Inheritance, opportunity and liberty

Are hereditary wealth transfers legitimate under liberalism?

ARTHUR CRISTÓVÃO PRADO

Abstract: This paper discusses the morality of the right of inheritance from a liberal perspective. It focuses on two liberal values: equality of opportunity and liberty. First, it argues that inheritances disturb equality of opportunity, as interpreted by John Rawls and Ronald Dworkin in their respective theories of justice. Because both authors prioritize leveling opportunities over other distributive considerations, they cannot coherently assert that inheritances are just. Second, it argues that any plausible conception of liberty must be justified in moral terms, so that one cannot argue in favor of inheritances simply because restricting it would decrease people's freedoms. It then insists that there is no morally justifiable basic freedom of inheritance. Finally, it acknowledges that abolishing inheritances is not a feasible goal on the short term. As a policy proposal, it suggests strengthening inheritance taxation instead, and illustrates how that could be done in the Brazilian case.

Keywords: inheritance; liberalism; taxation; political philosophy; equality of opportunity.

Herança, oportunidade e liberdade: as transferências hereditárias de riqueza são legítimas sob o liberalismo?

Resumo: Este artigo discute a moralidade do direito de herança com base numa perspectiva liberal. Centra-se em dois valores liberais: a igualdade de oportunidade e a liberdade. Inicialmente, argumenta-se que heranças perturbam a igualdade de oportunidade, como interpretada por John Rawls e Ronald Dworkin em suas respectivas teorias da justiça. Como ambos priorizam a equalização de oportunidades sobre outras considerações distributivas, nenhum deles pode argumentar coerentemente que heranças são justas. Em seguida, defende-se que qualquer concepção plausível de

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liberdade deve ser justificada moralmente, de modo que não é possível defender o direito de herança; e simplesmente restringi-lo diminuiria liberdades. Argumenta-se, assim, que não existe liberdade básica de herdar ou deixar herança. Por fim, reconhece-se que abolir heranças não é um objetivo factível no curto prazo. Como proposta de política tributária, o artigo sugere fortalecer a tributação sobre heranças e ilustra como isso poderia ser feito no caso brasileiro.

Palavras-chave: heranças; liberalismo; tributação; filosofia política; igualdade de oportunidade.

1 Introduction

The right of inheritance exists in most, if not all, contemporary capitalist societies. Inheritances are often thought of as a natural or logical consequence of the right of property, and, as such, as an exercise of basic human freedoms.

However, in unequal societies, individuals inherit unequally. In Brazil, for example, 15,9% of all inherited wealth is concentrated among the top 0,1% heirs (ALMEIDA, 2018, p. 26-28). This raises concerns: contrary to work income, which, in a perfect market at least, can be seen as a result of skill and effort, and even non-inherited capital income, which can be seen as rewarding thrift and investing acumen, inherited wealth is much harder to justify in terms of merit or resource allocation. This has led scholars to characterize inheritances as "anti-capitalist" (HASLETT, 1986, p. 127) or incompatible with liberalism (LEVY, 1983, p. 549-559).

In this paper, I have a somewhat more modest goal. I will try to show how inheritances relate to two core liberal values: i) the value of equality of opportunity, and ii) the value of liberty. Although I think it rather intuitive that liberalism values both, I will briefly argue that it does. I will also attempt to show that inheritances disturb equality of opportunity, and then that inheriting and bequeathing wealth is not a basic liberty. I conclude that bequeathing and inheriting large estates is incoherent under both Rawls' and Dworkin's theories of justice, contrary to what both authors propose. Nevertheless, I suggest that strengthening inheritance taxation would be a more feasible goal than abolishing inheritance rights altogether.

I should remark that my aim is critically analyzing a legal institution – the right of inheritance – from an ethical viewpoint. My methodology therefore involves philosophical argumentation within the framework of theories of justice, from which we could extract policy suggestions that might be useful for policymakers, lawyers and lawmakers in practical

settings. This constitutes what Courtis (2006, p. 126) calls a "*de lege ferenda* legal research". I will illustrate how that might take place using Brazil as a case study.

In section 2, I will describe how two theories of justice interpret equality of opportunity: those of John Rawls' and Ronald Dworkin's. I will then argue that inheritances are incompatible with equality of opportunity in both, and that, although neither author reaches this conclusion, one cannot coherently accept the right of inheritance in the societies that completely follow each theory of justice. I will conclude by commenting on the claim that inheritances pose a special problem to meritocratic conceptions.

In section 3, I will outline the argument for inheritances based on liberty. I will then argue that conceptions of liberty must be moralized, in the sense that one has to assign moral value to liberties in order to make sense of them in a normative theory, and defend one criterion of how to identify basic liberties, again using John Rawls' version of liberalism. Finally, I will argue that the inheritance of property, especially non-personal property, is not a basic liberty.

In section 4, I acknowledge that abolishing inheritances is not a feasible political prospect, and suggest we improve inheritance taxation instead.

In section 5, I will illustrate how my approach might affect actual policy discussing three possible paths to reform in the Brazilian inheritance tax system.

In the conclusion, I will sum up what this paper sets out to accomplish.

2 Inheritance and equality of opportunity

Equality of opportunity ranks among the core values of liberal societies and is one our most basic moral intuitions (ASCHER, 1990, p. 70; HASLETT, 1986, p. 128-131; MURPHY, 1996, p. 488). Normative political and philosophical theories ranging from libertarianism to egalitarian liberalism tend to agree that leveling opportunities in life constitutes a sort of point of departure for distributive discussions. Before we argue how social goods should be distributed, that is, we must make sure everyone has equivalent opportunities of striving for them.

The exact meaning of "leveling opportunities", however, is controversial. In the origins of liberalism, the idea of equality of opportunity was closely related to that of political equality, in the sense that no one should enjoy royal or feudal privilege due to being born into a certain family, for example (NAGEL, 2003, p. 63-66). Even in modern settings, in which formal political equality has been attained, equality of opportunity is still a very relevant idea. It implies, for example, that the discrimination

of persons based on natural attributes, such as race and gender, over which they have no control, is immoral. Certain social attributes, such as religion, also tend to be non-controversially included among the list of personal features that should not affect one's chances in life. But how about the inheritance of wealth?

In this section, I intend to show that inheritances disturb equality of opportunity, leading to theoretical consequences within justice as fairness that were not accounted by Rawls himself. To do so, I will argue that "equality of opportunity" is most plausibly understood either as equality of resources or as John Rawls' idea of fair equality of opportunity. I shall then attempt to show that inheriting wealth violates both.

I will start with Rawls' conception. Fair equality of opportunity is, in his theory of justice as fairness, one of the aspects of the second of the two principles of justice that, he argues, rational, self-interested hypothetical individuals would choose under a veil of ignorance. The first principle deals with liberties; it states that every person is entitled to the same basic freedoms, and that their claim to each of them is indefeasible. I will come back to the first principle on the next section. The second principle, in turn, states that inequalities are acceptable so long as "they are to be attached to offices and positions open to all under conditions of fair equality of opportunity", and that they operate to the advantage of the least-advantaged members of society, which Rawls (2001, p. 42-43) calls the "difference principle".

What does Rawls mean by "fair equality of opportunity"? According to Rawls (1999), the idea of equality of opportunity allows for at least two possible interpretations. The first, which he calls "careers open to talents", is formal in nature, and demands merely that offices and positions in society are open to those who are willing to strive for them. It sets no requirement that either natural or social contingencies be accounted for in the distributions of positions: differences in talent, in educational opportunities and ability can lead to better or worse prospects in life regardless of whether they are the result of arbitrary circumstances relating to birth or not (RAWLS, 1999, p. 57-62). In this conception, if two individuals are both formally allowed to apply for a career opportunity or public positions, then they are assumed to have equal opportunities, regardless of the education and health care they received in their childhood, for example.

