THE RULE OF LAW AND TAX LAW: THE CASE OF THE ABUSE OF LAW

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Abstract

The rule of law is in crisis, both in civil and public law matters. "Formal" law is loosing its prevalence and interpretative activity is becoming more relevant for the identification of the applicable discipline. Such phenomenon is expanding also in tax law, thus eroding the principle of reserve of law. The article analyses the crisis of the rule of law in tax law, focusing on the case of abuse of law/tax avoidance in the Italian tax legal system. That case highlights the growing importance of the courts as well as of the s.c. "technocracy" in shaping the content of the law in this field. Moreover, international soft law -albeit not binding- is often used as interpretative reference, showing its strong capability of directing national legal systems in their regulatory and tax policy choices. The whole picture becoming uncertain, the parties (tax administration and taxpayers) seem willing to replace the traditional rule of law with a rule of agreement, stemming from a coordinated and agreed interpretation and application of the law. In any case, the new environment urges for specific training for tax judges to overcome their scarce propensity to apply broadly values and principles developed at supranational level.

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1. Introduction: the rule of law and its current crisis

The rule of law has been defined as "elusive"[1]. In fact, it seems difficult to precisely circumscribe its essential characteristics, which depend on the context and historical period to which reference is made. Moreover, its origin in common law systems indicates that we are in front of a changing concept, which has undergone and still undergoes processes of enrichment and delimitation by administrative practice and jurisprudence. For a tax law scholar, who certainly does not aspire to venture into a field for which he does not have the necessary expertise, a summary can, however, be attempted for the sole purpose of the present analysis.

One can say that the rule of law is primarily an instrument which, through the prevalence of formal law (that is, the law approved and enacted by the Parliament), offers protection to the individual from a dual perspective. First, by giving him the rules of conduct capable of guiding his choices, guaranteeing certainty of the relative consequences and thus protecting legitimate expectations. Secondly, by limiting the arbitrariness of the executive power, in particular by requiring the public administration to act in compliance with the legal rules and the rights of the individual[2].

The picture is then necessarily completed by the presence of an efficient and autonomous judicial apparatus which, in compliance with the principle of separation of powers, can monitor the administration's respect for the limits of its prerogatives and offer the individual effective protection in case of violation of his/her rights[3].

Today, it is widely believed that the described concept is now largely in crisis. The main reason is the downsizing of the

[1] See B. Tamanaha, *The Rule of Law: An Elusive Concept?*, in G. Palombella, N. Walker (eds.), *Relocating the Rule of Law* 3 (2009).

[2] Those features are emphasized by S. Civitarese Matteucci, *Il significato formale dell'ideale del "governo delle leggi" (rule of law)*, *Diritto amministrativo* 29 (2011). According to the classical doctrine, the rule of law requires "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power": A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 202 (1965).

[3] An author has highlighted the link between our legal system and those of Anglo-Saxon tradition, whereas the former is growingly oriented towards a recognition of the creative role by the judicial power: S. Cassese, *Le basi costituzionali*, in S. Cassese (ed.), *Trattato di diritto amministrativo*, I, *Diritto amministrativo generale*, 202, 204 (2000).

role of formal law as the prevailing source in the regulation of the relationship between individuals and authorities. This situation has long been grasped by civilistic doctrine, which recognizes - without however manifesting a particular unease – that today the law shall not be identified with written law[4]. The latter is flanked by other types of regulation, which do not stem from institutions having democratic representativeness, but which are particularly effective in practice, since they result from the work of entities showing a high technical preparation. Therefore, the role of the legislator is weakened, while the activity of the interpreter - particularly the judge – is enriched by new functions, particularly that of composing the rule, adapting it to the context of the time and place in which it has to be applied. For private law scholars, as mentioned, no specific problems arise, since we remain in the context of relations between private individuals, characterised by the freedom of the parties and their substantial equality[5].

The position of public law scholars is more controversial. In the context of relations governed by public law, in fact, the equality between the parties is generally lacking and the need for a guarantee of the private one (which is implicit in the rule of law) appears particularly pressing in order to avoid the arbitrariness of the public administration and the consequent compression of individual rights. In front of the widespread awareness that written law now plays a recessive role, there is no unanimity of opinion on the consequences that may arise. Someone notes that the crisis of written law is inevitable in the light of the new paradigm of constitutional democracy, which imposes a dynamic vision of the relationship between the legislator and the interpreter, based on dialogue and on the need for the latter to guarantee the correct application of the norm in each single case[6].

[4] An author notes that ñil diritto non si identifica più univocamente con la leggeò: M. Franzoni, *Diritto, processo e precedente giudiziario*, *Politica del diritto* 415 (2013).

[5] It has been stated that ñil diritto applicato in base a regole e principi concorre sempre più con la funzione legislativa non fosse altro perché i diritti e le tutele devono essere ricercate, in via interpretativa, in un sistema plurale di fonti dove sono centrali la Costituzione e le Carte europee e sovranazionaliò: G. Vettori, *La giurisprudenza come fonte del diritto privato*, *Persona e mercato* 137 (2016).

[6] That is the position held by M. Fioravanti, *La Corte e la costruzione della democrazia costituzionale. Per i sessantôanni della Corte Costituzionale*, 28 April 2016, in *cortecostituzionale.it*.

