NOTES ON THE BRAZILIAN TAX SYSTEM

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I. INTRODUCTION

Any discussion of the principal aspects of the Brazilian tax system requires clarification of certain relevant terms, beginning with the fundamental concept of "the tax system" itself. This term is continually misused, even by tax specialists and in positive law, to refer to what should be called "constitutional apportionment of revenues."[1]

Strictly speaking, a "tax system" is a coherent complex of taxes designed to attain a more or less congruent body of purposes, both fiscal and non-fiscal. Therefore, as Schmöelders warns, a "tax system" does not consist simply in the juxtaposition of taxes, nor merely in allocating various taxes by constitutional rules among diverse taxing powers. Rather it presupposes the integration and coordination of differing taxes within the ambit of a certain politico-juridical framework.[2] This is done by multiple relationships that bind them, either to each other, to the several structures that make up the socio- economic system or to the complex of purposes or values that tax policy intends to implement and that represent the spirit or ultimate cause of the system.

The related concept "constitutional apportionment of revenues," simply denotes a legal structure resulting from constitutional provisions authorizing

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[1] Despite frequent improper use of one expression for the other, the distinction between the two concepts is well established and accepted by the prevailing Brazilian doctrine. The clearest and most precise formulation appears in a highly regarded study by Amilcar Falcão, who points out that "apportionment of revenues is a concept that cannot be confused with a system of taxation. ... A tax system designates the entirety of taxes existing in a State, considered as to their reciprocal relationships, and as to the effects produced, as a whole, upon social and economic life. . . . Quite different ... is the concept of the apportionment of revenues, which means that division or distribution of jurisdiction in tax matters among the federated units, or even among the autonomous entities existing in the so-called unitary regional States." Amilcar Falcão, *Sistema Tributário Brasileiro-Discriminação de Rendas* 26 (Ed. Financeiras: Rio de Janeiro 1965) See also José Afonso da Silva, *Curso de Direito Constitucional Positivo* 600 (Ed. R.T.: São Paulo 5th ed. 1989).

[2] Guenter Schmöelders, *Allgemeine Steuerlehre* 181 (Duncker & Humbolt: Berlin 1958) (Spanish translation: *Teoria general del impuesto* 221 (Ed. de Derecho Financiero: Madrid 1962); See also Sainz de Bujanda, "Estructura jurídica del sistema tributario," in 2 *Hacienda y Derecho* 253 (Inst. de Estudios Políticos: Madrid 1962); Geraldo Ataliba, *Sistema Constitucional Tributário Brasileiro 4 et seq.* (Ed. R.T.: São Paulo 1968).

governmental organs at diverse territorial levels to impose taxes and to regulate them. It is simply a legal allocation or division of taxes, or to be more precise, a constitutional division of the taxing power ("intergovernmental fiscal relations" or "Finanzausgleich"). Hence, constitutional apportionment of revenues is but an *integral part* of a combination of economic, social, political, legal, and fiscal structures within which the tax system is positioned.[3] It is only one (and a peculiarly legal one) of the many structures that make up the tax system. It is pertinent only when it has the institutional support of a certain form of decentralized political organization in which the constitution endows local bodies with authentic *rulemaking autonomy*, that is to say, with their own power to legislate in tax matters. As Falcão has noted, "apportionment of revenues and local autonomy — or, to use the expression preferred by English- speaking writers, local government autonomy — are problems that are interwoven in one context."[4] Even though it is possible to apportion revenues within a complex unitary State (which generally occurs in the so-called regional States) or not to apportion revenues in a federation,[5] "it is within the broad framework of autonomous federated power that the topic of apportionment of revenues most often arises."[6]

AN HISTORICAL SKETCH OF THE BRAZILIAN TAX SYSTEM

The idea of constitutionally dividing the power to tax goes back to the first manifestations of federalist aspirations, when Brazil was still a politically

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[3] "A tax system is composed of the several taxes that every country adopts, according to its forms of production, geographic nature, political form, necessities and even traditions ... . Scientifically, it is not possible to establish a standard or ideal tax system for all countries, or even for one of them. One cannot erase the past, nor disdain political, moral, psychological and even religious factors." Aliomar Baleeiro, *Uma Introdução à Ciência das Finanças* 220 (Rio: Forense 14th ed. 1984, updated by F. B. Novelli).

[4] A. Falcão, *supra* note 1, at 12.

[5] In 1965, Falcão cited the Soviet Union as his only example of a federation without apportionment of revenues, basing his opinion upon not only the text of Article 14(k) of the 1936 Soviet Constitution (Fundamental Law), but also upon numerous references from the most prestigious legal scholars. "This system of centralization," he wrote, referring especially to the Soviet budgetary and fiscal system, "led K. C. Wheare to state that the Soviet regime is financially unitary and not federal. See K. Wheare, *Federal Government* 98 (Oxford Univ. Press 3d ed., 1956). *Cf.* Falcão, *supra* note 1, at 10, text & n. 2. See also Victor Uckmar, *Principi comuni di diritto constituzionale tributario* 90 (Padua 1959).

It appears, however, that the USSR is not — or at least was not in 1965 — as Falcão thought, a "federation without apportionment of revenues" but rather simply a consortium of "fragments of Government" ("Staatsfragmente", in the expression used by G. Jellinek) without *federation*. This is because of the evident incompatibility between the federalist principle and the fundamental principle of "democratic centralization," which makes (or made until then) the USSR a *monocratic power structure*, and, thus, antipluralistic or essentially *antifederalist*. See A. Falcão, *supra* note 1, at 11 and n. 3.

Today the Soviet Constitution of 1977 provides in Article 73, similarly to that of the prior constitution, that "It is incumbent upon the Union of the Soviet Socialist Republics, personified in its highest organs of governmental power and administration... (6) to establish and ratify the sole governmental budget of the USSR and ratify the balance sheet of its application, to direct the sole monetary and credit system, to establish taxes and revenues which make up the governmental budget of the USSR..." *Cf.* 2 *Constituição do Brasil e Constituições Estrangeiras* 938 (Ed. Subsecretaria de Edições Técnicas do Senado Federal: Brasília 1989).

[6] A. Falcão, *supra* note 1, at 19.

centralized unitary State under an imperial regime. In 1834, an "Additional Act" amended the 1824 Constitution of the Empire (1824) in a plainly decentralizing fashion. This Act replaced the General Provincial Councils with Provincial Legislative Assemblies, which were granted a certain legislative autonomy for local matters. In defining the authority of these Provincial Legislative Assemblies, the new law included the power, previously denied to the Provincial Councils, to impose the taxes necessary to meet municipal and provincial expenses. The Act, however, contained no definition of what those taxes would be. The only limitation was expressed in the negative phrase: "so long as these [taxes] do not prejudice the general levies of the State."[7] The following year a statute was enacted that expressly reserved to the Empire no fewer than fifty-eight separate revenue sources, thus practically eliminating all possibilities for provincial taxation. After enactment of this law, the Provinces had available to them only residual taxation, tightly constrained on the one hand by national taxes, and on the other by those which the tradition of local government, inherited from the colonial institutions, had for many years already allocated to the Counties.[8]

Brazil did not establish true constitutional apportionment of tax revenues until the 1891 Constitution came into force. This first Republican Constitution, which created a federal structure with substantial degree of politico-juridical equality and autonomy for member States, for the first time specifically allocated certain taxes to the *exclusive jurisdiction* of the Federal Government (art. 7) or the States (art. 9). It was then up to the States to determine the part that should go to their respective Counties.

Another striking feature of the 1891 Constitution was its provision for a *residual* taxing power in the Federal and State governments. This power permitted either to institute, *concurrently* and even *cumulatively*, taxes other than those specifically designated by the constitutional text (art. 11). The singular importance of this clause to the panorama of our financial history is that only the Federal Government ever made use of the so-called concurrent taxing jurisdiction. Through this clause the Federal Government instituted and incorporated into the federal revenues precisely those levies which, with the passage of time, would become the most important in the Brazilian tax system. In 1891, the Federal Government instituted the consumption tax (imposto de consumo) today the Tax on Industrialized Products (IPI); in 1923, the Income Tax; and in 1924, the Tax on Commercial Sales, later called the Tax on Sales and Consignments, and today the Tax on the Circulation of Merchandise (ICM). As Baleeiro has noted, thanks to

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[7] Law No. 99 of Oct. 31, 1835.

[8] Rubens Gomes de Souza observed: "Thus, the Additional Act was the first attempt carried out in Brazil at what we would today call 'apportionment of revenues'. It was a primitive attempt, for it limited itself to stating that the Provinces could freely institute any taxes not reserved to the Crown. This attempt was betrayed by Law No. 99, which enumerated those reserved taxes." Gomes de Souza, "Sistema tributário federal," 72 R.D.A. 2 (1963) See also Rubens Gomes de Souza, Compêndio de Legislação Tributária 177 et seq. (Resenha Tributária: São Paulo 1975); A. Falcão, *supra* note 1, at 31; A. Baleeiro, *supra* note 3, at 223; A. Baleeiro, *Clínica Fiscal* 198 (Livraria Progresso Editora: Salvador 1958).

concurrent jurisdiction, "The 1930 Revolution found the Federal Government in quiet possession of more than 60% of all collections."[9]

When the 1934 Constitution came into effect, the apportionment of tax revenues was subjected to at least four significant alterations that were eventually definitively incorporated into it. First, the important Tax on Sales and Consignments was placed within the exclusive jurisdiction of the States and has remained there (since 1965 called the ICM). Second, counties were included in the constitutional division of taxes and granted their own taxing power along with the State and Federal Governments. Third, double taxation, previously expressly permitted, was prohibited, with federal taxes given preference over identical state taxes. Fourth, a third form of levy, a special assessment for public works (*contribuição de melhoria*), was introduced into the tax system and differentiated from a tax (*imposto*) and a charge (*taxa*). Like the charge, the assessment could be levied by any of the State taxing entities.

