Article

Parliamentary responsibilities in taxation and for taxation

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ABSTRACT:

The author addresses a series of characteristics of the European constitutional tax tradition emphasizing two aspects: parliamentary consent to taxes as a constitutional foundation as a common European principle and parliamentary fiscal responsibility as a non-generalized provision in European constitutions. Regarding the principle of legality or reserve of law in tax matters, he mentions the code's relative and not absolute nature and comments on the different constitutional solutions of various European countries. On the other hand, he shows the points in common between them. Regarding fiscal responsibility, he describes it as a provision that is not generalized in European constitutions and again exposes the points of divergence and convergence of the various European countries.

PALABRAS CLAVES:

Desarrollo sostenible, transparencia fiscal, educación de las partes interesadas, evasión fiscal

RESUMEN:

El autor aborda una serie de características de la tradición constitucional tributaria europea, y enfatiza dos aspectos: el consentimiento parlamentario de los impuestos como fundamento constitucional como principio común europeo: la responsabilidad fiscal parlamentaria como una disposición no generalizada en las constituciones europeas. Respecto del principio de legalidad o de reserva de ley en materia tributaria, menciona el carácter relativo y no absoluto del principio, y comenta las diferentes soluciones constitucionales de diversos países europeos, y por otro lado muestra los puntos en común entre ellos. Respecto de la responsabilidad fiscal, la describe como una disposición no generalizada en las constituciones europeas, y nuevamente expone acerca de los puntos de divergencia y de convergencia de los diversos países europeos.

MOTS CLES :

constitution politique ; régime fiscal; principes fiscaux; Union européenne; responsabilité fiscale

RESUME :

L'auteur aborde une série de caractéristiques de la tradition fiscale constitutionnelle européenne en mettant l'accent sur deux aspects : le consentement parlementaire aux impôts en tant que fondement constitutionnel en tant que principe européen commun et la responsabilité fiscale parlementaire en tant que disposition non généralisée dans les constitutions européennes. Concernant le principe de légalité ou de réserve de droit en matière fiscale, il évoque le caractère relatif et non absolu du code et commente les différentes solutions constitutionnelles des différents pays européens. D'autre part, il montre les points communs entre eux. Concernant la responsabilité budgétaire, il la décrit comme une disposition non généralisée dans les constitutions européennes et expose à nouveau les points de divergence et de convergence des différents pays européens..

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1 THE NECESSARY PARLIAMENTARY ROLE FOR PUBLIC FINANCING AND THE CHOICE OF THE RELATIVE FISCAL MEANS

Public funding must find its source and its basis in a parliamentary consensus. This is a conviction shared by the vast majority of European states, which have different constitutional solutions. These refer to taxes or broader forms of public financing or include constituent elements as well. or even provide for its application.

This is the case of the Constitutions of Germany, Austria, Belgium, Bulgaria, Croatia, Denmark, Spain, Estonia, France, Greece, Finland, Italy, the Netherlands, Poland, Portugal, and Sweden.

Therefore, a future Chilean solution of establishing in the Constitution that it corresponds to Parliament to decide on public financing options seems to be in line with those adopted in almost all European States, despite the institutional, structural, and historical differences that distinguish their constitutional charters.

2 FORMAL EXCEPTIONS TO A CONSOLIDATED EUROPEAN EXPERIENCE: TRUST IN CONSTITUTIONAL LAW AND NOT IN THE CONSTITUTION: THE HUNGARIAN CASE

This option of constitutional recognition of the power and responsibility of Parliament in deciding the forms of public financing can be described as European. Of course, there is the Hungarian exception, which does not provide for in its Constitution the reservation of the law on forms of public financing. However, Hungary has entrusted the constitutional guarantee to a law that, due to its constitutional nature, binds parliamentary decisions with the same effectiveness as the Constitution. As such, it only allows Parliament to decide, through legislative forms, public financing solutions.

It is a system solution which, precisely because it does not clearly differ from the options in the Constitution of the vast majority of European countries, can in turn be justified by national needs. Like not limiting the legislative responsibility of the Hungarian Parliament to an essential provision of the Constitution. Thus, Hungary considered that it could better articulate this responsibility through legislative development. However, he wanted to guarantee the same constitutional effectiveness but with a more articulated law than a single constitutional precept. In the Magyar legislative options, however, the freedom of the Parliament to adopt, through its own laws, the tax solutions that are considered more effective and coherent, will always find the limitation, this is included in the Constitution, unlike the reservation of law in tax matters, respect for the proportion with the economic situations of individual taxpayers. As a consequence, the political confrontation between the Government and the Parliament will then have to face different opinions and visions. In these cases, solutions could be affirmed through parliamentary mediation, even beyond the balances entrusted to the defined majority of national governments.

With the constitutional law provided, the Hungarian Parliament was also able to define the scope of financial options subject to parliamentary consent. More specifically, it decided whether to limit the expected parliamentary consent to tax benefits or to adopt a broader financial dimension. In this case, it is capital benefits of various kinds but always characterized by their financing function.

The Hungarian option to give the tax law reservation a constitutional basis, but with a special law and not in the Constitution, seems to be more formal than a substantial solution. The legal effectiveness of Hungarian constitutional law is equal to that of the specific provision that other European states have adopted in the Constitution. In fact, by means of constitutional law, Hungary has tied national tax options to the necessary formalization of a law. Thus, it does not allow fiscal limitations to be introduced by other forms of legislation that do not involve Parliament.

At the same time, the presence of a constitutional law places an even greater restriction on the Hungarian tax legislator than is imposed in other states by the constitutional reservation of tax law. In fact, a piece of legislation lends itself better to a more articulate analysis: one that can be used to indicate the characteristics that the national legislator must always respect when adopting new forms of taxation.

This is a Hungarian solution that could well be left to the evaluation of the Chilean Constituent Assembly. The task of the Constituent Assembly will either be to adopt, like the vast majority of European states, a general reservation of law on tax matters, or to refer, following the Hungarian experience, to the options of a constitutional law that could certainly be more articulate. In fact, it could better outline the constitutive features of the forms of taxation that the Chilean Parliament will want to adopt in the application of the Constitution. (Deak, 1997)

3 THE EUROPEAN PREFERENCE FOR A "RELATIVE" RESERVE OF TAX LAWS: AN "ABSOLUTE" RESERVE WOULD HAVE REQUIRED A BROAD TECHNICAL RESPONSIBILITY OF PARLIAMENTS.

Faced with a certain, but generic, investiture of Parliaments in tax matters, a constitutional interpretation has prevailed in Europe that has allowed the primacy assigned to Parliaments by the Constitutions to be maintained. However, parliaments are not fully responsible for both fiscal and enforcement decisions involving the introduction of a new tax or the modification of existing ones. On the contrary, full and detailed regulatory responsibility would have required parliaments to have a degree of technical-legal and

economic knowledge that, by tradition, cannot form part of the political experience of parliamentary representatives.

In addition, full parliamentary responsibility over the tax system as a whole would have required not only a political debate on the tax models and a debate on the individual tax solutions to be adopted but also the approval of the legislative options necessary to fully regulate the regulatory text. and its application. This would have lengthened the time needed to pass new or innovative tax rules. This would clearly conflict with the national financial needs that had inspired the general policy options. This would also have reduced the timeframe for the entry into force of the new provisions. Therefore, it would also have been difficult to guarantee, for all tax legislation, whether new or innovative, the degree of detail that the new rules would have required to guarantee the full innovative effectiveness of all the provisions, and not only those that constitute the new tax.

Therefore, with a relative reserve, the Parliament can exercise the fullness of its political role in the regulatory options on the structure of the new taxes. The Government, for its part, can make use of its technical competence to regulate, respecting the legislative principles, the regulation of new taxes, or extensive modifications of the existing ones.

This solution is common to the European Constitutions, as confirmed by the constitutional formulas adopted. None provides for parliamentary consent on tax matters with the determination and regulatory precision that the absolute nature of the legal reserve would require.

Thus, the relative reserve of tax laws is an experience so widely shared in Europe that it can be considered a European solution: that of not assigning Parliament full and complete responsibility for regulating all tax disciplines, but only the constitutive and qualifying elements of the tax levy.

Future Chilean constitutional options could well be inspired by the European solution of adopting a relative fiscal law reservation in constitutions. However, it would remain the responsibility of the Chilean constituents to choose a formula that objectively defines the scope of the constitutional operation of the tax law reserve.

