The Historical Principle of Consent to Tax is The Basis of The Sovereign State Legitimacy

Dr. Messaoud Saoudi
Associate Professor of Public Law
Faculty of Law, Jean Moulin Lyon 3 University,
Lyon, France

Abstract

For a long time, the royal power attributed the fiscal competence to levy the tax without the consent of the subjects of the Kingdom: thus under the French ancient Régime, from 1640 to 1789, the exclusive principle of royal consent to raise tax was a slightly different situation in the British case. The text then often invoked the Great Charter of 1215 (Magna Carta) where King John the Landless agrees to consult the representatives of his subjects before any new imposition. The French DDHC of 1789, in turn, seems to mark a certain break by establishing the non-exclusive principle of royal consent to tax. Since the 18th century, tax as a sovereign right of the People / Nation has thus replaced tax as the sovereign right of the King / Queen. This double material (revenue and expenditure) and institutional (Parliament and Government) authorization takes on an annual character and will be carried out in legislative form (budget law to finance law). This is a collective consent (nation) and not individual (Art. 14 of the DDHC). To do this, this sovereign right seeks a balance between consent to tax (legitimacy) and consent to tax (legality).

The historical foundations of tax consent reveal the need to reconcile the legitimate state and the legal state, consent to the tax which is at the source of the sovereign right of the State to levy the tax. Is not the current state crisis linked to the unstable balance between tax legitimacy and legality? The theories of sovereignty and taxation shed light on the relationship between the rule of law and citizen-taxpayers. They recall that a democratic society draws its political foundations from the historical principle of consent to tax, thus giving rise to tax law which establishes the legitimacy and monopoly of the sovereign fiscal power of the State. The health crisis caused by the Covid-19 pandemic has revealed the financial and economic fragility of States. Their sovereign fiscal power to raise taxes is limited in times of major social crisis. The necessary balance between legitimacy and legality of taxation is the basis of the existence and continuity of the rule of law.

Keywords: tax legitimacy, tax legality, financial executive, legislative authorities, Religious basis of tax.

Introduction

The historical principle of consent to tax, acquired as a result of turbulent constitutional history (Great British Charter of 1215 and French Declaration of 1789), is the basis of our political institutions with democratic and / or theocratic legitimacy. This legitimacy takes the legal route: tax law comes to legitimize the state power to levy taxes.This is why the principle of legality ("no tax without law") dominates in tax matters.

The tax should apply to citizens who have consented by designating elected representatives to Parliament, the body representing citizen-taxpayers. It is the meaning of the expression no taxation without representation (no taxation without representation)(1) launched by the American colonists with regard to the British Crown triggering the American Revolution which will lead to the Declaration of Independence of the United States of America in 1776.

The modern tax certainly covers expenses linked to missions of general interest (education, health, transport, industry, security, environment, etc.). Can religious activity be qualified as an activity of general interest? The question then arises of the tax financing of religious communities established in certain states, particularly in Europe, and in particular in France, a country marked by the principle of separation of Church and State. When analyzing national constitutions, the democratic legitimacy of taxes thus includes a religious dimension through the granting of direct public funding (taxation of religions) or indirect (tax expenditures).

Modern tax law seeks a balance between tax consent (legitimacy) and tax consent (legality).This tension is found in Muslim countries wishing to introduce a tax law of philosophical inspiration different from Islamic philosophy where ethical standards and legal standards are intimately linked.The sacred sources of Muslim tax law, where ethics hold a preponderant place, overlap with the general principles established by positive European law, and in particular French law, formalized by the Declaration of 1789.We are witnessing a kind of reciprocal legal acculturation.The colonial history of Muslim countries reinforces this legal acculturation.

The health crisis caused by the Covid 19 pandemic questions the principle of consent to / from tax by an ever-increasing need for resources on the part of the sovereign State to fight against the economic and social consequences suffered by companies and households weakened by the scale and duration of such a crisis.

(1) Ch. Monjou, «Question fiscale et révolution : l'exemple américain» (Tax question and revolution: the American example), *Regards croisés sur l'économie*, 2007/1, n°1, p.54.

The fiscal sovereignty of the State in the sense of its legitimate and therefore legal capacity to levy taxes then becomes a significant issue, especially in times of major crisis. The first step is to return to the foundations of the State's fiscal sovereignty in order to understand the current scope of the State's fiscal sovereignty, particularly since the health crisis of 2020.

I. The Foundations of the Fiscal Sovereignty of the State

The political foundations of the tax extend, with the welfare state, to its economic and social foundations and come to reinforce the religious legitimacy or not of the sovereign fiscal state.

