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Tax policies with a human rights perspective: towards greater tax justice

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Tax policies with a human rights perspective: towards greater tax justice

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Purpose: The main objective of this study is to analyse tax policies from a human rights perspective.
Motivation: This study is inspired by the observation of crises that appeal to us, revive existing challenges, and lead us to re-evaluate public services. In connection with the causes and consequences of these contexts, this study formulates a new approach to taxation practices, connecting the design of tax policies with their capacity to contribute to the realisation of economic, social, and cultural human rights.
Design/Methodology/Approach: The research was carried out following a methodology that includes a review of the relevant literature, the analysis of the work of international institutions in the field, and the examination of international and regional legal frameworks for the protection of human rights, in connection with states' obligations to provide adequate services.
Main findings: Tax justice stands as a pillar to ensure that states, through the management of public resources, can fulfil their obligations in the mitigation of economic and social inequalities and in the funding of rights and public services.
Practical implications/Managerial impact: The changes resulting from globalisation, transnational trade, offshoring of production and, among others, advances in digitalisation, make it necessary to analyse the validity of the foundations of our tax systems towards achieving the long-awaited tax justice. This study aims to contribute to the consolidation of the basis for this necessary connection between tax policies and human rights.
Novelty/Contribution: This study argues that only those tax policies that integrate a human rights perspective can be considered optimal for achieving tax justice.

Keywords: human rights; tax policies; tax justice; tax avoidance; tax evasion

1. Introduction

Situations of crisis revive existing challenges, lead us to revalue public services and pose new challenges to the protection and realisation of human rights. This requires taking advantage of its impact to address perspectives of analysis that have remained on the margins, but which deserve to be rescued in search of answers to persistent problems. Among these approaches we find the advance towards the design of tax policies, from an international and general perspective and despite national particularities, that contribute to the enjoyment of human rights.

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In recent decades there has been a global increase in interest in the analysis of tax law from a human rights perspective, in a perhaps utopian but necessary attempt to channel both tax policies and human rights law and guide them towards the achievement of common objectives. The changes brought about by globalisation, transnational trade, delocalisation of production and, among other things, advances in digitalisation, make it necessary to analyse the validity of the foundations of our tax systems with a view to achieving longed-for tax justice. Moreover, nowadays the public movement for fair taxation in order to address public needs seems to be omnipresent (Schön, 2023, p. 2).

In the absence of strong progress in this direction, according to the Tax Justice Network's latest report on the state of tax justice (Tax Justice Network, 2023), there will be tax losses of approximately US$4.8 trillion over the next decade. These would be losses that could have been avoided if rules against tax abuse were adopted and states assumed their obligations in terms of collection and fair mobilisation of public resources, with their consequent translation into the realisation of rights.

In this sense, and as Holmes and Sunstein (2011) argue, it is clear that "rights have costs". What might seem to be a unanimous affirmation continues to be the subject of debate. It refers to rights to a halo of utopia, far removed from legal enforceability. In this respect, as we intend to justify in this contribution, tax justice stands as a pillar to ensure that states, through the management of public resources, can fulfil their obligations in the mitigation of economic and social inequalities and in the financing of entitlements and public services.

The aim of this paper is to investigate the complicity between both legal spheres, tax law and international human rights law, under the paradigm that a fair tax policy can only be one that respects human rights. Starting with a conceptualisation of the two areas that integrate fiscal policies, revenue and public expenditure, we focus both on the citizen's duty to contribute to the support of public expenditure and on the state's obligations to mobilise these resources towards the achievement of general interests and goals. Thus, in view of the legal duty of states to contribute to the effective realisation of economic, social, and cultural rights, this study aims to justify why fiscal policies should be oriented towards the achievement of these rights.

Ultimately, this study seeks to argue an imperative for national, regional, and international tax policies, which is to include in their foundations the principle that legitimises fair tax systems, ensuring that states comply with a legal obligation according to international human rights law – and not merely a political commitment – to contribute through the efficient mobilisation of public funds to the realisation of human rights.

