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Variable commutativity tributes and reservation of legislative competence of the Portuguese constitution: a relationship (yet) to be stabilised

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Secção I

Investigação Científica*

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Tributos de comutatividade variável e reserva de competência legislativa na Constituição Portuguesa: uma relação (ainda) por estabilizar

Variable commutativity tributes and reservation of legislative competence of the Portuguese constitution: a relationship (yet) to be stabilised

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RESUMO: A ordem tributária portuguesa reconheceu, tradicionalmente, duas espécies principais de tributos, a saber: os impostos e as taxas públicas – perfeitamente destrinçáveis pela sua natureza unilateral ou sinalagmática / comutativa. Desde 1997, porém, que esta dicotomia tradicional foi abalada com o surgimento de uma terceira espécie tributária, denominada pela CRP de "demais contribuições financeiras" onde se incluindo um conjunto de realidades tributárias de sinalagmaticidade variável, nem sempre objetiva nem imediata. Neste estudo analisam-se os problemas emergentes da criação desta terceira espécie de tributos face à dogmática mais tradicional da política pública tributária, sobretudo como consequência da falta de uma dogmática estável onde, não raro, se questionam os respetivos limites constitucionais e principiológicos. Propõe-se a adoção de medidas que garantam que esta nova espécie de tributos respeita os ditames constitucionais e os racionais mais estruturantes da política pública tributária, no respeito pelos legítimos interesses dos cidadãos contribuintes, como forma de, pelo menos, mitigar abusos na sua utilização. Concluímos que é necessária uma definição concetual mais apurada da figura das contribuições financeiras, que as diferencie de outros tributos. Recomendamos ainda a criação de uma lei geral eficaz que concetualize aprofundadamente a figura das taxas e das demais contribuições financeiras e o estabelecimkento de medidas de escrutínio mais eficazes para proteger os agentes económicos e evitar abusos na sua instituição.

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PALAVRAS-CHAVE: Impostos; Contribuições financeiras; Taxas públicas; Tributos de comutatividade variável; Reserva de competência legislativa; reserva de lei parlamentar.

ABSTRACT: The Portuguese tax system has traditionally recognised (recognized) two main types of tributes - taxes and public fees – perfectly separable due to their unilateral or synallagmatic/commutative nature. Since 1997, however, this traditional dichotomy has been shaken with the establishment of a third tribute type, called "other financial contributions" by the CRP, which has included a set of tributes of a variable nature, not always objective or immediate. This study analyses (analyzes) the problems arising from the creation of this third type of tribute in the face of the more traditional dogmatics of public tax policy, mainly as a consequence of the lack of stable dogmatics where, not infrequently, the respective constitutional and principled limits are questioned. The proposal is to adopt measures that guarantee that this new type of tribute respects the constitutional dictates and the most structuring rationales of public tax policy, respecting the legitimate interests of taxpayers, as a way of, at least, mitigating abuses in their use. We conclude that a more refined conceptual definition of financial contributions is needed to differentiate them from other tributes. We also recommend the creation of an effective general law that thoroughly conceptualizes the nature of the public fees and other financial contributions and the establishment of more effective oversight measures to protect economic agents and prevent abuses in their imposition.
KEYWORDS: Taxes; Financial contributions; Public fees; variable commutativity on tributes; reserve of legislative competence; reserve of parliamentary law.

1. Introduction

Taxes, public fees, and financial contributions are tributes. They all represent a patrimonial sacrifice owed by citizens to satisfy collective needs. To this extent, all these types should be subject to principles of (prior) consent and legality, albeit differentiated, in order to limit the possibility of their imposition violating the legitimate rights and guarantees of taxpayers[4].

However, that is not the case. The fundamental option taken in this matter in Portugal has been, for many years, to subject only unilateral taxes to the regime of this prior direct and express consent through a principle of absolute reservation of formal law and of mere indirect reserve of law for fees and, more recently, for other financial contributions.

Constitutional law is content today with the existence of a general regime that delimits the creation of public taxes (clearly bilateral taxes) and other financial contributions (tributes with variable / difuse commutativity or para-commutative, according to Sérgio Vasques and Costa[5]). This general regime of public fees and

[4] CATARINO, João Ricardo; GUIMARÃES, Vasco Branco. *Lições de fiscalidade: Princípios gerais e fiscalidade interna*. 7ª ed. Coimbra: Almedina, 2022. ISBN: 9789724089829.

[5] VASQUES, Sérgio in Sérgio Vasques (Coord.), As Taxas de Regulação Económica em Portugal, Coimbra, Almedina, 2008, p. 38; VASQUES, Sérgio, Manual de Direito Fiscal, Almedina, Coimbra, 2018, pp. 257 e 274; COSTA, Cardoso da. Sobre o princípio da legalidade das «taxas» (e das «demais contribuições financeiras»). In MIRANDA, Jorge. Estudos em homenagem ao Professor Doutor Marcello Caetano no centenário do seu nascimento. Lisboa: Faculdade de Direito da Universidade de Lisboa, 2006, vol. I, págs. 806-807, 2006, Coimbra Editora. See Constitutional Court Ruling Nº 316/2014: "Uma das consequências metódicas e práticas da aludida tripartição dos tributos respeita ao teste da «bilateralidade». Continuando esta a ser uma característica essencial das taxas, não pode hoje todavia ignorar-se a existência das «contribuições», entendidas como "figuras de contornos paracomutativos que dão corpo a uma relação de troca entre a administração e grupos determinados de indivíduos" e em que tal

other financial contributions, based on a type of indirect security thus conferred on the acts creating and applying these tributes in particular, ends up, in practice, "dispatching" them to the mere domain of an intra-subjective relationship consummated in the context of relations between public authorities and citizens, without a regulatory Framework.

This question that is pertinent, as the phenomenon of the creation of public fees and other public financial contributions is, from a quantitative and qualitative point of view, marginal until the middle of the 20th century. It gradually assumed greater relevance due to the increased importance of public fees and other financial contributions in financing the State and other smaller public entities.

In view of this substantial change, it is important to consider whether such a mere indirect reservation of law established in the Portuguese constitution and the indirect legality control have proven adequate to guarantee that the imposition of public fees and other financial contributions today respects the dogmatic limits of these figures, to avoid abuses in its imposition. That is, it is important to consider whether or not the modification of the essential paradigms underlying the creation of public taxes and other financial contributions justifies a reinforcement of taxpayer guarantees[6,7,8,9,10,11].

The foundational balance of the tax system may be at stake to a great extent. On the one hand, neither the general regime of fees nor the general regime of other financial contributions referred to in article 165 al. i) of the CRP were ever created, and there is no news regarding their creation.

On the other hand, in a more general theory, the political regime is based on the protection of private property, which makes acts that affect this institutional value illegal, according to which everyone has the right to what is theirs and nothing and no one, can affect this right, except in the manner provided for by law. The law stipulates how obligations can be created over the personal property of individuals, within the framework of broad autonomy of will, but normally requires the express consent of the holder and the form of the law.

