monografías
ALTA CALIDAD EN INVESTIGACIÓN JURÍDICA

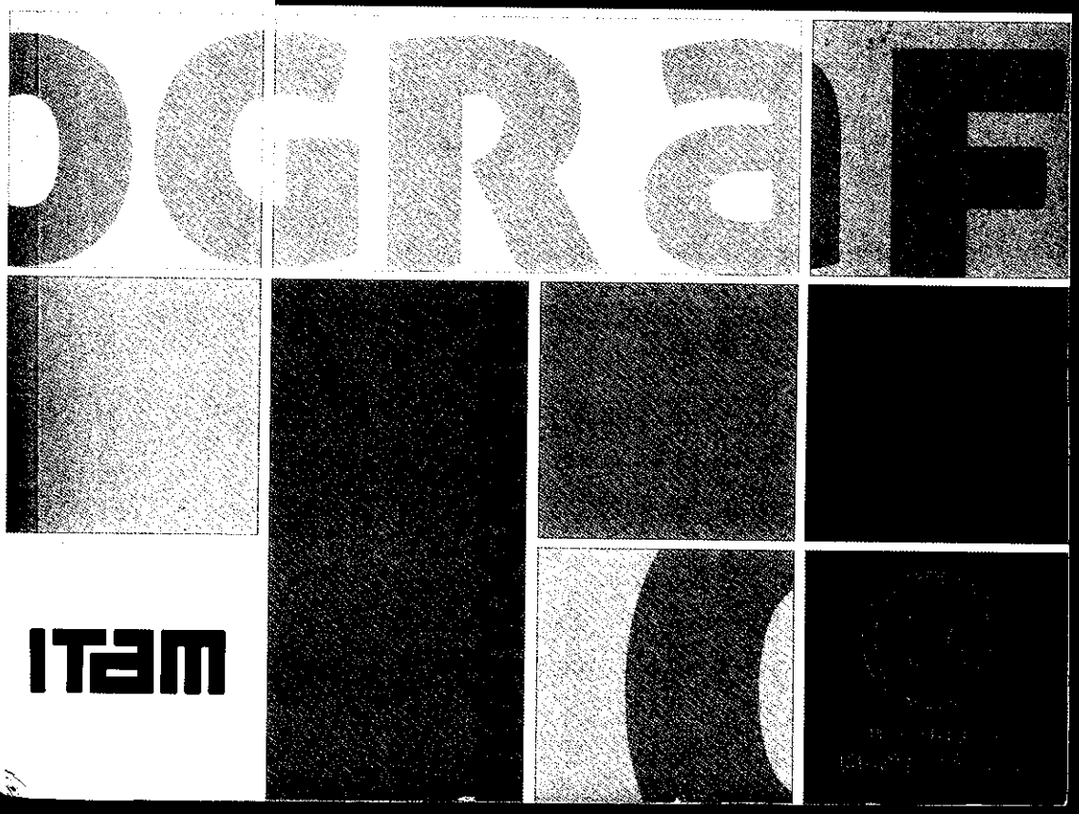
tirant lo blanch

+ebook GRATIS

CÉSAR ALEJANDRO RUIZ JIMÉNEZ
Coordinador

DERECHO TRIBUTARIO Y DERECHOS HUMANOS

Diálogo en México y el Mundo



ITAM

DERECHO TRIBUTARIO Y DERECHOS HUMANOS

Diálogo en México y el Mundo

DERECHO TRIBUTARIO Y DERECHOS HUMANOS

Diálogo en México y el Mundo

Coordinador
CÉSAR ALEJANDRO RUIZ JIMÉNEZ

ITAM IA
tirant lo blanch
Ciudad de México, 2016

© EDITA: TIRANT LO BLANCH
DISTRIBUYE: TIRANT LO BLANCH MÉXICO
Río Tiber 66, PH
Colonia Cuauhtémoc
Delegación Cuauhtémoc
CP 06500 Ciudad de México
Telf: (55) 65502317
infomex@tirant.com
www.tirant.com/mex/
www.tirant.es
ISBN: 978-84-9143-347-7
MAQUETA: Tink Factoría de Color

Si tiene alguna queja o sugerencia, envíenos un mail a: *atencioncliente@tirant.com*. En caso de no ser atendida su sugerencia, por favor, lea en *www.tirant.net/index.php/empresa/politicas-de-empresa* nuestro Procedimiento de quejas.

Este libro se terminó de imprimir en octubre de 2016 en Ultradigital Press, S.A. de C.V. Centeno 195, Col. Valle del Sur, 09819 México, Ciudad de México.

A Sofía María y Oscar Alberto,
dos ángeles en el cielo

Índice

La protección institucional de los derechos del contribuyente en México

Diana Rosalía Bernal Ladrón de Guevara
Francisco Javier Ceballos Alba
Rafael Gómez Garfias
Luis Alberto Placencia Alarcón
César Edson Uribe Guerrero

Parte 1

LOS DERECHOS HUMANOS SUTANTIVOS DEL CONTRIBUYENTE

Las garantías tributarias como derechos humanos

Alfredo Gutiérrez Ortiz Mena

El control constitucional de la motivación de las normas tributarias. El caso de la homologación del Impuesto al Valor Agregado en las franjas fronterizas

Intercambio de información y derecho a la privacidad

Fines Extra-Fiscales y Equidad Tributaria

El derecho al mínimo vital frente al procedimiento de ejecución de créditos fiscales en México

Derecho de propiedad y tributación justa

Parte 2

EL DEBIDO PROCESO EN MATERIA TRIBUTARIA

El sistema penal acusatorio frente a los delitos fiscales. Medios alternativos de solución de conflictos

Alfonso Pérez Daza

La garantía del interés fiscal y el acceso a la justicia

Magda. Zulema Mosri Gutiérrez

Las cláusulas de no discriminación en los tratados para evitar la doble imposición y el derecho humano a la igualdad

Arturo Pérez Robles

Reglas generales anti-elusión y certeza jurídica

Alejandro Calderón Aguilera

Parte 3
DERECHO COMPARADO

The Impact of Human Rights on Domestic Substantive Taxation-the German Experience

Joachim Englisch

Taxpayer Rights in Australia

Duncan Bentley

Human Rights and Taxation: due process of law and transparency under the Brazilian Constitution

Luís Eduardo Schoueri
Ricardo André Galendi Júnior

Taxpayer Rights in Canada

Allison Christians

Taxpayer Rights in the United States

Allison Christians

Prólogo

Como sabemos, todo Estado requiere de recursos económicos para llevar a cabo sus diversas funciones y lograr así sus objetivos; esto es, brindar seguridad, servicios y, en general, propiciar las condiciones óptimas para que su población pueda desarrollarse.

Por virtud de ello, entre mayor es la población, mayores son las necesidades y obligaciones de un Estado y, por lo tanto, también aumenta la cantidad de recursos económicos que requiere para sufragar aquéllas.

En los últimos años, nuestro país ha incrementado su población y concordantemente se ha desarrollado en ciertas áreas que demandan un aumento en los recursos que el Estado destina al gasto público, lo cual provoca que le sea necesario obtener más recursos.

Lo anterior se aprecia claramente al analizar que, en los últimos cinco años, el gasto público en nuestro país ha aumentado alrededor del 35%; sin embargo, las fuentes por las cuales se perciben los recursos necesarios no se han incrementado de forma proporcional, esto es, los ingresos petroleros y los ingresos tributarios.

En efecto, la variación en la captación de recursos por ambas fuentes de ingresos ha sido inversamente proporcional entre ellas en los últimos cinco años, pues mientras los ingresos petroleros han disminuido alrededor del 41% en dicho periodo, los ingresos tributarios han aumentado en un 82%.

Es decir, en los últimos cinco años ha aumentado el gasto público, pero han disminuido los ingresos petroleros, lo cual tuvo como consecuencia que el Estado tuviera la necesidad de recaudar una mayor cantidad de ingresos tributarios.

Al respecto, se reconoce que los particulares estamos obligados a pagar contribuciones al Estado, a fin de que pueda llevar a cabo sus funciones; no obstante, en este momento cabe preguntarnos ¿hasta qué nivel debe soportar la población el incremento de la carga impositiva?

Esto es, si bien los particulares debemos aportar recursos económicos al Estado, a través de las contribuciones que se establezcan, lo cierto es que dicha obligación debe tener un límite, que garantice a los gobernados ciertos derechos, entre otros, el de propiedad.

Por ello, resulta indispensable para la existencia de un verdadero Estado de Derecho, contar con principios e instituciones que limiten el actuar de las autoridades fiscales, que prevengan y, en su caso, sancionen excesos que podrían llegar a transgredir derechos de los contribuyentes.

Para tales efectos, es necesaria la participación activa de la sociedad civil y, en específico, de la academia y del gremio especializado en la materia, para fomentar, promover y defender los derechos de los contribuyentes.

En este sentido, es de reconocer el loable esfuerzo del Instituto Tecnológico Autónomo de México (ITAM) y de la International Fiscal Association Grupo Mexicano (IFA), que en conjunto hayan logrado agrupar a especialistas en la materia de derechos tributarios, para publicar un libro que aborde este tema de la mayor relevancia y actualidad para la sociedad.

Es a través de este tipo de trabajos como se facilitará a los miembros de la sociedad el conocimiento de cuáles son sus derechos y qué medios tienen para protegerlos, situación que también ayudará al posterior análisis respecto de si son suficientes o no los instrumentos e instituciones con las que contamos actualmente.

Por ello, insisto, resulta por demás plausible que el ITAM, reconocida institución de la academia en México, y la IFA, agrupación de profesionistas especializados en la materia tributaria internacional, hayan decidido reunir esfuerzos para publicar un documento de alta calidad y que sirva como referente para que la sociedad civil conozca el marco de sus derechos tributarios y los medios con los que cuenta para exigirlos y protegerlos.

Así las cosas, la presente obra es, además, un trabajo sumamente recomendable para las personas dedicadas a la asesoría fiscal y legal en México, ya que abona al detallado análisis sobre los derechos humanos de los contribuyentes y sus derechos en materia tributaria.