2. The (un)achievable concept of tax justice

In order to approach the term "global tax justice", it is of great interest to refer to the two points of view that exist: on the one hand, the internationalist (or statist) and, on the other, the cosmopolitan (Valentini, 2011). Cosmopolitan perspectives have in common the idea that "every person has global stature as the ultimate unit of moral concern and is therefore entitled to equal respect and consideration no matter what her citizenship status or other affiliations happen to be" (Peters, 2020, p. 168). This starting point leads cosmopolitans to the conclusion that the obligations of (distributive) justice are global in scope and therefore global inequalities must be eliminated. On the other hand, internationalist perspectives on global justice consider justice to be more restricted in its scope, content, and subjects. Consequently, internationalists "deny that egalitarian justice has a place beyond the domestic arena and opt for an account of international morality consisting of principles of mutual assistance and respect between internally well-ordered political communities" (Valentini, 2011; Peters, 2020, p. 168).

In addition to the various theories that have been formulated, it should be noted that the legal vagueness of the term "justice" and the moral subjectivity that delimits it often diffuse what is to be considered fair or unfair (Narváez Luque & Rodríguez Rodríguez, 2013, p. 17). Moreover, history has shown that the understanding of what "fair" means varies from one society to another and from one era to another (Hongler, 2019, p. 6).

The term "global tax justice" is, on the one hand, relates to society, insofar as considerations of justice are necessary to allocate goods in a society, but on the other hand, justice is present in all human relations. Despite its theoretical complexity and being almost unachievable, from a legal perspective, justice has been a very important element in achieving a legal system that is considered valid and legitimate among its members (Hongler, 2019, p. 5).

That said, the absence of a consolidated relationship between tax policies and human rights requires a definition of what is to be considered "fair" in this area of fair spending. The specific development of this problem has been a very laborious process, both in the academic sphere and in the legal system itself. In this sense, authors such as Bayona de Perogordo and Soler Roch point out that:

> … fair spending is that which is in line with the dominant values in society, in line with the general will wherever it can be expressed or with the general interest dictated by the person or social group that holds the power of the politically organised community. (Bayona de Perogordo & Soler Roch, 1989, p. 481; Soler Roch, 2022, p. 229)[1]

The general interest can take the form of demands to ensure the dignity of the person, and therefore, the realisation of human rights, in particular economic, social and cultural rights. These rights are defined by their benefit-based nature and progressive realisation, which implies the need for positive action on the part of the state to contribute to their development. In order to contribute to the progressive realisation of rights, states must, among other measures, mobilise their resources in compliance with both political commitments and legal obligations. To analyse this issue, it is useful to carry out a brief study of the institutions of public expenditure and revenue from the perspective of achieving tax justice.

2.1. *An approach to public expenditure and revenue concepts from the perspective of tax justice*

The authors submit that the study of public expenditure has received much less attention than the tax system, despite its indissoluble relationship with revenue. The reason for this general lack of interest in public expenditure in legal research may be due to the misleading belief that it is a political issue, and therefore, outside the scope of legality control. However, one of the central arguments of this study, e.g. the necessary connection between fiscal policies and human rights, will attempt to counter this idea by means of legal arguments from the grounds of international law.

We argue, in line with Orón Moratal, that the decision on public spending "is essential but not exclusively political", and that it must include the legal element, both in the undoubtedly formal aspects and, with even greater relevance, in the satisfaction of public interests and ends (Orón Moratal, 1995, p. 18).[2]

There are many definitions of public expenditure proposed by this specialised doctrine. In general terms, it could refer to the legal institution that seeks to satisfy economic needs through the expenditure of resources from the public treasury. Based on this definition, it is essential to determine what can be considered a public need or, in other words, a constitutionally recognised general interest. After such determination, these expenditures will be included in the general budgets of the states, the legislative act by which the annual expenditure configuration proposed by governments is authorised. Its fundamental characteristics consist in its implementation by a public body, through the use of public funds, by means of a functionalised process and with the objective of satisfying a need (Bayona de Perogordo & Soler Roch, 1989).

