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Legitimacy of tax rules

Subtopic 1:

Constitutional requirements in respect of tax legislation.

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1- Sovereignty, legitimacy of the constitution

Yes, the principle of sovereignty is set out in the Spanish constitution. Even though this principle has been existing for a long time it wasn't until the constitution of 1978 that the Spanish citizens didn't get it back.

But what does this concept mean? Well, this means that it is all of us, all citizens, who have the capacity to make the decisions that affect the community. All in all, it means that the power lies with the people.

This principle is mentioned throughout the constitutional text. The purpose of so much mention of this principle is to affirm that sovereignty resides in the people, who exercise it, always considering and respecting the forms and limits set out in the Constitution.

We can affirm that national sovereignty resides in the Spanish people, from whom the powers of the State emanate.

With this little introduction made regarding the sovereignty of the constitution is interesting to point out the three main constitutional factors that legitimate tax law.

On the one hand, of course, there are the parliamentary elections. This is such an important way of legitimizing tax laws this is because they provide a democratic process for citizens to elect representatives who will create and vote on legislation on their behalf. When citizens participate in parliamentary elections, they are choosing the individuals who will represent their interests and make decisions about what laws should be passed.

Once elected, these representatives debate and vote on proposed laws, ensuring that they reflect the will of the people. This process provides a level of legitimacy to the laws that are ultimately passed because they are created by elected officials who are accountable to the citizens who put them in power.

Additionally, parliamentary elections provide an opportunity for citizens to express their views on the issues that matter to them. Through their votes, citizens signal their priorities and preferences, which can influence the legislative agenda of the elected officials. This feedback loop between the electorate and elected officials ensures that laws are more likely to reflect the desires and needs of the population.

Overall, parliamentary elections are a crucial component of a democratic system of government, providing citizens with a voice in the legislative process and ensuring that the laws created are legitimate and reflective of the will of the people.

On the other hand, and another really important factor that tax law is legitimated by the Spanish constitution is with the division of taxation competences.

The division of taxation competences refers to the distribution of authority to levy taxes among different levels of government or branches of government within a country. For example, in many federal countries like the United States or Canada, both the federal government and individual states or provinces have the power to levy taxes.

This division of taxation competences can help legitimize tax law in a few ways:

- Democratic representation: When taxation powers are divided among different levels or branches of government, it allows for more democratic representation of the people who are subject to those taxes. For example, if a state government has the power to levy taxes, the people within that state can elect representatives who will make decisions about how those taxes are collected and spent.
- 2. Accountability: By dividing taxation powers, it also allows for more accountability. If the government that has the power to levy taxes is not using those funds in a responsible or fair way, the people can hold them accountable through the political process.
- 3. Competition: In some cases, the division of taxation powers can also create competition among different levels or branches of government. This competition can lead to more efficient and effective tax policies, as each government tries to attract investment and create economic growth within their jurisdiction.

Overall, the division of taxation competences can help legitimize tax law by creating more democratic representation, accountability, and competition among different levels or branches of government.

The last main legitimizing factor is that taxes are not levied indiscriminately but are differentiated between natural persons and legal persons and then, depending on the characteristics and particularities of each one, different rules are applied to them. The aim of this differentiation is to

ensure fair treatment of each. Therefore, this differentiation is an important factor that justifies the legitimacy of tax legislation.

2- Equality principle

Like the principle of sovereignty, the principle of equality is also enshrined in the constitution, Specifically in Article 14. What it basically points out is that there cannot be any difference between the citizens of the Spanish State and those of the rest of the world.

The principle of equality is one of the fundamental rights enshrined in the constitution, which means that its scope is infinite, i.e. equality is a principle on which both national regulations, whatever their scope, and the interaction of public authorities with Spanish society are based.

There are many criteria for determining whether there is equality or not, but we will focus on the following three principles.

The first of these is the principle of universality or generality. Article 31.1 of the EC states that "Everyone shall contribute to the support of public expenditure in accordance with his or her ability...". The first question that stands out is the expression "All", which must be understood as the Constituent Assembly's intention that public charges should be imposed on those who are located and carry out their economic activity in Spanish territory, regardless of whether they are nationals or foreigners.

