

DESTINATION OF THE PRODUCT OF TAX COLLECTION: an analysis of the sharing and untying of revenues from the perspective of legal certainty and the legitimacy of the Legislative and Executive Powers¹

Evana Rezende Batista

1 THEORETICAL-METHODOLOGICAL INTRODUCTION

This study deals with the importance of the destination of the product of tax collection, based on the analysis carried out on the fundamentals of the principle of non-allocation of tax revenues and on the institutes of sharing and untying revenues, from the perspective of the need for security and the legitimacy of the Legislative and Executive Powers.

Based on the studies carried out by several jurists, in particular the teachings of Misabel Abreu Machado Derzi, according to which it is up to the tax law to design a distributive system that guarantees fundamental aspects for human dignity, and Élide Graziane Pinto, in the sense that the central purpose of the public budget is the effort to ensure the realization of fundamental rights in the core of the society to which it refers. The aim of this work was to identify the main criticisms and to verify any impacts arising from the aforementioned principle and institutes in budgetary practice and in management of public resources.

Based on the analysis of the principle of non-allocation of tax revenues and of the institutions for sharing and untying revenues, there is, at first glance, an apparent contradiction, which stems from the simultaneous existence of a constitutional principle that prohibits the allocation, or binding, of tax revenue; several constitutional exceptions to the same principle; of ties, or destinations, and disconnections also enshrined in the scope of the 1988 Constitution.

This legal context, which appears to be conflicting and unstable, aligned with a social context that lacks the allocation of public resources for the fulfillment of basic guarantees, led to the second objective of this study, which consists of analyzing the possible impacts of using the principle and institutes cited above to legal certainty, which is so expensive to order, and to the legitimacy of the Legislative and Executive Powers, since they are primarily responsible for the allocation of resources, whether through constitutional, budgetary or administrative means.

¹ NOTE: the translations were made by the author, exclusively for the understanding of this article, and their use for other purposes is not authorized.

It is important to clarify that the present study does not intend to problematize or deepen technically the criteria, justifications or results of each link or disconnection. Nor does it intend to choose a side, defend or refute the principle and the institutes object of study.

On the other hand, the aim is to bring out, from a Public Law perspective, the criticisms and possible problems that may arise from this system for the stability and confidence of legal relations, especially when it comes to public values and needs, which it can thus directly compromise the democratic system and the legitimacy of the powers.

Based on the normative, jurisprudential and doctrinal study, this work was limited to the presentation of concepts, criticisms and possible problems that may arise from the use of the principle of non-allocation of tax revenues and the institutes of sharing and untying revenues.

After the considerations made, it was found that, from the point of view of distributive justice and the public budget as a mechanism to promote fundamental rights, as it has been practiced in the country, the sharing and untying of revenues has not shown correspondence with the solutions they propose, so that they bring fragility to the legal system.

The present study is justified by the need for a clear correspondence between the sharing and untying of revenues and the fulfillment of the public purpose for which they are intended. Society, which so much needs practical solutions that can be given by constitutional guarantees, by the effective implementation of the legal budget plan and by the administration of public policies, starts to discredit in the legal system, in the capacity for Public Law to turn to the satisfaction of needs more basic and, consequently, in representative institutions, which have law and discretion as instruments.

2 PRINCIPLE OF NOT AFFECTING TAX COLLECTION

The principle of not affecting tax collection is expressed in the 1988 Constitution of the Republic - CR / 88, through art. 167, IV, which also establishes other fences, as stated below:

167. The following are prohibited:

[...]

IV - the sharing of tax revenue to an organ, fund or expense, except for the distribution of the proceeds from the collection of taxes referred to in arts. 158 and 159, the allocation of resources for public health actions and services, for the maintenance and development of teaching and for carrying out tax administration activities, as determined, respectively, by arts. 198, § 2, 212 and 37, XXII, and the

provision of guarantees for credit operations by anticipating revenue, provided for in art. 165, § 8, as well as the provisions of § 4 of this article.²

As can be seen from the constitutional provision itself, the prohibition consists in the fact that it is not allowed to affect, or link, the tax revenue to any specific expenses.

2.1. History

It is noted that the prohibition on binding does not extend to other tax species, but only to taxes. But the constitutional provision did not originate in the way it presents its current wording. As André Castro Carvalho explains, the prohibition arose in the 1967 Constitution, having been established for all taxes at the time, which came to change only with the 1988 Constitution:

In the history of Brazilian constitutions, **the rule of non-affectation was enshrined in 1967/94, by prohibiting the binding of revenue from all taxes**, with the exception of only single taxes, which were specific taxes (on oil, telecommunications and energy electrical). This provision was maintained with Constitutional Amendment No. 01/1969, which, in addition to specifying what these single taxes would be, made it possible for complementary laws - infraconstitutional rules, therefore - to institute new exceptions to this prohibition. The 1988 constitution, however, adopted a different criterion, preventing the sharing of revenues only from taxes (in view of the various parafiscal taxes contained therein), however it did not allow any infraconstitutional exception to the original rule.³

It is interesting to note that the 1967 Constitution originated from voting, approval and promulgation, which formally characterizes it as a promulgated constitution. However, as Pedro Lenza points out, it can be considered as a constitution granted, since it was elaborated in the context of the dictatorial regime, in which the National Congress did not have *the freedom to substantially change the new state that was being established*⁴.

With this brief contextualization, it is possible to understand what the Executive Power intended at the time from the elaboration of the aforementioned rule: maximum freedom to use

² BRAZIL. Constitution (1988). **Constitution of the Federative Republic of Brazil**. Brasília, DF: Presidency of the Republic. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Accessed on: February 1, 2020.

³ MACHADO, Gabriella Consoli. **IMPOSITIVE BUDGET IN BRAZIL: the influence of the legal system and the recent EC 86/2015**. Rio de Janeiro, 2016. p. 51. Available at: <<https://pantheon.ufrj.br/handle/11422/11574>>. Accessed on: February 1, 2020.

⁴ LENZA, Pedro. **Outline Constitutional Law**. 15. ed. rev., current. and ampl. - São Paulo: Saraiva, 2011. p. 115.

taxes as it pleased. And the approval of this rule happened exactly from the absence of any power of manifestation by the Legislation.

This study does not intend to delve deeper into the results of the measure carried out at the time, but it highlights the criticism of the social setbacks that may result from the absence of government funding, which, in turn, are often ensured exactly through revenue shares. In these terms, there is the criticism presented by Fábio Konder Comparato, Heleno Taveira Torres, Élidea Graziane Pinto and Ingo Wolfgang Sarlet, regarding the guarantee of the right to education:

With regard to the fundamental right to education, **only dictatorial periods have dared to review the social commitment assumed since the 1934 Republican Constitution of government funding at minimum levels** in this sector. In other words, for more than 80 years, the Brazilian nation has recognized public education as the decisive path for the progressive and urgent overcoming of technological dependence, even though efforts to associate the obligation of minimum spending with quality in teaching are slow and complex.

The setbacks caused by the Constitutions of 1937 and 1967/1969 certainly postponed this historic cumulative process of seeking universal access to school for all citizens, with the duty of quality education.⁵

With the advent of the 1988 Constitution of the Republic, known as the Citizen Constitution, the prohibition on the sharing of revenues was restricted only to the collection arising from taxes and, in the same constitutional provision, exceptions to the so-called principle of non-affectation were determined, determined by government offices, mandatory constitutional requirements, allocation of resources to specific areas and provision of guarantees.

At first glance, there is a restriction on the total freedom of action of the Executive Power in relation to public revenues, since the non-affectation, previously applied to all taxes, started to apply only to revenues derived from taxes. On the other hand, and in a democratic way, the Legislative Branch guaranteed the Executive Branch the freedom to use tax revenues.

In other words, as currently expressed, the principle of non-allocation of tax revenues enshrines the independence and harmony between the powers, expressed by art. 2 of the Constitution of the Republic, insofar as it represents a freedom to the Executive Power originated from the freedom of the original constituent.

⁵ COMPARATO, Fábio; TORRES, Heleno Taveira; PINTO, Elida Graziane; SARLET, Ingo Wolfgang. Financing of health and education rights: non-negotiable minimums. **Legal Consultant Magazine**. 2016. Available at: <<https://www.conjur.com.br/2016-jul-27/financiamento-direitos-saude-educacao-minimos-inegociaveis>>. Accessed on: February 1, 2020.

Art. 167, IV of the Constitution enshrines the so-called Principle of Non-Affection, prohibiting the sharing of tax revenue to an organ, fund or expense. **Such a precept proves to be an open clause, consecrating the freedom of the legislator** to freely dispose of all the revenues that have been earned. [...] ⁶

2.2. Classification of taxes as to the incidence hypothesis

According to the concept expressed in art. 3 of the National Tax Code, a tax *is any compulsory cash payment, in currency or whose value can be expressed therein, that does not constitute a sanction for an illegal act, established by law and charged through fully shared administrative activity*⁷.

From the mere conceptualization, it is already faced with the expression “shared”, which, in this case, refers to the fact that the collection activity does not consist in the discretion of the Public Administration, but in mandatory. Taxes are established by law and, both for those who must collect them and for those who must meet their payment, the activity is mandatory.

Finally, the tax can be conceptualized as a fundamental duty and constitutes a pecuniary benefit that, limited by fundamental freedoms, under the direction of the constitutional principles of contributory capacity, cost / benefit or solidarity of the group and with the main or accessory purpose to obtain revenue for public needs or for activities protected by the State, it is required of those who have performed the fact described in law and prepared in accordance with the specific competence granted by the Federal Constitution.⁸

For this work, it is important to classify the taxes in terms of the incidence hypothesis, which presents yet another meaning of the term “sharing”, to be studied before we can move on to the next chapters.

The incidence hypothesis consists of the abstract definition of an act or fact that, when it occurs, starts to characterize the need to apply a certain tax. Once the incidence hypothesis is realized, that is, its occurrence is confirmed in the factual reality, there is an objective characterization of the taxable event, which demands taxation.

⁶ SCAFF, Fernando Facury. Sharing taxes to social spending is a key clause. **Legal Consultant Magazine**. 2017. Available at: <<https://www.conjur.com.br/2017-out-16/justica-tributaria-vinculacao-impostos-gastos-sociais-clausula-petrea>>. Accessed on: February 1, 2020.

⁷ BRAZIL. Law No. 5,172 (1966). **National Tax Code**. Provides for the National Tax System and institutes general rules of tax law applicable to the Union, States and Municipalities. Brasília, DF: Presidency of the Republic. Available at: <http://www.planalto.gov.br/ccivil_03/leis/15172.htm>. Accessed on: February 02, 2020

⁸ LEITE, Gisele. Considerations on the fundamentals of Brazilian tax law. **Jusbrasil**. 2015. Available at: <<https://professoragiseleite.jusbrasil.com.br/artigos/160040077/consideracoes-sobre-os-fundamentos-do-direito-tributario-brasileiro>>. Accessed on: February 02, 2020.

According to the incidence hypothesis, the different types of taxes are classified between shared or non-shared taxes. This classification is also referred to as the taxable event, because it represents the need, or not, that there is a specific state activity for the application of the tax to occur. In other words, the application of the tax is shared to a consideration by the taxing public entity.

Regarding the sharing of the taxable event to a state activity: taxes can be shared - when the taxable event refers to a specific state activity related to the taxpayer, such as, for example, the rates and the improvement contribution; or not, when the taxable event is a taxpayer activity, as in the case of taxes and special contributions.⁹

The tax is known as an unbound tax *par excellence*. This is because, as we have seen, taxes depend only on a particular manifestation of wealth by the taxpayer. They do not depend on any specific manifestation or consideration by the tax administration for its occurrence, nor do they generate any right to that performance.

According to the definition presented by Ricardo Alexandre, there is:

Taxes are, by definition, unrelated taxes that are levied on **manifestations of the taxable person's (debtor) wealth**. Precisely for this reason, the tax is based on the idea of **social solidarity**. People who manifest wealth are obliged to contribute to the State, providing it with the resources it needs to seek the achievement of the common good.¹⁰

When it turns out, then, that the constituent legislator chose to allocate the non-allocation only to taxes, and to withdraw its incidence on the other tax species, it is noted that an incompatibility may have been recognized when establishing the non-allocation on taxes that demand an executive performance for its occurrence, which would correspond to ignoring the very costs of that.

Not that there was an impediment to the verification of the costs of the activity and the necessary verification of correspondence or recomposition with the taxed values, even less that it was necessary to fix it in legal text so that the Executive Power would be responsible for this financial / budgetary balance and recompose the costs of your activity.

However, what is perceived is that, in theory, the non-affectation established full freedom of executive action with the resources coming from a collection resulting from the

⁹ LEITE, *Ibidem*.

¹⁰ ALEXANDRE, Ricardo. **Schematic tax law**. - 6. ed. rev. and current. - Rio de Janeiro: Forensic; São Paulo: METHOD, 2012. p. 21.

necessary administrative action, not that of the taxation activity, but a specific manifestation or consideration for the tax may be levied.

In other words, the freedom to use resources was established, the collection of which only occurs when the administration performs a specific activity that generates costs.

When it is constitutionally established not to affect tax collection alone, constitutional prohibition is in line with the technical definition of the characteristics of each tax, considering that taxes differ from other tax species precisely because of their character not shared to any tax. consideration.

This fact ends up representing a technical contribution to the effectiveness of distributive justice, as explained by the teacher and jurist Misabel Abreu Machado Derzi:

We are also interested in approaching it from another angle, that of distributive justice that it should serve. Evidently, taxes, being taxes not shared to a state activity (as in the case of taxes and contributions), whose normative hypothesis is descriptive of a fact indicative of economic capacity, are liable to face expenses in general, according to the criterion of need. If the destination of the collected product is previously defined by the legislature, the inherent distributive margin is reduced.¹¹

Shared taxes have the characteristic of retributivity, since they identify a situation corresponding to an administrative provision. Non-shared taxes are considered to be contributory *because, in the absence of state activity, the taxpayer would only be in solidarity, even if forcedly, with the ends of the State*¹².

So far, no mention has been made of the fact that special contributions and compulsory loans have also been instituted as unrelated taxes, with regard to the classification related to the incidence hypothesis. There are doctrinal and jurisprudential controversies about these tax modalities and, for the purposes of this study, it is not necessary to delve into the theme, since, with the classification of taxes as to the destination of the collection proceeds, it is noted that they have shared collections, which opposes the principle of non-affectation.

2.3. Classification of taxes according to the collection proceeds

The classification of taxes according to the destination of the collection product establishes the distinction between the taxes whose collection should be destined to a specific

¹¹ DERZI, Misabel Abreu Machado. The principle of non-allocation of tax revenue and distributive justice. In: HORVATH, Estevão; CONTI, José Maurício; SCAFF, Fernando Facury (Org.). **Financial, economic and tax law: studies in honor of Régis Fernandes de Oliveira**. São Paulo: Quartier Latin, 2014, p. 637-660 (p. 640).

¹² ALEXANDRE, *Op. cit.* p. 69.

application and the taxes whose collection can be used to fund any state activities, according to the needs presented by the Public Administration and by society, as well as the actions managed by the Executive Branch.