Turning to the study of public revenue, among the characteristics that could shape its own legal regime, the authors would especially highlight its instrumentality with respect to public expenditure, insofar as this does not constitute an end in itself. Indeed, it is precisely from this relationship that the basis of the revenue and the consequent duty to contribute to public expenditure, is drawn. This instrumental character makes it possible to start from the establishment of public spending needs in order to subsequently determine the levels of revenue necessary for the realisation of these ends (Bayona de Perogordo & Soler Roch, 1989, p. 562).

In relation to the obligation to contribute to the support of public expenditure, and within the framework of a historical analysis, we can detect a correlation between duties and rights in the 1948 Universal Declaration of Human Rights (UDHR), albeit in a tentative manner. The Declaration mentions the duties attributed to individuals in Article 29.1, which reads as follows:

> "Everyone has duties to the community in which alone the free and full development of his personality is possible".

A regional instrument adopted in the same year, the American Declaration of the Rights and Duties of Man, included it as a fundamental element. The interrelationship between the rights and duties was made clear:

> "The fulfillment of the duty of each is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty".[3]

Years later, among others, the African Charter on Human and Peoples' Rights dedicated the Chapter II to it, and established a correlation between rights and duties, on the grounds that "every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community".[4]

From this point of view, only through a holistic approach that considers that the enjoyment of rights and freedoms is accompanied by the fulfilment of duties, it will be possible to contribute to development and social progress. Continuing with the content of the same Declaration, it included, successively to the recognition of civil, political or social rights, the duty to contribute to the support of public services through the payment of taxes. This is not a completely novel content; the Declaration of the Rights of Man of 1789, one of the most important instruments in legal history, already contemplated the need to impose a common and equitable contribution according to the capacities of the population for the maintenance of the public force and the costs of administration.

On the basis of this historical background, and despite the existing shortcomings at the international level with regard to the attribution of duties, the necessary fulfilment of certain duties for the benefit of society is assumed; also for the enjoyment of individual and collective rights, especially in the case of rights of a welfare nature.

Accordingly, derived from the deep-rooted duty to contribute, and accompanied by the principle of economic capacity and progressivity, the basis of tax justice forms the foundation of the approach of this research. All of this, without losing sight of one of the main purposes of public spending, which is to contribute to the satisfaction of rights to benefits. The mobilisation of public funds is an essential tool for the state to adopt positive measures to fulfil its international legal obligation to contribute to the realisation of human rights.

Having outlined the general features of public revenue and expenditure, in the next subsection we will address the obstacles faced by states through certain harmful practices that hinder the achievement of the goal of global tax justice.

2.2. *Main obstacles to its achievement*

The main obstacles to the achievement of the longed-for tax justice are harmful tax conducts, such as tax avoidance and tax evasion. Indeed, the terms tax avoidance and tax evasion are often used interchangeably, but they are not the same (Kokott & Pistone, 2022, p. 132; Evans, 2009, p. 531). They are important elements of the discourse on national and international taxation that are not sufficiently understood or clearly defined (Baker, 2000, p. 1; Baker, 2013, p. 12).

On the one hand, tax evasion is the unlawful non-payment of a tax liability, involving a direct violation of tax law which, in certain tax systems, may give rise to a criminal offence. On the other hand, tax avoidance differs from the previous one in that it does not involve non-payment of the tax obligation, but rather infringes the purpose pursued by the law by using artificial or atypical legal structures with the sole or main objective of obtaining a tax saving or more favourable taxation position (Sevilla Bernabéu, 2022, p. 680). A doctrinal sector, especially the Anglo-Saxon doctrine, differentiates between "illicit tax avoidance" and "licit tax avoidance". However, in our view, this distinction is misleading. Tax avoidance involves the use of contrived structures with the main objective of obtaining tax savings, in violation of the spirit of the law (Sevilla Bernabéu, 2023, pp. 61-62). Therefore, we submit that there can be no room for "lawful" tax avoidance, but rather lawful tax planning. If the taxpayer did not carry out a transaction or business in an artificial way, but on the basis of other valid economic motives other than tax savings, he would be acting within the law, e.g. carrying out lawful tax planning.