Thus, the scheme of apportionment of tax revenues under the 1934 Constitution was based upon a series of essentially political decisions rather than any scientifically conceived general plan. This scheme, with insignificant changes, was retained in the subsequent Constitutions of 1937 and 1946. Even though rigid apportionment continued under the 1946 Constitution, a marked trend towards financial decentralization also developed, including a hesitant enlargement of the system of revenue sharing.

THE 1965 TAX REFORM

An ambitious tax reform was enacted by the military government that seized power in the so-called 1964 Revolution. For the first time, tax reform was not limited to simple partial formal modifications of the apportionment of revenues. The reform attempted to alter the tax system profoundly and fundamentally, making it an essentially *rational* rather an *historical* system, using the classifying criteria of Schmölders. The Commission charged with preparation of the Reform worked from two fundamental premises. One was "consolidation of taxes with identical natures into unitary taxes, defined with reference to their economic bases, rather than as one of the legal modalities in which they may be clothed." The second was conceiving of the tax system as "integrated into a national economic and legal plan, as replacing the present historical criterion, basically political in origin, of three autonomous co-existing tax systems, federal, state and

[9] A. Baleeiro, *supra* note 3, at 224. With respect to concurrent or residual taxing power, see A. Falcão, *supra* note 1, *passim*, especially at 75; Baleeiro, "Competência Concorrente", entry in 10 *Repertório Enciclopédico do Direito Brasileiro* 117 (Ed. Borsoi: Rio de Janeiro); Gilberto de Ulhôa Canto, "Alguns Problemas da Competência Tributária Concorrente," 3 Temas de Direito Tributário 199 (Ed. Alba: Rio de Janeiro 1964); Gomes de Souza, *supra* note 7, 72 R.D.A. at 6; Antônio Roberto Sampaio Dória, *Discriminação de Competência Impositiva* 61, 79, 91, 133, 205 (São Paulo 1972); Celso Cordeiro Machado, *Limites e Conflitos de Competência Tributária no Sistema Brasileiro* 156 (Belo Horizonte 1968); G. Ataliba, *supra* note 2, at 112.

municipal."[10] This Reform was substantially embodied Constitutional Amendment No. 18 of 1965 to the 1946 Constitution.[11]

The highlights of the 1965 Reform were:

(a) Greater *functionality*, *rationality* and *rigidity in the differentiation of revenues*. This resulted from *definition* in the constitutional text of the *types of levies* (taxes, charges and special assessments for public works), from more rigorous characterization of the different levies so as to correspond to their economic bases, and from the total abolition of residual jurisdiction (unnamed taxes). This last measure eliminated not only the possibility of creating concurrent taxes (even if not cumulative) but also that of simply creating taxes not contemplated by name in the definition of the exclusive jurisdiction of any of the political entities.

(b) Appropriate *centralization of the system*, from both the legal and the economic point of view. This was done by more rigorous coordination of the central and local subsystems through general rules categorized as laws complementary to the Constitution; through transfer to the Federal Government of the power, formerly granted to States and Counties, to impose taxes on exportation and on ownership of rural land; through limitations imposed upon the exercise of the taxing power by States and Counties, by their partial submission to federal norms (complementary laws and resolutions of the Federal Senate); and through granting exclusive power to the Federal Government, by complementary laws in expressly defined exceptional cases, to institute compulsory loans, a financial measure that despite its name was thereby incorporated into the national tax system as a new type of tax, an extraordinary and refundable tribute.

(c) *Determination of taxing jurisdiction* (original taxing power), taking into account goals not exclusively fiscal, and observing non-empirical criteria without economic considerations. Thus, the differentiation of revenues was aimed at: (1) systematic *pursuit of non-fiscal goals*, notably in the areas of levies on foreign trade, rural land and financial transactions; and (2) the *distribution of tax revenues*

[10] Comissão de Reforma do Ministério da Fazenda, Reforma da Discriminação Constitucional de Rendas (Anteprojeto) 6 (Fundação Getúlio Vargas: Rio de Janeiro, Public. No. 6, 1965).

[11] "The 18th Constitutional Amendment represents the culmination of a slowly developing process within the national tax system. Even though some of the prior characteristics of our tax system, such as its rigidity, have been maintained and even intensified, it is also a revolutionary reform in the sense of a profound break from the traditional decentralizing line of development of Brazilian taxation." José Souto Maior Borges, A Reforma do Sistema Tributário Nacional 14 (Imprensa Universitária: Recife 1967).

For discussions of the tax system of the 1965 Reform and those of the 1967 Constitution and the 1969 Amendment, in addition to the already cited works of A. Baleeiro, *supra* note 3; A. Sampaio Dória, *supra* note 9; C. Machado, *supra* note 9; G. Ataliba, *supra* note 2; see, *inter alia*: Manoel Lourenço dos Santos, *O Sistema Tributário Brasileiro e a Emenda Constitucional No. 18* (Ed. Tipografia Mineroa: Fortaleza 1966); Aliomar Baleeiro, *Limitações Constitucionais ao Poder de Tributar* (6th Ed. Forense: Rio de Janeiro 1985, updated by Novelli); Bernardo Ribeiro de Moraes, *Sistema Tributário da Constituição de 1969* (Curso do Direito Tributário, vol. 1) (Ed. R.T.: São Paulo 1973); Pontes de Miranda, *Comentários à Constituição de 1967 com a Emenda No. 1 de 1969* (2d. ed. Ed. R.T.: São Paulo 1973); Ricardo Lobo Torres, "Sistemas Constitucionais Tributários," in 2 Tratado de Direito Tributário Brasileiro (tome II)(Forense: Rio de Janeiro 1986); Roque Antônio Carrazza, *Princípios Constitucionais Tributários e Competência Tributária* (Ed. R.T.: São Paulo 1986).

among distinct categories of political entities, based principally upon their respective functions and duties.

(d) Application of the *value-added* technique to calculation of the IPI and the ICM, thus eliminating the archaic and anti- economic system of cascading taxes imposed on amounts already subjected to tax in preceding transactions.

(e) Institution of a true subsystem of *revenue sharing* compatible with the demands of federal autonomy and with the national nature of the tax system. Revenue sharing was designed to make up more systematically for inequalities and deficiencies arising from the very limitations set up by the division of taxing powers, thus assuring a more effective implementation of the federal principle in one of its principal aspects, that of *financial equilibrium*.[12]

Except for a few changes that never affected its fundamental structure, the tax system instituted by the 1965 Reform was maintained substantially intact by both the 1967 Constitution and Amendment No. 1 of 1969. Nevertheless, three significant changes should be noted.

First was enshrining basic tax principles and regulation of constitutional tax principles in the National Tax Code[13], which subsequently acquired the status of a complementary law. The new constitutional order, accentuating even further the rigidity and the centralized nature of the tax system, expressly required a *complementary law* in order to legislate in derogation of the financial autonomy of political entities on the following matters: general rules of tax law; conflicts of taxing jurisdiction between the Federal Government, the States, the Federal District and the Counties; and regulation of the constitutional limitations of the power to tax.[14]

Second was restoration of *residual taxing power*, now reserved solely to the Federal Government. Thus, the Constitution once again granted, but only to the Federal Government, the power to institute other levies, so long as they were distinguished (in both their taxable event and their basis for calculation) from those belonging to the exclusive jurisdiction of any of the political entities. It further permitted the Federal Government to transfer to the States, the Federal District and the Counties, the exercise of its respective tax power with respect any such taxes that might be established.

(c) Third was providing *in the constitutional text* for a new type of tax, the quasi-fiscal contribution, within the jurisdiction of the federal government. This new contribution is destined specifically pay for the costs of federal services, as a rule institutionally decentralized, stemming from governmental intervention in the economic order, from social security, and for the organization and supervision of occupations.

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[12] Cf. Comissão de Reforma do Ministério da Fazenda, *supra* note 10, at 5.

[13] Law No. 5.172 of Oct. 25, 1966.

[14] Const. of 1967, art. 19 § 1. A complementary law stands above ordinary legislation in the normative hierarchy.

II. THE TAX SYSTEM IN THE 1988 CONSTITUTION

The present Brazilian Constitution was plainly inspired by political and ethical values partially different from, if not wholly opposed to, those prevailing in the fundamental order that it replaced. Contrary to what one would have expected, the Constitution chose not to break nor even discreetly compromise with the model of the 1965 tax system, considered by many as centralized and even authoritarian.[15] Rather it opted for simple and vague retention, if not regression, in relation to that model. Except for the provisions that will be duly noted, the present constitutional tax system generally adheres strictly to the spirit and the system of the Tax Reform of 1965, in its 1967 and 1969 versions. Whenever, because of empiricism or political considerations, it departs from the 1965 Reform, the 1988 Constitution revives defects that the Reform had eliminated. The present system is rarely, if ever, superior to that instituted by the 1965 Reform.

One of the most characteristic traits of the present Constitution is its tendency to broaden the *constitutionalization of public finance*. This trend towards constitutionalizing tax law, manifest already in 1946 and augmented in 1965,[16] reached its height in 1988. Perhaps in no other constitution have financial matters, especially those relating to taxation, been so widely regulated, and in such exaggeratedly minute detail. The chapter covering the National Tax System is a minor tax code that at times, especially in the numerous provisions relating to the ICM, reaches the extreme of including details of a regulatory nature.

