LIMITS ON THE EXERCISE OF RESIDUAL TAXING POWER ACCORDING TO THE PRINCIPLE OF FUNCTIONAL CORRECTNESS

LIMITAÇÕES AO EXERCÍCIO DA COMPETÊNCIA TRIBUTÁRIA RESIDUAL EM FACE DO PRINCÍPIO DE CORREÇÃO FUNCIONAL

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ABSTRACT

The purpose of this paper is to verify whether the Brazilian Constitution contains any other limitations on the exercise of residual taxing power, other than those set forth in articles 154, I and 195, paragraph 4. For this purpose, based on a critical interpretation of the residual taxing power, using a deductive method, and adopting as a theoretical reference the principle of functional correctness, as systematized by Friedrich Müller, we demonstrate that this requires considering the effects of federalism on the Tax System. After reviewing the concepts of federalism and fiscal federalism in the recent literature and analyzing their adequacy to the Brazilian fiscal constitution, we conclude that the residual taxing power is limited by the principle of functional correctness. The results of the research indicate that the exercise of residual taxing power cannot offend the tax equalization, because the latter is a component of the federative form of the Brazilian State.

KEYWORDS: Fiscal Federalism. Residual Social Contributions. Residual Taxing Power. Taxing Power.

RESUMO

O presente trabalho tem por objetivo verificar se existem na Constituição da República outras limitações ao exercício da competência tributária residual, além daquelas enunciadas nos artigos 154, I e 195, § 4º. Para tanto, a partir de uma interpretação crítica da competência tributária residual, por meio de método dedutivo, e adotando como referencial teórico o princípio da correção funcional sistematizado por Friedrich Müller, demonstramos que este exige que se considerem os efeitos do federalismo sobre o Sistema Tributário. Após revisar os conceitos de federalismo e federalismo fiscal na literatura recente e a analisar a sua adequação à Constituição fiscal brasileira, concluímos que a competência tributária residual é limitada pelo princípio de correção funcional. Os resultados da pesquisa indicam que o exercício da competência residual não pode ofender a equalização fiscal, porque esta é componente da forma federativa do Estado brasileiro.

PALAVRAS-CHAVE: *Competência residual. Competência tributária. Contribuições sociais residuais. Federalismo fiscal.*

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1 INTRODUCTION

The year 2018 in which the thirty years of promulgation of the Constitution of the Republic (CR) was celebrated is also a critical point for federalism in Brazil, as demonstrated by the judgment of the Fundamental Precept Breach of Plea 523, on June 11, 2018. Subscribed by twenty-three States, in addition to the Federal District, the action questions the change in the financial profile of residual contributions operated through the perpetuation of the mechanism of Untying of Union Revenues (DRU), created by Constitutional Amendment 27, 2000[2] For petitioners, by extending the term of DRU repeatedly[3] the Union has been practicing fraud to the Constitution, circumventing the constitutional scheme of tax revenue distribution - especially Article 157, II, Cor - and violating the federal principle itself.

The action invites a theoretical reflection on the relationship between federalism and the National Tax System (STN) in the Constitution of 1988, a matter of primary interest for Tax Law, [4]which justifies academically and socially this work. As we know, the technique of tax division adopted by the Constitution is one of the projections of federalism in the field of taxation, precisely the one that, granting financial autonomy to federal entities, makes its political and legal[5] autonomy effective .

In order to enrich the literature related to the theme and foster reflection on the federative balance in the Trigenoary Constitution, this article aims to answer the following research problem: It is possible to identify in the CR limitations to the exercise of residual tax competence, beyond the constraints stated in the arts. 154, I and 195, § 4º, CR?

Starting from the principle of functional conformity - adopted as a theoretical reference in the form that the concept received in the systematization made by Friedrich Müller - we will verify whether the exercise of residual tax competence by the Union should be subject to this principle.

To this end, the present work is divided into four sections, besides this introduction and its conclusion. In the first section, the conceptual frameworks necessary to situate the problem of Brazilian fiscal federalism will be articulated. In view of the vastness of the literature

2 BRAZIL. Constitutional Amendment nº 27, from 2000. Adds the art. 76 to the Act of Transitional Constitutional Provisions, instituting the untying of tax collection and social contributions of the Union. Available at: http://www2.camara.leg.br/legin/fed/emecon/2000/emendaconstitucional-27-21-marco-2000-373981-publicacaooriginal-1-pl.html. Accessed on: 08 aug. 2018

3 Cf. BRAZIL. Constitutional Amendment nº 42, 2003. Changes the National Tax System and gives other measures. Available at: http://www2.camara.leg.br/legin/fed/emecon/2003/constitutionalamendment-42-19-December2003-497205-norma-pl.html. Accessed: 08 Aug. 2018.
BRAZIL. Constitutional Amendment nº 56, from 2007. Extends the deadline provided in the art caput. 76 of the Transitional Constitutional Provisions Act and other provisions. Available at: http://www2.camara.leg.br/legin/fed/emecon/2007/constitutionalamendment-56-20-December2007-567249-norma-pl.html. Accessed on: 08 Aug. 2017.
BRAZIL. Constitutional Amendment nº 68, de 2011. Altera o art. 76 do Ato das Disposições Constitucionais Transis. Available at: http://www2.camara.leg.br/legin/fed/emecon/2011/emendaconstitucional-68-21-dezember-2011-612061-publicacaooriginal-134728-pl.html. Accessed on: 08 aug. 2018.
BRAZIL. Constitutional Amendment 93, from 2016. Amends the Act of Transitional Constitutional Provisions to extend the untying of Union revenues and establish the untying of revenues of the States, Federal District and Municipalities. Available at: http://www2.camara.leg.br/legin/fed/emecon/2016/emendaconstitucional-93-8-setembro-2016-783591-publicacaooriginal-151044-pl.html. Accessed on: 08 aug. 2018.

4 The field of studies of Tax Law, which is not scientifically confused with that of Financial Law, is also composed by the investigation of the rules that "[...] delimit and coordinate tax powers between the different spheres of power in countries with federal government". VILLEGAS, Hector B. Curso de Finanzas, Derecho Financiero y Tributario. Buenos Aires: Ediciones Depalma, 2001. p. 185. Free translation.

5 COÊLHO, Sacha Calmon Navarro. Brazilian tax direct course. Rio de Janeiro: Forense, 2018. p. 43-45.
In the same sense: DA SILVA, José Afonso. Positive constitutional law course. São Paulo: Malheiros, 2011. p. 478.

on the subject, only the most fundamental concepts will be exposed, without any intention of elaborating a comprehensive review. The following presents the structure of division of competences and tax revenues contained in the 1988 Constitution. The understanding of this financial framework, the core of the Brazilian fiscal constitution, is fundamental so that the proposed research problem can be adequately addressed. In the fourth section we will discuss the hermeneutic principle of functional conformity, in order to identify its normative content. Considering the existing literature, a definition will be proposed that is believed to be more consistent with the dignity that the principle of federalism assumes in the current Constitution. Finally, the principle unveiled in the previous section will be used as a normative framework to identify the systemic limitations that condition the exercise of residual competence.

2 FEDERALISM AND FISCAL FEDERALISM: CONCEPTUAL ELEMENTS

Before moving to dealing with the question posed in this work, it is necessary to establish what is meant by federalism and fiscal federalism, notions that constitute the theoretical foundation of this research.

The multiplicity of forms adopted by federal states around the world makes it the task of developing a minimally comprehensive theory of the phenomenon[6]. It is for this reason that the goal of elaborating a theory capable of providing prescriptions that would apply indistinctly to all systems must be abandoned[7]. This, which is the classical approach, must be replaced by a typological definition of federalism, capable of recognizing it and analyzing it in its multiple forms, either as a principle of political[8] organization , in the legal sense, or as a political[9] ethos , in the philosophical sense.

Although the semantic evolution of federalism in history is expressive, the fundamental structure of the federal type is simple. According to classical theory, the federal model has the division of power between a center and its periphery. In principle, a state calls itself federal when it is subject to what can be called the duality of governance[10]. This duality occurs when, after the meeting of the parties that make up the federative pact, two politically autonomous

6 VILE, M.J.C. Teoria Federal e o "Novo Federalismo". Em: JAENSCH, D. (ed.) A Política do Novo Federalismo. Adelaide: Associação Australiana de Estudos Políticos, 1977. p. 01.