Alongside tax avoidance and tax evasion, another practice that undermines tax justice is the so-called "tax race to the bottom". Until the first half of the 1990s, international tax competition was generally seen as a phenomenon that served as a stimulus for individual tax systems to optimise the taxation necessary to sustain public spending (Schön, 2003). However, since the second half of the 1990s, both the European Union (EU) and the Organisation for Economic Cooperation and Development (OECD) have sought to set limits on harmful practices that undermine international tax competition.

States struggle to impose their own tax systems and taxation rules are largely determined by market conditions. Rather than requiring compulsory taxation to promote collective objectives, the aim is to attract investors to facilitate the growth of economic activity (Dagan, 2020, p. 6). In this way, it has increasingly become a price that taxpayers are willing to pay for residing, investing, and conducting business in an attractive state, rather than a civic obligation to be fulfilled as members of a political community (Dagan, 2020, p. 6).

Focusing on corporate taxation, we considered that the result of an international comparison would show that we have an increasingly regressive tax system; in particular in the case of corporate taxation. Tax rates have been falling in recent years: tax competition between countries is giving rise to what has been called a "race to the bottom", in which every country proposes a more attractive tax framework than its competitors in order to attract capital investment and talent (Oguttu, 2022). This tax race to the bottom is clearly observed with regard to corporate taxation: the average tax rate in the 1980s and in the EU countries was almost 50%. In 2000, the EU-28 countries had an average corporate tax rate of 32%, and in 2016 it was only 23%. Meanwhile, in ten years, Spain has seen its tax rate fall from 35% to 25%. In the case of the EU, Ireland stands out, which with a corporate tax rate of only 12.5% has become the base camp for all technology multinationals that want to operate in Europe (Sevilla Bernabéu, 2022, pp. 687-688).

The main reason for EU countries to contribute to tax competition is the desire to attract the establishments and activities of the most powerful companies within their national territory (Sevilla Bernabéu, 2022, p. 687). These arguments lead us to conclude that this "tax race to the bottom" presents a clear risk to the principles of tax justice (García Prats, 2001), which, moreover, affects human rights as long as the path to tax and social justice is being obstructed (Dagan, 2020, p. 9). Ultimately, this increased competitiveness leads states to reduce their tax rates and therefore collect less revenue, leaving them with fewer resources to tackle economic and social inequalities and to finance public services (e.g. health, education, culture, etc.).

Nevertheless, these practices reduce the tax revenues of states, forcing them to increase the burden on other taxpayers who manifest a contributive capacity attributable to state sovereignty. The fight against these practices must be understood as a limit imposed by global tax law on the regulatory activity of the legislator, in order to pursue objectives of justice at both the national and international level. These practices disrupt the contribution to public spending; taxpayers who engage in them reduce their income and, therefore, increase the tax burden on the rest of the subjects, producing alterations in other tax systems and, more generally, in relations between states (Pistone, 2016, p. 2).

3. A proposal for a human rights-based approach to tax policy-making

3.1. *Conceptualising the thematic connection*

This novel perspective is based on the need to advocate for greater integration between the revenue and public spending policies already discussed: spending is the objective and revenue is the instrument, so that citizens' wealth is collected in order to contribute to sustaining public spending.

Having established the parameters of justice in public spending, in this section we will try to establish the points of connection between fiscal policies and human rights. On this relationship, De Schutter strongly argues that fiscal policies are human rights policies, and he does so on three grounds (De Schutter, 2019). Firstly, because through taxation, states have the capacity to mobilise their resources to provide services such as health, education or housing, which are recognised as rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR); secondly, because in the application of fiscal policies, states contribute to the redistribution of wealth; and thirdly, because it is a central element of "democratic self-determination", in reference to the principles of participation and responsibility in the mobilisation of resources.