En ella, se exponen diversas posturas de expertos en la materia, que aportan elementos para analizar con mayor profundidad sobre los derechos en materia tributaria, su contenido, desarrollo, limitaciones y aplicación.

Incluso, los autores ponderan la aplicación de otros derechos humanos (diversos de los derechos humanos tributarios) y la forma en que pudieran llegar a ser transgredidos por las autoridades en el ejercicio de sus potestades tributarias, como es el caso del derecho humano a la propiedad privada.

En efecto, incluso quienes consideren que los principios tributarios de legalidad, proporcionalidad y equidad, previstos en la Constitución Política de los Estados Unidos Mexicanos, no califiquen como derechos humanos, coincidirán en que sirven para proteger el derecho de propiedad privada de los contribuyentes, al limitar la afectación que sufren en su patrimonio con motivo del ejercicio de las facultades tributarias de las autoridades.

En este sentido, ya sea que se considere a los principios tributarios constitucionales como derechos humanos en materia tributaria, o bien, como garantía de otros derechos humanos, la presente obra realza la importancia de contar con

ellos y, sobre todo, de la existencia de instituciones que permitan su protección frente al actuar del Estado en el desarrollo de su potestad tributaria.

Situación que cobra mayor importancia, si tomamos en consideración que en los últimos años se ha incrementado de forma considerable el número de juicios en materia tributaria que, incluso, han provocado un aumento en el número de órganos judiciales y jurisdiccionales que se encargan del trámite de dichos medios de defensa.

Lo anterior ha tenido como consecuencia que dichos órganos judiciales y jurisdiccionales se encuentren saturados y, por lo tanto, que el trámite de los medios de defensa no sean tan expeditos como se quisiera; por lo cual, se han buscado medios alternos de solución de controversias en materia fiscal, que velen por una mayor y más pronta protección de derechos de los contribuyentes.

Al respecto, la presente obra profundiza en una institución de relativamente reciente creación, dedicada y preocupada por la protección y fomento de los derechos de los contribuyentes, como la Procuraduría de la Defensa del Contribuyente (PRODECON).

Con respecto al papel de ésta última, el presente libro ayuda a conocer en gran medida cuáles son las funciones que desarrolla y de qué manera ha sido una herramienta invaluable para la protección de los derechos de los contribuyentes.

Esto es, se explica con gran claridad cuáles son los procedimientos que los contribuyentes tienen a su alcance en la defensa de sus derechos a través de la PRODECON, los cuales van desde la asesoría hasta la representación en medios de defensa jurisdiccionales, inclusive el juicio de amparo.

En relación con ello, resulta sumamente importante tener presente que la PRODECON ha logrado darle verdadera vigencia a los derechos de los contribuyentes y, sobre todo, de quienes más lo necesitan por no tener acceso a asesores especializados, ello mediante la asesoría y la representación en medios de defensa.

Del mismo modo, ha sido una gran aportación de la PRODECON los procedimientos de acuerdos conclusivos y de quejas, para poder solucionar controversias con la autoridad fiscal, antes de llegar a instancias jurisdiccionales.

Todo lo anterior puede conocerse a detalle con los datos estadísticos que aquí se mencionan sobre las labores de la PRODECON que, insisto, permiten dimensionar el rol fundamental que ha desarrollado desde su creación, en beneficio de los contribuyentes y en pro de una mayor justicia tributaria.

Además, es de resaltarse el hecho que este libro es el resultado del esfuerzo de diversos expertos en la materia, cuyo trabajo diario involucra el análisis de los derechos de los contribuyentes y, mejor aún, desde distintos puntos de vista, pues entre los colaboradores de la presente obra se encuentran asesores, académicos, integrantes del Poder Judicial de la Federación, del Poder Legislativo, del Consejo

de la Judicatura Federal, del Tribunal Federal de Justicia Administrativa y de la Procuraduría de la Defensa del Contribuyente.

Finalmente, resulta muy interesante que el presente libro analiza figuras de derecho comparado afines a las instituciones que tenemos en México, lo cual permite conocer los avances que hasta ahora hemos alcanzado, pero también, y sobre todo, cuánto nos falta por trabajar y hacia dónde debemos transitar en materia de protección de derechos de los contribuyentes.

Felicito a los autores que participaron en la preparación de este libro, no sólo por la selección de los diversos temas, sino también por el desarrollo que de los mismos hicieron, logrando así una obra de consulta que resultará muy útil para los diversos interesados en estos trascendentales temas.

CPC Miguel Ortiz Aguilar.
Presidente de IFA Grupo Mexicano A. C.

Introducción

Derecho tributario y derechos humanos son dos áreas de la ciencia del Derecho que pudieran considerarse distantes. No obstante, esa separación no es consecuencia de su concepto o contenido, sino de la tradicional resistencia de las administraciones tributarias a incorporar la aplicación de derechos fundamentales en el cálculo y recaudación de impuestos. Esta resistencia encuentra su origen en el temor a que el abuso por parte de los contribuyentes provoque una reducción drástica en la recaudación, temor exacerbado por planeaciones fiscales agresivas y argumentos litigiosos que en ocasiones, logran la reducción injustificada de la carga tributaria. Sin embargo, esta circunstancia no puede justificar una postura insalvable. No se puede negar la protección de los derechos humanos en el área tributaria; ello escapa de cualquier debate por la simple razón de que el goce de los derechos humanos no puede ser limitado arbitrariamente ni se puede despojar a los ciudadanos de su goce por el simple hecho de actuar como contribuyentes.

Los derechos humanos protegen a los ciudadanos en cualquier ámbito en el que se desenvuelvan, incluso cuando actúan como sujetos de la obligación fiscal. La verdadera pregunta es ¿cómo se aplican? El propósito de este libro es presentar las reflexiones sobre esta pregunta de quienes intervienen en la recaudación de impuestos. Legisladores, juzgadores, funcionarios de la administración pública, abogados practicantes y académicos de diversos países han sido convocados para compartir su pensamiento y propuestas de aplicación de los Derechos Humanos en el ámbito tributario. Derecho tributario y derechos humanos son dos áreas de la ciencia del Derecho que pudieran considerarse distantes. No obstante, esa creencia nace de la tradicional resistencia de las administraciones fiscales a incorporar la aplicación de derechos fundamentales en el cálculo y recolección de impuestos, debido al temor a una reducción drástica en la recaudación; pero ese temor no puede justificar una postura insalvable. La aplicación de los derechos humanos en el área tributaria escapa de cualquier debate por la simple razón de que no puede despojarse a las personas del goce de sus derechos fundamentales ni limitarse arbitrariamente su ejercicio sólo por el simple hecho de actuar como contribuyentes.

Los derechos humanos protegen a los ciudadanos en cualquier ámbito en el que se desenvuelvan, incluso como sujetos de la obligación fiscal. La interrogante es ¿cómo se aplican esos derechos? El propósito de este libro es presentar las reflexiones al respecto de quienes intervienen en la recaudación de impuestos. Legisladores, juzgadores, funcionarios de la administración pública, abogados

Human Rights and Taxation: due process of law and transparency under the Brazilian Constitution

Luís Eduardo Schoueri[1]
Ricardo André Galendi Júnior[2]

SUMMARY: 1. Taxpayers' rights in the brazilian constitution. 2. The Due Process Of Law Clause And The Protection Against Confiscation. 3. Transparency and The Need For Judicial Authorization For Accessing Bank Data. 4. State Transparency: Grounds and Implementation In Brazil. 5. Conclusion.

1. TAXPAYERS' RIGHTS IN THE BRAZILIAN CONSTITUTION

The Brazilian Constitution is comprehensive when it comes to tax matters in general, dedicating a whole topic to the "National Tax System" in its Fifth Chapter ("Taxation and budget"). Besides providing thoroughly for the allocation of tax jurisdiction and revenue sharing among the three federal subdivisions (Union, States and Municipalities), the types of taxes which may be charged by each subdivision and the role of the so-called "Complementary Law", the Constitution assigns Item II of this Chapter to the "Limitations to the taxing power". This is a set of fundamental principles and guarantees to taxpayers.

Specifically, the Constitution expressly provides for the i) principle of legality (prohibiting the imposition or increase of taxation without a prior statute to that effect), ii) the principle of equality and its corollary of ability to pay (forbidding unequal treatment of taxpayers in equal situations), iii) the anteriority principle (requiring a minimum term between the enactment of a statute establishing or raising taxation and its enforcement), iv) the non-retroactivity principle (forbidding taxation regarding tax events prior to the entry into force of the statute) and the v) non-confiscation principle (expressing the need for a maximum limit to taxation).

Moreover, the Constitution limits the tax jurisdiction it has granted to the federal subdivisions by means of specific immunities. There are circumstances in

---

1 Professor of Tax Law at the University of São Paulo. Vice President of the Brazilian Tax Law Institute.
2 LL.B. from the University of São Paulo. Lawyer in São Paulo.

which the constituent, deeming the situations as of great importance in terms of values protected by the Constitution or in which no ability to pay is to be found, understands that no taxes are due whatsoever. Examples are the immunity of books (usually considered a protection of the freedom of expression), as well as the immunity of temples (generally deemed as a guarantee of the freedom of religion).

There are also limitations intended to secure the political and economic unity of the country. In particular, the Constitution provides that the Union's taxes, excepting incentives promoting regional development, must be uniform in the whole country, or that States and Municipalities are not allowed to establish tax differences due to the origin or destination of goods and services. Article 5 of the Brazilian Federal Constitution, which sets forth the fundamental rights, is also applicable as limitations to the State's power to tax.

In other words, the Brazilian Constitution, besides settling potential conflicts of jurisdiction among the federal entities (Union, 27 States and more than 5,5 thousand Municipalities), is very comprehensive with respect to the protection of taxpayers against the State's power to tax. However, when it comes to human rights, the existence of an abstract and broad clause providing that "rights shall be protected" is not enough. In this matter it is also important to analyze how such rights are actually protected and if effective means of claiming the relevant rights are in fact available.

