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CAN TAX JUSTICE REARRANGE AN UNFAIR SYSTEM? THE BRAZILIAN CASE

A TAXA DE JUSTIÇA PODE REORGANIZAR UM SISTEMA INCOMPLETO? O CASO BRASILEIRO

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ABSTRACT

The present study had sought the concepts and meanings of Justice in the works of Aristotle (Nicomachean Ethics), Hans Kelsen (Das Problem der Gerechtigkeit – The Problem of Justice) and John Rawls (A Theory of Justice). After this, the study has analyzed the ideas presented by John Rawls in "Justice as Equity", which are the foundation for a more specific insight about tax justice. The Rawlsian concept, from which the study started, was that justice would be "an appropriate balance between conflicting demands". Then it has analyzed some situations of what tax injustices in the Brazilian Tax Legislation would be. Finally, it has concluded that an approximate idea of tax justice is in the fair balance between the concerns of the taxpayer and the State, which equitably establishes the size of the social minimum and the fair savings rate, as well as it avoids high inequality at the top of the income distribution through tax proportionality, which could limit equal opportunities and would inhibit economic growth.

KEYWORDS: Tax justice; proportionality; conflicting interests; economic growth.

RESUMO

O presente trabalho buscou conceitos e significados de Justiça nas obras de Aristóteles (Ética a Nicômaco), Hans Kelsen (O problema da Justiça) e John Rawls (Uma teoria da Justiça). Após isso analisou-se os institutos defendidos por John Rawls em “Justiça como Equidade” para, com base nestes, edificar uma noção mais específica de justiça fiscal. O conceito rawlsiano de que se partiu foi que o da justiça como “equilíbrio apropriado entre exigências conflitantes”. Em seguida analisou-se algumas situações de injustiça fiscal na legislação tributária brasileira. Ao fim, concluiu-se que uma ideia próxima de justiça fiscal passa pelo justo equilíbrio entre os interesses do contribuinte e do Estado, que estabeleça, de forma equitativa, o tamanho do mínimo social e da taxa de poupança justa, bem como, utilizando-se da proporcionalidade tributária, evite elevada desigualdade no topo da distribuição de renda, o que limitaria a igualdade de oportunidades e inibiria do crescimento econômico.

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PALAVRAS-CHAVE: Justiça fiscal; proporcionalidade; interesses conflitantes; crescimento econômico.

INTRODUCION

Justice: that is such a complex concept[1] in philosophy, as well as good, happiness, virtue, fairness, proportionality and reasonableness. There is much debate about it, and to this day, there is not an irrefutable meaning in the philosophy of law, alike to what happens with the other values mentioned above.

Regarding proportionality and reasonableness concepts, it can be mentioned that, in instrumental standings, law has been bounding its meanings. In proportionality, there is extensive precedents, beginning with the specification of this principle by the German Constitutional Court[2], then it has been systematized and polished in the theory of Human Rights by Robert Alexy[3]. As for the concept of reasonableness, from its deep rootedness in the Common Law system – the Wednesbury precedent in England[4] -, heading to a common ground in the Civil Law system, it is possible to work safely around it.

For Justice, however, there is no consensus around its concept, one dares to say that there is no concept at all for it. For the philosophy of law, despite the absence of definition, justice is related to the specific values of the most diverse societies and to the systems by which those values are legitimately affirmed, even though coercively.

The dictionary of philosophy of Nicola Abbagnano (2007) gives the word "justice" the concept of an order of human relations, of a conformity of the conduct with the norm, whether it is moral or of law. Not very different is the concept given by

[1] In this work the author brings extensive philosophical definitions about the word “concept”. “Concept” is meant as “every process that makes possible the description, classification and prediction of knowable objects (...)”.Concept is not a simple or indivisible element, but it can be constituted by a set of extremely complex symbolic techniques, as it is the case of scientific theories that can also be called 'concept', such as Concept of Relativity, Concept of Evolution, etc. (ABBAGNANO, 2007, p. 164).

[2] The doctrine regards the Luth Case as the milestone in terms of the objective dimension of fundamental rights, effectiveness of these rights and the rule of weighting, in case of collision of such rights.

[3] The two main books regarding the Principle of Proportionality are: “The theory of fundamental rights”, in which Alexy laid the foundations of his theory, and "Epilogue to the theory of fundamental rights", a latter work, engaged in rebating the criticisms thrown at the previous book.

[4] In short: No reasonable person acting reasonably could have made it. (Associated Provincial Picture Houses Ltd *v.* Wednesbury Corporation (1948)).