The second interpretation, which Rawls (1999) calls the "liberal interpretation" of equality of opportunity, supplements the idea of careers open to talents with that of "fairness" (resulting in "fair equality of opportunity"). According to it, "assuming that there is a distribution of natural assets, those who are at the same level of talent and ability, and

have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system". Moreover, "those with the same abilities and aspirations should not be affected by their social class" (RAWLS, 1999, p. 63). This conception makes a further requirement with respect to the formal one: that social class does not affect an individual's chances at attaining a certain position. Therefore, unequal educational backgrounds that are attributable to social class, for example, can create unequal opportunities.

Fair equality of opportunity is the interpretation of equality of opportunity that Rawls deems most plausible. The idea of "careers open to talents" allows for the distribution of goods according to morally arbitrary criteria, such as both natural attributes (the genetic factors influencing the potential for development of marketable skills, for example) and social circumstances (the educational opportunities one's family can afford, social connections and so on). Fair equality of opportunity tries to "correct" for this by stating that everyone should have a "fair chance" to attain positions and offices. Rawls believes that this principle implies that social class should not affect one's prospects in life, as he makes clear in the *Restatement* to his *Theory of Justice* (RAWLS, 2001, p. 43).

Now, Rawls (1999, p. 244) explicitly states his belief that, in a society governed by the two principles of justice, including, of course, the principle of fair equality of opportunity, inheritance is permissible, provided that the inequalities resulting from it "are to the advantage of the least fortunate". He believes, therefore, that inheritances should be governed by the second part of the second principle of justice, that is, by the difference principle. This would result in (presumably heavy) taxation of inheritances and gifts, as determined by the difference principle.

If we take Rawls to be coherent with the formulation of the second principle of justice and the concept of fair equality of opportunity, one of the two following statements must be true. Either: i) Rawls believes that the principle of difference should sometimes override fair equality of opportunity, allowing the distribution of goods in such way that one's opportunities can sometimes not be fair and equal; or ii) Rawls does not believe that unequal inheritances violate fair equality of opportunity.

Statement i) is false. In the *Restatement* to his *Theory of Justice*, Rawls (2001, p. 43) presents the two principles of justice and then remarks that "the first principle is prior to the second; also, in the second principle fair equality of opportunity is prior to the difference principle". He then goes on to explain that *priority* means that in applying one principle, the prior principles must the fully satisfied. In other words: no application of the difference principle is permissible if it disturbs fair equality of opportunity, just as no application of either part of the second principle is permissible should it disturb the basic liberties secured by the first principle. Elsewhere, Rawls (1999, p. 37) calls this *lexicographic priority*.

Statement ii) might be true, but it is never explicitly defended, much less justified, by Rawls. It is true that one of the conditions Rawls sets for the application of the difference principle to inheritances is that the resulting inequalities are compatible with liberty and fair equality of opportunity (RAWLS, 1999, p. 245), so he must presumably believe that they can somehow be so. But that is a bold claim, and one at least partially dependent on empirical observations.

Indeed, inheritances create opportunities, and inequal inheritances create them unequally (BIRD-POLLAN, 2016, p. 872). Evidence suggests, in fact, that inheritance inequality represents the most important barrier to intergenerational social mobility, especially in

the higher social *strata*, as Batchelder (2009, p. 633) shows for the American case[1]. It is true that other arbitrary factors, including personality, IQ correlation and upbringing influence one's chances to ascend socially, but financial inheritances represent a more important factor than all others combined (BATCHELDER, 2016, p. 86).

Even the expectancy of receiving a substantial inheritance in the future appears to create opportunities (KINDERMANN; MAYR; SACHS, 2020). Batchelder (2017, p. 25) exemplifies ways in which this might work, including: avoiding a drop in earnings during difficult times; supplying liquidity during periods of probably low income, such as when pursuing an education or starting a business; or making someone more comfortable at taking financial risk. The actual wealth acquired by means of inheritance can also be used to create opportunities, of course, for example by investing in education or financial assets (SEN, 2009, p. 228). Finally, acquiring inherited wealth tends to set an individual firmly into a given social class regardless of their choices and skills, simply because it advances their place in the income and wealth hierarchy (STRAND, 2010, p. 458).

It is therefore implausible to say that the right of inheritance can coexist with equality of opportunity, except perhaps in a setting in which inheritances are so equally divided that either everyone or no one can enjoy their benefit to the same extent – a world, that is, very far removed from our own. The distribution of wealth in wealthy nations, including inherited wealth, is more unequal than it has been in over one century (PIKETTY, 2017, p. 476-477).

Why did Rawls, then, advocate for the taxation of inheritances, but not their extinction? Perhaps he was being pragmatic: heavily taxing inheritances is much more feasible a political goal than their abolition, and already could cause a significant reduction in inequality of opportunity. That is true, and, as a political proposal in the real world, I, myself, would not advocate for the abolition of inheritance. But Rawls' published work is a contribution to the fields of political theory and moral philosophy, whose main concern, especially in the case of transcendental theories of justice, such as Rawls' – see Sen (2009, p. 1-20) –, is the justice or injustice of institutions, not their pragmatic feasibility. Moreover, many other aspects of the well-ordered society he imagines are far removed from any real society. In other words, as a theoretical scholar, he seems happy to give up pragmatism for the sake of theoretical coherence. And that is reasonable: as a theory of what justice is, justice as fairness must be internally coherent, but Rawls incurs in contradiction regarding the right of inheritance.

A final objection could be made that inheritances are not the only factor that disturbs equality of opportunity. *Natural* skills that are valued in the labor market, like material inheritances, are unequally distributed, and affect one's opportunities. Since they would still exist in a society without financial inheritances, it is futile to try to equalize opportunities by redistributing inheritances (ASCHER, 1990, p. 71-72; HASLETT, 1986, p. 128-131; MURPHY, 1996, p. 488).

This argument, however, is a *non sequitur*. It is indeed true that not all factors that disturb equality of opportunity can be equalized by legal institutions, but it does not follow that those that can be equalized should not be. In fact, the contrary might be true: if we are unable to achieve full equality of opportunity, then it seems reasonable that we should do what we can to at least reduce it to the lowest degree possible (ASCHER, 1990, p. 74; LEVY, 1983, p. 549-550).

[1] A similar case can be made for other nations. For the Brazilian case, see Prado (2020).

Otherwise, why should we strive to fight any other form of inequality and privilege? From income inequality to inequalities produced by racist, sexist and homo- and transphobic structures, it is not clear why, under the premise outlined in the last paragraph, we should have any reason to take action against them, which would be deeply counterintuitive – see Haslett (1986, p. 141).

I would now like to move on to a second possible interpretation of equality of resources, that is, Ronald Dworkin's. His entire theory of justice, which he presents as an interpretation of the moral imperative that the State must show equal concern for all citizens, is a theory of resource equality, which can be taken to be a form of equality of opportunity (ALSTOTT, 2007, p. 485). Equally distributing resources, after all, means distributing the same conditions for everyone to achieve their goals in life.

Dworkin argues that a just state must simultaneously treat citizens equally and allow them to pursue their own conceptions of what a good life is while recognizing their responsibility for their choices. The best interpretation of what *equality* means is one that simultaneously follows these two imperatives: making every life count and assigning responsibility for one's actions. After some discussion, which I will not reproduce here, he concludes that the distributive principle that must prevail in a just society is equality of resources (DWORKIN, 2002b, p. 1-5, 2011, p. 352).

To imagine what a society that enforces this conception of resource equality might look like, Dworkin (2002b) proposes a thought experiment in which a certain number of people survive a shipwreck and then find themselves in an island with natural resources but no native people. In order to fairly divide up the existing resources, all survivors receive a given number of tokens (shells, for instance) to which they ascribe no intrinsic value. All resources in the island are then auctioned in a way that every survivor can bid as they wish. If the ensuing distribution is such that any survivor prefers someone else's resource bundle to their own, the auction must start again, until a resulting distribution does not result in envy. Dworkin (2002b, p. 11-64) calls this process "the envy test".

