


The progressiveness of the property tax as a communicative stimulus for respect for the social function of property

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Luiza Boff Lorenzon¹

ABSTRACT

This article sought, through an explanatory and exploratory study, to analyze the issue of the Urban Property Tax (IPTU) regarding the application of the progressive rate over time as an instrument of validation and social effectiveness, using for this purpose the theory of communicative action of Jürgen Habermas. Such an analysis is pertinent, insofar as Municipalities, many times, aiming to discourage the maintenance of urban properties, impose on owners the payment of IPTU at a different rate, which ends up generating the so-called collection character. To this end, an examination of Habermas' theory of communicative action is followed, and then portrays and analyzes the progressive property tax over time. In the end, a relationship is made between the IPTU and the theory, in order to ascertain the foundations of this collection, analyzing mainly the effectiveness and social validation.

Keywords: Effectiveness, IPTU progressive over time, Theory of communicative action, Social validation.

¹ Master's student in the *Sticto sensu* Graduate Program in Fundamental Rights and Democracy at the Autonomous University Center of Brazil – UniBrasil. Specialist in Applied Law from the School of Magistracy of Paraná – EMAP, Curitiba Center (2021).



INTRODUCTION

The present article aims to study the Urban Territorial Property Tax (IPTU) from the perspective of its extra-fiscal progressivity and its social and legal inferences, using Jürgen Habermas' theory of communicative action, with the purpose of ascertaining to what extent the cited tax complies with rationality and affirms the social validity of the norm that instituted it.

The creation of the extrafiscal progressive property tax, through article 182, paragraph 4, II, of the Federal Constitution of 1988, with the purpose of meeting the demand for mechanisms capable of implementing the principle of the social function of urban property, through the requirement of compliance with the municipal master plan, caused the most varied repercussions.

Either because it brought another meaning to the concept of tax, stipulated in article 3 of the National Tax Code (CTN), which provides for the prohibition of the use of the tax as a means of sanctioning an unlawful act, or because it generated suspicions about the effectiveness of the tax instrument, combined with the distrust of the master plans as to their role in conducting municipal urban policy.

In order to understand the social and legal inferences related to the tax, it is necessary to study a theory based on rationality, which should aim at legitimizing the norm in society.

Such an analysis is pertinent, insofar as the Municipalities, many times, with the objective of discouraging the maintenance of unbuilt, unused or underutilized urban properties, impose on the owner the payment of the IPTU at the progressive rate over time. However, this rule, in many cases, does not prove to be an instrument of validation and social efficiency.

Thus, at first, it is important to analyze Jürgen Habermas' theory of communicative action, which emerges in a critical conjecture as a respectable work, aiming to develop a new methodology for the social sciences in their effort to recognize, in the social phenomenon, its characteristics, and to be able to act on it. The relevance of its premises in the legal sphere can be perceived through what Habermas points out as the problematic regarding the justification of law: the requirement of a moral-practical foundation.

In this logic, the theory of communicative action will be used as a methodological tool for analysis, as well as the articulation of the main postulates and the form of their application to Law.

From this, a study of the IPTU will be carried out, with the main focus on analyzing the system of progressive tax rate over time due to the inappropriate use of urban land, which is provided for in article 182, paragraph 4, II, of the Magna Carta. And, finally, the interconnection of Habermas' theory of communicative action with the IPTU will be made, if it reveals itself as an instrument of social validation and effectiveness of urban policy.



In this sense, it is necessary to consider the theme related to what is provided for in the constitutional text, in addition to ascertaining the doctrinal positions and technical concepts about the understandings, for which an inductive analysis and bibliographic research are used.

BRIEF ANALYSIS OF JÜNGEN HABERMAS' THEORY OF COMMUNICATIVE ACTION

Jürgen Habermas' theory of communicative action is part of critical theory and aims to expose a new logic for the field of social sciences, with the aim of identifying, in social events, their central characteristics and being able to act on them. Philosophically, the theory intends to return to Kant in his critical philosophy, however "without the commitment to a philosophy of the subject"², "giving it a social configuration that corresponds to the historical demands of truth, necessary for the very phenomenon of validation"³.

According to Denis Huisman, in his Dictionary of Philosophers:

[...] the "Theory of Communicative Activity" poses the following problem: to know whether the concept of rationality, which is thus re-established, and the theory of truth, which one does not think of abandoning, are in a position to integrate at the same time the transcendental problematic of criticism and substantialization implied by the materialist reconstruction of its genealogy from the contingencies of history⁴.

Legally, it is necessary to try to understand the main propositions of Habermas' theory in order to later apply his convictions in order to have a hermeneutic that considers the norm under its practical aspect, which the theory aspires to highlight. However, in order to succeed in this understanding, it is pertinent to follow the same logic that the author used until his conclusions.

So, initially, as Scruton explains⁵, the theory developed by Habermas is a theory of knowledge of a rationalist character, in the sense that what is properly conceived is true. Therefore, the way Habermas treats rationality is where his postulates will gravitate.

It is important to point out that Habermas seeks to distance himself from Kantian philosophy in relation to the nature of reason, and not in relation to the form that reason exercises in the discovery of truth⁶. Whereas for Kant reason is considered as an essence, for Habermas it is a

² BAYNES, Kenneth. Critical theory. São Paulo: Ideias & Letras, 2008, p. 235.

³ FERREIRA, Sérgio L. The progressive property tax over time and its legal-social implications: An analysis in the light of J. Habermas' theory of communicative action. Boletim Científico Escola Superior do Ministério Público da União, [S. l.], n. 54, 2019, p. 325. Available at: <https://escola.mpu.mp.br/publicacoescientificas/index.php/boletim/article/view/494>. Accessed on: 23 jan. 2023.