4 THE RELATIVE RESERVE IN TAX MATTERS AND EUROPEAN CONSTITUTIONAL DIFFERENCES

4.1 THE EFFECTIVENESS OF CONSTITUTIONAL SOLUTIONS THAT PROVIDE FOR THE PRESERVATION OF LAW BUT DO NOT EXPRESSLY MENTION TAX APPLICATION

4.1.1 The Italian experience and the role of tax benefits

Italy certainly offers an obvious constitutional innovation in the Constitutional Charter of 1948. Article 23 of the 1948 Constitution provides for the necessary consent of Parliament for a wide range of benefits of a patrimonial nature, which it calls imposed benefits (no personal or patrimonial benefit can be imposed but by law). This is a significant difference from the formula of the Constitution of the Kingdom of Italy, known as the Statuto Albertino. In effect, it established that taxes could not be imposed or collected without the authorization of the Houses of Parliament and the subsequent sanction of the King: a sovereign power to accept or reject parliamentary options in tax matters. A constitutional and political panorama very different from the one we have today in Italy. Here, the tax sovereignty of Parliament was explicitly regulated with reference not specifically to taxes, but to the much broader category of tax services. Hence the recurring interpretative effort of the Constitutional Court. In fact, over time, the Constitutional Court has dedicated itself to recognizing the constitutive

features of taxable benefits and, consequently, to defining the scope of the necessary intervention of Parliament in tax decisions.

Therefore, priority has been given to the definition of the content of the capital that qualifies, in general terms, the area of necessary parliamentary consent. This patrimonial content undoubtedly characterizes taxes. In this case, the benefit is justified, in turn, by the financial responsibilities of the taxpayer, linked to economically relevant situations to the point of being considered expressions of taxable capacity. The same function of public financing is also present in the broader category of taxes that, like rates, are owed by taxpayers without obtaining a concrete utility, such as the one that, instead, inspires the logic of compensation. The latter, in turn, is clear from the interpretation of the Constitutional Court to extend parliamentary consensus, in addition to taxes, to those services with a patrimonial content that, although they are not functional to public spending, nevertheless impose an economic impoverishment on the users of public service, without them being able to interfere on the reasons and measures of the patrimonial service that is requested of them. Therefore, in this case, according to the Italian Constitutional Court, the legal reservation also operates with respect to pecuniary benefits that have neither the function of public financing nor that remuneration for the services rendered to the plaintiffs. That is, those that appear to be characteristics qualified as tax benefits.

The Italian solution, with the relative interpretative experience, could be used in Chilean constitutional options if the Constituent Assembly decided to submit all fiscal options to Parliament, but also wanted to extend, following the Italian interpretation, parliamentary consent to capital services. Those that, without the function of public financing, and with the corresponding character, however, continue to have a common base of authority, excluding, however, contractual participation of the users. However, this solution, unlike those found in other Constitutions, such as the French one, would not be accompanied by details on the constituent elements of taxes. Therefore, it would correspond to the Chilean Constitutional Court, the double interpretative responsibility that the Italian Constitutional Court assumed. On the one hand, to define the qualifying features of the taxes to differentiate them from the benefits imposed and, on the other hand, to qualify the latter in an original way to differentiate them from benefits of a merely retributive nature (Allorio, E, 1957; Antonini, L, 2006; Bartholini, 1957; Berliri, 1958; Boria, 2021; Cipollina et al., 2006; Di Pierto, A, 2015; Fedele, 1994; Fedele & De Siervo, Ugo, 1978; Fois, Sergio, 1963; Grippa Salvetti, Maria Antonietta, 1998; Marongiu, 1991; Morana, 2007).

4.1.2 The Spanish experience is similar to the Italian one

The Spanish Constitution establishes, in its article 31, last paragraph, that: "Personal or patrimonial benefits of a public nature can only be established in accordance with the law".

Spain, like Italy, renounces a specific provision on taxes, to which the Constitutions of other countries refer explicitly. This is an advantage for a broader reference to capital benefits.

The interpretive result of this original solution is quite similar to the Italian one. The constitutional restriction is broad: it, therefore, imposes the necessary parliamentary consent not only for tax benefits but also for those of a broader nature of the authority. Which, in the interpretive evolution of the Spanish Constitutional Court, implies, as in Italy, the coercive nature of benefits, with the relative lack of correspondence, and the function of public financing. It is an original horizon that, however, like Italy, is not limited to the complexity of the criteria set out that contribute to qualifying the tax benefit, according to the interpretation of the Spanish Constitutional Court. Spain, like Italy, is concerned with offering parliamentary coverage not only to taxes but also to those patrimonial options that, although

they do not have a natural financial vocation, maintain an authoritarian character towards users of public services, even if they are not taxpayers . Thus, even within the framework of the Spanish Constitution, the technical and political evaluations of the Government cannot prevail over the options that, in terms of general coherence of the legal system, corresponds to Parliament adopting. This is true not only for the variety of authoritarian options of a fiscal nature, but also for those that impose, in any case, patrimonial benefits on users in the different sectors of public services, even without a financial function.

The Spanish solution, like the Italian one, could be used in the Chilean constitutional options. This solution is coherent with the intention of offering, through the reservation of law, the broadest constitutional guarantee not only to all taxes but also to those patrimonial benefits that are imposed by the State not for economic purposes but for remuneration, which in turn is determined authoritatively. It would then correspond to the Chilean Constituent Assembly to choose the most appropriate formula to represent this requirement. You could also use the formulas from the Spanish or Italian constitutions. Whatever the choice, the full interpretive responsibility of the Chilean Constitutional Court would be maintained, like the Spanish and, before, the Italian. It is a question of defining the original and qualifying characteristics of both the tax and the patrimonial benefit imposed (Calvo Ortega, 2013; Cazorla L, 2005; *Derecho Tributario. Parte General*, 2007; Menendez Moreno A, 2021; Queralt et al., 2020; Yebra Martul-Ortega, 2004).

4.1.3 Taxation as part of a broader financial responsibility of the Parliament in the Swedish experience.

Fiscal responsibility is part of a more general financial responsibility that the Swedish Constitution wants to be supervised by parliamentary decisions. In fact, in Chapter VIII of the Swedish Constitution, Article 3(2) states: "Provisions relating to relations between individuals and the public administration that impose obligations on individuals or otherwise interfere with their personal and economic will be established by law." In this way, Sweden demonstrates that it wishes to generalize the guarantee function offered by parliamentary consent. Its constitution extends it to a particularly broad field of legal and economic relations. They are those that, according to article 3, impose obligations on individuals or interfere in their economic relations. This is a provision that undoubtedly shows that it does not want to be linked to tax benefits, as occurs in other Constitutions. A provision that confirms, on the other hand, that the interest in submitting fiscal options to parliamentary control is not unique or exclusive among those that are constitutionally guaranteed.

Of course, it is precisely the characteristics that, in the European constitutional experience, qualify tax benefits that allow them to fit into the broad categories that the Swedish constitutional provision has chosen. It is, in any case, the authoritarian nature of the provision, excluding the payment function but, nevertheless, with the decisive function of financing public spending. Thus identified, the tax benefit is undoubtedly the most important aspect of the pecuniary obligations imposed that the Swedish constitution refers to the necessary parliamentary consent. However, it is blurred in a broad constitutional provision, without having the exclusive character that it assumes, on the other hand, in the constitutional provisions of other European countries that promote the reserve of law only in tax matters. Therefore, compared to these, the interpretive effort of tax benefits in the Swedish Constitution is certainly less important. In fact, it does not seem necessary to define the characteristics of such services since, in any case, they would be included in the much broader category of "relationships with the public administration that impose obligations on individuals or otherwise interfere with their economic relations". ".

The Swedish option could be useful, therefore, for the future Chilean Constitution if it wanted to adopt a scope of application of the reserve of law that is broader than the fiscal

one. This solution could be even broader than the one adopted by the Italian and Spanish experiences. Unlike these Constitutions, which do not mention taxes, the Swedish Constitution lacks any specifically patrimonial connotation. Instead, it is replaced by a more generic reference to relative efficiency: that of the interference of profit in economic relations.