Others, on the other hand, argue that the restriction of the role of the legislator and the extension of that of the interpreter with regard to rules often formulated in vague terms make the choices of conduct by the individuals more complex, strengthen the discretion of the public administration and contradict the democratic principle[7]. The prevailing role of the judiciary, therefore, risks to be problematic, since the *jurisdictio* is not always neutral, but tends to place itself in conformity to the wave (political and ideological) of the times[8], and in so doing it puts even more in crisis the pursuit of the goals of protection proper to a genuine rule of law. It can happen that the judiuciary either stands in contrast with the *gubernaculum* (as recent experiences in some Eastern European countries shows[9]) or flattens out on positions more or less in line with the dominant interests.

The picture appears, therefore, fragmented, especially in the analysis of the possible outcomes of an assumption that, instead, is almost unanimously accepted: that of the disappearance of the prevalence of the law and the simultaneous affirmation of a strong role of the interpretative activity.

2. The practice in tax law: the case of abuse of law

The question now is whether similar considerations apply also in the field of tax law. In this context, the situation appears even more delicate, since - in the Italian Constitution, but not only – the reserve of law requires that the legislator, national or regional, regulates the essential elements of the tax case (subjects, taxable facts, tax base). Indeed, it can be said that in tax law the analysis of the rule of law and its features has always been made precisely making reference to the reserve of law.

[7] See L. Vespignani, *Lo óstranoô mondo di Mr. Rule of Law. Le varie facce del rule of law nelle trasformazioni dello Stato contemporaneo*, *Diritto e questioni pubbliche* 467 (2017).

[8] The same concept could be expressed by saying that the judge is often driven by the aim to guarantee specific social values: and one knows that these values can reflect the prevailing political and ideological orientations.

[9] One can recall the passionate analysis made by M. Cartabia, *The Rule of Law and the Role of Courts*, *Italian Journal of Public Law* 1 (2018), where she writes that ñunexpectedly powerful leaders supported by strong majorities have dismantled all restraints; the separation of powers has been eroded and the rule of law, as well as judicial independence, are under attackò.

In recent years this issue - especially from the point of view of the certainty of the rule and therefore of the taxpayer's trust - has been the subject of many and not entirely univocal reflections. The reasons for this renewed interest in a rule (art. 23 of the Italian Constitution) that even in the debates of the Constituent Assembly received little interest are manifold: on the one hand, the global crisis and the growing interest in combating the abuses of multinationals, which are based on a rigidly formalistic application of the rule laid down by law; on the other hand, on the internal level, the hypertrophy and slowness of tax legislation and its often twisted formulation[10]. In front of these situations, the law loses its centrality to the advantage of other forms of regulatory production that lack many of the corollaries typical of the reserve of law.

Given the deep public and constitutional roots of tax law, that evolution raises at least two highly problematic issues: a metamorphosis of the system of sources, in the sense that the law becomes somewhat secondary; and a change in the role of the various actors involved (legislator, tax administration and taxpayer, especially if a multinational company). One should therefore question the continuing relevance of the reserve of law under art. 23 of the Constitution.

Such a process and its uncertain implications can be illustrated making reference to the case of abuse of law/tax avoidance in the Italian tax legal system[11].

Here, in fact, we have passed from a broad but specific rule (art. 37-bis of Presidential Decree 600/1973, which limited the elusion only to those cases listed exhaustively by the legislator); to an extension of its boundaries made by the jurisprudence, particularly that of the Court of Cassation which first recalled the prohibition of abuse under the EU law and then enhanced the preceptive function of art. 53 of the Constitution; until the

[10] R. Cordeiro Guerra, *Crisi della fattispecie, fonti multilivello e ruolo del giudice: il caso del diritto tributario*, *Rassegna tributaria* 265 (2019) observed that ñspesso gli interventi normativi sono tardivi, di pessima qualità e perciò tali da creare più problemi di quanti ne risolvonoò.

[11] See, *inter alia*, F. Gallo, *Lôabuso del diritto in materia fiscale nellôevoluzione della giurisprudenza della Corte di Cassazione*, *Rassegna tributaria* 849 (2016); and L. Del Federico, E. Traversa, *Il nuovo regime punitivo dellôabuso del diritto in materia tributaria: disciplina nazionale e quadro europeo*, *Rivista trimestrale di diritto tributario* 597 (2017).

formulation of European and international guidelines (especially by the OECD) on the need to introduce general anti-abuse regulations to combat the BEPS phenomena, which inspired and drove the intervention of our legislator, after the law of delegation of 2014, with the codification in a positive norm (art. 10-bis of the Statute of the taxpayer's rights) of jurisprudential guidelines and of other sources extraneous to the positive internal system[12].

We have therefore witnessed a sort of circular path: from a specific norm (art. 37-bis) we finally arrive at another norm (art. 10-bis), but in the middle there is a sort of cataclysm for the way in which the content of the discipline is established. In fact, there is a progressive and evident loss of relevance of the role of the legislator in defining what the abuse of law is: the latter in fact conforms more or less passively to the previous jurisprudence of the Supreme Court as well as to international soft law (among other things without even hiding this influence, as evidenced by the wording of the law of delegation). Therefore, at the end of the path and albeit the presence of a written rule, it seems that the respect of Art. 23 of the Constitution is only formal, since the content of that rule is thought of elsewhere, certainly outside the usual representative channels[13].

What emerges from the case of abuse of tax law is, therefore, twofold: the growing importance of living law (*diritto vivente*), which comes from the law in action of the courts and which here influences the normative activity of the legislator; and the relevance of the so called "technocracy", whereby the content of the law is in some way predetermined in assemblies where the rate of technical competence is high but the profile of democratic legitimacy and control is equally nuanced[14].

