



PRINCIPLES FOR
HUMAN RIGHTS
IN FISCAL POLICY

Constitutional Principles of Public Finance Law and Comparative Jurisprudence

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for Human Rights in Fiscal Policy N° 5

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N°



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SUMMARY



One of the goals of the **Principles for Human Rights in Fiscal Policy** is to promote international and domestic regulations that may assist in outlining progressive fiscal policies designed to guarantee human rights. This document analyzes some financial lessons that can be taken from a series of Latin American constitutional texts and their interpretations according to judges. The aim is to inform the process of formulating principles and also future constitutional reforms. The article contributes, among other things, a classification of constitutional principles in financial matters—or principles that have relevant financial connotations, such as the progressivity of rights. These are identified as consolidated (e.g., classic fiscal principles and clauses that provide financing for certain goods or services), frequent (the clauses that provide notions of substantive equality), emerging (e.g., the duty to contribute or the principle of tax progressivity), and isolated (such as the principle of non-regression in public expenditure).

The most salient conclusions are: a) the need to consider ways to settle possible conflicts that arise from the existence of conflicting economic organization clauses; b) the importance of moving towards institutional forms that guarantee decision-making procedures in tax matters that are less focused on executive branches and more transparent and participatory, and c) the need to rethink some aspects of the judicial process in order to provide an adequate response to conflicts of noteworthy significance in fiscal and rights matters.



1.

INTRODUCTION AND METHODOLOGY

If we look beyond the specificities of each historical and institutional process, it is possible to identify some common features in Latin America in the way constitutional systems have evolved since the enactment of the conservative-liberal constitutions of the 19th century. One of these features concerns the recognition and hierarchization of social rights during the second half of the 20th century, be it directly through their explicit incorporation in the new fundamental charters or indirectly through the ratification of international treaties on human rights. Another common feature is the series of tensions this recognition produced within the constitutional systems, given that their institutional and material models maintained, for the most part, a liberal-conservative configuration (Gargarella, 2014).

Part of these tensions can be explained due to social rights being recognized as true fundamental rights; that is, these are rights that require *guarantees* to support them. Social rights thus recognized are claimable aims whose implementation requires the deployment of a wide range of actions and institutions—which we may call “guardianship techniques.” These guardianship techniques are not limited to jurisdictional guarantees but rather involve other ways of ensuring the effectiveness of rights—such as the devising of standards (not necessarily jurisdictional) to provide them with minimum content, the implementation of State programs or policies, and the allocation of resources intended to fulfill them (Abramovich & Courtis, 2006). In turn, the policies or programs demanded by the social State (i.e., the guarantee techniques) entail a paradigm shift regarding the individual (no longer merely the individual, but an individual who is part of groups and collectives), equality (no longer merely formal, but also material), and the role of community, State, and property.

Notwithstanding the progress brought about by social constitutionalism, one of the most pressing problems that lingers in the 21st century is the enormous social, economic, and political inequality. In this context, there is growing consensus on the need to intersect economic measures and fundamental rights. Fiscal policies must work as true guarantee techniques for fundamental rights and, for that to happen, they must be nourished by the conceptual contributions of the latter. Simultaneously, in order to warrant minimum and progressive levels of rights, it is necessary to demand concrete guarantees, especially in fiscal matters.

However, as mentioned, the recognition of social rights was not accompanied by changes in the material and

institutional core of constitutions. On the contrary, in these documents, values and rationalities coexist that can spark conflict in many cases, for example, the duty to balance structural disparities or to ensure the provision of certain goods and services along with strong protections for the free market, free recruitment, or private property. As a consequence, the fiscal policies needed to warrant social rights do not always find a foothold, course of action, limits, or guidelines at the constitutional level. Thus, fiscal decisions are often adopted in institutional contexts that respond to a liberal-conservative paradigm alien to the purposes of popular participation and redistribution of wealth.

In the midst of these complexities, the initiative “**Principles for Human Rights in Fiscal Policy**” faces the challenge of promoting legal-institutional systems conducive to the development of a fiscal justice agenda in accordance with already existing commitments conveyed in the bills of rights. Along these same lines, the goal of this article is to analyze the current constitutional texts in Latin American countries, as well as domestic judicial decisions, so as to identify provisions, principles, and dogmatic elaborations in fiscal matters.

In the second section, we will examine the major trends in constitutional clauses in regard to material and formal principles, taxation, expenditure, and the overall financial process. For this survey, we used the database prepared by the Human Rights Clinic of the University of Virginia, which was complemented with the direct consultation of some constitutions⁰¹. Based on all of the above, we will propose a classification of constitutional clauses, according to whether they represent consolidated, frequent, emerging, or isolated principles in the region.

In the third section, we will address some jurisprudential trends on the subject, especially in regard to judicial decisions on the earmarking of resources. The typology of rulings that we present is based on previous classifications, such as the one drafted jointly by the Center for Economic and Social Rights (CESR) and the Center for the Study of Law, Justice and Society (DeJusticia), with some slight modifications. The rulings that were evaluated belong, for the most part, to higher courts and were incorporated through an analysis of direct sources (judicial decisions) and indirect sources (doctrinal articles).

Finally, in the last section we will compile a series of lessons focused on improving judicial practices and informing the constitutional reform processes.

01 | See data base and annex.



CONSTITUTIONAL CLAUSES AND FISCAL POLICY

In the constitutions of Latin American countries, one may find different types of clauses related to fiscal matters. Some include specific aspects of taxation and others are linked to public expenditure. Furthermore, provisions can be formal or material in nature, and can reflect different views on the economic and political project they seek to promote. Accordingly, one may frequently identify a mixture of principles characteristic of neutral or liberal systems (mostly consolidated in the systems) and other principles associated with more social and participatory State models (usually frequent, emerging, or isolated principles).

Based on the 16 constitutions that were analyzed, we consider the consolidated principles to be those contained in 10 or more constitutions; frequent principles are those contemplated in at least six to nine constitutions; emergent principles are those provided in at least two to five constitutions; and isolated principles are those considered in only one constitution⁰².

The *consolidated* principles include those that protect property and economic freedoms, characteristic of the liberal-conservative constitution model of the 19th century. Among these, taxation legality is usually applied both for taxes and tax benefits and is generally justified by the courts as a guarantee for property and legal certainty. Some constitutions provide specific tax benefits and usually require special procedures for their sanction (for example, the initiative of executive branches or the passing of special laws).

A number of material principles of taxation—non-confiscation, equality regarding public burdens, proportionality, and taxable capacity—can also be considered consolidated principles in all constitutions. However, the depth of the interrelation between the principles of equality and taxable capacity may vary, which gives rise to important nuances in the systems.