Whatever the objective, whatever the philosophy, whatever the political formula that inspires a Constitution, such an exasperating process, with its exaggerated constitutionalization of financial and a fiscal provisions is simply not in harmony with the nature and purpose of a constitution.[17] Besides the risk that

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[15] On the tax system of the 1988 Constitution, see, *inter alia*, Ulhôa Canto, "O sistema tributário nacional," in *A Constituição Brasileira-1988*, at 305 (Ed. Forense Universitária: Rio de Janeiro 1988); Dias de Souza, "Os tributos federais", in *A Constituição Brasileira-1988* at 311; Alcides Jorge Costa, "Os tributos estaduais", in *A Constituição Brasileira-1988*, at 323; Greco, "Os tributos Municipais", in *A Constituição Brasileira- 1988*, at 332; a symposium in the *Rev. de Dir. Tributário* 132 (Ed. R.T.: São Paulo, No. 47, 1989); de Castro Meira, "O sistema tributário na Constituição de 1988: os princípios gerais," Rev. de Informação Legislativa 69 (Federal Senate: Brasília 1989); Reale, "Contribuições sociais, in *Aplicações da Constituição de 1988*, 63 (Ed. Forense: Rio de Janeiro 1990); Ives Gandra da Silva Martins, *O Novo Sistema Tributário* (Ed. Findes-Conjur: Vitoria 1989); Ives Gandra da Silva Martins, Sistema Tributário na Constituição de 1988 (Ed. Saraiva: São Paulo, 2d ed. 1990); Celso Ribeiro Bastos & Ives Gandra da Silva Martins , 6 *Comentários à Constituição do Brasil* (Tome I, arts. 145 a 156) (Ed. Saraiva: São Paulo 1990).

[16] At the time of the 1969 Constitutional Amendment, Aliomar Baleeiro observed that: "The Brazilian Constitution distinguishes itself from others for having dedicated greater space to the rules of Financial Law. Of the some 25,000 words in the 1969 Amendment, approximately 5,000 concern financial provisions." *Direito Tributário Brasileiro* 1 (Ed. Forense: Rio, 10th ed. 1983, updated by F. Novelli). Even earlier, from the first edition of his classic monograph, Limitações Constitucionais ao Poder de Tributar, this eminent public legal scholar had already noted that "No Constitution exceeds the Brazilian, beginning with its 1946 wording, in the zeal with which it reduced taxation principles to legal provisions; no other contains so many express limitations in financial matters." A. Baleeiro, *supra* note 11, at 1.

[17] See the excellent study of M. Reale, "Constituição e totalitarismo normativo," in *Aplicações da Constituição de 1988*, *supra* note 15, at 1, 7.

such normative prolixity will sink into pure verbalism, this approach has the serious drawback of making the system overly rigid (a true "plaster cast") or, on the contrary, of exposing the Constitution to the vicissitudes of consecutive amendments. In addition to over constitutionalizing public finance, the present Constitution's mandatory subjection of broad sectors of tax rulemaking to the specific form of federal *complementary laws* also contributes to the rigidity of the tax system, in prejudice to both ordinary legislation and to state and county autonomy.[18]

In contrast with this reinforced centralization and rigidity of the tax system, it cannot be denied that in other areas the Constitution has conversely encouraged *decentralization and financial autonomy*. This was done partly by *transferring certain taxes that had* previously belonged to the Federal Government to the taxing jurisdiction of the States, the Federal District and the Counties.[19] It was also done by a substantial *increase in the system of sharing of tax revenues*, through which the direct and indirect participation of the States, Federal District and Counties in federal tax revenues has been especially augmented. This occurred most notably in those revenues derived from the IPI, the income tax, the tax on rural land ownership and the tax on operations of credit, foreign exchange and insurance (IOF). The extent of this revenue sharing is striking. The limit of around 50% of the proceeds collected from the first three levies, which represent close to two-thirds of total federal tax collections, is shockingly high.

In contrast to what occurred in the 1965 Reform, the decision to produce substantial financial decentralization by changing the division of taxing jurisdiction and increasing the shares of local governments in federal tax collections was not based on a *rational plan*.[20] Rather it was based on *political designs* and *empiricism*. This is evident in the grave incongruence (whose effects are already making themselves felt) of transferring a considerable sum of resources from the Federal Government to the States and Counties without also transferring the corresponding burdens. Not only did the Constitution maintain the same burdens upon the Federal Government, but also increased them.[21]

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[18] Such is the case, for example, with respect to: the undefined category of the *"general rules"* of tax law (art. 146-III); the institution of compulsory loans (art. 148); the institution of new quasi-fiscal contributions (art. 153-VIII) and residual federal taxes (art. 154-I); the "regulation of jurisdiction" for the imposition of a state tax on property transfer; the extension of local law to facts occurring or persons domiciled or resident abroad (art. 155 § 1-III); the ordering, at an almost regulatory level, of the conditions for the incidence and the exaction of the ICM (art. 155 § 2-XII); and fixing of maximum rates for county taxes on retail sales of fuels and on services of any nature (art. 156 § 4-I).

[19] Examples are: (a) transactions relating to electrical energy, liquid and gas fuels, domestic lubrificants and minerals (art. 155-I (b) and § 3); (b) exportation of semi-manufactured products (art. 155-I (b) and § 2 (X) (a)); (c) providing services of interstate and intercounty transportation and communications (art. 155 (I) (b)); (d) payment to the Federal Government of the income tax on profits, capital gains and earnings (art. 155 -II); and (e) retail sales of liquid and gas fuels, except diesel oil (art. 156-III).

[20] Concerning the problem area of so- called "financial compensation" ("intergovernmental fiscal relations," "Finanzausgleich"), Wilhelm Bickel's work is always current: "La Compensación Financiera", in 2 *Tratado de Finanzas* 445, 448 (W. Gerloff and F. Neumark eds., Spanish translation of the 2d edition from the 1952 German edition, Ed. El Ateneo: Buenos Aires 1961).

[21] "In 1965 and 1966 there was an attempt at planning, based primarily upon economic suppositions

To sum up, our constitutional tax system is a *national system*. It encompasses and integrates in a coherent unity the tax subsystems of the Federal Government, the member States, the Federal District and the Counties. Moreover, this national system is, constitutionally organized, based upon the coexisting relationship between the sovereign central order and the constitutionally autonomous particular orders of the member States, the Federal District and the Counties. This may be seen by:

(a) the Constitution's *granting* to the Federal Government and to local entities of *tax jurisdiction* (original tax power) *strictly allocated "ratione materiae", i.e.*, divided in accordance with the nature and content of the events considered proper for imposition of taxes (*allocation of tax jurisdiction*, arts. 153 to 156);

(b) *the subjection of the exercise of this tax jurisdiction* to a complex of limitations designed to safeguard directly, through application of fundamental principles, certain legally classified interests of persons liable to be taxed (*limitations on the power to tax*, arts. 150 to 152); and

(c) the *transference* from the Federal Government to the member States, and then to the Counties through revenue sharing revenues (arts. 157 to 162).

TYPES OF TAXES

In Brazil, *tax jurisdiction* is granted *only by the Constitution solely to political entities* — to public bodies that are *sovereign* (the Federal Government) or *politically autonomous* (States, the Federal District and Counties). Article 145 of the Constitution provides: "The Federal Government, the States, the Federal District and the Counties may institute the following levies: I — taxes; II — fees, by virtue of the exercise of police power or for actual or potential use of specific and divisible public services rendered to taxpayers or placed at their disposition; III — special assessments for public works. § 1 ... § 2 — Fees shall not have the same basis of calculation as taxes."

Although not defined by the Constitution, the term tribute (*tributo*) as well as its derivations, is used throughout as a designation of the genus to which the various species of tax belong. In the above-cited provision, instead of defining *"tributo"* or referring to the definition given by Article 3 of the National Tax Code (CTN), the Constitution prefers to specify its dimensions by, listing only those

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logically appropriate for Brazil. At that time, taxes without any logical base were eliminated, as were taxes which were superimposed upon each other, and taxes which did not show any taxpaying capacity. Furthermore, the system was restructured with the goal of making it both rational and scientific. In this Constitution, there is an excessive preponderance of politically inspired provisions, which once again places our Tax System more on the side of empiricism than of science. . . For all of this, I remain doubtful when I read that the taxing powers of the Federal Government were pruned, so as to give more to the States and Counties. Moreover, the increased sharing of the federal revenues worries me because there was not, as had been expected, any corresponding transfer to the States and Counties of part of the burdens and duties of the Federal Government. The Federal Government will have many more expenses and many more financial burdens after the new Constitution has been Promulgated." G. Ulhôa Canto, "O Sistema Tributário Nacional," *supra* note 15, at 306.

classes of tribute that the taxing power can impose: the tax, the fee and the special assessment.

Soon, however, through a *complementary law* the Constitution began to allow *exclusively* within the tax jurisdiction of the Federal Government, the institution of (a) *compulsory loans*, (in cases specifically provided for Article 148) and (b) *social contributions, assessments for intervention in the economy* and *in the interest of professional or economic categories* (usually called *quasi-fiscal assessments*) (art. 149).

Even though not included in the classification of Article 145, the compulsory loan and the quasi-fiscal assessment are undoubtedly tributes. This is because the Constitution itself has *incorporated them into the tax system*,[22] and they have the *nature of taxes*. Thus they are properly considered to be within the *legal concept of taxation* (CTN, art. 3). Like taxes, they belong to the class of pecuniary obligations imposed by law that are not sanctions for illegal acts but are owed whenever the event to which the law itself directly links the obligation to pay occurs. Consequently they are *subject*, with a few immaterial exceptions, *to the fundamental legal tax regime*.