Finally, this balance is based on the idea of representative consent, prior, free, informed, determined, and expressed in the law, granted through an assembly of representatives objectively elected by direct and universal suffrage.

«relação comutativa» se pode mostrar mais ou menos difusa (cfr. Sérgio Vasques, ob. cit., p. 33)." e Ruling Nº 24/2009.

[6] VASQUES, Sérgio. Remédios secretos e especialidades farmacêuticas: A legitimação material dos tributos parafiscais. *Ciência e Técnica Fiscal*, 2004, 413 (janeiro/junho), pp. 135-219.

[7] VASQUES, Sérgio. *As taxas de regulação económica em Portugal.* Coimbra: Almedina, 2008a. ISBN: 9789724034577.

[8] VASQUES, Sérgio. *O Princípio da equivalência como critério de igualdade tributária*. Tese de Doutoramento em Ciências Jurídico-Económicas, Faculdade de Direito da Universidade de Lisboa, Lisboa, 2008b.

[9] VASQUES, Sérgio. *Taxas e contribuições sectoriais.* Coimbra: Almedina, 2013. ISBN: 9789724086361.

[10] VASQUES, Sérgio. A taxa de segurança alimentar. *Cadernos de Justiça Tributária*, 2014, Braga, (julho/setembro), 2014, pp. 3-18.

[11] ALMEIDA, Aníbal de. Sobre a natureza das taxas pela realização de infraestruturas urbanísticas. In ALMEIDA, Aníbal. *Estudos de direito tributário*. Coimbra: Coimbra Editora, 1999, pp.35-82. ISBN: 9789724011035.

This idea has reached our days through liberal dogmatics, which materialized such values into structuring principles and norms[12,13].

However, the reality has changed substantially: both public fees and other financial contributions have ceased to be a marginal source of public revenue in the lives of citizens and have become frequent and far from insignificant tax revenues. This is due to several reasons: (1) today there are many more public entities (institutes and regulatory entities) with administrative and financial autonomy with the power to charge fees, normally created by a mere Regulatory act (e.g. Ministerial Ordinance, Administrative Regulation); (2) the regulatory State has grown significantly and, with it, the facts that require its individualised (individualized) intervention, raised by the citizens and agents themselves, in the form of authorisations, licensing, certifications, etc. are much greater numbers.

On the other hand, financial contributions have undergone meaningful changes, so much so that a large part of the doctrine understands that it is reasonable to make a distinction between ancient and "modern" financial contributions, a wide and variable spectrum of para-commutative tributes, of variable bilaterality, ordered based on two general regimes that were never created.[14] The Portuguese Constitutional Court considers that financial contributions are generally understood as coercive monetary payments, bilateral in nature, required by a public entity in exchange for an administrative service directed at a group, and only presumably caused or benefited from by the individual taxpayer. This is a category with very heterogeneous contours, especially in the absence of approval by the Assembly of the Republic of the general regime for other financial contributions in favor of public entities, as provided in Article 165, paragraph 1, clause i) of the Constitution.

This category includes a broad and varied set of parafiscal charges, with characteristics that are not always entirely consistent, highlighting the special difficulties experienced by scholars in precisely delineating it (Ruling No. 638/2022).The Court admits the financial contributions are not aimed at compensating for services actually caused or benefited from by the taxpayer, but rather at compensating for services that are only presumably caused or benefited from by the taxpayer, corresponding to a relationship of generic bilaterality (Constitutional Court ruling Nº 136/18).

2. Tributes in the Portuguese constitutional and legal order

Since the figure of tax is the financial support of the State, it is well understood that two realities arise from this, namely: on the one hand, the idea of a fiscal state is, and must be, viewed from the perspective of citizens, materializing in the principle of freedom. On the other, tributes are a price that we

[12] CATARINO, João Ricardo. *Finanças públicas e direito financeiro*. 8.ª ed. Coimbra: Almedina, 2023. ISBN: 9789894016052.
[13] CATARINO, João Ricardo; FERRAZ, Diogo. Impostos extrafiscais ainda são imposto? Um excurso sobre a admissibilidade teórica da figura e seus limites. *Revista Jurídica Portucalense*, n.º especial, 2022.
[14] FERNANDES, Filipe Vasconcelos, As contribuições financeiras no sistema fiscal português – uma introdução. Gestlegal, 2020, p. 43 e 52.º e segs.

necessarily pay for a globally organized society, rooted in prior knowledge of the rights, freedom, and fundamental guarantees of all agents[15,16].

Seen from the position of the subjects and the collective wealth-generating structures that support them, the fiscal state is characterized by the free economic availability it provides, giving room, in a market economy, for all agents to seek the satisfaction of their personal interests. It follows that the State's financial support results directly from the ability of such agents to pay, that is, from their ability to contribute to common expenses.

Taxes are based on the concretely revealed contributive capacity, in adherence to the ability to pay principle. They are levied on expressions of contributive capacity, which generally are no more than qualified manifestations of broader economic capacity.This means that they require a prior and complex operation to determine this individual capacity, aiming to ascertain the taxable income. Conversely, the amount of public fees due is generally determined, taking into account the the benefit (principle) received and the cost involved in providing the individually supplied public good. Bilateral tributes are effectively supported by a specific cause, constituted by the public service for which the fee or contribution serves as compensation[17].

Taxes are, therefore, the price due for the (previous) existence and primacy of freedoms and fundamental rights, which the resources leveraged through the tax system are intended to protect and deepen. Meanwhile, the fundamental tasks of the State grow, and public action extends to new realities of collective life.

Public fees are tributes bitalterais devidos pela prestação concreta de um serviço público, na utilização de um bem do domínio público ou na remoção de um obstáculo jurídico ao comportamento dos particulares (General Tax Law, article 4 n.º 2).

From a structural point of view, we have a primary distinction of tributes, according to which taxes are differentiated from fees and other financial contributions in favor of public entities by the fact that taxes involve unilateral monetary payments, while the public fees and financial contributions involve bilateral monetary payments.[18] The latter are fundamentally based on an economic or market legitimacy related to an individual or group exchange of

[15] BUCHANAN, James. *Public finance in democratic process: Fiscal institutions and the individual choice*. Carolina do Norte: Chapel Hill University of North Carolina Press, 1967. ISBN:978-0865972209.

[16] HOLMES, Stephen; SUNSTEIN, Cass. *The cost of rights, why liberty depends on taxes*. New York: Norton, 2000. ISBN: 9780393320336.

[17] Among many other authors see NABAIS, Casalta; SANTOS, Marta Costa. Contribuição Extraordinária sobre o Sector Energético: Um Imposto sob Outro Nome. Revista portuguesa de direito constitucional, RPDC N.º 2 2022, separata, pp. 41-80; The Constitutional Court Ruling Nº 194/2024 where the Additional Solidarity Levy on the Banking Sector (ASSB) is characterized as a tax and not a financial contribution, given the fact that it does not have any commutative nature.