In virtually all the cases, the principle of equality regarding public burdens is accepted under the form of “equality of equals,” hence admitting categorizations of different taxpayers under reasonable criteria. Courts in

different countries have shown slightly different criteria for controlling reasonableness and influencing the way that legislators should assess the taxable capacity. Consequently, taxable capacity as a basis for taxation and also as economic capacity that is useful for “measuring” equality is a *consolidated* principle. As noted, the principles of non-confiscation and prohibition of double taxation as a ceiling for this taxable capacity are also *consolidated*.

Moreover, there are *emerging* principles, such as the duty to contribute or the principle of progressive taxation, which are related to a solidarity variant of the principle of taxable capacity and which set forth a new dimension within the principle of equality: it is no longer about equality as the limit of financial policy, but about financial policy determined by the goal of equality. The duty to contribute is a principle that is expressly incorporated in various constitutions (or recognized through jurisprudence), although its dogmatic development is only present in some systems. In some cases, this principle has served to set the grounds for taxing powers as a tool for the accomplishment of social goals other than revenue in order to settle public expenditure. The duty to contribute was used, for instance, as a basis to curb large estates regardless of the strictly economic value of land—an “extra-fiscal” objective (CSJN, Rulings 210: 284). More recently, the principle of the duty to contribute was used in combination with the principle of solidarity to justify the constitutionality of informative obligations imposed upon taxpayers (STFB, AC 33 MC / PR) or duties imposed upon third parties as withholding agents (STFB, ARE 991.204 / SP). It has also served to attenuate the benefit principle underlying the fees charged for certain public services (TCP, 2572-2003 AA / TC) or, on the contrary, to toughen the analysis of the constitutionality of tax immunities, which is no longer limited to legal compliance or horizontal equality but has to be additionally justified under solidarity criteria (STFB, RE 253.472 / SP and RE 717.913 / MG; CCC, C-743-15).

The principle of progressive taxation has a greater jur-

02 | Argentina (1853/60, with significant reform in 1994); Chile (1980); Uruguay (1967); Paraguay (1992); Mexico (1917, with important reforms in 2001, 2008, and 2011); Costa Rica (1949, with multiple partial reforms); Brazil (1988, with multiple partial reforms); Bolivia (2009); Colombia (1991); Ecuador (2008); Peru (1993); Venezuela (1999); Guatemala (1985); Honduras (1982, with consecutive subsequent reforms); Nicaragua (1987, with subsequent reforms); Dominican Republic (2015).



isprudential development in the constitutions that expressly incorporate it in their articles. In these instances, progressivity is no longer a mere taxing technique, and it becomes a constitutional mandate for material equality, wherein those with greater economic capacity must be taxed more in order to level individual sacrifices in pursuit of the common good. Progressivity is usually predicated in the tax system, but taxes considered separately can also turn out to be unconstitutional if they provide an overt note of regressivity (CCC, C-100 of 2014; C-117 of 2018; C-571-19).

Constitutions that do not expressly incorporate the material principles of the duty to contribute, solidarity, taxable capacity, and progressivity have led to jurisprudential interpretations that are more deferential to the types of taxes that legislators may contemplate (e.g., on a proportional or progressive basis), so that the redistributive goal is only considered as an extra-fiscal purpose in some cases, discretionary to legislators. In several countries where constitutions remain within a liberal-conservative or neutral economic model, as is the case for Argentina, Chile, and Uruguay (Couso, 2017), the higher courts have endorsed fiscal policies that apply different proportional rates to equal wealth in pursuing extra-fiscal purposes (for example, different proportional rates for properties with the same economic value, with the goal of curbing large estates or the purchase of capital by individuals residing abroad). In these cases, fiscal policies were not justified as part of a solidarity or distributive justice system but as part of a discretionary decision by legislators in which the taxable capacity is not the sole expression of equality (CSJN Argentina, Rulings: 234: 568 and Rulings: 210: 611; SCJ de Uruguay, AR 233/02).

Other *emerging* principles are those of sufficiency and efficiency in revenue. These principles are found in constitutions of a social nature, insofar as they address the need to collect enough taxes to ensure the public expenditure demanded by a State that guarantees goods and services at the lowest possible economic and social cost.

All the constitutions contain formal provisions regarding the public budget. Even though the principle of budget legality is *consolidated*, constitutional texts bestow executive branches with important powers—such as estimation of income, budget submission, delegation of power to reassign budget lines explicitly or implicitly—and restrict legislative bodies from including substantial reforms (for example, adding new expenses without specifying the source of the resources or modifying the estimation of income).

Insofar as they lay out some bases or conditions for

public expenditure, virtually all the constitutional texts determine some aspects regarding the contents of the budget law; that is, they prescribe what that expenditure should comprise (substantive budget clauses). Here we may observe *consolidated* provisions referring to a material sense of equality and/or to the equitable redistribution of income. Except in those constitutions that maintain a strictly liberal configuration—where it is even possible to spot references to the equitable distribution of resources among regions—, clauses on the equal distribution of goods, services, and economic resources among citizens can be commonly found. Within those clauses, it is possible to notice different levels of depth and detail. A first level to consider is a *consolidated* criterion relative to solidarity in the distribution of resources, which is favorable to an equitable development between regions, municipalities, or territorial entities. On a second level, we find frequent references to the goal of compensating socioeconomic inequalities and to the consideration of aspects such as the poor population or the population with unsatisfied basic needs for the distribution of income. Finally, an *emerging* practice is to include the explicit mention of certain groups or collectives as priority targets of resources, in general, or of certain goods, in particular, (for example, land): indigenous peoples, rural workers, small producers, and women producers.

In many cases, the different criteria for allocating resources include concrete guarantees aimed at ensuring priority or equity in their implementation. Consequently, the clauses that mandate the financing of access to goods or services (or, in a generic term, “rights”) represent a *consolidated* practice. As in other instances, the level of depth and detail of such provisions may vary: articles that mandate establishing certain expenditures as priorities (for example, social expenditure, or spending on education or health) are *frequently* found. *Emerging* guarantees are those that set minimum percentages for certain expenses, require that these outlays be paid with permanent budget resources, and allocate specific incomes—such as royalties—to certain expenses. On the contrary, the non-regressive character of public expenditure as a guarantee can only be found in *isolation* (case of Colombia), while progressivity is only predicated (*frequently*) with respect to access to rights or services and not to expenditure.

It is also possible to spot differences when observing the clauses that regulate the institution of property and those linked to the governance of natural resources. One may assert that the economic models of all Latin American constitutions configure “fiscal States,”⁰³ yet there are significant differences that speak to the existence of States that more or less intervene in the

03| This is a State whose expenditures are mainly paid for through tax collection and not through the direct exploitation of economic activities.

economy (in most systems), others that assume a more neutral or liberal role (isolated cases, such as Chile and Uruguay), and finally, some features more characteristic of socialist States (especially concerning the regulation of certain institutes in the constitutions reformed during the 21st century).