In the same line, the Special Rapporteur on extreme poverty and human rights, Philip Alston, in the study of measures to reduce inequality, pointed out the virtuality of tax policies. Despite this, he also recognised that "it cannot be said that current human rights policies have come even close to recognising the fact that a fiscal policy is, in many ways, a human rights policy" (Human Rights Council, 2015). This statement highlights the long way to go, but reaffirms the appropriateness of his choice, namely that a tax policy must be respectful of human rights.

In an attempt to move towards the consolidation of this necessary relationship, authors such as Waris add a further novel argument, which is the formulation of the concept of the re-legitimisation of the fiscal state through the realisation of human rights. According to the author, the common ground between the two issues – taxation and human rights, and re-legitimisation and realisation – can be found in the essence of the social contract between state and society (Waris, 2013, p. 4). As resources, existing thanks to society's contribution, are limited, the destination of their expenditure must prioritise the needs of taxpayers. To this end, it is only through the realisation of human rights that the legitimacy of the fiscal state can be guaranteed within the framework of the social contract.

Separating from this idea of connection, other authors do not consider the existence of a link between taxation and human rights. In this sense, among others, Datt argues that there can be no abuse of human rights arising from taxation issues. In particular, he adopts the example of the non-existence of a duty of companies to alleviate poverty by paying their taxes (Datt, 2018, p. 138).

From our point of view, the connection between fiscal policies and the realization of human rights is of a material nature: the relationship between public expenditure and revenue and budgetary control. The State assumes the priority obligation to mobilize resources towards the maximum satisfaction of rights, starting from revenues. For their part, taxpayers, and in particular companies, will assume their legal obligations to contribute to the satisfaction of public expenditures, as marked by law and without prejudice to their right to tax planning. Provided that it has an economic substance and acts within the law.

The argued connection between fiscal policies and human rights is also beginning to be found in international and regional treaty monitoring bodies for the protection of human rights. Such is the case of the Committee on Economic, Social and Cultural Rights (CESCR), the monitoring body of the ICESCR. This body has devoted specific recommendations, in this particular case addressed to the United Kingdom, on the inextricable connection between fiscal policies and the impact of human rights with the rotundity suggested by the following wording:

"12. The Committee recommends that the State party:

(a) Establish a clear regulatory framework for companies operating in the State party to ensure that their activities do not negatively affect the enjoyment of economic, social and cultural human rights;
(b) Adopt appropriate legislative and administrative measures to ensure the legal liability of companies domiciled under the State party's jurisdiction for violations of economic, social and cultural rights in their projects abroad committed directly by these companies or resulting from the activities of their subsidiaries;
(c) Conduct thorough risk assessment s prior to granting licences for arms exports and refuse or suspend such licences when there is a risk that arms could be used to violate human rights, including economic, social and cultural rights." (Committee on Economic, Social and Cultural Rights, 2016)

This same connection is also beginning to be consolidated at the American regional level. The Inter-American Commission on Human Rights (IACHR) has expressly pronounced itself on the relationship between tax policies and human rights. Since 2015, it has been holding thematic hearings linking both spheres and consolidating the need for all tax policies to take this approach (IACHR, 2015). For its part, in a report published in 2017 analysing the situation of poverty in Latin America, the IACHR stated that "human rights principles constitute a framework that underpins the key functions of fiscal policy and taxation". In line with this, in order to achieve a tax policy with a human rights approach, they considered the following principles to be particularly relevant:

> "ensuring minimum essential levels; mobilisation of the maximum available resources for the progressive realisation of ESCR; progressive realisation and non-regression of these rights; and the principle of equality and non-discrimination." (IACHR, 2017)

In conclusion, and in light of the above, it can be argued that tax policies have direct implications for the realisation of human rights in all countries through their role in mobilisation of resources, redistribution, regulation and representation (Alston & Reisch, 2019, p.3). By invoking the imperative guarantee of the principle of justice, it will be necessary to reclaim as a cross-cutting element the chronicle of the relationship between these two branches of law and ensure their joint development and implementation.