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Norberto Bobbio, Nicola Matteucci e Gianfranco Pasquino (1998) in his dictionary of politics, in the sense that justice serves to a social purpose, in the same way as freedom, equality, democracy or welfare, but justice differs from them because it is not empirically verifiable. Subsequently he gives in and defines justice as a normative concept.

However, it is noticed that efforts to delimit and define the concept of Justice traverse the most varied approaches, either by looking at it only as values and thereby confusing it as morality and ethics, or by reducing it to a concatenated, homogeneous and coherent system of norms, most often in the form of rules. In general, there are several theories that explain the legal phenomenon, such as Natura Law, Positivism, Exegetical School, Normativism, Historicism, and others, notwithstanding any of them to provide a concept of Justice.

A sheer concept of Justice, albeit, there is no one. For the purpose of this work, the option is to extract it from the classic authors, naming Aristotle and Hans Kelsen, their ideas around the theme, however not even themselves drew a conclusion about the definition of Justice itself. Then, searching for the main scope of this work, which is, in the light of John Rawls's Theory of Justice, to frame the general lines on an conception of tax justice and, at the end, specifically to point out some occurrences of injustice in the Brazilian Tax System.

2 AN IDEA OF A FAIR AND PROPORTIONAL JUSTICE IN ARISTOTLE

There are precious lessons about the notion of Justice in the book V of Nicomachean Ethics, which expands on Rawls' "Theory of Justice". According to Aristotle's idea, Justice is a "disposition of character," which makes people prone to act and do according to what is presumably fair. As it can be seen, there is certain tautology in this proposition, since it's dealt as an introduction of the theme. Soon after, he goes on to explain that there is a general notion of justice, in which entails several types of it, *id est,* some specific values.

At first, without saying it directly with these words, Aristotle supports that Justice is related to moral values. Then, he cites as specific values of injustice: greed, improbity, and even the opposite of good. Furthermore, he drops to another "meaning"

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of it, calling it "particular meaning" of Justice, which is confused with the law, asserting it as "unfair, in the broad sense of ‘contrary to law’".

The philosopher goes on stating that there is more than one type of Justice, one of which is distinguished from virtue, in the full sense of the word, as well as from improbity, but always as a species-to-gender relation. For Aristotle, at the extremes of every kind of Justice there is iniquity: “in every kind of action where there is the most and the least, there is also the equal one. If therefore the unjust is iniquitous, the just is equitable, as indeed everyone thinks, even without any discussion. Once equality is an intermediary point, the just will be a middle ground".

He clarifies his idea by saying that the notion of equity is always relational, whether it be to two persons or to two things, and above all it is intermediate between these two things or persons, "which are respectively greater and minors ". The measure of this distribution, according to him will be formed by the idea of merit. This must occur even if not all of them specify the same kind of merit, since "the democrats identify it with the virtue of a free man, the partisans of the oligarchy with the (condition of) wealth (or with the nobility of birth), and the partisans of the aristocracy with the (condition of) excellence (moral and intellectual)”.

The unfolding of this idea, as a natural consequence of the measure of merit between two extremes, introduces the idea of proportion, being the proportion the measure of merit within the intermediary, which is equality. The unjust is the one who violates the proportion, once he removes the relation between the whole to the whole, and the relation between the part to the part.

Using the idea of "common possessions", taken in the context of its time, he sustains that Justice distribute these possessions accordingly to the ratio. Furthermore, under this criterion, the "common assets of a society" should also be distributed.

This means that there is in Aristotle an embryo of distributive justice. This inference can be ascertained even in a definitive way, when he says that "we must both subtract from the one who has the most and add to the one who has the least; and to this we shall add the quantity by which the intermediary one exceeds it, and from the one who has the most we will subtract its excess from the intermediary one”. Thus, "it is by proportional retribution that the city remains united".

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Therefore, he concludes stating that justice is a kind of middle ground, related to intermediary quantity, whereas injustice relates to extremes. It is also by that that a righteous man acts and shares - to himself and to the other ones - without being attributed more than it is due or to what is rather proper for the others and gives what is equal accordingly to the proportion. On the other hand, injustice is related to excess and insufficiency, opposed to the proportion of how useful it may be.

As it has been expounded, the writings of Aristotle are of major value for the notion of justice as the proportional, the equal, and even the middle ground, according to the idea of merit. However, not even this great philosopher dared to be categorical in the definition of justice, since he claims it to be a general concept on which several specific ideas are suitable.

At this point, moving forward, the analysis of Hans Kelsen theory on “The problem of justice” may be useful for the comprehension of the main idea of this paper – a contemporaneous concept of tax justice.