[18] Financial contributions are distinguished from special contributions because the former are bilateral taxes, whereas the latter are taxes, as mentioned in paragraph 3 of Article 4 of the Portuguese General Tax Law.

utilities.[19] Bilateral tributes are based on the idea of commutative justice.[20] They have an effective basis in a specific cause, constituted by the public service for which the fee or contribution serves as compensation, corresponding to a taxing power that, within the framework of a true exchange of utilities in which it operates, is inherent to the public service itself to which the bilateral tax corresponds as compensation.

The fiscal State is today, however, a "post-fiscal" or "post-tax" State in the sense that the tax - a central figure of demoliberal dogmatic thought - came to be associated with the figure of public fee and, more recently, that of para-commutative tributes with variable commutativity. The idea of a bilateral public fee was not unknown to liberal ideas, but it was also not its "figurehead", not only because it did not materialize its ideals of justice but also because it did not provide generous volumes of tax revenue[21].

It was previously referred to as bilateral relations between subjects and the State insofar as the latter required some service or access to a specific good.

On the contrary, both the public fees and the "financial contributions" today constitute a direct result of the expansion of the State's functions - and its financing needs - thanks to a varied set of factors that determined, especially throughout the entire 20th century, a very marked expansion of public action, as this constituted a need for social models. This was what happened especially in times of deep crisis and, later, through the evolution of thought of the ideas that advocated it, as was the case with Keynes' theories regarding full employment, the financial question, and currency, now expanded in the phenomenon of globalization and digitalization[22,23,24].

For this purpose, the tax instrument was insufficient in this specific case since this activity results in public policies and services and private benefits divisible or susceptible to individual use. The public fees initially, and the financial contributions soon after, rose in importance (in addition to other paratributes, such as the public tariff or public price), both in terms of the increasing frequency with which they have been instituted, and because they provide additional revenue, often to cover current expenses and, or, to finance smaller public entities, in a practice that is often repugnant and of earmarking public revenues.

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[19] NABAIS, Casalta; SANTOS, Marta Costa. Contribuição Extraordinária sobre o Sector Energético: Um Imposto sob Outro Nome. Revista portuguesa de direito constitucional, RPDC N.º 2 2022, separata, pp. 41-80

[20] CATARINO, João Ricardo, Teoria Fiscal, in Catarino, J. R. e Guimarães. V. B. VOL. I, Lições de Fiscalidade – Princípios Gerais e Fiscalidade Interna, Almedina, 7.º ed. 2023, pp. 44.51.

[21] CATARINO, João Ricardo; VALDEZ, Vasco. Ainda a propósito das taxas municipais de infraestruturas urbanísticas (TRIU) e de compensação. *Revista de Finanças Públicas e Direito Fiscal*, vol.1 (Ano II), Coimbra: Almedina, 2009, pp.207-231. ISBN: 9789724038254.

[22] NABAIS, José Casalta. Tributos com fins ambientais. *Revista de Finanças Públicas e Direito Fiscal*, vol.4 (Ano I). Coimbra: Almedina, 2009, pp. 37-58. ISBN: 789724037851.

[23] SILVA, Susana Tavares. *As taxas e a coerência do sistema tributário*. 2ª Ed. Coimbra: Coimbra editora, 2013. ISBN: 9789899667235.

[24] SILVA, Susana Tavares. *Ainda a distinção entre taxas e preços. A propósito da internalização dos serviços públicos locais* [online]. Coimbra: CEDRIPE- Centro de Estudos de Direito Público e Regulação - Faculdade de Direito da Universidade de Coimbra, 2019 [viewed 20 january 2024]. Available from: https://www.cedipre.fd.uc.pt/wp-content/uploads/2021/05/eb_2.pdf.

The same can be said of other types of tributes, widely and improperly called "public fees", but which, strictly speaking, do not refer to this type of tributes. The growth of public fees and other financial contributions has leveraged the phenomenon of para-fiscality, immediately associated with the regulation of economic activity outside of the systematized control and most often launched for corporate reasons, separate and without general systematicity when looking at the economy in its entirety. This phenomenon was widespread in the dictatorship period - Estado Novo, without any particular importance being given to it, primarily because they were located in a more neglected area of the tax system as a whole. The phenomenon continues to increase, with a revival of para-fiscality, whether due to the State's confessed intention to regulate increasing portions of collective life, as a result of the dispersion of regulatory entities lacking their own revenue, or due to the general need to increase tax revenue, among other aspects[25].

3. Constitutional differentiation of fundamental schemes of taxes, public fees, and other financial contributions

3.1 – Taxes, public fees, and financial contributions – the constitutional issue of reservation of law

Portuguese constitutional law establishes a distinct fundamental framework for different tribute types based on a logical paradigm that should be made clear. Nationally speaking, this concrete dichotomy of solutions results from the prior establishment of an eschatology of tributes divided between tax, (public) fees, and financial contributions[26,27,28].

There is no concept of tax in Portuguese law[29], although the Portuguese General Tax Law (LGT) indicates in Article 3, paragraph 2, that tributes comprise taxes, including customs and special taxes, and other types of tributes established by law, namely fees and other financial contributions in favor of public entities.

While it establishes these assumptions, the Law does not mention the terms and methods of their approval by public bodies. We know, however, that the

[25] SANCHES, José Luís; GAMA, João Taborda. Taxas Municipais pela Ocupação do Subsolo [online] [viewed 20 january 2024]. Available from: https://www.isg.pt/wp-content/uploads/2021/02/19_20_1_taxas_subsolo_fiscalidade_jlss_jtg.pd

[26] FERNANDES, Filipe de Vasconcelos. *As contribuições financeiras no sistema fiscal português: Uma introdução*. 1ª Ed. Coimbra: GESTLEGAL, 2020. ISBN: 9789898951335.

[27] FERNANDES, Filipe de Vasconcelos. As demais contribuições financeiras a favor das entidades públicas no sistema fiscal português – conceito, pressupostos e regime jurídico-constitucional (incluindo a analogia com as Sonderabgaben alemãs). *Revista de Finanças Públicas e Direito Fiscal*, 1-4 (ano XII). Coimbra: Almedina, 2021, pp.65-127. ISBN: 9780120191277.

[28] RIBEIRO, Diamantino; COSTA, Eva Dias. Taxas turísticas no Porto. In DOMINGOS, Francisco N; PISCITELLI, Tathiane. *Direito tributário do turismo: Um desafio do século XXI*. Lisboa: Rei dos Livros, 2021, pp. 37-48. ISBN: 9789895650361.