⁴ HUISMAN, Denis. Dictionary of Philosophers. São Paulo: Martins Fontes, 2004, p. 461.

⁵ SCRUTON, Roger. A Brief History of Modern Philosophy: From Descartes to Wittgenstein. Rio de Janeiro: José Olímpio, 1995, p. 71.

⁶ FERREIRA, Sérgio L. The progressive property tax over time and its legal-social implications: An analysis in the light of J. Habermas' theory of communicative action. Boletim Científico Escola Superior do Ministério Público da União, p. 326.



procedure: "Rationality has less to do with the possession of knowledge than with the way in which subjects are able to speak and act *acquire and employ the knowledge*"⁷.

That said, Habermas adopted communicative rationality, being a specific standard of rationality, originating from the *It is important to note that there is no need for* Its value is directly inserted in argumentative speech, which has the purpose of bringing

[...] with its connotations that, in the end, go back to the central experience of the spontaneously unitive and consensus-generating force proper to argumentative speech, in which several participants overcome their initially subjective conceptions in order to then, thanks to the agreement of rationally motivated convictions, to ensure at the same time the unity of the objective world and the intersubjectivity of its vital context⁸.

Habermas focuses on the linguistic branch, with the purpose of ascertaining what exactly communicative rationality consists of and how to identify it. He then develops the concept of *Télos*, which aims to understand the structures of interaction between what is said and the "way" it is said.

By means of this first conclusion, it means to say that *Télos* It is inherent to all argumentative language, in which it is possible to glimpse communicative rationality, establishing the distinction between "between an instrumental purpose and a communicative purpose of argumentative speech"⁹. While the former, according to Habermas, instigates success, and, therefore, can be considered as antisocial, the latter proposes the idea of understanding, in this case, being social, which ends up generating communicative rationality. Thus, Habermas points out that:

Understanding only functions as a mechanism for coordinating action to the extent that the participants in the interaction agree on the *intended validity* of their externalizations, that is, to the extent that they intersubjectively recognize the *claims of validity* that they manifest reciprocally¹⁰.

However, in order to achieve the separation of instrumental action from communicative action, Habermas states that in communicative action "all participants pursue ends without reservation illocutionary¹¹ with the aim of reaching an agreement that will serve as a basis for an adjusted coordination of the individual action plans"¹².

⁷ HABERMAS, Jürgen. Theory of communicative action: Rationality of action and social rationalization. Translated by Paul Astor Soethe. São Paulo: Editora WMF Martins Fontes, 2012, p. 31.

⁸ HABERMAS, Jürgen. Theory of Communicative Action: Rationality of Action and Social Rationalization, p. 35-36.

⁹ FERREIRA, Sérgio L. The progressive property tax over time and its legal-social implications: An analysis in the light of J. Habermas' theory of communicative action. Boletim Científico Escola Superior do Ministério Público da União, p. 327.

¹⁰ HABERMAS, Jürgen. Theory of Communicative Action: Rationality of Action and Social Rationalization, p. 191.

¹¹ "Through locutionary acts, the speaker says something, that is, he expresses states of affairs; By illocutionary acts, as an agent, he performs an action: to say something; Finally, through perlocutionary acts, he seeks to have an effect on the listener. Such speech acts can be characterized as follows: "to say *something*; to do *by saying* something, to cause something *by what one does by saying* something." CENCI, Angelo. The controversy between Habermas and Apel over the relationship between morality and practical reason in discourse ethics. Campinas, 2006, p. 80.

¹² HABERMAS, J. Communicative Action Theory. Rationality of action and social rationalization. V.1. Translated by Manuel Jiménez Redondo. Madrid: Taurus, 1999, c 1981, p. 379.



It is at the moment when Habermas presents the idea of the world of life and correlates it with the linguistic sphere, going beyond speech, that the theory gains greater consistency in what it proposes. In this sense, based on this relationship, it is necessary to understand how the theory of communicative action can be used in Law, since Habermas identifies a problem with the need for a moral and practical foundation¹³. He derives this understanding from his critique of Max Weber's legal sociology, which restricted legal praxis to a finalist idea.

Habermas notes that some understandings of modern law, particularly with regard to the aspects of positivity, legality, and formality, have been neglected. Thus, he realizes that the law is positive, regulated; it compels people to legal obedience; and defines, in the field of arbitrariness of private persons, what is legally permitted and prohibited¹⁴.

The author then exposes that "the fact that modern law is functional for the institutionalization of rational-teleological action does not yet explain the structural marks on the basis of which it can fulfill this function"¹⁵. And, finally, he concludes that these aspects "mean that the validity of law can no longer live on the (previously obvious) authority of moral traditions; Rather, it lacks *Reasons* autonomous, i.e. from a rationale *Not only to given purposes*"¹⁶.

This autonomous foundation, proposed by the author, is not properly linked to legality, but rather to morality, in the sense of a specific and practical morality, which is present in the very disposition of legal obedience. With regard to this distinction between legality and morality,

[...] the field of legality *as a whole* lacks a practical justification. The sphere of law – which requires of jurisusers their disposition to obey the law – is exempt from a morality, but at the same time points to a morality based on principles¹⁷.

