

## **Basic Income and the Constitutional Principles of Fiscal Justice**

Prof. Dr. Alonso Madrigal, Javier.

Facultad de Derecho. Universidad Pontificia Comillas.

Madrid. Spain.

Constitutional rules relative to fiscal justice and equitable allocation of public resources are the axes on which financial institutions should be based on. Basic Income (BI) is a public expenditure and has to agree with these rules to be constitutionally valid. Moreover, the establishment of BI is justified politically only if it contributes to the attainment of fiscal justice.

BI, like any other legal institution, has to be object of a trial for constitutional legitimacy according to the principles of fiscal justice found in a country's *Magna Carta*. Taxation must be distributed according to economic capacity and the principle of progressive taxation. However, the Public Treasury should not only collect taxes in a fair way to satisfy the public financial needs, but it must also distribute public expenditure in a fair way as well. It is not coherent to separate these two roles.

Public spending can only make an equal allocation of public resources if it follows the same principles that condition effectiveness of justice in taxation system: prohibition of privileges, economic capacity, equality, progressive taxation, and the prohibition of confiscatory taxation. If the regulations of BI do not respect these principles, it would be unconstitutional, in the same way that a tax could be declared unconstitutional if it doesn't respect those principles as well. As long as BI contributes to making those principles effective, it can be described as "equitable" or "fair" from a constitutional point of view. This would determine if it can be politically viable.

### **BI and principle of prohibition of privileges.**

Principle of prohibition of privileges implicit in the term "All" of the Art.31.1 of the Spanish Constitution (SC), constitutes a facet of the equality principle on its subjective side, closely tied to the principles of economic capacity and legality. This

principle is understood as a prohibition to establish subjective tributary exonerations for an individual or group, unless Constitution itself justifies them.

As it has been declared by the Spanish Constitutional Court (SCC) in its STC 96/2002 (FJ 7°):

*“The expression “all” includes de duty of any physical or legal person, national or foreign, resident or nonresident people, who by their economic relations with or from our territory (...) shows economic capacity, which also makes them, in principle, holders of the obligation to contribute according to the tributary system. Means, after all, the equality of all before a constitutional exigency - the duty to contribute or solidarity in the rise of the obligations owned to government- that implies, on one hand, a direct exigency to the legislator, forced to look for the wealth wherever it is (SSTC 27/1981, of 20 of July, FJ 4; 150/1990, of 4 of October, FJ 9; 221/1992, of 11 of December, FJ 4; and 233/1999, of 16 of December, FJ 14), and, on the other hand, the prohibition in the concession of discriminatory tributary privileges, that is to say, of unfair tributary benefits from the constitutional point of view, when constituting a bankruptcy of generic duty to contribute to the support of the State’s expenses”.*

The relation between prohibition of privileges principle and principle of economic capacity is very close, as far as this one must be concretion or measurement in fiscal field of equality principle, of whose subjective and negative facet the prohibition of privileges principle should be expression. In the tributary field, this principle does not imply that absolutely everyone must contribute to support public expenses; it does not prescribe that no citizen is exonerated of taxation. The prohibition of privileges in taxation demands that everyone who shows a certain manifestation of economic capacity must be taxed, without exemptions or advantages established “*intuitu personae*”; for subjective reasons that do not respond to an objective and reasonable justification.

So it is said by the SCC (STC 96/2002 (FJ 7):

*“the exemption or tax advantage - privilege for its holder- as a bankruptcy of the prohibition of privileges principle that rules the taxation (art. 31,1 EC), as far as neutralizes the tax duty born from the accomplishment of a fact that shows economic capacity, will only be constitutionally valid when it follows a general interest purpose*

*that justifies it (for example, by reasons of economic or social policy, to take care of the minimum of subsistence, for reasons of tax technique, etc.), being, on the contrary, prohibited, because we must not forget that the principles of equality and prohibition of privileges are damaged when “criterion of distribution of tax burden lacks of any reasonable justification and, therefore, is not compatible with a fair tax system which our Constitution consecrates in art. 31”.*