Such a solution would not require Chile to seek more demanding constitutional interpretations to guarantee the "presence" of tax benefits in the necessary constitutional provision. Certainly, those acquired in the European tradition may well be used in this case, with indisputable interpretative effects. On the other hand, the impact of taxes on the economy of individuals has a qualifying and original nature and, in any case, would be enough to guarantee respect for a broad constitutional option that Chile might want to adopt along the lines of the Swedish experience (Lodin, 2011)

4.2 THE EXPLICIT REFERENCE TO TAXES ONLY AS A SPECIFIC OBJECT OF THE LEGAL RESERVATION IN THE DUTCH AND BRITISH CONSTITUTIONAL PROVISIONS

There are numerous charters that simply give taxes the necessary legislative supremacy. These options acquire a general character, since they characterize various constitutional solutions, regardless of their more or less articulated formulation. In the Dutch Constitution (art. 104) state taxes are collected by law. The rest of the State taxes will be regulated by law) and in the laws of the Parliament of 1911 and 1949 of Great Britain the principle of reservation of law in tax matters was codified. In fact, these Constitutions explicitly mention taxes without further specification. Thus, they attribute the legislative power of taxes exclusively to Parliament in the Netherlands and to the House of Commons in Great Britain. In both cases, it is a solution explicitly oriented towards taxes, as can be seen from the specific constitutional provision on them. A specific choice that, as such, would not allow, from the textual point of view, a broader application. Consequently, other forms of taxation would be left out of the constitutional guarantee that, although they are functional to public financial needs, do not have the same structural and functional characteristics as those recognized as taxes. In particular, that of an economic duty linked to the occurrence of events that the legislator had judged as a measure of fiscal responsibility of taxpayers. It is precisely the authoritarian character and the lack of exchange function that characterize fiscal benefits that in turn would justify parliamentary control and decision. Only in this way can Parliament be prevented from being deprived of options that, like taxes, although they are not openly declared as such, snatch a part of their assets from individuals without them having any concrete benefit.

By adopting this broader interpretation, the constitutional guarantee of parliamentary consent extends beyond the textual data on taxes. In this way, all tax benefits are subject to parliamentary decisions, that is, those that are decided with authority and with a financing function. In this way, these services are not subject to the political evaluations of the government. At the same time, parliamentary options offer individuals a constitutional guarantee consistent with the effects of a reduction in their assets ordered by the authority, but to which no specific benefit corresponds.

Therefore, it will correspond to the constitutional interpretation to offer reasons and foundations to extend the constitutional guarantee to the broader sphere of taxes. It will be up to the Constitutional Court to underline the general effectiveness of parliamentary consent even beyond specific tax provisions. This is an interpretative commitment to enhance the constitutional textual data of taxes in a broader sense: the one that corresponds to the criteria traditionally used to qualify tax benefits. They are, precisely, the power, by virtue of which non- remuneration and the function of public financing are introduced into the system. However, even in this broader sense, the constitutional guarantee does not only

cover tax identification. It also extends to qualifying features for the entire category. It is, in effect, taxpayers, tax base and rates.

Thus, full political responsibility is left to the individual parliamentary choices of the Netherlands and Great Britain. Thanks to the broader interpretation of the Constitution, this responsibility extends to the legislative regulation of all taxes, even those that do not have the characteristics of a tax, without leaving them to the choice of the government.

Aware of these difficulties, therefore, the Chilean constituent might prefer to adopt the more general formula of taxes instead of taxes. In this way, the text would be sufficient to guarantee the broadest applicability of the legal reserve to the entire tax sector without having to resort to constitutional interpretation.

4.3 FROM THE PREDICTION OF TAXES TO THEIR CONSEQUENCES: THE DANISH AND IRISH EXPERIENCE

As a corollary to the extensive tax provision, the Danish and Irish Constitutions extend their scope of application. In fact, they also put under parliamentary control, although with different aspects, the phases after the establishment of the tax, such as future modifications and its extinction. Thus, in the case of Denmark (Art. 43 No tax can be instituted, modified or abolished except by virtue of a law; no loan of public money can be contracted or any army recruited except by virtue of a law). A finance bill is any bill that contains provisions relating to all or some of the following matters: the imposition, suppression, reinforcement, modification and regulation of taxes; the imposition of charges to the public treasury for the payment of debts or other financial charges, or the modification or elimination of such charges; approval of expenses; the consignment, entry, custody, exit or verification of public money loans; the issuance or guarantee of loans or the reimbursement thereof; issues incidental to or related to all or some of them).

These are textual options that further reinforce the constitutional vitality of taxes. In the Danish and Irish constitutional experience, parliamentary consent makes full legislative responsibility visible and therefore constitutionally effective. It is also about the very events of the fiscal elections that accompany the institution of a tax, until its repeal. This choice seems coherent with the legislative responsibility that guarantees the reserve. For the sake of consistency, the latter could not be limited solely to the institution of the tax, neglecting the equally important political responsibility of regulating its scope and effectiveness. Therefore, the responsibilities must go back to the same parliamentary political evaluations that were then entrusted with the choice to establish a tax.

The Irish and Danish options thus make clear in the constitutional text the full responsibility that the Constitution entrusts to Parliament. This is a result that the Constitutional Courts themselves had made consistent and well-founded in the case of the other Constitutions, which only provide for parliamentary consent to the tax. This was the case when events after the tax after its institution were placed under the law.

The Danish and Irish experiences offered the Chilean Constituent Assembly a useful opportunity for reflection: what is the best way to formalize full legislative responsibility in tax matters. The Chilean Constitution could be adapted to the options of the vast majority of European States. Therefore, it could be limited to only providing for the indication of taxes, leaving the responsibility of guaranteeing the full effectiveness of this broad provision to the Chilean Constitutional Court. A responsibility that the Court could assume with the interpretation that recognizes the full competence of the Parliament not only for the establishment but also for the subsequent acts of tax regulation until its final repeal.

Alternatively, the Chilean Constituent Assembly could make parliamentary sovereignty in fiscal matters clear and manifest. It could, therefore, extend in the Constitution

the provision of parliamentary sovereignty for the entire destination of taxes: from its institution to its extinction, thus accepting an indefinite number of amendments. In this case, the interpretative intervention of the Constitutional Court would no longer be necessary; which, on the other hand, in other European countries has required a constitutional formulation entrusted to the generic forecast of taxes.

4.4 THE BROADEST CONSTITUTIONAL GUARANTEE FRAMEWORK OF TAXES ONLY FOR ESTONIA AND SLOVENIA

There is no shortage of constitutional options that extend the legislative guarantee beyond the recognized and traditional scope of taxes. The need to textually guarantee the widest application of parliamentary options has inspired constitutional formulas which, like the Estonian or Slovenian constitutions, extend the legislative guarantee to a wide scope. This covers, as in the Slovenian Constitution, the entire scope of fiscal services, clearly in addition to the explicitly mentioned taxes (Art. 147. The State prescribes by law the taxes, customs duties and other charges. Local communities will establish taxes and other rights under the conditions established by the Constitution and the law). Or, as in the Estonian Constitution, an even wider scope of application is provided for. Which, in the rich textual forecast, mentions, in addition to taxes, a heterogeneous variety of patrimonial services, also characterized by non-financial functions. However, the authoritarian nature of the services continues to be common, justified either by a penalizing intention, or by the particular nature of the insurance contracts (Art.113 [Taxation] State taxes, rates, levies, sanctions and mandatory insurance payments will be determined by law).

For the Slovenian Constitution, the result of the interpretation could be consistent with the solutions adopted by other European constitutional courts to define and classify patrimonial benefits as fiscal. They are those in which authoritarian and financial aspects are combined.

For the Estonian Constitution, on the other hand, the scope of application of the reservation of law, precisely because it is envisaged as broader than that of taxes, allows the national legislator to go beyond the demarcation lines drawn for the latter. With such constitutional investiture, in fact, the national legislator is obliged to regulate, in addition to taxes, also the services provided by the authority but without financing functions. With such a broad responsibility, the Estonian Parliament will not have to face the difficulties of defining the scope of its necessary regulatory intervention. These difficulties, on the other hand, weigh on the interpretation and application of other European Constitutions that formally limit the reservation of law to taxes or duties only.