3.2. *Some initiatives that integrate this conceptual relationship to date*

On the theoretical basis set out above, and for the purpose of developing a tax policy that respects human rights, that is transparent, redistributive and offers responses to global challenges, we bring up two proposals drawn up by renowned research entities that we consider to be of the greatest scientific interest: Tax Justice Network and Center for Economic and Social Rights.

The first of these is the proposal drawn up by the Tax Justice Network and known as "The 4Rs". On the path towards the readjustment of the world's public tax systems in favour of the principle of tax justice, the organisation proposes the existence of a set of fundamental pillars around which a fair and sustainable recovery with a human rights perspective should revolve. These pillars are identified with the concepts of revenue, redistribution, repricing and representation (Tax Justice Network, 2021a).[5] Throughout these, a model can be provided for rethinking the connection between tax policies and human rights.

The second of the proposals to be highlighted has been elaborated by a group of organisations led by the Center for Economic and Social Rights. In 2021, this group of organisations published an interesting document titled "Principles for Human Rights in Fiscal Policy" (Center for Economic and Social Rights, 2021). This proposal is organised around fifteen principles, grouped into five chapters: (I) general principles (principles 1 and 2); (II) cross-cutting obligations applicable to tax policy (principles 3 to 7); (III) specific obligations applicable to tax policy (principles 8 to 12); (IV) responsibility of non-state and supra-state actors and extraterritorial obligations of states (principles 13 and 14); and (V) reparation and implementation mechanisms (principle 15).

We especially highlight the specific obligations of Chapter III, as they refer to the need to satisfy the effectiveness or realisation of the essential levels of economic, social and cultural rights through the adoption of measures to mobilise public resources. These specific obligations applicable to fiscal policy implies the mobilization of the maximum of available resources (principle 8); the guarantee of the enjoyment of minimum essential levels of rights (principle 9); or the assurance of non-retrogression (principle 11). It is also a reminder that, in the event that the design or implementation of fiscal policies leads to human rights violations, states must assume responsibility and provide reparations (Chapter V, principle 15).

This proposal has been endorsed by many stakeholders in the sector, including the Tax Justice Network (Tax Justice Network, 2021b, p. 8), and has even been proposed as a model for the elaboration of guiding principles by the United Nations, following the "Guiding Principles on Foreign Debt and Human Rights" approved by the Human Rights Council in June 2012.

4. The relationship between tax policies and human rights within the framework of states' legal obligations

The submission of citizenship to the law, including those rules of contribution to the support of public expenditure, as well as the attribution of obligations to the states, lay the foundations of Rousseau's social contract. Non-compliance or deficient compliance by the state entity, which assumes the original mandate of respecting and guaranteeing human rights, would constitute an unacceptable breach of this pact (Esteve Moltó, 2018, p. 749). This could lead us to another reflection developed by De Lucas, in which the struggle for rights becomes the "motor and basic element of a culture of rights" identified in a universal sense (De Lucas, 2018).[6] This citizen struggle and demand will be directed against the state, which is attributed the responsibility of effectively guaranteeing human rights.

Following the process of "humanisation of international law", materialised through the approval of the United Nations Charter and the UDHR (Remiro Brotóns et al., 2010, p. 738), states began to assume obligations to protect the fundamental rights of individuals subject to their jurisdiction, founding the successive legal instruments of international law.

Alongside the UDHR, whose adoption was a milestone in history, two international treaties were adopted that are considered central to international human rights law: the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR. These international instruments endow every person with protection, even beyond what may be determined by the domestic legal sphere of the state of nationality. In turn, their recognition leads to direct obligations on the part of states, which include respect (understood as refraining from violating them), protection (as acting against their violation), and guarantee (as adopting the necessary measures to ensure their full realisation).