Although these exactions are really taxes, nevertheless the Constitution did not specifically refer to them in Article 145 because they do not constitute distinct types of taxes differentiating them from the three types set out therein. The feature that characterizes each type of tax, or to use the formula of Article 4 of the CTN that which determines its *specific legal nature*, is solely the taxable event whose occurrence guarantees the respective legal obligation. One cannot see any real distinction between the taxable events of compulsory loans and quasi-fiscal assessments on the one hand, and taxes and fees on the other. In fact, the former are in substance reducible to either taxes or fees. Special taxes or special fees, by

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[22] Inclusion of compulsory loans into the constitutional tax system stems from the Tax Reform of 1965. Article 4 of the 18th Constitutional Amendment of 1965 — which was included among the general provisions relating to the national tax system arising out of that Reform — provided: "Only the Federal Government may institute: ....II — compulsory loans, in special cases defined by a complementary law, to which all constitutional provisions relating to taxes and all general rules of tax law shall be applicable." Some legal scholars, basing their opinion on an inconsistent argument, according to which the cited 1969 Amendment had in reality distinguished between compulsory loans *instituted in exceptional cases* (those of Article 18, § 3) and compulsory loans *instituted in special cases defined in a complementary law* (those of Article 21, § 2 (II), maintained that since only the latter were in the nature of taxes, only they were subject to the constitutional limitations on the power to tax. However, this point of view never prevailed among legal scholars, and especially not in the case law, where the contrary opinion eventually won out. It is now agreed that compulsory loans are subject to all those limitations save the rule of anteriority, by reason of the exceptional character and therefore urgency of the imposition." *Cf.* Extraordinary Appeal No. 111.954 of the Federal Supreme Court, Justice Oscar Corrêa (Reporter) (June 1, 1988), 173 *R.D.A.* 67 (1988).

Quasi-fiscal contributions were incorporated into the *constitutional* tax system through Article 21, § 2-I of the 1969 Constitutional Amendment, which provided: "The Federal Government may institute: I — contributions...aimed at intervention in the economic domain and the interest of social security or occupational categories." Later, Constitutional Amendment 8 of 1977 eliminated from the cited provision the reference to designated *social* contributions and included these in the list of matters within the legislative competence of the National Congress. For such purpose, it added item X to Article 43 of the 1969 Amendment. The change was patently designed to exclude such contributions from the tax system, and therefore, indirectly, from the legal regime appropriate for taxes. But the present Constitution rightly reincorporated these contributions into the tax system.

virtue of certain peculiarities in their legal structure, are subjected: (1) to a specific legal destination, direct or eventual (refund, in the case of loans; allocation to special purposes committed to indirect administrative entities in the case of assessments); and (2) to the "delegation" of the corresponding complementary taxing power (levying, collection and supervision) to those indirect administrative agencies destined to receive the linked revenues (in the case of the quasi-fiscal contributions).[23]

Given their basic structure as the presupposition for tax obligations, the taxable events for compulsory loans and quasi- fiscal assessments are identical to those that the law generically defines as proper for taxes and fees. There is no way one can avoid recognizing them for what they essentially are: *taxes* or *fees*. The complementary law itself considers irrelevant, for the purpose of determining their specific legal nature as taxes, the peculiarities of their legal regime.[24] These are merely formal: *inter alia*, the special *destination* and the *"delegation" of the respective taxing power*. In summary, these characteristics and this particular legal regime to which we referred surely mean that such public receipts are not *simply* taxes or fees, but rather *compulsory loans or quasi-fiscal assessments*. These characteristics, however, are not sufficient to make them types of taxes distinct from those enumerated in Article 145 of the Constitution enumerates.

CONSTITUTIONAL LIMITATIONS ON THE TAXING POWER

Adhering to a tradition that dates back to the origins of our constitutionalism, the 1988 Constitution subjects exercise of *original taxing power* to the *institutional limits* inherent in the system and arising from the fundamental principles it adopted, as well as to a series of *specific limitations* properly designated as *constitutional limitations on the power to tax*. Such limitations consist of *prohibitions* or *restrictions* — that is to say, in *duties to abstain* — which the Federal Constitution itself sets up directly, in order to safeguard certain *fundamental rights* (liberty, equality, security, property, etc). Thus, the true meaning of these limitations can only be properly determined by reference to the same fundamental rights whose exercise they are designed to *guarantee*.

According to Aliomar Baleeiro, since 1946, no Constitution has surpassed those of Brazil in the effort spent to convert political and doctrinal principles fundamental to taxation into juridical propositions. "No other [Constitution] contains so many express limitations in financial matters."[25]

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[23] Among Brazilian scholars, see A. Baleeiro, *supra* note 3, at 271. For foreign scholars, among many, see Lello Gangemi, 1 *Finanza Pubblica* 308 (Ed. Liguori: Naples 1965).

[24] CTN, art. 4 (I) and (II).

[25] For prior constitutions, see A. Baleeiro, *supra* note 11, at 1. For material on constitutional limitations on the power to tax, see A. Baleeiro, *O Direito Tributário da Constituição* 87 (Rio: Ed. Financeiras 1959); 2 Pontes de Miranda, *supra* note 10, at 396; Ylves José de Miranda Guimarães, *Os Princípios e Normas Constitucionais Tributários* (Ed. LTR-EDUSP: São Paulo 1976); A. Sampaio Doria, *Direito Constitucional Tributário e "Due Process of Law"* (Ed. Forense: Rio de Janeiro 1986).

With respect to the 1988 Constitution, see Hugo de Brito Machado, *Os Princípios Jurídicos da*

Paraphrasing Baleeiro, none of the previous Brazilian Constitutions instituted as many express limitations and conferred so many fundamental guarantees in financial matters as the 1988 Constitution. In contradistinction to prior charters, the present Constitution dedicates an entire section exclusively to the limitations on the power to tax.[26] Even so, not all such limitations are included within that section. Both in Section I, which deals with general principles of the tax system, as well as in Sections III and IV, which set forth exclusive taxing jurisdiction, the Constitution imposes other limitations, principally those *specific* to certain taxes. Moreover, the Constitution explicitly states that limitations, being guarantees, are not restricted to those that are formally expressed.[27]

(a) Among the *generic* tax limitations specifically designated under Section II, the most important is the *legality* principle (*nullum tributum sine lege*) articulated in Article 150 (I): "Without prejudice to other guarantees assured the taxpayer, the Federal Government, the States, the Federal District and the Counties are prohibited from: I — exacting or increasing a tax without a law that so determines". Strictly speaking, this principle establishes the fundamental rule of an *absolute requirement of a law* in tax matters. No taxing entity may impose or *increase a tax* without a law, which means, through an appropriate *normative act* by which the Federal Constitution (or, in their respective cases, a State Constitution or Organic Law) grants the *force of law*. Unless otherwise indicated, the form will be that of an *ordinary* law (art. 59-III to V) for a tax, fee or an assessment, and a *complementary* law (art. 59-II) for a compulsory loan (art. 148), a quasi-fiscal assessment (art.149) or a tax instituted by virtue of residual jurisdiction (art. 154-I). The *absolute* requirement of a law in tax matters means that the institution or increase of a tax must be *directly and immediately determined by the law itself.* This excludes the possibility that an exaction or an increase can be carried out in an indirect fashion through an administrative act, even if it is rulemaking in nature and promulgated "by virtue of" or "based upon" a law. It also means that any tax being imposed must be *differentiated by the law that* establishes it through rigorous definition of its "essential elements".[28]

The Constitution's requirement of a formal law to impose a tax (art. 150-I) permits no exceptions, even for extraordinary tributes like a compulsory loan for a public calamity (art. 148- I) or an extraordinary tax for a foreign war (art. 154-II). In these cases, where the extreme urgency of the fiscal measure may be presumed,

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Tributação na Constituição de 1988 (Ed. R. T.: São Paulo 1989); I.G. Martins, *Sistema Tributário na Constituição de 1988, supra* note 15, at 128.

[26] Const. of 1988, Title VI, Chap. I, Sect. II.

[27] *Id.*, art. 5 § 2 and art. 150.

[28] This means the tax laws must rigorously specify those elements indispensable to the creation and the consequent imposition of the corresponding tax obligation, *i.e.*: the factual event or hypothetical situation that identifies the tax, the taxable event, the taxpayer, the basis for calculation and rate. Cf. A. Baleeiro, *supra* note 11 at 27, 267; Amilcar A. Falcão, *Fato Gerador da Obrigação Tributário* 37 (Ed. R.T.: São Paulo 2d ed. 1971); Geraldo Ataliba, *Hipótese de Incidência Tributária*, 78 (Ed. R.T.: São Paulo 2d ed. 1975); Alberto Xavier, *Os Princípios da Legalidade e da Tipicidade da Tributação* 72 (Ed. R.T.: São Paulo 1978).

the levy must be instituted through a *legislative act* — that is, a rule-making act with the force of law — probably by a Provisional Measure (art. 62). This principle, however, does have an exception that permits the Executive Branch to increase or to decrease by administrative act the percentage rate used to calculate the taxes on imports, exports, industrialized products and financial operations.

In the context of a tax system in a Democratic State under the rule of law, the principle of tax legality assumes a significance and a reach much broader than might appear at first glance. First, because the principle of tax legality, which is essentially a special form of the principle of *administrative legality*,[29] is not achieved simply by the absolute constitutional requirement of a prior law. Two other, complementary forms are also required: (a) the *generic legal requirement* of Article 5 (II), with respect to "obligations" (*rectius*: secondary or instrumental duties) on tax laws, distinct from the primary tax obligation itself; and (b) the *pre-eminence or preference of the law*, based upon legal provisions that are essentially constitutional,[30] governs all related administrative activity in tax matters.