If we look at the regulation of the institution of private property, its strong protection continues to be *consolidated* in all the fundamental texts. Along with it, we can find protections for the right to free enterprise or the private sector. The social function of property is also consolidated. On the basis of these classic forms of understanding property, some constitutions have incorporated different modalities, such as communal or collective property (emergent forms). Overall, these novel forms of property are associated with the recognition of indigenous communities and producer or peasant groups in some constitutions in the Andean region. In other cases, the land of certain groups is recognized as such, albeit under the traditional form of private property. This is the case, for example, of Brazil, where the State must grant titles to the *quilombolas*⁰⁴ (Art. 68).

Apart from regulating property, constitutional systems include clauses to establish guidelines for the rational exploitation of land and natural resources, which is a *consolidated* practice. However, there are important nuances regarding the role of the State in the administration and exploitation of these resources, even though all the constitutions (to a greater or lesser extent) claim the State is in control—a *consolidated* practice. In this regard, one may *frequently* find clauses that reflect a subsidiary function of the State, such as the ones that mandate activities to further and promote specific economic areas. By contrast, in constitutions that set forth a more interventionist role for the State, it is possible to identify a series of *emerging* clauses, as the ones that declare certain resources and activities as pertaining to the public interest; define a crucial State role in the exploitation of strategic sectors (in some cases, State

companies are devised in the constitution); arrange for public funds to be directed to specific destinations for economic and social development; order to prioritize communal and cooperative forms of exploitation; and include agrarian reforms and fiscal incentives to curb large estates and favor small producers. In these cases, the forms of resource exploitation are usually accompanied by clauses that establish national development or investment plans and more innovative budgetary forms such as multi-annual budgets.

Despite the differences regarding the State's role in the economy and the inclusion of multi-year budgets, fiscal rules *frequently* indicate static visions of fiscal sustainability, characterized as the endeavor for economic balance or budgetary stability during a fixed period of time. For instance, the provisions that limit authorities' discretion by prohibiting budget expenses beyond the estimated income or that establish maximum percentages for certain expenses. Notable isolated cases are the Venezuelan Constitution, which links the concept of fiscal balance to the collection of enough tax resources to meet all ordinary expenses (Art. 320), and the Constitution of Colombia, which forbids appealing to the fiscal sustainability clause to undermine fundamental rights or evade their effective implementation (Art. 334).

Lastly, the social constitutions clash with a *consolidated* practice of limiting the forms of citizen involvement in fiscal and/or budgetary decisions (e.g., plebiscite, popular initiative or referendum). However, there are *emerging* modalities of engagement such as participatory budgets and popular consultations or hearings open to specific groups surrounding the exploitation of natural resources or for devising development plans. The Bolivian Constitution stands out for presenting community approaches for resource management that are based on social participation in the supply chain and the exploitation of the land.



04 | *Quilombolas* are the descendants of Africans who were enslaved in Brazil.

Principle Classification by Consolidation Level

CONSOLIDATED

- Clauses that provide for fiscal legality.
- Clauses that provide for non-confiscation
- Clauses that protect private property and provide guarantees
- Clauses that establish the principle of equality regarding public burdens.
- Clauses that establish the principle of taxable capacity.
- Clauses that contemplate budgetary legality.
- Clauses that forbid indirect forms of democratic participation for fiscal or budget issues.
- Clauses that mandate the financing of specific goods or services.
- Clauses that provide for solidarity in the distribution of resources tending towards equitable development.
- Clauses that establish the rational/sustainable exploitation of natural resources.

FREQUENT

- Clauses that establish substantive equality criteria to guarantee access to specific goods or services, or to ensure certain rights.
- Clauses that provide for progressivity in access to goods or rights (not in expenditure).
- Clauses aimed to further and promote economic activities related to the exploitation of natural resources.
- Budget balance clauses.

EMERGING

- Clauses that provide for the principle of the duty to contribute.
- Clauses that provide for the principle of progressive taxation.
- Clauses that establish the sufficiency and efficiency of tax revenue.
- Clauses that identify particular groups or collectives as priority targets of specific resources or goods.
- Clauses that establish specific guarantees to ensure certain expenditures (minimum percentages or specific allocations of certain income).
- Clauses that provide for new forms of property (communal or collective property)
- Clauses that mandate the exploitation of natural resources by the State
- Clauses that establish novel forms of citizen involvement (e.g., participatory budgets and consultation with specific groups in view of the exploitation of natural resources or for devising development plans)
- Participation of women in productive decisions and in the distribution of land, means of production, and acknowledgement of domestic work as a source of wealth.

ISOLATED

- Clauses that provide for non-regression of public expenditure.
- Clauses with a dynamic vision of fiscal sustainability.



FISCAL POLICY AND HUMAN RIGHTS: SOME RELEVANT CASES FROM THE REGION

Jurisprudential rules that deal with financial issues at a domestic level in Latin American countries surface mainly as a consequence of the justiciability of human rights or constitutional rights. In this respect, there is a series of judicial decisions that address the relation between rights and public resources based on considerations for the minimum content of rights, the degree of discretion with which political powers can assign budget priorities, and the limits to those powers.

Based on the previously proposed classifications (Corti, 2017; CESR-DeJusticia, 2019), this series of resolutions puts forth different categories which, in turn, show stronger, more deferential, intermediate, or moderate modes of control. From another point of view, these judicial decisions can be paired with distinct rationalities of fiscal justice, depending on whether they show greater concern for the defense of rights or for the redistributive impact of the resolution or policy that is

under scrutiny. Finally, there is a series of cases that respond to interpretations made by domestic courts about specific financial constitutional clauses (such as the “duty to contribute” or the concept of “fiscal sustainability”). Some of these jurisprudential rules were already addressed in the previous section.

The judicial decisions that pose various modes of control to regulate the relation between rights and resources usually deal with public expenditure—be it insufficient allocations, underutilization, or regression of expenditure. Financial issues may be introduced by plaintiffs, by the State in its defense or arise within the framework of the implementation of the ruling. In some instances, judicial control has also been applied to the effects of specific taxes on the rights at stake—for example, the income tax for sectors that enjoy preferential constitutional protection, or the value-added tax (VAT) in the case of basic needs.



➤ A. Resolutions That Focus on the Enforceability of Constitutional Rights

These are judicial decisions that focus on the effectiveness of rights and do not admit financial restrictions to justify State omissions nor insufficient measures to guarantee these rights. Usually, these are cases in which courts focus on the “minimum content” of rights and on the duty to move progressively towards their full effectiveness, even though these arguments also surface as a limit to discretion, for instance, when analyzing the reasonableness of financial decisions (section b).