Transferring this principle to public expenditure side demands to examine if BI would give a suitable fulfillment to it, keeping in mind that its payment is completely independent from economic capacity. The BI would be close to what in the tax field would be a poll tax. The analogy, however, can lead us to error. The poll tax does not agree with the principle of economic capacity, since it also burdens those who lack it; but the BI, which is expenditure, does not harm the negative limit constituted by this principle. Certainly, the principle of prohibition of privileges, applied to justice in the public expenditure - in the same way on which is interpreted in the tax side- does not demand that absolutely all citizens are addressees of a certain benefit independently of their economic capacity. It would not be in opposition to this principle that its payment, as it happens most of to the social benefits, should be conditioned to be below certain thresholds of income or patrimony. But it does not have to, in order to respect this principle.

Many public expenses, even by nature, are addressed to all citizens or residents, independently from their economic capacity, are what we call “pure public goods”. In an extreme example, from public expenditure dedicated to CO2 emissions’ reduction no resident in the planet can be excluded. Many others are addressed to the provision of goods that, not being a pure public good, involve important positive externalities and also benefit more subjects than the direct addressees, independently from their economic capacity; something that can be said of most of public expenses in health, education, justice, infrastructures, etc. There is not, therefore, any problem from the perspective of the prohibition of privileges principle, if those who hold a certain level of economic capacity are not excluded from a determined public expenditure. What this principle forbids is that public expenditure favors certain subjects, using a criterion of distribution that lacks of any reasonable justification and, therefore, is not compatible with justice.

BI would connect, in fact, with the original and ultimate sense of constitutional principle of prohibition of privilege, giving a clear expression to exigencies of “abstraction and impersonality”, without taking account of subjects; notes that the Supreme Court has considered the principle owns. It could almost be said that it translates literally, in public expenditure’s side; the exigency for contributions to be distributed “without exception or privilege” contained in art.339 of the Cadiz Constitution of 1812, first formulation in Spanish constitutional history of this principle. BI would not only exemption nor privilege to any of its collectors, but would also contribute to correct or to attenuate situations that constitute a kind of inverse privilege, a discrimination; making possible that those who are excluded from the benefit of certain basic goods, due to lack of income enough for it, can reach them.

### **Citizenship and prohibition of privilege.**

Articles 1, 2,1, 3 and 11 of Law’s Proposals of Basic Income, of Parliamentary Group of Esquerra Republicana (ERC) and of Creation of Citizenship’s Basic Income, of Parliamentary Group of Izquierda Unida, Iniciativa per Catalunya Verds, settled down that addressees of BI would be “every full citizen who credits his habitual residence in the State’s territory”. Therefore, the right to their perception is conditioned to the double filter of nationality and residence, constituting “the loss of the full citizenship” the only cause of its anticipated extinction.

Perception of BI is conditioned on a different way to which the prohibition of privilege principle implies in the tax field: it is evident that nationality is not a condition for tax payment. In SCC’s jurisprudence the term “All” of art.31 of the EC is understood as comprehensive “of any physical or legal person, national or foreign, resident or nonresident people, who by their economic relations with or from our territory shows manifestations of economic capacity”; it seems reasonable to defend that the prohibition of privilege, from public expenditure side, also would have to be understood in the same way.

On the other hand, if BI should be articulated with an income tax that uses criterion of residence and not the nationality one to assign the tax burden; excluding from its perception those who, being residents, are not citizens, this would have a distorting effect on a possible configuration of the Income tax that should have the BI as a guarantee of the vital or existential minimum, and would force a double regulation of

the protection of this minimum in the income tax, for citizens and for non citizens, as far as these were excluded from the perception of BI.

### **BI and economic capacity principle.**

Principle of economic capacity was already formulated in the first constitutional texts as a material principle of taxation's justice. In fact, it has been always present in Spanish legal ordering, from promulgation of the Carta Otorgada de Bayona of 1808 to our present Constitution. This principle supposed a rupture with Ancienne Regime's system of privileges, in close connection with prohibition of privilege principle. Everyone would have to contribute to effective support of general expenses based only on his economic capacity, declared through his income, or his patrimony or consumption or expenditure made. In different terms throughout the time, economic capacity, taxpaying capacity (used by the LGT of 1963 in its definition of tax) or payment capacity, but always making reference to necessity to contribute to support public expenses in agreement with capacity showed by contributors.