1. Political foundations

Consent to tax within the meaning of parliamentary authorization to collect tax revenue is the foundation of the constitutional principle of tax legality. We know that the historical principle of consent to tax in the sense of individual and collective acceptance of tax, for its part, founded the socio-political principle of tax legitimacy. The latter imposed itself following the political conflict of a financial nature between the executive and legislative powers(2) and, following the latter's victory, gave birth to democratic political regimes which have since been constitutionalized either in parliamentary form (British and French regimes)(3) or presidential (United States of America regime)(4).

1.1 Constitutional basis of tax

The constitutional law of the Asian and Middle Eastern African political regimes seem to be inspired by that of their respective former colonial empire by integrating both the legal dimension (principle of legality) and the sociological dimension of taxation (principle of legitimacy). However, with this particularity that the presidential form specific to these countries of Africa, Asia and the Middle East seems to dominate.

Public financial law is a set of rules which aims to legitimize the parliamentary authorization of expenditure and revenue and their government execution in order to meet needs in the general interest (security, education, health, transport, etc.). Depending on the form of the state, local or regional fiscal power is attributed

(2) N. Delalande, *Les batailles de l'impôt - Consentement et résistances de 1789 à nos jours (*Tax battles. Consent and resistance from 1789 to the present day), Seuil, Paris, 464 p. 225.

(3) E. de Crouy-Chanel, «Le consentement à l'impôt» (Consent to tax), *Pouvoirs*, n°151, 2014, pp. 5-14.

(4) Ch. De la Mardière, «Le rôle de l'impôt dans l'indépendance des Etats-Unis d'Amérique» (The role of taxation in the independence of the United States of America), *Revue européenne et internationale de droit fiscal*, n° 2019/1, pp. 123-128.

to sub-state entities: this is the case in Germany, Spain but not in France. This local and regional fiscal power is often linked to the extensive legal competences attributed to the federated states or to the autonomous communities.

Tax law, understood as the set of rules and procedures relating to taxation of all kinds, thus establishes the monopoly of legitimate fiscal violence of the State. The principle of consent to tax refers to the question of its legitimacy: the fact of making the tax acceptable and bearable for the taxpayer. To do this, the tax system must result from a democratic decision and not infringe the right to property. It was then that the principle of tax consent was asserted through liberal tax law, the main legal source of which remained the law. This right thus has democratic political foundations and pursues certain purposes of general interest of an economic and social nature.

The historical foundations of tax consent reveal the need to reconcile the legitimate state and the legal state, consent to the tax which is at the source of the sovereign right of the State to levy the tax. Is not the current state crisis linked to the unstable balance between tax legitimacy and legality? This issue is of interest to sovereign states with democratic legitimacy (European tax law) and/or theocratic (Muslim tax law).

The theories of sovereignty and taxation shed light on the relationship between the rule of law and citizen-taxpayers.They recall that a democratic society draws its political foundations from the historical principle of consent to tax, thus giving rise to tax law which establishes the legitimacy and monopoly of the sovereign fiscal power of the State. The latter can derive its legitimacy from popular and /or royal sovereignty.

«Tax is a technique of life in society» (Gabriel Ardant) in the sense that the tax puts the citizen-taxpayer in touch with the State, this legal relationship is formalized by the finance law adopted each year by the body representing citizen-taxpayers, namely Parliament. In France as elsewhere, «Parliament is the son of taxation»: the historical principle of consent to tax, acquired following revolutions (Great British Charter of 1215 and French Declaration of 1789), is the foundation of our democratic political institutions.

These religious societies before 1789 in France and in Europe (religion structures the lives of women and men from their birth to their death) gradually evolved into secular societies in the sense that religion no longer structures human life. Thus, since the 18th century, the tax is based on the right of individuals and not that of the powers of the Prince the victory of the legislative (Parliament) over the executive (King or Queen representing God on earth) legitimized by the principle

of consent to tax will be institutionalized through the principle of consent to tax thus giving rise to the constitutional principle of tax legality; moreover the economic character of the tax is affirmed (theory of equivalence in the sense that the tax has an exchange character, it constitutes the counterpart of a service rendered by the State according to A. Smith, Necker or Montesquieu (in his work *The Spirit of Laws*)(5).

1.2 Religious basis of tax

However, some European countries still maintain today a special relationship between taxation and funding of religious communities, a relationship enshrined in their national constitution(6). It is in this that the comparison with the Muslim tax law based essentially on ethical-rational principles (*darura, maslih mursala, anniya assaliha...*) can shed light on the theory of the tax beyond the religious basis or not of our political societies. These cardinal principles of Muslim tax law are found in articles 13 and 14 of the French declaration of 1789 (principle of necessity and equality before public charges).