Habermas also addresses some concepts such as the lack of validity, validity and subsistence of the norm, which will serve as a reference for the legal hermeneutics itself, with regard to the possibility of assessing in the norm, within the moral-practical rationalization, its social validity, that

¹³ "The concept of understanding refers to a common agreement desired by the participants and rationally motivated, which is measured according to claims of validity that can be criticized. The claim of validity (propositional truth, normative correctness, and subjective truth) characterize different categories of knowledge that is symbolically embodied in externalizations. These externalizations can be analyzed more closely: on the one hand, from the point of view of the possibility of substantiating externalizations such as these; on the other hand, under the aspect of how the actors relate, through them, to something in the world. The concept of communicative rationality refers to various forms of discursive rescue of validity claims (hence Wellmer also speaks of a 'discursive' rationality) and also to references to the world acceptable to people who act communicatively, as they manifest claims of validity for their externalizations (and for this reason the decentralization of the understanding of the world has revealed itself as the most important dimension in the formation of an understanding of the world)". HABERMAS, Jürgen. *Theory of Communicative Action: Rationality of Action and Social Rationalization*, p. 147-148.

¹⁴ HABERMAS, Jürgen. *Theory of Communicative Action: Rationality of Action and Social Rationalization*, p. 452-453.

¹⁵ HABERMAS, Jürgen. *Theory of Communicative Action: Rationality of Action and Social Rationalization*, p. 454.

¹⁶ HABERMAS, Jürgen. *Theory of Communicative Action: Rationality of Action and Social Rationalization*, p. 454.

¹⁷ HABERMAS, Jürgen. *Theory of Communicative Action: Rationality of Action and Social Rationalization*, p. 455.



is, "a theoretical foundation that unites the social repercussions produced in its surroundings to the practical meaning claimed by it"¹⁸.

In moral-practical arguments, participants can test both the correctness of a given action, referring it to a given norm, and the correctness of a norm of this type itself, at an advanced stage. This knowledge is part of tradition in the form of juridical and moral notions¹⁹.

Thus, when referring to validity and subsistence, Habermas establishes that the difference between them lies in the idea that, in validity, "the norm receives the assent of all those affected, because it regulates problems of common interest to them"²⁰. And in subsistence, "the claim of validity with which it is presented is recognized by those affected, and this intersubjective recognition is the basis for the *Social Validity* of the standard"²¹.

As for the concept of grace period, it will have a direct influence on the validation of the standard:

We do not link such a normative claim of validity to cultural values; however, values plead for embodiment in norms; in the face of a matter that lacks regulation, they *can* obtain general obligations. In the light of cultural values, the shortcomings of an individual are also plausible for other individuals in the same tradition. Deficiencies interpreted in an elucidative way, however, only become legitimate reasons for action in the regulation of certain problematic situations, when the corresponding values become normatively mandatory for a circle of affected parties²².

In this way, the theory of communicative action has influenced constitutional hermeneutics, as well as its own concept. In this sense, Häberle considers it to be a continuous process, seeking to achieve its widest application in the norm, in order to adapt it to the "open society", which must cooperate for this to occur²³.

To put it in time, the process of constitutional interpretation is infinite, the constitutionalist is only a mediator (*Zwischenträger*). The result of its interpretation is subject to the reserve of consistency (*Volberhalt der Bewährung*), and in the singular case it must be adequate and able to provide diverse and varied justifications, or even to undergo changes by means of rational alternatives. The process of constitutional interpretation must be extended beyond the concrete constitutional process. The range of normative interpretation is widened thanks to the interpreters of the Constitution of the open society. They are the key participants in the process of trial and error, discovery and obtaining of the right²⁴.

¹⁸ FERREIRA, Sérgio L. The progressive property tax over time and its legal-social implications: An analysis in the light of J. Habermas' theory of communicative action. *Boletim Científico Escola Superior do Ministério Público da União*, p. 333.

¹⁹ HABERMAS, Jürgen. *Theory of Communicative Action: Rationality of Action and Social Rationalization*, p. 575.

²⁰ FERREIRA, Sérgio L. The progressive property tax over time and its legal-social implications: An analysis in the light of J. Habermas' theory of communicative action. *Boletim Científico Escola Superior do Ministério Público da União*, p. 332.

²¹ HABERMAS, Jürgen. *Theory of Communicative Action: Rationality of Action and Social Rationalization*, p. 171.

²² HABERMAS, Jürgen. *Theory of Communicative Action: Rationality of Action and Social Rationalization*, p. 171-172.

²³ HÄBERLE, Peter. *The Problems of Truth in the Constitutional State*. Porto Alegre: Sergio Antonio Fabris, 2008.

²⁴ MARTINS, Ives G. S; MENDES, Gilmar F. *Concentrated control of constitutionality*. São Paulo: Saraiva. 2007, p. 264.



This idea of hermeneutics is mirrored in the very idea of rationality proposed by Habermas, which Häberle, later using Habermas' concept, will question the truths in the Constitutional State²⁵.

The rationality present in communicative practice extends to a broader spectrum. It indicates different forms of argumentation, as well as different possibilities of continuing the communicative action through reflexive resources²⁶.

Finally, it is pointed out that constitutional hermeneutics uses methods that allow it, in addition to coherence in the search for truth, also transparency and in the answers.

PROGRESSIVITY OVER TIME OF THE URBAN PROPERTY AND LAND TAX BASED ON THE FEDERAL CONSTITUTION OF 1988

In the field of legal interpretation, certain norms sometimes require greater rigor from the interpreter, mainly because they are norms that generate far-reaching effects on social relations. This is present in tax matters where the State exercises the exercise of its tax competence in a non-delegable manner, thus affirming its power before society.