The General Report of the 2015 International Fiscal Association Congress, authored by Professors Philip Baker and Pasquale Pistone, takes for granted the existence and justification of the fundamental rights of the taxpayers, which should be present in all of the reporting countries. The authors include therein "the following (which is not an exhaustive list): the right to privacy, including the protection of confidential information from disclosure; the right to a fair trial, including a fair investigation prior to trial and appeal rights; this includes the rights to an independent and impartial tribunal established by law, and a determination within a reasonable time; freedom from discriminatory or arbitrary tax laws or procedures; freedom from self-incrimination, at least in so far as criminal penalties (including substantial fines) are concerned; respect for the rule of law in tax legislation and tax procedures[3]".

There is no reason to disagree from this insightful premise. The Brazilian Constitution certainly comprises all these rights and they are, for sure, legitimate and duly justified. The issue is then, the extent to which such rights are in fact protected.

[3] P. Baker and P. Pistone, "General Report", in: *Cahiers de Droit Fiscal International*, vol. 100B, IFA, Basel, 2015, p. 18-89 (21-22).

For this reason, after briefly addressing how the due process of law clause is interpreted in Brazil, the present article focuses on issues of transparency, which is the point with which Brazil currently struggles the most. At first, the protection of confidential information, specifically with reference to the ongoing judicial debate on access of bank data by tax authorities in Brazil, is addressed. Secondly, the article provides an in-depth analysis of the current state of art of the access to information before tax authorities in Brazil.

The article concludes for a need for a firm position of the Judiciary and the Legislative in terms of human rights' protection in tax matters, since, when the issue is the collection of taxes, experience has shown that the Governments (in all levels) are not enthusiastic of the idea of having taxpayers' rights limiting their taxing expectations.

2. THE DUE PROCESS OF LAW CLAUSE AND THE PROTECTION AGAINST CONFISCATION

2.1. *The Due Process of Law Principle in the Brazilian Constitution*

Currently, there is no taxpayers' bill of rights in force for the whole country. Some States and Municipalities have enacted such rules, but this is still very rare. A set of taxpayers' rights with a Federal scope has been proposed under a bill (2.557/2011) aimed at editing a "Code for Protection of Taxpayers".

The Code would include general provisions on the abuse of power by the tax administration, and the bill is pending for approval at the Congress. No developments have been observed recently. The Finance and Taxation Commission of the Chamber of Deputies approved the bill with a few amendments, adding a provision concerning the right to oral defense in the administrative judgment. Considering that the content of the bill could "enhance tax evasion", a public hearing has been requested, probably with the intent of delaying the voting of the bill.

The Brazilian bill of rights is still the Constitution. As a matter of fact, most of the provisions of the Code could be inferred from constitutional principles and other laws, what makes the bill a compilation of sparse constitutional and legal provisions. The right of oral defense in the context of an administrative judgment could certainly be derived from the due process of law clause, which has a broad meaning in Brazil, as addressed below.

According to Article 5, item LIV, of the Brazilian Federal Constitution, no deprivation of liberty or appropriation of goods may be carried out in violation to the due process of law clause. Therefore, any taxation shall occur consonantly to

the due process of law. Besides the *substantive due process of law* - of which the legality rule (or the rule of law referred by Baker and Pistone), the non-retroactivity rule, the principle of non-confiscation and the ability-to-pay principle may be considered as an outcome[4] - it is also important to emphasize the procedural guarantees arising from such principle.

In this sense, one may speak of a *procedural due process of law*, which embraces: i) the right to present a defense; ii) the right to a fair hearing; iii) the right to previous notice and to accessing case files; and iv) the presumption of innocence (which, if understood in the terms addressed below, also constitutes an effective guarantee to taxpayers). Such procedural guarantees shall be granted not only in a judicial procedure, but also in the administrative process before tax authorities.

2.1.1. The right to present a defense

Article 5, item LV, of the Brazilian Constitution also guarantees the right to present a defense in an administrative process, which means that all taxpayers' allegations and evidences must be appreciated by the Court. Every aspect of the taxpayers' defense must be appraised. The judge cannot reject or omit any valid proof or allegation of the taxpayer.

2.1.2. The right to a fair hearing

As provided by Article 5, item LV, of the Brazilian Constitution, both in judicial and administrative processes, the right to a fair hearing is guaranteed to all litigants, applicants or defendants. From this principle, it is understood that taxpayers have the right to contest the tax assessment both before the tax authorities and a Judicial Court.

Unfortunately, Brazil does not have a tax ombudsman. The Federal Revenue Service keeps officers who answer the taxpayers' doubts with respect to the application of tax legislation and the fulfillment of forms. However, such service is far from having a nature of a tax ombudsman, as found elsewhere.

2.1.3. The "previous notice principle" and the right to access case files

The taxpayer has the right to be officially communicated about any procedure regarding his obligations. According to the applicable legislation, the taxpayer

4 See J. Marins, *Direito Processual Brasileiro Tributário (Administrativo e Judicial)*, 8th ed., São Paulo, Dialética, 2015, p. 185-186.

must have been previously noticed about any process that it is of his interest. In other words, no one can be surprised by any administrative activity related to him. Moreover, Article 3, item II, of Administrative Process Law also provides for the right of the taxpayer to have access to any information related to his/her procedure.

2.1.4. The presumption of innocence

The constitutional guarantee of the presumption of innocence is provided for by Article 5, item LVII, of the Brazilian Constitution. The wording of the provision makes clear that the guarantee is applicable solely to criminal cases.

Nevertheless, it is relevant to notice that the Supreme Court has already ruled that it is unconstitutional to impose administrative penalties and to consider as a tax debtor the taxpayer that is allegedly in debt with the Federal Revenue[5]. In this decision, the Supreme Court ruled that the provision that deems a taxpayer as a tax debtor when this taxpayer is still questioning his debt before the Judiciary is unconstitutional.

Furthermore, the National Tax Code, in its Article 112, included the *in dubio pro reo* guarantee, which is a logical consequence of the presumption of innocence. One example that illustrates the application of this provision is a case decided by the Brazilian Administrative Council of Tax Appeals (*Conselho Administrativo de Recursos Fiscais* - "CARF") in 2007. The Administrative Court denominated as *presumption of innocence* the rule of *in dubio pro reo*[6]. According to this provision, which refers to the interpretation of penalty rules, in case of doubt, one shall apply the most beneficial rule for the defendant. Also, one must note that it is not *in dubio pro taxpayer* because it is not an issue regarding less taxation, but regarding penalties and infractions[7].

2.2. *The Protection against Confiscation and the due process of law*

The due process of law clause is also considered to be applicable as to protect the taxpayer against confiscation. Brazil is a party to the American Convention on Human Rights and the constitutional provisions on the right of property lar-

5 See Supreme Court, Preliminary Decision on Direct Action of Unconstitutionality No. 1.155-DC, Reporting Justice Marco Aurélio, published on 05.14.2001, p. 166-167. Following this precedent, see: Supreme Court, Preliminary Decision on Direct Action of Unconstitutionality No. 1.178-RS, Reporting Justice Marco Aurélio, published on 05.14.2001.

6 See Administrative Council of Tax Appeals, Judgment no. 103-22.945, decided on 03.29.2007.

7 See L. E. Schoueri, *Direito Tributário*, 5th ed., São Paulo, Saraiva, 2015, p. 791.

gely contemplate the text of the convention[8]. Article 150, IV, of the Brazilian Federal Constitution expressly forbids the use of taxes as means of confiscation. The Constitution does not provide for any specific criteria in this respect. Scholars may refer to expressions as "annihilation of the private property[9]", "a substantial portion of the property or the totality of an individual's or an enterprise's income[10]", or "violation to the right of property without compensation[11]". Consequently, case law plays an important roll on establishing more precise contours to the definition of confiscation.

In fact, some even consider that the provision would not be necessary in a democratic state, since it could be inferred from the right of property and the due process of law clause. The Supreme Court handed down decisions under the 1946 Constitution deeming unconstitutional some measures it regarded confiscatory, despite the absence of an objective provision in that Constitution. In a 1951 case, paraphrasing Justice John Marshall[12], the Court held that, despite there were no objective limits to majoring taxes, there could be no "asphyxiation" to private activities, since "the power to tax cannot amount to the power to destroy[13]". In another case from 1952, the Court considered that, even in the absence of a non-confiscation provision, there were limits to taxation which would arise from the taxpayers' fundamental rights. Accordingly, the state shall not, upon the creation of exaggerated taxes, restrict the freedom of individuals to carry out their professional activities[14]. In 1984, under the 1967, the Supreme Court deemed unconstitutional a given increasing of judiciary fees[15]. Justice Moreira Alves stated that such fees could not be exaggerated, since they would obstacle the access to the judiciary by individuals. More recently, the Supreme Court deemed unconstitutional amendments to social security legislation which intended to impose a

8 Art. 21(2) of the Convention states that: " No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law".

9 R. L. Torres, *Tratado de direito constitucional financeiro e tributário*, vol. III, Rio de Janeiro, Renovar, 1999, p. 134.

10 A. R. Sampaio Doria, *Direito Constitucional Tributário e Due Process of Law*, 2nd ed., Rio de Janeiro, Forense, 1986, p. 196-196.

11 J. M. Conti, *Princípios Tributários da Capacidade Contributiva e da Progressividade*, São Paulo, Dialética, 1996, p. 55.

12 See US Supreme Court, *McCulloch v. Maryland*, 17 U.S. 327 (1819).

13 Supreme Court, Extraordinary Appeal No. 18.331-SP, Reporting Justice Orozimbo Nonato, published on 09.21.1951, p. 294.

14 See Supreme Court, Extraordinary Appeal No. 18.976-SP, Reporting Justice Barros Monteiro, published on 10.02.1952.

15 See Supreme Court, Repr. No. 1.077-RJ, Reporting Justice Moreira Alves, published on 09.28.1984.

progressive rate to the social contribution of public officials[16]. In this case, it was noted that, when summed to the income tax, the taxation could amount to 47% of the individual's income.