A major feature of Muslim tax law is the distinction between tax related to worship (the tax on Muslims *zakat*) and other taxes intended to cover the needs of the sovereign state (the property tax *kharaj*, the tax on non-Muslims *jizia,...*). It is in the latter case that the question of the legitimacy and therefore the fiscal sovereignty of the State arises in particular in states with a Muslim population which wish to introduce secular taxes (income tax, corporate tax, value added tax, etc.). The modern State, to maintain its legitimacy with any citizen-taxpayer whatever their religious denomination, must maintain good relations with the religious communities present in its territory. This legal relationship is formalized by the national constitution of the sovereign state.

The French Constitution of October 27, 1946 recalls in its first article that France is an "indivisible, secular, democratic and social Republic"; already under the regime of the Third Republic (1873-1940), the law of December 9, 1905 still in force consecrates the separation of Churches and State by affirming that «the Republic neither recognizes nor subsidizes any religion».

This constitutional principle of secularism, reaffirmed by the Constitution of October 4, 1958, currently in force, leads to the prohibition of all public finan-

(5) F. Saint-Bonnet, «Le constitutionnalisme libéral français en trompe-l'oeil. Actualité de l'autre Montesquieu» (French liberal constitutionalism in trompe-oeil. News from the other Montesquieu), *Droits,* n° 43, 2006/1, pp. 15-32.

(6) Exécutive summary, the Senate working documents comparative legislation series: *Funding of religious communities*, n°LC 93 September 2001, Paris, France, 62 p.

cing of religions, in particular by means of taxes, at least in certain territories of the French Republic(7).

Indeed, this principle does not find to apply in overseas (Guyana, French Polynesia, New Caledonia,) and in Alsace-Moselle. These latter, formerly German territories at the time of the Napoleonic Concordat of 1801 where it still remains in force, is affirmed the official recognition and therefore the public funding of the four cults which are the Catholic, Jewish, Lutheran and Reformed cults.

Thus, their religious executives (ministers of worship) are state officials and also provide religious education courses in public schools corresponding to these four cults. In addition to the fact that this French-style separation regime has a relative and not absolute scope, let us add that the law of December 31, 1959 relating to the relationship between the State and private educational establishments allows these private schools to benefit from public funds on the basis of an association contract with the State.

Note also that the law of 1905 authorizes indirect public funding in favor of school, hospital, prison and military chaplaincies without forgetting the indirect financing through an advantageous tax system of religions known as cult tax(8) (tax reduction on donations and bequests for religious associations).

The conception of French secularism is linked to the history of conflict between the State and religions, a French legal context which contrasts with that of other European countries(9). So much so that in France we speak of "fiscal secularism"(10). It can be illustrated through the examples of Germany, England, Belgium, Denmark, Spain, Italy, the Netherlands and Portugal, countries which have a particular historical link between public powers and religion.

This is revealed in particular through the public funding of religious communities. A general rule emerges in these countries which is the indirect public funding of chaplaincies in closed institutions such as schools, penitentiaries, hospitals and military institutions, like what already exists in France. These European countries

(7) J. Rivero, «La notion juridique de laïcité» (the legal notion of secularism), *Recueil Dalloz*, 1949, p. 137.

(8) F. Bin, «Actualité de la fiscalité cultuelle en droit français: où en est la laïcité fiscale?» (News of religious taxation in French law: where is fiscal secularism?), *Société, Droit & Religion*, n°1, 2011, pp 13-28.

(9) J.-P. Machelon, *Les relations des cultes avec les pouvoirs publics* (*Relations between cults and public authorities)*, La Documentation française, coll. des rapports officiels 2006, Paris, p. 85.

(10) O. Schrameck, «La fin de la laïcité fiscale» (the end of fiscal secularism), *Actualité juridique de droit administratif (AJDA)*, n°4,1988, pp. 267-269.

also provide in their constitutional and / or legislative texts for public aid or subsidies intended for religious instruction and also advantageous fiscal measures generally favorable to these religious communities.

However, the contrast between European countries appears when analyzing direct public funding. In this case, the State contributes directly from its budget and therefore through taxes to the financing of religions with the exception, however, of some of them (England, the Netherlands and Portugal). This distinction between European states does not seem to be linked to the form of the state (unitary state like France, federal state like Germany and Belgium or regional state like Italy or autonomous like Spain). It is more linked to the history of conflict or not between the state and the dominant religion.