[12] A thorough analysis of the evolution of the concept of tax avoidance in the Italian legal system can be found in G. Ingrao, *L'evoluzione dell'abuso del diritto in materia tributaria: un approdo con più luci che ombre*, *Diritto e pratica tributaria* 1433 (2016).

[13] See again, in that sense, R. Cordeiro Guerra, cit. at 10, 268, who refers to a written law "meramente riproduttiva di contenuti altrove pensati e progettati".

[14] The various characters of the new phenomenon of external influences on the works of national Parliaments has been analysed by P. Pistone, *I limiti esterni alla sovranità tributaria statale nell'era del diritto globale*, in C. Glendi, G. Corasaniti, C. Corrado Oliva, P.G. De' Capitani di Vimercate (eds.), *Per un nuovo ordinamento tributario. Contributi coordinati da Victor Uckmar in occasione dei novant'anni di Diritto e pratica tributaria* 655 (2019).

A last controversial issue needs to be highlighted with regard the process which led to the final formulation of the rule concerning the abuse of tax law. Art. 10-bis -as well as all GAARs- is a vague, evaluative norm, full of open concepts[15]; it therefore leaves to the interpreter, and first of all to the tax administration, the power to fill in its content in each specific case. Of course, it's normal that every legal norm has a component of uncertainty, in which the interpreter is called to work; however, in the general anti-abuse norms uncertainty - what a author calls "penumbra"[16] - is certainly prevalent. Therefore, the concrete application of the rule is delegated (mainly) to the tax office and realizes a real integration of the taxable facts[17]. The concretization of the general rule requires that a gap be identified, not formal but axiological[18], through a creative activity strongly characterized in ethical terms. As if to say, it is a fight against abuse even beyond the limits of the positive rule because it is right (value judgment) that the balance between the cunning taxpayer (who is usually the richest) and the honest one be restored. As a consequence, the risk of arbitrariness becomes concrete and the uncertainty for the taxpayer increases[19].

3. Other "clues" of the crisis of the reserve of law in tax law.

What has been highlighted in the previous paragraph with regard the abuse of law/tax avoidance shows that in that field the reserve of law is experiencing a clear downsizing. It is now necessary to investigate whether this is an isolated case or whether other cases can confirm the same evolution.

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[15] See F. Montanari, *Diritto giurisprudenziale, contrasto ai comportamenti abusivi e certezza nei rapporti tributari*, *Rivista di diritto tributario* 211, 227 (2019), who observes that ñla caratteristica preponderante di tutte le clausole generali sia proprio quella della indeterminatezza, anche dal punto di vista semanticoò.

[16] The expression has been used by H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harvard Law Review* 593 (1958).

[17] That is the correct opinion by V. Ficari, *Clausola generale antielusiva, art. 53 della Costituzione e regole giurisprudenziali*, *Rassegna tributaria* 389 (2009) who however explicitly recall the previous position held by A. Fedele, *La riserva di legge*, in A. Amatucci (directed by), I *Trattato di diritto tributario* 192 (1994).

[18] G. Fransoni, *Appunti su abuso del diritto e óvalide ragioni economicheô*, *Rassegna tributaria* 932 (2010).

[19] Those possible consequences are highlighted by F. Benatti, *Norme aperte e limiti al potere del giudice*, in *Europa e diritto privato* 19 (2013).

This principle of the reserve of law has ancient roots, dating back to the American Revolution and the established rule of "no taxation without representation". It has always represented, together with the right to self-imposition, the foundation of the democratic system based on the separation of powers and the guarantee of limits to the obligation for everyone to contribute to public expenditures[20].

The reserve of law had at its roots a guarantor function: to stem the power of the executive (first the sovereign and then the majority expressing the government), ensuring that the provision of assets imposed is determined according to the logic of the democratic principle (no taxation without representation). This *ratio* is consistent with nineteenth-century liberalism and has remained so even when the reserve of law has been combined with the need for certainty, guaranteed by the law that is capable of offering effective guidance to the conduct of individuals. Here, too, the liberal imprint of the protection of the individual sphere of proprietary rights prevails.

Such an arrangement entered in crisis, in the tax field, for at least two reasons: the awareness that legislation is too slow compared to the rapid change in practice and is often technically inadequate[21]; above all, the perception that this misalignment generates damage and inefficiency both for the country-system as a whole (in terms of foreign investment and its attractiveness) and even more for social balance, social rights, *welfare* and the redistribution of wealth.

The case of tax abuse/avoidance by multinational enterprises is the mirror of this situation: formal respect for written law, a practice that goes fast and that exploits the gaps in the legislation without violating it directly, creation of monopolies, deepening of economic inequalities, drainage of public resources at the expense of social policies, already

[20] The topic of the reserve of law under art. 23 of the Constitution has been deeply explored by scholars. One can make reference, as examples, to S. Cipollina, *La riserva di legge in materia fiscale nellôevoluzione della giurisprudenza costituzionale*, in L. Perrone, C. Berliri (eds.), *Diritto tributario e Corte costituzionale* 163 (2006); and A. Fedele, cit. at 17, 157.

[21] One author speaks about the ñdiscredito della leggeò, in front of which the role of courts becomes the tool to give the rules a practical and comprehensible meaning: A. Giovannini, *Certezza del diritto in materia tributaria: il ruolo della giurisprudenza*, *Innovazione e diritto* 6, 13 (2014).

shrinking as a result of the global crisis. Hence the reaction of the legal system, which, however, takes place largely outside the legislative channels, recalling general principles or formulating value judgments. In short, the need for "substantial justice" prevails, even if this objective is in conflict with the reserve of law[22].