On states like the Spanish, constituted as social and democratic, based on the rule of law, and that have equality in a material sense as one of its superior values, this principle has even greater relevance. Therefore, although it is true that doctrine and jurisprudence of some European countries understand that would directly derive from equality principle, Spanish Constituent preferred to include it in art. 31.1. of EC. SCC affirms that economic capacity principle, like the rest contained in art. 31,1 EC, constitutes an "inspiring criterion of tax system" (STC 19/1987, of 17 of February, Legal Foundation 3º), an structuring principle of this system (STC 182/1997, of 28 of October, Legal Foundation 6º). Some authors even affirm that the rest of constitutional principles or rules would not be more than derivations of fundamental principle of contribution to the support of public expenses according to economic capacity.

The principle of economic capacity is, in our constitutional regulation, taxation's foundation. A manifestation of economic capacity is an indispensable requirement to have the condition of contributor. The SCC in Sentence 233/1999 of date 16 of December has declared it, assuring that "economic capacity, in order to contribute to public expenses, means the incorporation of a logic exigency that force to look for the wealth there where the wealth is". The economic capacity acts like a limit for the

legislator in the tax configuration. The legislator cannot establish taxes based on circumstances that do not demonstrate economic capacity at all. As the SCC declares:

*“this constitutional reception of the obligation to contribute to the public expenses’ support according to each contributor’s economic capacity forms a mandate that entails not only citizens but also public powers (Legal Foundation 3° of STC 76/1990, of 26 of April;)... since, if they are forced to contribute in agreement with his economic capacity public expenses’ support, the public powers are forced to demand that contribution to every contributor whose situation shows an economic capacity able to be burden by taxation”.*

Constituent does not specify economic capacity signs that legislator must take into account and leaves him the task of building tax system giving a greater or smaller weight to each one of these signs. However, legislator will better fulfill the mandate of EC art.31 insofar the weight of the direct taxation, on income and patrimony is superior to the one of indirect taxation, on consumption and trade, since first it is based on more perfected signs of economic capacity.

Economic capacity constitutes a limit for the legislator:

*“tributary benefit cannot be made depend on situations that are not signs of economic capacity (STC 194/2000, on 19 of July, Legal Foundation 4°)... and although we have indicated that “it is enough that this economic capacity exists, like real or potential wealth or income in the majority of events contemplated by the legislator” so that constitutional principle of economic capacity is out of danger (SSTC 37/1987, of 26 of March, Legal Foundation 13°, and 14/1998, of 22 of January, Legal Foundation 11° b), among others), we have specified also that it is not possible to avoid that “the freedom of configuration of the legislator will, in any case, have to respect the limits that derive from this constitutional principle, that would break in those cases in which the taxed economic capacity is not only potential but nonexistent or fictitious”.*

*“economic capacity principle established in art. 31,1 EC prevents that legislator settles down tributes – whatever may be their position in tax system, or their real or personal nature, and even their fiscal or extrafiscal aim (by all, SSTC 37/1987, of 26 of March, F.J. 13°, and 194/2000, of 19 of July, F.J. 8°) - whose taxable matter or object do not constitute sign of real or potential wealth, this is to say, does not authorize him to*

*burden virtual or fictitious wealth and, consequently, merely inexpressive of economic capacity". (STC 193/2004, of 4 of November, F.J. 5º)".*

*"although the aim is constitutionally legitimate - fight against fiscal fraud- the tributary benefit cannot be made depend on situations that are not signs of economic capacity because, although very broad, the freedom of the legislator at the time of forming the tributes, must, "in any case, respect the limits that derive from this constitutional principle, that would break in those cases in which the economic capacity taxed by the tribute is not only potential but nonexistent or fictitious".*