On the other hand, the principle of generality means that the legislator must classify as a taxable event any act or legal transaction that demonstrates economic capacity. In other words, exemptions and allowances that may be discriminatory are generally prohibited. However, this does not mean that tax benefits cannot be granted for reasons of economic policy. In this sense, the Constitutional Court has recognized on many occasions that taxes, in addition to being a means of raising public revenue, serve as instruments of general economic policy and to ensure a better distribution of national income.

The second principle is that of equality of the tax system. This principle is expressed in the taxpaying capacity of citizens, in the sense that equal economic situations entail equal taxation. In other words, again, discriminatory treatment is prohibited, but not differential treatment arising from different factual situations. Moreover, the principle of equal taxation must be applied considering another principle that acts in unison: the principle of progressivity. Progressivity is a

taxation technique that goes beyond being a tax collection criterion and aims to achieve other purposes such as income distribution or other purposes provided for in Article 40 of the EC.

The third principle is that of non-confiscation. Article 31 of the EC states that citizens' contributions shall be made through a "fair tax system inspired by the principles of equality and progressiveness which, in no case, shall be confiscatory in scope".

The principle of equality is a fundamental principle of Spanish tax law and is essential to ensure fairness and equity in the tax system. This principle establishes that all taxpayers in similar circumstances should be treated equally before the law, without discrimination or favoritism.

The importance of this principle lies in its ability to prevent arbitrary treatment of taxpayers and to ensure that the tax burden is distributed fairly. It ensures that all taxpayers are subject to the same rules and regulations and are not disadvantaged or favored based on their social or economic status.

The principle of equality also serves as a safeguard against corruption and abuse of power by tax authorities. By ensuring that all taxpayers are treated equally, it helps to maintain public confidence in the tax system and to promote compliance with the rules.

In addition, the principle of equality is closely linked to the principle of proportionality, which states that the amount of tax paid should be proportionate to the taxpayer's ability to pay. By applying these principles together, Spanish tax law aims to ensure that the tax system is fair and equitable for all taxpayers, regardless of their income or wealth.

In summary, the principle of equality is a fundamental principle of Spanish tax law that is essential to ensure fairness and equity in the tax system. It helps to avoid arbitrary treatment of taxpayers, promotes compliance, and maintains public confidence in the tax system.

3- Tax legislation in the constitution

The constitution recognizes that tax legislation is the full competence of parliament. This is because it establishes that only the law can establish taxes and in turn recognizes that only parliaments, either the national parliament or the regional parliaments, can create laws. The latter under the competences that are recognized by the constitution itself.

in Spain there are three different types of taxes: State, regional and local. Therefore, it is the state government and the regional and local governments that are in charge of managing the taxes that correspond to them by the provisions of the constitution.

The door that opens the possibility of establishing tax legislation in the Spanish State comes in article 133 of the same. In other words, the state is recognized with the ability to impose taxes and to allocate and control public spending.

The justification to legitimize the establishment of tax legislation is simple: every community (the State or the regions) needs economic means to fulfill its objectives.

In addition to the central government, both regional and local governments are recognized as having the capacity to adopt tax regulations.

The central government is responsible for adopting all regulations relating to value added tax (VAT) or personal income tax (IRPF), corporate income tax (IS or ISOC) or non-resident personal income tax (IRNR).

Regional governments are responsible for adopting, for example, inheritance and gift tax regulations.

The local governments have the capacity to adopt regulations concerning the real estate tax (IBI), the road tax or the tax on the increase in the value of urban land (IIVTNU), which is a rather controversial tax, as it is taxing the same thing several times. This is also popularly known as the "plusvalía" (capital gains on real state).

In addition to the different governments, there are a multitude of public bodies that can adopt tax regulations, which are not taxes. These are mainly taxes and special levies. Such as, for example, the fees that must be paid to the DGT to obtain a driving license or the fees that must be paid to obtain a university degree from a public university.