This reference seems sufficient to realise how tax law is the emblem of an ongoing revolution both in the reconstruction of sources and in the argumentative method of jurisprudence. It is therefore necessary to analyse the causes of this phenomenon elsewhere. In addition to what has been said in general in the previous paragraph, it seems that the particular importance that "living law" takes on in tax law can be traced back to two phenomena: the first of a more formal nature, the second of a philosophical nature.

First of all, the influence of supranational sources in tax law appears even more marked than in other jurisdictional contexts.

The case law of the EU Court of Justice and the European Court of Human Rights has a very specific relevance in tax matters. This is due to the fact that neither the EU Treaties nor the ECHR have any direct relevance to tax law. It has therefore been the case law of the courts within their respective systems that over time has developed principles and rules that are also intended to apply to States member of the EU or part of the ECHR. This phenomenon of jurisprudential extension of the scope of supranational rules also to the field of taxation is particularly evident in relation to the experience of the European Union, where one can correctly speaks about a "negative harmonisation" in the field of direct taxation[23]: where the procedures for creating rules cannot operate, because of the obstacles placed by the Member States in a system characterised by the need for unanimity, case law intervenes, which - while resolving specific cases - is able to guide the conduct of national legislators and therefore of interpreters.

[22] The interpretation of the jurisprudence of the Supreme Court in term of the affirmation of a principle of substantive justice (*giustizia sostanziale*) has been proposed by G. Ingrao, cit. at 12, 1443.

[23] For an analysis of the preminent role of the EU Court of Justice in the field of direct taxation, see S. Dorigo, *Il diritto tributario nell'Unione europea*, in R. Cordeiro Guerra (ed.), *Diritto tributario internazionale. Istituzioni* 185 (2016).

However, the ECtHR, which, particularly with regard to the rights of taxpayers, has also reached not dissimilar points, has drawn up a set of rules and principles intended to apply in national legislation even if they conflict with specific legislative provisions[24].

The resulting situation is therefore peculiar. The tax case will in fact find its discipline in the internal rules but in so far as they are shaped, inter alia, by European or conventional legal interpretations. The "dialogue between the courts", repeatedly evoked by the interpreters as the inevitable peculiarity of our legal time, thus articulates the path of reconstruction of the legal norm, fragments it and makes it apparently problematic.

The second profile is, as mentioned, philosophical. In times of economic crisis - as we have been experiencing for almost a decade now - it is the jurisprudence that is in charge of adapting the rigid system of rules to the changed economic and social needs. The legislator often appears prisoner of its own procedures full of compromises and cross vetoes and is often unable to intercept these needs quickly, as would be appropriate. Judges, who live the law in action, interpret what is perceived as common sense and bend the interpretation and application of the rules to it, resorting - where they do not allow such manipulation - to the vent of general or immanent principles. These principles are always placed in a textual framework of constitutional rank, but in reality they are constructed time by time to protect subjective situations considered particularly worthy of protection. Once again, the example of the abuse of the law is enlightening: the legislator is in fact forced to follow, literally, the evolution of jurisprudence and when it resolves to intervene, it does so taking into account the landings of that jurisprudence, implicitly certifying its correctness.

There is a further aspect that appears to be relevant to investigating the matter. Here, perhaps more than in other areas of the legal system, one perceives the relevance of sources that are not such in the full sense of the term, since they do not produce

[24] As for the applicability of the ECHR to tax disputes, too, refer, with no claim of being exhaustive, to Ph. Baker, *Taxation and the European Convention of Human Rights*, 41 *European Taxation* 298 (2001); and L. Del Federico, *Tutela del contribuente ed integrazione giuridi-ca europea. Contributo allo studio della prospettiva italiana* (2010).

binding rules, but which nevertheless assume a weight that goes well beyond the strictly formal data[25]. A first example is the guidelines that international bodies draw up and suggest to Member States and beyond. In tax matters, it is mainly the OECD that elaborates these best practices and disseminates them, in an attempt to guide the conduct of States: the BEPS project, which aims to identify the main tax-damaging conduct of multinational groups and to propose to States the adoption of measures to combat it adequately, is made by non-binding indications, but the success of the final elaborations disseminated by the OECD in 2015 shows that national laws are prepared to refer to rules perceived as authoritative beyond the existence of a legal obligation to do so[26].

We are therefore witnessing a situation in which the traditional sources of law gradually lose their prevalence, to the advantage of forms of soft law, enclosed in instruments which are not formally binding but which, due to their particular authoritativeness, are capable of directing the national legal systems in their regulatory and tax policy choices. The phenomenon is not new in the context of international tax law[27], however in recent times - and in particular after the global economic crisis - there has been a real proliferation of such interventions without the traditional characteristics of coercion.

Within the European Union, too, this phenomenon is becoming increasingly common. In recent years, in fact, the Commission has taken action by adopting a series of communications, non-binding acts with the aim of offering the Member States some guidelines, drawn from the interpretation of the arrests of the EU Court of Justice, on some of the most controversial issues of direct taxation relating to transnational

[25] See again R. Cordeiro Guerra, cit. at 10, 267, who recognizes that ñle disposizioni domestiche in campo fiscale non solo perseguono lôadeguamento a fonti sovranazionali vincolanti, ma sempre più di frequente recepiscono raccomandazioni, pareri ed in generale atti di soft law che in tal modo acquisiscono in fatto una rilevanza che non avrebbero in dirittoò.