Direct financing thus exists in Germany, Belgium, Denmark, Spain and Italy but in different forms for each of these states : either the ministers of religion are remunerated by the State (Belgium), or there is provision for a religious tax supplemented by direct public subsidies (Germany and Denmark), or a share of the income tax imposed on individuals and / or morals is assigned to worship (Spain and Italy).

The legal regime of direct or indirect financing of religious communities is provided for by the national constitution of each of these European countries. Thus article 181-1 of the Belgian Constitution provides that : "the salaries and pensions of ministers of religion are payable by the State; the sums necessary to face it are entered in the budget". The ministers of worship paid by the Belgian State (during their activity and also after retirement) are those of the Catholic, Protestant, Israelite, Anglican, Muslim and Orthodox religions. Belgian local authorities (municipalities and provinces) are subject to the legal obligation to provide these ministers with accommodation or, failing that, compensatory allowances.

In Germany as in Denmark there is a religious tax and a direct payment of public subsidies. The provisions still applicable and contained in the Weimar Constitution of August 11, 1919 relating to the relations between the State and religious societies qualify the latter as "collectives under public law" and as such they have the right to levy tax in within the framework of the laws set by the federated states (Länder).

The latter consequently adopted laws establishing a worship tax, the implementation of which is the responsibility of the religious communities benefiting from this worship tax. Taxable persons are those subject to income tax (IR) and having declared their membership of a cult constituted in the form

of a collectivity under public law. It is estimated in 2000 that the German religious tax represents about 9% of the total amount of IR.

In addition to this religious tax, there are public subsidies for the maintenance of their movable and real estate assets. In Denmark, the religious tax benefits the national Church, namely the Evangelical Lutheran Church. Collected at the level of the communes, this tax represents in 2000 approximately 1.5% of the IR. The ministry of ecclesiastical affairs also pays subsidies to the national Church.

In Spain as in Italy, the taxpayer is free to allocate part of his income to the financing of the cult of his choice. While Spain limits this choice to Catholic worship alone, Italy opens this possibility to any other worship as soon as the religious community concerned has concluded an agreement with the State.

England, the Netherlands and Portugal are three countries characterized by the fact that the state does not directly finance any religion. Thus England, although having the Anglican Church as its official religion, it does not benefit from any direct public funding, it draws its resources from donations and collections as well as from the management and enhancement of its heritage. In the Netherlands, if a 1983 law consecrates the separation of Church and State thus ending the remuneration of ministers of religion, it opens up the possibility of concluding an agreement with the twelve existing religious communities.

It translate financially by the payment of an annual endowment managed by a foundation whose sole purpose is the payment of retirement pensions. So much so that since this 1983 law, the sources of funding for religious communities come mainly from collections and donations from individuals or even businesses. Finally in Portugal, as a senatorial report underlines, "while awaiting the entry into force of the law adopted on April 26, 2001, the Churches do not benefit from any direct public funding, the Catholic Church having for its part a significant real estate assets, which provides it with significant income"(11).

But the international economic crises (since 1929) and European wars (since 1914) call for increased action by the State by means of taxes to meet the needs of their citizens confronted with economic and social difficulties. The economic and social foundations of the tax are then asserted.

2. Economic and social foundations

The economic and social foundations of taxes refer to the concepts of solidarity and social justice. The conception of the tax evolves with the role of the State.

(11) Exécutive summary, the Senate working documents comparative legislation series*, op. cit.*

Thus, from the middle of the 19th century, we saw the emergence of a new role for the state, that of the state as an economic and social actor (welfare state on the British model of the Walfare State). We know that the Muslim tax theory based on the principles of *Istikhlaf* and *Al-amana* calls for tax fairness to promote social justice.

2.1 Welfare State and tax

The crisis of European parliamentarism in the 1930s (culminating in the riot of February 6, 1934, a symbol of anti-parliamentarism, also fueled scandals and politico-financial affairs) then that of the State - Providence since the 1960s, will question the principle of consent to tax (tax legitimacy) by distinguishing it from the principle of tax consent (legality of tax). This distinction seems to arise or even becomes necessary when Parliament is reduced to a chamber for registering financial and fiscal decisions actually taken by the Government.

The French regime of the Fifth Republic instituted by the Constitution of October 4, 1958 is the institutional and political translation of such an evolution. The meaning and scope of the principle of tax consent (legality of tax with the central figure of parliament) is supplemented or even supplanted by that of consent to tax (legitimacy of tax with the central figure of government and its tax administration).