Second, because other constitutional tax principles, even though formally autonomous (in the sense they are formulated separately from that of legality, and properly classified by both positive law and legal scholars as *distinct limitations* upon the power to tax, are formally or materially connected with the principles of legality.[31]

The first principles connected to legality deal with the *"temporal characteristics* that must distinguish them as taxing laws."[32] These three principles basically safeguard the fundamental right to *juridical security*, in that they predetermine the temporal ambit of the validity of the norms imposing taxes. The first principle is that of *non-retroactivity*. The Constitution prohibits levying any tax when the taxable event occurred prior to the law's taking effect.[33] The second principle is that of *anteriority*, which (except for taxes on importation, exportation, industrial products and financial transactions, as well as extraordinary war taxes and compulsory loans)[34] prohibits the tax law from exacting any: (i) tax within the

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[29] Cf. Heinrich W. Kruse, "Gesetzmaessige Verwaltung, Tatbestandsmaessige Besteuerung", in *Von Rechtsschutz im Steuerrecht*, at 100 (Duesseldorf 1960); Kruse, "Steuerrecht", vol. I, *Allgemeiner Teil*, (2d ed. Munich 1969). In the first of the cited works Kruse invokes, on this point, the opinion of O. Buehler, for whom the principle of tax legality, in its strict acceptance as taxation suitable to the taxable event, represents a reinforcement or a heightening (*"Steigerung"*) of the principle of administrative legality.

On the characteristics of the principle of legality in tax law, see A. Xavier, *supra* note 28, at 13; A. Falcão, *supra* note 28, at 35; F. B. Novelli, "Segurança dos direitos individuais e tributação," *Rev. de Dir. Tributário* 166 (Ed. R.T. Nos. 25/26 1963).

[30] Law of Introduction to the Civil Code, art. 2 *caput* and §1, and art. 4.

[31] The affirmation, as respecting the principles of annuality, anteriority and non-retroactivity, is by Alberto Xavier, *supra* note 28, at 3.

[32] *Id.*

[33] Const. of 1988, art. 5 (XXXVI) and art. 150 (III) (a).

[34] *Id.*, at art. 148 (I) & (II) and art. 150 § 1.

same fiscal year in which the law instituting it or increasing it has been published; or (ii) any social assessment within the ninety days following the publication of the law that instituted or modified it.[35] Third is the principle of *annuality*, which subordinates the validity of substantive tax law, in any given fiscal year (except the year immediately following that in which the tax was instituted or augmented) to the requirement that it be included in the annual budget.[36]

The remaining principles connected with legality concern the *fairness of taxation*.[37] The various specific constitutional limitations through which such principles are accomplished[38] can all be reduced to the fundamental principle of *taxpaying capacity* contained in Article 145 § 1.[39] By limiting the legal duty to participate in the sharing of public burdens to one's economic capacity, this limitation represents both the *substantive limit* as well as the appropriate *object* of tax qualification. This principle basically acts in two ways as a rulemaking requirement: (a) through the law's *qualification* of a certain economic fact as the *taxable event of the tax obligation*, a qualification which, given its constitutional legitimacy, *per se* presumes the absolute capacity to pay taxes; and (b) through the *prior definition of the conditions and criteria* necessary to the eventual concrete *determination* of the obligations in question, especially those of a subjective and quantitative nature.

(c) The broad framework of limitations on the power to tax includes still others, whose task is to safeguard, in the face of the taxing power, fundamental rights and values other than juridical security and equality. These other limitations — among which the so-called *tax immunities* stand out — are designed to assure regular exercise of certain essential and fundamental liberties, such as the inviolability of the institutional autonomy of governmental entities and the full development of the federal principle that serves as their support. Among these other limitations, we should mention at least the following:

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[35] *Id.*, arts. 150 (III) (b), art. 149, and 195 § 6. Cf. Novelli, "Anualidade e anterioridade na constituição de 1988," 62 (ed. R.T 51, 1990).

[36] *Id.*, art. 150 (III) (b). *Contra, id.* art. 165 § 8; art 150, *caput* and art. 5 § 2; Law No. 4320 of Mar. 17, 1964, arts. 2, 3, 6 and 51, insofar as this law has not been revoked. *Cf.* Novelli, "O princípio da anualidade tributária," 137 *R.D.A.* at 30 (1979) and 267 *Rev. Forense* at 89 (1979); Novelli, *supra* note 35.

[37] A. Xavier, *supra* note 28, at 74, 77.

[38] *Id.* Const. of 1988, art. 150 (I): prohibition of unequal treatment among taxpayers; art 150 (IV): prohibition of confiscatory taxation; art. 153 § 2 (I): generality.

[39] Article 145 § 1 provides: "Whenever possible, taxes shall be personal and shall vary with the economic capacity of the taxpayer. To make these objectives effective, the tax administration may identify the patrimony, income and economic activities of the taxpayer, respecting individual rights and the terms of the law."

See, in this respect, E. Botallo, *supra* note 13, at 234; I. G. Martins, Sistema Tributário da Constituição de 1988, *supra* note 15, at 74; I. G. Martins, Comentários à Constituição de 1988, *supra* note 15, at 57; S. Coêlho, *supra* note 15, at 90; H. Machado, *supra* note 25, at 39 ; Meira, *supra* note 15, at 76.

Prior writings include A. Baleeiro, *supra* note 11, at 254; R. Torres, *supra* note 11, at 189; José Marcos Domingues de Oliveira, *Capacidade Contributiva: Conteúdo e Eficácia do Princípio* (Ed. Renovar: Rio de Janeiro 1988).

(1) Those prohibiting limitations or obstacles upon the *movement of persons or goods*, by means of interstate or intercounty taxes, except for the collection of tolls (reincorporated into the tax system as fees) for the use of highways maintained (directly or indirectly) by the Government (art. 150-V);

(2) "Reciprocal immunity", designed to safeguard the *political and financial autonomy* of the varying spheres of government within the federal system. This principle prohibits the Federal Government, the States, the Federal District and Counties from levying taxes on the patrimony, revenue or services of each other (art. 150-VI (a)). The prohibition extends to autarchies and foundations instituted and maintained by the Government with respect to the patrimony, income and services linked, directly or indirectly, to the achievement of their respective institutional purposes (art. 150 § 2). *Per contra*, the above-mentioned prohibitions do not extend: (i) to *fees* and *assessments*, even though the latter may only be imposed, under the relevant legislation, upon privately-owned real estate; or (ii) to the patrimony, income and services related to the conduct of economic activities governed by rules that apply to private ventures, or where legal consideration is given or a price or tariff is paid by the user, thus encompassing not only government-owned companies, "mixed economy" companies, and concessionaires of public services, but also those services or industrial or commercial establishments that may be operated by the public administration (art. 150 § 3);[40]

(3) Principles designed to safeguard the exercise of religious, political, professional, educational, cultural, charitable or journalistic activities, by prohibiting taxation of places of worship of any sect, as well as on the patrimony, income or services or *political parties*, of *labor union entities*, of not-for-profit *educational* and *social assistance institutions*, as well as, *books*, *newspapers*, *magazines and the paper* used in their printing. These prohibitions, however, only protect the patrimony, income and services related to the essential purposes of the above-mentioned entities.[41]

(4) Those designed to protect the *political and economic unity* of the federal system, as well as that of the *equality of the entities* of which it consists. These principles prohibit the Federal Government from instituting a tax that is not uniform throughout the entire country, or that implies a distinction or preference for one State, the Federal District or a County to the detriment of another. Fiscal incentives, however, may be granted to promote balance in socio-economic development among different regions of the Country. They also prohibit the Federal Government from taxing income from bonds of the States, the Federal District and the Counties, as well as the remuneration and earnings of their

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[40] On reciprocal tax immunity in the 1988 Constitution, *cf.* I.G. Martins, Comentários à Constituição do Brasil, *supra* note 15, at 170; S. Coêlho, *supra* note 15, at 339.

The finest exposition on the topic of reciprocal immunity in our constitutional tax law is still that of A. Baleeiro, *supra* note 11, at 75-139. Even though dealing with earlier law, Chapter III of Baleeiro's work is an indispensable reference source, on the one hand, for the amplitude and the security of the historical and comparative law information provided, and on the other, because the present Constitution made only a few changes of limited importance.

[41] Const. of 1988, art. 150 (VI), (b), (c), (d), and § 4.

respective public agents, at higher levels than those fixed for its own obligations and agents (art. 151-I and II).

(5) Those designed to avoid regional or local discrimination prejudicial to the national economic interest or to the integrated and balanced development of the different regions or political units, by prohibiting the States, the Federal District and the Counties from establishing tax differentials between goods and services of any nature because of their origin or destination (art. 152).

TYPES OF TAXING JURISDICTION

Apportionment of revenues is among the most significant constitutional questions in the tax system of a federated State. The way in which it is resolved affects the dimensions and structure of political power and the economic and financial autonomy of federal and local governments. Beginning with the definitive installation of the Federation in 1891, our constitutional law reserved a privileged place for the apportionment of tax jurisdictions. The growing tendency has been that of a rigorous division of taxes, basically using the technique of the nominal designation of taxes.

The Constitution basically distinguishes between two classes of tax jurisdiction: *joint* and *exclusive*. The fundamental criterion for this distinction lies in the taxable event itself, which determines the specific legal nature of the levy.

With respect to fees and assessments, tax jurisdiction is an extension of the administrative or of the judicial powers granted to political entities. The capacity to impose, regulate, and to collect fees and special assessments is substantively determined by an underlying ability to provide the service or to carry out that activity or public work that the law characterizes as a necessary aspect for tax incidence. Therefore, the power to levy fees and assessments is *joint*, and may be *concurrently* or even *cumulatively* exercised by the Federal Government, the States, the Federal District and the Counties, so long as each of them carries out the activity to which the law has linked the imposition of the tax.