Despite the relevance of its approval, its result is also the confirmation of a failure. Despite the universal and interrelated nature of human rights, it was not possible to bring together in a single document and with a single supervisory body the recognition and international protection of all categories of rights. This artificial division into categories is described by Salvioli as an "undeniable failure" (Salvioli, 2014).

Focusing our analysis on economic, social and cultural rights (ESCR), it can be stated that this group includes all those rights that are related to the basic social, economic and cultural conditions necessary for a dignified life. ESCR were already incorporated into the UDHR alongside other rights of a civil and political nature, proof of their essential nature. However, they were first made binding in the ICESCR, which was adopted in 1966 and has now been ratified by 171 states.[7] This document is considered to be the main legal instrument that gives them universal recognition.

Broadly defined, ESCR respond to the satisfaction of basic and essential needs for the inherent dignity of every person, in an interrelated manner with civil and political rights. Their legal study is mostly carried out jointly, in line with the interdependent nature of the rights, although it is true that their substantive content maintains marked differences. According to the ICESCR, economic, social and cultural rights are articulated as rights of an eminently benefit-oriented nature, which compel the state to adopt positive measures. They include, among others, the right to an adequate standard of living, which covers the right to food, clothing and housing (Article 11.1); the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12); the right to education (Article 13); or, among many others, the right to the enjoyment of just and favourable conditions of work (Article 7).

Unlike civil and political rights, there has been a widespread belief that ESCR only impose on states obligations of means, not of result. This argument has been derived from a narrow interpretation of the content of Article 2.1 of the ICESCR. According to its wording, "each State Party to the present Covenant undertakes to take steps […] to the maximum of its available resources with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means […]". The "progressive" nature and the reference to "the maximum of available resources", without specifying a specific scope, have led to a certain lack of precision, which in practice has led to problems of tax compliance.

In order to confront this vagueness, the CESCR drafted General Comment number 3, through which the monitoring body analyses its interpretation in order to understand the nature of the legal obligations undertaken by the States parties to the ICESCR. Through its content, it puts an end to the belief that the ICESCR does not include obligations that require immediate effect. Firstly, it clarifies that although the realisation of rights may be achieved gradually, the state obligation to "take steps" must be concrete and adopted within a reasonable period of time. Moreover, these measures cannot be exhausted by the adoption of legislation but must be implemented in all those manners that may be considered appropriate for the full realisation of the rights, as provided for in Article 2.1.

In addition to the above, this debate can be considered to have been overcome following the adoption and subsequent entry into force in May 2013 of the Optional Protocol to the ICESCR. It has been affirmed that thanks to its approval, "a historic gap in relation to the protection of economic, social and cultural rights" has been overcome; "a milestone in the international human rights system" (Office of the United Nations High Commissioner for Human Rights, 2013). Insofar as a right without means of enforceability is not an effective right, the approval of the Additional Protocol provides a mechanism for their international protection similar to the one that already existed for the ICCPR: the communications mechanism. Despite the satisfaction with this advance, the main obstacle lies in the absence of international mechanisms for the enforceability of decisions. Although the procedure derives from the ratification of a Protocol, the binding nature of these rulings is a highly debated issue on which there is no unanimous conclusion to date.

In our opinion, the lack of effective control of compliance with the rulings of the treaty bodies, in this case the CESCR, contributes to legitimising non-compliance with state obligations and once again questions the effectiveness of the United Nations human rights system as a whole. The decision is dependent on the will of individual states. This situation calls for changes to consolidate the binding nature of these decisions, adopted once all domestic judicial avenues have been exhausted – this is a requirement of admissibility – and therefore, when victims have no other options but to turn to international mechanisms to demand accountability and reparation.

Once the diatribe on the enforceability of ESCR has been overcome, and the control mechanisms have been analysed, the subsequent consideration must focus on the assessment of the measures adopted by states to implement them. In this respect, the state obligation extends to having to "ensure the satisfaction of at least essential levels of each of the rights", as a result of the adoption of all feasible measures to progress towards their full realisation (Committee on Economic, Social and Cultural Rights, 1990). Measures must be deliberate, concrete and targeted towards the satisfaction of obligations and the realisation of rights.

