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Taxation in Italy: the Constitution Ignored

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Taxation in Italy today: the Constitution ignored¹.

1. An essay by Filippo Gallo on tax and the Constitution in Italy.

What are the presumptions on which the State bases its power to tax?

While the aim is to secure the revenues necessary for the life of the State, the criteria of justice on which its taxing power is based are different (and even contrasting). The power to tax is contractualist and commutative in nature (with the levy assuming the form and substance of a payment for a divisible public service, performing the function of a tax), with the amount raised corresponding to a benefit. The limit on the free availability of assets from individuals in association is then justified by the fact that it is the remuneration for a public service. The criterion of justice is democratic, and is distributive in nature (where the levy assumes the social function of a public charge directed towards meeting primary social needs, acquiring the function of the reduction of inequality). The historical period in which these different criteria of justice were promoted was first of all the 19th century, when the goals championed were the liberal state and the absolute protection of individual liberty, and when the rallying cry of ‘no taxation without representation’ justified public intervention in the private sphere in that it represented a counter-exchange. The next period was in the 20th century, when contractualist theories were abandoned and the goal was the advancement of the democratic State of law, which allowed the limitation on private property based on citizen consent as incarnated in the law and extended the function of the State guarantee of the positive rights to liberty and of action, with the clear emergence of the role of the State in the sharing out of public burdens. The last decade of the 20th century and the first of the second millennium marked a return to the criteria of justice inherent in the liberal State. The distributive function of taxation lessened, and there was a greater appreciation of the criteria of there being a benefit in return for tax and of proportionality rather than progressiveness. Tax has been seen as a factor in altering the fundamental right of property, which in turn is regarded as the basis for and expression of the person and his individual liberty as well as a limit – one that can be exceeded only in exceptional cases – on taxation. In terms of tax policy, not only do these concepts tend to guarantee owners’ rights and reject the model of the social State, but they affirm the individual’s original and natural right to the intangibility of his property and to retaining most of the fruits of his labour, allowing the State to levy only what it strictly needs to finance the cost of protecting that property and offering the classic public assets (judicial services, police, defence). In taking this view, the tendency is to regard taxation as being based on the consent of the individual, in other words as a person’s self-limitation. While this has been the political trend over the past few decades, in terms of theoretical formulation a school of thought has been developing whose aim is to re-evaluate the idea of property as being disconnected from the individual, regarding property as ‘a mere consequence of laws, including tax laws, whose aim is to protect other significant social and

economic values’. With this in mind, the institution of property is, it is true, based on the criterion of ‘belonging’, but it is also linked to a complex system of social obligations that reflect principles of fair and just distribution. In this respect, property rights acquire a value that is reasonably limited by rules, including fiscal rules, in order to promote social cohesion, interpersonal relationships and the formation of human capital. This kind of theoretical development is the outcome of the social doctrine of the Catholic Church on the issue of the relations between the State, the common good and taxation. On this subject the author cites the intervention by the Diocese of Milan ‘Justice and Peace’ commission of 2000 chaired by Cardinal Carlo Maria Martini. According to Filippo Gallo, Catholic thinking coincides with the view of the laity, that of more genuine liberal thinking, to the effect that while property rights do belong to the individual they are not innate in or identified with the individual, since they are the result of legal conventions defined by political decisions. The criteria of justice on which the State bases its taxing power are, according to the author, founded on the relationship between the protection of private property and the social function of private property that has its source in the Constitution. According to the author, the drafters of the Constitution made the choice of recognising the rights of property as instruments of private autonomy, although within the limits of ‘policy decisions on authority’, which were also imposed by the requirements of funding public and social spending. These rights are no longer subject to majority decisions as to whether they exist, but they are in no way predefined as to their amount, since as regards their content they may be disposed of and decided upon by virtue of the constitutional rules by which they are recognised. As provided by articles 42 and 43 of the Constitution, rights to property are not limited by law, but it is the law that recognises them, the aim being to afford them reasonable protection, making economic development compatible with a just social order. The reasoning for the protection of private property, then, appears to lie ‘in the functionality of the socio-economic system’.

In support of his theories, the author cites L. Mengoni, ‘Proprietà e libertà’, an essay on property and freedom appearing in 1988 in the Rivista Critica di Diritto Privato e la giurisprudenza della Corte Costituzionale.

In this context, taxation implements the constitutional precept of article 53: in Gallo’s words, it realises the ‘solidaristic sharing of public burdens, the sole impassable limit on which is observance of the principle of equality, this being the basis and foundation of the principle of contributing according to one’s ability’, and article 42 of the Constitution cannot exert any direct influence on the identification of the parameters for the legitimacy of the legislative choices arrived at pursuant to articles 53 and 3 of the Constitution.