Jurisdiction is *exclusive* as to the imposition and regulation of the remaining levies — taxes, quasi-fiscal contributions and compulsory loans. This is either because the Constitution itself, regardless of the specific nature of the levy, expressly makes this determination, as is the case with compulsory loans (art. 148) and quasi-fiscal contributions (art. 149), or because the Constitution chose to grant the power to impose certain levies exclusively to a specific governmental unit even though the taxable event is not connected to any specific governmental activity related to the taxpayer.

The following levies are within the field of exclusive jurisdiction:

(a) *the Federal Government*: (i) the ordinary taxes listed by name in Article 153; (ii) residual taxes (art. 154-I); (iii) extraordinary war taxes (art. 154-II); (iv) compulsory loans (art. 148); (v) quasi-fiscal contributions (art. 149); and (vi) in federal territories, state taxes and municipal taxes if the territory has not been divided into Counties (art. 147).

(b) *the States*: the taxes listed by name in Article 155.

(c) *the Federal District*: the taxes listed by name in Articles 155 and 156 (see art. 147, *in fine*).

(d) *the Counties*: the taxes listed by name in Article 156.

JOINT TAXING JURISDICTION

Jurisdiction is joint for levying *fees and special assessments for public works*. Fees are the only type of levy defined in the Constitution itself, a peculiarity of Brazilian constitutional law, dating back to the Tax Reform of 1965 and continued in the 1988 Constitution. Constitutionally defining the taxable events of fees has at least two purposes. The *first* is to confer a constitutional base upon the levying of fees that does not correspond to the "rendering of service" (and therefore the providing of an advantage or benefit to the taxpayer), as is the case with some of these which are exacted "by virtue of the exercise of the police power." The *second* is to abate abusive practices, principally by certain local governments that, under the label of "fees", either exact additional taxes or try to hide the improper expropriation of taxes for which other entities had exclusive jurisdiction. The more or less disguised violations of the above-mentioned constitutional concept of the apportionment of revenues were, as a rule, quite simplistic. They have occasioned numerous judicial decisions, in which these false fees were declared unconstitutional.[42] The present Constitution determines that the Federal Government, the States, the Federal District and the Counties may levy fees, "by virtue of the exercise of police power or for actual or potential use of specific and divisible public services rendered to taxpayers or placed at their disposition" (art. 145-II), adding that "fees may not have the same basis of calculation as taxes" (art. 145 § 2).

A complementary law (CTN arts. 78-9) defines the concepts of "police power" and "actual or potential use" and the "specific" and "divisible" nature of public services, as these phrases are used in constitutional provisions.[43]

Under Article 145, the other levy in which jurisdiction is joint is the *special assessment for public works*. Although in some important respects it is similar to a tax, and in others to a fee, the assessment is not to be confused with either. The assessment has certain features related to its taxable event that give it a specific legal nature, and thus make it a separate levy distinct from the others. Although placing it in the midst of provisions on the social and economic order, the 1934 Constitution (art. 124) introduced the assessment into the constitutional tax system as a third type of exaction. Like a fee, the assessment could be levied and collected

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[42] *Cf.* A. Baleeiro, *supra* note 11, at 196.

[43] On fees in the 1988 Constitution, see Ataliba, "Taxas e preços no novo texto constitucional," in *Rev. Dir. Tributário* 142 (No. 47, 1989); I.G. Martins, *supra* note 15, at 62; C. Bastos & I.G. Martins, *Comentários à Constituição do Brasil, supra* note 15, at 43; Coêlho, *supra* note 15, at 44.

Earlier legal writing includes, *inter alii*, Bernardo Ribeiro de Moraes, *Doutrina e Prática das Taxas* (Ed. R.T.: São Paulo 1976); A. Theodoro Nascimento, *Preços, Taxas e Parafiscalidade*, vol. III of *Tratado de Direito Tributário Brasileiro* (Ed. Forense: Rio de Janeiro 1977); I.G. Martins (coord.), *Taxa e Preço Público*, Caderno de Pesquisas Tributárias No. 10, (Ed. Resenha Tributária: São Paulo 1985).

by any taxing entity that had carried out the *public work* and caused an *increase in the value of real property*. The 1946 Constitution sought to differentiate the assessment from the fee; therefore, it conceptualized the assessment as a new form of levy, giving it very precise boundaries (art. 30). The 18th Constitutional Amendment of 1965 defined the concept more rigorously, stating in Article 19: "The Federal Government, the States, the Federal District and the Counties, within the scope of their respective powers, shall have jurisdiction to levy assessments to cover the cost of public works that result in appreciated real property values, having as an overall limit the expense incurred and as an individual limit the additional value that the work adds to each benefited property."

This conceptualization, which has been subjected to successive unrelated amendments,[44] has practically disappeared from the present Constitution. Article 145 (III) simply grants jurisdiction to the Federal Government, the States, the Federal District and the Counties to institute "assessments for public works." Although it lacks technical precision, this provision does fulfill its basic function of granting jurisdiction. As a rule the determination of the concept of a tax, the definition of its respective taxable event, and the normative provisions of generic and specific quantitative limits upon the corresponding obligation are not proper subjects for constitutional rulemaking. Rather, as the Constitution itself makes clear in Article 146 (III) (a), they are matters for a complementary tax law. Decree-Law No. 195 of February 24, 1967, is still such a law. In the absence of any true incompatibility between its provisions on assessments and those of the supervening constitutional ordering thereof, Law No. 195, as a "complementary law", was received by the present Constitution under the fundamental principle of the continuity of the legal system.[45]

EXCLUSIVE JURISDICTION

Exclusive jurisdiction is particularly important to the Federal Government, which, unlike other infra-governmental political entities, receives from the Constitution the power to institute taxes along with the other two types of levies mentioned. The levies which are usually classified as *ordinary*, to wit: *nominally designated taxes* (art. 153); *residual taxes* (art. 154-I) and *quasi-fiscal contributions* (art. 149), stand out among such federal levies, either by their importance as sources of revenue, or by their significant role in the political economy.

ORDINARY DENOMINATED FEDERAL TAXES

Article 153 provides that the Federal Government may levy taxes upon: I — importation of foreign products; II — exportation of domestic or nationalized products; III — income and benefits of any nature; IV — industrialized products; V — credit transactions, foreign exchange operations, insurance or transactions

[44] Const. of 1967, art. 19 (III); Const. of 1969, art. 18 (II); Amendment 23 of 1983.

[45] Minutes of the Transitional Constitutional Provision, art. 34 § 5.

relating to negotiable instruments or securities; VI — ownership of rural property; VII — large fortunes. The listed taxes — except for that on large fortunes, which has still not been regulated by a complementary law — were already integral parts of the tax system prior to the present Constitution. Therefore, their essential elements (taxable event, basis of calculation and taxpayer) are defined by the National Tax Code. These definitions continue to be valid and applicable unless expressly or implicitly amended.

The duties on foreign trade (*importation and exportation*, CTN arts. 19-28) are indirect taxes that today have less significance as producers of revenue, even though the former still is an important revenue source. The regulatory function of such duties predominates, insofar as they are basically subordinate to the objectives of exchange policy and foreign trade. Therefore, the Constitution allows the Executive Branch, as an exception to the principles of the absolute requirement of a law (art. 150-I) and of anteriority (art. 150- III (b)), to make changes in their percentage rates effective immediately (art. 150 § 1), under terms and conditions established by law (art. 153 § 1).

The *income tax* (art. 153-III; CTN arts. 43-45) is the most important tax in the entire tax system, both in terms of revenue production and as an instrument of fiscal policy. The Constitution eliminated a clause that had previously excluded from tax "expense accounts and per diems paid from public funds, in the form of the law" (1969 Amendment, art. 21-IV), which represented an undeniable restriction upon its generality. This exclusion and the improper extension of the concept of "expense account" had allowed a substantial part of the remuneration of high level government officials to be exempted from taxation. Not only has the present Constitution eliminated this exception and expressly prohibited any unequal tax treatment of taxpayers by reason of professional occupation or function without regard to the legal designation of the income (art. 150-II), but it also specifically provides that the income tax "shall be guided by the criteria of generality, universality and progressivity, in the form of the law" (art. 153 § 2 — I).

The income tax is a personal, direct and progressive tax. The CTN (art. 43) defines the taxable event as "the acquisition of legal or economic availability: I — of income, being the product of capital, labor or a combination of both; II — of gains of any nature, being increases in patrimony not comprehended within the previous item." Incorporating a long- standing provision of ordinary law, the Constitution exempts from tax, under the terms and conditions fixed by law, income received from retirement and pensions paid as social security benefits to persons over sixty-five whose total income consists exclusively of earnings from labor (art. 153 § 2-II).

The *tax on industrialized products* (IPI) (art. 153-IV; CTN arts. 46-51) is the second most important federal tax. It is an indirect tax imposed upon the turnover of industrialized products. The Constitution requires that it be: (a) *selective*, as a function of the essential nature of the product; (b) *non-cumulative*, with the tax owned on each transaction being offset by the amount charged on the previous transactions; and (c) *not imposed* on industrialized products destined for *export* (art. 153 § 3 — I through III). The CTN (art. 46) defines the taxable events of the IPI as: I — customs clearance, when coming from abroad; II — dispatch from the business establishment of an importer, industrial, commercial firm or court auction firm; III — public sale, when seized or abandoned and sold at public auction. The

cited article also provides that a product will be considered industrialized when it has been subjected to any operation that modifies its nature or purpose, or which perfects it for consumption. Moreover, the tax regulations define the concept of industrialization. Unlike other taxes, the Executive may change the percentage rates with immediate effect (art. 150 § 1), under terms and conditions fixed by statute (art. 153 § 1).