But justice requires, further, that individuals be held responsible by their choices. However, only consequences of voluntary, informed choices should result in responsibility. It is therefore necessary to set the consequences of a risky action apart from unpredictable, involuntary events that don't depend on one's choices or are unpredictable at the moment when the choice was made. Dworkin distinguishes in this way between option luck (such as whatever consequences a risky investment might have) and brute luck (such as the chance of being struck by lightning), and argues that rational individuals would want to avoid, if possible, any influence of second kind of (un)luck over their lives.

To do that, hypothetical insurances are introduced into the island thought experiment. They are meant to cover the risk of having one's perspectives of life negatively influenced by brute luck, including incapacitating disease and other deficiencies. The premium individuals are willing to pay to insure against a given risk is subtracted from their resource bundle. In real life, that could translate into taxes, which are then reverted to a comprehensive social insurance program (DWORKIN, 2002b, p. 73-83). If rational individuals would decide, for example, to insure against unemployment caused by natural disasters, the premium an average individual might be willing to pay for it might be translated into a tax used to finance unemployment benefits.

How do inequal inheritances fit into this scheme? According to Dworkin (2002b, p. 346-348), being born into a poor family instead of a richer one reflects class luck, which is a form of brute (un)luck – one, indeed, that hypothetical individuals would be willing to insure against. Therefore, inheritances should be taxed, partly compensating for the effects of unequal class luck.

I find that account implausible when it comes to inheritance rights and taxation. Inheritance is not a form of luck in the same way that being struck by lightning or falling ill is; its nature is social, not physical or biological in any way. Wealth and property rights, which include the right to bequeath and inherit goods, are distributed socially, as Dworkin himself (2002b, p. 1) and others (DUFF, 1993, p. 45; KENNEDY, 2011; MURPHY; NAGEL, 2002, p. 12-20) emphasize. It is a social resource, analogous to access to educational and health services, and such resources, like shells used as currency in a hypothetical island, should be distributed equally in a just society. Recognizing that inheritances are a resource, and a socially distributable one, of course means that no unequal distribution of it could be justified. Individuals might, surely, chose to spend their initial resources – inheritances included – to insure against unforeseen events or in any number of different ways, but they have to count as equal initial distributions in any case.

A very similar point was made by Otsuka (2002), who argues that unequal inheritances would not pass the envy test proposed by Dworkin, since individuals would envy bundles of resources that are greater of their own because of inherited wealth. Dworkin's own reply (2002a, p. 106) is that taxing inheritances can be illiberal, as it penalizes certain life choices over others (Dworkin believes, it seems, that saving instead of spending wealth in order to leave an inheritance is a life choice worthy of equal concern by the State), and that his thought experiment is not translatable immediately to the real world. He declares himself, however, eager for other suggestions regarding that problem.

Dworkin's objection that taxing or abolishing inheritances is illiberal is a serious one and will be partially discussed on the next section. It does not, however, answer my main objection, or Otsuka's, for that matter: Dworkin's theory ceases to be a theory of resource equality – and therefore one that takes equality of opportunity seriously – if it admits the existence of unequal inheritances. It could be true that sacrificing equality for liberty is a worthy exchange; but, if that is Dworkin's point, he must give up his commitment to resource equality.

I would like to conclude this section by commenting on the idea of merit and its relation to inheritance rights. Equalizing opportunities and resources, as Rawls and Dworkin propose we should do, could be taken to be a step in the direction of meritocracy, since it sets the stage to a society in which distributive outcomes depend on merit, not luck. If everyone has the same resources and opportunities, that is, the same "chances in life", how rich one becomes should depend on one's capacity for work, thrift and natural attributes. However, the idea of merit does not figure prominently in the liberal theories of justice I have analyzed. There are three main reasons for that. First, that one's place in society still depends, at least in part, on natural attributes and luck, which are distributed in morally arbitrary ways, and therefore unrelated to merit. Just like material inheritances, then, natural attributes are also not meritocratic. Second, that one's place in society is partially dictated by market outcomes. There is no guarantee, and it does not seem to be the case in real settings, that markets reward merit in any reasonable sense. Arbitrary factors such as social relations – some of which dependent on our families' standing – play a role, and it is not clear that marketable skills necessarily translate into praiseworthy abilities (one might for example succeed in commerce for being able to persuade buyers that one's wares are valuable, even if they are not). Finally, it does not follow either from Rawls' contractarian conception based on the two principles of justice or from Dworkin's idea of justice as equal concern that merit should have any place in the distribution of social resources[2].

Nevertheless, I would still maintain that unequal inheritances are a special violation to our intuitions about merit. It is of course true that a society without inheritances (or one in which inheritances are equally distributed) might still display inequalities that can be traced to other morally arbitrary sources, but that does not change the fact that a society without inequalities generated by inheritances is more meritocratic than one in which they exist. And even though natural attributes are morally arbitrary, we still can and do talk about the merit of displaying them. We tend to think that the fastest runner in a marathon deserves a prize because they were fastest, not because they put the most effort into it, and even if their performance depends in part on physical characteristics, such as lung capacity and leg length, which do not stem only from their effort. In this sense, that kind of inequality still brings us closer to our intuitions about meritocracy than inequalities caused by material inheritances – see Duff (1993, p. 49, 53-54).

In this section, I hope to have shown that inheritances present a problem to theories of justice that value equality of opportunity. In the case of Rawls' justice as fairness and Dworkin's resource equality, these challenges

[2] Both authors believe, however, that rewarding effort should have some place in distributive schemes – see Dworkin (2002b, p. 2), and Duff (1993, p. 49, 53-54). There is room to elaborate this discussion, but that would require going through the vast literature that discusses merit and liberalism, which falls beyond the scope of this paper. See, for example, Nagel (2003, p. 68, 2009, p. 116), and Murphy and Nagel (2002, p. 31-33, 67-72, 119-120, 154-155).

are unsurmountable, and have not been adequately answered by the respective authors. But is that enough to show that inheritance rights are illiberal? Liberalism it not just about equal opportunities – it is also about liberty. And stopping people from deciding whom to give their wealth to certainly seems like an interference with their liberty.

3 Inheritance and liberty

The right of property is sometimes presented as a basic human liberty, one that can be derived from self-ownership or natural liberty, for example (MILL, 1886, p. 221; SMITH, 1896, p. 120). Property implies the right to dispose of one's belongings as one will, which includes, of course, by means of donation or bequest. Therefore, donations and inheritances can be seen as a basic liberty, too, one that cannot be restricted without violating the core liberal values (BIRD-POLLAN, 2013; CHESTER, 1976, p. 82; HALLIDAY, 2016; STEINER, 1987, p. 70).

Some liberals and many libertarians spouse some version of this idea. On the other hand, a frequent objection to it, defended for example by Rawls (1999, p. 245-246) and others (ASCHER, 1990, p. 93-96; HASLETT, 1986, p. 135; NAGEL, 2009, p. 117-118; REPETTI, 2016, p. 816; SAEZ; ZUCMAN, 2019, p. 159), is that the large concentrations of wealth that the right of inheritance helps to form are detrimental to democratic rights and liberties, as they could be used to influence electoral processes and other democratic institutions.

That is a plausible objection, and one that has already been well explored in the past. In this section, I would like to add a different objection to the liberal argument for unrestricted inheritance rights. I intend to argue that the ownership and transference of property, except perhaps for personal property, cannot be considered a basic liberty.

We should start by better explaining the role that liberties have in moral theory. No legal system or political theory protects equally all individual and public liberties. Legal and moral norms often distinguish between liberties that should be protected and liberties that should be restricted. Libertarian theories are a good starting point for making this point clearer. That is because libertarians are adamant both in the defense of basic freedoms and of private property, which can sometimes clash with one another. I will show this using Cohen's analysis (1988, p. 295-296, 1995, p. 59-61), as exposed in the next few paragraphs.