3 THE (NON)CONCEPT OF JUSTICE ACCORDING TO HANS KELSEN

Another great thinker about the subject of this paper has been the law philosopher Hans Kelsen (1998), mostly known by his contributions to the systematization of the legal theory as one autonomous science, set in the work "The Pure Theory of Law". He pursued to confer scientific approach on the comprehension of law, aiming to abolish the intrusion of other branches of knowledge in law, and even to separate moral values whenever applying statutes and legal norms[5].

However, the most significant author’s contribution serving for the objectives of this text, is the understanding of justice itself – in “The problem of Justice” -, what may help the building of an idea of tax justice. In his work, nevertheless, there is not a definition of what is justice, but clear-cut definitions of what is not justice. That is why the word "non" is in this index subtitle.

[5] As a pure science, law does not have the function to decide what is fair, but rather to describe what is in fact mandatory without identifying itself with one of those value judgments.

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In his book "The Problem of Justice (1960)", Hans Kelsen collects several meanings that are historically attributed to the phenomenon of justice, highlighting their definition and analysis about them. He seeks to deconstruct, from a scientific point of view, each one of the existing descriptions for the phenomenon of justice, not being definite at the end.

The author starts stating that justice is a quality or attribute of different objects or individuals. In this sense, justice represents a virtue and, as such, belongs to the domain of morality. Under this approach, norms that seek to do justice have as a validity assumption to be good, fair, etc., whereas the legal norm should not concern about that matter. According to him, just in the fundamental hypothetical norm – all citizens must obey the Constitution -, one could establish value of justice for the law.

Then, some inconsistencies are pointed out in the simplest statements of definitions of justice. In the formula which he called "*suum cuique*", which says "to each one what is his own", he states it is understood what is his "by right", that is, according to a title or legal claim, therefore something not accurate. Concerning the "Golden Rule", which says "Do not do to others what you do not want them to do to you", Kelsen deems it uncertain, pointing the extreme situation where the lie could be something fair, if it is directed to someone who accepts it as way of living.

Then Kelsen goes on to analyze the "Categorical Imperative" of Kant, which says: "Act only according to that maxim whereby you can, at the same time, will that it should become a universal law ". According to Kelsen, this is most commonly used as the general and supreme principle of morality, rather than as a rule of justice. He also points to a flaw in Kant's theory, saying that in the case of suicide, the individual maxim (the person believes that suicide is better for himself) cannot be transformed into a universal maxim.

Then Kelsen discusses several examples in which his opinion, Kant's maxim would not be applicable, as in the case of the borrower who does not want to pay the debt or people who would rather have a reckless life to the development of their own capacities.

In the end, Kelsen states that what is left of Kant's rule is only a general law with which the maxim of action must adapt: "The need to conform the law is deontic

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and this is the meaning of all and any norm whatsoever". The content of this norm would not be filled by morality, rather by another normative science.

The author also does not think the retributive principle is the appropriate answer to the problem of justice. The retributive norm prescribes that "good must be done to one who does good, and evil to one who does evil". It is noticed that this is such an empty formula as is the general commandment to do good and keep away from evil, for it presumes a normative order that determines what is good and what is evil.

Kelsen continues to deconstruct the concept of justice based on the rules of custom, because, being changeable in time and space, they would not give accurate answers. On the same basis, he criticizes "the Aristotelian middle ground", once, under his view, it would not be manifested.

The author likewise disagrees with the idea of justice as proportionality, which is also found in Aristotle. According to him, in this sense, it must be assumed that values have different degrees, something disallowed by Kelsen, since in that sense a binary logic would be attributed to normativity. For Kelsen, a conduct cannot relate more or less to the norm, being better or worse, since different degrees must reside not in the norm itself, but in what it is called “subjective” or personal sense.

Then he goes further and deepens his criticism on the idea of proportionality in the strict sense, taken by the German Constitutional Court in 1958 in the Luth[6] Case, tried two years before the releasing of the book "The problem of justice", in which he dealt proportionality in an approximate sense and not in a strict sense. He advocates that proportionality in the strict sense only exists between values in the subjective sense, arising from the reaction embodied by the retributive principle. A proportionality would only be possible if the values considered were quantitatively measurable, which is not the case for him.

At this point, Kelsen evolves to the analysis of Marx's principle of communist justice, which states that must be requested from "each one according to his abilities and given to each one according to his needs". For this, he made the same criticism

[6] This is the leading case in the study of fundamental rights. The German Constitutional Court developed three central ideas: (a) the objective dimension of fundamental rights; (b) the horizontal effectiveness of fundamental rights; and (c) the need to weigh the values, in the event of a collision of rights.

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addressed to the maxim "suum cuique", which, according to him, does not say anything.

Regarding the idea of justice as an absolute good in Plato, Kelsen draws a parallel, stating that this idea - absolute good - is for this conception of justice as God is for the conception of divine justice. That is, they have as reference something transcendent, inaccessible to the men, who is prisoner of his senses.