The main issue to which the prohibition to the use of taxes as means of confiscation is applicable in Brazilian courts is the case of fines for the non-fulfillment of tax obligations. In other words, according to the Supreme Court, the prohibition that taxes amount to expropriation is not only applicable to taxes, but also to related fines. Even in these cases, there is not a fixed limit from which a fine shall be deemed confiscatory. If it is clear that a 300% fine is confiscatory[17], there are rates where the conclusion is not immediate. It has already been deemed confiscatory a 100% fine[18], but not a 75% one[19].

The limits between the due process of law clause and the prohibition of expropriation are indeed rather blurred. Grounded on the due process of law, the Supreme Court has established that "[i]t is unlawful for the authorities to forbid the taxpayer in debt to purchase stamps, dispatch goods and exercise their professional activities[20]". In the same sense, it has been considered that "[i]t is unconstitutional the seizure of goods as a coercive means to collect taxes[21]". Moreover, it has been regarded that "[i]t is unconstitutional to interdict an establishment as means to collect taxes[22]". The prohibition to confiscation protects not only the right of property, but is also an important consequence of the due process of law clause.

Despite the Brazilian tradition on protecting individuals against indirect expropriation, the wording of the Bilateral Investment Treaties ("BITs") signed by Brazil in the 1990s has been deemed problematic by the Legislative Branch[23]. It seems important to Brazil to maintain the jurisdiction to decide whether a state

16 See Supreme Court, Direct Action of Unconstitutionality No. 551-/RJ, Reporting Justice Ilmar Galvão, published on 02.14.2003.

17 See Supreme Court, Direct Action of Unconstitutionality No. 1.075-1-DF, Reporting Justice Celso de Mello, published on 11.24.2006.

18 See Supreme Court, Extraordinary Appeal No. 823.886-MG, Reporting Justice Carmen Lúcia, decided on 04.07.2015.

19 See Federal Court of the 5th Region, Writ of Mandamus No. 82908-RN, Reporting Judge Paulo Roberto de Oliveira Lima, published on 02.02.2003.

20 Supreme Court, Ruling ("*Súmula*") No. 547, approved on 12.03.1969. See also Supreme Court, RE 63045, decided on 03.08.1968; Supreme Court, Extraordinary Appeal No. 60664, decided on 05.31.1968; Supreme Court, Extraordinary Appeal No. 63047, decided on 06.28.1968; Supreme Court, Extraordinary Appeal No. 64054, decided on 04.26.1968.

21 Supreme Court, Ruling No. 323; See also Supreme Court, Extraordinary Appeal No. 39933, decided on 01.09.1961.

22 Supreme Court, Ruling No. 70; Supreme Court, See also RMS 9698, decided on 11.07.1962.

23 See UNCTAD, "Reforming the International Investment Agreements Regime", World Investment Forum, Statement of Mr. Daniel Godinho, 16 October 2014. Most statements of the

action constitutes an expropriation or a normal government conduct, even if in the detriment of the opinion of international arbitration courts.

The due process of law clause also holds a strong relation with the issue of transparency, which is will be addressed in the items below.

3. TRANSPARENCY AND THE NEED FOR JUDICIAL AUTHORIZATION FOR ACCESSING BANK DATA

Bank secrecy is protected by Article 5, items X and XII, of the Federal Constitution. If one reads the seventy-seven items of the list of fundamental rights in Article 5 of the Federal Constitution, one can reasonably conclude that in no case shall the right to bank secrecy be restricted. There is not a single sentence therein authorizing the violation of bank secrecy for the purpose of collection of taxes. The only exception would be for the purpose of criminal investigation. Article 5, item XII, authorizes the violation of communication and data secrecy, upon the authorization of a Judge, for the purposes of a criminal investigation. In this reasoning, it would be concluded that the right of the taxpayer to bank secrecy cannot be restricted, unless for the purpose of a criminal investigation.

However, a more restrictive interpretation to taxpayers' rights is also possible. Article 145, § 1, of the Constitution, sets forth that, for the purpose of implementing the principle of the ability-to-pay, the tax administration has the authority to "identify, provided that the individual rights are respected and in the terms of legislation, the assets, income and economic activity of the taxpayer".

Under this reasoning, one may find grounds for the tax administration to try and disclose the bank data of the taxpayer, for the purposes of the collection of taxes.

This interpretation demands, however, further attention. The expression "provided that the individual rights are respected", certainly recalls Art. 5 and the fundamental rights included therein. In this sense, the proportionality test must be applied in this interpretation, as means of weighing bank secrecy granted by Article 5, XII, and the ability to pay, set forth in Article 145, § 1.

An example of violation to proportionality is provided by the current applicable legislation. Art. 6, of Complementary Law No. 105/01 grants the power of tax authorities of Municipalities, States and the Union, to exam bank information of the taxpayer during a tax assessment. There is no further requirement for

conference are available at http: //unctad-worldinvestmentforum.org/programme/sessions/reforming-the-international-investment-agreements-regime/, accessed on 01.29.2016.

such violation to bank secrecy. The mere event of a tax assessment is enough for the tax authority to restrict the taxpayers' right to bank secrecy, upon its own discretion.

The constitutionality of this provision may be challenged. When applying the proportionality test, one may conclude that, despite being "adequate", the measure provided by the legislation is not "necessary". Necessity implies concluding that there are no other possible measures to achieve the intent pursued ("collection of taxes") without applying a less severe restriction to the fundamental right ("bank secrecy"). The possibility of a tax officer having access to bank information upon his/her own discretion is tremendously restrictive and there are certainly other less aggressive measures to provide means for the collection of taxes.

One of them is submitting the disclosure of bank information to a previous judicial authorization. This was essentially the applicable regime prior to the enactment of Complementary Law No. 105/01. According to a case judged by the Supreme Court, tax authorities do not have the power to violate a taxpayer's bank secrecy within the purposes of a tax assessment, without previous authorization of a Judicial Court[24]. In this decision, the Court considered that the Judiciary is the only legitimate power to authorize the disclosure of information protected by bank secrecy. Justice Ricardo Lewandowski has considered that "the Judiciary is the superior guardian of the fundamental rights". This understanding was endorsed by Justice Marco Aurelio, according to whom the attributions of the Judiciary cannot be transferred to the agencies of the Executive Branch.

However, this decision of the Supreme Court is not applicable *erga omnes* and the issue is still under litigation before Courts. The Supreme Court will have the opportunity to settle the issue in an Extraordinary Appeal, in which it will be possible to declare this provision unconstitutional or not[25]. Different from the previous opportunity, this Appeal has been granted an *erga omnes* effect, what explains the enormous expectations surrounding the case.

24 Supreme Court, Extraordinary Appeal No. 389.808/PR, Reporting Justice Marco Aurélio, decided on 12.15.2010.

25 Supreme Court, Extraordinary Appeal No. 601.314/SP, Reporting Justice Edson Fachin.

4. STATE TRANSPARENCY: GROUNDS AND IMPLEMENTATION IN BRAZIL

4.1. *State Transparency as a human right*

The idea of transparency in the relations between tax administration and taxpayer is not limited to the debate on the right of the taxpayer to the secrecy of his bank data. The recent call for the disclosure of aggressive tax planning and bank data is undoubtedly relevant, but it is also important to bear in mind that transparency implies reciprocity. According to Ricardo Lobo Torres, the financial activity of the State must rely on clarity, openness and simplicity, in order to overcome the "financial risks" arising from "budgetary disorder, irresponsible management of public funds, and corruption of State agents[26]".

The expectation that States reciprocate the transparency they demand from taxpayers is not ignored by the OECD, which has written lengthy reports on the issue[27]. The organization, presenting transparency as the general frame for the relationship between taxpayers and tax administrations, correctly acknowledged the need to reciprocate the openness and transparency expected from taxpayers, as to achieve an "enhanced relationship[28]".

More recently, the sincerity of OECD's concerns with regard to individual rights is being questioned. Soler Roch alerts that some skepticism is recommended when facing OECD's proposal for enhancing the relationship between tax authorities and taxpayers. According to her, OECD's concern would be the need to solve problems arising from aggressive tax planning, more than establishing mutual trust between citizens and their governments[29]. This also seems to be the main goal of activists contending tax transparency (*e.g.*, NGOs such as the *Global Witness* and the *Global Society Institute*), whose intention is to expand the public knowledge on the global profits of MNEs[30].

26 See R. L. Torres, "O princípio da transparência no direito financeiro", in: *Revista de direito da Associação dos Procuradores do novo Estado do Rio de Janeiro*, n. 8, Rio de Janeiro, Lumen Juris, 2001.

27 See, *e.g.*, OECD, Tax Intermediaries Study Team, *Working Paper no. 6*, published on july 2007; OECD, *Taxpayers' Rights and Obligations - a Survey of the Legal Situation in OECD Countries*, published on 04.27.1990.

28 OECD, Tax Intermediaries Study Team, *Working Paper no. 6*, op. cit.

29 See M. T. Soler Roch, "Tax administration versus taxpayer - a new deal?", in: *World Tax Journal*, Amsterdam, IBFD, September of 2012.

30 See A. Christians, "Tax activists and the global movement for development through transparency", in: Yariv Brauner e Miranda Stewart (org.), *Tax, law and development*, Edward Elgar Publishing, 2013, p. 293.

The notion of transparency as a key element of an ideal tax system recalls Adam Smith, according to whom taxes should be crystalline, *i.e.* their amount should be clear and evident to the taxpayer, and their collection should imply the lowest cost as possible[31]. Such ideals are still prevalent among economists. Stiglitz considers that political responsibility implies that tax systems should be clear, which is an attribute of optimal systems[32].

Essentially, tax transparency implies knowing who is paying taxes and who is benefiting from them. The public agents' desire to hide who effectively is paying the taxes can be seen in a quote attributed to Colbert, who, as Minister of Finance under the rule of King Louis XIV, stated that "the art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least possible amount of hissing[33]". It is common ground that governments, imbued with such a spirit, introduce taxes on legal entities in order to make one believe that it is these entities, and not individuals, which bear the tax burden. Similarly, the taxation of the seller hides the burden which is expected to be transferred to consumers.