[29] NABAIS, José Casalta; SANTOS, Marta Costa. Contribuição Extraordinária sobre o Sector Energético: Um Imposto sob Outro Nome. Revista portuguesa de direito constitucional, RPDC N.º 2 2022, separata, pp. 56-57. Em Espanha como no Brasil encontramos uma definição de tributo – veja-se o art. 2.º n.º 1, da Ley General Tributária espanhola e o art. 3.º do Código Tributário Nacional brasileiro.

different types of tributes are not subject to the same legal formalities in their creation. In the Portuguese case the different tributes are not subject to the same principles and structuring rules. Indeed, while the creation of taxes obeys the demanding principle of general and fiscal legality and their measure is based on the no less structuring principle of the ability to pay, the public fees and "other financial contributions" are only subject to a much less demanding principle of reserve of parliamentary law, valid only for its general regime.

This is how, under the provisions of article 103, paragraphs 2 and 3 of the Constitution, the principle of legality arises from the expression contained therein that "taxes are created by law" and that "no one may be obliged to pay taxes that have not been created under the terms of the constitution". This principle only covers the figure of tax *stricto sensu*, which is just one type of tribute. Only taxes are subject to matters of material and subjective incidence, exemptions, tax benefits, and guarantees for taxpayers, and the others provided for in article 8 of the Portuguese General Tax Law (LGT), to a strict reserve of law which is, according to peaceful legal dogmatics, absolute and formal[30,31].

The principle of reserve or prominence of law prevents taxes from being demanded based on a mere normative act, much less administrative, that has not been established in their essential characteristics by previous formal law.

The dichotomy of tax regimes, on the one hand, and fees and other financial contributions, on the other, is expressly enshrined in article 112.º no. 1 of the fundamental law, which assigns the category of legislative acts only and only to the laws of the Parliament, the Government Decree-Laws and the Regional Legislative Decrees. This excludes any other normative acts that, despite creating general and abstract norms, do not come from the legislative source par excellence, the Assembly of the Republic, which is the collegial body representing all citizens.

It is, therefore, as can be seen, an absolute and formal reservation of law, not merely relative and material concerning taxes.[32] The formal nature of such a reserve requires that the tax be created by a legislative act of the representative Assembly of citizens or, at the limit, by a previously authorised government decree (See articles 165.º no. 1 al. i) and 198.º no. 1 al. b) the Portuguese constitution. A reservation of law should not be confused with a reservation of legislative competence. This constitutes a reservation of competence for the legislative body par excellence, the representative assembly of citizens, in our case, the Assembly of the Republic. This reservation is, in the Portuguese case, a relative reservation of legislative competence, a fact that allows the government

[30] GARCIA, Nuno. A Caixa de Pandora na criação de contribuições. Comentário ao Acórdão do Tribunal Constitucional, de 20 de outubro de 2015 (Processo nº 539/15), Plenário (Relator Conselheiro João Cura Mariano). *Revista de Finanças Públicas e Direito Fiscal*, vol. 3 (Ano VIII). Coimbra: Almedina, 2016, pp. pp. 175-178. ISBN: 9780080391274.

[31] LEITÃO, Sara. Taxa de recursos hídricos. *Revista de Finanças Públicas e Direito Fiscal*, vol. 4 (Ano VIII). Coimbra: Almedina, 2016, pp. 99-130. ISBN: 9780080491271.

[32] DOURADO, Ana Paula, O Princípio da legalidade fiscal na Constitutição Portuguesa, in Perspetivas Constitucionais - Nos vinte anos da Constituição de 1976, Vol. II, 1997, pp. 429 e segs.

to be authorised to legislate on taxes and the fiscal system and therefore has a guarantee function.[33]

On the other hand, having an absolute nature represents the requirement that the tax law creating the tax must contain the criteria for deciding specific cases, in the sense that the respective decision is obtained by deduction from the law itself, a reality that the doctrine designates as the principles of typicality and exclusivity.

The express meaning of article 103.2 of the fundamental text is also that such a reservation does not apply to fees and other financial contributions to the same extent.[34] Firstly, because fees and other financial contributions, being tributes, are not, however, taxes. This idea is largely corroborated by what is added in article 165.º no. 1 al. i) of the Portuguese constitution, where a (relative) reserve of legislative competence in favour of the Assembly of the Republic of varying density is added to the reserve of law for:

- the creation of taxes (not tributes) and the fiscal system;
- the general (public) fee regime and
- the general regime for other financial contributions - Until the 1977 Constitutional revision of the CRP, the subject of public fees was completely silent in the fundamental law. From this amendment to the fundamental law, article 165 began to integrate into the reserve of parliamentary law (reserve of legislative competence) the general regime of fees and other financial contributions in favour of public entities, and to date, these regimes have never been created (see Constitutional Court Rulings N.º n.º 365/2008, of 02.07.2008; N.º 539/2015, of 21.10.2015, N.º 27/2015).

The creation and modification of the tax requires the parliament's intervention. In contrast, the creation of a fee or a financial contribution does not require it and can be materialised by unauthorised decree-law or, more frequently, simple administrative regulation. (cf. articles 103, 165, 198, no. 1 al. a) and 199 al. c) of the Portuguese constitution). In the sense that the constitutional review made the full characterization of a certain tax figure as a tax or public fee more important, being crucial to implementing the extension of the

[33] MIRANDA, Jorge, A competência legislativa no domínio dos impostos e as chamadas receitas parafiscais, in Revista da Faculdade de Direito da Universidade de Lisboa, vol. 29 (1988), 0870-3116. - p. 9-24, Coimbra: Coimbra Editora. NABAIS, José Casalta, Jurisprudência do Tribunal Constitucional em matéria fiscal, in Boletim da Faculdade de Direito da Universidade de Coimbra, vol. LXIX, 1993, pp. 247 e segs.

[34] DOURADO, Ana Paula, O Princípio da legalidade fiscal na Constitutição Portuguesa, in Perspetivas Constitucionais - Nos vinte anos da Constituição de 1976, Vol. II, 1997, pp. 429 e segs.

reserve of law, we can see Costa[35], and Faveiro[36]. The different position that taxes, on the one hand, and other financial contributions, on the other, have concerning the reserve of parliamentary law gives the issue greater relevance.

But why are public fees and other financial contributions, being tributes, not subject to the same structuring principles as taxes? There are several reasons for this:

- It could be argued, firstly, that this is due to the fact that fees and other financial contributions are subject to different principles than tax in terms of the nature of the responsibility to contribute. Which is the truth. Tax liability depends on the verification of tax facts, which also applies to fees and other financial contributions. But, unlike the latter, subjection to the former requires that the tax event results in a given manifestation of the ability to pay, which the latter do without, as their measure is based on the idea of an individualizable advantage and some measure of commutativity (or just para-commutativity);
- On the other hand, it can be argued that the other financial contributions, whether due to their relevance or their inferior financial expression, do not justify such strict adherence to parliamentary/popular control or such strict principles, a general framework of constitutionality control / indirect legality;
- It should be added, without exhausting the matter, that the financial measure of the tax has tended, historically, to be much more expressive than the amount of fees and other financial contributions. Thus, the need (historically) to limit abuses by public entities was, above all, felt at the level of taxes, not other tributes. These were not only levied in very specific and well-known cases but also proved to be a less frequent and low-amount patrimonial sacrifice, unlike the tax which, especially in liberalism, became universal;
- Furthermore, citizens tend to ignore small tributes, which are infrequent, in nature, affecting well-defined groups and/or charged in conjunction with other

[35] COSTA, José Manuel Cardoso da. Sobre o princípio da legalidade das «taxas» (e das «demais contribuições financeiras»). In MIRANDA, Jorge. *Estudos em homenagem ao Professor Doutor Marcello Caetano no centenário do seu nascimento*. Lisboa: Faculdade de Direito da Universidade de Lisboa, 2006, pp. 789-807.