Transferring the reasoning of the SCC to public expenditure side; public expenses, by their own nature, cannot harm the prohibition "to burden merely virtual or fictitious wealth", cannot break this principle as a limit that prohibits taxation of nonexistent or fictitious economic capacity. It is not possible to understand the economic capacity principle, as a principle of justice in the equitable allocation of the public resources, like an exigency for public expenditure to go exclusively to those who absolutely lacks this capacity or do not have economic capacity enough; like a prohibition for public expenses to be employed on those who have greater economic capacity. This, on one hand, is impossible as we have indicated when examining prohibition of privilege principle, in relation to certain public expenses in goods with positive externalities and, on the other hand, it is an aspiration that has more to do with progressivity principle than with the economic capacity principle. Considering it, BI cannot harm the principle of economic capacity as a limit.

But economic capacity principle is also an exigency directed to legislator, a mandate that forces him "to demand that contribution to all the contributors whose situation shows economic capacity able to be taxed". This exigency, translated to public expenditure side, would force to make addressees of this public expense to everyone who lacks economic capacity, and makes necessary his attenuation or correction with budgetary measures. Thus understood, it is evident that BI's absolute universality satisfies that exigency.

Finally, it is clear that, in the same way that economic capacity principle is more effective insofar burden is graduated on it, either on proportional or on a progressive way, also in public expenditure side that greater effectiveness would be obtained making depend the amount of benefit on economic capacity. BI would be, certainly,

more respectful with the economic capacity principle if it were graduated according to the economic capacity, instead of being a lump sum independent from it. However, it is necessary to emphasize it, that would not vitiate of unconstitutionality BI. Lump-sum taxes or taxes whose amount is not determined based on economic capacity that contributor declares, are nor unconstitutional as long as they respect the limit of not depending on no indicative facts of economic capacity, whatever the criterion used for their quantification. Furthermore, if BI is subject to taxation by a progressive income tax, the amount of BI available after taxation would vary according to the greater or smaller contributor's income his greater or smaller economic capacity, and the reproach that could be done to BI from this perspective would be attenuated remarkably.

The economic capacity principle can conflict with non fiscal tax aims. Legislator, sometimes, designs taxes or introduces fiscal benefits to demotivate or to encourage certain activities, not to burden subjects according to their economic capacity. However, still in these cases, it is necessary that taxes respond to a manifestation of economic capacity; additionally, non fiscal aims must be protected by the system of values of the Spanish Constitution. As it has been indicated by the CC in its STC 194/2000, of 19 of July F.J. 8º:

*“... is constitutionally permissible that the State, and the Regions in the scope of their competences, establish taxes that, without unknowing or contradicting economic capacity or payment principle, respond mainly to economic or social criteria oriented to the fulfillment of aims or to the satisfaction of public interests that Constitution promotes or guarantees. The existence of economic capacity as a real or potential wealth or income in the majority of cases contemplated by the legislator when creating the tax is enough to keep that constitutional principle out of danger”.*

BI, without unknown or contradict the principle of economic capacity or payment, should respond mainly to economic or social criteria oriented to the fulfillment of aims or to the satisfaction of public interests that Constitution promotes or guarantees, and would be, therefore, in view of this jurisprudence, clearly permissible from the constitutional perspective, and the fact that it does not graduate according to economic capacity could be therefore justified.

### **BI and equality**

Equality principle specifically appears referred to the tributary scope in the Art.31.1 of EC like a principle that has to inspire the just tax system through which everyone must contribute to support public expenses. It has been defined as the obligation for public powers to burden equal to subjects which are in the same situation, horizontal fairness, and unequally to which are in different situations, vertical fairness. Defined as a superior value of the Spanish ordering, when projecting on the tributary scope, would constitute the center around which gravitate the remaining principles of the Art.31.1 of the EC. Prohibition of privilege principle is the subjective and negative side of the equality principle, prohibition of privileges or inequalities of subjective character; economic capacity is the measurement by which equality principle has to be applied on tributary scope, burdening equally those who have the same economic capacity and unequally those who have different economic capacity. The progressivity principle would be intensity whereupon the EC demands that those that have an unequal economic capacity are treated unequally.