7 BURGESS, Michael. Federalismo Comparativo: Teoria e Prática. Londres: Routledge, 2006. p. 45.

8 DERZI, Misabel de Abreu Machado; DE BUSTAMANTE, Thomas da Rosa. The federative principle and equality: a critical perspective for the Brazilian legal system based on the analysis of the German model. In: DERZI, Misabel de Abreu Machado; BATISTA JÚNIOR, Onofre Alves; MOREIRA, André Mendes. Federal state and tax war in comparative law. Belo Horizonte: Arraes, 2015. p. 470.

9 MOOTS, Glenn A. The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar. Em: WARD, Ann; WARD, Lee. (eds.). The Ashgate Research Companion to Federalism. Farnham: Ashgate, 2009. p. 399.

10 SACCHETTO, C. Analysis of Fiscal Federalism from a Comparative Tax Law Perspective. In: BIZIOLI, G .; SACCHETTO, C. (eds.). Fiscal aspects of fiscal federalism: a comparative analysis. Amsterdam: IBFD, 2011. p. 12.

levels are configured, which will imply the existence of two distinct[11] legal orders, a phenomenon often called decentralization[12] .

Despite being widespread, the dualistic view is insufficient. To understand the federal structures found today, it is more appropriate to resort to the theory proposed by Daniel Elazar. According to the author, federalism is a form of distribution of power without a focal center, in an arrangement of interdependence, in which the different components coordinate around multiple centers[13]. In this scheme, the political force does not oppose itself in the center or in the periphery, but in the tension of the network as a whole[14].

Schematically, the forms of power distribution between subnational entities and the Union can take the form of dual[15] federalism ; cooperative[16] ; or competitive [17]. The first two correspond to historical models, i.e., empirically verifiable in existing political systems in the past or present. In dual federalism - found, for example, in Mexico, Malaysia, Russia, Canada, Australia, the United States, India and Pakistan - national and sub-national entities exercise their powers independently. Each entity is sovereign in relation to the powers granted to it and none of them is sovereign in relation to the powers granted to others[18]. The relationship that derives from this scheme is much more inclined to tension than to collaboration[19]. This is what opposes dual federalism to cooperative federalism. In the latter - currently practiced, for example, in Germany, South Africa and Belgium, in addition to Brazil - there is a harmonious balance between the actions of the various entities, which is characterized by the sharing of responsibilities over the same area of activity[20] . Finally, competitive federalism - an academic model that has no application in any current political system - proposes that federal entities should have identical roles, in order to maximize competition between them, which is supposed to result in an efficiency gain in the provision of public services[21].

11 "The organization of the Federal State is a task of laborious constitutional engineering. The federal state requires double regulation, triggering the rules and the rules for each one. I refer to the system of the Federation or the Union and the legal systems of the Member States."
HORTA, Raul Machado. Organização Constitucional do Federalismo. Revista da Faculdade de Direito da UFMG, n. 28-29, p. 09-32, 1986. p. 10..

12 It should be noted that fiscal decentralization is not unique to federations, but can also be found in unitary states, which make use of delegations of power to local authorities (devolutions)in order to make the administration of public affairs practicable. Cf. BOADWAY, Robin; SHAH, Anwar. Fiscal Federalism: Principles and Practices of Multiorder Governance. Cambridge: Cambridge University Press, 2009. p. 61.
Moreover, administrative decentralisation makes it possible to bring the spheres of power closer to the needs of citizens. Cf. SHAH, Anwar. Introduction: Principles of Fiscal Federalism. In: SHAH, Anwar. The Practice of Fiscal Federalism: Comparative Perspectives. Montréal: Mcgill-Queen's University Press, 2007. p. 10.

13 ELAZAR, Daniel J. Federalismo e Integração Política. Lanham: University Press of America, 1984. p. 15.

14 MOOTS, Glenn A. The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar. Em: WARD, Ann; WARD, Lee. (eds.). The Ashgate Research Companion to Federalism. Farnham: Ashgate, 2009. p. 400.

15 For the dual typology of dual federalism (layer cake and coordinate-authority), see: SHAH, Anwar. Introduction: Principles of Fiscal Federalism. In: SHAH, Anwar. The Practice of Fiscal Federalism: Comparative Perspectives. Montréal: McGill-Queen's University Press, 2007. p. 05.

16 For the Double typology of Cooperative federalism (interdependent spheres, marble cake and Independent spheres) See: SHAH, Anwar. Introduction: Principles of Fiscal Federalism. In: The Practice of Fiscal Federalism: Comparative Perspectives. Montréal: Mcgill-Queen University Press, 2007. p. 05.

17 For further study: BRENNAN, G.; BUCHANAN, J. The Power to Tax: Analytical Foundations of a Fiscal Constitution. Cambridge: Cambridge University Press, 1980.

18 SCHÜTZE, Robert. From Dual to Cooperative Federalism: The Changing Structure of European Law. Oxford: Oxford University Press, 2009. p. 78.

19 CORWIN, Edward S. The passing of dual federalism. Virginia Law Review, Vol. 36, n. 01, p. 01-24, 1950.

20 BARACHO, José Alfredo de Oliveira. General theory of federalism. Rio de Janeiro: Forensics, 1986.

21 "[...] If the citizens of a jurisdiction appraise the performance of their government by comparing it to the performance of governments elsewhere but at the same jurisdictional level, they would induce their own government to do as well as or better than these governments." BRETON, Albert. Modeling vertical competition. In: AHMAD, Ehtisham; BROSIO, Giorgio. (eds.). Handbook of Fiscal Federalism. Cheltenham: Edward Elgar, 2006. p. 92.

Within this complex scenario, the creation of the most appropriate regulatory structure to share responsibility for expenditure and the sources of revenue for its implementation is a matter of immediate concern. This is precisely the end of so-called fiscal federalism: the coordination of public finances among federated entities[22]. As in the case of the concept of federalism, here too several classical theories contribute to the resolution of the question of the organization of the tax structure at various levels: the rule of proximity, by George Stigler; the fiscal equivalence of Mancur Olson; Wallace Oats' theory of decentralization; James Buchanan's[23] theory of clubs. To these theories are added new contributions such as that of Shah Anwar; the World Bank's Accountability model; and the New Public Governance[24] model.

All these approaches follow the secular theorization of the principle of subsidiarity[25], according to which financial functions (taxation, spending, and economic regulation) must always be exercised by the smallest "social unit"[26], that located at the locality level in the federal structure, except where it is reasonably demonstrated that such functions will be better performed at the higher levels. In any case, a minimum guarantee of autonomy in the imposition of taxes[27] - what seems to be at the heart of the tax constitution - is constitutive of the very notion of federalism[28] .

Ideally, the distribution of fiscal power should be preceded by an evaluation of the expenses that will be borne by each entity, with three forms of its distribution[29] : the exclusive attribution of tax revenue (exclusive tax assignment), the competing attribution (concurency) and the provision of revenue-sharing mechanisms (tax sharing). As will be seen later, in Brazil the 1988 constituent employed a mixed technique, combining the three forms[30].

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22 MAJOCCHI, Alberto. Theories of Fiscal Federalism and the European Experience. In: WARD, Ann; WARD, Lee. (Eds.). The Ashgate Research Companion to Federalism. Farnham: Ashgate, 2009. p. 425.

23 For a summary of each of these theories, the reader is referred to: SHAH, Anwar. Introduction: Principles of Fiscal Federalism. In: SHAH, Anwar. The Practice of Fiscal Federalism: Comparative Perspectives. Montréal: McGill-Queen's University Press, 2007. p. 07-09.

24 For a definition and brief discussion of each of these theories, see: CABRAL, Nazaré da Costa. The theory of financial federalism. Coimbra: Almedina, 2015.

25 For an overview of the different philosophical and economic theories of subsidiarity, see: FØLLESDAL, Andreas. Competing Conceptions of Subsidiarity. In: FLEMING, James E.; LEVY, Jacob T. Federalism and Subsidiarity. New York: New York University Press, 2014. HUEGLIN, Thomas O. Federalism, Subsidiarity and the European Tradition: Some Clarifications. Telos, n. 100, p. 37-55, 1994. p. 46.
The application of the principle to an outline of moral justification of federalism in Brazil can be seen in: BATISTA JÚNIOR, Onofre Alves; DE OLIVEIRA, Ludmila Mara Monteiro; MAGALHÃES, Tarcísio Diniz. What federative pact? In search of a normative theory adequate to the Brazilian fiscal federalism. In: BATISTA JÚNIOR, Onofre Alves; MOREIRA, André Mendes. Federal state and taxation: from the origins to the current crisis. Belo Horizonte: Arraes, 2015.