Among these measures, the choice of the destination of public funds from tax revenues will have a prominent role to assume. To this end, these tax policies, from a human rights perspective, could be considered – or not – adequate and sufficient for the purposes of complying with Article 2.1 of the ICESCR. This approach would give rise to what we have been arguing as a necessary mainstreaming of state human rights obligations in the framework of tax policies.

5. Final considerations

The design of tax policies, in order to ensure a system based on the values of justice and equity, must be fully interrelated with human rights. While resources are limited, their destination must prioritise the basic needs of taxpayers. To this end, states must assume the obligation to mobilise the maximum of available resources to ensure the progressive realisation of economic, social and cultural rights, such as food, housing or health care.

It is a reality that the objective of tax justice is hindered by harmful tax practices, such as tax avoidance and tax evasion, that reduce the revenue expected by governments and, therefore, their capacity to mobilise public resources to reduce inequalities and guarantee social rights. Moreover, the current lack of definition of harmful tax conduct is detrimental to the principle of legal certainty, a fundamental pillar of the rule of law, as well as to the effectiveness of the prosecution of conduct that may be considered unlawful. This situation requires greater rigour in the determination of their characteristics in order to avoid figures such as evasion, avoidance or aggressive tax planning being blurred and ending up being used indistinctly despite the different legal consequences that derive from each of them.

Beyond the fight that states must wage against these harmful tax practices, public expenditure cannot be left to the political discretion of states. Decisions taken must integrate an imperative legal perspective, which compels to scrutinise the issue by assessing whether or not it complies with the obligations assumed by states based on the constitutional text and international mandates to protect, respect and realise human rights. Accordingly, decisions on public expenditure must pursue the objective of tax justice as an ultimate goal. Despite the complex definition of the element of fairness, it can be concluded that its determination must rest on compliance with constitutional values and human rights.

In order to consolidate this natural relationship between tax policies and human rights, it seems relevant to propose the drafting of a list of guiding principles on the subject, which, following in the footsteps of the "Guiding Principles on Foreign Debt and Human Rights", could be drawn up by the United Nations Independent Expert on the subject and approved by the Human Rights Council, or even, being ambitious, as a Resolution of the General Assembly of the United Nations. Although it would retain a non-binding character, these principles would give rise to the seeds of the progressive development of international law. Its objective would be to try to provide guidelines to states for the correct implementation of the legal obligations already assumed under other international treaties, consolidating the relationship between public spending and revenue policies and their duty to adopt positive measures for the progressive realisation of rights. We believe that the content of the “Principles of Human Rights in Tax Policy”, drawn up by several civil society organisations led by the Center for Economic and Social Rights, could be taken as a point of reference for its elaboration, and whose content we endorse.

As a conclusion, in implementing the proposal developed in this research, it will be essential to tax transnational profits under the parameters of justice, to address effective compliance with the duty to contribute to the support of public expenditure, and to make concerted efforts to put an end to tax evasion and tax avoidance. All of this, advocating the fundamental principle of tax justice and recovering as a cross-cutting element the imperative conceptual relationship that must exist between the design of tax policies and the realisation of human rights.

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Notes

1. Translation from the original in Spanish.
2. Translation from the original in Spanish.
3. American Declaration of the Rights and Duties of Man, preamble. See also chapter two.
4. African Charter on Human and Peoples’ Rights, Article 27.1.
5. From our point of view, “repricing” is not sufficiently significant to be classified as a pillar for these purposes. This pillar refers to the possibility of making use of the State’s taxing power to generate changes in commercial behavior, for example, through taxes on products that are harmful to health such as tobacco or sugar. In our view, this is potentially disconnected from achieving tax justice.
6. Translation from the original in Spanish.
7. Data as of January 2024.

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