[26] See F. Amatucci, *Lôadeguamento dellôordinamento tributario nazionale alle linee guida dellôOCSE e dellôUE in materia di lotta alla pianificazione fiscale aggressiva*, *Rivista trimestrale di diritto tributario* 3 (2015).

[27] Since the beginning of some form of international regulation in tax matters, there have appeared instruments, aiming at giving guidance to the States, which -albeit not mandatory- have become extremely important over time: just think of the OECD Model of bilateral convention against double taxation and the related commentary.

cases[28]. The attempt by the Commission is to offer authoritative, albeit not strictly binding, guidelines to the Member States, basing them, however, on the practice developed by the EU Court of Justice with regard to specific cases. Not surprisingly, those guidelines have a strong influence on the conduct of Member States, which, on the one hand, do not see themselves formally stripped of their sovereign powers in the field of direct taxation and, on the other hand, are persuaded by a discipline derived from the rulings of the EU Court of Justice.

The Italian tax legislator takes these addresses seriously. One can recall that the law of delegation n. 23/2014, in its art. 5 dedicated to the new regulation of abuse of law, included among the guiding principles those "contained in the European Commission's recommendation on aggressive tax planning no. 2012/772/EU of 6 December 2012". Then a document in itself devoid of any legal constraint for Member States is considered to be an expression of shared rules and it is attributed a mandatory effect even in the context of the constitutional procedure under Article 76 of the Constitution.

What matters is that in the context of tax law this is by no means an isolated or exceptional situation. The examples - apart from the debated issue of EU law, which is, however, becoming increasingly important in the field of taxation - could be very numerous, I will limit myself here to mention a recent case, which still shows how the legislator is lagging behind and how the heart of discipline completely escapes the hands of the internal actors.

With regard to transfer pricing, Article 110, paragraph 7, of Legislative Decree n. 917/1986 establishes the possibility for the tax authorities to adjust the price of transactions between two companies - one Italian and one foreign – part of the same group, where that price does not correspond to the free market price. It adds that by decree of the Ministry of Economy and Finance guidelines for its implementation will be established "on the basis of best international practices". So here we have a law that sets the rule, but that is basically a rule of principle (the price of intra-group transactions must be in line with that of transactions between independent companies) that leaves to a subordinated

[28] For an analysis of the practice recalled in the text, one can make reference to S. Dorigo, *Il diritto tributario nellôUnione europea*, cit. at 23 (185).

source the almost complete regulation of the institution. However, the primary source already indicates that that discipline will have to be somehow drawn elsewhere.

The ministerial decree of May 2018, which implemented the bill, significantly refers to a series of international documents which are not binding, being mere acts of soft law: OECD model, BEPS actions, OECD guidelines. Again, we are facing a rule that only apparently complies with Article 23 of the Constitution, but which in reality leaves the concrete discipline to international sources without any democratic legitimacy.

4. The changing nature of the reserve of law in tax law: crisis or opportunity?

The analysis reveals a complex but still fragmentary picture. Notwithstanding its constitutional rank, the reserve of law is weakening for at least two reasons: the legislator is increasingly inspired by the guidelines of international practice, even if they are not binding; the sources of international soft law are increasingly gaining relevance for the regulation of specific cases. As a logic consequence, the central role of the interpreter, be it the public administration or the judge, emerges, thus producing non-secondary effects: technical competence is considered more reliable than democratic representativeness; the choices for the taxpayer become uncertain; the financial administration, unbound by the limits deriving from formal law, acquires a very wide margin of discretion. At the same time, the attribution of a decisive role to the judiciary – which would be positive in abstract terms for the re-establishment of a balance - does not seem able to adequately protect a genuine rule of law in concrete, since -as mentioned- it is often flattened on the positions of the executive, especially in times of economic crisis.

Looking at a similar scenario, one could come to the conclusion that the rule of law is in deep crisis also in the field of taxation, so that the taxpayer's subjective position is in danger. In the writer's view this is not the case and there should be no room for pessimism. There are at least two situations which deserve consideration and should lead to a different (and more optimistic) view about the survival of the rule of law (albeit in a different shape than in the past) in the tax system.

The first one concerns the correct evaluation of the way the legislator has taken inspiration for re-writing the rule about tax avoidance in the new article 10-bis of the Statute of Taxpayers' Rights. That case highlights that the principle of the reserve of law in tax matters, as it is commonly interpreted, no longer expresses a value always and in any case destined to prevail[29]. The aim of certainty for the citizen remains important, but it is still mainly placed in an individual perspective, we could say proprietary, which today has to deal with different values. Therefore, the violation of the reserve of law in some cases could be the lesser evil[30], if it realizes a better balance between the various interests involved. As an author held, art. 23 of the Constitution is based on different *rationes* (some of them unrelated to the individual sphere of ownership) and therefore postulates a graduation of its own rigidity, which is also inherent in the same nature "relative" of the reserve[31].