26 BARACHO, José Alfredo de Oliveira. The subsidiarity principle: concept and evolution. Revista da Faculdade de Direito da UFMG, n. 35, p. 13-52, 1996. p. 51.

27 "Uma constituição fiscal é o corpo de regras e regulamentos fundamentais que enquadram a tomada de decisão na área da política fiscal." BLÖCHLIGER, Hansjörg; KIM, Junghun. Federalismo fiscal: trabalho de descentralização. Paris: Publicação da OCDE, 2016. p. 32.

28 RILKER, W. Federalism. In: GREENSTEIN, F.; POLSBY N. (eds.). The Handbook of Political Science: Government Institutions and Processes. Boston: Addison-Wesley Pub. Co., 1975.
On the contrary, stating that the distribution of tax competences is not a requirement of federalism, only the distribution of revenue: SCHOUERI, Luís Eduardo. Tax law. São Paulo: Saraiva Educação, 2018. p. 258.

29 For an economic analysis of the principles of the distribution of tax power, see: HUEGLIN, Thomas O.; FENNA, Alan. Comparative Federalism: A Systematic Inquiry. Toronto: University of Toronto Press, 2015. p. 166-204.

30 "Em princípio, a constituição de 1988 estabeleceu uma mistura relativamente convencional de cessão fiscal separada e concorrente. Na prática, o resultado mostra o quadro pouco convencional de um regime fiscal duplo: os Estados e os municípios adquiriram mais poder fiscal e uma maior quota-parte das receitas tradicionais; Ao mesmo tempo, foi atribuído ao governo federal um conjunto distinto de taxas compulsórias para financiar a política social de todos os brasileiros." HUEGLIN, Thomas O.; FENNA, Alan. Federalismo comparativo: um inquérito sistemático. Toronto: University of Toronto Press, 2015. p. 203.

From these theoretical considerations, it is necessary to emphasize that federal states hardly arise from the punishment of intellectuals. They are, on the contrary, the result of political confrontations, conflicts and social upheavals, distancing themselves expressively from the ideal models that derive from a thoughtful reflection. It is with this fact in mind that one should proceed to the analysis of the division of competences and tax revenues constitutive of the Brazilian fiscal federalism.

3 THE DISTRIBUTION OF COMPETENCES AND TAX REVENUES IN THE 1988 CONSTITUTION: BRAZILIAN FISCAL FEDERALISM

As previously seen, ideally, recommends the economic theory that the distribution of administrative competencies, since related to the budgetary scope of expenditures, precedes the distribution of tax competencies and government transfers, when the tax constitution[31] was created. This rarely happens in practice and was no different in the Brazilian case, whose Constitution incorporated, with some modifications, the tax framework existing in the previous[32] constitutions.

Even so, the 1988 Constitution innovated by providing for an unprecedented decentralization of revenue sources, a clear reflection of the democratization that the country was undergoing when it was elaborated[33] , distributing tributes to increase the autonomy of the subnational entities. But this movement was not accompanied by a decentralization of the burdens that remained concentrated in the Union[34]. The result, which could not be more disastrous for the coordination of the nascent financial federalism, was the expressive use of residual competence by the Union[35]. Whatever the historical reasons for this movement, however, from the dogmatic point of view, this practice is incompatible with the constitutional order in force, as will be shown below. Before proceeding, however, to a critical assessment of

31 SHAH, Anwar. Introduction: Principles of Fiscal Federalism. In: SHAH, Anwar. The Practice of Fiscal Federalism: Comparative Perspectives. Montréal: McGill-Queen's University Press, 2007. p. 19.

32 "In the Brazilian constitutional history, the subject of discrimination of competencies had an evolution marked by a much more empirical than rational character. The taxes were to include in each constitutional text from preexisting realities, being the cast that is found in the text of 1988 mere distribution of taxes that were already known sometimes with small modifications. In other words, the 1988 constituent had a (typological) notion of the existence of taxes and worked with them to forecast financial resources for the state." SCHOUERI, Luís Eduardo. The complementary law and the division of tax competences. In: COSTA, Alcides Jorge. The National Tax System and the stability of the Brazilian federation. São Paulo: Noeses, 2012. p. 680.
For a historical investigation of federalism in Brazilian tax law, see: COSTA, Alcides Jorge. History of taxation in Brazil: from the Republic to the 1988 Constitution. In: SANTI, Eurico Marcos Diniz de. Course on tax law and public finance. São Paulo: Saraiva, 2008.

33 As Misabel Derzi points out, federalism is closely related to democracy: "[...] federalism is a decentralization of power, keeping an intimate relationship with democracy. One does not deny the possibility of the unitary form of State coexisting with political regimes that adopt the democratic principle, but the decentralization of power peculiar to the federal form of state more easily brings about the democratic republic." DERZI, Misabel de Abreu Machado. Tax law, criminal law and type. São Paulo: Editora Revista dos Tribunais, 2007. p. 117.

34 For a more comprehensive investigation of the history of federalism in Brazil, see: OLIVEIRA, Fabrício Augusto. Theories of federation and fiscal federalism: the Brazilian case. Text for discussion n. 43. Belo Horizonte: João Pinheiro Foundation, 2007.

35 OLIVEIRA, Fabrício Augusto; CHIEZA, Rosa Angela. Height and decline of the Brazilian federation: 1988-2017. In: ANFIP; FENAFISCO. Tax Reform Required: diagnosis and premises. Brasília/São Paulo: Plataforma Política Social, 2018.

this practice, it is necessary to present the structure of the division of tax competences in the 1988 Constitution which is, as we know, and as a result of federalism, rigid[36].

As Sacha Calmon teaches, competence corresponds to the constitutional[37] division of the power to tax - "[...] originally one by will of the people [...][38] - among legal persons of domestic public law that, in Brazil, are the Union, the States, the Federal District and the Municipalities[39] . This is not confused, therefore, with the competence to legislate on tax law - competitor, as imposed by art. 24, Cor, it is up to the Union to legislate on general norms - nor with the active tax capacity that is the delegated ability to collect taxes. As the national doctrine teaches for a long time, tax competence is endowed with the characteristics of privacy, indelegability, incaducability, inalterability, irrenunciability and facultativity[40].

Also according to the magisterium of Sacha Calmon, the distribution of competences[41] in the 1988 Constitution follows a criterion resulting from the coordination of the concept of private competence (exclusive)[42] and of common competence cumulated with the theory of the linkage of the hypothesis of incidence[43] , the latter disseminated in Brazil by Geraldo Ataliba[44]. This is how taxes linked to a state action are said to be of common competence, that is, they can be instituted by any of the federated entities, provided that they are administratively competent for the practice of the act that associates with the person of the taxpayer (provision of a specific and divisible public service or exercise of police powers in the case of fees; and performance of public works resulting from the development of real estate, in the case of improvement contributions). As the tax competence in these cases is linked to the administrative competence, it is stated, as specified in the German literature, that it is an annexed[45] competence.

In the case of taxes not linked to a state action, the distribution takes place on the basis of the prior establishment of the generating facts that are then distributed among the legal entities of domestic public law (taxes, compulsory loans and special contributions). This is how the Union should establish, in addition to compulsory loans and special[46] contributions, the taxes provided for in art. 153; to the States those provided for in art. 155; to the Municipalities those listed in art. 156; and, finally, the Federal District simultaneously fits the taxes

36 WHALER, Aliomar. An introduction to the science of finance. Updated by Hugo de Brito Machado Segundo. Rio de Janeiro: Forense, 2015. p. 291.

37 As Humberto Ávila recalls, complementary laws also apply to the determination of tax jurisdiction. ÁVILA, Humberto. Tax constitutional system. São Paulo: Saraiva, 2010. p. 141-142.

38 COÊLHO, Sacha Calmon Navarro. Brazilian tax law course. Rio de Janeiro: Forense, 2018. p. 47.

39 Contrary to what happens, for example, in Argentina, in Brazil the power to tax granted to municipalities is originating and not derived. On the classification of tax power in originating and derived, see: FONROUGE, Giuliani. Derecho Financiero. Buenos Aires: La Ley, 2004. p. 267-270.