What constitutes a violation of freedom for a libertarian? Surely, there are some cases in which the inability to perform an action does not constitute a violation of individual freedoms – when that inability can be attributed to physical factors, for example. I may not be able to fly, but that is because I do not have wings, not because I am unfree. On the other hand, it seems that when the inability to perform an action stems from being withheld or prohibited by another person, then a freedom is, indeed, being limited[3].

Now picture the following situation: due to not having access to a house or for any other reason, individual A sets up a tent on a certain stretch of land, which happens to belong to individual B. B is displeased, and whishes A out. In any State enforcing private property rights, it is very likely that public agents will remove A from B's land, by force if necessary. That is unequivocally a limitation to A's actions caused by another person or persons, and therefore, in that sense, an infringement to his liberty.

[3] Here we should note the similarity between Cohen's and Berlin's (2002, p. 169) account of the difference between human and non-human restrictions to action.

However, it coexists, in a libertarian society, with an uncompromised defense of individual freedoms. How can that be?

This can be explained by the fact that libertarians conceive liberty as a moralized concept, in the sense that in order to determine what constitutes one's liberties, it is necessary to determine what one can and cannot morally do. Since, in the libertarian conception, it would be unjust for A to set up a tent on B's land, A is not free to do that, and his removal is not a violation of individual freedoms.

Cohen (1988, 1995) identifies two problems with that conception. First, that the libertarian concept of freedom departs substantially from the meaning of the word in natural language. In everyday usage, we seem to think that even justified restrictions to one's actions can, at least sometimes, incur in restrictions to one's liberty. For example, if a murderer is sent to prison (assuming we think that is a fair punishment, of course), the fact that their punishment is morally legitimate does not preclude the fact that it means a restriction to their freedom.

The second and more serious problem is that the libertarian definition is logically circular. If, on the one hand, the definition of liberty is moralized, inasmuch as it requires an account of just and unjust actions, the definition of morality is also dependent on that of liberty, since libertarianism argues that the only legitimate use of power is one that preserves liberties to the maximum degree possible[4]. A libertarian defines *just* in terms of *free*, but also *free* in terms of *just*.

This shows not only that the libertarian conception of liberty is at fault, but also that morality must set some liberties apart from others. Liberties, therefore, must be justified by their moral value, and not merely because they are liberties. If B is entitled to remove A from his land, then that must be explained in terms of B's legitimate rights of property and the illegitimacy of A's actions: we must explain, for example, why private property is just, and merits protection from external impediments. In this way we can explain, for example, why citizens are free to move through public spaces by virtue of their freedom of movement, but an inmate convicted for manslaughter is not free to move out of his prison cell.

But what makes a freedom morally valuable? A very influential conception of the moral worth of freedoms is, once again, John Rawls'. It is useful because it both justifies why liberties are fundamental to a good life and provides criteria for identifying which liberties can be deemed "basic" – that is, so important that just societies must preserve them above all else – and which cannot. These criteria are connected to the

[4] Vita (2007, p. 56) suggests that this confusion stems from the fact that the basic category in libertarian thought is property, not liberty.

idea of finality, end or good, which is fundamental to any moral theory, since any theory of moral action must somehow take into account what human action is for[5].

Rawls' criteria (2001, p. 112-115) are these: in order for a liberty to be considered basic, and thereby enjoy the maximum possible degree of moral priority, given by the first principle of justice, it must provide the conditions for individuals to develop their basic moral faculties, which are: i) the capacity to develop a sense of good, and ii) the capacity to develop a sense of justice. The more relevant a liberty is for the development of these two faculties, the more important it will be in a well-ordered society (RAWLS, 1993, p. 335). Rawls therefore explains liberties in terms of what makes a human life good: even if we recognize – as liberals do – that each person must be entitled to come up with their own conception of what is good and just, they must be free to think, discuss, publicize their ideas, associate with one another and pursue, within reason, whatever they think a good life is.

Rawls (1993) emphasizes that this connection between liberties and moral goods is responsible for their "fair value". That value can be lost. That takes place, for example, in situations in which the total depravation of material conditions limits individuals' capability to enjoy those liberties, and they become merely formal. As stated by Berlin (2002, p. 172) elsewhere (and before Rawls): "[t]he Egyptian peasant needs clothes or medicine before, and more than, personal liberty". The lack of conditions that guarantee the fair value to basic liberties is indicated by Rawls (1993, p. 324-327) as a situation in which even the priority of the first principle of justice is not applicable if it stands in the way of satisfying those needs.

What liberties pass that test? To Rawls (2001, p. 113), the classic freedoms of expression and press are included, but hate speech, for example, is excluded, as it is not related to the development of a sense of justice or an idea of good.

How about property? Rawls distinguishes between different conceptions of property, and names two that do not pass the text: one that includes natural resources and means of production, as well as rights of acquisition and bequest; and another one that includes the participation in the ownership of means of production. So conceived, property is not really necessary for the development of the moral faculties. It is hard to see how owning company shares, for example, or plots of land not directly used for work of living, is necessary for the development of

[5] The fragility of Rawls' theory of the good is one of the grounds from which he is criticized, for example, by Nussbaum (1988, 1992), who provides a much more robust theory of the good. For the purposes of this paper, however, it suffices to use Rawls' ideas from *Justice as fairness: a restatement*.

moral faculties. That does not mean that they are not to be adopted in a well-ordered society, only that they do not enjoy maximum priority as basic liberties – unlike, on the other hand, personal property, which Rawls deems essential for moral autonomy and a sense of self-respect. Societies are free to decide whether or not to adopt such rights, and either choice is compatible with Rawls' design of basic freedoms.

Personal property is a different matter. Owning a home, clothes, perhaps the instruments needed to work and objects needed for daily life is conductive to a sense of autonomy that Rawls deems necessary for the development of moral faculties. Owning personal property, therefore, is a basic liberty.

As a final remark, I would like to point out that the discussion undertaken in this section does not go into much detail when examining what liberty means. It could and has been argued, however, that individual liberty depends in part on material means that, in capitalist societies, come from wealth. This is easy to see intuitively: if we characterize liberty not only as being able to take action unimpeded by other individuals, but also as being able to choose from a range of possible actions, then it is clear that wealth increases liberty. An individual who has to work forty hours a week for a minimum wage cannot decide to go to Paris in summer, or to spend their afternoon on a weekday reading a book, possibilities that might be available for a richer individual, especially one whose income does not depend on labor (HASLETT, 1986, p. 133-134; ALSTOTT, 2007, p. 490).

This relationship between liberty and wealth can be somewhat formalized by means of a thought experiment proposed by Cohen (1995, p. 19-66). Imagine a society without any monetary system, in which individuals enjoy liberty comparable to that in the state of nature. Assume that a central power then appears in that society and starts giving out coupons to people. Each coupon lists a series of permissible actions. If someone is caught trying to do something without a corresponding coupon, that person is forcibly taken under arrest. That society is unfree even in the classic sense, since there are actions in principle possible that would be impeded by external human force. That situation, however, is analogue – Cohen (1995) argues – to the introduction of contract and property law. In contrast to a society in the state of nature, one in which wealth is legally structured and privately owned makes the possibility of action dependent on wealth. Individuals who lack real state property cannot occupy land and use it for their subsistence, for example, even when the land in question is not being used by anyone else. In this sense, wealth and liberty are connected.

Material depravation, therefore, is a form of unfreedom (SEN, 1999, p. 3-5, 15, 19; MEADE, 2013, p. 39). If we assume that the marginal gains in liberty decrease for the extremely rich – that is, an extra thousand dollars matters a lot more for someone who earns a minimum age than for a billionaire –, then inheritance taxation that decreases inequality tends to increase aggregated liberty.