In the age of globalisation, of the economic crisis and of the fading of social justice systems, of the imbalances between multinational companies and normal taxpayers, the need to protect the public/herarial interest and, ultimately, the defence of a certain social structure come to the fore, suggesting the need for the individual sphere to be limited. The balancing technique is certainly not new, if we look at the role of the Constitutional Court itself[32], for example in guaranteeing a balanced application of the new Article 81 of the Constitution with respect to the safeguarding of *welfare* policies. We can then consider sacrificing a little certainty if this aims to protect the revenue and the correct redistribution of the tax burden among the affiliates[33]. Because we

[29] The fact is that the reserve of law in tax matters is always relative, therefore it allows that further values can influence the way the tax fact are intended for the purposes of the legislative discipline.

[30] As pointed out by J. Rawls, *A Theory of Justice* (1971), 242.

[31] See in that sense A. Fedele, cit. at 17, 157.

[32] The need for a balancing of conflicting values has been ofted advocated by the Italian Constitutional Court. See, in that field, A. Morrone, *Bilanciamento (giustizia costituzionale)*, *Enciclopedia del diritto ï Annali*, II, VII, 185 (2008).

[33] It has been noted that ñtax avoidance reduces the effectiveness of welfare systems, a matter that is particularly important in the light of the public perception (that is probably accurate) that most tax avoidance is perpetrated by the rich or by people who are relatively well-offò (R. Preeble, J. Preeble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?*, *Victoria University of Weelington Legal Research Papers* 21, 40 (2012).

must not forget that here we are in the context of the tax obligation, which has a connotation of solidarity and a social and redistributive function that in some way must be preserved in face of conducts that give an advantage formally unexceptionable but in substance undue[34].

It seems to me that article 10-bis realizes in that sense a good compromise: a rule in which the legislator goes as far as it can go, that is, in which the directive is inevitably flexible but not indefinite, so as to limit as far as possible the arbitrariness of the subject (the tax administration) that will have to apply it[35]. The effect is not that of introducing a "moral" evaluation by the interpreter, rather that of permitting the latter to take into consideration social values in a clearly delimited legal field of action. As correctly noted by a scholar, "*la funzione della novella, comune a qualunque clausola generale, è quella di fornire le linee guida per una applicazione prudente dell'abuso e bilanciata tra diversi valori ed esigenze dell'ordinamento*"[36].

The second scenario shows completely new characters.

The latter are linked to the emergence of a different relationship between the tax administration and the taxpayers, no longer based on the opposition between authority/subsidiarity, but regulated in a basically equal and cooperative way[37]. This is a phenomenon which - once again - has international and European roots, but which is finding an unexpected success in the Italian tax system as a result of two competing causes: the need (increased by the global economic and financial crisis) to encourage the attraction of investments into the country and, therefore, to provide instruments capable of ensuring the certainty and reliability of the relative tax treatment. Therefore, consensual forms of determination of the way of being of the tax relationship,

[34] The authors in the preceding footnote add that ñcertainty and related rule of law values are, therefore, extremely important where criminal sanctions are imposed, but are less important where the issue is tax avoidanceò (42).

[35] It has been noted, on this regard, that ñparadoxically, the proponents of a GAAR considered that it would restore the rule of lawò (P. Way, *The Rule of Law, Tax Avoidance and the GAAR*ò, *GITC Review* 79, 97 (2013). The analysis made in the present article is evidently a confirmation of such a position.

[36] Again F. Montanari, cit. at 15, 243.

[37] The evolution noted in the text above has been emphasized, as one of the main features of tax law in the new millenium, by L. Del Federico, *Autorità e consenso nell'imposizione tributaria: tributi paracommutativi e tasse facoltative*, *Ragion Pratica* 55 (2008); and F. Gallo, *Le ragioni del fisco. Etica e giustizia nella tassazione* (2007).

through which the parties identify in advance and in the reciprocal discussion the tax discipline of a certain concrete case, thus avoiding any possible litigation, are increasing in number.

This process has gone through a number of successive stages: first of all, the function of the tax administration was enhanced in order to give opinions to the taxpayer following specific requests[38]; then, the possibility of stipulating advanced agreements with reference to companies with international activities was introduced[39]; finally, the legislator provided for the possibility, for larger companies, to establish a form of cooperative compliance, allowing them to come to a situation of continuative (i.e. throughout the tax period) monitoring and agreed resolution of any critical issues with the tax administration, in exchange for the preparation of adequate tax risk management procedures by the enterprise[40].

In all these cases, but especially in the last two, a new phenomenon emerges: the parties confront each other and agree on an arrangement which - while aimed at determining the actual tax burden in accordance with the principle of the ability to pay - is in fact the result of negotiation to the extent that the uncertainties of interpretation accompanying the legislative text are overcome. The objective of certainty and predictability of the discipline is therefore achieved, allowing the taxpayer to take his investment decisions consciously; at the same time, the interests of the tax administration -although fully respected- does not prevail,

[38] I refer to the discipline of the ñinterpelliò (advanced rulings), which is now completely described in art. 11 of Law n. 212/2000 (Statute of Taxpayerôs Rights). See, inter alia, A. Viotto, *Tutela dellôaffidamento, consulenza giuridica ed interpello*, *Rivista di diritto tributario* 698 (2017).

[39] The ñdecreto internazionalizzazioneò (internationalisation decree), approved with Legislative Decree n. 147/2015, introduced the possibility for multinational enterprises to reach prior agreements wuth the tax administration by which they can know in advance - and with binding effect also for the future, unless there is a change in the factual circumstances - the way with which the latter will consider certain transactions that occur frequently in the operations of international groups. See, for details, M. Grandinetti, *Gli accordi preventivi per le imprese con attività internazionale*, *Rassegna tributaria* 660 (2017).