The *tax on credit, exchange and insurance transactions, or relating to securities* (IOF) (art. 153-V; CTN arts. 63-67) is also an indirect tax. After the 1965 Reform, the IOF replaced the former tax on acts and instruments regulated by federal law, generally known as the stamp tax. Like the IPI and the duties on foreign trade, the IOF has an important regulatory function, particularly as an instrument of monetary policy. Therefore the Constitution permits the Executive to make immediately effective (art. 150 § 1) changes in the percentage rates of this tax, under terms and conditions fixed by statute (art. 153 § 1). The taxable event of the IOF is defined by Article 63 of the CTN.

The *tax on rural property ownership* (ITR) (art. 153-VI; CTN arts. 29-31) is a tax on patrimony. Its taxable event is the ownership, dominion or possession of *real property*, as defined in civil law, located *outside the urban zone* of a County (CTN arts. 29 and 32 § 1). Under the Tax Reform of 1965, the ITR was made an explicit instrument of agrarian reform. The ITR continues that regulatory function with the Constitution providing that "the rates [on the ITR] shall set in a way that discourages maintenance of unproductive real property and shall not be imposed on small rural holdings, as defined by law, when exploited by the owner himself or with his family, if the owner has no other real property" (art. 153 § 4). Originally a State tax, the ITR was successively transferred, first to the Counties (Const. Amendment 5 of 1961) and then to the Federal Government (Const. Amendment 10 of 1964). Even though the power to levy and collect the ITR belongs to the Federal Government, half the sums collected from real property located in a country must be returned to the County (art. 158-II).

The *tax on large fortunes* has not yet been enacted. The Constitution, unnecessarily repeating a general commandment (art. 146-III-a),[46] provides that this tax shall be instituted *under the terms of* a complementary law (art. 153-VII) — that is, in conformity with general rules defining its essential elements (taxable event, basis of calculation, taxpayer, etc.) — and not *through* a complementary law which, in the absence of an express constitutional provision, is not the appropriate rulemaking form for enacting a tax.

ORDINARY UNDENOMINATED FEDERAL TAXES

Ordinary federal taxes with exclusive jurisdiction include those permitted by the Constitution without identifying them with distinct names. These are the quasi-fiscal contributions and residual jurisdiction taxes.

[46] The observation is from C. Bastos & I. G. Martins, *Comentários à Constituição do Brasil*, *supra* note 15, at 269.

Article 154-I provides that the Federal Government may impose, through a complementary law, *taxes not listed in Article 153*, so long as (i) it adopts, where appropriate, the technique of non-cumulative incidence and (ii) it uses a taxable event or basis of calculation other than those specified elsewhere in the Constitution. Twenty per cent of the proceeds of the collection of any residual tax that may be imposed belongs to the States and the Federal District (art. 157- II).[47]

Similarly, Article 149 provides that the Federal Government has exclusive jurisdiction to institute *social contributions, contributions respecting intervention in the economic domain, and contributions in the interest of professional or economic categories.* These levies are instruments of the Federal Government act in these areas, usually by delegation to indirect administrative agencies.[48]

These contributions may only be instituted by statute (art. 150- I), after a *complementary law* (art. 146-III) has previously defined their essential elements (taxable event, basis of calculation, taxpayer, etc.). They are also subject to the rules of anteriority and non-retroactivity (art. 150-III). However, the Constitution provides that *social contributions* may only be exacted after 90 days have elapsed from the publication of the law that created or modified them (art. 195 § 4).[49] The States, the Federal District and the Counties may institute contributions collected from their employees to fund social security and assistance systems. (art. 149).

EXTRAORDINARY FEDERAL LEVIES

The exclusive tax jurisdiction of the Federal Government also includes two extraordinary levies, *war taxes* and *compulsory loans*. They are labeled extraordinary because the conditions under which they may be constitutionally imposed are exceptional events, such as a foreign war, a public calamity, or a public investment of urgent character and significant national interest. Because of the exceptional nature of their pre-conditions, the legal regimen of these taxes, at least for war taxes and compulsory loans, departs from the normal system of constitutional limitations. The duration of these levies is naturally limited to the period in which the extraordinary need persists. With the exception of compulsory loans, they may be instituted through *provisional measures* (art. 62).

[47] With respect to taxes of residual jurisdiction, see *id.*, at 185.

[48] *See* G. Ataliba- J.A. Lima Gonçalves, "Contribuição social na Constituição de 1988," *Rev. Dir. Tributário* 41 (No. 47, 1989) ; A. Lacombe, "Contribuições no direito brasileiro," *Rev. Dir. Tributário* 189 (No. 47, 1989) ; C. Bastos & I.G. Martins, *Comentários à Constituição do Brasil*, *supra* note 15, at 126 ; Coêlho, *supra* note 15, at 163; Sampaio Doria, "A contribuição social sobre lucros na Constituição de 1988," 177 *R.D.A.* 1 (1989). Among earlier writings, *see* Yves J. de Miranda Guimarães, *A Situação Atual da Parafiscalidade no Direito Tributário* (Ed. J. Buschatsky: São Paulo 1977); A. T. Nascimento, "Preços, taxas e parafiscalidade," *supra* note 43, at 395; A.T. Nascimento, *Contribuições especiais* (Ed. Forense: Rio de Janeiro 1986); B. Machado, "São tributos as contribuições sociais?," in *Estudos Jurídicos em Homenagem a Gilberto Ulhôa Canto* 62 (Ed. Forense: Rio de Janeiro 1988).

[49] *See contra*, Law No. 7689 of December 15, 1988, which imposed a *social contribution* on the profits of legal entities.

War taxes may be imposed by the Federal Government, in the case of actual or imminent foreign war, without regard to the limits on taxing power established by the Constitution (art. 154 (I)). Nor are such taxes subject to the anteriority limitation of Article 150 (III) (b). Since such taxes are only justifiable so long as the war needs continue to exist, they should be gradually phased out upon the termination of these circumstances.

The Constitution requires that the compulsory loan be imposed by *a complementary law* (art. 148). This requirement is designed to restrict Executive abuses in financial matters, by resorting to such expedients as the decree-law under the prior Constitution, and today the provisional measure. Because a complementary law requires the approval of an absolute majority of members of both houses of Congress, institution of such loans are subject to the inevitable procrastinations and uncertainties of an extraordinary legislative process. There is a substantial risk that approval of a compulsory loan will come too late or not at all. Perhaps the solution lies in permitting extremely urgent loans, *i.e.* those for a public calamity or foreign war, to be instituted by a *provisional measure* (art. 62), which takes immediate effect, even though it must subsequently necessarily be converted into a law by the National Congress, through an absolute majority vote (art. 69).[50]

Imposition of a compulsory loan should generally be subject to the constitutional limitations on the power to tax. Nevertheless, by interpreting *a contrario sensu* the provisions of Article 148, one can argue admit that the requirement of anteriority contained in Article 150 (III) (b) does not apply to compulsory loans imposed for public calamity or war. Like the war tax, the compulsory loan is a temporary levy and, as a rule, is of limited duration.[51]

TAXES OF THE STATES AND THE FEDERAL DISTRICT

Article 155 provides that the States and the Federal District have the power to impose taxes on: (a) transfers *causa mortis* and donations of any property or rights; (b) transactions relating to circulation of goods and the performance of services of interstate and intermunicipal transportation and communications, even on transactions or services begun abroad; and (c) ownership of motor vehicles. It also grants the States and Federal District the power to impose a surtax of up to five per cent of the federal income tax paid by individuals or legal entities domiciled in their respective territories.[52]

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[50] *See* C. Tácito, "As medidas provisórias na Constituição de 1988," 176 *R.D.A.* 5 (1989).

[51] With respect to the compulsory loan, *see* I. G. Martins, *Sistema Tributário na Constituição de 1988*, *supra* note 15, at 104; I.G. Martins, "Comentários," *supra* note 15, at 107; Coêlho, *supra* note 15, at 146.
Among earlier writings, the fundamental work is that of A. Falcão, "Natureza jurídica do empréstimo compulsório," (Thesis for visiting professorship at the State University of Guanabara, Rio de Janeiro, 1964); others are A. J. Costa, "Natureza jurídica dos empréstimos compulsórios," 70 *R.D.A.* 1 (1962); J. Borges, "Parecer, Empréstimo compulsório instituído pelo Decreto-lei No. 1.790/80," (Treasury Ministry: Brasília 1980); M. F. Ribeiro, *A Natureza Jurídica do Empréstimo Compulsório no Sistema Tributário Nacional* (E. Forense: Rio de Janeiro 1985).

The prior Constitution granted the States and the Federal District the power to impose a tax on transfers *of any nature*. It limited the tax, however, to transfers of real estate (by sale or inheritance) and to *in rem* interests, except those of guaranty. The transfer tax has now been divided, as it was prior to the 1965 Reform, into two different levies. Depending upon the cause of the transfer, jurisdiction is conferred upon either the Counties, or upon the States and the Federal District. The state transfer tax has only two taxable events, *transfers "causa mortis"* and *donations*, but it now affects transfers of *any property or rights* (art. 155-I-a). The Constitution confers taxing jurisdiction with respect to real property and respective rights on the State or Federal District where the property is located. It confers taxing jurisdiction with respect to personalty, securities and credit instruments on the unit of the federation where an estate's inventory or marshalling occurs, or where the donor has his domicile. Taxing jurisdiction must be regulated by a complementary law if the donor is domiciled or resident abroad or if the deceased was a foreign resident or domiciliary, owned property abroad or his estate was probated abroad. The maximum rates are to be fixed by the Federal Senate (art. 155 and § 1-I-IV).