The consequence I wish to extract from this section is that the right of inheritance is not a basic liberty, and that personal property enjoys a different status to other, broader types of property. The right of inheritance cannot, therefore, be defended on the grounds that it stems from a basic liberty, that of owning and transacting (unlimited) property: its legitimacy, if it has any, must be argued for on other grounds. My argument is of course dependent on my premises about the fundamentality of basic liberties as connected to certain goods, which is a controversial idea, although not one exclusive to Rawls. Defending this conception from criticism is not within the scope of this paper. Moreover,

wealth distribution that leads to greater equality can increase aggregate liberty in societies, which can be a point in favor of greater equality, including that brought about by the extinction or taxation of large intergenerational wealth transfers.

4 Are inheritances legitimate under liberalism?

In the two previous sections I have argued that: i) equality of opportunity is a core value of liberalism and, in fact, of most human societies; ii) unequal inheritances are incompatible with equality of opportunity; iii) it is a widespread argument that property and its transmission are basic liberties; and iv) that argument is not plausible under a moralized conception of liberty, and liberty cannot be defined without recourse to morals.

It seems that a natural conclusion would be that liberal societies should not recognize the right of inheritance. There are, of course, additional considerations to be made, that were not included in this paper. Since what a person will inherit depends on the arbitrary *luck* of being born to a rich family and not on effort, he right of inheritance seems not to be meritocratic. Depending on the role we believe merit should play in a theory of justice, that might be a further argument against the right of inheritance. On the other hand, the transmission of at least some property inside families appear to have some moral value inasmuch as it could strengthen bonds of affection of love among family members. Perhaps the transmission of certain kinds of personal property, such as simple family heirlooms, for instance, can be argued to be morally legitimate.

A second point to which I would like to draw attention is that my argument focuses almost exclusively on liberal and, to a much smaller extent, libertarian theories of justice. That has at least two reasons. First, the moral-philosophical debate after Rawls has been greatly influenced by him (LEVY, 1983, p. 549-553; MCCAFFERY, 1994, p. 286; MURPHY, 1996; NAGEL, 2009, p. 115-116), so that simply arguing that inheritances are not appropriately framed within his (liberal) theory of justice as fairness is academically relevant. Secondly, the liberal framework makes the debate especially interesting. Whereas right-leaning theories, such as libertarianism, can affirm more or less without internal controversy that inheritance is a moral right, and left-leaning theories, such as Marxist socialist theories, deny the morality (if they admit that morality is an issue at all) of private property over means of production (COHEN, 1988, p. 298; KYMLICKA, 2002, p. 176) and therefore of inheritance of such property, liberalism does not have an obvious reply to the question of inheritance. That is because core liberal values, at first sight, point in different directions: equality of opportunity seems inimical to inheritances and liberty seems coherent with it.

That said, even if we do believe that the right of inheritance is not legitimate, it is hard to imagine a non-socialist society in which it is not present. In fact, even taxing inheritances seems to be a very unpopular tax policy (GRAETZ; SHAPIRO, 2005, p. 6). Therefore, proposing the abolishment of the right of inheritance seems inadequate as an immediate policy recommendation.

If inheritances must exist, then it seems that taxing them works as a palliative but feasible measure. We should note that taxation is, in some sense, contiguous to the right of property. Determining exactly what *property* means is hardly a simple matter, as the regulation of property varies widely among societies in time

and space (KENNEDY, 2011, p. 8). The bundle of rights that being owner of an object (*lato sensu*) entitles depends, among other factors, on which taxes it ownership entices (MURPHY; NAGEL, 2002, p. 12-20). Taxing inheritances at 50%, for example – excluding complications that can arise from evasion, liquidity and other sources –, effectively means curbing inheritance rights by half; taxing them at 100% effectively means abolishing inheritances.

Therefore, a realistic policy recommendation could be strengthening taxes over intergenerational transmission of wealth, such as the American federal estate tax or the Brazilian tax on donations and *causa mortis* transmissions (ITCMD in the Portuguese acronym), as far as is politically feasible. Determining the precise contours, a just inheritance tax might have is a very complex task. Economists like Piketty and Saez (2013), who investigate optimal inheritance taxes, and lawyers, such as Batchelder (2007, 2009, 2016, 2017), who suggests taxing inheritances and gifts as income, have worked extensively on the topic and present useful suggestions. In the next section, I will briefly offer a policy recommendation using the Brazilian tax system as a case study.

5 Implications for Brazilian law

As a concluding remark, I will briefly present the Brazilian inheritance taxation system and show three ways of reform. This is not meant as a complete, ready to use policy proposal. That would require a much longer interdisciplinary work, involving economists, tax lawyers and of course policymakers. I aim here is twofold: i) I want to show that this political theoretical discussion has applications in real issues, and ii) I intend to suggest paths that could be taken up inside and outside academia for further development.

I will begin by describing how inheritances are taxed in Brazilian law. The Brazilian Constitution establishes the right of inheritance as a fundamental right and institutes an inheritance tax to be levied by the states – see articles 5, XXX and 155, I (BRASIL, [2022a]). Since fundamental rights are excluded from abolition via amendment under article 60, paragraph 4, it is legally impossible to abolish the right of inheritance in Brazil. It is possible, however, to reform the existing inheritance tax, the ITCMD.

Although states have, in principle, liberty to regulate their own inheritance taxes by statute, in practice their liberty is severely restricted by a Senate resolution limiting its rate to 8%. This number would already be significantly below the Organization for Economic Co-operation and Development (OECD) average of 15% (COLE, 2015), but actual nominal rates range from 2% (in Amazonas) to 8% (in Pernambuco and Santa Catarina) (DIAS, 2016, p. 20-21). Some states impose progressive rates and many others do not. The effective rate is estimated to lie somewhere between 4,04% and 5,22% nationally (PACHECO, 2020, p. 26-27). Exemptions vary but are usually low. As a result, Brazilian inheritance taxes are low and not very progressive.

That is by no means the only problem involving ITCMD's current design, however. In addition to liquidity and valuation issues, avoidance is common and facilitated by both the legal design of the tax and its administration. Since 2021, a ruling by the Brazilian Supreme Court (STF in the Portuguese acronym) (Recurso Extraordinário nº 851.108, Tema nº 825 de Repercussão Geral, decided on March 1st 2021 (BRASIL, 2021)) determined that taxing goods situated abroad depended on a general

federal statute, that was never enacted. As a result, state statutes regulating the taxation of goods held by Brazilian outside national borders were ruled unconstitutional and therefore void. In practice, since that ruling, Brazilians with financial means to denationalize their wealth are able to easily[6] and legally avoid the tax entirely. Brazilians and foreigners residing in the country who do not have such means usually have to pay tax on all inherited and donated goods above the exemption limit, which is currently around 80 thousand reais in the state of São Paulo, to give an example. This represents an obvious breach to equality of opportunity and an important mechanism for the preservation of intergenerational inequality, favored by the tax system.

The main problems with the system are that the tax is insufficiently high, not progressive enough, nationally heterogeneous and has loopholes that can be exploited especially by wealthier individuals, harming progressivity and fairness. Several policy proposals could and should be made to improve it, starting with enacting the general federal statute that would allow the taxation of offshore goods by the states, solving the issued created by the aforementioned Supreme Court ruling from 2021 (PRADO, 2021). In addition to that, three structural reforms could be suggested.

