Human rights, fundamental rights and international tax law[1]

Marco Greggi[2]

The rise of human rights in the field of tax law seems to have reached a new zenith, at least in Europe and all those countries which share cultural traditions and legal principles with Europe. In analysing the latest case law of the European Court of Human Rights, and also of the various national Courts that are most sensitive to the topic, the significant expansion and relevance of the protection of fundamental rights cannot be underestimated. This is even more the case if we consider that even judicial bodies that appear to be far removed from our experience, such as the High Court of Australia, read, analyse and apply the case law of the European Court of Human Rights in the field of tax law[3].

It may be argued that the protection of fundamental rights is entering a new phase as regards the relations between taxpayers and tax administrations, even in non-European countries[4]. If, on the one hand, it is undoubtedly true that the evolution of the protection of human rights owes a great deal to the contribution of academics (especially in the United States), it is also undeniable that today European case law seems to ensure the enforcement of fundamental rights, going beyond mere interpretation and policy-making.

There is no doubt that we are at a turning point for tax law, even in Italy. With regards to the sources of law, it is evident that international tax law,

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[3] KIRBY M., Getting by without a Charter: an Australian perspective, paper presented at the Human Rights Conference on the 10th Anniversary of the Human Rights Act 1988 (UK), Salford University, School of Law, June 2010.

[4] WILLIAMS G., HUME D., *Human Rights under the Australian Constitution*, Oxford: Oxford University Press, 2013, p. 8.

as intended by Udina,[5] constantly penetrates domestic tax law, thus leading to – or rather imposing – an interpretation of the provisions that must be implemented with specific attention to individual rights affected by the enforcement of tax laws.

The nature of the tax, its amount, the relevance of tax provisions in time and space, the non-confiscatory nature of taxes, the prevention of dual taxation, consultation with the taxpayer, their judicial protection: it can be stated that there is no field of tax law that has not recently been touched by the need to ensure the protection of (fundamental) human rights. All of this has had a strong impact on the legislature, the tax authorities and the judiciary towards an interpretation of tax provisions that is consistent with these issues, and also with the European dimension[6].

We are now witnessing a slow, but apparently unstoppable, transition from different forms of soft-law protection[7] to a kind of protection based on "hard law", including both statutory law and case law. From an exclusively juridical point of view, this transition[8] is as momentous as the earlier recognition by academics of the so-called "second generation"[9] of fundamental rights, more than 40 years after the signing of the European Convention of Human Rights.

While it is possible to imagine, at least for countries with a "similar juridical culture"[10] (as stated by the Court), an alignment of models of implementation of taxes towards common standards, it is also the case that such an alignment needs to be reached patiently, necessarily starting from

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[5] UDINA M., Il diritto internazionale tributario, in *Trattato di diritto internazionale,* FEDOZZI P., ROMANO S., Vol. X, Padua, 1949, p. 56.

[6] MELIS G., PERSIANI A., Trattato di Lisbona e sistemi fiscali, in *L'evoluzione del sistema fiscale e il principio di capacità contributiva,* SALVINI L., MELIS G., Padua: Cedam, 2014, p. 269 ss.

[7] ZAGREBELSKY G., *Il diritto mite*, Turin: Einaudi, 1992.

[8] On the relevance of human rights on Anglo-Saxon case law, see SANDELL P., Use of human rights arguments in court cases jumps 5%, Thomson Reuters News Release, 9 April 2012, available at:
http://www.sweetandmaxwell.co.uk/downloads/human_rights_arguments_rises_2012.pdf).
The author highlights the significant increase over the past year of the relevance of human rights in tax law.

[9] On the various "generations" of human rights, see DI TURI C., *Globalizzazione dell'economia e diritti fondamentali in materia di lavoro*, Milan, Giuffrè, 2007, p. 82, in particular, n. 113.

[10] For regional examples of human rights protection beyond Europe, see GILBERTI G., *Introduzione storica ai diritti umani,* Turin: Giappichelli, 212, p. 154.

the position of taxpayers and their protection as a counterweight to the right of States to raise taxes.

This is the beginning of a new model of a "*ius commune fisci*" that has to be patiently shaped on the primacy of the individual, the taxpayer, the human being, from a perspective which needs to go beyond the contribution of supra-national organisations (such as the OECD), whose legitimacy within the international community is not always unanimously recognised and within which the decision-making process does not always provide sufficient safeguards as far as participation and democratic representation are concerned (two elements that are paramount in Western tax systems).