40 For a definition of each of these characteristics, see: CARRAZZA, Roque Antonio. Tax constitutional law course. São Paulo: Malheiros, 1999. p. 339-431.

41 As the best doctrine wants, the Constitution does not create taxes, who does it is the person constitutionally competent, by law of its working. BALEEIRO, Aliomar. Brazilian tax law. Updated by Misabel de Abreu Machado Derzi. Rio de Janeiro: Forense, 2013. p. 38.

42 The private denomination is used here, because it is established in the Brazilian tax literature. However, in constitutional theory the modality of competence that does not admit delegation is called exclusive.

43 COÊLHO, Sacha Calmon Navarro. Brazilian tax law course. Rio de Janeiro: Forense, 2018. p. 51.

44 ATALIBA, Geraldo. Tax incidence hypothesis. São Paulo: Malheiros, 2013.

45 The administrative competencies in the 1988 Constitution are arranged in arts. 21, 22 (Union), art. 25, § 1º (residual competence of the States), art. 30 (Municipalities) and art. 32, § 1º (dual competence of the Federal District).

46 Exceptions are state, municipal and district social contributions instituted to finance the social security system of their civil servants, based on art. 149, § 1, CR.

provided in arts. 155 and 156. From the perspective of the taxpayer, who will not be the object of development in this work, the discrimination of skills aims to preserve the ability to contribute, avoiding multiple incidences on the same generating fact.

In addition to the private and common classification, the literature also identifies residual and extraordinary competence. Both fall exclusively to the Union - which demonstrates the centralizing character of Brazilian fiscal federalism - the latter being the competence to institute extraordinary war taxes (art. 154, II, CR). The residual competence, on the other hand, unfolds in the scope of two taxable species - taxes and social[47] contributions - should be exercised within the limits contained in articles 154, I, CR and 195, § 4º, CR.

The forecast of residual competence in Brazil refers to the Constitution of 1934[48]. As things stand, the Constitution lays down strict requirements for the exercise of the Constitution, since it is the exclusive responsibility of the Union and is indelible to other bodies. According to art. 154, I, CR, to institute residual taxes, the Union must avail itself of complementary law, taking care that the new exation does not have generating fact or own calculation basis of those taxes already foreseen in the constitutional text.

In the case of residual social contributions, the requirements refer to those contained in Article 154, I, CR, reason why there was a commotion regarding the determination of the normative command aimed by the Constitution. Should residual contributions take into account the literality of the requirements set out in Article 154, I, CR? That is, should they be instituted by supplementary law, be non-cumulative and not have a generating fact or own calculation basis of the taxes provided for in the Constitution? Or, more specifically, Article 194, § 4, RC, referring to Article 154, I, CR, would also prohibit the coincidence of the basis of calculation of any residual contribution with that of the taxes provided for in the Constitution, like the similar restriction on fees (Article 145, § 2, RC)? According to the Supreme Court, the answer is negative[49]. Thus, the institution of new contributions to the financing of social security should be made through a supplementary law (first requirement), it being sufficient for the legislator to avoid the coincidence of the "generating fact" and the calculation basis with that of other existing[50] contributions (second requirement).

With regard to the sharing of revenues - "[...] the main form of internal redistribution of wealth among the units of the Brazilian[51] federation " - two forms of distribution of the pro-

47 For the legal system of social contributions, see: LOBATO, Valter. The juridical-constitutional system of contributions to the cost of social security: the fundamental and structuring importance of the purpose and the other limits to the power to tax. 2014. Thesis (Doctorate in Law) - Faculty of Law, Federal University of Minas Gerais, Belo Horizonte.
See also: SPAGNOL, Werther Botelho. Social contributions in Brazilian law. Rio de Janeiro: Forense, 2002.

48 For a brief history, see: SCHOUERI, Luís Eduardo. Direito tributário. São Paulo: Saraiva Educação, 2018. p. 265-268.

49 "[...] when the § 4º, of art. 195, of the C.F. commands to obey the rule of residual competence of the Union - art. 154, I - does not provide that contributions should not have a chargeable event or tax basis. The contributions, created in the form of § 4º, of art. 195, of the C.F., should not have, that is, generating fact and basis of calculation own the already existing contributions."
The decision is thus based on:
CONSTITUTIONAL. TAX. SOCIAL SECURITY. SOCIAL CONTRIBUTIONS: ENTREPRENEURS. AUTONOMOUS AND INDIVIDUAL. Complementary Law nº 84, of 18.01.96: CONSTITUTIONALITY. I. - Social contribution instituted by Complementary Law nº 84, of 1996: constitutionality. II. - R.E. not known.

50 See, for all, the following judgments: BRASIL. Resource Extraordinary nº 177.137-RS. Plenário. Rel. Ministro Moreira Alves, D.J. 03.05.1996. BRAZIL. Extraordinary Resource nº 165.939-RS. Plenum. Rel. Minister Moreira Alves, D.J. 03.05.1996. and BRAZIL. Extraordinary Appeal nº 228.321-RS. Plenum. Rel. Minister Carlos Velloso, D.J. 20.05.2003.

51 MOREIRA, André Mendes. O Federalismo Brasileiro e a Repartição de Receitas Tributárias. In: MOREIRA, André Mendes; DERZI, Misabel de Abreu Machado; BATISTA JÚNIOR, Onofre Alves. (orgs.). Estado federal e tributação: das origens à crise atual. Belo Horizonte: Arraes Editores, 2015. p. 169.

ceeds of the collection[52] are found in the 1988 Constitution: the direct (simple) - by means of which one entity directly accesses part of the revenue received by another - and the indirect (complex), by which the funds collected are sent to funds for later sharing among its members according to criteria established by law[53]. In the Constitution, there is only the modality of vertical revenue sharing - the one that "[...] occurs from the highest to the lowest [...][54] ", that is, from the Union to the States or to the Municipalities and from the States to the Municipalities - not being in Brazilian law the so-called horizontal divisions - those that are given by the richest ones in favor of the poorest units of a federation - verified in the Australian and German[55] law.

The peculiarity of the Brazilian tax constitution is the fact that residual contributions, unlike residual taxes, are not subject to the revenue sharing scheme. The exception should not cause astonishment, in the first place, because the contributions are taxes whose revenue is linked to the fulfillment of certain purposes elected by the Constitution. Secondly, and as mentioned earlier, the decentralization of resources promoted by the 1988 Constitution was not accompanied by an effective decentralization of financial burdens.

It occurs that this concentration of burdens in the Union, added to the stricter regime for the institution of new taxes and the need to share the proceeds of their collection with other federal entities, resulted in the recurrent use of residual jurisdiction to institute new contributions, which, accompanied by the revenue untying mechanism created by Constitutional Amendment 27 of 2000, ended up further skewing the tax constitution in its favour[56]. Considering the functional perspective, it is nevertheless verified that the requirements for the exercise of residual competence should be sought in a systematic interpretation of the Constitution, which implies recognizing that its exercise is also subject to requirements other than those nominally provided for in Article 195, § 4c/c 154, I, CR, as will be seen below.

52 For an exhaustive analysis of the distribution of revenues in the 1988 Constitution, including its classifications in mandatory and voluntary, linked and unrelated, in addition to direct and indirect, see: MOREIRA, André Mendes. The Brazilian Federalism and the Tax Revenue Division. In: MOREIRA, André Mendes; DERZI, Misabel de Abreu Machado; BATISTA JÚNIOR, Onofre Alves. (Orgs.). Federal state and taxation: from the origins to the current crisis. Belo Horizonte: Arraes Editores, 2015.

53 COÊLHO, Sacha Calmon Navarro. Brazilian tax direct course. Rio de Janeiro: Forense, 2018. p. 286.

54 MOREIRA, André Mendes. Brazilian Federalism and the Tax Revenue Division. In: MOREIRA, André Mendes; DERZI, Misabel de Abreu Machado; BATISTA JÚNIOR, Onofre Alves. (Orgs.). Federal state and taxation: from the origins to the current crisis. Belo Horizonte: Arraes Editores, 2015. p. 158.

