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Constitutional Law: Latin American Tax Evasion the Benefits Generated through the Legal Vacuum

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Abstract

One of the biggest problems for the tax regimes of the countries that comprise Latin America and the Caribbean is tax evasion and how it has come to shield itself from the legal loopholes of the different constitutions, which seriously harms the collection of billions of dollars. per year by both national and multinational companies, without being able to take coherent action by tax regulation institutions in the region. This article seeks to show how these companies take advantage of these legal loopholes through constitutional law with several examples evidenced in the last 15 years and how different governments have reacted to avoid such evasions and in many cases of success, with a legal basis. of the constitutional right to recover millions in debt due to the exercise of tax evasion, in addition.

Keywords: *Taxation, constitutional law, tax evasion, constitutional principles, tax power.*

1 Introduction

One of the main sources of income for the economy of a country is the collection of taxes, since this allows a state to be able to solve public spending through taxes to which the members of society are subject, whether they are natural or legal persons (Fernandez et al., 2020). These taxes are generally stipulated by the tax entity of each country, which is strictly obliged to adjust to the economic requirements of the state, such as payment of debts with international financial entities, public works, among other items that allow the country's economy to keep balanced (Blanco Cordero et al., 2015). However, not all members of a society agree with paying taxes and look for ingenious methods to avoid them through legal loopholes and other tactics that harm the economy of a nation, such as embezzlement through foundations or non-profit organizations. that are exempt from paying taxes or their payments are minimal.

On the other hand, it is known that developing countries such as Colombia, Peru, among others in Latin America and the Caribbean, have difficulties in increasing their tax revenues.(Gabriel ION, 2019)This is clearly shown if one takes into account that the ratio of taxes to GDP in the so-called "industrialized" countries is generally higher than 30%, while this same ratio in developing countries is less than 15%. Therefore, this would

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imply that the latter have a limited source of income to provide public goods and other services necessary to improve the social and economic development of their citizens.(McGee, 2022), added to the fact that they present as a challenge, that many companies located in these countries do not always declare all their profits, so that their tax rate becomes much lower than what it really should be, this event is a frequent mass in SMEs and in entities or people that are part of the "shadow economy"(Uyar et al., 2021).

In addition, this tax collection problem increased after the last global pandemic of COVID-19, where according to United Nations reports up to 2.7% of annual world GDP has been the object of different forms of tax fraud, such as money laundering. , diversion of funds, corruption, etc. which leaves a total loss of 600 billion dollars annually (SWI swissinfo.ch, 2021), so it is important to know how to prevent and what should be the tactics by world governments to combat the so-called "Tax Engineering" where it seeks to evade taxes in malicious ways for different reasons such as hiding funds acquired by criminal activities, acts of corruption or simply to not comply with the corresponding taxes(UN et al., 2019)This agrees with the United Nations report where it indicates that tax non-compliance by companies worldwide is close to 6.1% of world GDP (UN News, 2020).

2 Tax evasion a global problem

However, what is the cause of this enormous problem of tax evasion by taxpayers?, in the report delivered by the United Nations in 2020(UN News, 2020)It is mentioned that it is due to many fiscal policies that are managed in an unfavorable and highly uncertain macroeconomic environment that depends on external situations such as social and political problems, mainly in developing countries.(UN News, 2019)On the other hand, experts such as Magdalena Sepúlveda, a member of the FACTI Panel (Financial Accountability Transparency and Integrity Panel), explains that the current collection systems of the member countries of the United Nations can become highly unfair and obsolete, which implies reforms to guarantee that the collection is viable for taxpayers and for the state and thus avoid tax evasion(SWI swissinfo.ch, 2021). Since multinationals are generally the companies that make use of "Tax Engineering" to limit their tax payment using as a strategy, declare their profits in subsidiaries established in countries with especially beneficial tax regimes with respect to their tax collection.