While many of these cases share the argument of “minimum content” as an impediment to allege budgetary restrictions⁰⁵, the truth is that courts have defined this minimal content through a variety of modes and degrees. This, in turn, concedes greater or lesser margins of discretion (and therefore breadth for budgetary de-

cision)⁰⁶. As a result, there are cases in which courts have not admitted arguments of budget shortage in the face of rights claims. The Colombian Court, for example, with its “vital minimum” jurisprudence, granted material content to a wide variety of rights—especially pension rights or rights that involved access to several goods or services—through qualitative evaluations carried out for each case, taking into consideration the biological needs and social positions of each petitioner (CCC T-650/98; T 619/95; T-143/98; T-284/98; T-139/99; T-373/98, among many others). In these instances, the court mandated to grant the benefits without giving room to the argument of insufficient resources or the lack of quotes in the social security system, although expenditures not provided for in the budget were dealt with only in a few cases (CIJUS, 2002)⁰⁷.

05| The impossibility of alleging budgetary restrictions in the face of minimum rights content violations arises from the interpretation of the ICESCR made by the ECSR Committee and other expert bodies, but it has also been adopted by various domestic courts, though not always in a clear fashion. For example, in Rulings 335: 452, the Argentine Court enabled the State to claim budget shortage even in these cases.

06| This article does not intend to identify different methodologies displayed by the courts to define the scope of rights. However, in broad terms, it is possible to differentiate between cases in which the minimum is established through a “do not discriminate” obligation (for example, the German *Numerus clausus* case), and cases in which standards are progressively approached, or rather the court establishes specific procedures for the materialization of these standards.

07| In reality, these cases did not rearrange the priorities of State expenditure, since they were mostly about rights derived from unfulfilled titles or contractual obligations, which for the most part involved lawsuits against private parties and only in a handful of cases required expenditures not provided for in the budget.

Argentine jurisprudence has also settled cases by affirming the content of a right without admitting the argument of financial restrictions and even by identifying priority social expenditures in order to guarantee the right to health (CSJN Argentina, Rulings: 323: 1339) or the right to proper food sources (Galeazzi *et al.*, 2019). These were mostly individual or collective decisions focused on obtaining specific benefits, not on bringing about structural reform. Likewise, the Constitutional Chamber of Costa Rica mandated the State to cover an expensive medication requested by a girl with a rare genetic disease, despite the weighty arguments made in regard to the consequences that this decision would have for the fiscal sustainability of the health system. What is particular about this case is that the chamber, having recognized the financial obstacles as proven, ruled in favor of the predominance of the right to life and health, and mandated the State to improve its efficiency in the management of resources (Sala IV, Decision 8377/03)⁰⁸.

There is another series of cases in which courts do admit the possibility of alleging financial restrictions (and are therefore more deferential), despite the fact that they deal with enforceable rights. Regarding the right to housing, for example, the Argentine Court admitted the justification of scarcity, interpreting that it was a case of “derived effectiveness” and therefore not judicial for everyone (CSJN Argentina, Rulings: 335: 452). The “Pabellón 13” case ruled by the Mexican Court followed this trend, as even though it recognized the existence of an enforceable minimum content of the right to health in an abstract manner, it accepted the

possibility of alleging financial restrictions. However, due to the particular factual circumstances of the case, it was not required to elaborate on its implications (Pou Giménez, 2019). In Brazil, there are studies that show a large number of individual decisions recognizing the right to specific medical benefits which had to be immediately provided by the State as part of the right to health. Nevertheless, these analyses also reveal a reluctance from Brazilian courts to rule collective claims on the basis of budget shortage arguments (Rosevear, 2018). The refusal to address this type of conflict collectively has been replicated in relation to other rights, such as the right to education (Vilhena, 2014) or the right to housing, and it is usually based on the doctrine of “reservation of the possible” (Perlingeiro, 2014).

As we will discuss below, some courts, such as the Constitutional Court of Colombia, distinguish between enforceable minimum content of rights (not bound to budgetary restrictions) and aspects that allow for making them progressively effective. The latter reflect State obligations that admit shortage justifications with greater deference in the face of non-compliance or poor compliance. This differentiation was clearly visible in a ruling (Sentence T 760-080) that addressed the health system’s structural problems. The court determined the need for transparent and participatory standards and procedures to define the content of the right to health, referring to benefits that should be immediately guaranteed—even if this involved the mobilization of resources—and others that should be guaranteed progressively.

➤ B. Resolutions That Devise a Reasonableness Control of Public Policies, Including Financial Measures

This category of decisions encompasses all cases in which the courts analyze the reasonableness of a certain State policy, program, or set of measures, including financial decisions. In general, a reasonableness control speaks of a more deferential court, compared to those that focus on the duty to guarantee a minimum content of rights (Young & Lemaitre, 2013). The premise is that the State has a margin of discretion regarding the measures it will take to achieve the full effectiveness of the rights that it is obliged to guarantee—for example, establishing priorities in terms of groups or objectives or allocating budget items.

The reasonableness control can be presented in different courts as a stricter analysis (sometimes referred to as “proportionality control”) or a laxer analysis, and in turn it can include additional principles emanating

from the human rights system—e.g., progressivity, non-regression, equality—and specific analyses related to the use of resources or to financial decisions, which are often carried out in light of said principles or others such as “suitability” or “efficacy.”

Accordingly, the reasonableness control in the rights–resources relationship can arise in three ways:

- I. As the only form of control over financial decisions (“balance of rights”, e.g., the South African case and to some extent the Supreme Court of Mexico).
- II. As a way to control financial decisions once the minimum specifications of the rights have been fulfilled (for example, some cases of the Higher Court of Brazil and the Colombian Court).

08 | The pharmaceutical company that produced the drug had lobbied significantly for the requested remedy to be granted.

III. As a way to control financial decisions when the minimum specifications have still not been fulfilled, despite maintaining the concept of “minimum enforceable content” (e.g., the cases of the Supreme Court of Argentina and the Supreme Court of Mexico).

The higher courts of Colombia and Brazil share the distinction they establish between obligations to guarantee a minimum content of rights—immediately enforceable, not subject to State discretion, and therefore immune to the argument of scarcity—and the obligations that build upon those minimum specifications. On the contrary, for the Argentine Court, under certain conditions, it can be argued that there is a lack of resources even if it is to justify not having guaranteed this minimum content in the case of rights of “derived effectiveness” (Corti, 2019). As anticipated, the Court of Mexico has also adhered to this position (SCJ de México, AR 378/14).