55 "Com a notável exceção dos Estados Unidos, portanto, a maioria dos sistemas federais estabeleceu programas de equalização fiscal. Apenas algumas federações, como a Alemanha, o Canadá e a Suíça, escreveram uma obrigação de equalização fiscal em suas constituições, reconhecendo-a como parte do pacto básico da união federal. Tal obrigação constitucional, no entanto, não é uma indicação automática do grau em que a equalização pode realmente ser praticada. Enquanto a Alemanha tem um dos sistemas mais abrangentes de equalização, o mesmo acontece com a Austrália, onde nenhum requisito constitucional para a redistribuição horizontal existe." HUEGLIN, Thomas O.; FENNA, Alan. Federalismo comparativo: um inquérito sistemático. Toronto: University of Toronto Press, 2015. p. 172.

56 "The standard of adjustment that the federal government adopted from this reality and which it has not given up to the present day has become perverse both for the tax structure and for economic growth and for the federation itself. As they are generally cumulative in nature, as they affect turnover, gross revenue or payroll, the further advance of social contributions in the tax structure would worsen the quality of the tax system, at the same time that it would undermine the principle of competitiveness by charging domestic production more than taxes on aggregate value. as far as the federation is concerned, because the priority that has now been given to its collection would weaken, in relative terms, the collection of traditional taxes, especially from the RI and the ICI, decreasing the relative participation of the subnational spheres in the tax cake and reversing the objectives pursued with the tax reform of the Constitution to modify the equation of the Federative distribution of revenues." OLIVEIRA, Fabrício Augusto; CHIEZA, Rosa Angela. Height and decline of the Brazilian federation: 1988-2017. In: ANFIP; FENAFISCO. Tax Reform Required: diagnosis and premises. Brasília/São Paulo: Plataforma Política Social, 2018. p. 565-566.

4 THE INFLUENCE OF FEDERALISM ON THE COMMAND OF FUNCTIONAL CONFORMITY IN THE INTERPRETATION OF THE CONSTITUTION

Traditionally, the rule of functional conformity has been understood as a rule concerning the preservation of the principle of separation of powers[57] constructed by the interpreter preserves the schedule of division of duties provided in its text. It is to say that the Constitution establishes a distribution of burdens and, in doing so, signals "[...] the vocation of each of the organs of the State, the type of legitimacy that characterizes its decisions, as well as the institutional capacities that brings together [...][58] ."

In Konrad Hesse's classic formulation, the principle, which is called the "criterion of functional correctness", focuses mainly on a restriction of the creative activity of the Constitutional Court, requirement parallel to that of legality and the Separation of Powers which recommends reverence to legislative activity, for the latter would be the privileged locus of normative creation[59]. Extending the semantic extension of the principle, José Canotilho affirms its incidence also in the "[...] vertical relations of power (State/regions, State/local authorities)[60] ", what would make this a principle closely linked to the distribution of competences in the sense stated in this work (decentralization of power between autonomous entities). This development is especially relevant in the states that assume the form Federativa, as is the case of Brazil.

Federalism, as a structuring norm of the Brazilian legal system, obliges to adapt the principle of functional conformity to its normative force. It is that, as Sacha Calmon recalls, quoting the Digest, in the epigraph of his festive work: "incivile est, nisi lege prospecta, una aliqua particle ejus proposita, judicare, vel responder [61]" - that is, the systematic character of the right cannot be forgotten when interpreting any of its elements.

In federations, the principle of functional conformity also requires that the Constitution be interpreted in such a way as to preserve the competences granted to subnational entities. As a support in Friedrich Müller, one can affirm that the commandment of functional correction makes federalism relevant with a view to the very method of constitutional[62] interpretation . In this passage, the interpretation of the devices that make up the Brazilian Tax Constitution - namely, the articles referring to the National Tax System and the distribution

57 For an example of this approach, see: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel. Constitutional law: theory, history and working methods. Belo Horizonte: Fórum, 2012. p. 1212. ed. eletr.

58 SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel. Constitutional law: theory, history and working methods. Belo Horizonte: Forum, 2012. p. 1212. ed. electr.

59 "A principle of constitutional interpretation is the criterion of functional correctness. If the Constitution orders the respective task and the collaboration of the holders of state functions in a certain form, then the interpreting body must remain within the framework of the functions assigned to it; it must not, by the manner and result of its interpretation, remove the distribution of functions. In particular, this applies to the relationship between legislator and the Constitutional Court: as the Court has only one controlling function before the legislator, He is denied an interpretation that would lead to a limitation of the legislator's conforming freedom beyond the limits outlined by the Constitution or to a configuration through the same court." HESSE, Konrad. Elements of constitutional law of the Federal Republic of Germany. Porto Alegre: Sergio Antonio Fabris Editor, 1998. p. 67.

60 CANOTILHO, José J. G. Constitutional law and theory of the constitution. Coimbra: Almedina, 2011. p. 1225.

61 In the author's translation: "It is against the Law to judge or answer without examining the text together, only considering any part of it." COÊLHO, Sacha Calmon Navarro. Brazilian tax direct course. Rio de Janeiro: Forense, 2018. (epigraph)

62 MÜLLER, Friedrich. Working methods in constitutional law. Rio de Janeiro: Renovate, 2005. p. 139.

of tax revenues - must take place under the perspective of power sharing established by the federal principle. However, as Valter Lobato says, recalling Ataliba, "[...] the principles that should guide the Judicial System Pátrio, as a consequence, the Tax System itself, are Federalism and the separation of powers in the preservation of the Democratic Rule of Law[63]. "

Caution is necessary, however, because the residual jurisdiction, provided for on two occasions in the constitutional text, is vested in the Union, and its exercise per se is not subject to any admonition. On the contrary, the creation of new taxes (taxes and social contributions) is the prerogative of the legal entity governed by domestic public law to which the Constitution has granted such a possibility, consisting of an important element of its tax structure, inseparable, therefore, from its political autonomy. Despite its natural conformity with the constitutional text, the exercise of residual competence cannot "[...] alter the constitutionally normalized distribution [...][64] of power among the units of the Federation. It is to say that the implementation of the Constitution[65] must inexorably take into account the balance of power relations between federated entities.

5 THE UNION'S EXERCISE OF RESIDUAL COMPETENCE AND THE DISRUPTION OF THE CONSTITUTIONAL MODEL OF DIVISION OF COMPETENCES

As seen above, the implementation of any constitutional rule should take into account the primary scheme of division of competences in which that rule is inserted. The interpretation of the text relating to tax jurisdiction cannot result in the construction of a standard that undermines the distribution of competences itself. Eventually, formally appropriate and seemingly legitimate exercise of tax jurisdiction, may challenge the Constitution. It is now that the command of functional conformity is relevant, because by introducing federalism as a method consideration, it reveals the internal limits of the exercise of this modality of granting the power to tax.

As already pronounced the Supreme Court in Ag.reg. RE No 793564-PE, the mere untying of Union revenue does not have the power to tax social contributions:

> SOCIAL CONTRIBUTION - REVENUE - UNTYING - ARTICLE 76 OF THE ACT OF TRANSITIONAL CONSTITUTIONAL PROVISIONS - CONSTITUTIONAL AMENDMENTS Nos 27, 2000 AND 42, 2003 - MODIFICATION IN THE CALCULATION OF THE MUNICIPAL PARTICIPATION FUND. The partial untying of the revenue of the Union, contained in Article 76 of the Act of Transitional Constitutional Provisions, does not transform social contributions and intervention in the economic field into taxes, changing the essence of those, absent any involvement in the calculation of the Municipal Participation Fund. Previous: Direct Action of Unconstitutionality nº 2.925/DF, in which I was appointed

63 LOBATO, Valter de Souza. The cost of social security and risk benefits: the applicable principles and limits to the power to tax. In: DERZI, Misabel de Abreu Machado (org.). Separation of powers and effectiveness of the tax system. Belo Horizonte: Del Rey, 2010. p. 433.

64 MÜLLER, Friedrich. Working methods in constitutional law. Rio de Janeiro: Renovate, 2005. p. 139.

65 The term "materialization" is used here in the sense of Friedrich Müller, quoted above. Cf. MÜLLER, Friedrich. Working methods in constitutional law. Rio de Janeiro: Renovate, 2005. p. 121.

> editor for the judgment. FINE - INJURY - ARTICLE 557, §2, CIVIL PROCEDURE CODE. Since the examination of the problem is manifestly unfounded, the fine provided for in§ 2 of Article 557 of the Code of Civil[66] Procedure must be imposed.