The concept of tax, in the Brazilian legal system, is defined by the provisions of the constitutional text and by infra-constitutional laws, such as the National Tax Code, which establishes in its article 3 as a compulsory pecuniary payment, in currency or whose value can be expressed, which does not constitute a sanction for an unlawful act, established by law and collected through a fully linked administrative activity²⁷. From the point of view of specificities, the tax system has five types of taxes, namely: taxes, fees, improvement contributions, special contributions²⁸ and compulsory loans.

In addition, the National Tax Code provides in its article 16 that the tax is a type of tax whose obligation has as a taxable event a situation independent of any specific activity of the State, relative to the taxpayer, that is, it does not depend on a related activity²⁹.

Regarding the functions of taxes, the doctrine points out that they have several foundations, such as: (a) fiscal: it consists of the collection of the tax with an imminent collecting character; (b)

²⁵ "The prototype of the constitutional state or, respectively, of pluralist democracy presents itself today as the most successful model antagonistic (certainly still in need of reforms) to the totalitarian state of any *couleur* and to all fundamentalist pretensions of truth, to information monopolies and to immutable ideologies. Thus he is characterized precisely by the fact that he is not in possession of pre-constituted eternal truths, but rather that he is predestined only to a mere search for truth." HÄBERLE, Peter. *The Problems of Truth in the Constitutional State*, p. 105.

²⁶ HABERMAS, Jürgen. *Theory of Communicative Action: Rationality of Action and Social Rationalization*, p. 34-35.

²⁷ BRAZIL. Law No. 5,172, of October 25, 1966. It instituted the National Tax Code. Available at: https://www.planalto.gov.br/ccivil_03/leis/15172compilado.htm. Accessed on: 08 feb. 2023.

²⁸ The special contributions, as provided for in articles 149 and 195 of the Federal Constitution of 1988, are divided into: social contributions (subdivided into contributions of interest to professional or economic categories and contributions for intervention in the economic domain), and social security contributions. BRAZIL. *Constitution of the Federative Republic of Brazil of 1988*. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: 08 feb. 2023.

²⁹ BRAZIL. Law No. 5,172, of October 25, 1966. It instituted the National Tax Code.



extrafiscal: it is the use of the tax with the intention of achieving social or political objectives, without an immediate collection purpose; (c) parafiscal: is the delegation of administrative capacity to collect and supervise taxes, which will be carried out by specific activities³⁰.

Allied to these functions, we can affirm that taxes have normative provisions of a principled and rule-making nature, such as: (a) fundamental rights and guarantees, since they are core to our system; (b) equality, seeking to ensure equal treatment among taxpayers; (c) legal certainty³¹, aiming at non-surprise and the planning of future actions; and (d) certainty of the law, aiming at the safety of the individual, since certainty is an indispensable premise for harmonious social coexistence³².

Compliance with such rules and principles means that the legal norm provides that any tax must necessarily establish criteria (material, spatial and temporal), which for the specialized doctrine is called the matrix rule of tax incidence. In addition, the active and passive persons, the calculation basis and the amount of the rate must be determined in the rule that will institute the tax³³.

In view of this, the urban property tax (IPTU) is the responsibility of the Municipalities and the Federal District³⁴, having as a taxable event the ownership, useful domain or possession of immovable property by nature or by physical accession located in an urban area of the Municipality³⁵.

In addition, the IPTU is subject to three different tax systems, namely: (a) progressive rates over time due to the inappropriate use of urban land (article 182, paragraph 4, II, of the CF/88)³⁶; (b) progressive rates according to the value of the property (article 156, paragraph 1, I, of CF/88); (c) different rates according to the binomial location/use of the property (article 156, paragraph 1, II, of CF/88)³⁷.

³⁰ MAZZA, Alexander. *Tax Law Manual*. 8. ed. São Paulo: Saraiva Educação. 2022, p. 55-61.

³¹ On this subject, see: FISCHER, O. C.; MALISKA, M. A. MATRIX RULE OF TAX INCIDENCE – LEGAL CERTAINTY AND THE BASIS OF CALCULATION OF IPTU. *Fundamental Rights & Journals Democracy, [S. l.]*, v. 22, n. 3, p. 272–293, 2017. DOI: 10.25192/issn.1982-0496.rdfd.v22i31212. Available at: <https://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/1212>. Accessed on: 17 feb. 2023.

³² LEAL, Rogério G. The Progressive IPTU as an Instrument for the Realization of the Social Function of the City in Brazil. *A&C Journal of Administrative and Constitutional Law*, Belo Horizonte, 2004, p. 108-109. Available at: <http://www.revistaaec.com/index.php/revistaaec/article/view/601>. Accessed on: 16 feb. 2023.

³³ LEAL, Rogério G. The Progressive IPTU as an Instrument for the Realization of the Social Function of the City in Brazil. *A&C Journal of Administrative and Constitutional Law*, p. 109.

³⁴ "Art. 156. It is incumbent upon the Municipalities to institute taxes on: I - urban land and land property". BRAZIL. Constitution of the Federative Republic of Brazil of 1988.

³⁵ "Art. 32. The tax, under the competence of the Municipalities, on urban land and land property has as a taxable event the ownership, useful domain or possession of immovable property by nature or by physical accession, as defined in civil law, located in the urban area of the Municipality". BRAZIL. Law No. 5,172, of October 25, 1966.