Beyond this distinction, courts also differ when delving into the criteria relevant to the reasonableness control over the use of public resources or over policies with clear budgetary effects. Broadly speaking, courts like those of Brazil and Mexico are deferential, while the Argentine Court, on the contrary, shows less deference to a certain degree, and the Colombian Court has moved towards a stricter control. However, courts do not generally present a systematic and clear development in this regard, and in many cases, there may be variations. The Argentine Court, for example, showed a more deferential standard in a case related to the right to housing compared to another that dealt with the right to retirement mobility. And even in the first instance, it was not very clear. It cited criteria developed by the ECSR Committee but did not implement them, merely stating that the State had not adopted measures to grant minimum guarantees to people in situations of extreme vulnerability and that the financial measures adopted were inefficient and inadequate (Etchichury, 2013). Nonetheless, in the cases known as “Badaro I” and “Badaro II” (CSJN, Rulings: 329: 3089 and Rulings: 330: 4866, respectively), that same court determined the lack of regulation to ensure mobility as unjustifiable and noted that the State had to prove “the existence of very dire economic or financial circumstances” to justify its non-compliance. This stronger control also characterized the case of a decrease in the wages of a group of municipal employees, where the matter was no longer about State omissions but about regressive actions (CSJN Argentina, Rulings: 336: 672). Although the court recognized the State’s capacity to temporarily reduce the salaries of its employees for the sake of the common good, it reached an understanding that this could not imply a lack of protection for the most vulnerable groups. On that account, the ruling seemed to estab-

lish the formula that the sole purpose of economic adjustment must be to protect ESCRs, but in this case, the municipal regulation had the opposite result.

In the “Pabellón 13” case, the Mexican Court carried out a lax reasonableness control, as it did not specify whether the analysis of scarcity had to prove the existence of other priorities of greater social relevance or if the consequence of implementing the principle of progressivity required a strict scrutiny of the State’s action or omission. In this case, the main consequence of the principle of progressivity was understood generically as a reversal of the argumentative and probative burden, in which the State had to prove that it had exhausted its efforts to allocate a maximum of its available resources. In a subsequent case, that same court rejected a claim that invoked the right of access to cultural goods and services, and when addressing the reasonableness of the State’s actions in relation to its progressive development obligations, it invoked the doctrine of the South African Court (SCJN de México, AR 566/2015). Specifically, it acknowledged that the State had taken up some actions aimed at guaranteeing access to cultural infrastructure and added, in a supplementary manner, that the resources derived from the sale of the property would be used to cover expenses related to the right to education.

Following this lax approach to control, the Mexican Court has implemented the principle of non-regression by imposing a reversal of the probative burden, but still showing a great deference to legislators in practice. For example, in cases related to social security, it has sufficed for the State to allege the high costs of the service and the need to procure a global financial balance for its measures to be considered reasonable (Pou Giménez, 2019). However, in another case where the gratuity of higher education was at stake, the court presented a stricter criterion, understanding that it was no longer possible to impose charges on the students once gratuity was recognized (SCJN de México, AR 750/2015). Consequently, it was the understanding that for there to be regression, (i) the decision must concern a *great number of people* and not just an individual; (ii) the enjoyment of the goods or services at stake must have already begun.

In a case that was also related to the provision of educational services, the Constitutional Chamber of Costa Rica implemented a stricter standard, considering that the obligation of progressivity includes the duty to not cut budgetary items *already assigned* and intended to improve the service, especially when this involves *lower-income sectors*—and even when that money is earmarked for guaranteeing other rights, such as teachers’ wages (Chamber IV, Decision 02743/03).

The Constitutional Court of Peru has also shown def-





erence. For example, it justified a reduction of assets for a number of pensioners in order to improve the situation of other workers in worse conditions (TCP, Jurisdictional plenary, “Colegio de abogados del Cusco”). In doing so, the court considered:

- I. That the social security reform did not affect the essence of the right to a pension.
- II. The redistributive impact that this reform would bring about for the whole scope of the population that it would reach (benefited or affected).

The Peruvian Court grounded its decision on the principles of solidarity, social justice, and progressivity—the latter understood as the progressive development of all, not only a group (CSJN, Rulings: 329: 3089, Rulings: 330: 4866).

The Colombian Court, by contrast, has not been so deferential when evaluating the reasonableness of budgetary motives that justify non-compliance with the progressive fulfillment of rights. The court included the element of *temporality* in the reasonableness analysis of proven State breaches regarding health issues, breaches which resulted in a structural crisis of the system. It also considered that the progressive nature of certain obligations aimed at expanding health coverage did not make them indefinite, and that a very long delay implied the violation of constitutional provisions. To study the temporality in depth, the court evaluated whether the State had already begun to adopt measures aimed at the “flow of resources for the system” (CCC, T-760/08).

However, the most salient developments recorded in the Colombian Court refer to those instances in which the reasonableness analysis is carried out on the basis of regressive situations. The “prohibition of retrogression as acknowledgement of legitimately protected expectations that must be respected *prima facie*” (Uprimny & Guarnizo, 2008) supports a presumption contrary to any reduction in the scope of a social right, as this would constitute a violation of the progressivity principle. The restriction may be valid if it passes a strict reasonableness analysis, which includes assessing its *necessity*. This was the criterion used in cases such as the partial invalidation of a pension reform (C-789/02) and the exclusion of family members of inactive military personnel from the health system (C-671/02). In one case, the court considered that decreasing budget

allocations destined to finance higher education represented a legitimate measure to reduce fiscal deficit, but the State had not proved the inexistence of alternative possibilities less harmful to the right to education (C-931/04). Furthermore, the court created a category of cases in which this presumption is highlighted: “when social rights are developed, which are held by persons under special constitutional protection” (C-991/04). In another case, however, it considered a labor reform that removed labor rights but was established with the aim of promoting employment and economic growth to be reasonable and proportional. In this way, the court understood that empirical or ideological discussions about the effects of labor flexibilization belonged in congress and deemed that a broad debate had been guaranteed (C-038/04).

It is also possible to identify different stances in cases that assess the reasonableness of taxes. The Colombian Court resolved several motions on the constitutionality of indirect taxes resorting to the concepts of progressivity and equity, and it established a series of criteria to assess their reasonableness in each case, namely: whether taxpayers would in any way benefit from the tax (C-080/96)⁰⁹; whether the tax referred to irreplaceable goods relative to the enjoyment of a vital minimum (C-117/18)¹⁰; and whether legislators had provided compensatory measures for disadvantaged groups (C-080/96). In this way, horizontal and vertical equality criteria have inspired the reconsideration of exemptions, differential rates, and simplified tax systems.

In the cases of other courts, however, jurisprudence has been more deferential to tax modifications introduced by political power and usually more reluctant to implement principles of progressivity/non-regression in the analysis. For instance, the Supreme Court of Mexico has understood that there is not an acquired right of taxpayers to always be taxed on the same basis and rate, and that therefore tax modifications should not be interpreted as violations of the principle of non-regression (SCJN, AR 226/16). As for the Argentine Court, in a recent case, it considered that taxing powers should be exercised by taking into special consideration the groups recognized as vulnerable in the constitution. Nonetheless, the ruling was not grounded—as is the case of the Colombian Court—on systemic ideas of fiscal justice nor on a methodology aimed at evaluating the regression of taxes in the system, but rather on a viewpoint more focused on the individual right at stake (CSJN, Rulings: 342: 411).