In fact, what is achieved by transverse means with the repeated use of this instrument is not exactly the nature of the contributions, whose resource would now be partially disaffected, but the fiscal equalization, which is normative component of the form State Government in Brazil. Analyzing the question superficially - that is, considering exclusively the formal angle of the attribution of competences and the distribution of revenues -, in fact it would not fit to consider the participation of States or Municipalities in the resource collected with these taxes. This is what the Supreme Court concludes in the judgment of the Extraordinary Appeal nº 537.610/RS of Minister Cezar Peluso, thus set:

> TRIBUTE. Social contribution. Art. 76 of the ADCT. Constitutional Amendment nº 27/2000. Untying 20% of the proceeds of the collection. Admissibility. No offense to the clause stone. Denied follow-up to the appeal. It is not unconstitutional to disconnect part of the social contribution collection, carried out by constitutional[67] amendment.

In the same sense, the position expressed by the Supreme Court in the Extraordinary Appeal nº 566.007/RS[68]. As previously seen, according to the best literature, competence must be understood as a network arrangement, on whose balance all federal entities depend. In Brazil, the Federative form of State, already stated in the inaugural article of the Constitution, under its article 60, § 4, I, can not be abolished even by constitutional amendment. This is why the legislative programme on residual jurisdiction falls within the explicit[69] textual limit of the federated form of State, which is at the same time a relevant element in relation to the method of implementation and in relation to the content of the legal rule, which was iteratively ignored by the STF:

66 "The partial untying of the revenue of the Union, contained in the aforementioned article 76 of the Act of Transitional Constitutional Provisions, does not transform social contributions and intervention in the economic field into taxes, changing the essence of those." BRAZIL. Agravo Regimental no Recurso Extraordinário nº 793564-PE. Plenário, Rel. Ministro Marco Aurélio, Dje 01.10.2014.

67 BRAZIL. Extraordinary Resource nº 537.610/RS. Plenary. Rel. Minister Cezar Peluso, DJ 18.12.2009.

68 The decision is thus set out: CONSTITUTIONAL AND TAX RIGHTS. GENERAL REPERCUSSION. UNTYING UNION REVENUES - DRU. ART. 76 OF THE ACT OF TRANSITIONAL CONSTITUTIONAL PROVISIONS. ABSENCE OF CORRELATION BETWEEN DRU'S ALLEGED UNCONSTITUTIONALITY AND THE RIGHT TO TAX RELIEF PROPORTIONATE TO THE DISCONNECTION. PROCEDURAL ILLEGITIMACY. ABSENCE OF A LIQUID AND CERTAIN LAW. EXTRAORDINARY APPEAL DISMISSED. 1. The core issue of this extraordinary resource is not whether art. 76 of the ADCT would offend permanent rule of the Constitution of the Republic, but if, possible unconstitutionality, would lead the Appellant to have the right to relief proportional to the untying of social contributions collected. 2. It cannot be concluded that any unconstitutionality of the partial untying of income from social contributions would result in the amount corresponding to the unlinked percentage being returned to the taxpayer, because the taxation would not be unconstitutional or illegal, the only hypothesis authorizing the repetition of the tax indictment or the recognition of the absence of legal-tax relationship. 3. The taxpayer who sues the restitution or non-repayment proportional to the untying of social contribution revenues instituted by art is not entitled to the cause. 76 of the ADCT, both in its original form and in the form of the amendments promoted by the Constitutional Amendments n. 27/2000, 42/2003, 56/2007, 59/2009 and 68/2011. Absence of legal right and right to impeach warrants of security. 4. Dismissal of the extraordinary appeal. BRASIL. Extraordinary Appeal nº 566.007/RS. Plenary. Rel. Minister Carmen Lucia, DJ 11.02.2015.

69 According to Riccardo Guastini, the constitutional interpretation is subject to implicit and explicit limits. The latter are "[...] those expressly established by the same constitutional document interpreted to the letter." GUASTINI, Riccardo. Interpretar y argumentar. Madrid: Centro de Estudios Políticos y Constitucionales, 2014. p. 320. (Trad. livre)
For Friedrich Müller, the reference of positivist literature to semantic limits fixed in the literality of the words that make up the normative text is illusory. However, this work takes the meaning of the limitation as explicit not in view of a supposed literal linguistic enunciation ("the Federative form of State"), but rather of its prediction in the normative text that opposes the limits derived from the norm itself (after its implementation). Cf. MÜLLER, Friedrich. Structuring theory of law. São Paulo: Revista dos Tribunais, 2008. p. 244 ff.

> It was the Constitutional Amendments nº 27/2000 and nº 42/2003 that amended the art. 76 of the Act of Transitional Constitutional Provisions, determined the untying of the revenues of taxes and social contributions of the Union and its application in the Single Account of the National Treasury, without this being incompatible with the rest of the constitutional text. In addition, it should be noted that the norm that determines the binding of the destination of the product of the collection of social contributions does not assume the character of a pedestrian clause, once not contemplated by art. 60, § 4º, of the Federal Constitution [...]. Thus, nothing prevents the Constitutional Amendment to deregulate prescribing, as did the Constitutional Amendments 27/200 e 42/2003[70].

That is to say, to verify that the exercise of residual competence is in accordance with the Constitution, the interpreter cannot limit himself to a "cold" reading of art. 60, § 4º, to verify that the binding of the collected resources is a clause that can be modified by the derived constituent power. In order to identify the programme of the rule in question, it is not sufficient to investigate the formal compatibility of the instrument exercising jurisdiction with the distribution scheme provided for in the Constitution (formal legitimacy) or its possible flexibility in the text of the constitution. It is also necessary for the interpreter to verify that his exercise is compatible with the higher (more generic) standard that guides that distribution, hence the applicability of the functional conformity criterion.

By providing for residual competence for both the tax institution and the institution of social contributions, the rule in question links the exercise of residual competence to the purpose of this important tax species - the financing of social security. The Constitution, however, did not want to limit the Union and granted it some of the power to impose taxes, in order to expand its tax area when necessary. Naturally, the competence for the imposition of new taxes aims at supplying the public coffers with unallocated revenue[71], consequently available to finance all other burdens of the Union. A simple scheme is therefore identified which corresponds to the teleological aspect of the standard which conditions the exercise of residual competence:

> (1) In view of the need to raise resources to finance social security expenditure, the Union should establish residual social contributions. Given that the income from the collection of contributions is linked to expenses, there is no need to consider the distribution of the revenue collected with the other federal entities, as the Constitution itself wants.
>
> (2) In view of the need to raise resources to finance general expenditure, as provided for in the tax budget, the Union should introduce residual taxes. In this case, it will obligatorily allocate 20% of the collected product to the States and the Federal District, pursuant to article 157, II, CR.

The reason behind this scheme is not, however, childish. It is about preserving the fiscal equalization among the federal entities, a requirement of democracy itself that does not tolerate the disregard to the texts of remissible norms the will of the people (the Federative form of State is example) by the very constitutive elements of the State[72] . By repeatedly instituting

70 BRASIL. Recurso Extraordinário nº 537.610/RS. Plenário. Rel. Ministro Cezar Peluso, DJ 18.12.2009.

71 For a reflection on the relation of the principle of non-allocation of tax revenue and the principle of equality, see: DERZI, Misabel Abreu Machado. The principle of non-allocation of tax revenue and distributive justice. HORVATH, Stephen; CONTI, Joseph Maurice; SCAFF, Fernando Facury (Org.). Financial, Economic and Tax Law: studies in honor of Regis Fernandes de Oliveira. São Paulo: Quartier Latin, 2014.

72 In this sense: MÜLLER, Friedrich. Working methods in constitutional law. Rio de Janeiro: Renovate, 2005. p. 140.

social contributions, untying the proceeds of their collection, to make up the fiscal budget, the Union aims to eliminate the requirements set out in Article 154, I, CR.

In doing so, the fiscal constitution not only irremediably imbalances in its favor, but, by depriving the other units of the Federation of resources, limits their power of action, which consists in an attack (indirect) to its competence. It is for this reason that the use of residual jurisdiction as provided for in item 1 above (institution of social contributions) for the purposes contained in item 2 (financing of the Union's overheads) is incompatible with the 1988 Constitution, though apparent legitimacy. Again, it is necessary to invoke the teachings of Sacha Calmon who, recalling the adjunct between purpose and competence in the causal and final taxes, states:

> It makes no sense for the Constitution to prohibit the allocation of taxes to a body, fund, programme or expenditure (art. 167, IV) and to subject to severe limitations the exercise of residual competence to create new taxes and contributions, in addition to those listed in the Constitution, thus preserving the system of distribution of tax powers imposed by political persons and, at the same time, doctrine and jurisprudence, admitting, outside the constitutional system, the creation a la diable, of thousands of "intervening contributions" and social in a broad sense (outside the art. 195 of the CF) for the most varied purposes and which are, by the analysis of their generating facts, true taxes instituted by ordinary[73] laws.