On the other hand, for small entrepreneurs, complying with the provisions of the tax regime can become complex and cumbersome, since their profits, unlike multinational companies, do not cover their operational requirements, so they resort to tax evasion tactics. to avoid paying taxes that generate losses within your business(Montenegro & Ferrero, 2021). In countries of the Asian continent, this type of situation generates a social phenomenon where many merchants, mainly informal ones, prefer to remain within the "shadow economy", and thus not pay taxes, which creates a vacuum with respect to regulations on your business activities and losses to the state (Alkhatib et al., 2019), since it does not allow sustaining the different state investments necessary to improve the economy, creating a vicious circle where both the state and small businesses do not obtain benefits.

Under the aforementioned, it is important to take into consideration that this phenomenon of tax evasion persists thanks to the inequity with which the laws of various countries seek to collect taxes without taking into account the purchasing power of each member of society and prevents the Entrepreneurship becomes a phenomenon of economic development of society, since this is one of the main sources of creating employment opportunities and reducing poverty (Dondena et al., 2017). Therefore, governments must take into consideration that the laws and regulations involved in tax collection must, in addition to seeking income from the state coffers, allow the development of all types of industries, from multinationals to SMEs.(Androniceanu et al., 2019a), so that in this way tax evasion would be reduced exponentially and economic and social development would increase.

3 Legal vacuum and tax evasion in Latin America

As mentioned above, tax evasion is a very creative way for multinational accountants to drastically reduce their tax return and pay less to the treasury.(Herbas & Gonzales, 2020), which generates a benefit for the company, and a million-dollar loss to the state coffers, however, this practice is possible thanks to "legal loopholes" within the laws and tax regulations, for which a knowledgeable person of the law can through "Fiscal engineering", find a strategy that allows you to reduce the amounts of payment to the treasury for tax reasons(Patiño Jacinto et al., 2019). From a technical perspective, technicalities that allow a person or company to evade sanctions by the competent authorities without directly violating a state law can be considered a “legal loophole”.(Gautam, 2022), these “loopholes” are frequent in complex businesses that involve tax policies and state laws(Gabriel ION, 2019), so they are more difficult to detect since they are argued on the basis of what is not stipulated to be a viable escape for high-profile companies (Ariyanto, 2020).

However, under this argument, the legal vacuum could not be considered as a method of tax evasion by itself, since it does not seek to break the law but, under the protection of this power, cover itself from any problem with the justice of the country of residence.(Gorecki & Letki, 2021). Therefore, for several governments it has been difficult to accuse a company or natural person of having evaded taxes, since under the law there is no flagrante delicto to be detected. This also puts pressure on world governments to review their Statutes and regulations from time to time, to adjust their own regulations and classify certain practices covered in the legal vacuum as a crime of tax evasion.(Androniceanu et al., 2019b)In other words, tax regulation laws must be subject to change as new forms of tax evasion appear through legal loopholes.

To take as an example a form of tax evasion that can be carried out through legal loopholes, are undeclared investments made in other countries considered tax havens, as was the case with the famous "Panama Papers" of 2016, where a large part was revealed. of the invisible wealth of many investors from various Latin American countries, who evaded the tax in their countries of origin (Burchardt & Ickler, 2023), through apparently legal figures that were only detected through the declassification of financial documents. Legal loopholes allow entrepreneurs to do what is known as "Tax Avoidance", which is not considered a crime but rather as a tool that allows reducing the payment of taxes for the benefit of the company.(Kogler & Kirchler, 2019), these business tactics lead to the laws seeking to toughen and take actions into account the flight of capital from tax collection is greater than the point of representing losses for the state(Van Brederode, 2019).

On the other hand, although tax avoidance produced by legal loopholes can be considered ambiguous, since technically it is not a crime, its practice in many cases can be unethical since it not only harms the state, but also profit sharing. of minority shareholders and workers(Sanchez Huete, 2021)For example, it is known that Latin American multinational companies acquire debts with subsidiaries of their same corporate group to reduce their profit and declare losses when presenting their income statements. Since this strategy was not classified as illegal, it allowed many investors evade taxes, in addition to not making the correct distribution of profits between their investors and workers(Ichuhuayta Ccahuana & Mansilla Ccahuana, 2020).