4- Ability to pay

A good start to answering this question would be to look at Article 31.1 of the Spanish Constitution:

- "1. Everyone shall contribute to the support of public expenditure in accordance with their economic capacity by means of a fair tax system inspired by the principles of equality and progressiveness which, in no case, shall be confiscatory in scope.
- 2. Public expenditure shall make an equitable allocation of public resources, and its programming and execution shall meet the criteria of efficiency and economy.
- 3. Personal or financial benefits of a public nature may only be established in accordance with the law".

From this precept we can firstly extract that everyone must, according to their economic capacity, contribute to the support of the tax system through the payment of their taxes. Therefore, everyone must have the capacity to pay (study and comment on the exemptions that exist).

Remember that the principle of tax progressivity means that the greater the economic capacity of a person, the greater the proportion of that person must contribute to the support of public expenditure through the payment of taxes.

Regarding the differences in terms of the regimes applicable depending on whether income comes from there is the wealth tax, which is levied on a person's wealth, regardless of where it comes from. (Regional management tax)

On the other hand, there is the personal income tax (national management tax) that does tax the income obtained by a person, the result of their work or not, during a calendar year.

Nevertheless, an important point of the ability to pay is to check the historical evolution, since it has been an important aspect in the scope of regular individuals.

Traditionally, the principle assumed that only when a legal event or transaction indicative of economic capacity occurred, the tax could be established. This supposes that the rule generally establishes the conditions for taxation; however, there have been occasions in which the generalization of the taxable event established in the norm could be contrary to the Constitution by producing greater fiscal pressure on those who actually have less economic capacity (STC 46/2000, of February 17). Of course, what the Constitutional Court has strictly prohibited is the taxing of apparent or non-existent wealth, "inexpressive of economic capacity" (STC 221/1992, of December 11 and 193/2004, of November 4). Sentences of interest in relation to this principle are those that deal with indirect taxes, which are levied on a specific manifestation of economic capacity: the one that is revealed with the consumption of certain products: STC 16/2003 of

January 30, which contemplates the Special tax on certain means of Transport and 108/2004 of June 30, regarding Tax on alcohol and alcoholic beverages.

Finally, the conformation of the taxable event must be compatible with what has been called exemption from the vital minimum, understood as the amount of income that does not express economic capacity since that income is required to cover the vital needs of the holder. The paradigmatic example is the so-called personal and family minimum of Personal Income Tax, that is, that part of the taxable base that, because it is intended to satisfy basic personal and family needs of the taxpayer, is not subject to taxation.

5- Equality – Nondiscrimination between different categories of taxpayers

In principle, and despite the progressive nature of the constitution, all taxpayers are equal in the tax system. However, savings are penalized, and this is discrimination, and it is also necessary to deal with the distinction that exists when dealing with the management of a tax towards natural persons or towards legal persons (there is a management unit for large companies), which could lead to discrimination because this could lead to different criteria when assessing the different cases.

These principles, equality, and non-discrimination are old aspirations of human beings, aspirations that were reflected in the different constitutional movements that arose throughout the 18th century, movements that also meant the end of the old regime.

In the current Spanish constitution, approved in 1978, both principles are included in article 14 of the same. This states that "Spaniards are equal before the law, without any discrimination on grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance".

Despite this recognized equality, it is important to point out that the difference in the treatment of different individuals is justified. This is because over time the Spanish courts have been establishing the different criteria or elements that make it possible to distinguish between a justified difference in treatment and a discriminatory difference in treatment.

However, both the courts and society in general understand the need for the interpretation of this article to be dynamic and open to the very equality that this same article establishes. This is with the ultimate objective of effective equality as set out in Article 9.2 of the Constitution.

individuals, whether they are workers (employed or self-employed) or entrepreneurs, pay the same tax, they must comply with the IRPF, however, it is true that there is a different tax regime for senior managers. In the case of workers and the self-employed it is clear that this is what they will be taxed on (for the income they obtain from their work (+ other things that have nothing to do with their working life) but I would like to clarify that businessmen will also be taxed on the income they obtain from the company (either through salary, dividends...) and then the company itself (the legal person) will also have to pay its taxes.