However, it was on the natural law that Kelsen focused much of the criticism in this work. He sought to assess all types of validation of this great school of the legal phenomenon justification, from nature, through God and religious matrices, and even through human reason. The core idea behind the critics of natural law does not differ from the other deconstructive analyzes he undertook against the other notions of justice presented above, always going through subjectivisms, transcendentalism and uncertain elements of justice.

As this addressed book was written in 1960, it faced great criticism on account of what was defended by Kelsen in his masterpiece “Pure Theory of Law”, published in 1934, and, even under a chronological approach, it can be said that "The problem of justice" functions, among other things, as an answer and an attempt to clarify that the legal problem differs from the justice problem. Problem that, incidentally, does not seem to have been his intention to define it.

4 THE “JUSTICE AS FAIRNESS” OF JHON RAWLS AND ITS CONTRIBUTION TO THE STRUCTURE OF AN IDEA OF TAX JUSTICE

In the quest of the idea of justice, having taken Aristotle and his lessons on fairness and proportionality, as well as the meaningful work of Hans Kelsen on the many understandings of what he called the problem of justice, John Rawls` theory about fairness might be useful for the development of this paper.

This author framed a theory that makes use of the valuable elements of the current society (democracy, equality, distributive justice, etc.) and organized them giving the fundamentals for building a society he considers the ideal one from the organizational outlook.

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In his most relevant work, "A Theory of Justice", John Rawls (2006) provides more analytical elements to justify a concept and a "conception of justice" as well as “distributional shares", providing grounds for differential governmental actions geared to protect people and to justify public policies aimed at reducing social inequalities and providing more equitable opportunities for citizens. This specific point will be resumed further.

The core thesis of Rawls is to establish what he calls the "two principles of justice" - the principle of equality, and the principle of difference. On account of that, he develops a series of reasoning that supports the antecedent (justification) and the consequent (application) of both principles. Further, in a specific chapter, he presents what he calls "distributional shares" and how they can be forged for the implementation of those principles of justice.

According to the author, it is required a set of principles to frame one social organization that would dictate the distribution of the advantages and would set an agreement on how appropriate the distributive shares should be. These streamlines are the principles of social justice, enabling rights and duties to "basic institutions" of the society and defining how benefits will be appropriated and how duties of social cooperation will be imposed (RAWLS, 2006, p.5).

Rawls states that people are born in different social positions, what implies on life expectations - in the sense of personal growth possibilities. These expectations are reinforced both by political systems and economic or social circumstances. These inequalities, stemmed from different social start points, are deep and cannot be justified by the idea of merit (RAWLS, 2006 p.8-9).

Furthermore, he distinguishes a concept of justice from a conception of justice. The first one refers to the proper balance between conflicting demands, while the second one relates to the set of principles that identify "significant considerations" in determining balance. The role of these principles attributing rights and duties and defining the appropriate division of social advantages are definite factors of the concept of justice (RAWLS, 2006, p.12)

Devoted to the Social Contract theory of Locke and Rousseau, presenting himself as a "Kantian-constructive" thinker, Rawls borrows the idea of a "state of nature" to metaphorize an "original position" that would be "the appropriate *status quo*

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to ensure that fundamental agreements are equitable." Hence, the idea of "justice as fairness" relates to the situation in which the participants would only adopt rational and equitable principles.

To be accepted by the entire society, these premises or principles must be as comprehensive as possible, to the point of encompassing the most diverse personal aspirations and circumstances (RAWLS, 2006, p.21). In order to explain this, he makes use of another metaphor, "the veil of ignorance", which would be the absence of knowledge of the original position of the party when making political decisions.

The concepts of original position, veil of ignorance and rational justification applied to political decisions altogether, outline principles of justice as the ones in which people, driven by the fulfillment of their concerns, would accept boundaries of equality on natural or social contingencies (RAWLS, 2006, p.23).

Given these assumptions, Rawls (2006, p.73) builds on the two principles of justice, which, by their importance are transcribed:

> First Principle: Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, whose scheme is compatible with the same scheme of liberties for all; Second Principle: Social and economic inequalities are to satisfy two conditions: a) They are to be attached to offices and positions open to all under conditions of fair equality of opportunity; b) They are to be to the greatest benefit of the least-advantaged members of society (the difference principle).

These two principles of justice are the basis of the author's theory. Unfolding them, he presents his idea of "distributive justice," which relates to other concepts he conceives of, such as "distributive shares", "primary goods", "pure procedural justice" and “basic institutions”.