The most obvious path would be reforming individual state legislation to increase tax rates, improve valuation techniques and include some progressivity, both by increasing marginal tax rates for larges inheritances and by creating exemptions for smaller ones. A problem with that strategy is that, as mentioned, the current tax rate is capped at 8% by a Senate resolution (Resolução nº 9/1992 (BRASIL, 1992)), so reforming the resolution itself would be a preliminary necessary step, dependents on a separate deliberative process to take place inside the federal legislative branch. This has been proposed in 2015 by a group of states (Ofício Consefaz nº 11/2015, signed by the states of Amazonas, Espírito Santo, Goiás, Maranhão, Mato Grosso, Mato Grosso do Sul, Minas Gerais, Pará, Paraíba, Paraná, Pernambuco, Piauí, Rondônia, Roraima, São Paulo, Sergipe, Tocantins and the Federal District), but no deliberation followed from it. Further, since states are free to regulate their own local taxes, there could be wide variations throughout the nation, and no guarantee that the result of a push towards reform would in fact be higher rates or more intelligent designs.

A second possibility would be emending the Brazilian Constitution to allow for a federal inheritance tax. A constitutional amendment bill with that content has already been proposed before Congress (PEC nº 96/2015) and would take the form of an additional tax on *large* inheritances (BRASIL, 2015c). There is no general prohibition against *bis in idem* in Brazilian tax law, so a constitutional amendment could, indeed, open way for a federal tax existing in parallel with estate taxes. It would have the advantage of instituting a uniform federal inheritance tax system, solving some of the issues that I pointed out in the last paragraph in relation to reforming individual state laws. However, the qualified majority required for the approval of constitutional amendments (three fifths in each of the two houses of Congress, in two rounds each) makes this strategy politically difficult.

A third proposal, in line with what Dodge (1978) and Batchelder (2016, 2017) advocate for the American case, would be including inheritances and donations in the taxable

[6] Of course, here can be difficulties involving liquidity and administrative costs. I mean simply that evading the tax is possible through a straightforward procedure.

income, thereby taxing it through the federal income tax. In Brazil, that could, in principle, be done by revoking article 6, XVI of a federal statute (Lei nº 7.713/1998), which currently exempts inheritances and donations from income taxation (BRASIL, [2015a]). This is, in fact, object of a bill (Projeto de Lei nº 5.205/2016 (BRASIL, 2016)), presently awaiting deliberation by the Chamber of Representatives (Câmara dos Deputados).

If enacted, this proposal would have substantial advantages over the current system. First, it would substantially increase the marginal tax rate (to 27,5%, for taxpayers earning over 4,664.68 Brazilian reais as of 2022, in accordance to the federal statute on income taxation rates – Lei nº 13.149/2015 (BRASIL, 2015b)). This represents a substantial improvement over the current rates, which, as commented, are nationally capped at 8% and lower than that in several states. Second, it would include in inheritance taxation the progressivity already inherent to income taxation, which currently distinguishes five different tax brackets, with different rates for each[7]. Third, it would be centrally levied by the Brazilian Federal Revenue Service (Receita Federal do Brasil), benefiting from the information it already collects on taxpayers and its mechanisms for valuating wealth.

The main objection that could be raised is constitutionally grounded: it could be argued that a federal income tax on inheritances would violate state competence to tax inheritances, since, without a constitutional amendment, federal competence is limited to taxing "income and revenue of any nature" – see Cassone (2017). I believe that this stems from an inadequate, although widespread, understanding of the constitutional concept of *income*. There is no reason why the idea of income should include certain transferences of wealth, such as salaries, business revenues, dividends – which are exempt, but still considered income in Brazil – and profits, but exclude others, such as donations and inheritances. In all cases, wealth is being transferred from one individual or firm to another, which is the very definition of income. This is in fact backed by Brazilian statutory law: the National Tax Code (Código Tributário Nacional) extends the legal base of the income tax, in its article 43, II, to "earnings of any nature, understood as estate increases" not included in the article 43, I, which lists as possible bases work and or capital income (BRASIL, [2022b], our translation). Combined, these two norms include in the taxable base for the income tax all possible estate increases, since the second one explicitly includes all cases not included in the first one.

[7] Since inheritances usually represent large and extraordinary incomes, perhaps an additional fixed exemption could be conceived, such as the ones that exist for stock trading.

This objection, there does not seem to be a valid constitutional objection to the inclusion of inheritances in the taxable base of the income tax.

If possible, the inclusion of inheritances in the income tax base could be a way of strengthening the Brazilian inheritance tax without radically changing the system, since in principle it could be brought about by merely revoking the statutory provision that exempts them from the income tax base. The most serious challenge to this proposal would be political and constitutional, but neither appears to be unsurmountable.

With this brief discussion, that is intended as an invitation for debate, I aim to show what it could look like to recommend policy change in inheritance taxation in the spirit of the conclusions obtained from the ethical discussion I offer in this paper. Similar cases could be – and have been (see, again, Batchelder (2016, 2017)) – made for other nations and settings.

6 Conclusion

My goal in this paper was to show how the right of inheritance relates to two values that are important to liberalism: equality of opportunity and liberty. I argued that both are very important values and that equality of opportunity is somewhat incompatible with unequal inheritance. On the other hand, I also argued that inheriting and bequeathing property is not a basic liberty, so one cannot argue for the right of inheritance on that basis alone, even within a liberal theory of justice. Finally, I suggested that taxing inheritance as much as possible may be a reasonable alternative to abolishing the right entirely. I illustrated how that could happen using Brazil as a case study.

This paper does not exhaust the debate on the morality of inheritance by any means. As I have mentioned, there are other questions we could ask: how does inheritance relate to welfare? In fact, how, if at all, should merit feature in liberal theories of justice? Does inheritance not have moral value due to expressing bonds of love inside families?

The questions asked in this paper, which I have tried to answer, are, however, particularly important for two reasons. First, due to the privileged place that equality of opportunity has in liberalism, as exemplified by the lexicographical priority it has over the principle of distribution in Rawls (the difference principle) and any other distributive consideration in Dworkin (since the very point of departure of his virtue is equality of resources), it is very difficult to explain how liberals could favor the right of inheritance while simultaneously ascribing such an important role to equality of opportunity. Second, the defense of inheritance on the basis of liberty is perhaps the most important moral argument for inheritance,

and, if I am right, it depends on a morally implausible conception of liberty. These problems show up frequently in the legal and philosophical literature on the theme and have amassed significant attention from liberal authors in recent decades (ALSTOTT, 2007; BIRD-POLLAN, 2013; DUFF, 1993; LEVY, 1983; MURPHY, 1996). This paper joins the discussion by attempting to offer a solution to them and to show how that solution could be translated into real policy reform.

Sobre o autor

Arthur Cristóvão Prado é mestre em Direito pela Faculdade de Direito da Universidade de São Paulo (FD-USP), São Paulo, SP, Brasil; doutorando em Filosofia e Teoria Geral do Direito na FD-USP, São Paulo, SP, Brasil; pesquisador-visitante na University of Toronto, Toronto, Canadá; advogado da União.
E-mail: arthur.prado@usp.br

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Referências

ALMEIDA, Samir Luna de. *Distribuição de heranças no Brasil*: o que dizem os dados da Receita Federal. 2018. Dissertação (Mestrado em Economia) – Universidade Federal de São Paulo, Osasco, 2018. Available at: https://repositorio.unifesp.br/handle/11600/52817. Access on: June 2, 2023.

ALSTOTT, Anne L. Equal opportunity and inheritance taxation. *Harvard Law Review*, [*s. l.*], v. 121, n. 2, p. 469-542, Dec. 2007. Available at: https://harvardlawreview.org/2007/12/equal-opportunity-and-inheritance-taxation/. Access on: June 2, 2023.

ASCHER, Mark L. Curtailing inherited wealth. *Michigan Law Review*, [*s. l.*], v. 89, n. 1, p. 69-151, Oct. 1990. Available at: https://repository.law.umich.edu/mlr/vol89/iss1/3/. Access on: June 2, 2023.