[36] FAVEIRO, Vítor. *O estatuto do contribuinte – A pessoa do contribuinte no estado social de direito*. Coimbra: Coimbra editora, 2002. ISBN: 9789723210781.

debts. This anaesthetic effect or fiscal illusion was widely studied by Amilcare Puviani[37], Buchanan[38], Wagner[39], Mourão[40,41].

- Moreover, it has always been believed, based on the idea of a rational State, that public fees as well as other financial contributions should necessarily be moderated in their amount and frequency, respecting the principles of equivalence of cost and benefit;
- Finally, it can be argued that fees and other financial contributions began to be, above all, due to the provision of an individualised, concrete public service, raised by the citizen himself, being the result of a voluntary, bilateral relationship, in which the State was still moderately regulatory. In the second case, due to minor facts or realities, based on the provision of a relatively diffuse public service, guidance, regulation, or standardization, without losing sight of the financing of smaller public entities that have these regulatory or disciplinary functions.

Today, however, this is not the case. These tributes are also required as a way of circumventing the State's fiscal saturation, be it as an alternative source of financing the transfers from the State Budget, or even to finance the activities of smaller public entities on a consigned basis[42].

Since the government (in principle) and public administration are prohibited from creating taxes, the political option has been to raise these public fees to the status of an increasingly essential additional source to satisfy growing financing needs and logical support of public entities through consigned revenues. In such a way that not only can we witness its profuse institution and demand by the most disparate bodies and services and entities endowed with some measure of public powers in all sectors of public administrations, but also observe a conceptual indiscipline with which the doctrine and the courts have been debating. Both represent a legal certainty and security and the citizen's place in the political system.

[37] PUVIANI, Amilcare. *Teoria dell'illusione finanziaria.* Milão: ISEDI, 1973.
[38] BUCHANAN, James. *Public finance in democratic process: Fiscal institutions and the individual choice*. Carolina do Norte: Chapel Hill University of North Carolina Press, 1967. ISBN:978-0865972209.
[39] WAGNER, Richard. Revenue stucture, fiscal illusion, and budgetary choice. *Public Choice,* 1976, vol. 25, pp. 45-61. https://doi.org/10.1007/BF01726330
[40] MOURÃO, Paulo. Towards a Puviani's fiscal illusion index. *Hacienda pública española,* 2008, vol. 187, n.º 4, pp. 49-86. https://core.ac.uk/download/pdf/6836108.pdf
[41] MOURÃO, Paulo. *Quatro ensaios sobre a ilusão fiscal.* Tese de Doutoramento em Ciências Económicas, Universidade do Minho. Braga, 2009.
[42] TARSCHYS, Daniel. Tributes, tariffs, taxes and trade: the changing sources of government revenue. Published online. *British Journal of Political Science,* 1988, vol. 18, n.º 1, pp. 1-20. https://doi.org/10.1017/S0007123400004932.

3.2 - Equivalence, benefit, and the necessary objective commutativity in the imposition of fees and, desirably, also other financial contributions

The principle of tax equality, applied to public fees, assumes the contours of equivalence due to its commutative, bilateral, or syntagmatic nature. This nature removes the principle of ability to pay that assists the tax, which is a direct legacy of the demoliberal thinking embedded in our political constitutions (see Constitutional Court Rulings no. 20/2003, of 15.01.2003, proc. 327/02; no. 461/87, of 16.12.1987, proc. 176/87; no. 76/88, of 04/07/1988, proc. 2/87; no. 67/90, of 03/14/1990, proc. 89/89; 297/2018, of 06/07/2018, proc. 1330/17; no. 301/2021, of 13.05.2021, proc. 181/20,among many others). At the same time, it chooses as a distribution criterion the principle of equivalence, whether in terms of cost or benefit, as currently enshrined in article 4 of the General Regime of Municipal Fees (RGTM), approved by Law no. 53-A/2006, of December 29th.

If, as is easily understood, fees generally aim to compensate specific and concrete public services, the only fair way to distribute them is to take into account the cost or value of these services. Hence, to us, equivalence naturally appears to be evident as the appropriate criterion for a fair distribution and fixation of rates. So much so, that its explicit constitutional consecration was not even necessary for it to impose itself on the legislator and public administrations in the exercise of their regulatory power as a simple logical consequence of the provisions of article 13 of the CRP.

The principle of equivalence, similar to the principle of general equality, therefore constitutes more than a simple general ordering idea. Indeed, equivalence cannot fail to be seen as a structuring reality on which the legality (and justice) of charging the fee depends. In other words, either the public fee is established in terms such that equivalence clearly results from the manner, terms, and grounds in which it is required, or it violates the order of values and structuring legal principles[43,44,45].

Taxes as a patrimonial and definitive provision established by law in favour of public entities that pursue public purposes to satisfy collective needs have an eminently unilateral nature, that is, their payment does not confer the taxpayer the right to any concrete, individualised public provision. The tax return, so to speak, in terms of benefit or consideration is diffuse, not direct and immediate, and appears in the form of public services and goods produced with tax revenue, such as security, health, or education (see Portuguese Constitutional Court Rulings Nº 539/2015, of 21.10.2015, process 27/15; Nº 437/2021, of 06/22/2021, process 82/21; No. 582/94, of 26.10.1994, proc. 596/93; No. 583/94, of 26.10.1994, proc. 536/93; No 584/94, of 26.10.1994, proc. 540/93; Nº 1140/96,

[43] FERREIRA, Eduardo Paz. Ainda a Propósito da Distinção entre Impostos e Taxas: o Caso da Taxa Municipal Devida pela Realização de Infra-Estruturas Urbanísticas. *Ciência e Técnica Fiscal,* 1995, 380, pp. 63-81.

[44] LOBO, Carlos Baptista. Reflexões sobre a Necessária Equivalência Económica das Taxas. In PITTA E CUNHA, Paulo de. *Estudos Jurídicos e Económicos em Homenagem ao Prof. Doutor António de Sousa Franco - Volume I*. Coimbra: Coimbra Editora, 2006, pp.409-451. ISBN: 9780000056696.

[45] VASQUES, Sérgio. *Os impostos especiais de consumo*. Coimbra: Coimbra editora, 2001. ISBN: 9789724015118.

of 11/06/1996, proc. 569/96; Nº 274/2004, of 20.04.2004, proc. 295/03, among others).