09 | When assessing the constitutionality of an indirect tax—the slaughterhouse tax—the court specified that, if evaluated from the viewpoint of the tax system as a whole, this tax was in line with the constitutional principles of equity and progressivity, while those who would be compelled to pay it afterwards would benefit from investment projects made with public funds to be allocated primarily to their region.

10 | Based on previous jurisprudence, the court reaffirmed that the principle of progressivity has a structural or individual dimension, the latter being the one that allows for evaluating if the tax could contribute a dose of regression to the system. Regarding VAT, the court understood that it is a violation of the principle of non-regression (and therefore unreasonable) when this tax becomes extensive to goods and services that had previously been excluded, if this is done (i) without public deliberation; (ii) in regard to the essential services on which the effective enjoyment of the vital minimum depends, and without policies that compensate for this affectation; (iii) without addressing the impact of that discrimination on the system.

Unmistakably, there is no clear doctrinal development among the highest courts in the region that allows for the provision of a series of standards applicable to financial decisions that constrain rights. However, it can be said that criteria vary depending on:

I. Budgetary or tax matters, with some courts ultimately implementing limits based only on traditional principles (such as non-confiscation or proportionality), while others assess according to ideas of fiscal justice.

II. Cases that deal with various social rights (e.g., there may be stricter criteria depending on the right at issue: health, social security or housing).

III. Courts that distinguish criteria according to a minimum content of rights and instances of progressive development obligations and also courts whose doctrine does not reflect such a distinct division.

IV. Different approaches on whether or not to apply the analysis of regression and, if applicable, what the scope of such control would be, including aspects such as context criteria (for example, financial crises);fiscal sustainability criteria; principle of necessity or less restrictive alternatives; the existence of preferential guardianship groups; compliance with procedures, such as robust legislative debates; and the existence of features that are “ideological” or debatable within the empirical.

➤ C. Deontological and Utilitarian Rationalities

Among the judicial decisions examined here, we can find the expression of different rationalities in matters of fiscal justice. There are different stances on what a “socially just fiscal policy” means, which often concur with the literature that governs the rights–resources relationship, or with the different meanings attributed to principles emanating from constitutional clauses or from the human rights system—equity, progressiveness, solidarity, sufficiency, or fiscal efficiency.

Broadly speaking, we have identified two main rationalities: the first is expressed in rulings that place greater emphasis on the enforceability of the right at stake and on the claimant, without prejudice to the impact that the decision potentially has in fiscal or redistributive terms or to other holders of rights. These are usually judicial decisions that focus on the enforceable content of the right that is object of the claim and promote remedies—whether individual or collective—that are not open to the pursuit of structural responses or dialogue¹¹. The most frequent examples are found in the field of the right to health, where a deontological/pro-rights viewpoint prevails. For instance, the health guardianships ruled on by the Colombian Court can be mentioned, which were ruled on the basis of the “vital minimum” doctrine or related actions, prior to Ruling T-760. This is similar to the health protections ruled on by the Argentine federal justice to this day, in which claims for individual benefits are predominant and there is no deliberation on the structural failures of the health system nor the indirect effects it may have on other rights (Gotlieb *et al.*, 2016). Similarly, there are the health cases in Brazilian law or the aforementioned

case in the Court of Costa Rica as well as some cases related to social security rights (for example, CCC, C-754/04 and CSJN, Rulings: 329: 3089).

The second rationality corresponds to rulings that place greater emphasis on the redistributive impact of the decision. These include decisions that have a purely utilitarian approach, with broad deference to legislators, who may consider or balance priority interests and their budgetary allocations or decisions that strive for balance between a minimum guarantee of the rights that must be recognized and the search for global solutions that address the whole scope of problems, including the financial implications of the decision. Examples of more utilitarian views can be found in decisions that apply doctrines such as the principle of reservation of the possible—in Brazil and cases that follow the German tradition—or that employ a lax control of reasonableness—like Mexico and cases that follow the South African doctrine. The case of the Constitutional Court of Peru’s application of principles of solidarity and fiscal sustainability to grant the restriction of retirement benefits to the most favored groups in order to improve the situation of the poorest (TCP - “Colegio de abogados del Cusco”) and the doctrine of presumption of unconstitutionality advanced by the Constitutional Court of Colombia to analyze the regressive measures of the right to wage mobility (CCC, C-1064/01; C-1017 / 03; C-931/04) are clear examples of stances that try to find a balance between pro-rights positions and other more utilitarian ones because they distinguish the minimum content required from the content subject to assessment in pursuit of the general welfare.



11 | This type of rationality is often criticized because: (i) it may generate inequities among populations that can access justice and those that cannot; (ii) it may have negative impacts on other rights that judges cannot estimate due to a lack of suitable methodologies;(iii) it ignores the structural flaws behind the claim; (iv) it does not promote harmonization in the defense of rights through democratic dialogue. Among its favorable aspects, it has been noted that the narrative of the enforceability of rights generates positive effects on social mobilization.

4.

RECOMMENDATIONS ON GOOD AND BAD PRACTICES



As a result of the comparative analysis of constitutional texts and judicial decisions with a fiscal impact that have taken place in the region, some lessons can be learned that may be useful to advance the fiscal justice agenda at the domestic level. In this regard, these recommendations seek to inform future constitutional reforms and improve related judicial practices.

1

It is insufficient to include social rights in fundamental charters if they lack sufficient and adequate guarantee techniques.

The inclusion of socioeconomic rights in Latin American constitutions during the 20th century did not suffice to prevent the implementation of neoliberal economic policies nor to promote inclusive economic policies focused on reducing inequality. This was partly due to the fact that such inclusion was not accompanied by adequate guarantee techniques and political tools for citizen participation. The only institutional reforms accompanying the incorporation of social rights (and only in some constitutions) were those of a jurisdictional character. This is the case, for instance, of the implementation of more extensive forms of procedural legitimacy or the creation of new courts (such as the Constitutional Court of Colombia or Costa Rica's Chamber IV). Although this type of guarantee has given rise to valuable jurisprudence, its ability to promote fiscal policies with a rights perspective is somewhat limited.

2

The combination of decision-making procedures for fiscal matters being concentrated in the executive branches and also being opaque does not encourage participation.

Although liberal constitutions enshrined the ideal of “no taxation without representation,” their main objective was to provide strong protection guarantees for private property and to limit the community's political participation in economic decisions. Indeed, there are no institutions that guarantee the representation and/or participation of the different groups that comprise the social State in such matters. In practice, executive branches concentrate strong decision-making powers in fiscal and budgetary matters. In many cases, beyond the principle of legal reserve, important aspects of fiscal issues are resolved by presidential decisions through regulatory decrees or delegates¹² or else through laws whose exclusive legislative initiative rests with the executive branch.