For this reason, several Latin American administrations have taken pertinent actions to prevent legal technicalities from being used to defraud the treasury, based on international cooperation between the countries of Latin America and the Caribbean.(ECLAC, 2020),where participation instances have been created to coordinate efforts between member countries and thus combat tax evasion at the international level, such as multilateral agreements on the automatic exchange of financial account information, administrative assistance agreements in tax matters, multilateral agreement for the exchange of reports between countries, among other instances established with the purpose of reaching the same language regarding tax declaration and knowing what methods are being used for tax evasion and efficiently covering legal gaps within the region and have better tax control at the block level(ECLAC, 2020).

For example, in Ecuador, the change in fiscal policy, where various practices considered tax reduction strategies were classified, allowed tax collection, which for the year 2000 was 1,675 million dollars, to increase by the end of 2022 by 15,182 million dollars. dollars, which represents an improvement in its collections of 906%(Internal Revenue Service of Ecuador, 2023), where creative accounting or fiscal engineering practices that seek tax evasion are punished with economic fines, in addition to the fact that practices that took advantage of the legal vacuum to divert funds were classified as crimes(Mejía Flores et al., 2019). In Ecuador, tax policies currently seek to make the income or profits of national and multinational companies transparent by declaring the variation in sales volume, historical information, extraordinary expenses and costs, macroeconomic information, and the financial information of comparable employees.(Garnica, 2023)

On the other hand, Mexico has implemented in recent years tax reforms regulated by the SAT (Administrative Tax Service) to avoid the manipulation of information on the economic income of companies subscribed to its tax regime, with respect to many inter-company activities of the different multinationals hosted in the country and seek to take advantage of certain legal loopholes in practices that are permitted by tax law(Rosas Rodríguez et al., 2020), mainly with respect to what is known as transfer pricing, where two or more companies associated with the same conglomerate can sell, or lend goods, many times in order to seek a tax benefit through a fair market value in their operations. inter company(Garnica, 2023).

Transfer pricing in the Mexican market has been a big problem to regulate in recent years since it is not an exact science for its calculation and companies can easily deceive regarding their calculation by inflating the value for tax deduction, however, it is known that thanks to this practice in Mexico there is a loss of tax of 6.3% of the national GDP(Rosas Rodríguez et al., 2020)However, in 2020 the Mexican Chamber of Deputies adopted measures based on the OECD framework, such as requesting income tax withholding through digital platforms, a limit on tax deductions and the request that the multinational companies reveal their tax planning scheme, in this way to be able to counteract any possible tax fraud through facilities provided by the current Mexican tax contribution law(Chamber of Deputies of the honorable Congress of the Union, 2022).

In Peru, however, there is a greater problem regarding tax evasion due to the Peruvian tax culture, since this is not assumed responsibly by the citizens, since its citizens instead of considering that it brings a benefit to the improvement and development of the country they perceive as unfair values to pay(Cabrera Sánchez et al., 2021)Therefore, the reforms to avoid tax evasion are not only focused on covering legal gaps, but also on raising awareness among citizens of the importance of contributing and that taxes support the public economy of Peru, its development projects and solving problems and needs. of the general population. A point to take into consideration is that the level of tax evasion in Peru is very high where its percentage came to be close to 50% at the level of the entire population, and although in recent years this has been reduced, it has not been less 30% (Arias, 2021).

Faced with this problem, Peru implemented in its legislation new regulations recommended by the OECD, this includes the general anti-avoidance regulation that came into force in 2019 in accordance with international regulations, with key points such as the management of transfer pricing, the obligation on the part of all companies, both national and multinational, to present financial statements and the presentation of affidavits of final beneficiary, in addition to international cooperation to detect tax evasion through the exchange of tax and financial information (Arias, 2021). This implies that Peru, like other countries, are under an international cooperation agreement to counteract tax evasion and maintain a policy of tax reforms based on each problem that may arise with respect to said practice.