Regarding the sharing of the collection proceeds - taxes with shared collection - those in which the collection proceeds must be applied to the purpose that gave rise to the tax, ex: special contributions and taxes with non-shared collection - are those in which the amount collected does not need to be applied to any established purpose, eg fees and taxes.¹³

It is important to clarify that this classification, related to tax revenues, is not to be confused with the previous classification, related to the origin of taxes. As Ricardo Alexandre explains:

[...] There, the watershed is whether the situation defined by law as necessary and sufficient for the emergence of the obligation to pay tax is an activity of the State or a fact of the taxpayer. Here, the concern is with the freedom that the State has to define the application of the proceeds of the collection.¹⁴

Clearly, it is clear that the taxes whose collection is shared materialize the allocation, binding, restricted by art. 167, IV, of the 1988 Constitution.

Shared revenue tax is that which the law determines a destination for the amounts collected, such as the compulsory loan (art. 148, sole paragraph of the CF). In these cases, the different destination implies the accountability of the public agent.

Non-shared revenue tax, on the other hand, is one in which the public administrator can choose, using the criteria of convenience and opportunity, where to apply the amounts collected.¹⁵

There remains, then, the analysis of the taxes whose revenue is not shared to a specific benefit. As already seen, among taxes, fees and improvement contributions, only taxes cumulate with this characteristic that they do not originate from specific state consideration.

Thus, it is clear that the constitutional decision to limit the non-allocation to taxes seems to have been oriented according to the typical characteristics of the tax, so that the characteristic would not have resulted from the constitutional provision, but the opposite: the constituent legislator would have taken taking into account the typical attributes of the taxes to establish

¹³ LEITE, *Op. cit.*

¹⁴ ALEXANDRE, *Op. cit.* p. 69.

¹⁵ BALSAN, Francys. Do not confuse: shared tax with shared revenue tax. **Jusbrasil**. Available at: <<https://fbalsan.jusbrasil.com.br/noticias/317931055/nao-confunda-tributo-vinculado-com-tributo-de-receita-vinculada>>. Accessed on: February 8, 2020.

and restrict the prohibition, so that it makes sense to apply them to the taxes while the other taxes raises questions related to their nature.

This fact also represents that the Constitution determined a freedom of administrative action in relation to the tax revenues that are, by nature, unrelated to specific activities, allowing the Executive Power to have autonomy to face priority expenses, adapting its performance to the best service to social needs that are constantly changing.

In this sense explains Gabriella Machado:

[...], the most relevant characteristic of the tax is extracted: non-binding, that is, it does not result from any state activity and, therefore, it is not intended to supply it. This means that it is necessary to decide where to apply the revenues derived from this tax type, aiming at the priorities of each federative entity, using the budget law for the destination of the collected resources.¹⁶

2.4 Single box and solidarity

In a simplified way, it can be understood that non-allocation materializes as the provision of the entire financial volume of tax collection in a single box from each public entity, which constitutes the set of resources that the public manager has to dispose of according to their discretion, that is, considering the convenience and the opportunity of the act.

At the same time, these resources are presented to legislators as the cash available to public policies that can be established or prioritized.

It should be noted that the purpose of the principle is to require that all resources be allocated in a “single box” of each of the federative entities, without being stamped with a certain expense or special fund already determined⁴⁹³. In fact, the program-budget technique exposed by JOSÉ AFONSO DA SILVA is reticent regarding the shares, taking into account that its basic budget premise is the freedom of resources to promote the execution of works and services according to a pre-established *scale of priorities*.¹⁷

¹⁶ MACHADO, *Op. cit.* p. 49.

¹⁷ CARVALHO, André Castro. **Sharing public revenues and the principle of non-allocation: uses and mitigations**. University of Sao Paulo. Faculty of Law - São Paulo, 2010. Available at: <https://www.tese.usp.br/tese/disponiveis/2/2133/tde-24022011-091027/publico/Carvalho_Andre_Castro_dissertacao_completa.pdf>. Accessed on: February 9, 2020. p. 127.

When detailing this characteristic, the teacher Misabel Abreu Machado Derzi even considers that the principle of non-affectation becomes complementary to the principles of the Gross Budget¹⁸ and Universality¹⁹, which are basic guidelines for public finances. See if:

Now, the principle of non-allocation (prior) of tax revenue to an organ, fund or expense is a complementary rule to gross accounting and one of the aspects of universality. **The receipts must form a distinct and unique mass, covering all expenses**, according to the priorities elected by Parliament. Only then will planning be possible. If the sharings are large, with the revenue being compromised in advance by the tax legislator, the budget legislator will be deprived of the ability to program and the integrated planning.²⁰

Thus, the principle of non-affectation is seen not only as a guide for the Legislative Branch's performance, but also as a guarantor of the Executive Branch's freedom of action.

The latter has the capacity of being a recipe available to the administrator to apply, according to their priority scales, the resources in areas of greatest need for the population. That is, in an interpretative analysis as to the main purpose of the principle of non-affectation, it appears that it is precisely to give freedom to the public administrator to handle public resources in order to meet the most needy social needs, since they constitute an unrelated tax species originally.²¹

It turns out that this freedom, or discretion, is not unlimited. It has restrictions and is governed according to the constitutional principles and objectives, which express the priorities listed by the constituent legislator, which are not of free choice, but determine what should be the primary orientation of public managers when implementing public policies.

As Luís Henrique Madalena explains:

Admitting that the Law delegates to the administrator choices that are at his or her discretion, starting from the definition of principles in a teleological conception, in which these become optimization orders that have the ability to open the interpretation of the law and open the range of possible answers, it is clearly undemocratic. It is not possible to carry out an interpretation of the law in which democracy, in a democratic manner, delegates the definition of the law to non-democratic instruments, which is to say that one chooses democratically not to be more democratic. Now, any interpretive "method" that leads to such a result of subverting the Constitution in

¹⁸ The Gross Budget principle means that all portions of income and expenditure must appear in the budget in their gross amounts, without any deduction. Available at: <<https://www2.camara.leg.br/orcamento-da-uniao/cidadao/entenda/cursopo/principios>>. Accessed on: February 9, 2020.

¹⁹ The principle of universality determines that all revenues and expenses must be provided for in the Annual Budget Law - LOA. Available at: <<https://www2.camara.leg.br/orcamento-da-uniao/cidadao/entenda/cursopo/principios>>. Accessed on: February 9, 2020.

²⁰ DERZI, *Op. cit.* p. 640.

²¹ MACHADO, *Op. cit.* p. 49.

multiple forms, arguably removing its normativity, cannot be considered authentic, being nothing but a real blow to the Democratic Rule of Law.²²

In this context, it is impossible not to highlight the constitutionally expressed objectives, according to art. 3rd of the Constitution of the Republic of 1988:

Art. 3 The fundamental objectives of the Federative Republic of Brazil are:
I - build a free, just and solidary society;
II - guarantee national development;
III - eradicate poverty and marginalization and reduce social and regional inequalities;
IV - promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination.²³

It is noted that the constitutional objectives privilege freedom, solidarity and the reduction of inequalities, which, in a capitalist state, demands tax and financial organization that is geared towards these ends, as explained by the teacher and lawyer Onofre Alves Batista Júnior:

In the Distributor State, finances are based on tax, levied on the basis of distributive justice and the principle of contributory capacity. The State's power to impose taxes is not justified by the mere existence of the State or by its financial needs, but by the conception of a capitalist, Tax and Distributor State, social in its desideratum, oriented towards the common good, which should provide social justice.²⁴

At this point, it is possible to recognize that the principle of non-allocation is an important instrument for this purpose, since, first, it constitutes a robust financial block and, second, it can be used directly and without major limitations according to public needs.

The Distributing State must be fair in collecting taxes, on the one hand; it must provide its services efficiently, on the other. If you tax poorly, unfairly, the model fails; if it is inefficient or corrupt, the public machine suffocates. In this context, the revenue must be obtained in compliance with the principle of economic capacity (tax justice); on the other hand, the “mass of taxes collected” must support a state action that is oriented towards providing social justice. For the financial aspect, therefore, it is up to the budget laws, voted by the legislatures, to decide and guide the resources collected to meet the needs of the community, conditioned by the greater desire to provide social justice.²⁵

2.5 Constitutional exceptions to the principle of non-affectation and stone clauses

²² MADALENA, Luis Henrique. **Administrative and hermeneutic discretion**. Coord. Lenio Luiz Streck. Salvador: Juspodivm, 2016. p. 211.

²³ BRAZIL, Constitution (1988). *Op. cit.*

²⁴ BATISTA JÚNIOR, Onofre Alves. Why the fiscal war? State challenges in liquid modernity. **Brazilian Journal of Political Studies**. v.102, p. 305 - 341, 2011. p. 314.

²⁵ BATISTA JÚNIOR, *Ibidem*. p. 314.

So far it has only been the first part of art. 167, IV, of the Constitution of the Republic, which refers to the prohibition of sharing tax revenue. However, it remains to deal with most of the device, which consists precisely of exceptions to the rule.

As it appears from the reading of the device:

Art. 167. [...]

IV - [...] the distribution of the proceeds from the collection of taxes referred to in arts. 158 and 159, the allocation of resources for public health actions and services, for the maintenance and development of teaching and for carrying out tax administration activities, as determined, respectively, by arts. 198, § 2, 212 and 37, XXII, and the provision of guarantees for credit operations by anticipating revenue, provided for in art. 165, § 8, as well as the provisions of § 4 of this article.

At this point, it should be noted initially that, as it is a constitutionally established rule, following the principle of parity of forms, *being thus instituted, it is also only through constitutional amendment that exceptions can be made to it*²⁶.

It is observed that the constitutional exceptions refer especially to the collection of certain taxes that is destined to constitutional offices and to the realization of fiscal federalism; shares to actions and services to guarantee fundamental rights to health and education; the cost of the tax administration itself and the provision of guarantees.

And there are not a few exceptions. On the other hand, as detailed by André Castro Carvalho, not only in this constitutional provision are exceptions to the rule of non-binding:

Despite the fact that the principle of non-consignment of revenues has continued to be enshrined in the Brazilian constitutional order, the Charter itself establishes vast exceptions to the rule, either in the very item in which it is conceived, or by several constitutional amendments that exception the general rule of law. non-binding through a specific constitutional binding.

The non-allocation does not apply to the distribution of the proceeds from the collection of the IR, ITR, IPVA, ICMS, IPI, stating that such an exception does not include the “shares” to fiscal federalism. Thus, there is the possibility that these taxes may be used in order to serve as transfers in fiscal federalism, either to the State and Municipal Participation Fund, or as observance of another normative command that provides for this assumption - as in the hypothesis state law allocate the FPE's share to distribute to the municipalities located in its territory.

In addition, there is also a provision for reservations in the case of the allocation of resources for public health actions and services, maintenance and development of teaching and carrying out activities of the tax administration. In the first two cases, there are exceptions to the "entitlements" - mandatory expenses - for health and education, demonstrating that the Magna Carta deals with both concepts in common by treating them as synonyms.

²⁶ LEITE, *Op. cit.*

It also does not apply to the provision of guarantees to credit operations in anticipation of budget revenue (AROs). Furthermore, there is no verification of the guarantee or counter-guarantee to the Union and the payment of debts to it in relation to ITCMD, ICMS, IPVA, IPTU, ITBI and ISS and, also, with respect to the product of the allocation of funds for fiscal federalism. Thus, it also considers it possible to link-guarantee the tax revenue in some established modalities.²⁷

In the opinion of several jurists, the existence of so many exceptions to the rule is detrimental to the rule itself, as highlighted by Gabriella Machado, who makes explicit other exceptions throughout the constitutional text:

It should be noted that, despite the aforementioned principle having an essential purpose for good budget management, it is impaired due to several exceptions. [...]

In addition to those provided for in the provision that enshrines the principle of non-allocation, other tax revenue shares were permitted or fixed by the Federal Charter in sparse provisions, such as, for example: States and the Federal District were allowed to link to a state fostering culture up to 0.5% of its net tax revenue, to finance cultural programs and projects and; within the scope of each State and the Federal District, the Fund for the Maintenance and Development of Basic Education and for the valuing of education professionals (Fundeb), to be in force until 2020, will be constituted by 20% of the resources to which items I (ITCD), II (ICMS) and III (IPVA) of art. 155; item II (residual liability tax) of the caput of article 157; items II (50% of the ITR), III (50% of the IPVA) and IV (25% of the ICMS) of the caput of article 158 (deals with transfers to the Municipalities); and items a (FPE) and b (FPM) of item I and item II (IPI, proportional to exports) of the caput of article 159 (deals with transfers to States), all of which are in the Federal Constitution.²⁸

Also noteworthy is the permission to link own tax revenues for the provision of a guarantee or counter-guarantee to the Union and for payment of debts with it (art. 167, §4, CR / 88) and the sharing by the States and the District Federal program to support social inclusion and promotion up to 0.5% of net tax revenue (art. 204, sole paragraph, CR / 88).

With the aforementioned exceptions noted, it is noted that they are about the realization of fiscal federalism, basic and fundamental guarantees of health and education, social rights and balance in public finances.

Thus summarized, it is noteworthy that all of them are related to rights, guarantees and principles privileged by the Constitution of the Republic and by the Brazilian democratic system, as priorities, highlights of what cannot be limited and needs to be protected in order to be guaranteed, on the other hand. On the one hand, the freedom to use tax collection.

²⁷ CARVALHO, *Op. cit.* p. 131.

²⁸ MACHADO, *Op. cit.* p. 50.

In this sense, there are those who even defend that the exceptions characterize constitutional stone clauses, which are listed in art. 60, §4, of CR / 88, under the terms:

Art. 60. The Constitution may be amended by means of a proposal:
[...]
§ 4 The proposal for an amendment to abolish:
I - the federative form of State;
II - direct, secret, universal and periodic voting;
III - the separation of Powers;
IV - individual rights and guarantees.²⁹

Among the exceptions listed, several are easily recognized as aimed at meeting needs established according to the federal form of the State, such as those related to constitutional allocations and the balance of public finances.

With regard to the others, it is possible to characterize them as insurances of individual rights and guarantees. In these terms explains the teacher Fernando Facury Scaff:

Well, why is it stated that this exception to the non-affectation rule, conveys a constitutional stone clause?

As is well known, the stone clauses do not allow some topics to be even the subject of a proposed amendment with a view to their modification (art. 60, paragraph 4, CF), with the “individual rights and guarantees” contemplated in item IV.

Here is the question: Will the financing of these two social, educational and health rights be contained within the “individual rights and guarantees”?
I answer yes, through the legal construction that I briefly explain.

Title II of the Constitution, called “Fundamental Rights and Guarantees”, has five Chapters. The first of these Chapters concerns “Individual and Collective Rights and Duties”, containing art. 5, and the second deals with “Social Rights”, which begins with art. 6, in which social rights to health and education are enshrined. The STF has already decided that these two social rights are fundamental rights (see, for all, health for ADI 3.510, Min. Ayres Brito; and for education, ADC 41, Min. Roberto Barroso and ADI 5.357, Min. Edson Fachin). Therefore, it is understood that the rights to education and health are social and also fundamental rights.

This analysis is sufficient, but it can be advanced, questioning, since the standard rule mentions “individual rights and guarantees”. Are social rights, already identified as fundamental rights, also “individual rights”?

