJur.
- Becho, R. L. (2015). *Lessons in Tax Law* (3rd ed.). Saraiva.
- Brazil (1988). *Federal Constitution of 1988*. http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm
- Cardoso, D. B. (2016). Collision of Fundamental Rights, Balancing, and Proportionality in Robert Alexy's View. *Constitution and Rights Guarantee Journal*, 137-155. <https://periodicos.ufrn.br/constituicaoegarantiadedireitos/article/viewFile/10327/7300>
- Carrazza, R. A. (2024). *Course in Constitutional Tax Law* (35th ed.). JusPodivm.
- Carrazza, R. A., & Barreni, S. R. (2019). Prohibition of Confiscatory Effects in Tax Law: Enshrinement, Application, and Identification of Objective Limits. *Rdiet*, 14, 28-52.
- Coêlho, S. C. N. (2016). *Judicial Review of Laws and the Power to Tax under the 1988 Federal Constitution* (4th ed.). Forense.
- Costa, R. H. (2022). *Course in Tax Law: Constitution and the National Tax Code* (12th ed.). SaraivaJur.
- Englisch, J., & Kube, H. (2023). Constitutional Requirements for Substantive Tax Law in Federal Republic of Germany. *Review of International and European Economic Law*, 2. <https://rieel.com/index.php/rieel/article/view/46>
- Filgueira, E. F. B., & Valadão, M. A. P. (2020). The Principle of Non-Confiscation and Its Delimiting Criteria. *Revista Jurídica (FURB)*, 24, 1-24.
- Moraes, A. de (2023). *Constitutional Law* (39th ed.). Atlas.
- Nakagaki, R. K. (2010). *The Principle of Non-Confiscation in Tax Law*. Master's Thesis (Law), Pontifical Catholic University of São Paulo (PUC-SP).
- Oliveira, A. M. de, & Borges, A. de M. (2016). Limitations on the Principle of Contributive Capacity: Minimum Existential and Confiscation. *Conpedi Law Review*, 2, 180-200. https://doi.org/10.26668/2448-3931_conpedilawreview/2016.v2i4.3660
- Saraiva Filho, O. O. P. (2021). *Fundamental Rights of Taxpayers: A Tribute to Jurist Gilmar Ferreira Mendes* (p. 77). Almedina.
- Schoueri, L. E. (2023). *Tax Law* (12th ed.). SaraivaJur.

United Mexican States (1917). *Mexican Constitution*.

<https://www.constitucionpolitica.mx/versiones-antiores/1917>

Von Arnould, A., & Zimmermann, K. W. (2000). *Regulating Government's Share: The Fifty-Percent Rule of the Federal Constitutional Court in Germany*. Helmut Schmidt Universität Hamburg, Working Paper No. 100.

Zilveti, F. A., Coelho, M. P. (2006). Essay on the Principle of Non-Confiscation. *Current Tax Law Review*, No. 20, 45-57.

<https://revista.ibdt.org.br/index.php/RDTA/article/view/1542>