[40] The regime of the cooperative compliance has been introduced by Legislative Decree n. 128/2015 following the indications in the Law of Delegation n. 23/2014. On this sensitive issue, see the seminal considerations made by F. Gallo, *Brevi considerazioni sulla definizione di abuso del diritto e sul nuovo regime del c.d. adempimento collaborativo*, I *Diritto e Pratica Tributaria* 947 (2014).

since the logic of the agreement is precisely that of equalising the position of the parties involved.

Although in an unchanged constitutional and normative context, the structure being implemented in the Italian legal system seems therefore suitable to carry out the same functions as the rule of law, in some way making up for the perceived crisis of the prevalence of the written law by means of a sort of "rule of agreement".

The two scenarios, in short, show that, if the rule of law, as traditionally understood, seems to be in crisis, the system is capable to reach different forms of regulation of the conflicting interests of the public and private parties which are suitable, at least in abstract, to preserve the fundamental values that the principle is designed to guarantee.

5. The problem of judicial protection

Of course, there remains a problem, that of the trial (and, therefore, of judicial protection). Whatever road is outlined for the practical affirmation of the values underlying the rule of law, a fair and effective remedy must be made available to the taxpayer in order to protect his rights in case of violation.

It is not possible to dwell on the subject here. The inadequacies of the Italian tax process have long been highlighted[41] - as much as the lack of independence of the judge, the limits to the proofs admitted and the numerous procedural rules granting advantages to the tax administration over the taxpayer - but until now any proposed reform has never seen the light of day.

The problem is undoubtedly a general one, in the sense that it is the very structure of the tax process that seems inadequate to achieve effective protection of the subjective situations that normally underpin the principle of the rule of law. However, I would here make some reflections on the specific profile that

[41]One author has critically emphasized ñlôinadeguatezza del processo tributario di merito, disciplinato da una legislazione antiquata ed incompleta, affidato ad organi vetusti, di origine ottocentesca, composti da giudici tutti e istituzionalmente onorari e *part time*, neppure necessariamente laureati in giurisprudenza, dipendenti di una delle parti processuali, ossia del Ministero dellôeconomia e delle finanze, selezionati senza nessuna forma di concorso pubblico, proprio, invece, dellôordine giudiziarioò (A. Giovannini, cit. at 21, 15).

relates to the preparation of the judges and their lack of propensity to accept the protections and values developed at supranational level. Even if it were possible to resolve the inadequacies of the trial, the need to train the tax judge to a greater respect for supranational guidelines, which can be decisive to ensure compliance with the rule of law at the internal level, would remain alive.

It may then be wondered whether, already in the current asset of things, it is possible to identify some instrument of dialogue between national tax judges and supranational courts useful to feed the propensity of the former to achieve the objectives of a genuine rule of law, thus taking the former away from the influence by the executive power.

The answer to the question may seem obvious. In the legal system of the EU there is already the instrument of the reference for a preliminary ruling, which has been used for several decades in relation to tax disputes. In fact, it has been used so frequently that today many of the most significant decisions delivered by the CJEU concern tax issues.

With regard to the ECHR, the jurisprudence of the ECtHR has always been a reference for internal judges in the interpretation of conventional rules given the fact that the latter are perceived as living norms continuously adapted to new needs precisely by the jurisprudence of the ECtHR. Furthermore, this role should be strengthened following the recent entry into force of the additional Protocol 16 to the ECHR, which provides for the possibility for national courts "of the highest jurisdictions" to submit to the Court a request for an opinion concerning the interpretation and the application of the provisions of the Convention in concrete cases. The mechanism that has been deliberately made similar to the reference for a preliminary ruling system existing in the EU because of the desire of its creators to promote the dialogue between the judicial authorities.[42]

[42] See in that sense the Explanatory Report to Protocol 16, which recalls that according to the Group of Wise Persons ñ*it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Courtôs óconstitutionalô role*ò. The Explanatory Report can be found at www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

In reality, the just mentioned procedures do not seem satisfactory. The advisory instrument envisaged by Protocol 16 has a very limited subjective scope covering only the highest jurisdictions (even with the exclusion of the Constitutional Court with regard to Italy). Therefore, judges of merit are excluded from its functioning and these are the courts which are highly engaged with the substance of the concrete case and therefore are often more attentive to a substantialist approach in balancing the opposing interests (of the tax authorities and taxpayers). Moreover, not only the beginning of the procedure is always optional, but also the opinion eventually delivered by the chamber established within the ECtHR is never binding, even with regard to the judgment which gave rise to the question.

Some perplexities arise with regard to the suitability of a mechanism of preliminary ruling to guarantee an effective and fair exchange of interpretative messages between national and supranational courts in the field of tax law. And these problems arise apart from the just mentioned characteristics of the referral to the ECtHR according to Protocol 16 which are themselves profoundly differentiating the instrument in question from the EU preliminary ruling and are in some way weakening its effectiveness in the context of the dialogue between the courts. In fact, the preliminary ruling gives rise to a formal and public procedure which produces the risk that the conflicting positions may become even more rigid. The publicity that the outcome of the proceedings may have (and usually has) represents, in short, the greatest inconvenience, since often the involved courts prefer to assume more "expendable" positions in the public debate, rather than making a serious effort towards a genuine dialogue.