For the authors of the 1958 Constitution, in particular General de Gaulle, a State is only strong if it is legitimate in the sense that the executive, which in reality holds most of the political power, has the support and consent of the people : we understand the frequent use and recourse by the Gaullian Head of State to referendums in times of crisis in the legitimacy of power.

The principle of tax consent thus coexists with the classic principle of tax consent; this coexistence reflects the shift of financial and fiscal power from Parliament to the Head of State and / or the Head of Government.

For example, the North African and Sub-Saharan African constitutions consecrate such a real transfer of power from the legislative to the executive, all the more so as the drafting of these constitutions takes up, by a kind of normative and institutional mimicry, the provisions contained in the French Constitution of 1958 of less for the constitutions of French-speaking Africa.

2.2 Rule of law and tax

The establishment of the State in Africa, Asia and the Middle East follows a rhythm and a logic of its own while being inspired by the model of State of the former European colonial power (French, Portuguese, British...). Howe-

ver, with this precision to remember, namely that the French political regimes (with the Declaration of 1789) and the British (with the Charter of 1215) first asserted the freedoms of the individual before devoting their effort to building a society of social and economic progress: these founding revolutionary texts indeed preceded the revolution of capitalism in the sixteenth century and the industrial revolution of the nineteenth century.

The European cultural context thus favored the emergence of political freedoms before establishing an economic development policy. The African, Asian and Middle Eastern States seem to know at the end of their independence a reverse historical process : developmentalism (economy first, democracy later) then, since 1989 with the fall of communism symbolized by the fall of the Berlin Wall and therefore the triumph of liberalism, institutionalism (project to establish a rule of law) appear to be the two dominant logics, both resulting in a certain failure(12).

So much so that culturalist thought asserts itself by noting that democracy is fundamentally a system specific to a cultural area (the West) and that it would therefore not be transposable outside this area. This approach is contradicted by studies focused on African, Asian or Middle Eastern political thought, in particular of the Muslim tradition, which notably highlight the universalism of the principles of the separation of powers and the presence of the two elements characterizing such a democratic system: the existence of a public space for deliberation (shura in the Koranic and prophetic sense) and the emergence of an informed citizen because he is well trained (Muslim guided by divine knowledge).

The wealth of Africa from which it can benefit is that social relations are regulated by oral tradition (the palaver tree)(13) and a political philosophy, that is to say a conception of man and society. where the thought of unity dominates (we cannot separate the world from below with the world beyond, the human person and the visible and invisible world are one). African, Asian or Middle Eastern anthropology seems different from that of former colonizing countries, but this anthropological factor does not appear at the present time

(12) P.H. Chalvidan, *Droit constitutionnel. Institutions et régimes politiques- Section 2 Ombres et lumières de la démocratisation en Afrique et à Madagascar (Constitutionnal law. Political institutions and regimes. Section 2 Shadows and lights of democratization in Africa and Madagascar)*, Nathan Université, Paris, 1996, pp. 269-286.

(13) A. Ndaw, *La Pensée africaine. Recherches sur les fondements de la pensée négro-africaine (The African Thought. Research on the foundations of Negro-African thought),* Nouvelles éditions africaines, 1983, p. 284.

to be integrated into the construction of States in Africa, Asia and the Middle East, which is incessantly at the same time. search for their legitimacy. Institutional mimicry does indeed seem to persist.

The increased financial needs of the interventionist State lead to a new conception of the tax; we will insist more on its obligatory nature, less on that of free consent; we will focus on its unconditional character and less on the idea of compensation for a service provided. Finally, the twentieth century marked by the affirmation of economic and social rights (Preamble of 1946 to which the current French Constitution of October 4, 1958 refers) now make taxes an instrument of social reform.

The Keynesian approach to public finances and taxation dominated during the period known as the glorious thirties (1945-1975) in Europe and elsewhere in the world marked by the crisis of the international monetary system and the rise in unemployment. According to this approach, in a context of crisis, the State must activate the levers at its disposal fiscal and monetary leverage even if it means going into debt. A mark of sovereignty, the fiscal power is in great demand, making the tax a major instrument of economic and social action.

The tax system then becomes quite complex because it is a question both of satisfying a yield objective (productivity and elasticity of the tax), an economic objective (fiscal interventionism in the form of legislative relief measures, exemptions inducing a tax cost or loss for the State and covered by the complex notion of "tax expenditure") and finally a social objective (the ideal is equality through taxation; in reality we limit ourselves to a simple equality before tax, that is to say an equal distribution of tax taking into account the taxpayer's ability of each taxpayer, natural or legal person).