³⁶ "Art. 182. The urban development policy, implemented by the municipal government, according to general guidelines established by law, aims to order the full development of the city's social functions and ensure the well-being of its inhabitants. § 4 It is possible for the municipal government, by means of a specific law for the area included in the master plan, to require, under the terms of federal law, the owner of unbuilt, underutilized or unused urban land to promote its proper use, under penalty, successively, of: II - tax on urban property and land progressive over time". BRAZIL. Constitution of the Federative Republic of Brazil of 1988.

³⁷ MAZZA, Alexander. *Handbook of Tax Law*, p. 561.



It is important to note that until the enactment of Constitutional Amendment No. 29 of 2000, the Federal Constitution only had an express provision for the progressivity of the property tax due to the inappropriate use of urban land (article 182, paragraph 4, II, of the Federal Constitution), which is why the Federal Supreme Court pacified the understanding³⁸ that, prior to the year of the enactment of said Amendment, the collection of the tax at progressive rates was not allowed due to the value or use/location of the property³⁹.

The progressive rate over time, with regard to the IPTU, consists of an instrument used by the Municipalities with the objective of discouraging the maintenance of unbuilt, unused or underutilized urban properties, which can reach the maximum level of 15% on the market value of the property.

On the other hand, the tax rate based on the value of the property has a purely collection purpose, carried out according to the taxpayer's economic capacity. And, finally, the variable rates according to the use and location of the property, which imposes on the legislator the duty to observe the use and location to define the rate.

Thus, the IPTU rate may vary according to the utilization index, the land, the type of construction, its dimensions, its location, its destination, the number of floors, the property, and so on. It will all depend on the director's plan. But in order for the property tax to comply with the principle of ability to pay, there is no need for a master plan to be issued⁴⁰.

Such considerations lead us to other conceptualizations that are important to elucidate here, namely those related to the real or personal character of taxes. Doctrinally, personal taxes take into account legally established aspects of possible taxpayers, which are essentially levied on the person, through the economic characteristics of each individual⁴¹. In this sense, Baleeiro prescribes:

Personal or subjective taxes are regulated by criteria that contemplate the individuality of the taxpayer. The very personal conditions of this are elements that are integrated in the formation of the taxable event and determine variations for more or less in the determination of the quantum to be claimed by the tax authorities⁴².

On the other hand, real taxes, whether objective or impersonal, are those that do not take into account the conditions of the taxable person, that is, they are based on the materiality of the taxable thing⁴³. According to Bernardo Ribeiro de Moraes, the real tax:

³⁸ BRAZIL, Supreme Court. Precedent 668. "A municipal law that established, prior to Constitutional Amendment No. 29/2000, progressive rates for property tax is unconstitutional, unless it is intended to ensure the fulfillment of the social function of urban property." Brasília, DF: Supremo Tribunal Federal [2003]. Available at: <https://portal.stf.jus.br/jurisprudencia/sumariosumulas.asp?base=30&sumula=1521>. Accessed on: 13 feb. 2023.

³⁹ MAZZA, Alexander. Handbook of Tax Law, p. 562.

⁴⁰ CARRAZZA. Castling A. Course in Constitutional Tax Law. 17. Ed. Malheiros: São Paulo, 2002, p. 95.

⁴¹ LEAL, Rogério G. The Progressive IPTU as an Instrument for the Realization of the Social Function of the City in Brazil. A&C Journal of Administrative and Constitutional Law, Belo Horizonte, 2004, p. 111. Available at: <http://www.revistaaec.com/index.php/revistaaec/article/view/601>. Accessed on: 16 feb. 2023.

⁴² WHALER, Aliomar. Brazilian Tax Law. Rio de Janeiro: Forense, 1999, p. 73.

⁴³ LEAL, Rogério G. The Progressive IPTU as an Instrument for the Realization of the Social Function of the City in Brazil. A&C Journal of Administrative and Constitutional Law, p. 111.



It is calculated without taking into account the personal conditions of the taxpayer, or rather, completely ignoring the individual situation of the taxpayer (the tax taxes a given wealth or a situation in the same way, regardless of the taxpayer). Real taxes are levied on the taxpayer with a view only to the taxable amount, according to its specific objective characteristics, regardless of the economic, legal, personal or family conditions related to the taxpayer. The rate is set solely on the basis of the material circumstances of the factual situation provided for by law⁴⁴.

Thus, there is a complication that involves the two institutes previously discussed, namely: fiscal progressivity and extrafiscal progressivity. With regard to fiscal progressivity, it considers the economic capacity of the taxpayer, giving greater meaning to the principle of ability to pay and equality, so that it seeks to treat the unequal in an unequal way, to the extent of their inequalities, in addition to having a collection function for the public treasury.

On the other hand, extra-fiscal progressivity uses an exogenous paradigm, as it operates in the face of a higher tax rate on the legal asset to be taxed, surpassing the collection function, surpassing the state and individual sphere, with the objective of achieving social goals and public policies, such as the fact of encouraging the proper use of urban property by the property owner, in order to fulfill the social function of the city and the property.

It is in this context that the IPTU progressive over time, provided for in article 182, paragraph 4, II, of the Federal Constitution is inserted, since it provides for several measures in order to promote the social function of urban property. However, its collection ends up transforming the tax into a mechanism of progressive coercion, associated with the time of non-compliance by the property owner with the master plan, which prescribes the structuring of urban land⁴⁵.

However, some questions are raised regarding the use of such a measure, with regard to ensure the fulfillment of the social function of the property, either due to the low efficiency of the master plan in which it is inserted, or due to the absence or non-existence of public policies that enable urban planning in reasonable and conceivable criteria.

In view of these questions, an interpretation of the constitutional provision will be carried out in the light of the Habermasian theory.