There is certainly an individual dimension to social rights. It does not end with individuality, since the whole is greater than the sum of the parts, as Aristotle taught, more than 2,500 years ago. Therefore, there is an individual dimension among social rights, which reaches the amplitude intended by stone clauses.³⁰

²⁹ BRAZIL, Constitution (1988). *Op. cit.*

³⁰ SCAFF, *Op. cit.*

The teacher explains that it is not just a matter of establishing the right, but also guaranteeing the protection of the financing of that right, bearing in mind that, if there are no resources to guarantee it, it is not possible to recognize that the right is guaranteed. See if:

Analyzing the STF's jurisprudence, an interesting analysis by Min. Gilmar Mendes, in ADPF 33-MC, is seen, when dealing with the reach of stone clauses, in which he asserts that “the injury to fundamental precept will not be configured only when it is possible it affronts a fundamental principle, as based on the constitutional order, but also provisions that give normative density or specific meaning to that principle”. Thus, one can expand this restrictive concept of “individual right” provided for in the stone clause, in order to reach all the normative density, which Min. Gilmar deals with, for these two social rights, already declared as fundamental. I know that he did it by analyzing what would be a fundamental precept, a different institute, but which is related to what is now discussed in this text.

However, what is guaranteed is the right or the financing of that right? We must not forget that it is a question of sharing, that is, a normative link that unites a source of resources to fund a given social expenditure.

Because these are overpriced, onerous rights, in addition to the others that also cost - nor is it necessary to invoke Cass and Sustain's doctrine to do this -, cutting the cost source means undermining the right. And the Constitution established in its text a specific source of funding for this - which is different from having an infra-constitutional source. Therefore, the source of funding - read, the link - is also covered by the constitutional stone protection, according to my point of view, as I tried to outline in the lines above.

The consequence of such reasoning is that the allocation of resources must be protected constitutionally and petrified, even against possible advances by the derivative constituent - which has already occurred, but still without the STF's pronouncement.³¹

On the other hand, it is worth noting that there are also divergent understandings, in the sense that the principle of non-affectation should not present mitigations and, therefore, exceptions should not be admitted even if constitutional, as summarized by Gabriella Machado:

[...] For Régis Fernandes de Oliveira, there should not be what he calls “mutilation of public funds”. According to the indoctrinator, the State cannot be deprived of the mass of money collected, since it must have the prerogative to allocate its resources in the way that best suits it, obeying the parameters it chooses as preferential. The essential idea that this author expresses is that the State should not be placed in a “straightjacket”, reducing its resources, under penalty of having its government objectives frustrated.

The teacher Ricardo Lobo Torres presents an even more extreme understanding and notes that there should be no exception to the principle of non-sharing, defending the restriction to any and all sharing of tax revenue. According to Torres, there should not even be a possibility of sharing revenue from contributions and fees.³²

³¹ SCAFF, *Ibidem*.

³² MACHADO, *Op. cit.* p. 52.

It is also worth highlighting the understanding made explicit by the teacher José Ribamar Caldas Furtado, according to which the ties even represent aggression to the federative pact. See if:

However, it cannot be forgotten that the sharing, since it is prior, universal and indiscriminate, causes distortions in the allocation of resources, greatly compromising the optimization of the return on public expenditure. It is undeniable that the constraints of the attachment of budgetary resources, challenging the constitutional principle of non-attachment of tax revenue, compromises the important functions of the budget - political, economic and regulatory -, attacks the federative pact, limits the practice of participatory budgeting, restricting the participation of the people in the definition of the destination of public resources, and, what is more serious, it is so addictive to the budget system that it restricts the most important of the public budget attributions: operating as a planning tool.³³

As for these understandings, the discussion can still be prolonged, since it opens the possibility of questioning even about whether non-affectation would characterize a principle or a rule. Bearing in mind that, being considered a principle, it constitutes a commandment of optimization and, therefore, allows exceptions.

It is worth highlighting the teachings of Robert Alexy:

[...] Principles require that something be accomplished to the greatest extent possible, within the existing legal and factual possibilities. In that sense, they do not contain a *definitive commandment*, but just *prima facie*. From the relevance of a principle in a given case, it does not follow that the result is what the principle requires for that case. Principles represent reasons that can be dismissed for antagonistic reasons. The way in which the relationship between reason and counter-reason must be determined is not something determined by the principle itself. The principles, therefore, do not have the extension of their content in face of the colliding principles and the factual possibilities.

The case for rules is totally different. As the rules require that exactly what they order be done, they have a determination of the extent of their content within the scope of legal and factual possibilities. This determination may fail in the face of legal and factual impossibilities; but, if it doesn't, then definitely what the rule prescribes.³⁴

It is not for the present study to present the answers to such discussions. The use of the term “principle” was adopted for the analysis of non-affectation due to the literalness of the use practiced in the legal sphere, in an unintentional way in relation to reaffirming this or that understanding.

What is intended is precisely to consolidate the controversies discovered in the study of the theme, in a perspective of analysis on the consequences that may arise for legal security in

³³ FURTADO, José de Ribamar Caldas. **TCU Magazine**, Jan./Apr. 2008, p. 72.

³⁴ ALEXY, Robert. **Theory of fundamental rights**. São Paulo: Malheiros, 2008. p. 103-104.

Public Law, confidence in institutions and Powers and, finally, the effectiveness of all measures in meeting real social needs.

2.6 Excess of exceptions and the crisis of the principle

Having exposed so far the characteristics of the principle, what can be evaluated and is nothing hidden is the fact that the number of exceptions is considerable, which gives the institute a high degree of contradiction.

[...] Respectfully the view of the renowned authors, it cannot be demanded that a Government like the Brazilian, in view of all the social, political and economic complexity faced, simply does not establish any shared recipe. It is worth mentioning that the sharing of revenues is not all bad. Among its advantages, there is greater ease of control by Organs technical bodies of external and internal control, as well as greater transparency in public management. It is also noticeable that some expenses will always be a priority for the State, such as, those for the maintenance and development of education or those for the health area.

However, it is clear that the legislative intention proposed by the principle of non-affectation has been undermined by several constitutional provisions that make it stand out and distort its purpose. It follows that from these exceptions and from the other constitutional rules that link public resources, the current public budget is extremely plastered, which only makes it difficult for the Chief Executive to manage public spending and, consequently, its governability.³⁵

Between the constitutional guideline of wide unbundling of tax revenues, already mitigated by the restriction of the applicability of the rule on other tax species, and the set of established exceptions that stands out for the quantity and volume of resources, there is a euphemistically weakened principle or, in other words, a principle that, due to its own number of exceptions, opens room for questioning.

This situation can be seen from a harmonic perspective, in order to establish a balance between the discretion of the public manager and the guarantee of destinations that resources that cannot be relaxed. But it can also represent legal incompatibilities that are projected for insecurity in institutions, mistrust between Powers and lack of clarity for the citizen about the destination of public resources.

The aforementioned context can become even worse when basic needs are not met or met with low quality and with scarcity of resources, as is the case in Brazil, especially in the areas of health and education, which are the exception to non-affectation.

³⁵ MACHADO, *Op. cit.* p. 52.

As an example, in an article published in May/2018³⁶, several problems were listed that reflect the precariousness of the health system in Brazil, which can be highlighted:

- There is a lack of doctors (according to data from the CFM - Federal Council of Medicine, there is one doctor for every 470 Brazilians);
- There is a long wait for consultations (according to Fisc Saúde 2016, Brazil presented an average of 2.8 consultations per inhabitant in 2012, being 27th out of 30 countries, with a rate much lower than that of the best placed countries: Korea South - 14.3, Japan - 12.9 and Hungary - 11.8);
- There is a lack of beds (according to the National Association of Private Hospitals, Brazil has 2.3 beds per thousand inhabitants, below the WHO recommended - between 3 and 5);
- Emergency care is of low quality (in Ipea studies on the services provided by SUS, the topic received the highest negative qualifications: 31.1% - health posts and 31.4% - urgency or emergency);
- Resources are low (only 3.6% of the federal government budget was allocated to health in 2018. The percentage is well below the world average of 11.7%, according to the WHO. This rate is less than the average in the African continent - 9.9%, in the Americas - 13.6% and in Europe - 13.2. In Switzerland, this proportion is 22%. The study points out that health spending in Brazil is 4 to 7 times less than in countries with a universal health system, such as the United Kingdom and France, and less than in countries in South America where health is not a universal right, as in Argentina and Chile);
- The training lacks qualification (According to Cremesp - Regional Council of Medicine of the State of São Paulo, almost 40% of recent graduates do not pass their exam. In the rest of Brazil, only two other States apply an assessment - Goiás and Rondônia, and medical schools are multiplying in the country, which are not always well evaluated);
- Private plans are expensive, coverage is insufficient and does not always provide reimbursement;
- Discrimination in care (The National Health Survey, from IBGE, points out that 10.6% of the adult Brazilian population (15.5 million people) have already felt discriminated against in the public and private health network. The majority (53, 9%) said they were mistreated for "lack of money" and 52.5% due to "social class").

At the present moment, in the context of a worldwide pandemic caused by Sars-Cov-2, which became known as Coronavirus or Covid-19, Brazil presents the health system in

³⁶ SOBRINHO, Wanderley Preite. Lack of doctors and medicines: 10 major health problems in Brazil. **UOL Notícias**, 2020. Available at: <<https://noticias.uol.com.br/saude/listas/falta-medico-e-dinheiro-10-grandes-problemas-da-saude-no-brasil.htm>>. Accessed on: May 16, 2020.

precarious conditions³⁷, shortage of basic personal protective equipment³⁸ and an excessive number of infected people and fatal victims³⁹.

Still regarding education, the country does not present positive data. According to data from the National Continuous Household Sample Survey (Pnad) of 2018, released by the Brazilian Institute of Geography and Statistics (IBGE), more than half of Brazilians aged 25 or over this age have not completed basic education; 52.6% of Brazilians in this age group have not completed the minimum expected study; 35% of working-age Brazilians have not completed elementary school⁴⁰.

In the end, according to the above, the normative context is characterized by a legal principle and several exceptions intended for purposes that are not confirmed in the reality of the facts. Therefore, the situation becomes complex and can generate discredit.

As the teacher Régis Fernandes de Oliveira explains, the high number of exceptions seems to become the rule, which inverts the constitutional objectives:

Little by little, the budget is mutilated, returning to the old regime of budget tails. It is unfortunate what has been happening. The exception becomes the rule and what should be developed through public policies becomes the result of momentary opportunities, at the taste of futile, volatile and electoral events.⁴¹

In this way, the principle and its exceptions express a normative weakness, which is reflected in the lack of legal certainty in its practical application. In the terms of Aliomar Baleeiro: *the principle of not previously affecting the collection of taxes has never been sufficiently studied by the doctrine, respected by the legislator, nor followed by the Courts*⁴².

³⁷ CANSIAN, Natália. Four out of ten complaints to medical advice indicate a lack of protective equipment.

Folha de São Paulo, 2020. Available at: <<https://www1.folha.uol.com.br/equilibriosaude/2020/05/quatro-em-cada-dez-denuncias-a-conselho-medico-apontam-falta-de-protection-equipment.shtml>>. Accessed on: May 16, 2020.

³⁸ FERREIRA, Letícia; FERREIRA, Lola. In addition to long hours, nurses face a lack of protocol and protective equipment. **Folha de São Paulo**, 2020. Available at: <<https://www1.folha.uol.com.br/equilibriosaude/2020/03/alem-de-longas-jornadas-enfermeiras-enfrentam-falta-de-protocolo-e-de-protection-equipment.shtml>>. Accessed on: May 16, 2020.

³⁹ MANZANO, Fábio. The number of deaths in Brazil passes that of Italy and reaches 34,021; country is now the 3rd in the world with more deaths. **G1**, 2020. Available at: <<https://g1.globo.com/bemestar/coronavirus/noticia/2020/06/04/brasil-tem-34021-mortes-por-coronavirus-diz-ministerio.ghtml>>. Accessed on: June 5, 2020.

⁴⁰ OLIVEIRA, Elida. More than half of Brazilians aged 25 or over have not yet completed basic education, points out IBGE. **G1**, 2019. Available at: <<https://g1.globo.com/educacao/noticia/2019/06/19/mais-da-metade-dos-brasileiros-de-25-anos-ou-mais-ainda-not-completed-basic-education-point-ibge.ghtml>>. Accessed on: May 16, 2020.

⁴¹ OLIVEIRA, Régis Fernandes de. **Financial Law Course**. 2. ed. Sao Paulo. Ed. Revista dos Tribunais, 2008. p. 337.

⁴² BALEEIRO, Aliomar. **Brazilian Tax Law**. 11. ed. Rio de Janeiro: Forensics, 2009. p. 205.

The principle of non-affectation cannot be understood as a norm with a purpose in itself, aimed only at guaranteeing the use of resources to the Public Administration. Likewise, the exceptions are not based on the mere guarantee expressed in its text, which would empty them of their functions.

Under the canopy of the 1988 Constitution, revenues shared to social security and the levels of spending on health and education are instruments of budgetary-financial protection of rights that cannot be reduced or denied. Here is a conclusive synthesis as simple as the realization of the profound deficit in the effectiveness of such rights in our society.

In fact, for those who defend the extinction of budgetary ties, the problem of the effectiveness of public health and education policies, for example, would be a consequence of the low quality of public spending, which, in turn, would justify the removal of the floors that support them. But this line of reasoning, in our view, cannot be sustained.

Although the realization is that it is necessary to improve the management of such shared expenditures, the impasse cannot be resolved simply by expanding the scope of allocative freedom for public managers.

To contain the high degree of correlation between corruption and the low quality of public spending (whether made from the constitutional floors in health and education or carried out with resources shared to social security), we need more transparency and better planning in identification of goals and costs, so that concrete results can be measured, along the concomitant process of controlling the expenses undertaken there.

It will not be with more budgetary discretion in times of fiscal crisis that we will correct distortions, deviations and abuses. Rather, on the contrary, the unrestricted expansion of budgetary discretion will deconstruct the civilizing process that we have proposed in social security, in the universalization of mandatory basic education from four to 17 years of age and in the Unified Health System (SUS), of public coverage full and full access to all citizens.

To deny the existence of any allocative priority in favor of fundamental rights in the midst of Brazilian public budgets is a strategy that certainly is not intended to provide better public services, but only gives rise to a constitutionally prohibited inversion of priorities.

The national system, however, does not allow a government budget that refutes the minimum cost of fundamental rights, to start to bear mostly financial charges of public debt. It is worth remembering that this, in turn, still lacks constitutional limits and parameters of motivation, transparency and economy.⁴³

In the eyes of the citizen, there is a lack of correspondence between norms (principles or rules) and factual reality. Questions that relate to the tax contributed to and the immediate public need that is expected to be resolved are common, as highlighted by Balsan:

⁴³ COMPARATO, Fábio; PINTO, Elida Graziane. Minimum costing of fundamental rights, under maximum constitutional protection. **Legal Consultant Magazine**. 2015. Available at: <<https://www.conjur.com.br/2015-dez-17/custeio-minimo-direitos-fundamental-maxima-protacao-cf>>. Accessed on: May 17, 2020.

Complaints about the precariousness of the streets and highways are often broadcast, mainly on social networks. In general, people complain that they pay IPVA and cannot enjoy satisfactory roads and highways.