From the constitutional history of each state, we observe the major role of Parliament as the body representing citizens-taxpayers, the only competent authority to authorize the levying of taxes, then gradually, after multiple institutional upheavals and political revolutions, will acquire the power of authorize the use of the tax i.e. the expenditure. The parliamentary state making the voted tax an instrument of economic and social action.

The pursuit of these sometimes contradictory productivity, economic and social objectives (thus how to reconcile tax yield and derogatory measures of relief see tax abolition?) explains the complexity of the tax matter today codified in the General Tax Code (CGI) and Tax procedures book (LPF) and starting from the legal tax regime, namely its legal foundations. This codification of tax rules legitimizes the power of the State to levy taxes. The latter

appear when examining the extent of the State's fiscal sovereignty.

II. The scope of the fiscal sovereignty of the State

The scope of the fiscal sovereignty of the State appears through the sociological and legal dimension of the consent to tax or tax consent.

1. Sociological significance: consent to tax (legitimacy)

Consent to tax refers to sociological constraint in the sense of the sociologist of law Max Weber. The State having here the legitimate fiscal physical violence. This legitimate state force can draw its source from the will of God (theocratic legitimacy) and / or the will of the people (democratic legitimacy). An authority is legitimate if it is obeyed spontaneously, the permanent recourse to violence to make oneself obeyed is an admission of weakness of this authority and not of its strength.

Tax would be legitimate depending on whether it is fair or unfair in consideration of its capacity to promote or, on the contrary, to hinder real social redistribution. The distribution of tax by the legislator reveals the structure of society and the degree of inequality between social categories. Contesting taxes is often used as a pretext for revolts or even revolutions to demand a profound change in political and administrative institutions when the principle of equality before the law in general and before taxes in particular is put to good use.

Notion more sociological or even psychological than strictly legal, legitimacy forces the parliamentary state to justify the tax on rather complex criteria such as that of fiscal justice or even of social redistribution by the tax. This crisis, which seems to target more the rulers in the broad sense (parliament and government) crosses any democratic regime, it has been observed since November 2018 in France with the so-called "yellow vests" movement. The response to this crisis by each state can take several forms: stepped up fight against fraud, illegal tax evasion, «tax havens», also improving relations between the tax administration and the taxpayer through a new tax compliance or even simplified and transparent tax legislation (constitution objective) understanding and intelligibility of the law.

More generally, the crisis of tax consent, in the sense of the fiscal competence of parliament, often announces the crisis of parliamentarism and therefore of political representativeness : if the fiscal competence lies in law with Parliament, this regalian competence lies in fact with the government which holds in practice, in our current political regimes, the main part of the budgetary power as regards both revenue and expenditure.

So much so that the legal principle of classical legality (tax consent) has been added or even tends to replace the principle of tax legitimacy (tax consent). Parliaments in Africa, Asia and even the Middle East, in particular in certain countries where Muslim law dominates, are not immune to this development marked by crises of representative political institutions.

However, these continents are experiencing a particular difficulty, that of the capacity of the public authorities (parliament, government and state administration) to mobilize tax revenues given the importance of the share taken by the informal economy. The latter leads to a loss of revenue reducing the margin and the financial capacity of States to face the development challenge. All the more so as development aid from donor countries is shrinking in a global context of slowing economic growth and also the increase in inequalities often associated with the foreseen crises due to «global warming».

The ecological transition calls for public funding to match the challenges. But the financial crises of 2007 and health of 2020 weaken sovereign states in their ability to levy taxes in the face of low corporate and household income. The consent to tax in the sense here of its legitimacy in such a context of crisis is then at stake. We understand the importance taken by public borrowing which is according to economists only a deferred tax allowing in the long term to cover the capital and the interest of the loan. The intervention of central banks appears necessary to reduce the cost of government borrowing for the citizen-taxpayer.

Thus, the European Central Bank (ECB), by buying back government debt securities on the secondary market, allows euro zone states to borrow at low or even negative rates. Added to this is the European recovery plan of 750 billion euros covered for the first time by a common debt to face the economic and social consequences of the health crisis.

The own resources of the European budget, in particular for tax purposes, have been established to repay this solidarity loan by 2050. It is recalled that the European budget mainly financed by the national taxpayers of the 27 Member States. The principle of consent to tax is thus beginning to apply at European level.