The constitutional solutions of Estonia and Slovenia could be a useful experience for future Chilean options. They offer, in fact, a broader constitutional guarantee than the one limited textually to taxes in other constitutional letters. Consequently, they explicitly commit the Estonian Parliament to carry out its legislative responsibilities in all fiscal matters, and the Slovenian Parliament to extend the constitutional guarantees of legal reserve also to authorized benefits other than public funding, such as taxes.

5 BEYOND THE CONSTITUTIONAL PROVISIONS OF TAXES: THE RELATIVE RESERVE OF THE LAW AND ITS CONSTITUTIVE FEATURES

5.1 UNIQUE FUNCTION AND VARIETY OF CONSTITUTIONAL SOLUTIONS ADOPTED

In many constitutional letters, the confidence in parliamentary consent does not stop at the mere mention of taxes but is enriched by the express provision of the elements that qualify them.

This is a useful solution to make the parliamentary function in tax matters clearer and more accountable, specifying the scope of the necessary regulatory intervention. It is, therefore, a corollary of the relative nature that the European States have firmly recognized to the reserve in tax matters, with a direct implication of the constituent elements of the tax. This constitutional solution is necessary to guarantee the reserve's full regulatory effectiveness and to eliminate the danger that the mere mention of taxes in the Constitution could limit its effectiveness, confining it to a mere programmatic scope.

Despite this common intention, the constitutional options are not homogeneous. This is so, both when defining the scope of application and the constituent elements of the tax, as well as when it also includes the scope of application and even that of administrative control and not only the traditional and consolidated substantive scope.

5.2 THE VARIETY OF CONSTITUENT ELEMENTS OF THE TAX

The national constitutional options continue to be divergent precisely in the choice and consequent strengthening of the constituent elements of the tax. Those that represent a culturally acquired fact, even if it is not always expressed in the legislation, for the constitutional experiences that are based on the reservation of law in fiscal matters.

5.2.1 The Portuguese constitutional provision to determine the scope of taxes

In the Portuguese Constitution, attention is focused on the constituent elements of taxation that continue to play the fundamental role of defining the amount of the tax benefit and, specifically, the tax base and the tax rate: article 103. - (Tax system) 1 The tax system will have as its objective the satisfaction of the financial needs of the State and other public entities and the fair distribution of income and wealth. 2. Taxes will be established by law, which will set the rates, the tax base, tax benefits and guarantees for taxpayers. No person will be obliged to pay taxes that are not set within the terms provided by the Constitution, that are retroactive, or that are not paid or collected in accordance with the law).

The Portuguese Constitutional Charter is, therefore, a guaranteed option. Useful, as such, to define more and better the characteristics considered essential of the relative reserve of law. In this way, governmental options are avoided for an election that, on the contrary, should reinforce the responsibility of Parliament, which is urged, in the name of the Constitution, to define the elements on which the financial participation of the taxpayers.

The Portuguese experience clearly highlights some of those constitutive elements of the tax that, according to the European tax culture, a law must identify in order to guarantee full respect of the constitutionally affirmed reserve. The Portuguese choice thus demonstrates a willingness to prioritize the tax base and rates. This, probably in the awareness that these are the characteristics in which the financial responsibility of taxpayers is measured. This is a substantial interest that seeks to explicitly highlight parliamentary responsibilities to the extent that they are decisive in determining fiscal outcomes in objective terms.

It is a conscious choice so that the legislative responsibility is manifested in the determination of the constitutive elements of the tax on which the sacrifice of the taxpayers is really measured.

This is a different option to what can be found in the constitutional experiences of most European states. There, parliamentary responsibility for taxes is provided for without further specification and then relies on constitutional interpretation to define its limits.

A conscious choice, the Portuguese one, to highlight, at the constitutional level, the importance of the tax base and the tax rate, that is, the elements necessary to settle the tax and thus determine the level of indebtedness of the taxpayers. In Portugal, therefore, the Constitutional Court has the specific task of identifying the criteria that serve to qualify the tax components that are essential to quantify the measure of the economic benefit of taxpayers. Those that, as such, are already constitutionally provided for.

These are options that the Chilean Constitution could then share. It could decide to integrate the broader provision of parliamentary consent on taxes with those constitutive features useful in determining its amount. Those that serve to affirm, with constitutional authority, the importance of the full execution of the tax debt. Therefore, with this specific objective, the Chilean option could be the best guarantee of a fully recognized parliamentary responsibility. It would therefore be the best demonstration of the substantial effectiveness of the fiscal sacrifice. In this way, Parliament's responsibility in determining and applying the criteria on which the tax benefit is based would be more directly understandable and coherent (Casalta Nabais J, 2005; Catarino, J., 1999; Gomes Ns, 1993; Pires, M, 1978) .

5.2.2 From the broad constitutional provision of the constituent elements of taxes to that of their application: the Greek experience

Common to the Portuguese experience is the concern of the Greek Constitution to make evident in the textual data the elements that qualify the reserve of law in tax matters. (Art. 78 1. No tax can be established or collected without the existence of a formal law that determines the taxpayers and income, types of goods, expenses, and categories of operations to which the tax refers).

The Greek Constitution thus favors the substantive elements that qualify the tax, such as taxpayers and the so-called presupposition in fact. In such analytical provision, on the other hand, the references to the tax base and the tax rate that characterize the Portuguese Constitution are not specifically mentioned. This is a clear sign of the Greek concern to highlight, at the constitutional level, the greater importance attributed to subjects and objects, as constitutive elements of taxation, rather than those that serve to determine its measure, such as the tax base and the tax rate.

Both the tax base and the tax rate have a substantial effect. This is necessary to contribute to the quantification of the tax debt and to make effective, and therefore implement, the fiscal responsibility that the subjective and objective conditions of the tax have helped to establish.

Furthermore, the Greek Constitution combines the institution and the collection of taxes. This is a broad formula that allows Parliament to be given a broader responsibility: that of regulating not only the structure of the new taxes or any modification thereof, but also their collection. Thus, it is recognized that the constitutional formula is necessary to guarantee effective and punctual compliance with taxes, thus defining a balanced relationship between the powers of the administration and the rights of taxpayers.

The Hellenic experience offers the future Chilean Constitution a different analytical alternative to the Portuguese one: that of privileging the substantial aspect of the distribution of the tax sacrifice in subjects and budgets, instead of promoting the elements that qualify

the tax according to its liquidation. In the Greek Constitution, therefore, the clarity and certainty of the application prevail over the need, although appreciable, to establish the essential elements for the calculation and liquidation of the tax, as in the Portuguese Constitution.

However, if in the end the Chilean Constitutional Council does not want to run the risk that the constitutional provisions clearly value only some of the constitutive elements of the tax, it could propose a text that manages to combine the Greek and Portuguese solutions. For this reason, the Chilean constitutional proposal could contemplate all the constituent elements of the tax instead of dividing them. Thus, both the taxpayers and the prior condition, provided for in the Greek constitution, and the base and type of the Portuguese.

If this solution is considered excessively complex for a constitutional text, another alternative would be to provide a formula inspired by the Greek that would bring together, in the legislative responsibility, both the institution and the collection. However, it should no longer refer only to the subjects and the factual basis, which are indicated analytically, but to a general provision that refers to the tax and its constitutive characteristics.

5.2.3 The broad legislative responsibility in the original tradition of the French Constitution: from the structure of taxes to their application

Like the Portuguese and Greek constitutions, the French one is also based on the constituent elements on which the tax is then measured, such as the tax base and rates. This solution is consistent with the inspiration of the Declaration of Human Rights and Fundamental Freedoms which, however, continues to constitute the very preamble of the Constitution.

The constitutive elements, in turn, retain a broad effect, consistent with the equally broad reference to the impositions indicated as of any nature, but which continue to be impositions.

In fact, Article 34 of the French Constitution states: "La loi fix the rules concerning l'assiette , le taux et les modalités de recouvrement des impositions de toutes nature . This choice is lexically justified by the intention of confirming, in the Constitution, the broad provision contained in the Declaration of Human Rights (article 14 of the DDHC: "... All citizens have the right to verify, by themselves or by their representatives, the need for public contribution, to consent freely to continue the employment, and to determine the quota, the amount, the collection and the duration... "

This constitutional solution required, in order to be effective, to combine a broad provision of taxation with the specificity of its structural elements, such as the tax base and rates. Basically, those that qualify the tax benefit and that, in turn, are essential to define the amount to be paid by taxpayers; that is, the amount that quantifies your financial responsibility.