Is the complaint justified? Taxally speaking, no. The IPVA, as a tax, is a non-shared tax. Therefore, the duty to pay arises from the realization of the taxable event and not from a consideration.⁴⁴

Questions like this only confirm that society, especially the Brazilian population, lacks the verification of the effectiveness of the allocation of public resources, which demonstrates that not even the principle fulfills its role in granting freedom for the public manager to allocate resources efficiently, nor do the exceptions work for the guarantees that have been established.

And it is important to remember that all this is financed by the taxpayer himself, who takes part of his assets due to state determination, but, on the other hand, trusts and expects correspondence in the public entity's policies and duties.

The right to property is a fundamental right, for which guarantees and protection such as legal certainty and trust, free enterprise and prohibition of confiscation through taxes are cogent norms. Nor could we ignore, from a constitutional point of view, the option made in favor of the construction of the Democratic Rule of Law, social rights and the eradication of misery and inequalities between groups and regions.⁴⁵

Obviously, it is not appropriate to assign responsibilities to the constitutional texts, but to the powers and representatives who have a duty to respect them, which, when it does not materialize in a transparent manner, is reflected in the discredit of the legal system.

This is the reason why we emphasize, with emphasis, the existence in the 1988 Charter of a true microsystem of protection of the funding of fundamental rights. The financing guarantees contained in the constitutional text itself reveal a maximum degree of protection, so that public budgets are not silent on the material satisfaction of those rights.

It is interesting here to return to the perspective that the general principle of non-allocation of tax revenue admits the exception made by article 167, item IV, in its final part, in favor of the protection of fundamental rights to health and education. In a systematic interpretation, we infer that the levels of minimum spending in favor of such rights, in fact and in law, are already considered as the immutable content of budgetary legislation, even so that the adventured restriction of the “reserve of the possible” can be verified for face other public policies.

We are in the midst of a pedagogical and civilizing process of ensuring health, assistance and social security, as well as educating our citizens, which cannot be prevented or passed over for controversial reasons of fiscal crisis. Today, more than

⁴⁴ BALSAN, *Op. cit.*

⁴⁵ DERZI, Misabel Abreu Machado. Fiscal war, Bolsa Família and silence (relations, effects and regressivity). *Legal Journal of the Presidency*, vol. 16, 2014, p. 39-64, p. 48.

ever, the minimum of dignified life involves guaranteeing the fundamental rights in question. There is nothing more priority in public budgets than such a constitutional desire, under penalty of frustration of the very reason for being of the State and of the social agreement that it contains.

For all these reasons, we do not accept initiatives and deliberations aimed at constraining the guarantees that establish the protective financial core of fundamental rights as constitutionally valid. If they remain oblivious to this maximum protection, public budgets will simply violate the 1988 Constitution, which, first of all, is a citizen, because founded on the dignity of the human person.⁴⁶

Freedom or binding without effectiveness are revealed more as contradictions than as solutions and risk turning the constitutional text into a dead letter if they are not carried out taking into account the objectives set out in the Constitution.

3 CONSTITUTIONAL AND LEGAL SHARES

In a broad sense, the link can be understood as a link between a source and a destination⁴⁷. In this sense, the legal sharing of revenues characterizes a normative sharing and *consists of the legal or constitutional provision that certain budget revenues, or a percentage of them, be invested in areas elected as priorities*⁴⁸.

It is a broad definition, so that any allocation of resources that is normatively predetermined fits into the concept of sharing. It should also be noted that among all forms of sharing there is the effect of limiting the discretion of the public manager in the allocation of resources⁴⁹. Thus, in this study, the exceptions to the principle of non-allocation of tax revenues as bonds have been treated so far.

It happens that, when analyzed under strict perspectives, the different forms of sharing have peculiar characteristics, which even generate conflicts related to the classification, application and considerable impacts in the analysis of the destination of public resources.

The following are some conceptualizations for various forms of sharing. Some conflicts arising from them are also mentioned. It is not the job of this work to establish a new

⁴⁶ COMPARATO; PINTO, *Op. cit.*

⁴⁷ SECAF, Francisco. **Financial Direct and Public Policies**. Trekking. Available at: <<https://www.trilhante.com.br/curso/direito-financeiro-e-politicas-publicas/aula/vinculacao-de-receitas-e-gastos-minimos-obrigatorios-2>>. Accessed on: May 23, 2020.

⁴⁸ JÚNIOR, Roberto Di Sena. Fiscal crisis and unbundling of municipal revenues (DRM). **JUS.COM.BR**. 2019. Available at: <<https://jus.com.br/artigos/71630/crise-fiscal-e-desvinculacao-de-receitas-dos-municipios-drm>>. Accessed on: May 23, 2020.

⁴⁹ SECAF, *Op. cit.*

classification, which is an arduous task even for the most renowned indoctrinators. For organizational purposes, the classification presented by André Castro Carvalho was based⁵⁰.

The purpose of presenting the various forms of sharing, then, is to demonstrate that they consist of different normative treatments, established constitutionally or legally, and leading to conceptual conflicts in the doctrinal sphere and to the expansion of incompatibilities already existing between the principle of non-affectation of tax revenues and the rules that

Thus, the hypothesis of this work is reinforced that the excess of institutes that establish resource allocations and the principle of non-affectation have reflected their technical-legal conflicts in practical reality, which presents itself as a lack of resources and public policies efficient.

3.1 Referability and sharing

Referability consists of a mechanism whereby the destination of the collection proceeds is established directly in the law that creates the tax⁵¹. It can be understood as a broader link, since it encompasses the concept of the tax itself.

The classic example is that of special contributions, since they have their collection focused on certain purposes, which characterizes the tax species itself⁵².

Under the terms of art. 149 and its Paragraph 1, of the Constitution of the Republic, are the following:

Art. 149. It is the exclusive responsibility of the Union to institute **social contributions, of intervention in the economic domain and of interest to the professional or economic categories**, as an instrument of its performance in the respective areas, subject to the provisions of arts. 146, III, and 150, I and III, and without prejudice to the provisions of art. 195, § 6, regarding the contributions to which the provision refers.

§ 1 The Union, the States, the Federal District and the Municipalities shall institute, by law, **contributions to cover their own social security system**, charged to active employees, retirees and pensioners, which may have progressive rates in accordance with the value of the contribution base or retirement and pension benefits.⁵³

⁵⁰ CARVALHO, *Op. cit.* p. 45.

⁵¹ SCAFF, Fernando Facury. You are not obliged to spend: budget bonds and mandatory spending. **Legal Consultant Magazine**. 2016. Available at: <<https://www.conjur.com.br/2016-mai-17/contas-vista-vinculacoes-orcamentarias-gastos-obrigatorios>>. Accessed on: May 23, 2020.

⁵² SCAFF, 2017. *Op. cit.*

⁵³ BRAZIL, Constitution (1988). *Op. cit.*

When citing special contributions, it is interesting to highlight the case of CIDE-fuels (contribution of intervention in the economic domain related to the activities of importing or trading oil and its derivatives, natural gas and its derivatives and fuel alcohol). Said tax characterizes both the comparability of contributions, since it is established in function of the intervention in the aforementioned economic activities, and a specific link of its destination⁵⁴, which takes place through art. 177, §4, II, of the Constitution of the Republic. See if:

177. [...]

§ 4 The law that institutes an intervention contribution in the economic domain related to the activities of importing or trading oil and its derivatives, natural gas and its derivatives and fuel alcohol must meet the following requirements:

[...]

II - the funds raised will be used:

- a) the payment of price subsidies or transportation of fuel alcohol, natural gas and its derivatives and petroleum derivatives;
- b) the financing of environmental projects related to the oil and gas industry;
- c) the financing of transport infrastructure programs.⁵⁵

It is also worth mentioning the social contributions tax type. As the teacher Misabel Derzi explains, although the Constitution of the Republic established freedom as to the allocation of resources from tax collection, she specified, on the other hand, tax species shared to social purposes. Thus, social contributions represent, at first sight, the fulfillment of the constitutional commitments to build a free, just and solidary society, to eradicate poverty and reduce social inequalities.

The sovereign option of the Brazilian people in favor of a Democratic State of Law is clear, repetitive and consistent, in which the construction of fundamental social rights is imperative. For this, in addition to the principle of prohibiting the binding of tax revenue, the Constitution of the Republic thought of a broad Social Security, whose financing and support taxes - social contributions - are affected for social purposes.⁵⁶

It happens that, in view of the regressive nature of the hypotheses of incidence of social contributions, a more in-depth analysis of these taxes reveals that they even tend to accentuate Brazilian social disparities. So explains the teacher:

[...] We will see, however, that a large part of these taxes, which are already born in the Magna Carta to the State of Social Welfare, contributions, have a hypothetical

⁵⁴ SCAFF, 2017. *Op. cit.*

⁵⁵ BRAZIL, Constitution (1988). *Op. cit.*

⁵⁶ DERZI, 2014. *Op. cit.* p. 648.

incidence of taxation (we are in the face of constitutional equivalence contributions) of a regressive character, because incidents on payroll, billing or company revenue (PIS / Cofins). Such finding leads to an undesired result, that the actions in the scope of Social Security, including assistance, are heavily funded by those who need them most.⁵⁷

Therefore, there is one more highlight for the incompatibilities that are related in this work in relation to the allocation of public resources and their effects on the society that expects to see them reflected in effective policies.

3.2 Minimum expenses, mandatory expenses and funds

One of the main examples mentioned as shares is the allocation of resources for public health actions and services and for the maintenance and development of education as provided by art. 198, § 2 and art. 212 of the Constitution of the Republic.

This allocation of resources to the areas of health and education establishes its origins as being net current revenue, transfers and tax revenue. In this way, it is possible to identify the direct link between a specific source and a specific destination, in order to constitute a link itself.

This characterization as sharing is further reinforced by the fact that they are subject to hypotheses of the sharing that is prohibited, through art. 167, IV, of CR / 88, which constitutes the principle of non-allocation.

It is, therefore, of minimal expenses, guarantees of basic protection for areas and services considered essential to citizens, which are understood as binding due to the very treatment that the Constitution gives them, being, therefore, protected as a priority. To this end, the constituent legislator sought to protect them even from the discretion of the Executive Branch.

I have always imagined that these constitutional shares to health and education, among others, were created by the *constituent legislator* in the face of the enormous suspicion that he had of the *ordinary legislator*. I suppose you must have thought something like: if a minimum percentage is not set for application in these social expenditures, the government will be able to use this money in other things and leave these activities essential to the resource drain.⁵⁸

⁵⁷ DERZI, 2014. *Ibidem*.

⁵⁸ SCAFF, 2016. *Op. cit.*

It is also worth mentioning the existence of mandatory expenses, which differ from the minimum expenses, according to the doctrine, as they do not present the specification of a source of revenue to be funded, even though they must also be met in order to guarantee resources for the established destination. There is, for example, public debt service and expenses with personnel and charges, which are maintained by the general collection.

As the teacher Francisco Secaf points out, the minimum expenses and mandatory expenses are similar, in view of the fact that mandatory expenses are often guaranteed through funds, which ends up making a link:

It is a very subtle difference, since many of the mandatory minimum expenses will be made through funds, from which a link is also established, a link if intended for revenue.⁵⁹

In this sense, it is appropriate to present the definition of funds, or special funds, according to art. 71 of Federal Law No. 4,320, of 1964, which establishes General Financial Law Norms for the preparation and control of budgets and balance sheets of the Union, the States, the Municipalities and the Federal District:

Art. 71. The product of specified recipes constituting a special fund that by law is shared to the achievement of certain objectives or services, allowing the adoption of specific rules of application.⁶⁰

Therefore, it is necessary that both the minimum expenses, as well as the mandatory expenses and any other expenses that can be guaranteed through special funds are constituted as bonds, with only the first ones being constitutionally expressed exceptions to the principle of non-affectation. tax revenue.

As José Alves Neto points out:

The constitutional principle, however, has little application, given that legal norms and economic law already bind much of the revenue. Constitutional Review Amendment No. 1, 1994, further weakened the principle of non-affectation, by creating, in the years 1994 and 1995, the Social Emergency Fund, with the objective of financial sanitation of the Federal Public Finance and stabilization economic, whose resources would be used to fund the actions of the health and education systems, social security benefits and assistance of a continuous duration, including settlement of social security liabilities, and other programs of relevant economic and

⁵⁹ SECAF, *Op. cit.*

⁶⁰ BRAZIL, **Law No. 4,320** (1964). It establishes General Financial Law Norms for the elaboration and control of the budgets and balance sheets of the Union, the States, the Municipalities and the Federal District. Brasília, DF: Presidency of the Republic. Available at <http://www.planalto.gov.br/ccivil_03/leis/l4320.htm>. Accessed on May 23, 2020.

social interest. This superfund relied on resources from the collection of income tax, IOF, social contribution on profit, as well as twenty percent of the proceeds from the collection of all taxes and contributions of the Union.

The Emergency Social Fund, later called the Fiscal Stabilization Fund, was in force until December 31, 1999. As of the year 2000, it was reformulated and renamed the Federal Government's Untying (DRU), with its extension approved by the National Congress until 2007.⁶¹

According to a report published by Exame magazine, in 2015, 87% of the country's net revenue was used to pay mandatory expenses:

Therefore, the resources shared in Brazil are stipulated either by social contributions or by articles of the Constitution. In all, 19.5% of the country's net revenue is shared to some specific expense.

The biggest expenses in 2015 were not related expenses, but mandatory expenses, those that cannot be paid and that represent 87% of Brazil's net revenue (this value cannot be added to the 19.5% of shared expenses, since part of the shared expenses are used to pay mandatory expenses, as in the case of teachers' salaries).

The expenses with Social Security (which pocketed 42% of last year's income) and the payroll of federal employees (23%) are included in the mandatory expenses account.

Although they are not mandatory payments, public debt spending is also seen as a priority. In 2015, 367.7 billion were spent on interest payments, according to data from the Central Bank. This amount is more than enough to pay for 15 years of Bolsa Família: Brazil spent 221.7 billion with its main income transfer program between 2000 and 2015.⁶²

Thus, there is again a situation that denotes a weakening of the principle of non-affectation, which, analyzed in relation to the aforementioned institutes, brings up the existence of a hodgepodge of shares and, once again, raises questions about possible plastering of the budget and the need to match these guarantees to the reality of the facts.

This is because, also as already demonstrated in this study, the statistical data do not prove that the applied resources are capable, sufficient and well used to the point of guaranteeing health systems and quality educational systems.

3.3 Breakdowns and transfers

⁶¹ ALVES NETO, José. **Budgetary principles: an analysis in the context of the Constitutions and federal budget laws**. Brasília: University of Brasília, 2006. p. 15.

⁶² OLIVEIRA, Carol. Untying of revenues. **Exame**, 2016. Available at: <<https://exame.com/economia/a-desvinculacao-de-receitas/>>. Accessed on: May 23, 2020.

Establishes art. 167, IV, of CR / 88, as one of the caveats to prohibiting the binding of tax revenue, the sharing of the proceeds from the collection of taxes referred to in art. 158 and 159.

It is, therefore, about the distribution of tax revenues among public entities, what is known as fiscal federalism.