State transparency, however, goes beyond its very relevant political effect; it is a condition of the efficiency of the tax system. Especially in open economies, in which investors are able to decide where to allocate their funds, it is important to ensure them broad information with respect to the tax burden to which they are subject. Opaque tax systems may attract short-term investments. However, an economic system intended to attract and keep productive investments in the long run is expected to offer complete clearness with regard to the costs to be incurred, thus allowing the investor to make an informed decision.

State transparency is not only politically desirable and economically advisable. State transparency is an object of several international treaties signed by civilized nations. As an example of the treaties to which Brazil is a party, one may refer to the United Nations Convention against Corruption (UNCAC)[34],

31 See A. Smith, *A riqueza das nações*, Book V, Chapter II, second part.

32 See J. Stiglitz, *Economics of the public sector*, 3th ed., Nova York, W.W. Norton, 1999, p. 457-458.

33 See J. Stiglitz, *Economics of the public sector*, op. cit., p. 467.

34 See Articles 10 and 13: Each State Party shall take measures such as "[a]dopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration (...) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; Ensuring that the public has effective access to information". United Nations Convention against Corruption, approved on 2003 and in force since 12.14.2015. Brazil ratified this treaty by the Decree No. 5.687 on 01.31.2006.

the Declaration of Principles on Freedom of Expression[35] and the International Covenant on Civil and Political Rights[36].

Nevertheless, a closer exam of the effective protection of taxpayers' rights, mainly in developing countries, is startling. In the 1990's, when concluding that the protection offered by some States to taxpayers in their relations with tax administrations was bellow minimum standards, the OECD issued a *taxpayers' bill of rights*, which embraced: the right to be informed, the right to be heard and assisted by an attorney before tax authorities, the right to appeal from the decisions of tax authorities, the right not to pay taxes in an amount superior to the due amount; the right to legal certainty, the right to privacy; the right to confidentiality and to the secrecy of information[37].

If such issue had lost its importance in the international scenario, there would be no reason to, twenty-five years later, select the protection of taxpayers' rights in their relation with tax authorities as a subject for the General Report of the *International Fiscal Association (IFA)*[38]. Even though the authors include a list of taxpayers' rights in their study[39], their main concern is how such rights are protected in practice.

The report thus approaches essential issues for the effectiveness of the protection of the taxpayer, such as the need for simplification of the tax administration[40]. After all, if the protection exists but is too costly, then it is useless.

The use of technology for communicating, storing and processing data has stressed the importance of State transparency. Even though the use of such technologies is desirable, since it increases the efficiency of tax administration, they

35 See Principle 4: "Access to information held by the state is a fundamental right of every individual.
States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies". Declaration of Principles on Freedom of Expression, approved by Inter-American Commission on Human Rights on 2000. This Declaration provides a definitive interpretation of Article 13 of American Convention on Human Rights, which was ratified in Brazil by the Decree No. 678 on 11.06.1992.

36 See Article 19: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". International Covenant on Civil and Political Rights, approved on 1966 and in force since 1976. Brazil ratified this treaty by the Decree No. 592 on 07.06.1992.

37 See OECD, *Taxpayers' Rights and Obligations - a Survey of the Legal Situation in OECD Countries*, published on 04.27.1990.

38 See P. Baker and P. Pistone, "General Report", in: *Cahiers de Droit Fiscal International*, vol. 100B, IFA, Basel, 2015, p. 18-89 (21).

39 P. Baker and P. Pistone, "General Report", op. cit., p. 21-22.

40 See P. Baker and P. Pistone, "General Report", op. cit., p. 22.

may be harmful to taxpayers' rights, once there is the possibility that the data is unduly or fraudulently used[41].

In this sense, it is essential to grant the taxpayer the right to access the information related to him when they are kept by tax authorities and, if there is any wrong information, the means to correct any imprecision should be accessible. Such right is, in a certain perspective, an extension of the due process of law clause, once imprecise information may entail wrongful assessments and unnecessary disputes[42]. For this reason, among the minimum standards set forth by the General Report, it is included the right to access personal data and correct them in case they prove imprecise[43].

Additionally, there is no reason to conclude that the tax authorities should be able to reveal personal information from a taxpayer to other States, without previous notice to the taxpayer[44]. As taxpayers' rights are derived from the Constitution or from international human rights conventions, in case there is a conflict between such rights and the efficiency on the collection of taxes, taxpayers' rights protection should prevail[45]. Consequently, tax administrations cannot bring up their own convenience in order to violate taxpayers' constitutional rights.

For this reason, previous notification and the right to intercede should be granted prior to the disclosure of confidential information[46]. Such notification is essential in case of exchange of information between States, in order to ensure the adequate control of the administrative activities and the content of the information to be provided.

In summary, given that the exchange of information is a procedure, the due process of law should be observed, as to protect the relevant taxpayers' rights[47]. Hence, control mechanisms, allowing the taxpayer to question the legality of the exchange of information carried out and to act in due time, should be made available by the tax administration.

41 See P. Baker and P. Pistone, "General Report", op. cit., p. 23-24.

42 See P. Baker and P. Pistone, "General Report", op. cit., p. 25.

43 See P. Baker and P. Pistone, "General Report", op. cit., p. 25.

44 See R. A. Tonelli Júnior, "O Procedimento de Troca de Informações em Matéria Tributária Adotado pela Administração Tributária Brasileira e a Violação da Cláusula *Due Processo of Law*", in: *Revista Direito Tributário Atual*, n. 33, 2015, p. 359-388 (372).

45 See P. Baker and P. Pistone, "General Report", op. cit., p. 22.

46 See P. Baker and P. Pistone, "General Report", op. cit., p. 31.

47 See R. A. Tonelli Júnior, "O Procedimento de Troca de Informações em Matéria Tributária Adotado pela Administração Tributária Brasileira e a Violação da Cláusula *Due Processo of Law*", op. cit., p. 378.

4.2. *Habeas Data, Access of Information and role of the Courts for the protection of taxpayers' rights in Brazil*

Ideally, taxpayers' rights should be protected by the tax administration itself. However, the state of art in terms of human rights protection is far from the ideal in cases involving the Brazilian tax administration. Hence, considering the increasing trend towards the exchange of tax information and other potentially harmful measures allowed by the use of technology by the States, one cannot passively wait for the tax administration to be prepared to protect the rights of citizens.

As a consequence, the Judiciary plays a very important role in this transition. While the tax administration is still not prepared to adopt the relevant transparency measures expected from a democratic State, it is up to the Courts to protect constitutional rights, being the taxpayer equipped with important instruments to protect himself against harmful acts of the Executive branch, namely the *Habeas Data* and the Law on Access of Information.

4.2.1. Habeas Data and the protection of taxpayers' rights

Before 1988, during the authoritarian regime, it was not clear that a decision of the public administration to deny the access to personal information of a citizen held by public authorities was unlawful[48]. As a consequence, it was common that the public administration would keep information that, besides being obtained in violation to the due process of law clause, would serve as proxy to impose restrictive measures to individual rights, and citizens were unaware of this sort of discrimination[49].

The 1988 Federal Constitution introduced the *habeas data*, which includes the right of every citizen to have access to information about him held by State authorities, and also the right to correct or even delete such information, if they prove incorrect or imprecise[50]. Indeed, it is a "new constitutional guarantee" [51] brought by the Constitution, aimed at promoting State transparency.

48 See D. A. Dallari, "O habeas data no sistema jurídico brasileiro", in: *Revista da Faculdade de Direito, Universidade de São Paulo*, v. 97, 2002, p. 239-253 (241).

49 See W. de Moura Agra, "Habeas data", *in* José Joaquim Gomes Canotilho; Gilmar Ferreira Mendes; Ingo Wolfgang Sarlet; Lenio Luiz Streck; Léo Ferreira Leoncy (org.), *Comentários à Constituição do Brasil*, São Paulo, Saraiva, Almedina, Serie IDP, 2013, p. 486-487 (486). See J. C. B. Moreira, "O habeas data Brasileiro e a sua Lei regulamentadora" *in* Teresa Arruda Alvim Wambier (Org.), *Habeas data*, São Paulo, Revista dos Tribunais, 1998, p. 124-147 (127).

50 See D. A. Dallari, "O habeas data no sistema jurídico brasileiro", op. cit., pp. 240-241.

51 See M. G. Ferreira Filho, *Curso de Direito Constitucional*, 37th edição, São Paulo, Saraiva, 2011, p. 358.

Even though this constitutional remedy is a relevant expression of the democratic transition, the importance of the *habeas data* cannot be deemed as merely "symbolic[52]". The *habeas data* is able to provide citizens with significant outcomes, by protecting important principles of a democratic State. The remedy ensures transparency of information held by public entities, preventing acts of these entities from being based on information that is inaccessible to the interested parties. Besides, private entities may also be subject to the *habeas data*, as it will be addressed below.

Moreover, the great development of information technology has provided the State with a huge capacity of accumulating data on the individuals' personal life[53]. Therefore, the *habeas data* should be seen as an instrument whose importance is increasing, as an answer to the use of information technology by the State.

It is, thus, a typical and specific instrument[54], for the protection of certain individual rights. Several jurisdictions have similar instruments, aimed at granting citizens the right to access and correct information held by the State[55]. The Constitution of Spain (Art. 18) and Portugal (Art. 35) set forth similar rights, although not including a specific instrument as the *habeas data*[56]. In Latin America, several States have also introduced the right to access personal information in their Constitutions, protecting, more generically, the right to information and the right to intimacy[57].

Despite the importance of the further regulation brought by Law No 9,507/97, the complete structure of the constitutional remedy was already provided by the Constitution.

The Constitution determines which are the records and databases in relation to which the *habeas data* grants transparency. Article 5, LXXII, "a", of the Federal Constitution sets forth that the *habeas data* shall be conceded "to ensure information on the data related to the demanding person, contained in records and databases of government entities or with a public character".