These concepts provide a substantial basis for one idea of tax justice or, at least, for one more solid philosophical foundation of the theme. When Rawls presents his "distributional shares", he provides a theoretical framework for a disparate treatment between diverse ones in a society molded by institutions, people and values which are the most divergent ones, tending to perform the idea of "social choice"[7].

[7] The most usual expression would be “social welfare" rather than "social choice", but Rawls reject this concept because, he argues, it has a suggestion of utilitarianism. It is exactly the pure utilitarianism he wishes to avoid as the foundations of a Theory of Justice. At the end of the book he accepts certain

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In Rawls, the idea of distributive justice, unfolding the principles of justice, is based on the meaningful choices for the conception on how the distributive shares will be minted. Such choices have moral, political and economic foundations, regardless of specific needs and desires of the current members in a set historical time (RAWLS, 2006 p.325-327).

He resorts again to the metaphor of the "original position," deeming it as the constructive philosophical foundation that Kant has given to the "general will", conceived by Rousseau (RAWLS, 2006, p.328). In it, the eventual intergenerational conflict over the allocation of wealth and the notion of fair savings between generations would be solved by "precepts of justice."

For the author, only a few issues of political economy have relevance enough to be worked out in the theory of justice: the proper rate of fair savings between generations[8]; the basic organization of taxation and private property, and, finally, what may be the social minimum amount of one society (RAWLS, 2006, p.330).

Rawls thoroughly concerns for taxation and private property, in what he calls the “distribution sector”. Both elements stem from his two principles of justice. The inheritance tax, the progressive income taxation system and the legal definition of self-ownership should ensure equal freedom in a citizen-owner democracy, as well as the fair value of the rights established by such instruments. On the other hand, proportional taxes on consumption or on income, must provide revenue for public policies, for social benefits agencies and for equitable educational offer, in order to implement the second principle (RAWLS, 2006, p.348).

Therefore, in both phases, the taxation system and the private property regime would handle the unequal ones in a disparate manner not allowing an unreasonable increase of inequality, as well as, in the second phase, providing the basis for an equalization on the "acceptable social minimum amount" through transfers of an equitable supply of opportunities.

dosage of utilitarianism in the construction of the concept of justice, though this is not the substrate of the concept and does not dictate the process of choosing what is fair.

[8] Rawls raises the question of how to ensure that one generation does not harm the next one. The answer, again, is the veil of ignorance, suggesting that the settlers on the original position do not know what generation they will belong to. He introduces the idea that one generation will always aim to improve the life of their direct descendants. In order to do this, he conceived the idea of fair savings, which, in short, consists on the wealth produced by a generation to improve its quality of life, but partly spare to a future generation, that must do the same to the subsequent one.

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The compliance to both principles of justice implies the definition of an adequate rate of savings and a criterion for the social minimum amount, raising the expectations for the underprivileged through transfers and benefits provided by essential public policies to be compatible with the expectations of equal liberties (RAWLS, 2006, p.377). The distribution through this basic structure will result in justice (or at least absence of injustice), at least in what it means by pure procedural justice.

Rawls outlined reasons, foundations and purposes for a divergent treatment among citizens, including a different tax treatment as well (LOVETTI, 2013). That is, if his theory points to the embodiment of a fair society, it encompasses a fair tax operation as well.

Rawls theory is not immune to criticisms, as nothing in science, much less in the philosophical field. Roberto Gargarella (2008), for instance, points out some criticisms made by Ronald Dworkin, Amartya Sen and General Cohen on some traits of the Theory of Justice, specifically on the justification of inequality in the second principle of justice and on the luck factor in the distribution of the primary goods. However, such criticisms do not undermine the relevance of the theory, since it seeks to provide a systematic response to a fair operational society.

5 A CONCEPT OS RAWLSIAN TAX JUSTICE

As we have seen, the gathering of elements about justice in Aristotle, Hans Kelsen and John Rawls are useful to the understanding of the theme of this work. In the first and third authors, the concept of justice permeates *a priori* an idea of equal treatment between people and, *posteriori*, a treatment according to some rules of justification[9], allowing a divergent treatment between unequal ones.

The aim of this work, grounded on these theories, is to connect the idea of justice to the tax system. Most of the works[10] on this theme – taxation and justice -

[9] Aristotle speaks of proportionality according to the merit.

[10] Many writings about tax justice are presented by economists rather than jurists, like Adam Smith, H. M. Goves and J. M. Keynes. This author identifies the commitment of economists on the lack of interest of jurists and philosophers on the subject. (TIPKE, 2012, p.12). Adam Smith, in his masterpiece "Uma Investigação sobre a Natureza e as Causas da Riqueza das Nações", since 1776, devised four principles for tax justice. The first, which he called *quality*, consists of the "tax" must respect the measure

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assume that tax justice basically consists of a more burdensome tax treatment to those who possess higher wealth and a lesser one to those who do not have it.