BATCHELDER, Lily L. Estate tax reform: issues and options. *Tax Notes*, [*s. l.*], p. 633-647, Feb. 2, 2009. Available at: https://its.law.nyu.edu/faculty/profiles/representiveFiles/

Batchelder-Estate%20Tax%20Reform_3913E563-C1A2-CE4F-7EB05F027D8344CE.pdf. Access on: June 2, 2023.

_____. Taxing privilege more effectively: replacing the estate tax with an inheritance tax. *Hamilton Project Discussion Paper*, Washington, DC, n. 7, p. 1-59, June 2007. Available at: https://www.hamiltonproject.org/publication/policy-proposal/taxing-privilege-more-effectively-replacing-the-estate-tax-with-an-inheritance-tax/. Access on: June 2, 2023.

_____. The "silver spoon" tax: how to strengthen wealth transfer taxation. *In*: DELIVERING equitable growth: strategies for the next Administration. Washington, DC: Washington Center for Equitable Growth, 2016. p. 85-96. Available at: https://equitablegrowth.org/delivering-equitable-growth/. Access on: June 2, 2023.

_____. What should society expect from heirs? A proposal for a comprehensive inheritance tax. *NYU Law and Economics Research Paper*, [*s. l.*], n. 08-42, p. 1-111, June 2017. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1274466. Access on: June 2, 2023.

BERLIN, Isaiah. Two concepts of liberty. *In*: _____. *Liberty*: incorporating four essays on Liberty. Edited by Henry Hardy. Oxford, UK: Oxford University Press, 2002. p. 166-217.

BIRD-POLLAN, Jennifer. Unseating privilege: Rawls, equality of opportunity, and wealth transfer taxation. *The Wayne Law Review*, [*s. l.*], v. 59, n. 2, p. 713-741, 2013. Available at: https://uknowledge.uky.edu/law_facpub/370/. Access on: June 2, 2023.

_____. Why tax wealth transfers?: a philosophical analysis. *Boston College Law Review*, [*s. l.*], v. 57, n. 3, p. 859-881, 2016. Available at: https://uknowledge.uky.edu/law_facpub/582/. Access on: June 2, 2023.

BRASIL. Câmara dos Deputados. *Projeto de Lei nº 5.205, de 2016*. Altera os valores da tabela mensal do Imposto sobre a Renda da Pessoa Física, dispõe sobre a tributação das doações e heranças, do excedente do lucro distribuído pelas empresas optantes pelo lucro presumido e arbitrado […]. Brasília, DF: Câmara dos Deputados, 2016. Available at: https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2083686. Access on: June 2, 2023.

_____. [Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988*. Brasília, DF: Presidência da República, [2022a]. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Access on: June 2, 2023.

_____. *Lei nº 5.172, de 25 de outubro de 1966*. Dispõe sobre o Sistema Tributário Nacional e institui normas gerais de direito tributário aplicáveis à União, Estados e Municípios. Brasília, DF: Presidência da República, [2022b]. Available at: https://www.planalto.gov.br/ccivil_03/leis/l5172compilado.htm. Access on: June 2, 2023.

_____. *Lei nº 7.713, de 22 de dezembro de 1988*. Altera a legislação do imposto de renda e dá outras providências. Brasília, DF: Presidência da República, [2015a]. Available at: https://www.planalto.gov.br/ccivil_03/leis/l7713.htm. Access on: June 2, 2023.

_____. *Lei nº 13.149, de 21 de julho de 2015*. Altera as Leis nºs 11.482, de 31 de maio de 2007, para dispor sobre os valores da tabela mensal do Imposto sobre a Renda da Pessoa Física, 7.713, de 22 de dezembro de 1988, 9.250, de 26 de dezembro de 1995, e 10.823, de 19 de dezembro de 2003. Brasília, DF: Presidência da República, 2015b. Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13149.htm. Access on: June 2, 2023.

_____. Senado Federal. *Proposta de Emenda à Constituição nº 96, de 2015*. Outorga competência à União para instituir adicional sobre o imposto de que trata o inciso I do art. 155, destinado ao financiamento da política de desenvolvimento regional. Brasília, DF: Senado Federal, 2015c. Available at: https://www25.senado.leg.br/web/atividade/materias/-/materia/122230. Access on: June 2, 2023.

_____. Senado Federal. Resolução nº 9, de 1992. Estabelece alíquota máxima para o Imposto sobre Transmissão Causa Mortis e Doação de que trata a alínea "a", inciso I, e § 1º, inciso IV do art. 155 da Constituição Federal. *Diário Oficial da União*: Seção 1, Brasília, DF, ano 130, n. 85, p. 5.626, 6 maio 1992. Available at: https://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=06/05/1992&jornal=1&pagina=2&totalArquivos=56. Access on: June 2, 2023.

_____. Supremo Tribunal Federal (Plenário). *Recurso Extraordinário nº 851.108/SP*. Recurso extraordinário. Repercussão geral. Tributário. Competência suplementar dos estados e do Distrito Federal. Artigo 146, III, a, CF. Normas gerais em matéria de legislação tributária. Artigo 155, I, CF. ITCMD. Transmissão *causa mortis*. Doação. Artigo 155, § 1ª, III, CF. Definição de competência […]. Recorrente: Estado de São Paulo. Recorrida: Vanessa Regina Andreatta. Relator: Min. Dias Toffoli, 1º de março de 2021. Available at: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=755628450. Access on: June 2, 2023.

CASSONE, Vittorio. Imposto de Renda sobre herança e doação. *GEN Jurídico*, São Paulo, 7 fev. 2017. Available at: http://genjuridico.com.br/2017/02/07/30729/. Access on: June 2, 2023.

CHESTER, C. Ronald. Inheritance and wealth taxation in a just society. *Rutgers Law Review*, [*s. l.*], v. 30, n. 62, p. 62-101, 1976.

COHEN, G. A. *History, labour, and freedom*: themes from Marx. Oxford, UK: Clarendon Press; New York: Oxford University Press, 1988.

_____. *Self-ownership, freedom, and equality*. Cambridge, UK: Cambridge University Press; Paris: Maison des Sciences de l'Homme, 1995.

COLE, Alan. Estate and inheritance taxes around the world. *Fiscal Fact*, Washington, DC, n. 458, p. 1-8, Mar. 2015. Available at: https://taxfoundation.org/estate-and-inheritance-taxes-around-world/. Access on: June 2, 2023.

COURTIS, Christian. El juego de los juristas: ensayo de caracterización de la investigación dogmática. *In*: _____ (coord.). *Observar la ley*: ensayos sobre metodología de la investigación jurídica. Madrid: Trotta, 2006. p. 105-156.

DIAS, Laura Domingues. *A tributação sobre heranças e doações no Brasil e suas implicações na efetivação da justiça distributiva*. 2016. Trabalho de Conclusão de Curso (Bacharelado em Direito) – Faculdade de Direito, Universidade Federal de Juiz de Fora, Juiz de Fora, 2016. Available at: https://repositorio.ufjf.br/jspui/handle/ufjf/3690?locale=pt_BR. Access on: June 2, 2023.

DODGE, Joseph M. Beyond estate and gift tax reform: including gifts and bequests in income. *Harvard Law Review*, [*s. l.*], v. 91, n. 6, p. 1.177-1.211, Apr. 1978. DOI: https://doi.org/10.2307/1340475.

DUFF, David G. Taxing inherited wealth: a philosophical argument. *Canadian Journal of Law & Jurisprudence*, [*s. l.*], v. 6, n. 1, p. 3-62, Jan. 1993. DOI: http://dx.doi.org/10.1017/S0841820900001788.

DWORKIN, Ronald. *Justice for hedgehogs*. Cambridge, MA: Harvard University Press, 2011.

_____. Sovereign virtue revisited. *Ethics*, [*s. l.*], v. 113, n. 1, p. 106-143, Oct. 2002a. DOI: https://doi.org/10.1086/341579.