So intimately bound to tax equality are the remaining principles of Art.31 EC that a sector of doctrine denies it to have its own substance, considering it simply like the mere sum of the rest of them. Potentiality of reference of article 31,1 EC to equality would be merely dialectic, because it would be easier to defend a certain position from this principle than from the economic capacity one.

About the scope of the equality before the Law principle, the CC has elaborated in numerous Sentences a doctrine whose essential characteristics summarize as it follows in STC 10/2005, of 20 of January, FJ 5º: “a) every inequality of treatment by the Law does not suppose an infraction of the article 14 EC, this infraction is only produced by the inequality that introduces a difference between situations that can be considered equal and that lacks an objective and reasonable justification; b) the equality principle demands that to equal cases or facts equal legal consequences are applied, considering that two cases are equal when the use or introduction of differentiating elements is arbitrary or lacks rational foundation; c) the equality principle does not prohibit the legislator any inequality of treatment, but only those inequalities that are contrived or unjustified, not founded on objective and sufficiently reasonable criteria or in agreement with criteria or generally accepted judgments of value; and d) finally, so that the differentiation is constitutionally allowed, is not enough that the aim that is persecuted by it is constitutional, but is also indispensable that the legal consequences

derived from such distinction are adapted and proportioned to this aim, so that the relation between the adopted measurement, the result and the aim tried by the legislator surpasses a constitutional judgment of proportionality, avoiding specially onerous or excessive results (by all, SSTC 3/1983, of 25 of January, FJ 3, and 193/2004, of 4 of November, FJ 3)”.

If we look at this doctrine, it seems clear that the BI does not violate equality principle, as it is understood by SCC, at all. BI does not introduce any differences between their collectors. If non nationals or nonresident were excluded, this differentiation with respect to nationals residents would be made between situations that cannot be considered equal; the differentiating element between them would not be arbitrary or devoid of foundation and would count on an objective justification, based on objective criteria, no skillful, but reasonable, in agreement with generally accepted criteria or value’s judgments. It would be possible to affirm the same about the eventual determination of a different amount for the minor ones. Naturally, differences in perception of BI, to be constitutionally allowed, should pass a proportionality constitutional judgment between aims persecuted with them and legal consequences, to avoid specially onerous or excessive results.

As the SCC affirms:

*“equality has to be evaluated in each case considering legal regime of the scope of relations over which it projects, and on tax matter Constitution itself has specified and modulated the reach of art. 14 in a rule, art. 31.1, whose determinations must be considered here, because equality before tax law is inseparable from prohibition of privileges, economic capacity, justice and progressivity equally enunciated in art. 31,1 EC (SSTC 27/1981, of 20 of July, FJ 4, and 193/2004, of 4 of November, FJ 3, by all)”.*

Therefore, BI’s valuation to the light of equality principle, has to be made taking into account the scope of relations over which this equality projects and considering that EC specifies and modulates its reach in art.31. In the same way that equality before the tax law, equality before the law relative to public expenditure is inseparable from the rest of material principles of financial justice: prohibition of privilege, economic capacity and progressivity. As long as BI does not contradict these principles can be considered respectful with equality.

Talking about equality principle in tax scope, the SCC has affirmed that:

*“... Although the respect to the principle shaped in art. 31,1 EC does not demand that legislator must take in consideration each one from the possible conducts that tax payers can carry out to obtain their yields, in the scope of their patrimonial autonomy (in similar sense, STC 214/1994, of 14 of July, FJ 6), is not less certain that from that principle can be deduced that Law must necessarily arbitrate opportune means or the suitable techniques which allow to reflect the totality of yields obtained by each tax payer in the tax base of the exercise, either is regular, or has irregular nature. In other terms, the mentioned principle does not demand that legislator has to give an egalitarian treatment or not to the yields of different nature obtained by a contributor, or to settle down or not specific treatments based on the diverse behaviors or guidelines of conduct followed by him, from which could derive different tributary consequences”.*

With it, the SCC excludes the possibility of understand damaged equality principle by non differentiation, rejecting to demand tributary differences of treatment between unequal facts. Transferring this jurisprudential doctrine to public expenditure scope would have special relevance in relation to BI, since the immediate reproach that generates; generally, it would be against equality principle not to treat in an equal way those who are not equal. If equality principle shaped in the Art.31 does not demand that public expenditure grant a differentiated treatment to their addressees, specific treatments with different consequences according to their income, no reproach could be made to BI from this point of view.