It is in Rawls that one finds a theoretical arrangement on which it is possible to structure a more precise idea of tax justice. As previously said, his theory is not immune to criticisms, and the screening of some of its aspects is required. As an example, there is an underestimation of the distortion that original inequality promotes, specifically in countries where it is very noticeable, such as Brazil. What should be considered, however, is that it was a work written by an American citizen in the 1950s and 1960s, that is, in a society with low inequality levels and fully afforded with primary goods.

Like any classical work, however, Rawls's theory provides tools for the assembling of the most diverse theoretical outputs – the current paper intends to make use of them for the discussion of tax justice starting from his concept of "proper balance between conflicting demands". Therefore, what would be the conflicting demands of tax justice? Moreover, what would be the proper balance of such requirements?

Based on the society of citizens-owners fashioned by Rawls, in this spotlight, taxpayers with "equal rights to the most extensive system of equal fundamental freedoms", must be granted equality in the distribution of the tax burden and the respect to their ability to pay. To these elements of tax equality, it must be added a key principle of the system, the prohibition of the confiscatory taxation. Agricultural

On the other hand, the State, whenever framing the tax system, must seek the most adequate economic basis - exercising a "conception of justice" (in Rawls's words) -once it would be bound to choose the fairest relevant conditions - in order to raise the financing of "basic institutions". These conditions, in turn, would be responsible for the provision of "primary goods" for the implementation of the “social minimum amount" as well as for the distribution of equal opportunities (such as in educational issues).

That is, tax justice would be the appropriate balance between these two conflicting demands. On one hand, the right to equality, non-confiscatory taxation and the respect for taxpayer's ability to pay; and on the other hand, the need for the State

of the capacities of the subjects. The second is *certainty*, assuring the tax must not be arbitrary. The third tax principle is the convenience of payment: tax collection must be related to the time of the economic gain. For example, a tax on farming production must match with the harvest season. The forth principle is related to the collection economy itself: the collection cannot be more expensive than the revenue it provides (SMITH, 1999).

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to implement the second principle of justice, *id est*, the "difference principle", by means of "distributive shares", to bring citizens closer even if they are from different social stratus.

Certainly, the core debate in contemporary democracies is in this balance. Since this is an approximate idea of what society perceives by its purposes, if the objectives of the various groups within it are divergent, tax justice will consist of non-abusive state funding, being, however, adequate for the reach of a minimum well-being state.

This work aims to go further, going beyond the fluid concepts of justice presented here, dealing with some of the unequal treatments found in the Brazilian tax system.

6 CURRENT CASES OF TAX INJUSTICE IN BRAZIL

From now on it will be presented five[11] current situations that break the appropriate balance between the conflicting requirements mentioned above, whether by not observing the actual taxpayers' ability to pay, by underfunding the economic bases of distributive justice, or even both at the same time.

The most emblematic example is the fact that the Federal Government has never exercised its taxation power regarding the wealth tax – Large Fortunes Tax - foreseen in item VII of article 153 of the Constitution of the Republic of Brazil, dating from 1988. The reasons seem to be obvious: this is not only an economic matter over the risk of capital flight[12], but it is also a political choice since among the 513 congressmen elected to the 2014-2018 legislature, almost half of them are millionaire, an increasing ratio in each legislature[13]. This lack of taxation not only violates the

[11] Within the Brazilian tax system, there are dozens of cases in which there is a notorious injustice in respect of the ability to pay principle.

[12] Thomas Piketty does not neglect the possibility of capital flight to countries with mild taxation in case of the institution of this tax. For this, he suggests, in a utopian way, a world tax on capital. As an alternative to this, he claims a major international cooperation in tax matters and, moreover, transparency in the financial data (PIKETTY, 2014).

[13] This data, related to the last national elections as well as the private funding of campaigns, reveals that politics has become a *locus* of wealthy people (REIS, 2006).

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Ability-To-Pay Taxation principle, but also fails to raise a large mass of resources that would be extremely useful for the financing of public policies[14].

A viable way out for such omission would be the increase of tax rates on inheritance. Currently, Resolution 9 of the Federal Senate, based on item IV of paragraph, article 155 of the Federal Constitution, establishes the maximum rate of 8%. In this matter, Piketty (2014) also points out that taxation on inheritance has an essential role of reducing the immediate concentration of assets. For Rawls (2006), similarly, the progressive taxation on inheritance would restore the primary role of merit in the capitalist society.

Another case of clear tax injustice is the absence of taxation on the income of the individual on profits and dividends from one legal entity. In other words, an entrepreneur who as a natural person earns millionaire profits, will not have this amount taxed. Differently, one employee whose income is above the exemption range of R$ 28,559.70 (approx. US$ 7,500.00) for the last fiscal year, will be bound to collect the mentioned income tax.