If one considers Community law, it does not appear that such a basis for the State’s power to impose taxation can be reconstructed in this sense. Looking at the system of the sources of law, article 17 of the Nice Charter seems to retrace the steps of the dialogue between the holder of the right of ownership and the State that is inherent in classic liberal thinking. According to the intentions of the drafters of the Charter, the fundamental right to property always seems to prevail over social rights (which are apparently fundamental rights that may be attenuated – see article 52(3)), with the implicit consequence that
national lawmakers may not, through the imposition of taxes, impose limits on property for the purposes of funding social rights in order to arrive at a fairer apportionment.

Nevertheless, Gallo considers that the Charter may be read from a different viewpoint, in other words looking at the content of Community regulations in matters of tax. The approach here seems to have been reversed: one does not start with the Constitutional concept of property and then derive from it the legitimacy of the power to tax, but one starts with tax regulations in order to justify the possibility of placing limits on property from the social viewpoint. For this purpose, then, use is made of article 1 of the Protocol to the Convention for the protection of Human Rights, which states that the provisions on the protection of property ‘shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to … secure the payment of taxes or other contributions or penalties’. An approach of this kind is justified on the basis of the axiological system inherent in the Community Treaties, which tend to take personal property as a reference, to see the function of property as having the sole objectives of safeguarding business and market competition and therefore to disregard the issue of the correlation between tax, the effect of property, and the aim pursued by national legislators of the sharing of public and social burdens. The conclusion that Gallo derives from his analysis is that the Italian Constitution clearly highlights the fact that taxes are to be considered as an inextricable part of a modern overall system of rights of ownership, which the tax laws help to expand, safeguard and protect. Justice and injustice in taxation should only signify justice or injustice in that system of property rights and the market that arises from the system of taxation, although not only from that system. The tax system is then defined as an instrument of distributive justice, an instrument at the disposal of the State in shaping property rights, correcting their distortions and market imperfections in furtherance of individual and collective freedoms and upholding social rights.

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The essay is a minor masterpiece of loyalty to an interpretation of the Constitutional Charter with the aim of by contributing content on legal policy in order to bridge the wide gaps in the Constitution where economic issues are concerned, the most recent outcome of the broad compromises made by the drafters of the Constitution in arriving at their decisions. In this context, according to Gallo’s historical and legal reconstruction, the logic of fiscal justice takes on the key role of an element that orders the relations between private property and the social interest as the pivotal means of implementing a just distribution for the purposes of solidarity. It is not a matter of concern here to criticise the author’s thinking from this viewpoint. It should be borne in mind, however, that the subject has been discussed in a harshly critical tone by the philosopher, Peter Sloterdijk, who in Germany has recently denounced ‘fiscal theft’ from the taxpayer, forced to rescue the banks and underwrite the public deficit though the vertiginous increase in the taxes levied on him in the name of a ‘gift to the economy’, emerging, however paradoxically, as a defender of solidarity. Today’s finance ministers are, according to the philosopher, ‘Robin Hoods who have sworn a constitutional oath’ and compulsory tax is ‘an instrument for the pillage of the productive by the unproductive’. At the same time, however, Sloterdijk
considers the problem of how to achieve the objective of social solidarity in a complex society, except by imposing an even heavier tax burden. Highly institutionalised solidarity, he reasons, encourages individualism and impulsive accumulation. And more parsimonious institutions and more closely controlled government generosity appear to favour a more spontaneous acceptance of solidarity by civil society. In short, the question is not confined to the controversy over the question of whether a commutative fiscal policy has a worse outcome in terms of social solidarity than a redistributive policy. It is not a question of discarding the social State but of founding it anew, based on the mentality of the political stakeholders who should shed their guilty conscience, their feeling of indebtedness, and the victim mentality, by advocating direct rather than indirect generosity, so that a debt becomes a gift; the guilty flight of taxpayers should make way for an inrush of donors; the utterance of the American millionaire and philanthropist Andrew Carnegie should become the universal maxim: ‘The man who dies thus rich, dies disgraced’. It is not a matter of justifying tenacious fiscal commitment by relying on its constitutional legitimacy in terms of the democratic access to property. It is promoting a mentality of solidarity and responsibility, which should precede any legal principle to the effect that the levying of tax acquires the dimension of just one, but not the only, instrument for the attainment of social justice. Gallo’s constitutional reading of Catholic positions on the subject of both property and taxation seems far-fetched. The positions predate and go well beyond the albeit respectable charter of rights that goes under the name of the Constitution. They aim to promote a culture of solidarity that we feel is closer – using legal language – to the theory of human rights (which, according to the teaching of Jeanne Hersch, precede but are not disconnected from law) than to the theory of the Constitutional formant of law. ‘Solidarity in relations between citizens, participation and adherence, actions of gratuitousness, … stand in contrast with giving in order to acquire (the logic of exchange) and giving through duty (the logic of public obligation, imposed by State law)’ declares Pope Benedict XVI in his encyclical letter, Caritas in Veritate. And he adds: ‘In order to defeat underdevelopment, action is required not only on improving exchange-based transactions and implanting public welfare structures, but above all on gradually increasing openness, in a world context, to forms of economic activity marked by quotas of gratuitousness and communion’. The best soil for the growth of such forms of activity is seen as lying outside the State and the market, outside institutions, but as being within civil society. We see the Catholic positions as being closer, albeit with differences, to the premises underlying the positions of both Sloterdijk and the drafters of the Constitution (on the one hand, charity as an instrument of truth; on the other the psycho-political categories, anger and honour). In the same way, we feel that the instrumental use made of Constitutional case-law in the essay is straining the point, where this case-law too is called upon to support the reasons justifying the redistribution model of taxation expounded in the text reviewed. By the admission of a judge of the Constitutional Court, Valerio Onida, ‘in tax matters the Court, suspended half-way between the abstraction of law and the concrete nature of day-to-day cases, has safeguarded certain...
minimum conditions of justice but, contrary to what has occurred in other fields of law, it has not introduced into collective life the spirit and logic that refer back to the grand ideals of constitutionalism. The spirit and logic of constitutionalism are absent from the Court’s judgments on fiscal matters.’ As Enrico De Mita aptly affirms, ‘Although the Court gives an interpretation in general of tax interest as an interest of the community, in other words a constitutionally correct definition of that interest, in individual decisions it has given a more antiquated version, which in practice coincides with the true ‘raison d’état’”. And in support of his statements he cites the Court’s legitimisation of the extension of the term for ascertaining and allowing the condono, i.e. the post-hoc condonation of a breach of regulations on payment of a fine (an institution that belies the very foundations of Constitutional principles), concluding with these words: ‘it has been the guiding principle of the Court that tax is a matter left to political discretion (both in defining taxes and in determining the rates), the only limit being reasonableness, with only a very small number of decisions excluding taxes on the grounds that they are unreasonable’.