52 Regarding the symbolic importance of the *habeas data*, see L. R. Barroso, "A viagem redonda: habeas data, direitos constitucionais e as provas ilícitas" *in* Teresa Arruda Alvim Wambier (Org.), *Habeas Data*, São Paulo, Revistas dos Tribunais, 1998, p. 202-221 (203-212).

53 See J. S. Pacheco, *Mandado de Segurança: e outras Ações Constitucionais Típicas*, 3th ed., São Paulo, Revista dos Tribunais, 1998, p. 349.

54 See J. Afonso da Silva, *Curso de Direito Constitucional Positivo*, 35th ed., São Paulo, Malheiros, 2012, p. 209-210; J. S. Pacheco, *Mandado de Segurança: e outras Ações Constitucionais Típicas*, op. cit., p. 349.

55 See C. R. Bastos, "Habeas Data", *in* Teresa Arruda Alvin Wambier (Org.), *Habeas Data*, São Paulo, Revista dos Tribunais, 1998, p. 83-93 (84); J. S. Pacheco, *Mandado de Segurança: e outras Ações Constitucionais Típicas*, op. cit., p. 349.

56 See J. Afonso da Silva, *Curso de Direito Constitucional Positivo*, op. cit., p. 453-454.

57 See D. A. Dallari, "O habeas data no sistema jurídico brasileiro", op. cit., p. 252.

Therefore, according to the constitutional provision, the *habeas data* is applicable i) to ensure information on the data related to the demanding person, *contained in records and databases of government entities* or; ii) to ensure information on the data related to the demanding person, *contained in records and databases with a public character*. Hence, the Constitution grants access to records and databases i) belonging to government entities; and ii) with a public character. In case of government entities' records and databases there is no need to inquiry on the "public character" of the data. Government entities' records and databases are *per se* subject to the *habeas data*.

In other words, the *habeas data* protects the right to informational self-determination[58], which embraces both the protection of intimacy, *i.e.*, the right of privacy in a broad sense, and the right to preserve information that is not considered as private information. As "data related to the demanding person", one must include information related to religion, ideology or political orientation, as well as data related to economic transactions, professional data and the existence of tax debts[59].

The data covered by the *habeas data* is not necessarily intimate. The scope of the remedy is to grant State transparency in relation to data held by the State regarding the citizen. There is no reason to believe that the *habeas data* is not able to protect information with an economic importance[60]. Also, it is undisputed that the instrument is also valid as a protection against the tax administration[61].

In other words, the applicant of a *habeas data* in fact knows the information he/she is requesting: he/she knows the color of his own hair, his/her religion, and the income he/she has derived in a given year. What he/she actually wants when resorting to the remedy is to know which is the information registered in the relevant records and databases and, eventually, to correct the information if it proves imprecise. The applicant does not want to know the color of his/her hair, but what the relevant records and databases say about the color of his/her hair.

58 Regarding the right to informational self-determination or as used in Germany (*informationelle Selbstbestimmung*), see M. Albers, *Informationelle* Selbstbestimmung, Baden-Baden: Nomos, 2005; S. Nojiri, "O habeas data e o direito à autodeterminação informativa", *in* Teresa Arruda Alvim Wambier (org.), *Habeas data*, São Paulo, Revista dos Tribunais, 1998, p. 356-371 (360-363).

59 See J. S. Pacheco, *Mandado de Segurança: e outras Ações Constitucionais Típicas*, op. cit., p. 349; P. R. Decomain, "O 'habeas data'", in: *Revista Dialética de Direito Processual*, v. 87, 2010, p. 121-154 (127).

60 Regarding the *habeas data*'s disability to protect information with an economic importance, see M. Justen Filho, *Curso de Direito Administrativo*, 6th ed., Belo Horizonte, Fórum, 2010, p. 1189.

61 See H. L. Meirelles; G. F. Mendes; and A. Wald, *Mandado de Segurança e Ações Constitucionais*, 36th ed., São Paulo, Saraiva, 2014, p. 352.

As the *habeas data* protects information related to the applicant, only the (legal or natural[62]) person to which the information refers is entitled to the remedy. Third parties, except for heirs[63], are not entitled to the remedy[64]. It is also important to mention that, if the authorities deny the existence of certain information, such information cannot be further used against the citizen[65]. The citizen may not resort to the *habeas data* without proving that the administrative authorities have previously denied the access to the information in reference[6667]. The *habeas data* is also available in cases where the authorities have provided information, but such information is insufficient or incomplete[68].

Law No. 9,507/1997 further defined, in its Article 1, what should be understood as "public character". The record or database shall be considered of a "public character" if: i) the information it contains may be transmitted to third parties; or ii) the information contained is not of private use.

The definition of "public character" is relevant only in case where the record or database does not belong to a government entity. In case of "government entities", one shall not question whether the information may be transmitted to third parties or is not of private use. The contrary understanding, besides violating the explicit wording of the Constitution, denies the idea of State transparency which the *habeas data* actually aims.

Records and databases with a public character may refer, among several other possibilities, to records and databases held by private institutions, including fi-

62 See E. D. Bottallo and R. A. Carrazza, "Habeas Data, Licitude da Prova e Direitos dos Administrados", in: *Revista Dialética de Direito Tributário*, n. 10, 2004, p. 113-119 (113).

63 See W. M. Agra, "Habeas data", op. cit., p. 487.

64 In this sense, see Supreme Court, Habeas Data 87, Reporting Justice Min. Cármen Lúcia, decided on 25.11.2009.

65 See E. D. Bottallo and R. A. Carrazza, "Habeas Data, Licitude da Prova e Direitos dos Administrados", op. cit., p. 115 e 119.

66 This position had been consolidated, on the case law of the Superior Court of Justice even before the publication of Law No.9.507/97. According to the Ruling ("*Súmula*") No. 2 of this Court, it is not possible to resort to the *habeas data* without proving that the administrative authorities have previously denied the access to the information in reference. Afterwards, this prerequisite was included on Article 8 of the Law No.9.507/97, which prescribes that the initial pleading shall have proof (i) of the authorities' denial to the access of information or after ten days without answer; or (ii) of the authorities' denial to correct an information or after fifteen days without answer; or (iii) of the authorities' denial to make an explanation or a contestation of the data.

67 According to the Supreme Court's case law, the refusal of the request of information or the omission in answering it is indispensable to the validity of the *habeas data*. See Supreme Court, Habeas Data 22, Reporting Justice Celso de Mello, decidec on 09.19.1991. In the same sense, see Supreme Court, Habeas Data 87, Reporting Justice Cármen Lúcia, decided on 11.25.2009.

68 See H. L. Meirelles; G. F. Mendes; and A. Wald, *Mandado de Segurança e Ações Constitucionais*, op. cit., p. 354.

nancial institutions[69], and embracing, for instance, credit protection services[70], direct mailing and news agencies listings[71]. In case of private institutions, it is essential to analyze whether it is possible that the information is transmitted to third parties (it is not necessary to prove actual transmission, but the mere possibility of transmission[72]), and if it is not of private use of the institution.

It is important to insist that the wording of the Constitution is clear: records and databases of government entities are subject to the *habeas data*, irrespective of having a "public character". The public character is relevant only for the purpose of demanding transparency from private entities. Nevertheless, for almost three decades, adopting an interpretation against the explicit wording of the Constitution, Brazilian Courts have sensibly reduced the scope of the *habeas data*. A very important decision of the Supreme Court has recently changed this scenario.

4.2.2. Habeas Data in Courts: the dark age and the light shed by the Supreme Court

The scope of the *habeas data* is, in summary, to grant transparency in relation to information held by the State about a citizen. The citizen has the right to know and correct any and every information held about him by government entities.

Despite this very clear intent of the remedy, this right has been blurred by Judicial Courts, which have for decades unduly restricted the access to information. Frequently, Judicial Courts would resort to the concept of "public character", set forth by Law No. 9,507/97, in order to deny the access to records and databases of government entities, even though, as argued above, such analysis is not necessary. This interpretation is in breach of the spirit of the *habeas data*, whose main intent is to promote transparency in relation to information held by the State about the citizens.

69 See São Paulo Court of Justice, Civil Appeal No. 0017225-37.2012.8.26.0576, Reporting Judge Alexandre Bucci, decided on 06.04.2013.

70 *Habes data* cases related to financial institutions, see São Paulo Court of Justice, Civil Appeal No. 1086655-95.2013.8.26.0100, Reporting Judge Teixeira Leite, decided on 02.25.2015; São Paulo Court of Justice, Civil Appeal No. 2.0000.00.295085-4/000, Reporting Judge Batista Franco, decided on 02.15.2000; São Paulo Court of Justice, Civil Appeal No 2.0000.00.310192-2/000, Reporting Judge Maria Elza, decided on 08.02.2000; Rio Grande do Sul Court of Justice, Civil Appeal No. 70049279607, Reporting Judge Orlando Hermann Júnior, decided on 08.09.2012.

71 See A. Wald and R. G. Fonseca, "O *Habeas Data* na Lei 9.507/97", *in* Teresa Arruda Alvim Wambier (Org.), *Habeas data*, São Paulo, Revista dos Tribunais, 1998, p. 13-32 (15).

72 See J. C. B. Moreira, "O habeas data Brasileiro e a sua Lei regulamentadora", op. cit., p. 131.

In Judicial cases, it became common to analyze whether the record or database had a "public character", even if the record or database belonged to a government entity. In tax matters, Courts would question whether the information had a "public character", or were, instead, intended to the "private use of the Federal Revenue Service[73]". Hence, even in cases where access to information held by government entities was at stake, Courts would deny the access, considering that the record or database did not comply with the requirement of Law No. 9,507/97, "since they do not have a public character and cannot be transmitted to third parties, being of private use of the Federal Revenue Service[74]". This reasoning has crippled the *habeas data* and broken any possibility of transparency with respect to information held by tax authorities.

Grounded on such reasoning, Courts would deny access to systems which they considered that had the function of "orienting the assessment and control services by the Federal Revenue Service, and not of informing the taxpayer with respect to the credits it held against the Federal Union". Contradicting the logic of the *habeas data*, the disclosure of the information was denied, because the system "was fed solely with information provided by the taxpayer himself, being, thus, previous and completely known by him[75]". Hence, it was often argued that, "if the information required by the applicant cannot be transmitted to third parties and are of internal use of the Federal Revenue Service, the access by means of the *habeas data* is prevented by Article 1, sole paragraph, of Law No. 9,507/1997[76]".