According to a study of the International Center for Inclusive Growth Policies for the United Nations Development Program (PNUD), out of 71,000 ultra-rich Brazilians (over 4 million reais income per year; approx. one million dollars), about 50,000 of them earned dividends in 2013 and paid nothing on that (GOBETTI, 2016). This condition leads Brazil, as well as Estonia, as the only two countries, including members and key partners of the Organization for Economic Cooperation and Development (OECD), which do not tax this economic base.

This same study has made some estimates on the income tax legislation, since the implementation of some more tax brackets (35%, 40% and 45%), to the taxation of dividends with one single tax rate. Depending on the scenario, it could increase the collection to finance basic public policies from 43 to 72 billion reais (approx. 11 to 19 billion dollars) reducing inequalities.

Moreover, there are several situations where income over capital is taxed exclusively at the source, with one single proportional rate, taxing less the income on

[14] Within the Brazilian National Congress there are dozens of legislative proposals to implement the Great Wealth Tax (IGF). In one of the them, the PLC 130/2012, adopting a 1.2% rate, there should be an increase of R$ 12.66 billion (US$ 3 Billion) in tax collection, according to the latest IRS data.

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capital than income on salary, overturning the progressive tax system. This opposes to the Constitution directives, since it does not allow discrimination based on the occupation or function exercised by taxpayers, regardless of the legal denomination of income, titles or rights (MARIA; LUCHIEZI JR.; 2010).

Yet on the income taxation matter, it can also be mentioned the non-correction of the tax table income as patently unfair, which makes tributes even more regressive, since people in the lower income brackets are the ones who are mostly affected by inflation.

One more scenario, regarding the taxation capability of the member-states, is the position of the Federal Supreme Court (STF) to deny the taxation of Motor Vehicle Property Tax (IPVA) on vessels and aircrafts, something that opposes to the ability-to-pay principle. Such understanding fosters an unfair situation: a wage earner citizen who purchases his first automobile, fully financed, is obliged to pay IPVA at a tabletop list price, whereas a millionaire yacht or aircraft owner does not have to pay such tax on these properties. The reasons for this instance are some leading cases of the STF, such as Extraordinary Appeals RE 134.509/AM[15] and RE 379.572/RJ[16], which barred member-state laws from outlining this taxation hypothesis, stating that, due to the fact of IPVA has replaced the former Single Road Tax (TRU), it would only refer to ground vehicles.

7 PROGRESSIVE TAXATION SYSTEM AND TAX JUSTICE

Having been demonstrated the significance of tax justice and, on the other hand, some examples of their misapplication in Brazil, the theory of Klaus Tipke (2012), about taxation and morality outlined at his work State and Taxpayer Morale

[15] SUPREME COURT. **RE 134509**. IPVA - Tax on Property of Motor Vehicles (Federal Constitution, article n. 155, III; Federal Constitution 69, article 23, III e § 13, Federal Constitution. EC 27/85). No taxation on vessels and aircraft. Reporter: Min. Sepúlveda Pertence. Full Court, judged on 2002 May 29, DJ 2002 Sep 13.

[16] SUPREME COURT. **RE 379572**. Extraordinary Appeal. Tax Law. 2. There is no Tax on Property of Motor Vehicles (IPVA) on vessels (Article n. 155, III, Federal Constitution/1988 and Article n.23, III and § 13, Federal Constitution/1967 according to EC 01/69 and EC 27/85). Precedents. 3. Extraordinary Appeal known and granted. Reporter: Min. Gilmar Mendes, Full Court, judged on 2007 Apr 11, Dje-018.

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(Besteuerungsmoral und Steuermoral), seems to be a good fit for understanding the role of taxation to deal with social inequality.

The author, also admitting the problem on the conception of tax justice in the German legal system, given the vagueness of the term, enlightens that it does not conceptualize justice, sustaining that the equality principle is an outcome of this idea. Going further, he states that, under the Constitutional State, offenses of liberties can also bring an offense to justice. Furthermore, the Social State, referring to justice, also comprises social justice.

Despite the conceptual imprecision, tax collection has a major legal protection to the point that tax evasion is considered a felony – a serious crime – in almost all developed countries. This is easily understood because it not only affects the primary interest of the State, but also it harms honest taxpayers who will have to bear the burden of the evader. The evader breaks down the solidarity of the community of taxpayers (TIPKE, 2012).