It should be noted, therefore, that although they are considered together with the bonds subject to art. 167, IV, the constitutional allocations do not operate so that the specific allocation of resources is detailed, but only the distribution among the entities.

[...] State and Municipal Participation Funds (FPE and FPM) cannot be considered as instruments for earmarking revenues. In these Funds there is a definition of the source of funding (the shared resources for fiscal federalism), but there is no allocation (the determined expenditure). Therefore, they are sharing instruments that only serve to operationalize the sharing of revenues among the federal entities.⁶³

In this case, it is understood that the treatment of resource allocations amid the shares mentioned by the article that establishes the principle of non-allocation can be understood as a reinforcement of the transfer guarantee, in order to prevent any different interpretations about these resources, that could grant some degree of freedom to the managers of each public entity responsible for transfers. It is the idea that the protection of resources is the first step for the guarantee of transfers.

Even so, there is a common delay or the need to renegotiate in amounts below the amount owed for the entities to affect the transfers⁶⁴. Take, for example, the case of the Kandir Law, between the Union and the State of Minas Gerais:

Complementary Law 87, of 1996, was better known by the surname of the then Minister of Planning, Antonio Kandir. At the time, it was established that the states would not collect the Tax on Circulation of Goods and Services (ICMS) on exports. It would be up to the Union to financially compensate the federal entities for the tax waiver. This compensation, however, stopped being paid in 2004, which started legal disputes between the federal entities and the federal government.⁶⁵

⁶³ CARVALHO, *Op. cit.* p. 177.

⁶⁴ Minas Gerais Association of Municipalities. State pays only part of the last transfer of ICMS and Fundeb in 2018. **Portal AMM**, 2019. Available at: <<https://portalamm.org.br/estado-paga-somente-parte-do-ultimo-repasse-de-icms-e-fundeb-de-2018/>>. Accessed May 24, 2020.

⁶⁵ State of Minas. Minas Gerais will receive R \$ 8.7 billion by 2037 with the agreement of the Kandir Law. **State of Minas**. Policy, 2020. Available at: <https://www.em.com.br/app/noticia/politica/2020/05/19/interna_politica,1148761/minas-vai-receber-r-8-7-bilhoes-ate-2037-with-law-agreement-kandir.shtml>. Accessed on: May 24, 2020.

It even sounds strange that constitutional guarantees need to be disputed by judicial means, over several years, in order to be effective. Unfortunately, this is not an uncommon fact in Brazil. It should also be noted, resuming the aforementioned minimum expenses, that *the judicialization of health grew 130% in the 10 years between 2008 and 2017*⁶⁶. According to data published by Insper Conhecimento in 2019, almost 70% of the demands are related to medicines⁶⁷.

As stated, failure to comply with the constitutional guarantee of revenue sharing weakens fiscal federalism, removing autonomy from public entities to carry out their policies. It is similar to noncompliance with non-affectation or shares, when this noncompliance compromises the realization of rights or policies that, due to their essentiality, are constitutionally guaranteed.

3.4 Guarantee

Art. 167, IV, of CR / 88 also establishes, as an exception to the principle of non-allocation, the provision of guarantees for credit operations by anticipating revenue.

The rule aims to ensure the satisfaction of debts of public entities (States, Federal District and Municipalities) to the Union, as a rule that compensates for the guarantee of distribution, since it serves entities that do not have the transfer power and, therefore, depend on the guarantee of lending, and this serves the main public entity that can be a creditor, since the Union is the holder of the power to tax on the largest number of types of taxes, according to art. 145 and following of CR / 88.

This connection sounds like the intention of receiving faster and less tortuous debts acquired between public entities, which is not a problem. As André Castro Carvalho highlights:

In view of this, the second rule is that the sharing of revenues does not function as a *guarantee of self-satisfaction of a debt*, but rather as certainty that the budget credits shared for this purpose cannot be redistributed to the detriment of the payment of the contracted obligation.

⁶⁶ CONDE, Luiz Felipe. The increasing judicialization and increased influence of the Judiciary in the health system. **Legal Consultant Magazine**. 2019. Available at: <<https://www.conjur.com.br/2019-dez-18/judicializacao-influencia-judiciario-sistema-saude>>. Accessed on: May 24, 2020.

⁶⁷ Insper. Judicialization of health soars and already costs R \$ 1.3 billion to the Union. **INSPER CONHECIMENTO**, 2019. Available at: <<https://www.insper.edu.br/conhecimento/direito/judicializacao-da-saude-dispara-e-ja-costa-r-13-bi-a-uniao/#:~:text=Judicializes%20C3%A7%C3%A3o%20consumes%20every%20times%20more,responsible%20por%2090%25%20of%20this%20value.>>. Accessed on: May 24, 2020.

With this, it is concluded that *the bonding of revenues, in the function of guarantee (bonding-guarantee), translates into the budgetary commitment that the resources should be used to fulfill the contracted obligation, being forbidden the double bonding and self-satisfaction of the debit through guaranteed revenues.*⁶⁸

On the other hand, the link implies the establishment of a kind of control over the tax collection of other public entities by the Union, which would hurt the competences established by the Constitution of the Republic itself.

As Carvalho points out, the scope of this rule is questionable, which was reinforced by Complementary Law No. 101, of 2000, which establishes public finance rules aimed at responsibility in tax management and takes other measures, widely known as the Fiscal Responsibility Law:

In Brazil, it is the modality that leads to greater discussions about the constitutionality of its application in some cases, mainly with the advent of the Fiscal Responsibility Law; increasing the scope of application of the permissive contained in article 167, § 4, the Law provided for the possibility of retaining these shared revenues for self-satisfaction of outstanding debt with the Union.⁶⁹

3.5 Incentive laws and revenue waivers

Federal Law No. 8,313, of 1991, re-establishes the principles of Law No. 7,505, of July 2, 1986, institutes the National Program to Support Culture (Pronac) and provides other measures. It is known as the Rouanet Law and, among several provisions, establishes the possibility for the Income Taxpayer (natural or legal person) to collect a percentage of the amount of his tax by directing him to a specific project or cultural fund.

In this case, there is no doubt that this is not a donation by the taxpayer, since the taxpayer has no alternative regarding the incidence of taxation. It is, therefore, a legislative direction of the revenue from the collection of taxes to a specific sector.

There is no doubt that the legislative initiative aims to promote sector financing. As Saulo Almeida, Maria Lírida Mendonça and Vicente de Oliveira Júnior point out, it is even an example for other sectors:

It is interesting that this practice of sharing public revenues appears to have its genesis shared to a high level of political distrust. Corresponds to the way found by certain sectors to safeguard the continuity of receiving public resources regardless of any change or instability of governments. After all, it is known that political changes mean

⁶⁸ CARVALHO, *Op. cit.* p. 95.

⁶⁹ CARVALHO, *Ibidem.* p. 47.

new government programs that, certainly, could result in the discredit of certain sectors.

Therefore, the allocation of tax revenue protects the funds established there, guaranteeing the continuity of its irrigation, regardless of any political scenario. A true irreducible mechanism for state funding, ensuring that budget transfers will not be mitigated or suppressed.

In this context, it is not surprising that the tax incentive model developed in the cultural sector, at the federal level, became widespread and started to infiltrate not only among the other political entities (states, federal district and municipalities) but would also be “copied” by several other sectors, such as areas such as Research and Technological Innovation (Law 11.487 / 2007), Sport (Law 11.438 / 2006), among others.⁷⁰

It so happens that the measure, although it establishes an important incentive and prioritization, clearly consists of a sharing of the revenue derived from taxes, established by Law and not by the same instrument that the prohibition to this form of sharing was foreseen, that is, via the Constitution. In this sense, these jurists explain:

It would be a theoretical inaccuracy to argue that incentive laws (be it culture, sports, science and technology) are in harmony with the rigidity of the constitutional rule of non-allocation of tax revenue for the simple fact that the link is not due to an imposition, but rather option granted to taxpayers. It would be a position that would open the door to the possibility of the future extinction of this constitutional limitation through a simple “maneuver” to be carried out by the legislature, which could adopt a true mechanism for binding taxes through cross-cutting routes. From a budgetary perspective, the consequence will be inefficiency in meeting public policies as taxes protected by the legal system are no longer collected revenues.

In this way, it can be understood that the constitutional rule is eminently addressed to the legislature, which will not be able to allocate tax revenues directly or even indirectly (passing on this possibility to the taxpayer). An imposition that must be followed by the Union, States, Federal District and Municipalities when reproducing tax and fiscal rules that deal with tax revenue. Those, will not be able to experience affectation, except for the exceptional hypotheses foreseen in the constitutional text.

[...]

It is evident that a single promotion legislation interferes, be it to a greater or lesser degree, in the budget of that federated entity, affecting its autonomy regarding the use and application of its revenue. In extreme scenarios, it can be imagined that a plexus of tax incentive legislation would even be able to empty, absolutely, the revenues collected by a given unit of the federation. In other words, as a result, incentive laws would plague the State's resources by directing them to specific segments such as culture, sports activities, technological innovation, environmental preservation, medical research, professional qualification, without any rationality regarding an order of conduct priorities to be observed according to the needs of the federated entity itself.

⁷⁰ ALMEIDA, Saulo Nunes de Carvalho; MENDONÇA, Maria Lírida Calou de Araújo e; OLIVEIRA JÚNIOR, Vicente de Paulo Augusto de. THE ROUANET LAW OF INCENTIVE TO CULTURE AND THE PRINCIPLE OF NON-AFFECTING REVENUE. **Cultural Rights Magazine**, v. 14, n. 33, p. 159-174, abr. 2019. p. 163. Available at: <<http://srvapp2s.urisan.tche.br/seer/index.php/direitosculturais/article/view/2980/1684>>. Accessed on: May 30, 2020.

The consequence would be, precisely, what the Constitutional Text sought to avoid, a compromise of financial revenues, in which the funds of the political entity are mutilated, ceasing to be part of its collection. A scenario in which the Administrator will not be able to make budgetary adjustments to the amounts shared by taxpayers, regardless of how serious or unpredictable the current social scenario may be.⁷¹

This tax revenue allocation mechanism is very similar to legislation that implies revenue waivers. In this case, the difference is only due to the lack of specific destination, since, in the case of the waiver of revenues, these cease to be part of the public entity's cash.

Revenue waivers are regulated by Federal Complementary Law No. 101, 2000, known as the Fiscal Responsibility Law, already mentioned in this study. The aforementioned Law establishes requirements for the waivers to occur and cites mechanisms that characterize them:

Art. 14. The granting or expansion of a tax incentive or benefit that results in a waiver of revenue must be accompanied by an estimate of the budgetary-financial impact in the year in which it should start and in the following two years, comply with the provisions of the law of budgetary guidelines and at least one of the following conditions:

I - demonstration by the proponent that the waiver was considered in the estimate of revenue under the budgetary law, pursuant to art. 12, and that it will not affect the fiscal results targets provided for in the proper annex to the budget guidelines law;

II - be accompanied by compensation measures, in the period mentioned in the caput, through the increase in revenue, arising from the increase in rates, expansion of the calculation base, increase or creation of tax or contribution.

§ 1 The waiver includes amnesty, remission, subsidy, presumed credit, granting of exemption on a non-general basis, alteration of the rate or modification of the calculation basis that implies a discriminated reduction in taxes or contributions, and other benefits that correspond to differentiated treatment.

Paragraph 2. If the act of granting or expanding the incentive or benefit referred to in the caput of this article arises from the condition contained in item II, the benefit will only come into force when the measures referred to in that item are implemented.

§ 3 The provisions of this article do not apply:

I - changes to the tax rates provided for in items I, II, IV and V of art. 153 of the Constitution, in the form of its § 1;

II - the cancellation of a debt whose amount is less than the respective collection costs.⁷²

⁷¹ ALMEIDA; MENDONÇA; OLIVEIRA JÚNIOR, *Ibidem*. p. 168.

⁷² BRAZIL, **Complementary Law No. 101** (2000). It establishes public finance rules aimed at responsibility in fiscal management and takes other measures. Brasília, DF: Presidency of the Republic. Available at <http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp101.htm>. Accessed on: May 30, 2020.

As an example, the deduction applied on the ISSQN in the Municipality of Belo Horizonte, established by the Municipal Law n° 11.010/2016 in order to promote cultural projects, according to which:

Art. 16 - Transfers made by incentives in favor of cultural projects may be fully deducted from the amounts owed by them as Tax on Services of Any Nature - ISSQN, subject to the limit set by the Executive, pursuant to paragraph 1 of art. 1 of Law No. 6,498 / 93.⁷³

In a similar example, art. 23 of the Municipal Law n° 9,795, of 2009, which alters the Tax Policy of the Tax on Urban Property and Territorial Property - IPTU - and provides other measures, in the Municipality of Belo Horizonte. Said device establishes the well-known BH Note 10 Program, and presents the following wording:

Article 23 - Portion of the value of the Tax on Services of Any Nature - ISSQN - incident on services broken down by regulation and covered by the Electronic Services Invoice - NFS-e, instituted in the Municipality, limited to 30% of the value of that tax, be used by natural persons borrowing the respective services as credit for the reduction of up to 30% (thirty percent) of the IPTU, under the terms provided for in the regulation.

§ 1 - The credit referred to in this article is not entitled:

I - legal and equivalent persons of any nature;

II - natural persons domiciled outside the territory of the Municipality.

Paragraph 2 - The credits referred to in this article will be totaled annually to deduct the IPTU for the immediately following year, relating to the properties of the person taking the service, natural person or third parties that he indicates.

§ 3 - The Executive is authorized to establish, by regulation, the conditions of concession and the amounts of credits generated from ISSQN and the deduction of IPTU to be granted, considering the maximum limits of the percentages mentioned in the caput of this article.⁷⁴

It appears that the BH Nota 10 Program grants credits in the IPTU from the registration of electronic invoices - NFE's, so that one of the objectives of the device is to encourage the issuance of invoices by service providers (ISSQN contributors).

⁷³ BELO HORIZONTE, **LAW No. 11,010** (2016). Provides for the Municipal Policy for the Promotion of Culture and other measures. Belo Horizonte, MG: City Hall. Available at <<https://www.cmbh.mg.gov.br/>>. Accessed on: May 30, 2020.

⁷⁴ BELO HORIZONTE, **LAW No. 9,795** (2009). Alters the Tax Policy of the Property Tax and Urban Territorial Property - IPTU - and makes other provisions. Belo Horizonte, MG: City Hall. Available at <<https://www.cmbh.mg.gov.br/>>. Accessed on: May 30, 2020.

It is important to highlight that, even though the proposal is intended to promote an increase in the regularization of the provision of services and, thus, contribute to guarantee the due collection of taxes and to the expansion of municipal tax control, any exemption or compensation of taxes should be assessed under the prism of the principles of equality and contributory capacity, so that the excess of these mechanisms may represent that the tax is not adequately charged or that its collection may be compromised.

From the analysis of the aforementioned provision, it is noted that part of the collection of the ISSQN revenue is what directly enables the waiver of the IPTU revenue, which could raise doubts as to a possible existence of sharing the product of the ISSQN collection to the body fund or expense related to the proceeds from the collection of IPTU. However, there was no legislative affectation under the aforementioned legal provision.