PROGRESSIVENESS OVER TIME IN THE LIGHT OF THE THEORY OF COMMUNICATIVE ACTION: SOCIAL VALIDATION OR TAX COLLECTION?

The comprehension of the progressive property tax over time based on Habermas' theory of communicative action, in order to ascertain its social validity, should be based on the concepts

⁴⁴ MORAES, Bernardo Ribeiro. Compendium of Tax Law. Rio de Janeiro: Forense, 2002, v. 1, p. 441.

⁴⁵ FERREIRA, Sérgio L. The progressive property tax over time and its legal-social implications: An analysis in the light of J. Habermas' theory of communicative action. Boletim Científico Escola Superior do Ministério Público da União, p. 333.



presented by the theory, explained in the first topic of this article. For this, two definitions present in article 182, paragraph 4, II, CF/88 will be used, which seek to substantiate the collection based on the social interest, namely: the social function of the property and the master plan. The first has to do with the purpose of the norms, and the second has to do with the means by which it will be able to produce its effects.

First of all, the City Statute⁴⁶ determines to the owner, as a tool of urban policy, the subdivision, building, or compulsory use of unbuilt, underutilized, or unused urban land⁴⁷. If the practices provided for above are not complied with, there will be the imposition of the IPTU progressive over time, whose rate is increased for a period of 5 (five) consecutive years⁴⁸.

However, if these five (5) years have passed without the owner having complied with the installment, building, or compulsory use, the Municipality may proceed with the expropriation of the property for subsequent social use, with payment in public debt securities, which must have prior approval by the Federal Senate⁴⁹.

Thus, property must be understood and propagated as a right of all, and not as a form of unreasonable and excessive exploitation, protected by a highly individualistic economic power, under penalty of not fulfilling the social function, the appropriate constitutional measures are adopted, as well as by the Statute of the City, considering that they enable municipal intervention in private property, which, of course, must comply with the principle of proportionality, in so far as such intervention must comply with factual and legal conditions.

Regarding the factual conditions, the author Bruno Filho clarifies important precepts to identify the social function of urban property and its connection with reality.

The FSPIU [social function of urban real estate] thus constitutes something that we will provisionally call a superprinciple, not so much hierarchically superior, but with broader effects than the others, given its own structure and historical and political insertion. From this will derive so many other principles, which will give concreteness to the social function, and will sustain its validity and applicability in it. More than a univocal content, what should be sought are logical argumentative procedures that make their expression coherent in each specific fact or program, minimally plausible and effective for the changing realities in which they operate – that is, the cities, with all the myriad of diversity and plurality that they shelter among themselves or within themselves⁵⁰.

When the author proposes the phrase "logical argumentative procedures that make its expression coherent in each specific fact or program"⁵¹, it brings a reflection on reality, in the sense

⁴⁶ BRAZIL. Law No. 10,257, of July 10, 2001. It regulates articles 182 and 183 of the Federal Constitution, establishes general guidelines for urban policy and provides other provisions. Available at: https://www.planalto.gov.br/ccivil_03/leis/leis_2001/110257.htm. Accessed on: 17 feb. 2023.

⁴⁷ Art. 5, Law 10.257/01. BRAZIL. Law No. 10,257, of July 10, 2001.

⁴⁸ Art. 7, Law 10.257/01. BRAZIL. Law No. 10,257, of July 10, 2001.

⁴⁹ Art. 17, Law 10.257/01. BRAZIL. Law No. 10,257, of July 10, 2001.

⁵⁰ BRUNO FILHO, Fernando G. Principles of urban law. Porto Alegre: Sergio Antonio Fabris, 2015, p. 58.

⁵¹ BRUNO FILHO, Fernando G. Principles of Urban Law, p. 58.



that the principle of social function must be guided by the concrete/real, which is essential for the practical foundation, which was dealt with by Habermas. In this way, he wants the principle to reflect the social needs of the cities, in each concrete situation.

These requirements, as far as they are concerned, can be translated as a set of precepts, which are often not covered by the norm allied to the master plan, considering that cities are in constant change, and are compatible with the meaning of "needs" proposed in the theory of communicative action⁵².

From this perspective, the social function appears as a concept under construction, undergoing an argumentative process that gives it social coherence and, once positive, will give the same open character to the norm. This is reflected in the term of the "subsistence" of the norm employed by Habermas in his theory. In this sense:

The justification for the existence of the State does not lie primarily in the protection of equal subjective rights, but in the guarantee of an inclusive process of opinion and will formation, within which free and equal civilians agree on what norms and ends are in the common interest of all. With this, much more is required of the republican citizen than the simple orientation of one's own interest⁵³.

The master plan, on the other hand, is a means of achieving the social function, whose founding function is the implementation of urban policies, which present difficulties, especially cultural, for their implementation⁵⁴. Furthermore, the relevance of the master plan is not limited to the implementation of urban policies, it includes the choice, at the constitutional level, of this mechanism as defining the social function of property⁵⁵.

It can be said that the provisional conclusions reached in this analysis are that, in relation to the social function of property, "the subsistence of the device can be said to be suspended, by virtue of the very open nature of the principle that encloses the social function"⁵⁶, with regard to the Master Plan, its suspension is due to the lack of intersubjectivity for the acceptance of the standard.

⁵² FERREIRA, Sérgio L. The progressive property tax over time and its legal-social implications: An analysis in the light of J. Habermas' theory of communicative action. *Boletim Científico Escola Superior do Ministério Público da União*, p. 338.