In the Regional Federal Court of the First Region ("TRF-1"), judges would summon "the understanding of this Court", according to which it was improper to use the *habeas data* as means of accessing "existing information of the files of the Federal Revenue Service", because they would be destined to the "internal use" of the Federal Revenue Service and would not have the "public character, as defined by the Law[77]".

73 Regional Federal Court of the Third Region, Civil Appeal No. 0000479-71.2014.4.03.6114/SP, Reporting Judge Nery Junior, decided on 11.27.2014.

74 Regional Federal Court of the Third Region, Civil Appeal No. 0000226-28.2014.4.03.6100/SP, Reporting Judge Mairan Maia, decided on 11.06.2014.

75 Regional Federal Court of the Third Region, Civil Appeal No. nº 0000479-71.2014.4.03.6114/SP, Reporting Judge Nery Junior, decided on 11.27.2014. Similarly, with respect to the very same database, see Regional Federal Court of the Third Region, Civil Appeal 0014907-42.2010.4.03.6100/SP, Reporting Judge Cecília Marcondes, decided on 10.18. 2012; Regional Federal Court of the Third Region, Civil Appeal No. 0000226-28.2014.4.03.6100/SP, Reporting Judge Mairan Maia, decided on 11.06.2014.

76 Regional Federal Court of the First Region, Civil Appeal No. 0001524-91.2011.4.01.3812/MG, Reporting Judge Rafael Paulo Soares Pinto, decided on 06.10.2014.

77 Regional Federal Court of the First Region, Civil Appeal No. 2007.38.01.002751-4/MG, Rel. Reporting Judge Reynaldo Fonseca, decided on 06.24.2014. In the same sense, see Regional

In the Superior Court of Justice ("STJ"), the interpretation was not different. Again, access to relevant assessment information was denied on the basis that they did not have a "public character" and could not "be transmitted to third parties[78]". The understanding was that the access to information which is exclusively intended to the "internal control of the payment of taxes" should not be made available to the taxpayer[79]. The fact that the sole paragraph of Article 1 of Law No. 9,507/1997 was not applicable in relation to records and databases held by government entities was never considered by the Court. Curiously enough, even when the access to information held by the tax administration was granted, the Courts would argue that the database in question had a "public character" and would not be "of private use of the [government] entity[80]".

As an outcome of the prevalent understanding of the Courts, for years, Brazil has significantly deviated from one of the minimum standards set forth by the OECD during the 1990s[81]. The Brazilian tax administration is still far below other countries analyzed by Baker and Pistone in terms of transparency. However, at least in relation to the application of the *habeas data*, the Supreme Court has fixed an interpretation that has for long restricted the rights of taxpayers in relation to the transparency of tax authorities and of the State as a whole.

The Supreme Court, in a decision from 2015[82], has finally acknowledged the importance of the *habeas data* for the promotion of State transparency, despite the precedents of lower Courts. According to the Reporting Justice Luiz Fux, the *habeas data* is a constitutional guarantee, through which the taxpayer is able to

---

Federal Court of the First Region, Habeas Data No. 2007.38.01.002748-7/MG, Reporting Judge Catão Alves, decided on 02.11.2011; Regional Federal Court of the First Region, Habeas Data No. 2006.38.11.007802-3/MG, Reporting Judge Leomar Barros Amorim de Souza, decided on 08.15.2008; Regional Federal Court of the First Region, Civil Appeal No. 0021624-50.2004.4.01.3800/MG, Reporting Judge Saulo José Casali Bahia, decided on 03.30.2012.

78 Superior Court of Justice, Special Appeal No. 1.411.585/PE, Reporting Judge Humberto Martins, decided on 08.05.2014.

79 Superior Court of Justice, Special Appeal No. 896.367/RJ, Reporting Judge Eliana Calmon, decided on 04.17.2008. In other case, the Court did not accept the Special Appeal of the Tax Authorities because of the constitutional focus of the court of origin's decision. See Superior Court of Justice, Special Appeal No. 1.064.569/RJ, Reporting Judge Eliana Calmon, decided on 06.18.2009.

80 Regional Federal Court of the Third Region, Civil Appeal No. 0006191-66.2010.4.03.6119/SP, Reporting Judge Consuelo Yoshida, decided on 05.02.2013. In the same sense, see Regional Federal Court of the Third Region, Civil Appeal No. 0004563-75.2005.4.03.6100/SP, Reporting Judge Giselle França, decided on 01.31.2013.

81 See OECD, *Taxpayers' Rights and Obligations - a Survey of the Legal Situation in OECD Countries*, published on 04.27.1990.

82 Supreme Court, Extraordinary Appeal No. 673.707/MG, Reporting Justice Luiz Fux, decided on 06.17.2015.

obtain information related to the payment of taxes contained in informational systems held by tax authorities. The decision shall be followed by lower Courts.

The decision has a broad scope. According to the Court, taxpayers have the right to access information that are relevant for their business planning, investment strategy and right to be refunded for the payment of undue debts. Also, it was considered that tax information related to the applicant, if secret, must be protected against the society as a whole, but not against the person to which the information refer. Furthermore, in the same sense as explained above, the inexistence of a "public character", as defined by legislation, should not be invoked as to deny the access to information held by government entities.

Another important statement of the Court is that allowing taxpayers to access information held in the systems of the Federal Revenue Service does not imply creating an unnecessary obligation for tax authorities. On the contrary, tax authorities cannot claim they are not prepared to protect the taxpayers' constitutional rights, but should, instead, adapt their organizational structure as to comply with the Constitution. The Supreme Court has loudly rejected the utilitarian logic whereby the rights of taxpayers are subject to the convenience of tax authorities. As from the Supreme Court decision, one can reasonably expect that the *habeas data* will enhance State transparency in Brazil and the interest on the remedy shall be increased.

In his vote, Justice Luiz Fux considered that his understanding was supported by the enactment of the Law on Access of Information (Law No. 12,527/2011 - "LAI"). Effectively, the LAI played a major role in increasing the institutional consciousness with respect to the importance of State transparency and may be considered as an important element for the development of the understanding of the Judiciary with respect to the *habeas data*. However, LAI and *habeas data* have distinct scopes. While the *habeas data* grants the citizen the right to access information *about him*, the LAI grants access to information of public or private interest, which may or may not refer to the petitioner.

4.3. *Law on the Access to Information ("LAI")*

The LAI regulates the access to information set forth in Article 5, XXXIII, of the Federal Constitution, according to which "everyone has the right to receive from public agencies information of his private interest, or of public or general interest, which shall be delivered in the term set forth by the law, subject to liability, except for information whose secrecy is essential to the security of the society and of the State". Further, the LAI also aims at granting "access to administrative records and to information on government acts" (Art. 37, § 3°, II, of the Federal Constitution) and establishing guidelines for "the management of government

documents" as well as "measures to grant access to them for those who need it"(Art. 216, § 2°, of the Federal Constitution).

Item XXXIII is broad, since it grants access to information of private, public or general interest. Such information must be distinguished from those whose access is granted by the *habeas data*[83]. The latter requires that the information refers to the petitioner, which is not a requirement of Item XXXIII. It is enough that the information is of private, public or general interest. Indeed LAI and *habeas data* are complementary instruments in promoting the transparency of the State.

As from the enactment of the LAI, Brazil has (i) consolidated and defined the regulatory framework on access to public information under the custody of the State; (ii) established procedures for the government to respond to requests of information by the citizens; and (iii) determined as one of its guidelines the "observance of disclosure as a general rule and secrecy as an exception" (LAI, Article 3, I)[84].

It must be noted that the LAI, besides setting forth the procedure for the protection of constitutional rights, has a great pedagogical importance. Admittedly, the LAI has the intent of fostering the "development of the culture of transparency in public administration" and contributing to the "development of social control of public administration" (LAI, Art. 3, IV and V).

In this sense, the LAI intends to develop, among public officers, the consciousness that citizens have rights before the public administration, which must be protected irrespective of the administrative convenience of such protection. The right to information is a right *per se*, and not a mere instrument to achieve other rights. As a consequence, the public power cannot deny access to information under the argument that granting the access is costly. The right to information must be granted without further considerations on practicability, being up to the citizen to decide whether the information is useful or not.

In other words, it may not be expected from the citizen to petition before the Judiciary every time he/she wishes to access a given information. Such requisite is contrary to need for good administration, as addressed by Baker and Pistone[85]. Indeed, in case of information of public interest, the public administration should not even expect a request from the citizen. The LAI sets forth that the State shall

83 Regarding this distinction, see D. A. Dallari, "O habeas data no sistema jurídico brasileiro", op. cit., p. 243-251; F. B. M. Pinto Filho, "O segredo de estado e as limitações ao habeas data", in: *Revista dos Tribunais*, v. 91, n. 805, Nov. 2002, p. 34-59 (44-45).

84 Comptroller-General of the Union, *Relatório sobre a Implementação da Lei n° 12.527/2011: Lei de Acesso à Informação*, Brasília, 2014, p. 7. Available on: http: //www.acessoainformacao.gov.br/central-de-conteudo/publicacoes/arquivos/relatorio-2-anos-lai-web.pdf, accessed on 06.16.2015.

85 See P. Baker and P. Pistone, "General Report", op. cit., p. 22.

give information not only upon request ("passive transparency"), but also proactively ("active transparency")[86]. The LAI embraces active transparency by establishing, as a rule, "the disclosure of information of public interest, irrespective of requests" (LAI, Art. 3, II).

With regard to passive transparency, the LAI provided for a procedure for access to specific information, requested by individuals or legal entities (LAI, Arts. 10 to 20). The procedure of access to information has proven effective. Between May 2012 and June 2015[87], 281.236 have been responded[88]. 73.1% of the requests were granted, 3.4% were partially granted and 10% were denied[89].