Furthermore, legislative branches tend to perform their functions excluding the community, without offering requests for discussion such as public hearings or inquires with experts to inform public debate, and in contexts where public fiscal information is insufficient or inaccessible to citizens. According to IBP's latest annual index, the budget information published by the region's assessed countries is considered “insufficient” in 12 instances, while it is only deemed “sufficient” in five cases (IBP, 2019)¹³. This means that tax reform projects go underdis-

12| For instance, in the case of Paraguay, the property tax is important to curb large estates (as the constitution demands). However, one of the problems is that land tax valuation is resolved by the executive branch, which is prone to be influenced by the owners' pressure (CADEP, 2018: 38). Likewise, if we look at the case of Argentina—one of the few countries with constitutional limitations to issue certain decrees in economic matters—, practice shows that such a prohibition can always be avoided by concealing decrees that are not sanctioned by the constitution (DNU) under the guise of others that are (regulatory or delegated decrees, even though the Supreme Court has imposed some limitations, see Rulings: 337: 388).

13| The countries ranked as “sufficient” were Mexico, Guatemala, Brazil, Peru, and the Dominican Republic.



cussed in the legislative branch and are negotiated behind closed doors or that some important 'details' are later defined in a regulatory manner (tax valuations, proportional rates, reallocation of budget items, etc.).

This opacity is also present in decisions related to public debt, which tend to largely depend on the discretion of executive branches, which act based on their own constitutional powers or on delegated legislative ones, both to contract debt and renegotiate it as well as to resolve every financial aspect surrounding debt (conditions to obtain it, use and allocation of resources, forms of repayment, amount of interest, requests for write-offs or renegotiation). The formal conditions imposed by constitutions are scarce (in most cases they are given a similar treatment to that of other laws, or else they are delegated), and substantial conditions are only provided in a small number of cases, such as the use of funds or the maximum committable percentages of GDP. Although, in this case, whether maximum percentages are advisable is open to debate, since they could also result in obstacles to guaranteeing rights.

Additionally, most constitutions openly ban semi-direct forms of democratic participation for these cases (for instance, popular initiatives, referendums, etc.). In cases that are not explicitly banned by the constitution, popular participation through these mechanisms has also been blocked by actions of the constituted powers, as is the case of Colombia, where a decision of the Constitutional Court declared a series of popular municipal consultations that had resulted in a vote against the mining exploitation of those territories unconstitutional (CCC, SU 095-18)¹⁴.

In contexts where there are strong ideological debates surrounding different economic programs, this institutional scenario creates a situation in which fiscal reforms are defined with very little public discussion and amid apathetic citizens; that is, these decisions are made by the sole will of very strong executive branches, which are subject to low levels of control—and therefore vulnerable to the influence of the financial elite—, or these reforms are defined based on “wars of attrition” between executive and judicial branches.¹⁵



➤ Which Good Practices Can Be Identified?

An increasingly frequent use of **semi-direct forms of democracy** to define issues that constitute the economic life of States, such as activities related to the extractive industries or consulting indigenous communities regarding the exploitation of natural resources.

The creation of **popular branches of power** in order to encourage citizen participation and control. Ecuador's Council for Citizen Participation and Social Control, whose task is to promote citizen participation and social control mechanisms, pursued valuable activities right from its start (such as overseeing public contracting, public policy monitoring observatories, or citizen training workshops), although its activities focused more on control tasks than on promoting participation.

Among the **new forms of democratic participation**, institutional designs can be inspired by existing community experiences. One example is the Permanent Multi-Sector Commission for the Transparency of Extractive Industries in Peru, created to monitor the Extractive Industries Transparency Initiative (EITI), which seeks to promote transparency in the payment processes carried out by mining, oil, and gas plants to cover extractive activities (OAS, 2013). Other examples are **participatory budgets** in Brazil and the resource management and territorial and urban development **decentralization processes** in Bolivia.

14| Centrally, and countering a previous case-law, the court ruled that municipalities do not have the competence to carry out popular consultations regarding projects that modify land use

15| This is the expression used by Couso (2017, p. 356) to describe the situation in Colombia, where “...the inevitable tension between the center-left and the right—an economic model based on the preeminence of the free market—, the result is a type of ‘war of attrition’ in which the Constitutional Court of Colombia attempts to attenuate some of the most socially disruptive effects with those that the government promotes, while the latter continues implementing what is central to its program.”

Prior and mandatory consultation processes with communities or groups that will be affected by certain activities or by the enactment of specific key infra-constitutional regulations (for example, legislation on territorial planning or to regulate the exploitation of certain natural resources). Some constitutions include consultations with indigenous communities prior to the exploitation of natural resources.

There are ways to **make fiscal policy reform processes more visible and open to discussion**. For example, there are constitutions which require laws to stipulate that tax amnesties or exemptions be adopted through special laws (Brazil), through mediation of reports from specialized areas of the government (Peru), or through the inclusion of detailed analyses of the impact of tax benefits on incomes and expenses when presenting the budget (Brazil). Another good example is Costa Rica's constitution, which includes the need for legislative approval of administrative contracts that provide for tax exemptions.

Another problem identified in the region's constitutional experience involves **the existence of economic organization clauses that could cause conflict**. It is not uncommon to find a group of provisions that, on the one hand, give property a social function and establish a fair, progressive, solidary and participatory tax system while, on the other hand, establishing strong protections for private property and free enterprise. Thus, for example, different understandings of property (private property, social function of property, or communal property) may coexist in some cases and, in turn, hide conflicting points regarding economic growth, development, and the scope of individual rights and duties in relation to property. This tends to block far-reaching reforms in institutional contexts, such as the one described above. In Colombia, for example, the understanding of property's social function has coexisted with fiscal policies aimed at encouraging the concentration and exploitation of large areas of land at the expense of certain groups' collective ownership¹⁶. Likewise, despite the jurisprudential development of property's social and ecological functions, the problems of access to land in this country have been addressed with policies that reflect a liberal understanding of property—such as land formalization and title deed distribution to provide good incentives to private investment (Alviar García, 2017). This shows that when there are conceptual tensions between different forms of property—and between them and modes of natural resource exploitation—, implementing truly redistributive fiscal policies is difficult—particularly in institutional contexts of economic and political concentration.

Brazil offers another example of this tension between different forms of property. In this country, the constitutional recognition of properties inhabited by *qui-*

lombolas gave rise to an action of unconstitutionality of the law that tried to put the constitutional norm into practice. Even though the action was dismissed by the STF (ADI 3239), the dissenting vote evinced an analysis of the issue made from an individual perspective of property, by assimilating it to the case of "usucapion" (or "adverse possession") and rejecting consideration of a "social interest" instead of a "public interest" to settle the land grant.