_____. *Sovereign virtue*: the theory and practice of equality. Cambridge, MA: Harvard University Press, 2002b.

GRAETZ, Michael J.; SHAPIRO, Ian. *Death by a thousand cuts*: the fight over taxing inherited wealth. Princeton, NJ: Princeton University Press, 2005.

HALLIDAY, Daniel. Inheritance and hypothetical insurance. *In*: WALUCHOW, Wil; SCIARAFFA, Stefan (ed.). *The legacy of Ronald Dworkin*. Oxford, UK: Oxford University Press, 2016. p. 99-114.

HASLETT, D. W. Is inheritance justified? *Philosophy & Public Affairs*, [*s. l.*], v. 15, n. 2, p. 122-155, 1986.

KENNEDY, David. Some caution about property rights as a recipe for economic development. *Accounting, Economics, and Law*, [*s. l.*], v. 1, n. 1, p. 1-62, 2011. DOI: https://doi.org/10.2202/2152-2820.1006. Available at: https://www.degruyter.com/document/doi/10.2202/2152-2820.1006/html. Access on: June 2, 2023.

KINDERMANN, Fabian; MAYR, Lukas; SACHS, Dominik. Inheritance taxation and wealth effects on the labor supply of heirs. *Journal of Public Economics*, [*s. l.*], v. 191, p. 104-127, Nov. 2020. DOI: https://doi.org/10.1016/j.jpubeco.2019.104127.

KYMLICKA, Will. *Contemporary political philosophy*: an introduction. 2nd ed. Oxford, UK: Oxford University Press, 2002.

LEVY, Michael B. Liberal equality and inherited wealth. *Political Theory*, [*s. l.*], v. 11, n. 4, p. 545-564, Nov. 1983.

MCCAFFERY, Edward J. The uneasy case for wealth transfer taxation. *The Yale Law Journal*, [*s. l.*], v. 104, n. 2, p. 283-365, Nov. 1994. DOI: https://doi.org/10.2307/797006.

MEADE, James E. *Efficiency, equality, and the ownership of property*. Abingdon: Routledge, 2013. (Routledge Revivals).

MILL, John Stuart. *Principles of political economy, with some of their applications to social philosophy*. 9th ed. London: Longmans, Green and Co., 1886.

MURPHY, Liam B. Liberty, equality, well-being: Rakowski on wealth transfer taxation. *Tax Law Review*, [*s. l.*], v. 51, n. 3, p. 473-494, 1996. Available at: https://heinonline.org/HOL/Page?public=true&handle=hein.journals/taxlr51&div=22&start_page=473&collection=journals&set_as_cursor=2&men_tab=srchresults. Access on: June 2, 2023.

MURPHY, Liam B.; NAGEL, Thomas. *The myth of ownership*: taxes and justice. Oxford, UK: Oxford University Press, 2002.

NAGEL, Thomas. Liberal democracy and hereditary inequality. *Tax Law Review*, [*s. l.*], v. 63, n. 1, p. 113-122, 2009. Available at: https://heinonline.org/HOL/Page?public=true&handle=hein.journals/taxlr63&div=6&start_page=113&collection=journals&set_as_cursor=2&men_tab=srchresults. Access on: June 2, 2023.

_____. Rawls and liberalism. *In*: FREEMAN, Samuel (ed.). *The Cambridge companion to Rawls*. Cambridge, UK: Cambridge University Press, 2003. p. 62-85.

NUSSBAUM, Martha C. Human functioning and social justice: in defense of Aristotelian essentialism. *Political Theory*, [*s. l.*], v. 20, n. 2, p. 202-246, May 1992. DOI: https://doi.org/10.1177/0090591792020002.

_____. Nature, function, and capability: Aristotle on political distributions. *In*: ANNAS, Julia; GRIMM, Robert H. (ed.). *Oxford studies in ancient philosophy*. Oxford, UK: Clarendon Press; New York: Oxford University Press, 1988. p. 145-184. Supplementary volume.

OTSUKA, Michael. Luck, insurance, and equality. *Ethics*, [*s. l.*], v. 113, n. 1, p. 40-54, Oct. 2002. DOI: https://doi.org/10.1086/341322.

PACHECO, Cristiano Scarpelli Aguiar. Estimativas da alíquota efetiva média do Imposto sobre Transmissão Causa Mortis e Doação (ITCD) nos estados e no Brasil. *Revista de Finanças Públicas, Tributação e Desenvolvimento*, Rio de Janeiro, v. 8, n. 10, p. 1-34, jan./jun. 2020. DOI: https://doi.org/10.12957/rfptd.2020.44756. Available at: https://www.e-publicacoes.uerj.br/index.php/rfptd/article/view/44756. Access on: June 2, 2023.

PIKETTY, Thomas. *Capital in the twenty-first century*. Translated by Arthur Goldhammer. Cambridge, MA: Harvard University Press, 2017.

PIKETTY, Thomas; SAEZ, Emmanuel. A theory of optimal inheritance taxation. *Econometrica*, [*s. l.*], v. 81, n. 5, p. 1.851-1.886, Sept. 2013. DOI: https://doi.org/10.3982/ECTA10712.

PRADO, Arthur Cristóvão. Elisão do ITCMD mediante desnacionalização de patrimônios. *JOTA*, [*s. l.*], 9 ago. 2021. Available at: https://www.jota.info/opiniao-e-analise/artigos/elisao-do-itcmd-mediante-desnacionalizacao-de-patrimonios-09082021. Access on: June 2, 2023.

_____. Herança e estrutura de classes: uma análise a partir dos Grandes Números da Receita Federal. *Revista Debates*, Porto Alegre, v. 14, n. 1, p. 150-172, jan./abr. 2020. DOI: https://doi.org/10.22456/1982-5269.97856. Available at: https://seer.ufrgs.br/index.php/debates/article/view/97856. Access on: June 2, 2023.

RAWLS, John. *A theory of justice*. Rev. ed. Cambridge, MA: Harvard University Press, 1999.

_____. *Justice as fairness*: a restatement. Edited by Erin Kelly. Cambridge, MA: Harvard University Press, 2001.

_____. *Political liberalism*. New York: Columbia University Press, 1993. (The John Dewey Essays in Philosophy, n. 4).

REPETTI, James R. Should we tax the gratuitous transfer of wealth?: an introduction. *Boston College Law Review*, [Boston], v. 57, n. 3, p. 815-821, 2016. Available at: https://lira.bc.edu/work/ns/f8fe554b-9171-40e3-9e85-0b9646ded5cf. Access on: June 2, 2023.

SAEZ, Emmanuel; ZUCMAN, Gabriel. *The triumph of injustice*: how the rich dodge taxes and how to make them pay. New York: W. W. Norton & Company, 2019.

SEN, Amartya. *Development as freedom*. New York: Knopf, 1999.

_____. *The idea of justice*. Cambridge, MA: Harvard University Press, 2009.

SMITH, Adam. *Lectures on justice, police, revenue and arms*. Reported by a student in 1763, and ed. with an introduction and notes by Edwin Cannan. Oxford, UK: Clarendon Press, 1896. Available at: https://archive.org/details/lecturesonjustic00smituoft/mode/2up?ref=ol&view=theater. Access on: June 2, 2023.

STEINER, Hillel. Capitalism, justice and equal starts. *Social Philosophy & Policy*, [*s. l.*], v. 5, n. 1, p. 49-71, 1987. DOI: https://doi.org/10.1017/S0265052500001242.

STRAND, Palma Joy. Inheriting inequality: wealth, race, and the laws of succession. *Oregon Law Review*, [*s. l.*], v. 89, n. 2, p. 453-504, 2010. Available at: https://scholarsbank.uoregon.edu/xmlui/handle/1794/10955. Access on: June 2, 2023.

VITA, Álvaro de. *A justiça igualitária e seus críticos*. 2. ed. São Paulo: Martins Fontes, 2007. (Coleção Justiça e Direito).