Public fees must express a necessary and objective commutativity as they result from the interaction of activities and concrete requests from individuals to public bodies and can be demanded as a result of a triple reality: for the provision of public services, such as registration and notary services and school fees, the use of public property, such as tolls, and the removal of legal limits on private activity, examples of which are municipal licenses or hunting and fishing licenses[46,47].

Article 3 of the General Regime of Public Fees states that "fees are tributes based on the concrete provision of a local public service, on the private use of assets in the public and private domain of local authorities or on the removal of a legal limit on the behaviour of individuals". The precept emphasizes the bilateral or commutative nature of the public fees, requiring that they always be a consideration for benefits actually caused or taken advantage of by the respective taxable person. In other words, effective benefits can be attributed to them concretely and individually, and not abstract benefits in which the consideration obtained is diffuse or non-individualizable.

However, it is not enough for the public fees to successfully pass the bilaterality test. It is equally important, in the words of Casalta Nabais, to test the criteria and the concrete basis on which the public tax requirement is grounded.[48] Either this criterion is based on the idea of proportionality between the benefit and the public fee, or it escapes it. In the latter case, the due fee charge loses its characteristics as a public fee and must be regulated by the tax regime itself. There are, therefore, from the outset, two problems in addition to the prior question of the admissibility of charging public fees without consent in a law of the parliament: (1) the invoked basis or the concrete public provision from which the duty to support derives and (2) the reasonableness of its amount. These are very relevant today for the reasons mentioned.

In effect, respect for the principles of equivalence or benefit has been placed concerning public fees on indivisible public services or utilities, that is, on activities whose use is not susceptible to individualisation. This possibility has been censored from the point of view of legal conformity with the principle of (legal) equivalence. The Portuguese Constitutional Court (TC) concluded that when public fees refer without distinction to general and diffuse benefits, as was the case with the municipal civil protection fee (TMPC) when levied on urban properties, such fees cannot be legally differentiated from a tax (see Rulings nº

[46] ANASTÁCIO, Gonçalo; PACHECO, Joana. A taxa de regulação e supervisão da entidade reguladora para a comunicação social: Anotação ao Acórdão do Tribunal Constitucional n.º 365/2008. *Revista de Finanças Públicas e Direito Fiscal,1(3),* Coimbra: Almedina, 2008, pp. 213-229. ISBN: 9789724036847.

[47] BORGES, Sofia. A taxa de segurança alimentar mais – enquadramento – análise de jurisprudência. *Revista de Finanças Públicas e Direito Fiscal*, 4 (3), Almedina, 2017, pp.173-222. ISBN: 9780100191273.

[48] NABAIS, Casalta. Direito Fiscal, Almedina, 5.ª edição pp. 20-26, citando abundante jurisprudência do Tribunal Constitucional português; NABAIS, Casalta. Contribuição Extraordinária sobre o Sector Energético: Um Imposto sob Outro Nome. Revista Portuguesa de Direito Constitucional (Portuguese review of constitutional law) (RPDC) N.º 2 (2022), pp. 48-51.

232/2022, of 31.03.2022, proc. 105/22, process rapporteur Figueiredo Dias; no. 301/2021, of 13.05.2021, proc. 181/20). In the specific case, this fee was, therefore, declared unconstitutional by him with general mandatory force through Ruling 218/2017, on the express basis of the lack of a concrete consideration due to violation of the relative reserve of legislative competence of the Assembly of the Republic enshrined in paragraph i) of number 1 of article 165 of the Constitution and the principle of legality enshrined in number 2 of article 103 of the Portuguese Constitution[49].

The same happened with the so-called due fee for the creation of urban infrastructures (TRIU), which was harshly criticized by the doctrine and judged to be unconstitutional. The problem of diffuse, indirect, or mediate public services subject to public fees has been raised concerning other public fees, raising the same intensity as a violation of the principles of reserve of legislative competence and fiscal legality[50,51,52] (see also Ruling no. 7/2019, of 13.05.2021, Ruling 301/21, rapporteur Almeida Ribeiro, of the Constitutional Court).

The problems reported take on increasing importance in the fair measure that today public fees are not insignificant, they are very frequent, and it is often difficult to establish a reasonable correlation between their amount and the public charges caused by the public provision or the benefit obtained by the passive subject.

3.3 - Conceptual problems, para-commutativity, and respect for the constitutional indirect law reservation regime regarding other financial contributions

When establishing the reserve of parliamentary law on tax matters, the Portuguese constitution prior to the 1997 revision enshrined only in its article 168 (current article 165) a dichotomous representation of taxes, distinguishing them between taxes and other tributes.

For the purposes of the Parlament's reservation of law, doctrine and jurisprudence distinguished only between taxes (covered by this reservation of parliamentary law) and fees (not subject to this reservation). Consequently, the so-called parafiscal tributes were classified in the category of taxes or fees,

[49] In the same vein, the Constitutional Court expressed its opinion in its Ruling Nº 149/2024, delivered in case no. 638/2022 about the Adicional de Solidariedade sobre o Setor Bancário (ASSB).

[50] CATARINO, João Ricardo; VALDEZ, Vasco. Ainda a propósito das taxas municipais de infraestruturas urbanísticas (TRIU) e de compensação. *Revista de Finanças Públicas e Direito Fiscal*, 1 (Ano II), Coimbra: Almedina, 2009, 2009, pp. 207-231. ISBN: 9789724038254.

[51] RODRIGUES, Pedro Neto. Anotação ao Acórdão nº 410/00 do Tribunal Constitucional – Taxas de Urbanização, relator Tavares da Costa. *Ciência e Técnica Fiscal*, 2003, nº 409-410 (janeiro/junho), pp. 371 a 403.

[52] ALMEIDA, Aníbal de. Sobre a natureza jurídica das taxas pela realização de infraestruturas urbanísticas. In ALMEIDA, Aníbal. *Estudos de direito tributário*. Coimbra: Coimbra Editora, 1999, pp.35-82. ISBN: 9789724011035.

depending on the case, to determine whether their creation should have been (or not) subject to the principle of formal reserve of law[53,54].

Going beyond a more classic, dichotomous division of tributes, the existence of other figures, generically known as parafiscal tributes (article 3, no. 1, a), of the Portuguese General Tax Law, has been highlighted. This includes, with special visibility, financial contributions to cover the expenses of non-territorial public legal entities, smaller public entities, and regulators, which result in a true subjective allocation of revenue in their favour. The imposition of these financial contributions in favour of public legal entities other than the state, regional or local Administration aims at their financial support, escaping the classic dichotomous legal discipline, as a way of avoiding the growth of the public account deficit and circumventing the rigidity of the regime, creation, and imposition of taxes, through more flexible financial means[55].

This evolution was accepted in the 1997 constitutional review and contributed decisively to the abandonment of this dichotomous vision, constitutionally enshrining a “tertium genus” of coercive revenues, broadly and fluidly designated “other financial contributions in favour of public entities”.