⁵³ HABERMAS, Jürgen. *Law and Democracy: between facticity and validity*. Vol. I. Translated by Flávio Beno Siebeneichler. Brasília: Tempo Brasileiro, 1997, p. 335.

⁵⁴ On this subject, see: COLET, C. P.; COITINHO, V. T. D. LOCAL POWER AS A SPACE FOR THE ARTICULATION OF CITIZENSHIP AND THE CONSTRUCTION OF SOCIAL RIGHTS: the political refoundation of the Democratic State through the communicative action of Jürgen Habermas. *Fundamental Rights & Journals Democracy, [S. l.]*, v. 10, n. 10, p. 137–163, 2011. Available at: <https://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/139>. Accessed on: 20 feb. 2023.

⁵⁵ BRUNO FILHO, Fernando G. *Principles of Urban Law*, p. 170.

⁵⁶ FERREIRA, Sérgio L. The progressive property tax over time and its legal-social implications: An analysis in the light of J. Habermas' theory of communicative action. *Boletim Científico Escola Superior do Ministério Público da União*, p. 340.



The discussion regarding the problem of social validation of the norm requires an argumentative response that manages to weigh principles, through a rationality that raises other "possibilities of continuing the communicative action through reflexive resources"⁵⁷.

In this logic, it is possible to think of a reconciliation of actions of the municipal and state public administration, as well as of the Legislative Branch for an effective urban structuring, which translates, in pragmatic terms, into a greater allocation of financial and budgetary resources, with regard to the growing needs of each location⁵⁸.

The conflict of legal assets hovers over the discretion of the public administration and the practical realization of the social function of property. In this sense, the accomplishment of the social function supersedes the public administration, in view of the normative need for subsistence and also the satisfaction of the intersubjective deficiencies of values, not yet materialized by the process of social validation.

Such intersubjective deficiencies are reflected in the instructive character of the sanction established in the type. In this case, it can be seen that the collection as a result of the imposition must be used in an activity related to the prevention of the offense itself, such as, for example, the amount collected in traffic fines, which must be used exclusively in activities of policing, inspection, driver education, signaling, among others.

To resolve the issue of the conflict of legal goods, the doctrinaire Gomes Canotilho brings the idea of the interpretative principle of harmonization or practical agreement, which proposes the "coordination and combination of the conflicting legal goods in order to avoid the (total) sacrifice of some in relation to the other"⁵⁹. In other words, in the absence of criteria established by the Constitution itself for harmonization and principles, this is concretized in the face of subjective evaluations of the interpreter at the time of the act of interpretation and application⁶⁰.

In view of this, the rationality regarding the theory of communicative action, determines a practical solution in the sense of linking the proceeds of the collection of the progressive property tax over time to the fulfillment of programs that correspond to the needs of the values, stipulated in the urban policy of each municipality, through its master plan.

In the meantime, it means that the linkage of the proceeds collected in relation to the IPTU must be used in any sector contemplated by the master plan, such as, for example, housing, security, transportation, among others, so that it complies with its validation and social effectiveness.

⁵⁷ HABERMAS, Jürgen. Theory of Communicative Action: Rationality of Action and Social Rationalization, p. 34-35.

⁵⁸ On this subject, see: OLIVEIRA, O. B. de; FERRER, W. M. H. THIRD SECTOR ENTITIES: DEMOCRATIC PARTICIPATION IN PARTNERSHIPS WITH PUBLIC AUTHORITIES. *Fundamental Rights & Journals Democracy*, [S. l.], v. 25, n. 1, p. 204–221, 2020. DOI: 10.25192/issn.1982-0496.rdfd.v25i11430. Available at: <https://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/1430>. Accessed on: 17 feb. 2023.

⁵⁹ MARINONI, Luiz G.; MITIDIERO, Daniel; SARLET, Ingo W. Curso de direito constitucional, p. 220.

⁶⁰ MARINONI, Luiz G.; MITIDIERO, Daniel; SARLET, Ingo W. Curso de direito constitucional, p. 221.



FINAL THOUGHTS

In the course of this article, we sought to present the issue of the Urban Property Tax (IPTU) regarding the application of the progressive rate over time as an instrument of validation and social effectiveness and, for that, Habermas' theory of communicative action was applied. Thus, as an initial conclusion, it can be seen that the theory of communicative action provides an argumentation with the purpose that rationality helps hermeneutics to become a means of searching for truth.

In addition, the relevance of the theory applied to the legal area was observed, since the idea of moral-practical foundation is directly applied in argumentation, in the sense of seeking the validity and efficiency of the norm, especially in its social aspect.

As for the IPTU that is progressive over time, it was noted that it has open concepts, either due to the open nature of the principle of the social function of property, or due to the intersubjectivity in its recognition process, which ends up hindering its validation and social effectiveness.

All these explanations contribute to the result with regard to the linkage of the collection of the progressive property tax over time, which should stick to programs that correspond to the intersubjective needs of the values, stipulated in the urban policy itself. In other words, the norm must be framed in a practical and real plan, giving adequate preponderance to the social function of urban property and requiring the linking of its proceeds to the prevention of illicit activities.

Therefore, since the progressive IPTU is a sanctioning norm that induces a certain behavior, granted to the Municipality through the Federal Constitution, it must seek the purposes intended by a Social State, that is, to minimize social discrepancies, thus seeking a social balance.