The reason of State that emerges from Constitutional case-law, albeit tempered by a vague sense of a communitarianism in the democratic mould, speaks volumes on the overall vagueness of the Constitution on economic matters. The lacunae left by this vagueness are filled in according to the viewpoints of the interpreters of law and the lawmakers, the vagueness being the prime reason for the Court hovering in mid-air between the abstraction of the principles and the practical nature of the claims, jeopardising the neatly sculpted historical and theoretical vision emerging from the essay. The binding nature of the system of property for the social purposes of taxation seems to be closer to the heart of the author than to that of the Constitutionalists. Community laws, moreover, take no sides on this question. To discern an indication that the Community favours a system of property of a binding nature by reason of the fiscal claims of the Member States seems once again to be far-fetched. The Treaties do not espouse theories of commutative justice or theories of distributive justice in tax matters. Like the Italian Constitutional Charter, they too confine themselves to a ‘non liquet’ (in times of economic crisis, many people interpret this non liquet as a Community weakness). Looking at Italy’s system of taxation, we feel that it is strongly influenced by criteria of commutative justice, albeit in the sphere of a ‘maximal’ rather than a minimal sphere of State action. Its life blood is drawn from an egalitarian (and therefore Constitutional) aspiration, administered not democratically but according to the ancien régime (the raison d’état, which is extraneous to the democratic Constitution). The State is not prepared to negotiate as to services (and the clientele for which they are provided) and at the same time is incapable of managing the levy in constitutional terms (due to basic choices made by the legislator, which contribute to the inefficiency of the administrative apparatus and to tax evasion). The criteria it deploys, therefore, are not those of distributive justice (as laid down by article 53 of the

3 E. De Mita, ‘Diritto Tributario e Corte Costituzionale’ [Tax Law and the Constitutional Court], in Jus, 1, 2008, p. 56, from which the immediately preceding citation of Onida has also been taken.