As a last mention on policies against tax evasion, it should be mentioned that Panama, due to its status as a tax haven, its tax laws have allowed multinational companies from other countries in the region to use its financial system to evade taxes, shielding themselves from certain privileges. that the country offers for foreign investors (UN News, 2020), given that a territorial tax regime is used in the country, in other words, taxes are only paid on profits from Panamanian and other sources (Miranda, 2021). For this reason, the Panamanian territory has been used as a vehicle for tax evasion by many businessmen who want to hide profits and investment funds outside their territories of origin, taking advantage of this legal vacuum that prevents the Panamanian government from taxing these capitals, to the point that criminal organizations have taken advantage of said legal advantage (Cano Valdes & Cabrera Bermudez, 2021).

However, despite this aforementioned problem and thanks to the phenomenon caused in 2016 by the issue of the Panama Papers, where several businessmen worldwide appeared as owners of offshore companies, evading taxes in their countries of tax residence.(Bhihi, 2020), the Panamanian government took as an initiative from 2019, the approval of law 70 that reforms the penal code and dictates several adherent provisions to the crime of tax evasion, where money laundering is classified as a crime and precedent, however this law is in constant discussion since for several international organizations such as GAFILAT, it does not cover the legal gaps necessary to combat the crime of tax evasion, and that in its latest report published in 2019 it is mentioned that there is no real guideline that allows combating the crimes of money laundering or tax evasion in accordance with the provisions of the Vienna Convention and the Palermo Convention (León-Trujillo & Vélez-Brito, 2022).

4 International constitutional law and tax evasion

Currently several Latin American countries have begun to classify the crime of tax evasion within their laws, however, there are few countries that consider it a criminal offense, however, joint actions to detect it and that it is a precedent of connection with crimes such as money laundering, corruption and others, has been a permanent problem for the United Nations Organization,(GAFILAT, 2023)Therefore, it has been imperative to seek international action mechanisms such as international cooperation agreements, among others, to redouble efforts to effectively detect this type of tax engineering strategies. To achieve this objective, it is important that the classification of tax evasion crimes is in accordance with international constitutional law and that of each country.(Alstadsæter et al., 2022), in order to be able to speak the same language when imposing fines and sanctions on tax fraudsters and cover gaps that companies can take advantage of to reduce their taxes in an unethical manner, as mentioned above.

Currently, the legal loopholes for tax evasion are considered more as an unethical or immoral practice than a tool for tax fraud, therefore, the laws must be evaluated and modified for said objective, as in the case of Panama, which is still the problem has not been corrected and continues to be questioned by international organizations as lukewarm measures to control tax fraud (Cano Valdes & Cabrera Bermudez, 2021), under the argument that Panama only considers it a crime if the company or investor that attempts tax fraud practices resides in Panamanian territory. On the other hand, no tax law can be above the primary rights or the political constitution of a country, so any reform that must be carried out in the tax laws to penalize a crime must be in accordance with what is established by the constitution (Peralta, 2016).

For this reason, tax reforms are carefully studied so as not to violate the fundamental and constitutional rights of the members of a company and to be fair with the tax obligations that are requested(Merino Jara, 2020). Under this premise, the United Nations, through the recommendations of GAFILAT, has set objectives to improve the fight against money laundering and tax fraud, so from time to time it studies and reformulates strategies for international cooperation, generally these plans or recommendations are put for periods of 5 years, under the following assumptions: focus efforts to reduce or eliminate gaps by strengthening anti-money laundering systems, improve strategies carried out in previous periods, strengthen mutual evaluation systems, where actions can be taken to update the systems used to detect tax fraud and other crimes associated with tax engineering in member countries, develop a comprehensive training system for the member countries, promote actions aimed at raising awareness of the population regarding financial crimes, and develop a friendly and secure technological platform that allows access to financial information from Latin American and Caribbean countries(GAFILAT, 2023).In this way, tax controls to detect tax evasion seek not to infringe fundamental rights and comply with beneficial control for member countries..

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