The fiscal power must be reconciled here with the right of property because all the taxation relates by nature to the goods and people. Reconciling tax law and property law is the goal sought by any rule of law. Besides the difficulty of transposing secular taxes in a Muslim country, absolute property, within the meaning of Muslim tax law, belongs to the Creator, it is to be distinguished

from the relative property of which the creature has only temporary possession. Modern positive law, like Muslim law, shares in common the idea that the legitimacy of the democratic and / or theocratic state has a legal-rational basis. The history of taxation teaches us the need to reconcile legitimacy and legality.

2. Legal significance: tax consent (legality)

Tax consent refers to legal constraint. The force of law replaces the law of force. The legal-rational nature of the tax is thus affirmed. The principle of legality is the basis of most of the rules of tax law. The adage «no tax without law» allows control of the sovereign power of the state to levy taxes.

More precisely, reconciling legality and tax equality makes it possible to establish and strengthen the democratic and / or theocratic legitimacy of a State. Let us add that this consent is annual: annuality of the tax and annuality of the use of the tax, ie of the expenditure. Tax legality, equality and annuality are historically closely linked. As such, the principle of equality before public charges and equality before tax, are a double variation in tax matters of the principle of equality before the law on which democratic constitutions are founded.

Recall that the French Declaration of 1789 sets out principles that echo while opposing the principles that then reigned under the Ancien Régime : equality before the law taken in its two branches equality before tax and equality before public charges against inequality before the law and therefore inequality before tax because the tax system during the Ancien Régime differs or even was non-existent according to the social body to which they belong (Church, Nobility or Third Estate). The tax and its fair distribution or not is the mirror of the structure and evolution of social categories and their balance of power.

The tax law developed by the State aims to legitimize the sovereign power to levy taxes to meet needs of general interest (education, health, transport, environmental protection, etc.). Muslim tax law is strongly in love with ethics where the balance is constantly to be found between reason (fiscal legal norms) and morality (ethical principles from Koranic and prophetic sources).

As much as legality has fairly well defined legal contours (tax is governed by law, that is to say the act of parliament with a general and impersonal scope), legitimacy is an elusive notion with a more political content than strictly legal. Thus a tax may be legal in the sense that the law has established it and therefore is imposed on any taxpayer falling within its scope, but this tax may be

considered illegitimate if it appears in the eyes of the taxpayers who are the recipients of the tax. tax standard as unfair: this can be illustrated by the recent French example of the fuel tax which triggered the social movement known as "yellow vests", some commentators even seeing it as a kind of "tax revolt" turned towards the executive. (head of state and / or head of government) and not the legislature (Parliament). The legitimacy of public authorities is linked to the legitimacy of the taxes they have defined and established.

Once enshrined in texts often of constitutional value, the principle of tax consent falls, for its implementation, to the law, an essential instrument of action by Parliament, the body responsible for monitoring the government and its tax administration. The role of the latter is to establish and collect taxes of all kinds in accordance with the authorization given by Parliament in finance laws and / or ordinary tax laws.

The growing phenomenon of trade globalization and the prodigious development of the digital economy are forcing States to reform their public management and in particular their tax management. The present situation tends to marginalize the financial and fiscal action of the parliament for the benefit of the government and its administration. Such a development appears to demonstrate the change in the status of citizen-taxpayer from a simple legal taxpayer to a client of the tax administration(14). In any case, parliament plays a central role in controlling the financial administration submitted to the government and responsible for implementing finance and / or tax laws.

The incessant reforms of tax law reveal the difficult adaptation of the tax system and the rules which organize and structure it to the phenomenon of globalization accentuated by the era of the digital economy. The tax administration is at the heart of this transformation of our societies built on taxes originally established on material bases (income, heritage consumption of goods and services) which have now become more and more immaterial (virtual and relocatable base generated by electronic commerce, value produced by digital platforms, deterritorialization of the profits of companies subject to value added tax or VAT and / or corporate tax or corporate tax).

The most successful tax system is one that has an efficient and competent administration to respond to current financial challenges and issues. The paradox is that information and communication technologies increase the services offered by the administration and its powers of control thanks to the massifica-

(14) M. Bouvier, «Le consentement de l'impôt: les mutations du citoyen-contribuable» (Tax consent: citizen-taxpayer transfers), *Cahiers français*, n°405, juillet-août 2018.

tion of data collected on taxpayers and processed in an industrial manner (data base) while allowing some individuals and companies reduce or even escape tax by relocating their source of income and / or capital from one territory to another «with a single click».

The principle of tax territoriality is severely put to the test with the generalization of the Internet without borders and tax competition forces States to conclude cooperation agreements and / or treaties to fight against tax fraud and tax evasion. To this unprecedented fiscal situation is added an unprecedented monetary situation with the prodigious development of virtual currencies thanks to the decentralized virtual technique that is the blockchain.