In any case, care must be taken so that the ISSQN collection proceeds treated as credit are not shared, except for carrying out activities of the tax administration itself, as indicated in art. 167, IV, of the Constitution of the Republic.

As mentioned above, the revenue waiver does not characterize an irregular mechanism, which does not mean that it can compose instruments that eventually culminate in non-compliance with the principle of not affecting tax revenues, and should be exercised sparingly.

3.6 Binding impacts

In view of all the above, we sought to analyze the consequences of the ties, either to guarantee the allocation of resources they propose, to increase confidence in the Legislative and Executive Powers, or even to the effectiveness of public spending on prioritized policies.

It is important to remember that several of the aforementioned sharings are an exception to the principle of non-affectation of tax collection, so that, when recognizing benefits to them, the effectiveness of the tax is recognized, and, when disadvantages are found, the questions fall on the effectiveness of the two institutes.

Throughout the studies carried out, several advantages are pointed out by jurists and other indoctrinators as to the shares, which can be mentioned:

Reinforcement of the tax benefit principle;
reconnection between taxes and services⁷⁵;
ensuring that certain funds will always have resources;
stabilization of state finances;

⁷⁵ SECAF, *Op. cit.*

facilitating popular approval at the institution or increasing a tax;
regularity of resource flows and economic efficiency of public spending;
stability of the federative system;
decentralization of the decision-making process; the formation of compulsory savings⁷⁶.

It is observed that one of the main advantages attributed to the bonds can also be considered an effect arising from the principle of non-allocation of tax revenues. It is about prioritizing resources for specific areas, considered essential. In the sharing, this prioritization operates by the Legislative Power, while with no affectation it is the Executive Power that will determine it, and both powers have their reciprocally limited performance with the rules of one institute or the other.

The most modern doctrine understands that the allocation of expenses, as a budgetary technique, is considered a procedure that tends to regress. However, when it comes to budgetary policy, it is viewed favorably by both Parliament and the Executive, mainly for the cost of new expenses. Given this, it is difficult to truly identify which Power benefits the most from this instrument.⁷⁷

In practice, logically, the compatibility of the numerous interests of an essentially diffuse and changing society is not simple. However, as already mentioned above, the Constitution of the Republic presents the first guideline, which is the fulfillment of its objectives.

In this way, both the principle and the bonds require legislative and executive action oriented to the other constitutional principles, under penalty of the Powers making the institutes ineffective. In fact, the normative text has no life alone and it is precisely the performance of the representatives that sets the tone for the rule's effectiveness.

[...] It is true that we have not managed to organize this social expenditure with quality, but this is not the fault of the bonds, but of management.⁷⁸

Another important advantage is the limitation of powers. This is because the constitutionally established shares represent limitations both to the discretion of public managers and to the infraconstitutional legislative activity. Again, these are consequences that can also be recognized as arising from the principle of non-allocation of tax revenues, since none of the Powers is given the initiative to carry out this allocation.

⁷⁶ CARVALHO, *Op. cit.* p. 58.

⁷⁷ CARVALHO, *Ibidem.* p. 55.

⁷⁸ SCAFF, 2016. *Op. cit.*

The shares must be conceived as reservations to the budgetary dynamics, restricting the freedom of the legislator or the public administrator to depend on their normative hierarchy. A link established by the Constituent Assembly may be a limitation on the free allocation of resources to the derived constitutional legislator (if such link constitutes a stone clause) or to the infraconstitutional legislator; in turn, it will also be reflected in the activity of the public administrator. This, ultimately, will be the receiver of the binding rule, taking into account that the binding ends up being instruments of limitation of the Legislative Power directed to the Executive Power.

It is, indeed, a distrust, on the part of the Legislative, about the possibility of excesses by the members of the Executive, reducing their discretion in the allocation of public goods by imposing an act shared to the administrator, even though with this it may reduce the scope of the company's performance legislating activity.

It should be noted that, to this end, the conception that (i) the freedom of the public administrator in financial matters must encompass a wide margin of discretion given by budget rules, and that (ii) the influence of a certain interest group on the budget it would not constitute a link in the legal sense, but would be its political aspect, which can also be verified in the participatory dimension of the public budget through popular representation. Thus, the bonds would come to reduce this discretion in the performance of the public administrator.⁷⁹

In the analysis of advantages, the requirements or limitations that operate on the Executive and Legislative Powers, based on constitutional ties, confer a certain harmony on those that operate due to the application of the principle of not affecting tax revenues. On the other hand, the data reveal that the excesses need to be studied, under penalty of preventing any budgetary adjustment geared to meeting social needs.

In fact, the sharing of revenues to the specific destination, especially when used on a large scale, as occurs in Brazil today, generates several negative consequences, mainly because this is a dynamic society in which the preferences for the allocation of public resources are constantly changing. It turns out that the mere sharing of revenues does not constitute any damage to public management. However, as can be seen from the aforementioned research, these shares are excessive, partly removing the main function of the LOA, which is precisely to determine the destination of public resources, according to annual criteria of priorities.⁸⁰

Among the main criticisms of the shares, the following can be highlighted:

Distortions in public choices and allocations;
inadequacy to budget dynamics;
commitment of the budget as an instrument of fiscal policy;
loss of quality in the tax system;
difficulty of control by the Legislative Branch;
reduced flexibility of revenue management⁸¹;

⁷⁹ CARVALHO, *Op. cit.* p. 16.

⁸⁰ MACHADO, *Op. cit.* p. 45.

⁸¹ SECAF, *Op. cit.*

restriction on the discretion of the Executive and Legislative Powers⁸².

Again, it turns out that consequences are pointed out that could also result from the misapplication of unrelated public resources, that is, from the application of the principle of non-allocation. The difference lies in the absence of the Powers' freedom to modify this allocation of resources, since, in the case of ties, the constitutional limitation affects both the infraconstitutional and the Executive branches of government.

Thus, also in the perspective of criticism, the consequences fall on both powers, which can be considered reciprocal restrictions that end up effecting harmonic limitations.

Once again, attention is drawn to the fact that perhaps the biggest problem is not in the existence of the sharing institute, but in excess, as the teacher James Giacomoni explains:

[...] the requirement that revenues should not be shared, first of all, is an imposition of common sense, since any administrator prefers to have resources without any commitment, to meet expenses as needed. Excessively shared resources are synonymous with difficulties, as they can mean too much in less important programs and lack in others with higher priority.⁸³

In short, it is not for this study to answer whether the shares are right or wrong, if they ease or amplify the problems of management and application of public resources, since even the most specialized doctrines remain in endless debates. However, the entire context presented demonstrates that the sharings are added to the principle of non-allocation of tax revenues to characterize a legal-normative problem when, in practical reality, the fulfillment of certain guarantees does not materialize.

There is no doubt that the shares represent pre-established priorities, which favors areas considered essential for the allocation of resources. In practice, the sharings have not been shown to be sufficient: the areas of health and education have basic deficiencies, internal and external debts continue to exist and perpetuate budget conflicts, and budgets remain restricted in the face of social needs.

Based on this factual recognition around what is called a plastered budget, two paradoxes are presented to the normative analysis of the current budgetary framework. The first of them arises from the perspective that, although it is said that, in Brazil, budgets are simply authoritative and non-binding pieces, in practice, the discretionary nature of annual budgets is in practice minority. On the other hand, the second paradox involves the inversion of the equation between income and expenses, because, in an aggravated scenario of debt rollover and excessive expenses with personnel and social

⁸² CARVALHO, *Op. cit.* p. 54.

⁸³ GIACOMONI, James. **Public budget**. 13. ed. São Paulo: Atlas, 2007, p. 80.

security benefits, it is necessary to orient the amount collected, which passes oscillate to achieve (or seek to achieve) cover unavoidable expenses. In other words, with a predominantly mandatory budget, expenses become an immutable goal around which unimaginable efforts are made to guarantee revenues that, at least, account for the stability of public sector net debt.⁸⁴

In the eyes of the citizen, in view of the aforementioned shortcomings and difficulties, the shares do not take place in a concrete way and the budget does not reflect the reality of public expenditure. In contrast, taxes have a very high and regressive burden⁸⁵, so that inequalities are accentuated and there is no correspondence between what is paid from taxes and what is received from public policies. This leads to an apparent incompatibility between the tax and financial / budget systems.

As previously mentioned, even for taxes, which are essentially unrelated taxes, it is common for citizens to correlate taxation with the need to invest the resources collected in the area where it occurred. In the case of bonds, this context is accentuated, since the bonds themselves create an expectation of destination.

Another problem is that sometimes, affects are established without any connection with the shared tax, which makes it difficult to justify, as well as any attempt to establish a logic in the collection of public revenues and the economic correlation of the benefit principle in taxation.⁸⁶

According to the above, the shares are not based on themselves and on a mere written guarantee. Due to their character of determination, they need to represent greater clarity in public spending and the effective functioning of the services to which they are intended. They need to characterize priorities and achieve proportionality in the application of public resources, under the risk of presenting themselves as instruments that only remove the connection between taxation and expected policies, increase the complexity with which budget instruments are seen and hide deviations in purpose.

The bonds under this perspective are not imposed in a rigid way, which would completely eliminate any possibility of exercising discretion, nor do they relieve the Legislative and Executive Powers of their functions to implement public policies in the most efficient way. On the contrary, they establish themselves as another obligation for the Powers to act in a straightforward manner and oriented towards constitutional purposes.

⁸⁴ PINTO, E. G. Six times DRU: budgetary flexibility or emptying social rights? In: **Revista De Jure - Legal magazine of the Public Ministry of Minas Gerais**. Belo Horizonte, n. 11, 2008. p. 514

⁸⁵ OXFAM Brazil. The amount of your tax. **OXFAM Brasil**, 2019. Available at: <<https://www.oxfam.org.br/justica-social-e-economica/o-valor-do-seu-imposto/>>. Accessed on: May 31, 2020.

⁸⁶ CARVALHO, *Op. cit.* p. 56.

Our conviction is established in the perspective that the immutability command that gives maximum protection to fundamental rights also extends to its constitutionally guaranteed guarantees. Now, just as habeas corpus is for freedom of movement, the duty of minimum cost is for social rights to health and education, which must be provided by the State on a progressive basis.

The prohibition of retrogression in social security, in equal measure, was fixed in article 194, sole paragraph, item IV of our Constitution, as a true guarantee of the irreducibility of the value of the benefits, which, obviously, includes the service offer stage within the scope of SUS and social assistance, and not just social security.⁸⁷

In spite of solving the apparent problem of administrative freedom arising from the principle of not affecting tax revenues, the bonds are added to it, increase the constitutional financial instruments and bring new questions, which also turn to the search for objective correspondence between what has been established and what has in public reality.

4 DEVINCULATIONS

Untying, in the current constitutional legal order, consists of rules that allow the Executive Branch to use discretionarily certain resources hitherto shared by constitutional force.

In governmental terms, they therefore have the following objectives: *to give greater flexibility to the allocation of public resources; allow the most appropriate allocation of budgetary resources; do not allow certain items of expenditure to be over-shared, while other areas have a lack of resources; and allow the financing of incomprehensible expenses without additional debt from the Union*⁸⁸.

4.1 History and transience

Untying was initially created as funds, in a context of the need for economic stabilization. The first of them, created in 1994, was called the Social Emergency Fund - FSE - and represented a disconnection operated on tax collection in a broad way, as detailed by the teacher Élide Graziane Pinto:

The mechanisms that increased the margin of discretionary application of revenues in the General Budget of the Union began with the so-called Social Emergency Fund -

⁸⁷ COMPARATO; PINTO, *Op. cit.*

⁸⁸ ALVES NETO, José. *Op. cit.* p. 15.

ESF instituted by the Constitutional Review Amendment No. 1, of March 1, 1994. This amendment was inserted in the Provisions Act Transitional Constitutional Laws (ADCT) arts. 71 and 72, in order to, in creating the ESF, promote both the “financial sanitation of the Federal Public Treasury” and the “economic stabilization” of the country.

With a duration limited to the financial years of 1994 and 1995, the referred fund comprised (a) all income tax collection levied at source on any payments made by the direct, municipal and foundational Administration of the Union; (b) the increase in revenue from changes brought to taxes on rural property, income and income of any kind and on financial transactions (respectively ITR, IR and IOF), as provided by Law No. 8,894, of June 21, 1994, and Laws 8,849 and 8,848, both of January 28, 1994; (c) the increase in revenue from the increase in the social contribution rate on the profit of financial institutions (in the form of Article 22, § 1 of Law No. 8,212, of July 24, 1991), which, at the time, reached 30% (thirty percent), according to the final part of item III of art. 72, of the ADCT; (d) 20% (twenty percent) of the proceeds from the collection of all taxes and contributions of the Union, except for the previous hypotheses; (e) the result of the collection with the contribution to the Social Integration Program (PIS) owed by financial institutions, through the application of the rate of 0.75% (seventy-five hundredths percent) on the gross operating revenue of those; and (f) other revenues provided for in a specific law.⁸⁹

From the operationalization of the referred fund, it was found that economic stabilization prevailed as a function of it, in view of social action. In this context, in 1996, when the Social Emergency Fund ended, the Fiscal Stabilization Fund - FEF was created, as an extension of the first, promoting small changes.

So explains the teacher and lawyer:

In Constitutional Amendment 10, of March 4, 1996, for its part, there are few changes in the transition from the ESF to the ETF, among them, the inclusion of the word as a priority to the ESF text that provides for the allocation of resources unshared to actions social and other programs, in order to mitigate the criticisms resulting from the application of unbundled resources.

As a matter of fact, the primary purpose of EC No. 10/1996 was the mere extension of the institute to go from January 1, 1996 to June 30, 1997. With the extension, the assignment of a new name also came - “Fiscal Stabilization Fund” (FEF), which effectively became more coherent (than the name “Social Emergency Fund”) with the destination of the resources raised by the referred fund.

In addition to the nomenclature, the Tax Stabilization Fund - if compared to the Social Emergency Fund - changed the rule included in art. 72, § 4, of the ADCT of prior deduction of the untying of 20% (twenty percent) of all taxes and contributions on the basis of calculation of all other constitutional bonds or participations, to make an exception not only to the Participation Funds of States and Municipalities (art. 159 of the CF / 1988), but also to the 50% (fifty percent) income from ITR to which the Municipalities are entitled (art. 158, II, of the CF / 1988).⁹⁰

⁸⁹ PINTO, E. G. 2008. *Op. cit.* p. 515.

⁹⁰ PINTO, E. G. 2008. *Ibidem.* p. 518.

At the end of the term of the Fiscal Stabilization Fund, in 1997, the disconnection operated was renewed again, with minor modifications.

It is important to clarify that, with the FEF 2, the federal government was obliged to progressively reimburse the Municipalities for the losses resulting from the inclusion of the portion of the IR that composes the FPM in the calculation of the disconnections. Art. 3 of Constitutional Amendment nº 17/1997 brought a measure of compensation for the losses arising from the ESF, notably when the revenues from the tax on rural territorial property to which the municipalities are entitled under art. 158, II of the Constitution.⁹¹

Until then, the aforementioned funds had an average term of 2 years, an aspect that contributed to giving them the character of transience, since they consisted, in fact, of departing from the constitutional binding rules.

In 2000, the Untying of Federal Revenue - DRU was created, which presented major changes, in addition to extending the term to 4 years.