The main reason for denying access to information was that the information referred to "personal data" (36.4%). Article 31, §1°, I, of the LAI, determines that information related to the intimacy, private life, honor and image of persons has their access restricted to legally authorized public agents and the person to which the information refers. Hence, the information was denied to third parties and not to the person to whom it refers.

In 13.6% of the cases, the information was denied for being "secret information according to the applicable legislation". It is stated that among the legal reasons for denying access, it is included the "tax secrecy and the bank secrecy". Reportedly, requests were denied on the ground of "classified information[90]", which is expressly allowed by the Constitution in its Article, 5, XXXIII, according to which the disclosure of "information whose secrecy is essential to the security of the society and of the State" is not granted.

Even though the procedure of the LAI increases the access of taxpayers to information, there are still several cases where the relevant information will only be disclosed after a petition before the Judiciary. Despite the legislative effort, the Judiciary is the only power from which impartiality can be expected, in the sense of effectively protecting constitutional rights.

86 Comptroller-General of the Union, *Relatório sobre a Implementação da Lei n° 12.527/2011*, op. cit., p. 7.

87 As it is stated on the following official report: "Relatório de Pedidos de Acesso à Informação e Solicitantes entre maio de 2012 e junho de 2015", on: http: //www.acessoainformacao.gov.br/sistema/Relatorios/Anual/RelatorioAnualPedidos.aspx, accessed on 07.16.2015.

88 Between May 2012 and June 2015, there were 283.304 access information requests. 281.236 were answered. Among the 2068 requests not answered, 1587 were out of time, as established by the LAI (the deadline is about 20 days as provided by Article 11, paragraph 1, of this Law) and 481 were in normal course through legal channels.

89 The other requests had the following answers: "inexistent information; or "it is not an information request"; or "this institution does not have the jurisdiction to answer about this issue"; or "repeated request".

90 Articles 27 to 30 of the LAI provide the classification, reclassification and declassification proceedings of secret information.

For instance, in a request grounded on the LAI[91], the access to a certain document was denied by the Ministry of Finance, which considered the information would be covered by "tax secrecy". After an appeal to the Comptroller-General of the Union, the access was partially granted to the taxpayer. It is important to notice that the denial referred to a document which could certainly be obtained upon petitioning before the Judiciary, mainly after the decision of the Supreme Court[92]. Curiously, there is a decision of the Superior Court of Justice, prior to the Supreme Court decision, where the right of the taxpayer to access this specific document was acknowledged. Despite denying that the taxpayer could resort to the *habeas data* in that case, the Court considered that it would be possible to access the document due to the enactment of the LAI[93]. This understanding is interesting, because the document contained information regarding the petitioner himself and the reasoning reproduces the then prevalent restrictive understanding concerning the *habeas data*. At this point, it is possible to understand how the LAI has stressed the importance of State transparency, even though all the elements for fostering transparency were already present in the 1988 Constitution.

This example evidences that the final decisions regarding the disclosure of information shall always be subject to the impartial view of the Judiciary and not to the public officers' discretion[94]. The decision of the Supreme Court should be considered as a first step in the long path towards the effective social control over the acts of the public administration. The tax administration is still far from actually reciprocating the transparency it expects from taxpayers. The so-called "enhanced relationship" is still to be implemented[95].

At the same time, it is expected from the public administration to follow the developments of the Courts regarding State transparency. Ideally, public officers should be aware of the rights of taxpayers, thus preventing the intensive petitioning before the Judiciary. Where the administrative authority fails, it is up to the citizen to protect himself, based on the LAI or by means of the *habeas data*. In

91 Comptroller-General of the Union, Technical Note 16853.006354/2012-17, decided on 09.11.2012.

92 Before the Supreme Court's decision, this right was denied by the Superior Court of Justice, which argued that it was a private document of the Federal Revenue Service. Therefore, it did not have public utility nor could it be sent to the others. Superior Court of Justice, Special Appeal No. 1.411.585/PE, Reporting Judge Humberto Martins, decided on 08.05.2014.

93 Superior Court of Justice, Special Appeal No. 1.411.585/PE, Reporting Judge Humberto Martins, decided on 08.05.2014.

94 See L. R. Barroso, "A viagem redonda: habeas data, direitos constitucionais e as provas ilícitas", op. cit., p. 213; D. A. Dallari, "O habeas data no sistema jurídico brasileiro", op. cit., p. 249.

95 See OECD, Tax Intermediaries Study Team, *Working Paper no. 6*, op. cit.

any case, the Executive branch can never refuse to preserve the rights which the Legislative and the Judiciary decided to protect, subject to personal liability of the public officer who violates the rights of the citizens (LAI, Art. 32 ss).

The access to information is also essential for the purpose of fostering equality. Where the criteria adopted by the State are known, legal certainty is increased. It is true that the amount involved in a given transaction is not relevant for other taxpayers, and may even be subject to secrecy. However, if tax authorities make a decision regarding this transaction, it is important that the criteria which served as ground for the decision are known. This conclusion, besides evidencing the obvious importance of disclosing case law, should be taken broadly, in order to support the disclosure of criteria for the concession of special tax regimes and other administrative acts whose reasoning may be of interest for third parties who wish a similar treatment.

In this sense, the amendments to the regulation of a sort of tax ruling applied in Brazil should be acknowledged as an improvement. In Brazil there is a form of tax ruling ("*Solução de Consulta*"), whereby the taxpayer is allowed to submit a query before the Federal Revenue Service, with regard to interpretation of tax legislation and classification of services and intangibles. In 2013, the regulations were improved. The outcome of a *Solução de Consulta* is now binding to the tax administration, not only when applying the rules to the taxpayer who requested the tax ruling (as in the former regulations), but also to any and every taxpayer in the same conditions of the consulting person. Another important development on the tax rulings is that the reasoning of the solution met by the tax administration shall be disclosed. This shows that Rulings are not intended to benefit only the taxpayer concerned; they are rather a clarification of tax authorities' understanding in cases they are asked for.

5. CONCLUSION

Human rights' protection in tax matters can only be developed with a firm position both from the Judiciary and the Legislative. Whilst in theory the Government should also be concerned with such protection, the practice shows that the Executive branch is the one to actually violate fundamental rights when it comes to the collection of taxes.

The international trend towards fiscal transparency has enthroned transparency of the taxpayer instead of State transparency. The sincerity of tax authorities' concern with human rights protection is not evident. The measures carried out by tax authorities make one believe that, the more the State invades citizens' privacy, the less are such citizens able to claim transparency from the State.

This statement is not a consequence of a lack of legal provisions, since the right to transparency is included in major international instruments and Constitutions of civilized nations. Instead, it is an issue of effective protection of rights, *i.e.*, a problem arising from a lack of actual measures and instruments able to grant the citizens their fundamental rights, without further obstacles and costs.

When rights are protected, such protection comes *ex post*. At first, aggressive measures of collection of taxes are implemented. After years of violation of rights and litigation, tax authorities (and State authorities in general) slowly start implementing mechanisms aimed at granting the fundamental rights of taxpayers.

When the Brazilian 1988 Constitution was enacted, Celso Ribeiro Bastos and Ives Gandra Martins, in a very insightful comment, regretted the Constituent had not taken the occasion to build an effective instrument to protect the citizens against the use of technology by the State[96]. The authors foresaw that, absent such instrument, it would be extremely hard for Brazilian institutions to avoid the excessive expansion of the power of the State against the individuals. However, besides pointing out the problem, they also drafted a solution, which would be "a constructive judicial interpretation, as well as the enactment of ampliative legislation[97]".

The scene envisioned by the authors became a reality. The taxpayer is now burdened with multiple obligations, and the State has equipped itself with several records and databases, without further concern with respect to the transparency of information included therein. The construction of such databases came at the expense of the individuals' private sphere, under multiple speeches, being the need for anti-abuse measures currently the most frequent argument. State transparency, on the other hand, has been rejected under unacceptable reasons, subject to the convenience of State authorities.

In Brazil, the response of the Legislative and the Judiciary is already too late and still far from what is expected from a democratic State. At first, the right to information was overshadowed by an omission of the Judiciary. The LAI came as an important element for institutional enhancement, but the improvement of transparency measures is still needed.

96 C. R. Bastos and I. G. Martins, *Comentários à Constituição do Brasil*, op. cit., p. 366-367.
97 C. R. Bastos and I. G. Martins, *Comentários à Constituição do Brasil*, op. cit., p. 366.

Taxpayer Rights in Canada

Allison Christians[1]

SUMMARY: 1. Introduction. 2. Legal Sources of Taxpayer Rights. 3. Canada's Taxpayer Bill Of Rights. 4. Rights in Context: A Contemporary Case Study. 5. Conclusion.

1. INTRODUCTION

Canada is one of many countries where taxpayer rights are becoming an increasingly common topic of discourse among policymakers, practitioners, and the public. Especially in light of recent developments regarding the global expansion of taxpayer information exchange, the role of taxpayer privacy and confidentiality rights have emerged as significant legal issues. This chapter surveys the contemporary theoretical, legal, and political landscape of taxpayer rights in Canada. Part I outlines the theoretical and legal sources from which taxpayers may be said to have rights in Canada. Part II briefly outlines the main principles of Canada's Taxpayer Bill of Rights and considers some of their historical, legal, and political context. Part III focuses in on the taxpayer's right to privacy and confidentiality in the context of evolving global trends surrounding the use and exchange of taxpayer information. The Chapter concludes with some observations about where taxpayer rights may be headed in Canada.

2. LEGAL SOURCES OF TAXPAYER RIGHTS

A tension exists between taxation and human rights owing to the apparent contradiction of taxation with some basic principles including rights to life, liberty, and security of the person. These rights are articulated in the Canadian Constitution and form a core set of principles with which Canadian laws must be consistent[2]. These include:

1 Allison Christians, H. Heward Stikeman Chair in Taxation, McGill University Faculty of Law.
Thanks go to Melanie Crestol, Jake Heyka, and Brian Sherman for research assistance.
2 Canada Constitution Act, 1867-1982.