### **BI and progressivity.**

Article 31 EC demands that citizens' contribution to public expenses is made through a just tax system, inspired by the principles of equality and progressivity. A tax or a tax system are progressive when to a difference of economic capacity between two tax payers corresponds a proportionally greater difference on their taxation; or, in other words, when the proportion that represents tax burden on the economic capacity showed, grows as capacity does.

Progressivity is closely connected with equality value, and therefore with arts. 9.2:

*“2. It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.”*

and 40 of the EC:

“The public authorities shall promote favorable conditions for social and economic progress and for a more equitable distribution of personal and regional income within the framework of a policy of economic stability. They shall devote special attention to carrying out a policy directed towards full employment.”

A “more equitable distribution of personal and regional income”, cannot be obtained exclusively by a progressive tax system, but in conjunction with public expenditure policies which have the same character. Really, by means of a public expenditure that makes a “equitable allocation of public resources”, in the way we are interpreting art.31.2 EC. It is not necessary, I believe, to emphasize the roll that, from the promotional equality point of view, BI could carry and, based on it, the favorable judgment that deserves from the foundation of progressivity itself.

The relation between progressivity and equality has been emphasized by the SCC:

“that is why - because equality here required is intimately connected to economic capacity concept and with progressivity principle- it cannot be simply understood like the article 14 EC: certain qualitative inequality is indispensable to fulfill the principle. Precisely the one that is carried out by tax system global progressivity that ultimate aims income redistribution.”

But brushing aside the fact that a progressive tax system and public expenditure can be used as instruments for income redistribution and to obtain a greater degree of material equality; foundation of constitutional mandate that progressivity inspires tributary system and public expenses policies, is possible to base it in principle of formal equality or equality before the law. The Theory of the Decreasing Marginal Utility would justify, with the aim of obtaining an authentically equal treatment to those who show different economic capacity, a greater burden for the units of economic

capacity that provide minor utility to their holder, because he has a greater number of them; causing the sacrifice caused by tax to be minor than the one caused if the same units were demanded to another subject of smaller economic capacity, to which they provide a greater utility. Although real utility from income is impossible to measure exactly, neither individually nor socially, it is rational to think that the utility decreases as income increases. The progressive tax tariff is a legislator's attempt to translate the social utility function, taking care of the redistributive foundation of the progressivity.

From this point of view, BI would deserve a more favorable judgment. It would seem, on a first approach, that we could only describe as regressive a lump sum payment like BI, independent from the addressee's economic capacity. However, since the proportion of this sum to income decreases as this grows, if we think about the utility that BI supposes for the one that receives it, it is evident that is much greater for those who lack all income or have an income below the vital minimum of subsistence, than the utility obtained for those that have higher income and, therefore, have their elementary necessities covered.

However, regarding to progressivity principle, we must keep in mind that the exigency contained in art.31 of the EC is understood by constitutional jurisprudence like a mere programmatic principle, just a recommendation to the legislator that cannot be demanded to him legally, judging the dispositions that contradict it. With it, actually, its potentiality would be equivalent to the one of a mere governing principle of the social and economic policy. The reason of this devaluation of the progressivity principle is the impossibility of building a tax system exclusively with progressive taxes. In fiscal systems, together with personal imposition on income and patrimony, we have also indirect taxes, on the consumption or the traffic of goods. Indirect taxation burdens partial manifestations of economic capacity, and that prevents to burden on a progressive way.

This impossibility leads to SCC to understand that the progressivity exigency has to do with the setting of tax system as a whole, and not with each one of taxes of it. The SCC should admit, based on it, elimination of a progressive tax, diminution of progressivity of other, or increase of relative weight in system of proportional or merely regressive taxes. Final result can be that tax system turns to be globally regressive – and we do not have really an index that can exactly measures progressivity or regressivity of

a tax system as a whole- but following the SCC doctrine, each one of the legislative measures that produced that result could not be declared unconstitutional.