The experience of the *Taricco* case – which was result of a reference for a preliminary ruling and concerns, although indirectly, a tax law issue - shows precisely how the media produced clamor of some events does contribute for genuine and sincere dialogue and is pushing instead a compromise in which one of the conflicting positions prevails and the other loses.[43]

[43] The critical view expressed in this article is not common. Many scholars argue that the Taricco case is a positive example of dialogue between national courts and the EUCJ. See in the latter sense M. Bonelli, *The Taricco saga and the consolidation of judicial dialogue in the European Union*, 25(3) *Maastricht Journal of European and Comparative Law* 357 (2018).

Of course, this does not diminish the usefulness of this institute, which has helped over the years for the formation of a common European spirit also on many tax issues. However, it is necessary to imagine more meaningful places and means of dialogue, far from the excessive political and media pressure that sometimes surrounds the former and therefore capable of achieving a more fruitful compromise between conflicting positions.

For example, one could imagine wider forms of circulation of supranational court decisions in national jurisdictions and the institutionalization of informal mechanisms of joint training between tax judges of several European states. A model could be that of the coordination meetings that take place periodically within the Eurojust project.[44] The aim is to create supranational bodies that put together tax judges from the Member States of the European Union as well as the judges of supranational courts and which promote the dialogue and the exchange of knowledge between them. The joint training tool seems to be in fact suitable to allow an effective circulation of the interpretative models, thus favoring the identification of best practices to be replicated in the national context.

This is not a particularly new idea. Since many years, especially in the context of the EU, several initiatives have been put in place to develop dialogue and joint training for judges (and more generally of legal practitioners) of the Member States. The 2011 communication of the EU Commission entitled "Building trust in EU-wide justice in new dimension to European judicial training" states the importance of creating a genuine European legal culture and recalls that "judicial training is a crucial element of this process enhances mutual confidence between Member States, practitioners and citizens ". Even before, however, the Hague Program called for "the progressive creation of a European judicial culture [...] based on training and networking".[45]

However, this process is still largely unsatisfactory. First of all, significant progress has been made so far only with regard to criminal justice, in the presence of a clear foundation of the

[44] See A. Weyembergh, *The Development of Eurojust: Potential and Limitations of Article 85 of the TFEU*, 2(1) *New Journal of European Criminal Law* 75 (2011).
[45] G. Oberoi, *Globalisation of the judicial education discourse*, 38(3) *Commonwealth Law Bulletin* 393, 415 (2012).

European action in the Treaties. On the contrary, in other areas of law - such as that of civil and commercial law - the initiatives undertaken have been much less incisive. This situation is linked to the absence of equally clear justifications in the treaty norms and to the incapacity, therefore, of the European institutions to undertake direct actions which are binding for the Member States. This entailed the adoption of bottom-up training systems: starting from the initiative of private bodies representing the categories of legal operators, they go on with the subsequent support of common training actions by the Commission that recommends the adoption of the same by the Member States.[46]

As one can see, there is no binding power for the Commission, while every responsibility remains with the Member States, both at the level of support of exponential private organizations and then at the level of transposition of the Commission's guidelines.

In such less institutionalized context the training of tax judges suffers from further problems. The Commission documents do not deal with tax matters and - apart from some sporadic exceptions - even the exponential bodies of the judiciaries of the Member States do not attach particular importance to this matter. The European Judicial Training Network, an institution created by the Member States in 2004, identified tax law as worthy of particular attention in the context of the activity of the working groups set up within it. However, no concrete initiatives seem to have been undertaken.

An intervention by the Commission in the direction of identifying common training tools on European tax law issues now seems to be prevented by the difficulty of attributing to the EU a general competence in the matter, but also by the fears of the states that such initiatives can have a negative influence on the independence of the judiciary in such a delicate area, even from a political point of view, such as that of taxes. There is also the tendency of the European institutions to enhance the principle of subsidiarity in this field too, limiting the common intervention

[46] H.E. Hartnell, *EUstitia: Institutionalizing Justice in the European Union*, 23 *Northwestern Journal of International Law & Business* 113, 116 (2002).

only to those sectors where a clear European value added can be realized.[47]

It seems to me, however, that an alternative model can still be imagined. It could refer to the experience gained within the OECD, based on the development of guidelines that are not binding for the states but whose compliance is subject to periodic revision with a consequent (public) evaluation of the greater or lesser "virtuosity" of one state over others. The absence of a legal constraint is filled by the risk of negative publicity that the incorrect transposition of the guidelines could generate. A situation capable of pushing many states to a spontaneous adaptation.

Hence, a mechanism of this kind could perhaps also be replicated for tax matters. One could think, given the importance of fundamental rights in the action of national tax courts, to a concerted action between the EU and the Council of Europe. This could produce guidelines or models of joint training of national tax judges, including linguistic ones, whose implementation - if appropriate through the establishment of bilateral or multilateral bodies - could then be monitored at central level (by the EU Commission, for example, or by the Council of Europe itself) according to a periodic peer review procedure.

Anyhow, the proper training of judges is fundamental in every legal system, but it is even more so in a supranational context, where - as we have seen - a compromise must be reached between two different ways of conceiving the tax relation, the internal and the European one. Therefore, the development of informal but institutionalized bodies aimed at achieving a steady dialogue between national and supranational jurisdictions seems to be the most suitable solution to avoid judicial approaches excessively centered on the national level and to achieve a genuinely supranational - and therefore uniform - conception of the taxpayer's rights in the context of the tax relation.

[47] S. Benvenuti, *The European Judicial Training Network And Its Role In The Strategy For The Europeanization Of National Judges*, 7(1) *International Journal for Court Administration* 59, 65 (2015).