Finally, and regarding this topic I would like to add that the constitution does not prohibit different tax treatment of nationals and foreigners. Moreover, tax legislation, firmly based on and supported by the constitution, clearly treats natural and legal persons differently depending on whether they are nationals or foreigners. A clear example is the difference between IRPF (Spanish residents) and IRNR (non-Spanish residents).

From my point of view, something that in principle is prohibited by the constitution is the different tax treatment between Spaniards (based on the principle of equality and non-discrimination) and despite this, there is a tax treatment between Spaniards depending on the autonomous community in which they reside.

An example of this is the 99% reduction in inheritance and gift tax that exists in the community of Madrid, while many other communities do not have such a reduction. This means that a Madrilenian has to pay almost no tax when receiving an inheritance while a Valencian will have to pay a very high amount of tax.

This means a different tax treatment between citizens of the same country.

6- Legal certainty, retroactivity

Regarding these two principles, it is important, first of all, to remember that they are enshrined both in the Spanish constitution and in the rest of the Spanish legal system.

Both the principle of legal certainty and the principle of non-retroactivity have their origin in the principle of the rule of law.

This principle, that of the rule of law, is expressly set out in Article 1 of the Spanish Constitution. It is worded as follows:

"Spain is constituted as a social and democratic State governed by the rule of law, which upholds freedom, justice, equality and political pluralism as the highest values of its legal system.

The principle of legal certainty and the principle of non-retroactivity are therefore developed from this principle. As regards the former, it is enshrined in Article 9.3 of the Constitution and is worded as follows:

"The Constitution guarantees the principle of legality, the hierarchy of norms, the publicity of rules, the non-retroactivity of punitive provisions which are not favorable or which restrict individual rights, legal certainty, responsibility and the prohibition of arbitrariness of the public authorities."

Regarding the second, yes, retroactivity is expressly prohibited by the constitution. This prohibition is contained, once again, in article 9.3 of the constitution. Moreover, I would like to add that this prohibition is not only contained in the constitution. For example, it is also contained in Article 2.3 of the Civil Code. Although it is not in the constitution, this rule is also of great importance in the Spanish legal system.

Within the tax system, these three principles are of great importance, since they provide taxpayers with profound legal certainty and allow them to be fully aware when making decisions of tax significance.

Finally, it is also convenient to analyses the principle of "vacatio legis" in the legal system, as it is an important response to the uncertainty that is often generated by the application of new tax rules.

In law, "vacatio legis" is the period that elapses between the publication of a rule and its entry into force.

As such, the concept of "vacatio legis" is not expressly stated in a rule of law. Although it is usual for the rule itself to establish the moment of entry into force, it is possible that subsidiary rules of application may dictate it instead. For example, in Spain, in the event that a law does not establish a specific period for its entry into force, it is understood that it will enter into force 20 days after its complete publication in the Official State Gazette, unless otherwise stipulated.

The aforementioned is set out in Article 2 of the Civil Code, which provides as follows:

"Laws shall enter into force twenty days after their full publication in the "Official State Gazette", unless otherwise stated

Main research questions Subtopic 1:

1) How are constitutional requirements structured in order to legitimize tax legislation.

The legitimacy of tax legislation is organized in such a way that the constitution, the basis of the entire national legal system, is the one that establishes the possibility of establishing and managing different taxes at different levels. These rules, being backed by the constitution, are considered legitimate, since the constitution was endorsed by the Spanish people, and it is the approval of the constitution by means of the favorable result of a referendum that gives the constitution its legitimacy. Since it is not only a few who vote for or against it, but the great majority of the Spanish people.

The constitutional requirements that legitimize tax legislation are structured around six principles. These principles, enshrined in the constitution, are in turn the requirements that tax legislation fulfils and, therefore, by fulfilling them, it is legitimized.

These principles are as follows:

Firstly, we come across the principle of universality or generality. Article 31.1 of the EC establishes that "Everyone shall contribute to the support of public expenditure in accordance with their ability...". The first question that stands out is the expression "All", which must be understood as the Constituent Assembly's intention that public charges should be imposed on those who are located and carry out their economic activity in Spanish territory, regardless of whether they are nationals or foreigners.