6 ‘Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate person's rights not to be forced to do certain things, and is unjustified; and that the minimal state is justified as well as right. R. Nozick, ‘Anarchy, State, Utopia’, 1974, p. 290.
Constitution) but of commutative justice (the imperative being not that everyone should contribute towards public spending according to their ability to pay but that its budget should be determined by what are regarded as the irreducible heads of spending for the purpose of managing its own power). In this way, the distance between the citizen and the State is made greater. The State is forced by necessity to meet social expenditure (and to fund the network of power and patronage associated with that spending), as well as to radicalise its taxation by constantly stepping up its efforts in order to favour the raison d'état instead of democratic procedures. Democracy was first realised in the economic and political institutions of France and England, and John Locke described the effect of the social contract as a pactum societatis, categorising it as incorporation, in other words using a term that, in common law, designates the establishment of a company or a non-profit society. What is happening today is not dissimilar to what happened in the 18th, but in the reverse direction. At that time the principles on which democracy was based – the majority principle, one man one vote, the constraint of the mandate, the reasonableness of law – were transferred from corporate law to public law. Today the founding principles of uncorporation, in other words the shift from corporations to partnerships or even to the individual enterprise (hedge funds, private equity funds, trusts), the deprival of voting rights by declassifying the position of shareholder to that of investor, a mere creditor of the company, majorities without controls and corporation law divested of any principle of reasonableness, the constraint imposed by mandates being blocked by the opportunism of the managers vis-à-vis the shareholders: all these are passing from the statute of markets and undertakings to public law. Walter Rathenau’s prophecy, that the objectivisation of the undertaking would lead to a point at which the undertaking is transformed into an institution that is like a State, has been fulfilled, bearing in mind that the State that Rathenau was thinking about was certainly not the democratic State but the 19th century liberal State. The State has become a gigantic enterprise that, however, has divested itself of the garments of the corporation and put on those of the partnership or even the individual enterprise. Citizens’ rights have been downgraded to mere interests, which are no longer protected in that today the citizen is treated on a par with an investor. While financial capitalism has destroyed the market, rendering it impenetrable and developing an ‘off-market capitalism that deprives others of wealth that is either destroyed or accumulated by those not entitled to it), government authority is evading its task of shedding light on human affairs by offering a public space in which men can show through their words and deeds who they are and what they can do, good or ill. Democracy is debased as a result, because it finds no channels through which citizens are given the opportunity to express their ideas and uphold their rights. The intermediate organisations (the political parties, unions, professions, trade associations) have in practice been deprived of their function as the instruments of democracy in that they are not found to be efficient for the system. And the reason why they have not in practice been eliminated is because they bow to the
instruments of authority when they are told that they need not trouble about their ‘out-of-
date’ role of serving as a link between the State and the citizen. The citizen, who is now
downgraded to the status of investor without representation, invests in the State enterprise,
now reduced to a partnership and very far from the model of a democratic corporation,
sometimes supporting it by underwriting the public debt, sometimes contributing through
the payment of tax that is not in proportion to his own private means but is determined by
the demands of the raison d’état, which are met by taxation. The professional who is writing
these notes would like to be able to reflect with Gallo on the method of current taxation,
which seems very far from the Constitutional model in terms of rights, including the rights
of owners, and the model of the liberal State in terms of the configuration of public
interests and of the form of the State, as well as the dangerously dwindling jurisdictional tax
guarantees and immunities. One merely needs to read through the Inland Revenue circulars
issued at the start of the year setting out the objectives for the collection of revenues and
the preventive remedies that can be adopted against the taxpayer, even without scanning
the massive case material on the abuse of law, a principle that has become a picklock
capable of forcing open any private strongbox. Without mentioning the conduct of an
inventory of practical case history on the subject of ‘new applications’ of tax regulations
that contradict customs established for decades, in order to obtain an immediate return
without having to amend current rules.

The opacity of the managers of undertakings is equalled by that of the various agencies into
which the State enterprise is broken down. And there is no Supreme Court decision in
sight (woe is us!) that, invoking the principles of proportionality, reasonableness and good
faith, protects the investor and citizen against the overbearing power wielded by managers.
Such a judgment has been given by the US Supreme Court on 30 March 2010 (no 08-586):
we would have liked this to have been delivered by our own Constitutional Court, not only
on the same subject as in the US Court (the remuneration of managers in large
corporations) but also on taxation.

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Appendix

Articles cited in the text.

*Italian Constitution*

Art. 3

All citizens have equal social dignity and are equal before the law, without
distinction of sex, race, language, religion, political opinion, personal and social conditions.  
It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

Art. 42.
Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired and enjoyed and its limitations so as to ensure its social function and make it accessible to all.  
In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest.  
The law establishes the regulations and limits of legitimate and testamentary inheritance and the rights of the State in matters of inheritance.

Art. 43
For the purposes of the common good, the law may establish that an enterprise or a category thereof be, through a pre-emptive decision or compulsory purchase authority with provision of compensation, reserved to the Government, a public agency, a workers' or users' association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and are of general public interest.

Art. 53
Every person shall contribute to public expenditure in accordance with their capability.  
The tax system shall be progressive.

Charter of fundamental rights of the European Union  
(2000/C 364/01)

Article 17
Right to property
1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected
Article 52

Scope of guaranteed rights
1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

Article 1
Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.