This original French constitutional formula, however, required a lengthy process of judicial and administrative interpretation to better define the broad formula adopted by Article 34 of the Constitution.

It has been difficult, for the French jurisprudential and administrative experience, to define a precise line of demarcation to guarantee, with sufficient certainty, the obligation of legislative choice extended to impositions, generically indicated as of any nature. The result has been to include not only taxes, but also what are called fiscal taxes and what are called quasi-fiscal taxes.

The former is applied to the operation of a public service, but without being a counterpart. The latter, despite their wide application, are a borderline category with rates.

Thus, it can be understood how the same legislator can attribute to the Government a broad power to regulate the tax base, the rates and the collection procedures and can decide to remove the pertinent controversies from tax litigation, as occurs with the tax on lottery prizes and casinos.

In this way, it is confirmed, in conclusive terms, that the legislative obligation in France is not constitutionally enforceable for benefits that have a general nature of consideration, among which are those that constitute, unanimously, social security contributions and charity.

Therefore, legislative responsibility also extends to the tax base and tax rates. Both allow you to measure or assess taxable wealth and base the amount of the tax on it. With this specific function, they deserve a specific legislative responsibility: the one that France, like Portugal, has wanted to reserve for the tax base and the rates instead of entrusting them to the interpretation of the Constitutional Court. From this perspective, the subsequent constitutional choice to explicitly extend legislative responsibility to the realm of tax collection can be understood. In this way, the French Constitution shows that it also wants to guarantee parliamentary control of the rules governing the last stage of the application of taxes. It is the phase of tax collection in which, in the name of the final acquisition of financial resources, the responsibilities of the taxpayer and the functions of financial administration coexist. This importance justifies the explicit constitutional involvement of Parliament without deducing it from a more general constitutional precept, as occurs in the solutions adopted by other European States. On the other hand, the decision to extend the legal reserve to the collection of taxes and not only to their creation, equates the French solution to the Greek and Portuguese ones. However, the effectiveness of the French option is even greater than that adopted by Greece and Portugal. Actually, it refers to the application of forms of taxation that, by express constitutional provision, are of any nature. This is a solution that could also be proposed to the Chilean Constituent Assembly if it wanted, in turn, to entrust the law with the responsibility of regulating both the "creation" of taxes and their application and final collection. In addition, the French experience would offer the Chilean Constituent Assembly the possibility of making this widely applicable provision even more effective, referring it not only to taxes in the classical sense, but to all those forms of taxation that mark European experiences. Those in which the constitutive nature of taxes continues to be authoritarian but with an indisputable financial vocation. What seems to be the unequivocal sign of distinction with respect to services of an onerous nature, although they continue to be characterized by an authoritative source.(Barque, 2013; Beltrame, 2017; Beltrame & Mehl, 1997; Bienvenu & Lambert, 2010; Bourget, 2012; Bouvier, 2020; Bouvier et al., 1995; Casimir & Chadefaux, 2007; Dussart, 2014; Gest G & Tixier G, 1986; Grosclaude et al., 2019; Lamargue J. et al., 2016; Lignereux, 2020; Philip, 1995; Plagnet B. et al., 2006; Schmidt J., 1992)

6 THE HETEROGENEITY OF FISCAL SOLUTIONS IN FEDERAL CONSTITUTIONS

A global vision of the European constitutional experiences could not ignore that of the federal constitutions if the new Chilean constitutional configuration adopts its model.

In the experience of the European federal states, the competence in financial and fiscal matters between the federation and the states is always included in the constitutional provision, although it is distributed according to different criteria.

The models vary according to national traditions, the different roles and the legislative force recognized to the federation and the states in the construction and operation of the federal State.

6.1 CONSTITUTIONAL STABILITY AND VARIABILITY OF LEGISLATIVE SOLUTIONS IN FEDERAL AUTONOMY IN BELGIUM

Thus, in the Belgian experience, the constitutional provision guarantees a substantial division of powers in tax matters between the State, the regions and the Community. The Constitution continues to recognize the primacy of legislation to establish State taxes (Art. 170 1. No tax may be established in favor of the State except by virtue of a law). At the same time, the same Constitution entrusts the communities and local entities that participate in the federal structure of the Belgian State with the power to establish, through their own sources, taxes within their competence (Art. 170 2. No tax may be established tax in favor of the Community or the Region, except by virtue of a decree or a rule provided for in Article 134). However, this competence of the regional bodies can be attributed, in accordance with article 39 of the Constitution, by a law that, in turn, defines its scope of application (article 170 3. The law may totally or partially suppress the taxes provided for in the first paragraph).

In Belgium, an asymmetric system of tax powers has thus been created that continues to recognize a prominent role for the central State. At the same time, the Constitution allocates financial resources to federal entities, which, however, have profoundly different powers. In fact, the regions have ownership of some taxes and the share of federal income from personal income tax and VAT. In detail, the fiscal autonomy of the regions is now guaranteed by granting them a third of the personal tax, which becomes, for all intents and purposes, a regional tax. Basically, the State should continue to define this tax based on the amount of income of residents in each Region. The latter, for their part, should receive their share based on the amount of personal tax paid to the State.

The Communities, on the other hand, only benefit from the co-participation in State taxes. In fact, they maintain the financing of teaching expenses, with the allocation of a VAT quota , linked to the objective criterion of the real number of students. In addition, the Communities benefit from a part of the personal tax, calculated according to the principle of just compensation and, therefore, more favorable for the Flemish Community than for the Walloon Community.

Despite this constitutional distribution of financial powers, the Belgian financial system is characterized by an asymmetry of fiscal powers and powers, to which is added regulatory inconsistency. Over time, a succession of legislative solutions has repeatedly changed the financial structure of the regions and of the Community. In particular, they have modified the federal tax quotas, which continue to be a constant in the financing of regions and communities.

It seems difficult for the Chilean Constituent Assembly to decide to adopt the Belgian model. This financial experience reflects the particularities of the history of the formation of the Belgian state as a federal one. In particular, it would be difficult for Chile to adopt a model that would reflect, in financial terms, linguistic, cultural and economic differences such as those that still divide the two Belgian communities, the Walloon and the Flemish. The Belgian experience demonstrates the difference between the constitutional configuration, which seeks to guarantee a symmetrical distribution of regulatory powers in tax matters between the State, the regions and the Community, and its legislative application. The Belgian experience, on the contrary, is characterized by financial solutions that are not stable, since they are periodically subjected to political pressures that modify their reorganization.

It is precisely this inconsistency in the financial forecasts, with which Belgium has continued to apply the distribution of financial powers established by the Constitution, which constitutes the main difficulty for the future Chilean Constitution to be inspired by the Belgian model. This is a difficulty that the Chilean Constituent Assembly should take into account if it decides to adopt a federal model. It would have to be able to reconcile the constitutional

choice of the financial system with the tax enforcement laws. Those who would have to reconcile federal powers with the relative forms of territorial taxation. Those that are useful to combine the fiscal autonomy of the State with the specific territorial location of the fiscal requirements or with the territorial distribution of the financial resources of the Federation (Autenne J., 2006; Couturier JE. & Peeters B., 2004; Henneaut F., 2019; Tiberghien, 2022).

6.2 THE CONSTITUTIONAL STRUCTURE DIVIDED BETWEEN THE FOUNDATION AND THE LANDER DOES NOT GUARANTEE THE STABILITY OF FISCAL OPTIONS IN THE GERMAN FEDERAL EXPERIENCE.

6.2.1 The competence of the Federation in matters of customs duties and monopolies has become European

The German constitutional solution is essentially based on the competition of competences between the Federation and the Lander, since the evolution of the European Charters has reduced the effectiveness of the exclusive competence in matters of customs duties and monopolies that the German Constitution attributes to the Federation (Art.105 (1) The Federation has exclusive legislative competence in matters of customs duties and fiscal monopolies).

In fact, the Charter of Lisbon establishes the exclusive competence of the European Union in matters of customs duties, with a solution that is justified by the elimination, since 1993, of national fiscal frontiers and the application only of the fiscal frontier of the Union.

The same fate, though for different reasons, applies to monopolies. The full affirmation of freedoms in the European space does not allow the maintenance of national monopolies, not even for fiscal purposes.