Human rights and fundamental rights are thus aligned in the international tax scenario, since every fundamental right in the field of tax law can also be defined as a human right on the basis of an interpretation of several Conventions and Treaties[11].

Starting from this assumption, the US doctrine[12] and also a number of the articles in this issue of *European Tax Studies*, highlight the fact that the protection of human rights in the field of tax law should be conceived not only as protection from unfair taxation, but also as protection within taxation and within the enforcement of tax law[13].

This means that the implementation of tax provisions must be respectful of fundamental rights (from the right to property to the right to a fair trial) and that states must also ensure the effective taxation of each and every taxpayer in light of the principle of equality,[14] though always in line with the statutory law of the place of residence/citizenship or of the State with a sufficient and reasonable connection to the income at issue.

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[11] See EDREY J., GREGGI M., Bridging a Sea: Constitutional and Supranational Limitations to Taxing Power of the States across the Mediterranean Sea, Rome: Aracne, 2010.

[12] Although characterised by an educational approach, see the report on Tax Abuses, Poverty and Human Rights, International Bar Association, London, 2013, at http://www.ibanet.org/.

[13] See also COHEN S., Does Swiss Bank Secrecy Violate International Human Rights?, in *Tax Notes International*, 2013, p. 140.

[14] Arguably "the subject who interprets the public or general interest should distribute the tax burden according to the ability-to-pay and proportionality principles", GALLO F., L'evoluzione del sistema tributario e il principio di capacità contributiva*,* in *L'evoluzione del sistema fiscale e il principio di capacità contributiva*, SALVINI L., MELIS G. (eds), *supra*, p. 12.

According to these authors, the behaviour of some non-cooperative fiscal jurisdictions, which facilitate avoidance and evasion by allowing banks or other financial institutions to avoid effective co-operation with foreign tax authorities, is inconsistent with fundamental principles (thus resulting in a violation of human rights)[15].

Human rights theories become a new and original foundation stone on which to build cooperation between States for the purpose of attaining a fair system of taxation, which, at the beginning of the twenty-first century, seems to go beyond the Smithian canons of taxation, recognising that either a tax is fair also at a supra-national level or it is not fair at all. In other words, a tax system can de defined as consistent with human rights *only* if it does not make it easier for taxpayers to violate tax provisions in another jurisdiction.

This is a concept that undoubtedly seems foreign to the current European and Italian experience. However, it is also the case that the OECD appears to have reached the same conclusion through its work on the re-elaboration of its Model Convention in the context of the recent project on Base Erosion and Profit Shifting (the BEPS project).

Recent OECD reports[16] advocate the need to move beyond the instrument of the convention aimed at reducing or in the best-case scenario preventing international dual taxation, thus emphasising a concept that has been underestimated so far: the Convention should become a tool aimed not only at the prevention of dual taxation, but also at ensuring the effectiveness of the taxation on the income at issue, always in compliance with the rules laid down by the State exercising the right to tax. Today, conventions are instruments that are capable of ensuring the effective taxation of cross-border income, thus preventing the risk of dual non-taxation. This transition will require time and particular attention by the courts and legislators in order for it to become effective. However, this clear change of pace will undoubtedly bring about new developments.

[15] COHEN S., *supra*, p. 141. See also TASCA G., VIETTI M., *Società offshore e paradisi legali. Regole e disciplina*, Milan: Giuffrè, 2009, p. 164.

[16] OECD, *Action plan on Base Erosion and Profit shifting*, Paris, 2013, and, in particular, the subsequent studies in the field of treaty abuse (Action 6).

This issue of *European Tax Studies* on fundamental rights (which also pays due attention to digital privacy) brings together the insights of leading European, American and Israeli academics and contributions from Ph.D. candidates of the University of Bologna, highlighting different aspects of the Italian legal order that could be affected by the cross-border dissemination of the doctrine on human rights.

Traditional topics, such as the right to be heard, the burden of proof and the right to a fair trial, are revisited from an authentically European point of view, with the aim of outlining a unitary legal order capable of going beyond the specificities of domestic law, thus confirming, as argued by the authors in this issue, the pre-eminence of legal principles over mere statutes.