A reading of the parliamentary work of the 1997 Constitutional Review shows that the reference to financial contributions contained in paragraph i), paragraph 1 of article 165, of the Portuguese Constitution came to encompass contributions charged to cover the expenses of the State. Canotilho and Moreira clarified that the expression "financial contributions" was chosen for its neutrality, not to mention special contributions, and parafiscal contributions, as the doctrine normally refers to. This category includes the so-called “fees” of the former economic coordination institutes, and a growing set of financial contributions that are neither public fees nor taxes in the technical sense, but financial contributions created for and in favour of certain regulatory entities aiming at their financing[56].

These financial contributions take on a “hybrid” character. They are in a certain sense, closer to taxes as there is no individualised compensation and also closer to public fees in that they aim to repay the service provided by a public entity to a homogeneous group of entities. They lead back to the figure of parafiscal tributes that partially incorporate aspects of the two main figures[57,58].

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[53] SOARES, Cláudia Dias. O enquadramento constitucional dos tributos ambientais: sua natureza e regime. *Revista de Finanças Públicas e Direito Fiscal*, vol. 1 (Ano VII). Coimbra: Almedina, 2014, pp. 59-82. ISBN: 789724037851.

[54] Rulling of the Constitutional Curt n.º 80/2014. Diário da República, 2ª Série, 50, pp.6851-6858 (12-03-2014). https://diariodarepublica.pt/dr/analise-juridica/acordao/80-2014-1343849.

[55] SOÓS, Károly Attila. Tributes paid through special taxes: populism and the displacement of ‘aliens’. In Magyar, Báliant; Vásárhelyi, Júlia. *Twenty-Five Sides of a Post-Communist Mafia State*. Budapeste: Central European University Press, 2017, pp. 259–78.

[56] CANOTILHO, José Joaquim Gomes; MOREIRA, Vital. *Constituição da República Portuguesa Anotada.* Vol. I. 4ª ed. Coimbra: Coimbra Editora, 2007. ISBN: 9789723222869.

[57] COSTA, José Manuel Cardoso da. Sobre o princípio da legalidade das «taxas» (e das «demais contribuições financeiras»). In MIRANDA, Jorge. Estudos em homenagem ao Professor Doutor Marcello Caetano no centenário do seu nascimento. Lisboa: Faculdade de Direito da Universidade de Lisboa, 2006, pp. 789-807.

[58] Constitutional Court Ruling n.º 365/2008. Diário da República, II Série, 155, pp.35822-35828 (12-08-2008). https://diariodarepublica.pt/dr/detalhe/acordao/365-2008-1241335; TC Ruling n.º 613/2008. https://www.tribunalconstitucional.pt/tc/acordaos/20080613.html; Constitutional Court Ruling n.º 261/2009 http://w3b.tribunalconstitucional.pt/tc/acordaos/20090261.html.

Now, reality has demonstrated that parafiscal tributes constitute a very heterogeneous group of tribute figures, on which there is no total consensus in doctrine on how to qualify them. Thus, some understand that "Parafiscal tributes thus have the intermediate nature of contributions: they cannot be confused with taxes, as they are not aimed at compensating any public benefits; They should not be confused with public fees, as they aim to compensate benefits actually caused or taken advantage of by the taxpayer."[59].

For other authors, financial contributions must qualify as tributes according to the following eschatology: financial contributions themselves, which are valid as "instruments for financing new services of general interest", quasi-fiscal contributions, which stand out as "financing instruments for new administrative entities whose activity benefits a homogeneous group of recipients", and also extra-fiscal contributions, which serve as "behaviour guidance instruments"[60].

As can be seen, the constitutional revision of 1997, by changing the wording of paragraph i), paragraph 1 of article 165 (previous paragraph i), and paragraph 1 of article 168, has been determining a reformulation of the assumptions of the discussion on this matter, as the Constitutional Court has already recognised in its Rulings no. 152/2013 and 80/2014. In fact, in the section where article 168, no. 1, paragraph i), of the CRP stated that "it is the exclusive competence of the Assembly of the Republic to legislate on the following matters, unless authorised by the Government: (…) i) Creation of taxes and fiscal system (…)" now appears at, al. i) "Creation of taxes and fiscal system and general regime of fees and other financial contributions in favour of public entities".

The Portuguese Constitutional Court has admitted that, if the constitutional legislator understood that the best way to legally frame "financial contributions in favour of public entities", without losing agility in their creation was to only require the approval of a general regime by the Parliament, the latter would not need to intervene in the individual creation of such tributes and the definition of their specific regime by the government. As it no longer makes sense to equate the figure of financial contributions with taxes to consider them subject to the reservation of formal law, the principle of legality in relation to them only requires that parliament legislate or authorise the government to legislate on general rules and principles. This is common to the different financial contributions, which must be present in the specific creation of each of them. Its concrete creation no longer requires parliamentary intervention or authorisation, meanwhile, for each tax, this qualified intervention continues to be required, which must determine its incidence, rate, tax benefits, and guarantees of taxpayers"[61].

But how to proceed in a context where that general regime does not exist? As is the case for both public fees and other financial contributions. In its Ruling No. 80/2014, the Constitutional Court concluded that in the absence of a general regime for financial contributions, it is acceptable that legislative acts of the Government create this type of tribute in situations covered by parliamentary law

[59] VASQUES, Sérgio. Remédios secretos e especialidades farmacêuticas: A legitimação material dos tributos parafiscais. *Revista de Ciência e Técnica Fiscal*, 2004, 413 (janeiro/junho), pp. 135-219. ISBN: 9789724024998.
[60] TC Ruling no. 152/2013. https://www.tribunalconstitucional.pt/tc/acordaos/20130152.html
[61] TC Ruling no. 365/2008. https://www.tribunalconstitucional.pt/tc/acordaos/20080365.html

that previously defines its essential elements (e.g. Judgments no. 365/08, 613/08, and 152/2013, (...)). The Constitutional Court considers that, in the absence of a general regime for financial contributions in favour of public entities, is sufficient for there to be a prior parliamentary law to consider the constitutional objectives aimed at with its requirement respected since there is no lack of intervention of the people's direct representatives, albeit indirectly, in defining the principles and elementary rules regarding the essential elements of the new tribute (be it a public fee or a financial contribution).

The Constitutional Court went further. In its Ruling No. 539/15, it was argued that the absence of approval of a general regime for financial contributions by the Assembly of the Republic cannot prevent the Government from establishing individualised financial contributions in the exercise of a concurrent competence, without prejudice to the Assembly always be able to revoke, amend or suspend the respective diploma, in the exercise of its constitutional powers.

Even if we agree, in principle, with this conclusion, since it seems clear to us that the lack of approval of a general regime for fees and financial contributions by the Parliament, it should not have the effect of preventing the Government from approving the creation of these tributes, under a concurrent legislative competence. And without prejudice to the fact that the Assembly can at any time revoke, amend or suspend the respective diploma in the exercise of its constitutional powers, as the Constitutional Court has already stated, the truth is that this solution, de jure constituto, is fragile and is not exempt from difficulties, as has been seen.