Therefore, ultimately, the exclusive competence of the German Federation in matters of customs and monopolies has lost the original effectiveness that was constitutionally attributed to it. Now it faces the limits set by the rise of the European order. The one that, with the suppression of national customs, has regulated and continues to regulate European customs regulations, also including the classifications of merchandise and tax rates.

Even more evident is the European effect on the German federal jurisdiction over monopolies. In fact, the primacy of European law has excluded the German Federation, like other European States, from establishing new monopolies within the Union. These national options would be incompatible with the economic freedoms that the European space allows and guarantees.

6.2.2 The difficult relationship between the powers of the Federation and the Netherlands in tax matters

The European weakness of the Federation in the legislative options of customs and monopolies ends up concentrating the legislative relationship between the Federation and the States in matters of competition. However, over the years, this constitutionally guaranteed solution has shown a recurring uncertainty in the definition of the distribution of legislative powers with a direct impact on those in fiscal matters.

The constitutional solution has given individual laws the responsibility to define the functions and effectiveness of this competitive relationship between the Federation and the Lander. In fact, it is expected that:

Article 105 (2) The Federation will have concurrent legislative competence over other taxes if their collection corresponds totally or partially, or if the conditions established in the second paragraph of article 72 are met. Art. (2a) The Länder will have competence to

legislate on local consumption and luxury taxes, as long as they are not analogous to taxes regulated by federal law Art.3 (3) Federal laws relating to taxes whose revenues accrue wholly or partly to the Länder or to the municipalities (or associations of municipalities) will require the approval of the Bundesrat .

This broad distinction is followed by a more detailed list (art. 106) in which legislative competence is specifically divided into fiscal sectors divided between the Federation and the Länder . A textually clear constitutional solution, which, from a financial point of view, divides income tax and business tax revenue in half, while remitting the allocation of volume tax revenue of business to a specific legislative provision (art. 106, para. 3). The amount of taxes on income, on companies and on turnover will be divided between the Federation and the Länder (common taxes), insofar as the amount of income tax is not to be considered as belonging to the municipalities by virtue of section 5. The Federation and the Länder will each be entitled to half the amount of income and company taxes. The share of the Federation and the Länder in the turnover tax is determined by a federal law, which requires the consent of the Bundesrat).

Thus, the Constitution would have had to assign to a shared legislative election the responsibility of distinguishing the areas in which the normative competence of the Federation and of the Länder must be recognized. A law would then have to define the respective responsibilities of both in the application and collection of taxes.

Despite this rational and express constitutional division, the experience of the German application has revealed the difficulty for the Federation and the Lender to find objective criteria to distribute, as provided by the Constitution, the income of the most important taxes. Responsibility has been attributed, at the request of the Constitutional Court, to a federal law that would make it possible to establish the criteria on the basis of which to first decide the allocation of financial resources and then make the calculations. However, the Federation and the Lander have interpreted this responsibility in a primarily political sense. In fact, they first concerned themselves with establishing the calculations and then allocating the financial resources. This made it difficult to achieve a stable and effective financial effect.

Of course, the responsibility of the Federation remains central in the case of taxes whose collection must be shared with the landowners, but also when they must be assigned in full. However, this precludes the adoption of an objectively safer, albeit more radical, solution. That of distributing the main taxes, VAT, personal and business income between the Federation and the Lander with full financial responsibility for the two actors. This would mean that the Lander, whatever the tax assigned to it, would also have to guarantee, with the application, its autonomous control and collection. Only in this way could the Lander assume the complete financial autonomy that such a defined allocation, by fiscal categories, should guarantee. Only in this way would the Federation continue to guarantee the national uniformity of legislation. On the other hand, the EU countries would have to guarantee the full effectiveness of its application in their respective territories.

In conclusion, even the German financial model struggles to establish itself as an example for a future federal option of the new Chilean Constitution. For the latter, it would be difficult to reconcile the legislative centrality of a future Federation with the financial autonomy that would be granted to individual States. This balance depends, in fact, on the political agreements that in the German experience have ended up weighing more in the regulation of the financial effects for the Federation and the Lander than in the positive regulation of the respective fiscal powers.

Therefore, the German experience is a fiscal and financial experience that cannot easily be imported into Chile if it decides to adopt a federal constitution. Alternatively, in the future and conceivable Chilean financial framework, it would be preferable to adopt, like the

German constitutional experience, a division of tax legislative powers. To prevent the protracted difficulties of the Federation and the Lander from reproducing in Chile, it would be advisable to rely on a constitutional law that is in charge of establishing financial and not only legislative relations between the Federation and the States, to ensure clarity and consistency. certainty in the future constitutional options of Chile.

With this more precise competence, it would be easier to establish areas of fiscal regulation intervention with related responsibilities at the different levels of government in the future Chilean Federation. If the resulting tax diversification seems excessive, it could be limited to the rates that each State could adopt for the State taxes applicable in its territory. This choice would still represent a national fiscal responsibility, although within the limits established by a constitutional law (Birk, 2006b; Kruse HW, 1966; Nawiasky, 1982; Tipke, 1973, 2000, 2001, 2002).[1]

7 TOWARDS A SHARED EUROPEAN INTERPRETATIVE SOLUTION

Once the constitutional option of attributing regulatory responsibility for all fiscal discipline to national parliaments has been abandoned, the European solutions formally diverge precisely in the definition of the scope of the necessary parliamentary intervention. This is entrusted to broader financial options, or it is returned only to the fiscal sphere or, more specifically, it is destined to the provision of the constituent elements of the tax, although it is articulated in various ways.

The interpretation of national constitutional courts has focused on constitutional differences. Consistent with the variety of regulatory data, they have operated with respect to different formulations. However, the Courts have endeavored to enhance the role and function of taxation, even when no explicit reference is made to it, as is the case of the Italian and Spanish Constitutions. However, the Courts have been urged to classify the taxes when the constitutional provision is limited to referring to them. However, the Courts have taken care to reconcile the fiscal provision of parliamentary consent with the constitutive elements to which the national charters have explicitly referred. Now, the Courts have assumed the responsibility of reconciling the provision of the substantive discipline of taxes with that of its application, where the constitutional data explicitly unites them.

It is natural, then, that the interpretation responsibility of constitutional courts has differed in national experiences. Its responsibility has been broader when it comes to defining the characteristics of tax benefits in those constitutional letters in which these characteristics have not been mentioned. He has been more specific when he has had to qualify the distinctive features of the taxes that the letters had entrusted exclusively to parliamentary decisions. It has been most consistent when courts have had to reconcile the general qualifying characteristics of the taxes with the broader scope of the reservation of law. This has been done with a different responsibility depending on whether the reservation explicitly touches on the constituent elements of the taxes or also extends to their application. This difference between the different interpretative solutions does not weaken the effectiveness of the constitutional precept, but only affects its extension.

This is a responsibility that the Constitutional Courts have assumed with an interpretative commitment that has been effective. In the name of a unity of taxes to which all the Constitutions refer, this has made it possible to overcome the textual divergences

[1] *Kruse HW, Steuerrecht, Monaco 1966, edizione spagnola Derecho tributario Madrid 1978 a cura di Yebra Matul P. 1978; Naviasky H.,Steuerrechtliche Grundfragen, Monaco 1926, edizione spagnola a cura di Ramallo J.,Cuestiones fundamentales de dercho tributario, Madrid, 1983;*

present in the European Constitutions. Thus, after overcoming the variety of terminological meanings and linguistic differences, tax benefits have been understood in their specific and original meanings, as recognized in European constitutional interpretations. Such is the authoritarian character, referred exclusively to the services of patrimonial content. Such is the non-remunerative nature of the tax. This is the only way to guarantee the original function of the tax: that of ensuring the financing of public spending without any specific advantageous effect for the taxpayer. Therefore, based on these characteristics, the European constitutional experience has made it possible to establish a sufficiently precise dividing line. This is the line that today divides the taxes, thus qualified, from the pecuniary considerations that are used to remunerate the services rendered.

This result is consistent with the constitutional provisions that refer specifically to taxes. On the other hand, the result is more uncertain with those constitutional formulas that either do not mention them, as occurs with the Italian or Spanish Constitutions; or they are accompanied by a broad and general qualification, as is the case with the French. In these cases, then, the relative constitutional experiences have contributed to extending the parliamentary consensus, either to non-specific tax benefits, and therefore for purposes that are not typically financial, as has happened in the Italian and Spanish experiences, or to benefits fiscal, but defined in such a broad way, like those of any nature, that it is difficult to establish with precision the necessary line of demarcation with the benefits of consideration, as in the French experience.