Substantial change occurred only with the replacement of FEF 2 by DRU, which was inserted in the text of the Transitional Constitutional Provisions Act through Constitutional Amendment No. 27, of March 21, 2000, through the inclusion of art. 76 to the aforementioned body of transitional provisions.

Created in the form of a 20% (twenty percent) linear unbundling of the total amount collected from any Union taxes and social contributions, the DRU distinguished itself - in relation to its predecessors (ESF and ETF) - by (1) does not cause a reduction in the calculation base for regional funds and FPM and FPE, as provided in art. 76, § 1 of the ADCT; · (2) having as object only a fixed percentage of the collection of social contributions and taxes, without considering - as was the case with the ESF and the ETF - of incorporating other additional installments, by increasing the existing tax rate or assimilation income tax at source of payments made by the Union; and, finally, because (3) it has a comparatively longer term in relation to the other amendments that successively created or maintained discretionary allocation mechanisms.⁹²

In 2003, the referred DRU was extended for another 4 years and started to include the contributions of intervention in the economic domain - CIDE's among the revenues subject to 20% horizontal unbundling. A further extension was followed in 2007, with no changes except the renewal of the institute itself.

In 2011, the DRU was extended for another 4 years and its calculation base was expanded, with *the unnecessary exclusion of resources for maintaining and developing the teaching referred to in art. 212 of the Federal Constitution*⁹³.

⁹¹ PINTO, E. G. 2008. *Ibidem*. p. 519.

⁹² PINTO, E. G. 2008. *Ibidem*. p. 519.

⁹³ FERREIRA, Francisco Gilney Bezerra de Carvalho. The mechanism for untying the federal revenue as a guarantee of the free allocation of budgetary resources. The "Brazilian way" enters the scene again!. **Jus**

Finally, in 2016, Constitutional Amendment EC No. 93/2016 operated a new extension of the DRU, this time for 8 years; increased the percentage of disconnection to 30%; and extended the possibility of untying all federal entities. The table below⁹⁴ summarizes the changes made over the period mentioned:

Período	Ato	Prazo	Percentual
1994 a 1995	ECR1/1994	2 anos	Fundo Social
1996 a 1997	EC 10/1996	1,5 anos	Fundo Fiscal
1997 a 1999	EC 17/1997	2,5 anos	Fundo Fiscal
2000 a 2003	EC27/2000	4 anos	20%
2004 a 2007	EC42/2003	4 anos	20%
2008 a 2011	EC56/2007	4 anos	20%
2012 a 2015	EC68/2011	4 anos	20%
2016 a 2023	PEC87/2015*	8 anos	30%

* Presented on 07/08/2015 to replace PEC4 / 2015, which unshared 20% of the budget until 2019.

In 2019, social contributions for the cost of social security were excluded from the rule, under the terms of EC No. 103/2019. After all the changes mentioned, the current wording of art. 76 and following of the Transitional Constitutional Provisions Act - ADCT, which consolidate the DRU:

Art. 76. Up to December 31, 2023, 30% (thirty percent) of the Union's tax revenue related to social contributions are unrelated to an organ, fund or expense, without prejudice to the payment of expenses under the General Social Security System, at intervention contributions in the economic domain and the rates, already instituted or that may be created by the said date. (Wording given by Constitutional Amendment No. 93, 2016)

§ 1 (Repealed).

§ 2 The collection of the social contribution from the education salary referred to in § 5 of art. 212 of the Federal Constitution.

Navigandi Magazine, Teresina, year 17, n. 3208, Apr. 13 2012. Available at:

<<https://jus.com.br/artigos/21510>>. Accessed on: June 6, 2020.

⁹⁴ GUIMARÃES, Cassius Marques. DRU and the false Social Security deficit. **Jusbrasil**. 2016. Available at:

<<https://supercassius.jusbrasil.com.br/artigos/347498097/a-dru-e-o-falso-deficit-da-previdencia-social>>.

Accessed on: June 6, 2020.

§ 3 (Repealed).

§ 4 The disengagement referred to in the **caput** does not apply to income from social contributions destined to the cost of social security. (Included by Constitutional Amendment No. 103, 2019)

Article 76-A. Until December 31, 2023, 30% (thirty percent) of the revenues of the States and the Federal District related to taxes, fees and fines, already instituted or that may be created until the aforementioned, are disconnected from an organ, fund or expense. date, its additions and respective legal additions, and other current revenues.

Single paragraph. Except for the disconnection mentioned in the caput:

I - resources destined to the financing of public health actions and services and to the maintenance and development of teaching referred to, respectively, in items II and III of § 2 of art. 198 and art. 212 of the Federal Constitution;

II - revenues that belong to the Municipalities resulting from transfers provided for in the Federal Constitution;

III - income from social security contributions and health assistance for civil servants;

IV - other mandatory and voluntary transfers between Federation entities with a destination specified by law;

V - funds instituted by the Judiciary, by the Courts of Accounts, by the Public Ministry, by the Public Defender's Offices and by the Attorney Generals of the States and the Federal District.

Art. 76-B. Until December 31, 2023, 30% (thirty percent) of the Municipalities' revenues related to taxes, fees and fines, already instituted or that may be created by the said date, are unrelated to an organ, fund or expense, until December 31, 2023 and respective legal additions, and other current revenues.

Single paragraph. Except for the disconnection mentioned in the caput:

I - resources destined to the financing of public health actions and services and to the maintenance and development of teaching referred to, respectively, in items II and III of § 2 of art. 198 and art. 212 of the Federal Constitution;

II - income from social security contributions and health assistance for civil servants;

III - mandatory and voluntary transfers between Federation entities with a destination specified by law;

IV - funds instituted by the Municipal Court of Auditors.⁹⁵

As can be seen, the institute of untying is nothing more than the mere exceptionalization of the constitutionally established rules of engagement. Initially instituted as a transitional mechanism, it is already authorized for 29 years.

⁹⁵ BRAZIL. Transitional Constitutional Provisions Act - ADCT. In: Constitution (1988). **Constitution of the Federative Republic of Brazil**. Brasília, DF: Presidency of the Republic. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Accessed on: June 06, 2020.

It is then necessary to go a little deeper into the study to see if this institute has fulfilled the functions it has proposed.

4.2 Counterpoint to excessive sharing

Naturally, as a counterpoint to the excess of constitutional ties, it is expected that the untying will be able to solve the problems arising from the ties, or at least mitigate them.

Untying revenues is the measure diametrically opposed to sharing and was conceived as an escape valve from the growing link imposed by the 1988 constitutional order. When created in 1994, the measure sought to return part of the budgetary flexibility that public managers had in the past and covered only the Union, in the well-known DRU (Untying of Union Revenue).⁹⁶

According to what the doctrine presents, since the creation of this mechanism, there seemed to be a confidence that the mere expansion of resources under the discretion of the Executive Power would make it possible to promote considerable changes in meeting social demands and in economic and financial stabilization.

At this point, it is worth remembering, as already mentioned in this study, that Brazilian social needs remain, as well as socioeconomic inequality, at very high levels. Furthermore, economic and fiscal regulation depends on countless other factors, such as internal and external economic policy.

As the teacher Élide Graziane Pinto demonstrates, several criticisms can be made to the institutes of untying created, such as being unnecessary, disproportionate and even unconstitutional.

When affirming the needlessness of the institute, the teacher denounces the attribution of untying to the argument of strengthening social policies, and demonstrates that, in practice, the untying resulted in the reduction of resources destined for security:

Now, it was not necessary to create a mechanism for untying revenue if the ESF effectively tried to allocate resources to health, social security and social assistance actions, because social security, backed by art. 195 of CF / 1988, already justified the institution and collection of a wide range of social contributions. In fact, the legal autonomy of this tax species, by design, is based on its destination for social security.

Despite the fact that social security actions already have constitutionally shared revenues, the FSE managed, based on art. 72, IV, of the ADCT, to unlink 20% (twenty

⁹⁶ JÚNIOR, Roberto Di Sena. *Op. cit.*

percent) of social contributions, which, in practice, meant a reduction in the amount of resources exclusively destined for health, assistance and social security.

Nor was there any allocation of resources to education actions in order to increase - notably - the flow of spending there. [...]

Constitutional Revision Amendment No. 01/1994 did not promote the increase of the revenue base destined to the activities of maintenance and development of education, but, on the contrary, the FSE managed to reduce the amount shared to education, based on the provisions of art. 72, §§2nd and 3rd, of the ADCT.

Having created a rule for the prior deduction of resources that make up the ESF of the basis for calculating the shares with social security, education, some mandatory transfers to States and Municipalities and with the Social Integration Program (PIS), the aforementioned §§2 and 3rd of art. 72 of the ADCT actually promoted a restrictive relocation of revenues to such public policies. An example of this is the disconnection over art. 212 of CF / 1988, which, in practice, meant that the 18% (eighteen percent) of the total taxes collected by the Union that should be earmarked for education would be approximately 14.4% (fourteen integers and four tenths per percent) of the amount actually collected.⁹⁷

In another way, the teacher demonstrates how rules were established that disproportionated the rules of constitutional allocations, directly compromising the transfers due to the States, Federal District and Municipalities, which ended up encouraging that, later on, these entities also sought the same flexibility shared resources. So explains:

On the other hand, it cannot be forgotten that the creation of the ESF also directly affected some of the mandatory transfers from the Union to States and Municipalities. The ESF revenue entered in art. 72, items I, II, III and V - in the wording given by ECR No. 01/1994 - were not subject to the provisions of arts. 158, II, 159, 212 and 239 of the Constitution. In other words, they were not subject to the rules of mandatory transfer to the Participation Funds of States and Municipalities (FPE and FPM), nor to the shares with education and PIS / PASEP.

Paradoxically and ironically, such an exception inscribed in art. 72, §4 of the ADCT to art. 159 of the Constitution - which is the most important article on the FPM and FPE -, in trying to partially respect the federal pact, evidenced the affront of the ESF having absorbed several revenues, whose transfer in favor of States and Municipalities the Union was constitutionally thanks.

In this case, what was done was to establish contradictory normative commands, as has been denounced before, since States and Municipalities would no longer receive a percentage that corresponds to them in the increase in revenue with the income tax and the tax on rural territorial property, even though it was not deduced from the calculation base inscribed in art. 159 the 20% (twenty percent) of untying of art. 72, IV of the ADCT.

There is no way to only partially comply with the constitutional provision that requires the sharing (real rebalancing) of revenues between the different levels of the federation. It is a norm inserted in the intangible nucleus of CF / 1988, since any alteration that seeks to constrain the federal form of State will be rejected as unconstitutional, in the form provided by art. 60, §4, I, of the Constitution. It is for this reason that States, Municipalities and the Federal District arose to question the

⁹⁷ PINTO, E. G. 2008. *Op. cit.* p. 518.

fact that the ESF collided with some of the constitutional rules for mandatory transfer of tax revenues.⁹⁸

Finally, the teacher defends the material unconstitutionality of the disengagement mechanism, considering that it hurts the constitutionally established bases for the principle of non-affectation of tax revenues and for the reserved shares:

In view of the exceptions referred to by the aforementioned art. 167, IV to the general rule of being forbidden to link revenues and in view of art. 149 of CF / 1988 - which affects the existence of social contributions for the purposes set out in the corresponding instituting law - questionable is the constitutionality of the existence of a fund such as the ESF that raises tax revenues to the detriment of mandatory intergovernmental transfers and - what add the FEF and DRU - which absorb revenue from social contributions at the expense of the sharing of revenue with security. The unconstitutionality arises both from the affront, in the first case, to the federative pact (art. 60, §4, I, of the Constitution), and, in the second, to fundamental rights (art. 60, §4, IV).

It is also possible to point out the unconstitutionality of the FSE and FEF and DRU in the untying of revenues constitutionally affected to certain public policies that promote - in a material and progressive character - second generation fundamental rights (also called social rights) based on two lines justification. The first is the finding that social security has different constitutional support through the shared allocation of social contribution revenue and the existence of its own budget. And the second argumentative basis to support such unconstitutionality can be extracted from the principle of prohibition of retrocession⁶ with regard to the guarantee of fundamental rights. [...] ⁹⁹

In another moment, the discussion about the possible recognition of formal unconstitutionality had already been raised, in view of the fact that the disconnections operate as transitory within the ADCT, although they have been perpetuated in time.

Even though the country is in times of peace and no social or institutional disturbance threatens it structurally, the solution recently put into debate for the fiscal crisis is very similar to the suspension of fundamental rights for a given period, but long enough to be more serious than war and the state of siege that it can, in dramatic situations, give rise to.

So-called transitory rules are created and maintained to constrain the proportionality relationship between government revenues and expenses, to ensure both partial unbundling of revenues and an equally partial ceiling on expenses. In this sense, it is symptomatic that the country is debating the 8th (eighth!) Proposal to amend the Constitution, which aims to untie a significant part of federal revenues, always through a mockery of the normative breach inserted or extended in the United Nations Act. Transitional Constitutional Provisions.

Instead of carrying out the necessary tax reform and dealing with the difficult federal and economic impasses that it ends, the Union, since 1994, partially untypes its revenues, mitigating the effectiveness of the costing source of the Social Security

⁹⁸ PINTO, E. G. 2008. *Ibidem*. p. 518.

⁹⁹ PINTO, E. G. 2008. *Ibidem*. p. 524.

Budget (where health would be supported, social security and social assistance) and refuses - directly or indirectly - the duty to share these resources with subnational entities.¹⁰⁰

Therefore, having exposed the controversies arising from the mechanisms of untying, it is possible to see that the untying rules started to command what may or may not be shared, as if they had taken on the function of the shares themselves. From the beginning, they propose restrictions or flexibilities that operate exactly on the shares established by the Constitution of the Republic.

Thus, without entering into the discussions that oppose them, it is necessary to recognize that, as long as they exist in the legal-constitutional system, the institutes of untying and sharing are complementary, having been created even under the same justifications.

4.3 Impacts of untying

If the main objectives of the untying were as initially specified, with a focus on meeting social needs, they would reinforce the argument regarding the needlessness of these, since the shares were already established by CR / 88 for this purpose.

It should be noted, however, that the defense of untying did not fail to recognize the possibility of social benefits:

For the teacher Sergio Firpo, from Insper, if the DRU serves to partially contain the escalation of public debt and deficit, it can generate greater social benefits even than specific social programs. "If there are related expenses, you cannot use these resources to resolve part of the debt. In this case, the government is obliged to increase the debt and print paper, which causes inflation and, subsequently, interest increases to contain it", he says. "In such a scenario, the worker only loses".¹⁰¹

As seen, in the first modifications, the argument of giving greater freedom to public managers with more resources unconnected with specific purposes was maintained. However, the disconnections ended up showing that its main objective was economic stabilization, which has been confirmed with the others, as highlighted by Carol Oliveira:

In practice, one of the main objectives of the government with this extra money is to try to reduce the country's primary deficit. In 2015, the deficit was 111.249 billion, a

¹⁰⁰ PINTO, Élide Graziane; JÚNIOR, Geraldo Biasoto. Suspending or postponing funding for fundamental rights should not even be considered. **Legal Consultant Magazine**. 2016. Available at: <<https://www.conjur.com.br/2016-jul-03/adiar-custeio-direitos-fundamentalnem-deveria-cogitado>>. Accessed on: June 6, 2020.