Strong protections for private property can also come into conflict with the constitutional principles that establish the duty to pay taxes according to taxable capacity and progressive taxation. In this respect, in constitutional systems that establish fewer guidelines for fiscal justice (because they assume, for instance, the principle of equality and do not establish the duty to pay taxes nor the principle of progressivity), progressive tax systems may be subject to greater criticism (especially when considering that protections for private property are often deeply rooted in all constitutions). On the contrary, constitutions that show commitment to fiscal justice principles have favored a greater dogmatic development that strengthens the redistributive potential of the fiscal system, which, in turn, is more consistent with a strong charter of social rights.

Moreover, the constitution's economic model should be in keeping with subnational finance-related provisions. For example, the recognized financial powers of subnational entities may in some cases go against redistributive aims. In Uruguay, the somewhat complex drafting of the constitution when addressing the distribution of fiscal powers among the central government and the departments led the Supreme Court to declare a tax on rural land concentrations—which sought to promote an agrarian reform—unconstitutional¹⁷. How-

16 | This happened, for example, with the Curvaradó and Jiguamiandó river basins in the Chocó Department and with palm heart plantations backed by paramilitary forces.

17 | Constitution of Uruguay, Art. 297. As interpreted by the Supreme Court of Justice, this provision only allows the national government to establish additional taxes on departmental rural property taxes, which led it to declare the Rural Property Concentration Tax unconstitutional (Sent. N 17/2013). Argentina provides another example, where the constitution stipulates a federal co-participation system which all provinces must agree on. This system prevented the negotiation of a co-participation law with fair and equitable redistribution criteria.

ever, experience also presents examples of central governments abusing local decisions regarding the use and exploitation of natural resources—as in the case of Colombia.

Finally, economic and development policies promoted by the constitution should also adhere to fiscal rules. It is not uncommon to find that constitutions guaranteeing a wide range of rights and social services, at the

same time, impose a static understanding of fiscal balance and establish strong restrictions on expenditure and debt reduction, or they establish annual budget cycles (instead of multi-year ones, as a long-term development policy would require). Since constitutional reform is not easy, including fiscal rules that allow for more flexible and dynamic economic policies would be advisable.

► Recommendations and Good Practices

The Constitution of Bolivia offers a good practice, which not only provides for collective and community property, but also develops aspects related to land exploitation. In this respect, it states that land must belong to those who work it, puts rural workers at the forefront, and promotes the protection of local labor.

Another good practice is found in constitutions that offer a more in-depth development of fiscal justice principles, insofar as they provide fiscal policy orientation, place a greater argumentative weight on States when adopting economic policies, and promote the justiciability of tax systems.

The issue of subnational finances is delicate and deserves special attention in the context of constitutional reforms. The challenge is to find a balance between providing subnational entities with sufficient financial capacity, autonomy, and decision-making power over the exploitation of their natural resources while, at the same time, preventing overly autonomous districts from blocking national development and wealth distribution policies. Some guidelines may be useful to achieve this aim:

- I. Ensuring that national financial powers are in line with existing development aims in the constitution (e.g., in order to eradicate the large estate system, the central State should concentrate certain land-taxing powers).
- II. Ensuring that national development policies include limits regarding decisions adopted by popular consultation systems at the local level when it comes to certain issues of significant social and environmental impact, such as the exploitation of natural resources.
- III. Laying the foundations to ensure the financial capacity of subnational entities while, at the same time, ensuring fair redistribution and development procedures throughout the territory (for instance, avoiding the need for all districts to consent on issues regarding the redistribution system)¹⁸.



18| It is common for countries in the region to have large development and wealth gaps at the subnational level. The ratio between the highest and the lowest per capita GDP generally exceeds 6:1 (with the exception of Uruguay), while in developed countries it rarely goes beyond 3:1 (Brosio *et al.*, 2018; Muñoz *et al.*, 2016).

Despite the justiciability of rights and the increasing acknowledgement that fiscal policies are key for making them effective, the judicial scene has several deficiencies in dealing with this problem. To some extent, these deficits occur because both the institutional organization of the judicial branch and the process-regulating norms are designed to resolve purely bilateral conflicts based on an individualistic conception of people and property. As a result, judges

seldom analyze fiscal policies systemically, nor do they evaluate the impact of economic measures on different groups and community members. (When they perceive this to be necessary, they are deferential to legislators.)

Notwithstanding the need to promote structural reforms of judicial and procedural institutions in order to create systems that are receptive to these problems, some specific recommendations are:

Develop specific probatory standards to control the constitutionality of economic measures. For example, systems could be developed that adopt different analysis standards (either stricter or laxer) to evaluate these measures depending on whether they are:

- I.** Fiscal policies that can be presumed to be contrary to fair tax systems (which, for example, is what the Court of Colombia does to analyze tax amnesties).
- II.** Fiscal policies adopted through popular participation mechanisms (such as popular consultations or referendums). In these cases, for instance, a more deferential control could be required—one limited to certain aspects, such as the violation of very specific provisions, like the way in which the consultation process was carried out or the existence of urgent cases requiring a decision review—.
- III.** Particular taxes or the entire tax system. In this respect, for instance, stricter control rules could be developed to analyze the progressive or regressive character of the entire tax system, and more deferential ones to individually assess the constitutionality of particular taxes (in order to cancel measures with negative effects for the tax system considered globally; for example, criteria such as respect for the vital minimum could be adopted).
- IV.** Economic measures adopted in emergency contexts or with an intent of permanence.
- V.** Specific standards created to standardize frequently conflicting fiscal principles. In order to analyze, for instance, whether tax collection efficiency can justify a regressive tax for the global system, the State might be required to provide a stronger argumentative burden evaluating the cost-benefit of adopting alternative measures.

Promote different kinds of processes depending on whether non-compliance complaints are about formal or substantial aspects of fiscal policies. For example, create more expedited processes to resolve non-compliance complaints regarding formal requirements for adopting certain measures—such as holding public hearings for debt contracting or consultations prior to the exploitation of natural resources—and complaints of budget item reallocation in evident violation of constitutional or legal guidelines.

Create special mechanisms for evidence production when debating fiscal measures and promoting the intervention of specialized institutions. For instance, produce economic reports on the probable impact of invalidating a certain tax, or invite the participation of universities, specialized civil organizations, specialized bodies within legislative bodies or ministerial offices, among others. Here, an example of a good practice would be the judicial branch's "Technical Support Groups" for health-related litigation in São Paulo, Brazil, which have allowed a considerable reduction in medication-related cases brought to court.

Design dialogic ways to implement remedies and monitor the execution of sentences. For this purpose, guidelines could be developed based on the experience gathered in dialogical panels within each domestic system. Courts can also draw from the accumulated knowledge of the international and regional human rights monitoring system in order to develop progress indicators and measure the implementation levels of public policies with a human rights perspective.



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