In the same way, the inevitable existence of public expenses of regressive character, prevents to declare unconstitutional due to its regressive character a determined public expenditure measure, and we should be forced to interpret that would be the whole set of public expenses that would have to fulfill the exigencies derived from the progressivity principle. This doctrine would allow elimination of of certain public expenses of progressive character, diminution of progressivity of others, or increase of the relative weight in the set of public expenses of proportional or regressive expenses, even if, in the end, the set of the public expenses turns out to be globally regressive.

### **BI progressivity and its taxation**

To establish an exemption for BI in income tax means, in my opinion, to confuse two different scopes in a necessary connection between them, would reduce income tax progressivity and will also deprive BI of progressivity that can easily acquire in combination with progressive taxation. To not tax BI mixes in a wrong way protection of vital or existential minimum in Income tax, the amount that must be exonerated in order not to harm the principle of economic capacity and not to become confiscatory, with the taxation of BI itself. The amount of personal minimum can be adjusted with the amount of BI, but that does not mean that BI should be free of taxation. The benefits for unemployment, for instance, are included between income taxed by the Spanish Income tax as salaries, and they are not included between incomes free of taxation. If its amount is inferior to the one of personal and familiar minimum of the tax payer and the tax payer does not perceive other income, they will not be taxed. On the contrary, if the amount surpasses this minimum, the excess will be taxed, or if the contributor perceives additional income, the excess of the set of the incomes of the contributor on the personal or familiar minimum will be taxed. Otherwise, to the amount of personal and familiar minimum it would be added, actually, the amount of benefit by unemployment. On the same way, BI does not have to be declared exempted on the Income tax, must be taxed with the rest of the contributor's income and only be exonerated as long as it is under the personal or familiar minimum protected by tax.

To replace personal or familiar minimum by exemption of BI would reduce tax progressivity. Exemption, or the no subjection, supposes a tax saving that grows with the marginal rate applicable to each tax payer, and therefore a loss of progressivity: the greater the income, the greater the tax saving from the exemption. It would be enough to establish a deduction in the quota equivalent to the turnout of multiplying BI's amount by effective tax rate applicable to it, as it is made for the personal and familiar minimum in Spanish income tax law. The effect that would have tax on BI, if it is understood like expression of the vital or existential minimum, would be neutralized in the same way for all the taxpayers, but would not affect taxation of remaining income that could obtain tax payer, avoiding the progressivity loss caused by an exemption.

Finally, to do not tax BI by income tax, would suppose to deprive BI of progressivity. As any other income, if its amount would be equal or inferior to the personal and familiar minimum, and is the only income perceived, it would not be taxed. But for those who obtain income, BI included, over the amount of the personal or familiar minimum that is exonerated, will pay for it, according with the progressive tariff.

If BI is taxed, we could affirm, - like regarding any other income taxed - that it is taxed to the marginal rate of the scale applicable to each tax payer. From this point of view, BI after taxation would decrease with income; its net amount would be graduated in a progressive way, according to tax payer's economic capacity.

However, it is possible to regard BI taxation from another perspective, as if it were the tax payer's only income or as if it were his first income taxed. In that case it could be said that is not taxed; as long as we considered it included in the amount of personal minimum that is not taxed; but it would cause that the remaining income of the contributors should fall into the progressive tariff; increasing the average rate according to which the totality of their income is taxed (BI included). In that case too, we could consider that net amount of the BI would be graduated in a progressive way according to tax payer's economic capacity.

Finally, it is possible to think on a different way to articulate income tax and BI, this could be suppressing personal minimum on income tax and substituting it by BI. The effect on taxation would be the same obtained by the deduction in quote correspondent to personal minimum, it would only demand to add to the amount

considered suitable for BI a quantity that compensates the suppression of this personal minimum and the corresponding quota deduction. In the same way that happens in the previous cases, those who obtain income in addition to BI, will see increased the average rate applicable to the totality of their income (BI included), diminishing the amount of net quantity of BI as taxed economic capacity grows.