In fact, an adequate understanding of the norm in question guides the interpreter in the sense that the choice by the use of one or other residual species is not pure and simple political prerogative of the Union. As we know, it is up to the constitutional text, in the Democratic States of Law, as is still the case in Brazil, to standardize the political[74] process. In the present case, the necessary adequacy of the purpose of the revenues that will be obtained with the taxable species that is intended to be established represents an unavoidable limit to the exercise of residual competence, from the perspective of functional correction. Otherwise, the Union would be allowed to change unilaterally, and by cross-cutting means, the pattern of revenue distribution imposed by the principle of federalism, which would consist of fraud against the Constitution, to the detriment of the federative pact itself.

6 CONCLUSION

As indicated in the literature review carried out in this work, the multiplicity of models of existing federal states recommends that federalism be understood more as a principle of political organization, that is, as a political type, than as a well-established ideal model. In this sense, as we have demonstrated, an adequate theory seems to be that of Daniel Elazar, for whom a federal system is a complex in network format, in which the elements are interconnected by interdependence arrangements.

73 COÊLHO, Sacha Calmon Navarro. Contributions to Brazilian law: its problems and solutions. In: DERZI, Misabel de Abreu Machado (org.). Separation of powers and effectiveness of the tax system. Belo Horizonte: Del Rey, 2010. p. 430.

74 MÜLLER, Friedrich. Métodos de trabalho no direito constitucional. Rio de Janeiro: Renovar, 2005. p. 140.

In the countries that adopt federalism, the question of public finances becomes urgent, because in order to guarantee the political autonomy of the subnational entities it is necessary to safeguard their financial autonomy. For no other reason is that the 1988 Constitution establishes, as a matter of fact, a thorough division of tax competences that is accompanied by a mechanism of vertical redistribution of revenue. In this arrangement, the Union had the possibility of instituting tributes other than those provided for in the original text of the Constitution, a phenomenon called "residual competence". This can be used to raise new taxes or contributions. In the case of residual taxes, the Constitution determines the distribution of the proceeds of their collection with the States (art. 157, II, CR), and there is no similar rule regarding residual social contributions. It is to say that the Constitution did not provide for the sharing of resources with new social contributions possibly created by the Union. The reason for this is in the nature of this tax, whose revenue is tied to certain constitutionally privileged purposes, in this case, the financing of social security. Despite the appearance of legitimacy, recognized even by the Federal Supreme Court on more than one occasion, the implementation of the fiscal constitution requires that an interpretation of residual jurisdiction be adopted according to the functional correction criterion.

As we have demonstrated in this work, in the federal states, the principle of functional correction, also called the command of functional conformity, requires that the result of interpretation be in accordance with the federal structure, that is, with the constitutional division of competences. On the basis of Friedrich Müller, it can be said that this principle transposes federalism to occupy space in the very methodology of constructing constitutional norms. It is to say that by virtue of the criterion of functional correction, federalism becomes relevant to the enforcer of law in relation to the method of approach of the constitutional text itself.

This twofold influence of federalism in the construction of the norm that creates residual competence obliges one to observe its internal limits. Thus, we conclude that the exercise of residual competence cannot offend the fiscal equalization, an unspeakable component of the state Federative form in Brazil. For this reason, it is not enough to check only the formal compliance - whether from the perspective of revenue untying, whether in the creation of new social contributions - both facts should be evaluated in the light of the norm that guides the distribution of competence itself to the entities of the Brazilian Federation.

Dessarte, as demonstrated in this work, can not ignore that, by providing for two different hypotheses of exercise of residual jurisdiction, the Constitution binds the choice of each of the hypotheses to the destination that is intended to give to the resources that will be collected. If the intention is to obtain a new source of revenue for the financing of general expenditure, the Union should use the residual competence provided for in Article 154, I, Cor. In this case, it is necessary to distribute the collected product with the States, in accordance with Art. 157, II, CR. On the other hand, if the intention is to obtain income to finance social security, the Union may use the residual jurisdiction provided for in Article 194§ 4, Cor, when it will be exempted from any obligation relating to the allocation of resources. The conclusion drawn from an interpretation which conforms to the commandment of functional correction is that the option of creating one or other residual species is not at the sole discretion of the Union. The analysis of the functional correction principle in the light of Brazilian fiscal federalism showed that the adequacy of the purpose of the revenues received with the taxable species to be instituted represents an objective limit to the exercise of residual competence.

REFERENCES

ALTHUSIUS, Johannes. Politics as the Art of Associating. *In:* JARMIS, Dimitrios; NORMAN, Wayne (eds.). *Theories of Federalism*: A Reader. New York: Palgrave Macmillan, 2005.

ATALIBA, Geraldo. *Tax incidence hypothesis*. São Paulo: Malheiros, 2013.

ÁVILA, Humberto. *Tax constitutional system*. São Paulo: Saraiva, 2010.

BALEEIRO, Aliomar. *Brazilian tax law*. Updated by Misabel de Abreu Machado Derzi. Rio de Janeiro: Forense, 2013.

WHALER, Aliomar. *An introduction to the science of finance*. Updated by Hugo de Brito Machado Segundo. Rio de Janeiro: Forense, 2015.

BARACHO, José Alfredo de Oliveira. The subsidiarity principle: Concept and Evolution. *Revista da Faculdade de Direito da UFMG*, n. 35, p. 13-52, 1996.

BARACHO, José Alfredo de Oliveira. *General theory of federalism*. Rio de Janeiro: Forense, 1986.

BATISTA JÚNIOR, Onofre Alves; DE OLIVEIRA, Ludmila Mara Monteiro; MAGALHÃES, Tarcísio Diniz. What federative pact? In search of a normative theory adequate to the Brazilian fiscal federalism. *In:* BATISTA JÚNIOR, Onofre Alves; MOREIRA, André Mendes. *Federal state and taxation: from the origins to the current crisis*. Belo Horizonte: Arraes, 2015.

BLÖCHLIGER, Hansjörg; KIM, Junghun. *Fiscal Federalism*: Making Decentralization Work. Paris: OECD Publishing, 2016.

BOADWAY, Robin; SHAH, Anwar. *Fiscal Federalism*: Principles and Practices of Multiorder Governance. Cambridge: Cambridge University Press, 2009.

BRAZIL. *Constitution of the Federative Republic of Brazil 1988*. Available at: http://www.planalto.gov.br/ccivil_03/constitutica/constituticao.htm. Accessed: 12 Aug. 2018.

BRAZIL. *Constitutional Amendment nº 27, from 2000*. Adds the art. 76 to the Act of Transitional Constitutional Provisions, instituting the untying of tax collection and social contributions of the Union. Available at: http://www2.camara.leg.br/legin/fed/emecon/2000/emendaconstitucional-27-21-marco-2000-373981-publicacaooriginal-1-pl.html. Accessed on: 08 aug. 2018.

BRAZIL. C*onstitutional Amendment nº 42, 2003.* Changes the National Tax System and gives other measures. Available at: http://www2.camara.leg.br/legin/fed/emecon/2003/constitutionalamendment-42-19-December2003-497205-norma-pl.html. Accessed: 08 Aug. 2018.

BRAZIL. *Constitutional Amendment nº 56, from 2007*. Extends the deadline provided in the art caput. 76 of the Transitional Constitutional Provisions Act and other provisions. Available at: http://www2.camara.leg.br/legin/fed/emecon/2007/constitutionalamendment-56-20-December2007-567249-norma-pl.html. Accessed on: 08 Aug. 2017.

BRAZIL. *Constitutional Amendment nº 68, de 2011.* Altera o art. 76 do Ato das Disposições Constitucionais Transis. Available at: http://www2.camara.leg.br/legin/fed/emecon/2011/emendaconstitucional-68-21-dezember-2011-612061-publicacaooriginal-134728-pl.html. Accessed on: 08 aug. 2018.