This fragility is very relevant. In fact, if the option for an indirect reserve of law, in itself, already constitutes an opening of the regime that requires the necessary precautions that can only be resolved in the Courts, with clear harm to taxpayers. We cannot fail to have the greatest reservations regarding the creation of “other financial contributions” without a general regime that defines the limits of this imposition. Consider the relevance that the general regime of local fees has had in the necessary scrutiny that is required when public rates with abstract commutativity, group, or even without commutativity are launched.

Nor does it seem to us that subsequent, eventual scrutiny by the Parliament is an acceptable solution in a matter such as tribute imposition. This is not only for reasons of principle but also because this scrutiny does not take place in the field of public fees, and it is not credible that it will happen, except very incidentally, in the context of tributes with variable commutativity, such as other financial contributions[62].

In this regard, valid, mutatis mutandis and with the necessary adaptations, the structural precautions that underlie the regime of reserve of law and legislative competence, and because we are in the field of taxation, with effects equivalent to those of taxes – often regular financing of public activity or smaller public entities – the creation of such public fees or other public financial contributions should not depend on an unexpected and uncertain scrutiny, but on a law framing the dogmatic limits of each of these tribute types. All the more so as they have

[62] MOUFFE, Chantal. Democratic politics and conflict: An agonistic approach. *Politica Comun*, 9, 2016. https://doi.org/10.3998/pc.12322227.0009.011.

come closer to the classic figure of the tax, as an instrument of public imposition and collection where the counterpart is diluted and not always well justified, such as those highlighted above.

4. Conclusions And Proposals

The Portuguese constitution now refers to three tribute types, creating the autonomous category of "other financial contributions". In practice, this solution, better suited to the new times, reveals several fundamental problems.

The first of them is a problem of conceptualisation – neither the doctrine nor the courts were or are dogmatically equipped for the difficult questions of legal-dogmatic qualification of these new realities. There continue to be serious interpretive difficulties in such a delicate matter where there should be solid dogmatics in the name of the most elementary values of democracy and the positioning of individuals in the face of the states' growing anxieties and tax exaggerations - precisely the same ones that inspired the great revolutions of the centuries XVIII and XIX;

The second of them is a problem of heterogeneity - the set of tributes understood here is very vast and has very different foundations, allowing them to be framed in a somewhat vague and residual expression such as "financial contributions" or even "parafiscal tributes". Sometimes it is conceptually close to the figure of tax, as is the case with social security contributions and, others, closer to the figure of public fees, sometimes as collective fees or true taxes under the cover of tributes of another nature.

The third of these problems – of concrete guarantees – is whether the constitutional densification emerging from al. i) of paragraph 1 of article 165 of the CRP is sufficient to cover the constitutional guarantees that the principles of reserve of law and reserve of legislative competence continue to require in the name of protecting the legitimate interests of citizens since parafiscal tributes impose property sacrifices that are often as relevant as those determined by taxes.

We state this because there has been a profound change in the way the state finances itself, driven in part by the phenomenon of tax saturation as the primary instrument of its funding. But it is also true that new financial contributions are being successively created that increase the overall tax burden. Which, due to their relevance, objectively require scrutiny that should not be content with the mere existence of a general regime that does not yet exist, more than 48 years after the entry into force of the 1976 Portuguese Constitution.

A solution in which, in the absence of this general regime, the Parliament, if it sees fit, could suddenly question the creation of these contributions by governments, known as the deficits in parliamentary representation in democracies around the world, does not seem safe[63,64,65].

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[63] NORRIS, Pippa. Representation and the democratic deficit. *European Journal of Political Research,* 32(2). 2003, pp. 273-282.

[64] JENSEN, Thomas. The Democratic Deficit of the European Union. *Living Reviews in Democracy*, 2009, Vol.9, 1-9.

[65] MOUFFE, Chantal. Democratic politics and conflict: An agonistic approach. *Politica Comun*, vol. 9, 2016. https://doi.org/10.3998/pc.12322227.0009.011.

A fourth problem – of practical effectiveness – is that, throughout the period of validity of the current Constitution, the Parliament has never raised abstract parliamentary / popular scrutiny of these public finantial contributions or fees. This role has been the responsibility of the courts, but only as a response to concrete demands from affected entities, which does not, in any way, reinforce the feeling of security that the national parliament should inspire among citizens in matters of tributes.

A fifth problem is the abuse in the exercise of legislative power by governments. Governments have successively created an increasing number of parafiscal charges with varying degrees of commutativity and sometimes no commutativity at all. These charges are created to satisfy the permanent financing needs of public entities, providing them with their own earmarked public revenues, which they fully manage. The motivations for their creation are not always clear, often coming down to the need for more permanent revenue.

A sixth problem is the absence of a sufficiently robust doctrinal framework for these new tribute figures, despite the efforts of legal scholars and higher courts (as seen in numerous Constitutional Court rulings). This negatively impacts the values of legal certainty, security, proportionality, and public scrutiny in the creation of finantial contributions and public fees.

Additionally, there is a general issue of posture – there seems to be a benign and passive acceptance of the fact that financial contributions are only subject to indirect constitutional oversight, which is not always enforced. In reality, this type of contribution often ends up serving the same purpose as a tax, and the potential for dangers and abuses in its creation is, at least theoretically, equal to those traditionally associated with taxes.

Finally, there is a problem resulting from the fact that “financial contributions” are based on a somewhat variable degree of commutativity, which is sometimes difficult to understand, rationalize, or measure. This commutativity partly draws from the nature of financial contributions (because it does not necessarily have an individualized return for each taxpayer). It also partly draws from public fees because it aims to compensate for services rendered as a result of an administrative activity by a public institution to a certain circle or category of people or entities that benefit collectively.

The financial contributions include all situations where the public service may benefit a uniform group or a distinct set of recipients. It also includes the ones where the duty to finance an administrative task is attributable to a specific group that maintains some proximity to the public goals intended to be achieved through that activity.

Now, in this regard, in our opinion, there is a potential risk that needs to be better taken care of since only the general regime of financial contributions is subject to the relative reservation of legislative competence of the Assembly of the Republic. However, its individual regulation is not the case, assuming prima facie that this general regime will concretely discipline the essential characteristics of financial contributions and, therefore, guarantee the stability of everyone's legitimate expectations.

The use of fees and other financial contributions we are witnessing, places the problem at a structural level, raising the question of to what extent the

fundamental rights of taxpayers are being fully respected, as is clear from the countless concrete cases judged by the courts, distorting the order of values that support them.

The protective function of the parliamentary law reserve, as well as the democratic principle itself, seem to be subverted by the possibility of creating additional financial contributions (and even public fees), which are as significant as some taxes, without systematic and effective ex ante scrutiny.

In light of the aforementioned points, we advocate for a refined conceptual definition of financial contributions to differentiate them from other tributes. Additionally, we recommend the establishment of an effective general law regulating detailed fees and financial contributions, integrating this refined conceptual framework.

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