On the other hand, the principle of generality means that the legislator must classify as a taxable event any act or legal transaction that demonstrates economic capacity. In other words, exemptions and allowances that may be discriminatory are generally prohibited. However, this does not mean that tax benefits cannot be granted for reasons of economic policy. In this sense, the Constitutional Court has recognized on many occasions that taxes, in addition to being a means of collecting public revenue, serve as instruments of general economic policy and to ensure a better distribution of national income (e.g. SSTC 46/2000, of 17 February; 276/2000, of 16 November and 289/2000, of 30 November, 3/2003 of 16 January and 10/2005 of 20 January).

The second principle is that of equality of the tax system, which the Constitutional Court has developed extensively in its doctrine, including SSTC 46/2000, 17 February 47/2001, 15 February 164/2005, 20 June 91/2007, 7 May and 19/2012, 15 February. This principle is expressed in the contributive capacity of citizens, in the sense that equal economic situations entail equal taxation. In other words, once again, discriminatory treatment is prohibited, but not differential treatment derived from different factual situations.

Moreover, the principle of equal taxation must be applied taking into account another principle that acts in unison: the principle of progressivity. This principle has also been endorsed by the doctrine of the Constitutional Court (e.g. SSTC 134/1996, of 22 July and the same 46/2000, of 17 February). Rulings that analyze this principle, among others, are 108/2005 of 30 June 2005, in relation to indirect taxes, and 245/2009 of 29 September 2009. The High Court has said that progressivity in the tax system is constitutionally acceptable since Article 9.2 of the EC goes beyond formal equality by recognizing material equality as a criterion for action by the public authorities to correct real inequalities that are not constitutionally justifiable.

The third principle is that of non-confiscation. Article 31 of the EC states that citizens' contributions will be made through a "fair tax system inspired by the principles of equality and progressiveness which, in no case, will be confiscatory in scope".

Progressivity, as explained above, is a tax technique that goes beyond being a collection criterion and aims to achieve other purposes such as the distribution of income or others provided for in Article 40 of the EC (on the concept of extra-fiscal purposes, STC 53/2014, of 10 April 2014). But as Article 31 of the EC itself points out, the limit of progressivity is that the tax should not be confiscatory in nature. Evidently, the level of contribution that should be considered confiscatory in scope is a complex question that the Constitutional Court has resolved by stating that it is so when, because of the application of the different taxes, the taxpayer is deprived of his income and property (SSTC 14/1998, 150/1990, and 295/2006 of 11 October in relation to Personal Income Tax and its relationship with Wealth Tax). However, the Court itself affirms "the difficulty of situating with technically operative criteria the borderline at which what is progressive or, perhaps better, what is fair, degenerates into confiscation".

The fourth principle is that of economic capacity. Traditionally, the principle has meant that only when a legal event or transaction indicative of economic capacity occurred could taxation be established. This means that the law generally establishes the conditions for taxation; however, there have been occasions when the generalization of the taxable fact established in the law could be contrary to the Constitution by producing greater tax pressure on those whohave less economic capacity (STC 46/2000, 17 February). Of course, what the Constitutional Court has strictly prohibited is the taxation of apparent or non-existent wealth, "inexpressive of economic capacity" (STC 221/1992, 11 December 1992 and 193/2004, 4 November 2004). Rulings of interest in relation to this principle are those dealing with indirect taxes, which are levied on a specific manifestation of economic capacity: that which is manifested by the consumption of certain products: STC 16/2003 of 30 January, which deals with the special tax on certain means of transport, and 108/2004 of 30 June, on the tax on alcohol and alcoholic beverages.

Lastly, the taxable event must be compatible with what has been called the exemption of the vital minimum, understood as the amount of income that does not express economic capacity since that income is required to cover the holder's vital needs. The paradigmatic example is the so-called personal and family minimum of Personal Income Tax, i.e. that part of the taxable base which, because it is used to satisfy the basic personal and family needs of the taxpayer, is not subject to taxation.