BRAZIL. *Constitutional Amendment 93, from 2016*. Amends the Act of Transitional Constitutional Provisions to extend the untying of Union revenues and establish the untying of revenues of the States, Federal District and Municipalities. Available at: http://www2.camara.leg.br/legin/fed/emecon/2016/emendaconstitucional-93-8-setembro-2016-783591-publicacaooriginal-151044-pl.html. Accessed on: 08 aug. 2018.

BRAZIL. *Extraordinary Resource nº 165.939-RS.* Plenum. Rel. Minister Moreira Alves, D.J. 03.05.1996.

BRAZIL. *Extraordinary Resource nº 177.137-RS.* Plenum. Rel. Minister Moreira Alves, D.J. 03.05.1996.

BRAZIL. *Extraordinary Resource nº 228.321-RS.* Plenum. Rel. Minister Carlos Velloso, D.J. 20.05.2003.

BRAZIL. *Agravo Regimental no Recurso Extraordinário nº 793.564-PE*. Plenário, Rel. Ministro Marco Aurélio, Dje 01.10.2014.

BRENNAN, G.; BUCHANAN, J. *The Power to Tax:* Analytical Foundations of a Fiscal Constitution. Cambridge: Cambridge University Press, 1980.

BRETON, Albert. *Modelling vertical competition*. *In:* AHMAD, Ehtisham; BROSIO, Giorgio. (eds.). *Handbook of Fiscal Federalism*. Cheltenham: Edward Elgar, 2006.

BURGESS, Michael. *Comparative Federalism:* Theory and Practice. London: Routledge, 2006.

CABRAL, Nazaré da Costa. *The theory of financial federalism*. Coimbra: Almedina, 2015.

CARRAZZA, Roque Antonio. *Tax constitutional law course.* São Paulo: Malheiros, 1999.

COÊLHO, Sacha Calmon Navarro. *Brazilian tax law course.* Rio de Janeiro: Forense, 2018.

COÊLHO, Sacha Calmon Navarro. *Contributions to Brazilian law*: its problems and solutions. *In:* DERZI, Misabel de Abreu Machado (org.). Separation of powers and effectiveness of the tax system. Belo Horizonte: Del Rey, 2010.

CORWIN, Edward S. *The Passing of dual federalism*. Virginia Law Review, v. 36, n. 01, p. 01-24, 1950.

COSTA, Alcides Jorge. *History of taxation in Brazil*: from the Republic to the 1988 Constitution. *In:* SANTI, Eurico Marcos Diniz de. Course on tax law and public finance. São Paulo: Saraiva, 2008.

DA SILVA, José Afonso. *Positive constitutional law course*. São Paulo: Malheiros, 2011.

DERZI, Misabel Abreu Machado. The principle of non-allocation of tax revenue and distributive justice. HORVATH, Stephen; CONTI, Joseph Maurice; SCAFF, Fernando Facury (Org.). *Financial, Economic and Tax Law:* studies in honor of Regis Fernandes de Oliveira. São Paulo: Quartier Latin, 2014.

DERZI, Misabel Abreu Machado; DE BUSTAMANTE, Thomas da Rosa. The federative principle and equality: a critical perspective for the Brazilian legal system based on the analysis of the German model. *In:* DERZI, Misabel de Abreu Machado; BATISTA JÚNIOR, Onofre Alves; MOREIRA, André Mendes. *Federal state and tax war in comparative law.* Belo Horizonte: Arraes, 2015.

DERZI, Misabel Abreu Machado. *Tax law, criminal law and type.* São Paulo: Editora Revista dos Tribunais, 2007.

ELAZAR, Daniel J. *Federalism and Political Integration*. Lanham: University Press of America, 1984.

FOLLESDAL, Andreas. *Competing Conceptions of Subsidiarity. In:* FLEMING, James E.; LEVY, Jacob T. Federalism and Subsidiarity. New York: New York University Press, 2014.

FONROUGE, Giuliani. *Derecho Financiero*. Buenos Aires: La Ley, 2004.

GUASTINI, Riccardo. *Interpreting and arguing*. Madrid: Centro de Estudios Políticos y Constitucionales, 2014.

HESSE, Konrad. *Elements of constitutional law of the Federal Republic of Germany*. Porto Alegre: Sergio Antonio Fabris Editor, 1998.

HORTA, Raul Machado. Organização Constitucional do Federalismo. *Revista da Faculdade de Direito da UFMG*, n. 28-29, p. 09-32, 1986.

HUEGLIN, Thomas O. *Early Modern Concepts for a late Modern world:* Althusius on community and federalism. Waterloo: Wilfrid Laurier University Press, 1999.

HUEGLIN, Thomas O. *Federalism, Subsidiarity and the European Tradition*: Some Clarifications. Telos, n. 100, p. 37-55, 1994.

HUEGLIN, Thomas O. ; FENNA, Alan. *Comparative Federalism*: A Systematic Inquiry. Toronto: University of Toronto Press, 2015.

LOBATO, Valter. *The juridical-constitutional system of contributions to the cost of social security:* the fundamental and structuring importance of the purpose and the other limits to the power to tax. 2014. Thesis (Doctorate in Law) - Faculty of Law, Federal University of Minas Gerais, Belo Horizonte.

LOBATO, Valter. The cost of social security and risk benefits: the applicable principles and limits to the power to tax. *In:* DERZI, Misabel de Abreu Machado (org.). *Separation of powers and effectiveness of the tax system*. Belo Horizonte: Del Rey, 2010.

MAJOCCHI, Alberto. Theories of Fiscal Federalism and the European Experience. *In:* WARD, Ann; WARD, Lee. (eds.). *The Ashgate Research Companion to Federalism*. Farnham: Ashgate, 2009.

MOOTS, Glenn A. The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar. *In:* WARD, Ann; WARD, Lee. (eds.). *The Ashgate Research Companion to Federalism*. Farnham: Ashgate, 2009.

MOREIRA, André Mendes; DERZI, Misabel de Abreu Machado; BATISTA JÚNIOR, Onofre Alves. (Orgs.). *Federal state and taxation*: from the origins to the current crisis. Belo Horizonte: Arraes Editores, 2015.

MÜLLER, Friedrich. *Working methods in constitutional law*. Rio de Janeiro: Renovate, 2005.

MÜLLER, Friedrich. *Structuring theory of law*. São Paulo: Revista dos Tribunais, 2008.

OLIVEIRA, Fabrício Augusto. *Theories of federation and fiscal federalism*: the Brazilian case. Discussion text n. 43. Belo Horizonte: João Pinheiro Foundation, 2007.

OLIVEIRA, Fabrício Augusto; CHIEZA, Rosa Angela. Height and decline of the Brazilian Federation: 1988-2017. *In:* ANFIP; FENAFISCO. *The Necessary Tax Reform:* diagnosis and premises. Brasília / São Paulo: Social Policy Platform, 2018.

RILKER, W. Federalism. *In:* GREENSTEIN, F .; POLSBY N. (eds.). *The Handbook of Political Science*: Government Institutions and Processes. Boston: Addison-Wesley Pub. Co., 1975.

SACCHETTO, C. Analysis of Fiscal Federalism from a Comparative Tax Law Perspective. *In:* BIZIOLI, G .; SACCHETTO, C. (eds.). *Tax Aspects of Fiscal Federalism*: A Comparative Analysis. Amsterdam: IBFD, 2011.

SCHOUERI, Luís Eduardo. The complementary law and the distribution of tax powers. *In:* COSTA, Alcides Jorge. *National Tax System and the stability of the Brazilian Federation*. São Paulo: Noeses, 2012.

SCHOUERI, Luís Eduardo. *Tax law.* São Paulo: Saraiva Educação, 2018.

SCHÜTZE, Robert. *From Dual to Cooperative Federalism*: The Changing Structure of European Law. Oxford: Oxford University Press, 2009.

SHAH, Anwar. Introduction: Principles of Fiscal Federalism. *In:* SHAH, Anwar. *The Practice of Fiscal Federalism*: Comparative Perspectives. Montréal: Mcgill-Queen's University Press, 2007.

SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel. *Constitutional law*: theory, history and working methods. Belo Horizonte: Forum, 2012. ed. electr.

SPAGNOL, Werther Botelho. *Social contributions in Brazilian law*. Rio de Janeiro: Forensics, 2002.

VILE, M.J.C. Federal Theory and the "New Federalism". *In:* JAENSCH, D. (ed.) *The Politics of New Federalism.* Adelaide: Australian Political Studies Association, 1977.

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