From the political feasibility point of view this coordination formula could perhaps be more convenient, because links its creation to income tax personal minimum, very well known by tax payers.

### **BI and indirect taxation's progressivity**

The possibility of combination of BI with Value-Added Tax, would be justified in the necessity of financing it, at least partially, with consumption taxation, and also in the potentiality that BI could have in order to improve indirect taxation in terms of constitutional tax justice. The combination between tax and receipt has a precedent in Spanish income tax maternity deduction. Personal and familiar minimum performs a similar function to the one that could be carried out by BI in combination with VAT. It cannot be justified, in terms of vertical and horizontal justice, the exclusion from fiscal policies of family protection of those who, due to their low income do not have to pay income tax, and it cannot be neither justified that VAT taxes families in the same way, whatever their composition or income may be.

I believe that a combination between VAT and BI could constitute a viable alternative to a personal consumption tax, a personal and progressive tax on the expenditure that would personalize tax considering the different tax payer's economic capacity and to make it more progressive, without replacing VAT by a personal tax on consumption whose great administrative disadvantages have caused that have never been implanted successfully and to be considered more "an intellectual curiosity than a realistic political option". Tax on personal consumption, would not serve suitably as an alternative to personal income taxation (somehow an income taxation that does not burden saving), precisely because does not tax saving, with the aim of better achieving the justice principles established in EC.

A VAT made more personal and progressive by its combination with BI, and an income tax with the same character could much better serve constitutional exigencies of

justice. Otherwise, due to the increasing convergence between European Union state members in the scope of indirect taxation will cause that the VAT, as it is now, ballast even more our fiscal system in an opposite direction from the one demanded by constitutional mandate.

### **BI and prohibition of confiscatory nature.**

Prohibition of confiscatory nature constitutes a limit to taxation whose foundation is in constitutional recognition of private property and inheritance rights and the rule of contribution according to economic capacity itself. Some authors consider this limit superfluous and indicate that a confiscatory tax would no longer be a tribute to transform itself into another institution, unconstitutional to contravene propriety right.

The Spanish CC has said about this limit:

*“since this constitutional limit is established in reference to taxation’s result, because what it is prohibited is not seizing, but exactly that taxation had confiscatory nature, it is evident that the tax system would have this effect if, by application of diverse tax figures, tax payer were deprive from his income and property, what would, in addition, disown, by the indirect tax route, the guarantee anticipated in article 33.1 of the Constitution...”* STC 150/1999, of 4 of October.

In this sentence the prohibition seems to be understood as referred to tax system and taxation’s result. It would be unconstitutional a tax of confiscatory nature as much as a combination of taxes, therefore, to judge tax application it would be necessary to compare its total quota with the economic capacity taxed, and not only the marginal rates applicable only to last portions of it.

This principle does not only constitute a limit to taxation’s progressivity, but also to its regressivity. If the fiscal system does not respect the vital, existential or subsistence’s minimum, taxing those who are below a minimum level of economic capacity, it will have confiscatory nature. From this perspective, it is reprehensible that indirect taxation burdens those who lack a minimum income to face their more elementary necessities. A suitable public expending policy that guarantees a minimum income level to cover the individual or familiar elementary necessities would serve to resist effectively this confiscatory effect of indirect imposition. BI could play a fundamental role in order to avoid confiscatory nature of indirect taxation.

As I said in a previous work, the joint between VAT and BI would allow compensating for the VAT taxation to those tax payers who are below a certain consumption level, to which BI would serve to subsidize an elementary level of consumption, and to obtain effective rates that increase with taxed economic capacity. The mentioned effects on the fairness are greater when considering the effect on families according to their composition, and collaborate in the correction of the denominated VAT's "depravity". Adjustment to tax payer's economic capacity obtained through combination between VAT and BI would radically improve the roughly imperfect present form of actual VAT's combination of general rate with reduced and super-reduced rates and exemptions of social character and would allow to give fulfillment to constitutional exigency of protection of vital or existential minimum, consolidated in the German constitutional jurisprudence and merely outlined in Spanish, an exigency from which is possible to do very serious reproaches to present VAT.