The fifth principle is the criterion of efficiency and economy in the programming and execution of public spending (art. 31.2 of the EC). This principle, which only indirectly affects tax justice and is more a principle of public expenditure planning, is based on two postulates: equity in the allocation of public resources and the criterion of efficiency and economy in their

processing and execution. The first refers to the aims that must constitutionally direct State policy in order to achieve the principles of generation and distribution of wealth; the second of a more technical nature, requires the State to act in accordance with the criteria that science and technology make available at any given time in order to better manage public goods (SSTC 29/1982 of 31 May, 214/1989 of 21 December, 13/1992 of 6 February). In other words, these principles translate, on the one hand, into the need for there to be a correspondence between the ends that the expenditure items are intended to satisfy and the effective achievement of these ends and, on the other, into the optimization of the means used to achieve the stipulated ends.

The sixth principle is that of the reservation of law in tax matters (art. 31.3 of the EC). The reservation of law in tax matters is also enshrined in Article 133.1 of the EC. One of the most important questions regarding the principle of tax legality has been the extent of this reservation. Leaving aside personal benefits, which are today absolutely residual, and looking at property benefits, the first thing to note is that these are not only of a tax nature and others may appear, such as the prices of public services or social security contributions. On the other hand, the reservation of law is not, as the Constitutional Court has pointed out, of an absolute nature; it only requires conformity with the law and does not impose that the establishment of a tax be regulated by law in all its aspects. In other words, the reservation does not affect all the elements of the tax in the same way (SSTC 221/1992 and 185/1995) but does affect the ex-novo creation of a tax and the modification of the essential elements of its identity.

2) How should constitutional requirements be structured to improve legitimacy of tax rules.

Tax legislation is clearly a political weapon, a good electoral instrument, and what this does is to diminish its legitimacy and at the same time it reduces its credibility, which is a very important aspect of legitimacy.

In my opinion constitutional requirements are well structured, the problem is that they are not being respected. The problem is basically that these principles are not the same for everyone in the sense that they don't apply the same way, depending on where you live different tax laws will apply to you. it is necessary to reduce the increasingly large regulatory differences between the different Spanish regions. (Principle of real equality) all citizens are equal and live in the same country, so we should not be treated differently in terms of taxation because we live under different regional administrations.

For me the solution goes through limiting the capability, the power that the regional governments must modify and adapt the taxes to their regions.

Another important thing that will improve the legitimacy of tax rules will be the criterion of efficiency and economy in the programming and execution of public spending (art. 31.2 of the EC). It would be interesting for citizens to be able to clearly see, but above all to understand what their taxes are used for and, as far as possible, to be able to redirect the destination of their tax

expenditure. In this way, citizens would be able to see what their taxes are used for and therefore legitimize the tax legislation that makes them pay taxes.

Finally, one thing that for sure must be modify to improve the legitimacy of tax rules is the Golden Visa. For those who don't know anything about this, the golden Visa is the Visa that the Spanish government gives to the foreigners who invest more than 500.000 euros. This is causing a tremendous impact on people's economies, regarding the price of the houses

All in all, this is a tax rule that has no legitimacy because is not treating everybody the same plus is giving advantages to foreigners who actually are not moving the economy, they are not investing in local business or whatever they are just buying a vacation house.

So, a good way of improving legitimacy of tax law will be reducing the advantages, raising the requirements to obtain this visa or directly eliminate it, as countries such as Portugal or Canada have already done.

It would be much more legitimate to make a fiscal effort to promote or retain national investment, which favors society, instead of focusing so much on foreign investment, which on many occasions is detrimental to the domestic economy of Spanish citizens.

We can conclude that for tax legislation to be truly legitimate, it is necessary that taxpayers know clearly what they are being ordered, authorized, or prohibited to do.

Only due to this knowledge, they will be able to determine their present conduct and plan future actions within a rational framework of foreseeability. We can affirm that uncertainty in law empties the constitutional principle of legal certainty of its content. The constant modification of tax rules, by means of regulations or even by interpretation and application circulars based on purely tax collection criteria, is a disregard for the certainty that taxpayers need.

This would therefore be a good constitutional principle to "extend" to improve the legitimacy of tax legislation. The principle of legal certainty is something that undoubtedly endows tax legislation with great legitimacy because it allows the taxpayer to know what he is facing and thus be accepting, de facto, the legitimacy of the constitution.