Klaus Tipke states that the key issues involving tax policy are addressed by economists rather than lawyers. At first, such decisions are taken in the economic sphere, later on they are adjusted into law. That is why the work of Thomas Piketty, "Capital in the 21st Century"[17], is quite meaningful. It demonstrates, with plenty of data of the last decades, the relation between capital accumulation and the increase of inequality, sustaining that when the capital interest rate is higher than the economic growth ratio, it fosters inequalities to unbearable rates, which radically threatens meritocracy (PIKETTY, 2014).

Some conclusions of Piketty, regarding the role of taxation to solve social inequality, are significant to be drawn for the purpose of this work. Coherently with the notion of tax justice, he asserts that taxes are not only a technical financial problem, but the most imperative political and philosophical matter of the State, since they finance public policies, being the tax issues at the core of all political revolutions. For instance, the withdrawal of tax privileges in the revolutionary France or the *"No taxation without representation*" movement in the British colonies in America in the context of the American Revolution (PIKETTY, 2014, p.480).

[17] Piketty has collected official wealth record data from more than twenty countries over the past three centuries.

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Piketty claims that pure proportionality in taxation has direct relation to the structure of inequality. For him, in the opposite sense, it seems to indicate that progressivity in higher incomes and in inheritances have detained wealth concentration after the two world wars, not allowing to reach concentration of wealth levels of the Belle Époque. He supports that the huge fall in the progressiveness of high-income taxation in the United States and the United Kingdom from 1970-1980 largely explains the leap in higher concentration income.

"Progressive income and inheritance taxes have played an important role during the twentieth century, but they are being threatened by 'tax competition' across countries" (PIKETTY, 2014, p.482-483). This statement does not apply to Brazil, but to countries where these taxes are higher. In Brazil, those rates are relatively low. For the income tax, it starts at 15% going to 27.5%, and for the inheritance and assets transmission taxes it reaches 8% (SINDIFISCO, 2017), whereas in Europe, according to Sacha Calmon, it can reach up to 80% for more distant relatives (COÊLHO, 2012, p. 328).

The failure on the implementation of a proper progressiveness in the taxation system consists, by a transverse mean, in establishing regressiveness, what may cause the deterioration of the legitimacy of the tax system before most of the population, since the middle and the lower classes may no longer accept to pay proportionately to most public expenditures. For Piketty, this prognosis entails individualism and selfishness in society (PIKETTY, 2014).

It is possible to go beyond this reflection made by the French economist and support that the illegitimacy of the tax system increases tax evasion and informal economy as well, reducing the fiscal administration power of the governments against the decrease of tax collection in critical moments like the current one.

CONCLUSION

Despite a universal concept of justice has not been achieved by the authors mentioned above, it is possible to get closer to what would be this phenomenon. Whether making use of equity, proportion, or merit as measures, as Aristotle has

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suggested, or by associating it with normative values, as advocated by Hans Kelsen, or, more analytically, as John Rawls did, taking that as the appropriate balance between conflicting interests, these reasonings can, at least, exclude what is not justice all about.

Assuming these ideas, rearranged to tax law, associated with unequal treatment of the unequal ones, and the Aristotelian notion of "merit", in this specific field, the figure of tax progressivity takes place. For Rawls, the idea of tax justice relies on the balance of opposing interests - of the State representing the collectivity *versus* the individual in defense of his patrimony - in an appropriate way. It can also be deduced from him that the functioning of a fair society requires a fair taxation system as well.

The balance of this tax collection can only be dictated by a democratic debate among all concerned parties involved. The discrepancy at the top of the income earnings should not limit the equal opportunity for the members of the society and inhibit economic growth. Going beyond the vague concepts dealt over here demands a prompt response to a dynamic problem. This is something that not even the previously classical authors dare to do.

Some instances of the Brazilian legal system can be pointed as cases of tax injustice. This occur by the disrespect to the ability-to-pay principle. As examples mentioned above, the neglected taxation on large fortunes, the little taxation on inheritances in Brazil, and the absence of the individual income taxation on profits and dividends of the legal entity. Moreover, the taxation on capital gain is lighter than taxation on wages, and the government negligence on the income table tax update produces more injustice at the bottom of the economic pyramid – not to mention the non-taxation of IPVA on boats and airplanes.

Based on data dealing with the income concentration and the tax collection increase, it is possible to point out that the progressivity on higher incomes and inheritances helps to hinder the concentration of assets. However, this may display a mitigated role considering the international competition undertaken by several countries, offering a more satisfactory tax treatment to draw capital.

Therefore, the non-implementation of a proper progressivity on taxation consists, by transverse ways, of establishing a regressively system of taxation on

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inheritance and incomes. This provokes the erosion of the legitimacy of the tributary system, specifically before the middle and lower social classes, that may not tolerate – peacefully – proportionally funding most of the public expenditures.

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