In conclusion, this multiple European experience may allow Chilean constituents to choose between an explicitly tax solution and another more broadly aimed at benefits in which the authoritarian character is not, however, specifically aimed at imposing the financing of public spending. However, in the first case, the one that occurs most frequently in the European experience, it will be up to the Chilean Constitution to decide whether to mention not only the tax but also those characteristics that have been recognized as their own in the European constitutional experience. If the Chilean Constituent Assembly limits itself to pointing out only the tax as the object of necessary parliamentary consensus, then, as has happened in Europe, it will transfer the responsibility of pointing out and, above all, qualifying these characteristics to the Constitutional Court. In the second case, then, the Chilean constituent could propose to explicitly extend parliamentary consent to certain constitutive elements of the tax, or even include assessment or collection procedures.

If the Constituent Assembly prefers to adopt simpler formulas so as not to tax the constitutional provision, but at the same time wants to ensure, from the beginning, more precise characteristics of the tax benefits that require parliamentary consent, it could propose original formulas that would allow the memory of European experiences without burdening the future Chilean constitutional text. The Constituent Commission could, therefore, propose the introduction in the Preamble of the Constitution of an express mention that highlights the nature and function of the legal reserve in tax matters. Or it could foresee, when defining the powers and functions of the Constitutional Court, that in its interpretative function it could take into account the guidelines defined and consolidated in the European constitutional traditions for the principles related to the fiscal sector.

II. FROM PARLIAMENTARY FISCAL RESPONSIBILITY TO FOR PARLIAMENTARY FISCAL RESPONSIBILITY: A PROVISION NOT GENERALIZED IN EUROPEAN CONSTITUTIONS

Summary: 1. A limited provision of the fiscal responsibility of the States in the European Constitutions. 2. The experience of interpretation and application of fiscal responsibility without a constitutional provision: the example of Germany. 3. The interpretive and application experience of fiscal responsibility: the financial responsibility of public spending. 4. The interpretive and application experience of fiscal responsibility: the involvement of taxpayers. 5. The interpretative and application experience of the national constitutional options: the economic parameter of the responsibility of taxpayers in the financing of public spending.

1 LIMITATION OF THE FISCAL RESPONSIBILITY OF THE STATE IN THE EUROPEAN CONSTITUTIONS

Only in some European Constitutions does parliamentary responsibility not stop at legislative decisions on taxation. That is, those by which the elements that characterize taxation are established and on which, subsequently, the legislator makes his decisions to introduce new taxes or modify existing ones.

However, there is a minority of European States that have wanted to make explicit, already in their constitutions, the relationship between the generalized obligation to contribute financially and the relative graduation based on economic availability. These states wanted to assert a legally sound and constitutionally effective limitation from which parliaments cannot escape. A constitutional guarantee that will then correspond to the national courts to enforce in a responsible interpretation and effectiveness.

For the rest, without an express constitutional provision, parliamentary options are freer and, in any case, difficult to judge. Therefore, it will be up to the national courts to firstly identify the constitutional provisions that can support and justify a judgment on the coherence and rationality of the national fiscal options and, then, qualify them to allow a constitutionally founded judgment on the fiscal options adopted by national Parliaments.

2 THE EXPERIENCE OF INTERPRETING AND APPLYING FISCAL RESPONSIBILITY WITHOUT A CONSTITUTIONAL PROVISION: THE EXPERIENCE OF GERMANY

Germany is a significant example of how the lack of an explicit constitutional provision on fiscal responsibility does not preclude the effectiveness of this principle in the national tax system. In fact, the German Constitution does not make explicit reference to the principle of ability to pay, unlike what was established in the Weimar Constitution of 1919 in its article 134.

In Germany, both doctrine and jurisprudence, however, consider that this principle implicitly underlies others that, included in the Constitution, affect in any case the law that regulates the tax relationship. A result, this German, obtained through a broad and deep systematic analysis. This is the one used by the Constitutional Court and the doctrine to elaborate the qualifying features of the principle of taxable capacity, thus deducing it from other constitutionally affirmed principles. In particular, that of equality which, established by article 3 of the German Constitution, in turn guarantees substantial justice and equity. Respect for these principles constitutes, therefore, a limit to the exercise of the tax power of the State. It is a priority guarantee, coherent with the traditional vision of taxation as a limit of the economic resources of the taxpayer. It is a guarantee that serves to graduate the sacrifice of individual property in relation to the public financial needs that the tax burden must always ensure. A necessary guarantee to balance, in the name of substantial justice,

the effectiveness of taxation with social solidarity. This is what inspires the distribution of tax burdens, based on the economic availability of taxpayers, whose ability to pay is both an inspiration and a guarantee.

In the German constitutional experience, therefore, fiscal responsibility acquires a double meaning: on the one hand, it expresses the prohibition for the legislator to proceed in fiscal matters on the basis of broad discretion; on the other, it provides useful elements for the systematic interpretation of constitutional norms, which grant citizens, and therefore taxpayers, fundamental rights (Birk, 2006a; Kirchhof, 2011; Rivista di diritto tributario, 2000; Tipke et al., 2013; Tipke K, 1996; Tipke & Lang, 1994).

Among the options offered to the Chilean Constituent Assembly, one could also include not mentioning the principle of fiscal responsibility in the Constitution, without losing faith in the effectiveness that will be applied to the future fiscal options of the Chilean legislator.

This solution, however, would increase the responsibility of the Chilean Constitutional Court, as in Germany. The Chilean Constitutional Court, with the precise support of scholars, would have a double responsibility: that of identifying the general constitutional principles on which to base the recognition of the principle and that of elaborating the characteristics that should contribute to qualify such a concept of fiscal responsibility. effective and important to control and judge the legislative options. Indeed, such a concept would represent the economic basis of the facts taken as the basis of the different forms of taxation; the general nature of the tax obligation without distinguishing between taxpayers based on territoriality or residence.

However, as an alternative to the lack of constitutional provision, the Chilean Constituent could be offered the solution adopted by a minority of European Constitutions: that of making visible the relationship between the tax liability of taxpayers and the criteria to achieve it. A constitutional trust, this one, useful to make evident the financial relationship on which the same democratic participation of taxpayers is based. That is, the participation in the functioning of the administration and in the achievement of the political, economic and social objectives that a State intends to achieve.

3 THE EXPERIENCE OF INTERPRETING AND APPLYING NATIONAL CONSTITUTIONAL OPTIONS: THE FINANCIAL RESPONSIBILITY OF PUBLIC SPENDING

In the Constitutions that have provided for it, fiscal responsibility acquires a general character. It explicitly covers the need for and purpose of public funding. Both play a critical role in the balance needed to define financial responsibility. In constitutional provisions, this remains general, without specifying the fiscal instruments with which to achieve it. Without even mentioning the tax benefits, which, moreover, are provided for in various ways in the European Constitutions as the object of the legal reserve.

These are constitutional solutions common to the experiences of countries that have adopted this explicit constitutional option. Of course, the formulas adopted vary: now they are expressly intended to finance public spending, as in the Italian Constitution (Art.53 Everyone will contribute to public spending according to their economic capacities through a fair tax system inspired by the principles of equality and progressivity, which in no case will have an expropriatory purpose); in the Greek Constitution (Greek citizens will indistinctly contribute to public spending in proportion to their possibilities).

Now the elections are allocated to the financial needs of the State, as in the Portuguese Constitution (Art.103. - (Tax system) 1. The tax system is intended to satisfy the financial needs of the State and other public entities and fair distribution of income and

wealth). Now, with an even broader formula, justified by what is called common needs, in the new Hungarian Constitution (article XXX 1. Each one contributes to satisfy the needs of the community to the extent of his possibilities and in proportion to his participation In the economy).

The financial purpose, therefore, unites the constitutional options of the different European countries that have chosen to formalize graduated fiscal responsibility according to different parameters. Among them, the most original, which refers to the ability to pay, and other more general ones referring to economic means or consistency with public needs. In fact, the constitutional options link, although with different lexical accents, individual patrimonial responsibilities and public financial needs. A relationship that inspires notional legislative options, thus excluding arbitrary tax solutions because they favor public financial needs without consistency with the financial resources of taxpayers.