However, it is up to parliament to exercise fully and effectively this power of budgetary control in order to reconcile the legality and legitimacy of the tax. This parliamentary control forces the executive to provide transparency and financial accountability which condition the sustainability of a political democracy. Finally, controlling the state budget means controlling all government action because public finances remain an essential lever of any public policy.

Conclusion

State sovereignty finds its limits in the context of cross-border tax practices of companies and the wealthiest households. These practices call into question the principles of consent to tax (legality of tax) and consent to tax (legitimacy of public powers). An internationally harmonized tax law (G7, G20, OECD, etc.) seems necessary.

The recent setting of a minimum corporate tax rate reflects this desire, which however needs to be effective. Muslim tax law with a pronounced ethical content can make its contribution to such an advance if the principles derived from Koranic and prophetic sources are really implemented. In particular to fight against fraud and corruption which must become a priority on the agenda of international meetings.

The changes underway, in particular the ecological transition, the requirement of which is reminded us by the current health crisis, question the future of consent to / of taxation and therefore the very existence of sovereign States to protect their territory and population by means of public funding provided by legitimate institutions because they act according to the principle of legality and not arbitrariness.

It is about moving from a state of police where arbitrariness dominates to a state of law where law reigns and characterized by a double dimension, an

organic dimension (effective separation of legislative, executive and judicial powers) and material (effective guarantee of citizens' rights). Basically, it is a question of reconciling legitimacy and legality. Tax law, a sovereign right historically established on the principle of consent to tax, must reflect this reconciliation.

List of References

- F. Bin, «Actualité de la fiscalité cultuelle en droit français : où en est la laïcité fiscale?» (News of religious taxation in French law: where is fiscal secularism?), *Société, Droit & Religion*, n°1, 2011.
- M. Bouvier, «Le consentement de l'impôt: les mutations du citoyen-contribuable» (Tax consent: citizen-taxpayer transfers), *Cahiers français*, n°405, juillet-août 2018.
- P.H. Chalvidan, *Droit constitutionnel, Institutions et régimes politiques-Section 2 Ombres et lumières de la démocratisation en Afrique et à Madagascar (Constitutionnal law, Political institutions and régimes, Section 2 Shadows and lights of democratization in Africa and Madagascar)*, Nathan, Université, Paris, 1996.
- E. de Crouy-Chanel, «Le consentement à l'impôt» (Consent to tax), *Pouvoirs*, n°151, 2014.
- N. Delalande, *Les batailles de l'impôt - Consentement et résistances de 1789 à nos jours (*Tax battles, Consent and resistance from 1789 to the present day), Seuil, Paris.
- Exécutive summary, the Senate working documents comparative legislation series: *Funding of religious communities*, n°LC 93, Paris, France, Sep. 2001.
- J.-P. Machelon, *Les relations des cultes avec les pouvoirs publics* (*Relations between cults and public authorities)*, La Documentation française, coll. des rapports officiels, Paris, 2006.
- Ch. De la Mardière, «Le rôle de l'impôt dans l'indépendance des Etats-Unis d'Amérique» (The role of taxation in the independence of the United States of America), *Revue européenne et internationale de droit fiscal*, n° 2019/1.
- Ch. Monjou, «Question fiscale et révolution: l'exemple américain» (Tax question and revolution: the American example), *Regards croisés sur l'économie*, 2007/1, n°1.
- A. Ndaw, *La Pensée africaine. Recherches sur les fondements de la pensée négro-africaine (The African Thought. Research on the foundations of Negro-African thought),* Nouvelles éditions africaines, 1983.

- J. Rivero, «La notion juridique de laïcité» (the legal notion of secularism), *Recueil Dalloz*, Paris, 1949.
- F. Saint-Bonnet, «Le constitutionnalisme libéral français en trompe-l'oeil. Actualité de l'autre Montesquieu» (French liberal constitutionalism in trompe-œil, News from the other Montesquieu), *Droits,* n° 43, 2006/1.
- O. Schrameck, «La fin de la laïcité fiscale» (the end of fiscal secularism), *Actualité juridique de droit administratif (AJDA)*, n°4,1988.

Table of Contents

KILAW
كلية القانون الكويتية العالمية
KUWAIT INTERNATIONAL LAW SCHOOL

PRINCIPLES OF CRIMINOLOGY

Dr. Ahmed Awad Belal

Professor of Criminal Law
Former Dean
Faculty of Law - Cairo University
Visiting Professor at KILAW

2020