The tax on *transactions relating to the circulation of goods* and on the performance of interstate and intermunicipal transportation and communication services ("ICMS" — art. 155-I-b) is the most important of the local taxes. Together with the Income Tax and the IPI, the ICMS is one of the three most important taxes of the national tax system. Like the IPI, the ICMS is non-cumulative. An offset is allowed against the tax owed on each transaction of circulation of goods or performance of services of the amount charged on the previous ones by the same State, another State or the Federal District (art. 155 § 2-I). Unlike the IPI, which is obligatorily selective, the ICMS *may* be selective as a function of the essential nature of the goods and services (art. 155 § 2-III).

The Constitution provides that the ICMS shall be imposed on the entry of goods imported from abroad, even when dealing with goods intended for consumption or the fixed assets of the taxpayer, as well as on services performed abroad. The tax is allocated to the State where the establishment receiving the merchandise or services is located (art. 155, § 2-IX-a). It may not be imposed on: (a) transfers abroad of industrialized products, excluding *semi-processed* products defined in a complementary law; (b) transfers of electrical energy and petroleum to other States, including lubricants, liquid and gas petroleum derivative fuels; or (c) on gold, when defined by law as a financial asset or instrument of foreign exchange, in which case IOF tax is due.[53]

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[52] On state taxes, see, *inter alia*, A.J. Costa, *supra* note 15, at 322; A.J. Costa, "ICM —Tributação dos produtos semi- elaborados," *Rev. Dir. Tributário* 62 (No. 47, 1989); H.D. de Souza & M.A. Greco, "ICM — Semi-Elaborados", *Rev. Dir. Tributário* 72 (No. 47, 1989); J. Borges, "Competência tributária dos Estados e Municípios," *Rev. Dir. Tributário* 132 (No. 47, 1989); F. F. Scaff, "O ICMS, o IOF e as vendas financiadas de mercadorias," *Rev. Dir. Tributário* 101 (No. 47, 1989); M. Reale, "O ICMS na Constituição de 1988," in *Aplicações da Constituição de 1988, supra* note 15, at 89; I. G. Martins, Sistema Tributário na Constituição de 1988, *supra* note 15, at 205; C. Bastos & I.G. Martins., Comentários à Constituição do Brasil, *supra* note 15, at 338; Coêlho, *supra* note 15, at 218.

[53] Const. of 1988, art. 155, § 2 (X) (a) (b) (c). *See* Law No. 7766 of May 11, 1989 with respect to gold as a financial asset and its tax treatment.

The fundamental legal regimen of the ICMS must be established by a complementary law (art. 155, § 2-XII). Its rates are fixed principally by the Federal Senate, in accordance with a complex system set up by the Constitution itself, having in mind the territorial scope and subjective aspects of different transactions and performances (art. 155, § 2-IV to VII).

The tax on the *ownership of motor vehicles* ("IPVA", art. 155-I-c) is a personal and direct tax imposed on patrimony. The IPVA was an innovation Amendment No. 27 of 1983 to the former Constitution, replacing the so- called "Unitary Highway Fee." Article 23-III of the 1969 Constitution, as modified by Amendment 27, explicitly prohibited "the collecting of taxes or fees imposed on the use of vehicles" to eliminate the former federal fee whose taxable event was not the use of a vehicle (which could never be a taxable event for a fee), but rather the registration thereof or the renewal of the annual transit license.

The tax provided for in Article 155-II, a surtax on the federal income tax which is imposed on profits and capital gains and earnings, has the *payment* of the principal tax as its taxable event, which is one of the possible technical means of additional taxation. Nevertheless, no Federal complementary law has yet been enacted to define the essential elements of the new tax, as is required by Article 146-III-a. Such failure has not, however, prevented the majority of States from "instituting" the surtax, through a rule-making act of their own competence (an ordinary statute); this has given rise to judicial challenges of the tax, on the grounds of the patent unconstitutionality of the State laws.

Finally, it is to be observed that in federal territories, Article 147 grants the Federal Government the jurisdiction to impose *state taxes*, and that the Federal District, besides the taxes referred to in Article 155, also has jurisdiction to charge municipal taxes.

MUNICIPAL TAXES

Article 156 determines that Counties have the power to levy taxes on: I — the ownership of urban lands and buildings; (b) any type of non-gratuitous *inter vivos* transfer of real property, whether natural or by physical accession, and any *in rem* rights except guarantees, as well as the assignment of rights to acquire them; (c) retail sales of liquid and gaseous fuels, except for diesel oil; and (IV) services of any nature not included within those of interstate and intermunicipal transportation and communication, which are within the sphere of incidence of the State tax on the circulation of goods and services (art. 155-I-b).[54]

The *tax on the ownership of urban land and buildings* ("IPTU", art. 156-I; CTN arts. 32-34) is a levy imposed upon patrimony, in this case upon real property, improved or not, located in the *urban zone* of a County. Its taxable event is ownership in the broad sense, and embraces not only full title, but also useful

[54] *Cf.* A. F. Barreto, "Impostos municipais," *Rev. Direito Tributário* 245 (No. 47, 1989); M. A. Greco, "Os tributos municipais," *supra* note 15, at 332; I. G. Martins, Sistema tributário na Constituição de 1988, *supra* note 15, at 247; C. Bastos & I.G. Martins, Comentários à Constituição do Brasil," *supra* note 15, at 521; Coêlho, *supra* note 15, at 218.

dominion, or a right which evidences ownership, such as possession, having as its object property which is immovable *by nature* or *by physical accession*, as defined by civil law (CTN art. 32).

The urban zone is defined by municipal law, which must respect the criteria set out in Art. 32 paragraph 1 of the CTN.

The Constitution finally ended the controversy over whether the IPTU could be progressively defined by municipal law so as to assure the achievement of the social function of ownership (art. 156 § 1).

The *tax on any type of non- gratuitous inter vivos transfers of real property*, whether natural or by physical accession, and of *in rem* rights except guarantees, as well as the assignment of rights to their acquisition ("ITIV", art. 156- II) was split off from the former State tax on the transfer of real property.

According to Article 110 of the CTN (formerly Article 35 of that Code when the tax was under state jurisdiction), the concepts of real property by nature or by physical accession, as well as those of *in rem* rights, guarantee rights, and that of the assignment of rights to acquire realty, are defined by civil law.[55]

The Constitution provides that the ITIV shall not be imposed on the transfer of rights or interests incorporated into the patrimony of a legal entity as a capital investment, nor upon the transfer of rights or interests as a result of consolidation, merger, split-off or extinction of a legal entity,[56] unless the preponderant activity of the acquiring party is the purchase and sale of these rights or interests, the leasing of real property or mercantile leasing. The ITIV is also not imposed if the property belongs to the County in which it is located (art. 156 § 2-I and II).

The *tax on retail sales of liquid and gaseous fuels*, except diesel oil (IVVC) (art. 156-III) is an indirect tax resulting from the splitting of the former sole federal tax on liquid or gaseous lubrificants and fuels. It is therefore a new tax, whose essential elements should be defined by a federal complementary law, which has not yet occurred. A complementary law is also needed to fix its maximum rates (art. 156 § 4-I). Until this is enacted, it may be charged at a maximum rate of three percent, provided a complementary law has fixed its essential elements.[57] The IVVC does not exclude imposition of the State tax on the circulation of goods (art. 155-I-b) on the same transaction (art. 156 § 3), and may be charged even where there is an exemption from the ICMS.

The *tax on services of any nature* (ISS) not included within the scope of the ICMS (art. 155-I-b) is an indirect tax that covers all services that have been or may be defined in a complementary law, except for those specifically mentioned in the exception. The definition of taxable services is done by means of exhaustive enumeration. The list of services presently in effect is that which was approved by Complementary Law 56 of December 15, 1987. The constitutionality of this law

[55] Civil Code, arts. 43, 44, 524, 674-I to VI, 1065.

[56] See Articles 219, 227-229 of Law No. 6.404 of Dec. 15, 1976.

[57] Minutes of Transitory Constitutional Provisions, Art. 34 § 7.

has been challenged on the theory that it was never approved by the constitutionally required quorum of an absolute majority.

A complementary law is also required to fix its rates and to exclude the exportation of services abroad from its incidence (art. 156 § 4).

ALLOCATION OF TAX REVENUES

The 1988 Constitution was extremely innovative in the system of sharing of tax revenues, substantially increasing the transfer of tax proceeds to the States, the Federal District and the Counties.[58]

The following belong to *the States and the Federal District*: (1) the proceeds of the collection of the Federal Income Tax withheld at source from any income paid on any account by them, their autarchies and the foundations they create and maintain; (2) twenty percent of the proceeds from the collection of any residual taxes that the Federal Government may institute (art. 157).

The following belong to the *Counties*: (1) the proceeds from the collection of the federal income tax withheld at source from any income paid on any account by them, their autarchies and by foundations they create and maintain; (2) twenty percent of the proceeds from the collection of the ITR on real property located therein; (3) fifty percent of the proceeds of the collection of the IPVA on vehicles licensed within their territory; and (4) twenty-five percent of the proceeds of collection of the ICMS (art. 158).

In addition, the Federal Government must hand over: (1) forty-seven per cent of the proceeds of the collection of the Income Tax and the IPI, in the following manner: (a) twenty-one and one- half per cent to the Participation Fund of the States and Federal District; (b) twenty-two and one-half per cent to the Participation Fund of the Counties; (c) three percent for application in programs to finance productive sectors of the North, Northeast and Center-West Regions; (2) the States and Federal District, in proportion to the value of their respective exports of industrialized products, ten percent of the proceeds of the collection of the IPI (art. 159).

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[58] On the sharing of tax revenues, *see* D. F. Moreira Neto, "Repartição das receitas tributárias," in *A Constituição Brasileira 1988*, *supra* note 15, at 343; I. G. Martins, Sistema tributário na Constituição de 1988, *supra* note 15, at 268; Coêlho, *supra* note 15, at 410.