The recurrence of the formulas adopted in the European Constitutions can be a useful reference for future Chilean elections. Those with which Chile, like some significant European States, wishes to formalize in its Constitution the financial pact between the State and the taxpayers on the basis of which the financial responsibility of the taxpayers is graduated according to economically justified parameters. Consequently, this excludes fiscal options that, since they are not so proportionate, must be considered arbitrary and, therefore, constitutionally illegitimate.

This interpretation is based on an uninterrupted commitment of the Constitutional Courts in the definition of the objective parameters of the tax liability of taxpayers. Thus, the Italian and Spanish Constitutional Courts have had to combine the original constitutional reference to ability to pay with an effectiveness of tax options that is economically consistent with the fiscal responsibility of taxpayers.

For other States, the constitutional formulas are oriented towards more descriptive solutions, such as the proportion of own means, affirmed by the Greek Constitution. Otherwise, they are based on objectives that can be shared, certainly, but that are indicated in a generic way, such as the fair distribution of wealth, as established by the Portuguese Constitution. On the other hand, they shift the parameter of financial responsibility to a more generic participation in the economy, as in the Hungarian Constitution.

Thus, with a common economic parameter drawn from European experiences, the financial responsibility of taxpayers can be defined by the Chilean Constitution with more or less coherent and effective formulas depending on the European model in which it wants to be inspired. Certainly, for the Chilean Constituent Assembly, adopting the ability to pay would mean preferring a constitutional solution that is more consistent with the financial responsibilities of national taxpayers. However, to be equally effective, the future Chilean election should use the interpretative solutions that Italian and Spanish constitutional jurisprudence have adopted, not without difficulty. Alternatively, the Chilean Constitution could be based on the broader formula derived from the Portuguese experience, establishing a proportion of fiscal options with the fair distribution of wealth. Indeed, it would correspond to the future Chilean legislator to combine the two judgments about the fiscal options that he wishes to adopt: that of the redistributive efficacy of taxed wealth and that of justice that in objective terms should/can guarantee the choice.

Perhaps the Greek solution could be a useful compromise. Providing the financial responsibility of future Chilean taxpayers to their means ratio could ensure an easier and more direct interpretation for future legislative responsibility. The means of the taxpayers to which the Constitution could ask proportion is, in fact, an indication and not a legal category. As such, they could be the minimum guarantee of fiscal responsibility. Certainly, this interpretative flexibility would be accompanied by a greater possibility of political appreciation by Parliament when adopting its tax decisions. In fact, by adopting a non-

technical indication of financial availability, parliamentary options will have to mediate between the wide possibility of defining the financial responsibility of taxpayers and their ability to guarantee its effectiveness.

4 THE EXPERIENCE OF INTERPRETING AND APPLYING NATIONAL CONSTITUTIONAL OPTIONS: THE PARTICIPATION OF TAXPAYERS

The financial responsibility of taxpayers is a common part of the constitutional provisions of the countries that have adopted parameters of responsibility of the subjects involved.

Except for the Greek Constitution, which explicitly refers only to citizens, the constitutions of the other countries unanimously show a preference for general provisions. As such, those that refer to subjects not identified by a specific legal status. The alternation between a general provision, as occurs in the Italian and Spanish Constitutions, which refer to everyone, and the Polish and Hungarian Constitutions, which refer to individuals, does not call into question the result. The common result is to refer to financial responsibility in a subjectively broad and legally undifferentiated way.

In this way, constitutions offer national legislators a wide range of criteria to identify future taxpayers. Of course, the solutions are variable depending on the economically relevant facts, which are taken by the national tax legislation as an expression of the taxable capacity or of the broader responsibility of taxes. However, they always constitute a measure of financial sacrifice and therefore a necessary justification for individual taxation.

The alternative offered by the European experience to future Chilean options is, first of all, legal. It will be a matter of deciding if citizens are only involved in public financial responsibilities or if, on the contrary, a broader and more general provision is used for those responsible for paying taxes.

The solution for citizens, as adopted by Greece, is undoubtedly the most suitable from a legal point of view. As such, it makes it possible to identify with certainty the persons to whom financial responsibility should be attributed, but at the same time limits the constitutional obligation to a limited number of taxpayers. Consequently, it excludes the coherence and reasonableness of tax options that may affect other categories of people who do not enjoy the status of citizens but who, nevertheless, have significant economic and financial resources in the territories of national States.

For this reason, it seems preferable that the Chilean options be based on the general options that the Constitutions of other European countries have adopted and continue to apply. It matters little, in this case, to use the general provision that refers textually to all, as in the Italian and Spanish constitutions, or the specific one that mentions the responsibility of each one, as found in other constitutional texts.

5 THE EXPERIENCE OF INTERPRETING AND APPLYING NATIONAL CONSTITUTIONAL OPTIONS: THE ECONOMIC PARAMETER OF TAXPAYER RESPONSIBILITY IN THE FINANCING OF PUBLIC SPENDING

In national Constitutions, the availability of money naturally arises as a balancing element to legitimize the financial options that are acceptable, as constitutionally legitimate. This constitutional concern is evident in the reference to means and availability found in the Greek and Hungarian Constitutions, respectively. The a-legal formulas used in these national experiences have, in fact, facilitated the interpretation of the constitutional precept, but have made its application more complex. This has increased the responsibility of the Constitutional Courts to find an objectively differentiated criterion that makes it possible to draw up with certainty the constitutionality judgments on the tax options of the national

legislators. These are formulas that, in their concretion, guarantee a well-founded and economically appreciable relevance also in textual expressions.

The choice of interpretation becomes even more complex in the Italian and Spanish Constitutions. These establish as a comparison parameter for financial responsibility an economic category with specific characteristics in comparison with the general provisions, revealed in other constitutional texts. It is about the ability to pay, of which it has not been easy, without the authorized constitutional interpretation, to define the characteristics that qualify a constitutionally innovative category. The tools to make effective that economic availability that guarantees the correspondence with the national financial responsibility. Those functional also to identify both subjective and objective characteristics without which the ability to pay could not have played the essential constitutional role of legitimizing tax options. With the passage of time and the multiplication of new forms of taxation, the Italian and Spanish Constitutional Courts have also exceeded the traditional limit of effectiveness linked to the actuality of the wealth chosen as the object of taxation. In fact, they have proposed a relative expansion, justifying with economic potential the tax options that the national legislator had adopted to broaden the scope of taxation of existing taxes or to justify the introduction of new taxes.

This interpretative solution of the Italian Constitutional Court has been revealed to be consistent with a legislative experience in Europe that has progressively strengthened the discretion in the normative choices of the facts to which to link the tax obligation in accordance with the function of financing public spending.(Casalta Nabais J, 2005; Catarino, J., 1999; De Mita, 1991; Gomes Ns, 1993; Herrera Molina, 1998; Lasarte J., 1990; Moschetti F., 1994; Perez de Ayala Jl., 1979; Pires, M, 1978; Rodríguez Bereijo, 1994; Spagna Escribano F., 1988; Stevanato D, 2019)

With the framework of the different European experiences to define in the Constitution the proportion of the financial responsibilities of the taxpayers, the Chilean Constituent would certainly have an advantage. The options it decides to adopt may consciously take into account the interpretative evolution of the European Constitutional Courts. In this way, the Chilean Constituent Assembly could responsibly adopt the textual solutions used in the European Constitutions, but with awareness of the interpretative or application uncertainties that each of the two options has entailed, but also of the interpretative solutions offered by the Constitutional Courts. Europeans who have dealt with them.

It is therefore up to the Chilean constituent to confirm the objective effectiveness of financial responsibility in the face of the need for public financing: the one that affects the costs of administration and the effectiveness of financial guarantees of social rights. A responsibility that, in turn, must be based on economically qualified characteristics. The European experience thus offered the Chilean constituent the possibility of choosing two broad provisions, both of an objective nature. One, which graduates the tax obligation to a necessary financial relationship, either with the taxpayer's means or with their use. The other is based on a specific category, such as the ability to pay, to adjust the tax rate of taxpayers.

This is an option that Chile could take with clearly greater constitutional certainty than having to force the search for the foundations of the tax liability of taxpayers to a continuous and recurring "critical" liability on the part of the constitutional courts. Those on which to base the control of the conformity of future legislative options in tax matters.

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