REFERENCES

1. BAYNES, Kenneth. Teoria crítica. São Paulo: Ideias & Letras, 2008.
2. BALEEIRO, Aliomar. Direito Tributário Brasileiro. Rio de Janeiro: Forense, 1999.
3. BRASIL. Constituição da República Federativa do Brasil de 1988. Disponível em: http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm. Acesso em: 08 fev. 2023.
4. _____. Lei nº 5.172, de 25 de outubro de 1966. Instituiu o Código Tributário Nacional. Disponível em: https://www.planalto.gov.br/ccivil_03/leis/15172compilado.htm. Acesso em: 08 de fev. 2023.
5. _____. Lei nº 10.257, de 10 de julho de 2001. Regulamenta os arts. 182 e 183 da Constituição Federal, estabelece diretrizes gerais da política urbana e dá outras providências. Disponível em: https://www.planalto.gov.br/ccivil_03/leis/leis_2001/110257.htm. Acesso em: 17 fev. 2023.
6. _____. Supremo Tribunal Federal. Súmula 668. Brasília, DF: Supremo Tribunal Federal [2003]. Disponível em: <https://portal.stf.jus.br/jurisprudencia/sumariosumulas.asp?base=30&sumula=1521>. Acesso em: 13 fev. 2023.
7. BRUNO FILHO, Fernando G. Princípios de direito urbanístico. Porto Alegre: Sergio Antonio Fabris, 2015.
8. CARRAZZA, Roque A. Curso de Direito Constitucional Tributário. 17. Ed. Malheiros: São Paulo, 2002.
9. CENCI, Angelo. A controvérsia entre Habermas e Apel acerca da relação entre moral e razão prática na ética do discurso. Campinas, 2006, p. 80.
10. COLET, C. P.; COITINHO, V. T. D. O PODER LOCAL COMO ESPAÇO DE ARTICULAÇÃO DA CIDADANIA E CONSTRUÇÃO DO DIREITO SOCIAL: a refundação política do Estado Democrático pela ação comunicativa de Jürgen Habermas. Revista Direitos Fundamentais & Democracia, [S. l.], v. 10, n. 10, p. 137–163, 2011. Disponível em: <https://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/139>. Acesso em: 20 fev. 2023.
11. FERREIRA, Sérgio L. O IPTU progressivo no tempo e suas implicações jurídico-sociais: Uma análise sob a luz da teoria do agir comunicativo de J. Habermas. Boletim Científico Escola Superior do Ministério Público da União, [S. l.], n. 54, 2019, p. 323-346. Disponível em: <https://escola.mpu.mp.br/publicacoescientificas/index.php/boletim/article/view/494>. Acesso em: 23 jan. 2023.
12. FISCHER, O. C.; MALISKA, M. A. REGRA MATRIZ DE INCIDÊNCIA TRIBUTÁRIA – SEGURANÇA JURÍDICA E A BASE DE CÁLCULO DO IPTU. Revista Direitos Fundamentais & Democracia, [S. l.], v. 22, n. 3, p. 272–293, 2017. DOI: 10.25192/issn.1982-0496.rdfd.v22i31212. Disponível em: <https://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/1212>. Acesso em: 17 fev. 2023.
13. HÄBERLE, Peter. Os problemas da verdade no estado constitucional. Porto Alegre: Sergio Antonio Fabris, 2008.



14. HABERMAS, Jürgen. Teoria do agir comunicativo: Racionalidade da ação e racionalização social. Tradução de Paulo Astor Soethe. São Paulo: Editora WMF Martins Fontes, 2012.
15. _____. Teoria de la acción comunicativa. Racionalidad de la acción y racionalización social. V.1. Tradução de Manuel Jiménez Redondo. Madrid: Taurus, 1999, c 1981.
16. _____. Direito e Democracia: entre facticidade e validade. Vol. I. Tradução de Flávio Beno Siebeneichler. Brasília: Tempo Brasileiro, 1997.
17. HUISMAN, Denis. Dicionário dos filósofos. São Paulo: Marins Fontes, 2004.
18. LEAL, Rogério G. O IPTU Progressivo como Instrumento de Efetivação da Função Social da Cidade no Brasil. A&C Revista de Dir. Administrativo e Constitucional, Belo Horizonte, ano 4, n. 16, p. 107-123, abr./jun. 2004. DOI <http://dx.doi.org/10.21056/aec.v4i16.601>. Disponível em: <http://www.revistaaec.com/index.php/revistaaec/article/view/601>. Acesso em: 16 fev. 2023.
19. MARINONI, Luiz G.; MITIDIERO, Daniel; SARLET, Ingo W. Curso de direito constitucional. São Paulo: Revista dos Tribunais, 2013.
20. MARTINS, Ives G. S; MENDES, Gilmar F. Controle concentrado de constitucionalidade. São Paulo: Saraiva. 2007.
21. MAZZA, Alexandre. Manual de direito tributário. 8. ed. São Paulo: Saraiva Educação. 2022. 1016 p.
22. MORAES, Bernardo Ribeiro. Compêndio de Direito Tributário. Rio de Janeiro: Forense, 2002, v. 1.
23. OLIVEIRA, O. B. de; FERRER, W. M. H. ENTIDADES DO TERCEIRO SETOR: PARTICIPAÇÃO DEMOCRÁTICA NAS PARCERIAS COM O PODER PÚBLICO. Revista Direitos Fundamentais & Democracia, [S. l.], v. 25, n. 1, p. 204–221, 2020. DOI: 10.25192/issn.1982-0496.rdfd.v25i11430. Disponível em: <https://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/1430>. Acesso em: 17 fev. 2023.
24. SCRUTON, Roger. Uma breve história da filosofia moderna: de Descartes a Wittgenstein. Rio de Janeiro: José Olímpio, 1995.