¹⁰¹ OLIVEIRA, Carol. 2016. *Op. cit.*

record since the Central Bank started counting the numbers in 2001. On May 25, Congress authorized the government to register a primary deficit of 170.5 million reais this year.¹⁰²

At this point, it should be noted that the results were also not the best. As shown in the graph below, produced from data presented by the Institute for Applied Economic Research - IPEA¹⁰³, the total Brazilian public debt (calculated as a percentage of the Gross Domestic Product - GDP) showed a considerable increase between 1996 and 2003 (8-year period), and the downward trend recorded from 2004 to 2013 (10-year period) was slower, has not reached the initial minimum percentage, and the worst has already been reversed.

As can be seen, in a simplified analysis, over the past 38 years, the country's average public debt corresponded to more than 40% of GDP. It is equivalent to saying that almost half of the goods and services produced in the country do not generate wealth, do not result in values that can be reverted to social benefits and, thus, represent another difficulty in reaching the objectives and constitutional foundations.



With this scenario, the discouraging conclusion is reached that, just as the shares have not shown correspondence in the practical reality, so also the disconnections. None of the institutes fulfill their functions of guaranteeing priority areas.

¹⁰² OLIVEIRA, Carol. 2016. *Ibidem*.

¹⁰³ Available at: <<http://www.ipeadata.gov.br/exibeserie.aspx?serid=38388>>. Accessed on: June 6, 2020.

The studies carried out by the teacher Élide Graziane Pinto are again evoked, who, quoting José Roberto Afonso, reaffirms the arguments presented by the author, which demonstrate the lack of effectiveness of the disconnections:

According to Afonso (2004, p. 19), "[...] it is worth criticizing the idea of untying a little more, which the federal authorities see as the necessary way to rationalize [public] spending and implement countercyclical fiscal policies", because "[...] there is no cause-and-effect relationship - that is, neither to link, much less to untie, in itself, ensure good or bad performance of the expenditure". The assertions on the agenda are based on the findings made by the aforementioned author (2004, p. 19-21) that:

- a) "in an extreme example, if social security contributions were converted into freely applicable taxes, by itself, that would not mean releasing social security from paying pensions, even those who still work, but have acquired rights "; although it is always "alleged that, without such a process [of untying], it would be impossible to meet the fiscal targets, however, the tougher ones signed with the IMF, even after raising the primary surplus target to a level never seen in recent history, were successively and fully fulfilled ";
- b) "after the implantation of the National Treasury's single cash, there is always an option to simply limit budget allocations and keep resources hoarded, as a shortcut to ensure the generation of the surplus";
- c) "at the state and municipal level, the achievement of the primary surplus targets has been precisely the result of a link: of the proportion of current revenue to monthly payment of debt service renegotiated with the National Treasury";
- d) there is a severe contradiction in the "recent official discourse that the sharing undermines the efficiency and effectiveness of the provision of basic social services, because they [the sharing of revenue to social security and the minimum percentage of spending on health and education] were approved in Congress precisely with the opposite objective";
- e) while "the pretext [of untying] was to ensure continuity of financing and expenditure on basic social benefits and services, including to allow the agreement of a new division of responsibilities between spheres of government that would promote the decentralization of actions and also to defray the increase in current expenses resulting from the new and larger expected investments ", in fact, " it is undeniable that the fiscal policy of the federal government was and will continue to be benefited by the disconnection of 20% of its tax revenue ", with " the greatest effect practical of this measure was to release social security contributions (COFINS, CSLL) to finance the benefits of inactive [public] civil servants ", which would circumvent the differentiation of the general and proper social security systems; and, finally,
- f) it is important to remember the relevant role of internal savings in the "[...] sharing that was designed with a special regime, aiming to generate public savings in the present that finance future spending, or even try to avoid it - in a particular case of the destination constitution of the contribution on revenues (from PIS / PASEP) for applications through the BNDES and for the cost of unemployment insurance, within the scope of the Workers' Support Fund (FAT)." According to Afonso (2004, p. 21). "[...] it is paradoxical that, thanks to a constitutional link, one of the most valuable items of the federal public patrimony was formed - the Workers' Support Fund - FAT, whose value of the fund - above R \$ 80 billion in 2004 - already exceeds the book value of the controlling shares of PETROBRÁS, the largest company in the country and among the largest in the world."¹⁰⁴

¹⁰⁴ PINTO, E. G. 2008. *Op. cit.* p. 530.

Thus, for the disconnections, it sounds more serious, since in its defense it was claimed that the problems stem from budgetary rigidity, but instituting them did not lead to the solution of the same problems that already exist.

[...] In fact, it is known that the DRU constitutes a fundamental instrument of budgetary flexibility, of increasing the discretionary margin of resources, an instrument that propels the accommodation between the norm and the social reality, but this mechanism should be temporary, acting as an immediate measure to the solution of the budgetary rigidity. It so happens that the constraints to the budget are legally grafted without analyzing the already present rigidity, making a permanent solution to the real limitation of public spending impossible. It derives from a norm constantly reformulated through constitutional amendment that does not permanently solve the problem, on the contrary, periodically the problem of budgetary rigidity must be re-analyzed and the DRU reformulated to allow a margin of budgetary flexibility that Brazil has been unaware of for many years. Such a scenario seems, at the very least, intricate.

The present study does not seek to unravel the complex and dynamic theme of the DRU, but only to demonstrate how the Brazilian legal system itself shares the budget, sharing it excessively, perpetuating its imposing character and the consequent budgetary rigidity. It seems that the budgetary matter in Brazilian legislation is too embarrassed. Legislators decide to link and unlink, limit and increase the margin of flexibility, through constant votes on constitutional amendments that have a transitory character and do not effectively solve the initial problem: budgetary rigidity.¹⁰⁵

5 TAXES AND REVENUE AND PUBLIC LAW

So far, it has dealt with the controversies existing around the constitutional principle of the non-allocation of tax revenues; the ties, which are constitutionally provided for exceptions to that principle; and disconnections, which are formally understood as transitional acts of removal or limitation of constitutional bonds.

We sought to verify, based on a broad analysis, possible impacts of the principle and the institutes on the legal security of the Brazilian system and on the confidence of the representative institutions. It is now necessary to detail a little more about these impacts.

5.1 Compliance with fundamental rights and constitutional law

¹⁰⁵ MACHADO, *Op. cit.* p. 56.

As analyzed, the principle of non-allocation of tax revenues was established to ensure the adequacy between public expenditure and public needs, directly by the Executive Branch, providing autonomy and discretion to act more quickly and closer to society. The ties, in turn, were established as exceptions to the aforementioned principle to guarantee priority and privilege rights considered fundamental, which is at the base of the constitutional objectives. Finally, the disengagements arose in order to make the shares more appropriate to the needs of society and the government.

It turns out that, as seen, it is not possible to say that any of the institutes was sufficient for what was proposed. On the contrary, they have suffered harsh criticism for actually reducing the effectiveness of others.

One cannot ignore the fact that there are countless other factors that contribute to whether or not constitutional rights are effectively guaranteed. An example of them, which directly influences the dynamics between the principle of non-allocation, the bonds and the untying are the mandatory expenses, which do not fit properly in bonds, but have considerable impacts on the budget.

However, in view of all the controversies presented, it is clear that, within the scope of these institutes, it is necessary to return to basic concepts about the constitutional hierarchy, objectives and fundamental rights. In this sense, Fábio Konder Comparato, Heleno Taveira Torres, Élica Graziane Pinto and Ingo Wolfgang Sarlet are cited:

There is a historical learning worth noting in the experience of the 1988 Constitution by Brazilian society: the priority of our founding pact lies in the democratic promotion of fundamental rights, with emphasis on social rights, guaranteeing an inclusive and active citizenship. [...]

Eight decades, since its establishment by the 1934 Constitution, have taught us not to negotiate the minimum cost for education, his not to give up. Almost three decades have taught us to excel in the defense of health in its systemic, public, universal and integral dimension.

We are in the midst of a pedagogical and civilizing process of educating and safeguarding the health of our citizens, which cannot be prevented or passed over for controversial reasons of fiscal crisis. There is nothing more priority in public budgets than such a constitutional desire, under penalty of frustration of the very reason for being of the State and the social pact that it contains.¹⁰⁶

¹⁰⁶ COMPARATO; TORRES; PINTO; SARLET. *Op. cit.*

It is therefore necessary to reassess the applications of these institutes, since, as stated, they have not served constitutional purposes efficiently and, thus, weaken the constitutional legal system.

5.2 Discretionary and Administrative Law

The principle of non-affectation, the shares and the untying, in fact, represent extensions or restrictions that take effect legally or constitutionally on the discretion of the Public Administration. In this way, a dispute between the Legislative and Executive Powers materializes within the Constitution of the Republic.

At this point, it should be noted that discretion is not a *carte blanche* that is conferred on the Executive. All discretion is limited and it is not too much to remember that its main limits are constitutional foundations.

As the teacher and lawyer Marcus Abraham points out, the Fiscal Responsibility Law is an important instrument that contributes to the administrative and institutional organization that public finance management demands:

But, after all, two decades after the edition of the LRF, it is undeniable to recognize that, thanks to our democratic and institutional progress, today Brazil has solid public institutions, capable of giving effectiveness to the precepts of the law, materialized in the tripod of the budgetary planning, transparency and fiscal balance, unequivocally essential guidelines for the achievement of the objectives of the Brazilian Republic contained in article 3 of our Constitution: building a free, just and solidary society, developing the country, ending poverty and marginalization and minimize social and regional inequalities, promoting the good of all.

Despite its recently completed 20 years, the Fiscal Responsibility Law is a dynamic and unfinished legal work, which requires constant evolution and improvement. Ensuring its effectiveness, allowing the discussion of the quality and dimensioning of revenues and expenses, with the necessary control of public finances, is part of a sustainable national development project.¹⁰⁷

Between the discretion of the Administration and the legislative brake is the need to guarantee efficient, basic, fundamental public policies. The entire structure of the Executive and Legislative Powers is justified only if it is recognized that the representation is legitimate, which can also only be confirmed if it effectively attends to the social concerns it has proposed.

¹⁰⁷ ABRAHAM, Marcus. The 20 years of LRF: the past, the present and the future. Fiscal Responsibility Law is a dynamic and unfinished legal work that requires constant evolution and improvement. **JOTA Info**. 07 jun. 2020. Available at: <<https://www.jota.info/opiniao-e-analise/colunas/coluna-fiscal/os-20-anos-da-lrf-o-passado-o-presente-eo-futuro-07052020>>. Accessed on: June 7, 2020.

5.3 Planning, transparency, balance and Financial Law

The main reason given to justify the existence of the principle of non-allocation of tax revenues and the creation of untying is the need for the public budget not to be rigid and plastered to the point of preventing the adjustment between essentially public needs, changes and the resources destined to satisfy them. Budgetary rigidity prevents proper planning and hinders fiscal balance.

On the other hand, unrestricted discretion makes transparency impossible, essential for the inspection and control of public resources to occur, and opens the door to corruption. This is the criticism presented by the indoctrinator Kiyoshi Harada to the:

[...] In fact, the DRU is a disastrous instrument to move, rummage and dismantle the annual budget approved by Parliament, allowing spending without supervision and control, expenses that are almost always far from public interests, at least those taken over by the sovereign will of the people, which are exactly those revealed by the examination of the Annual Budget Law - LOA.¹⁰⁸

In relation to financial and budgetary law, the disconnections not only represent a compromise in transparency, but also make it difficult to achieve fiscal balance, since the freedom to allocate resources may represent a break with the medium-term planning established by the Multi-Year Plan.

In addition, this proposal disregards the budget cycle and its instruments (Pluriannual Plan, Budget Guidelines Law and Annual Budget Law) for defending the "untying" and "easing" of the budget - pillars of responsible fiscal management established by the Fiscal Responsibility Law.¹⁰⁹

This criticism is not only valid for disconnections. This is because excessive sharing also affects the fiscal balance, making it more difficult to reconcile the collection proceeds with the fulfillment of the previously determined allocation of resources and that which needs to be made to meet the new needs that arise.

In the end, it is recognized that neither constitutional determinations nor the public budget can impose or mitigate each other, since they are part of the same complex that has the

¹⁰⁸ HARADA, Kiyoshi. Strange speech around the DRU. **Jus Navigandi Magazine**, Teresina, year 21, n. 4841, 2 out. 2016. Available at: <<https://jus.com.br/artigos/49987>>. Accessed on: June 7, 2020.

¹⁰⁹ SANTOS, Lenir; FUNCIA, Francisco. Budget unbundling: advances and setbacks in health financing. **Legal Adviser**. 26 mar. 2019. Available at: <<https://www.conjur.com.br/2019-mar-26/opiniao-desvinculacao-orcamentaria-financiamento-saude>>. Accessed on: June 7, 2020.

purpose of carrying out public policies. So, it is in relation to the Legislative and Executive Powers, which cannot establish relations of inequality or hierarchy, but must work harmoniously.

In the current scenario, the budget is a multifunctional instrument, acting as a social means of monitoring the State's performance in meeting its objectives, as well as an instrument for planning, administration, transparency and control of public finances. In view of the Brazilian historicity regarding the present theme, the youth of Brazil is perceived when it comes to the public budget and the extreme need for continuous studies on the theme, in order to improve it and transform it into an instrument for efficiency in public Management.

[...]

It is perceived that the public budget acts as a planning tool to ensure that the State's Financial Activity is efficient, forecasting revenues, planning the application of expenses, effectively realizing public spending and still serving as a means of controlling public finances. It is in this instrument that revenues from taxes and contributions extracted from the population or resulting from loans and disposals of state assets are provided for. Likewise, this is the mechanism that will determine state investments in social, cultural, economic areas, among others. It can be said that this determines for the population what benefits will be provided as a result of the payment of taxes and contributions. It is also a determining factor in checking the correspondence between the promises and the real achievements of the politicians elected to govern the country, configuring an extremely important instrument for the control of the people, the true holder of power, over state action.

[...]

The public budget is an instrument of general interest to society in its most diverse sectors and a means of planning to solve social problems. For this reason, the preparation of the public budget, with the Federal Constitution of 1988, involves the essential participation of two branches: the Executive and the Legislative. The first is responsible for preparing and executing the budget, while the second is responsible for analyzing the proposal submitted by the Executive, approving, transforming the project into law and controlling the execution. The idea of establishing competencies for both Powers is to maintain a balance, both in relation to public spending destined to priority areas for one or another power, and in respect of the principle of separation of powers, in which one is not in a higher degree than other, but they must act in a harmonious way.¹¹⁰

The Legislative and Executive Powers need to seek the optimum performance that ensures the constitutional results that the principle of non-affectation, the shares and the untying require and, at the same time, ensure that the instrumentality of the budget materializes planning, transparency and fiscal balance so necessary for the country to develop.

5.4 Collection, destination and Tax Law

¹¹⁰ MACHADO, *Op. cit.* p. 11.

It is often said that Tax Law is only related to the rules related to the collection of taxes, as if the destination of the collection product represented a procedure totally disconnected from the tax rules and their consequences.

The first and main function of Tax Law, clearly, is the collection function and, already with the first function, it is possible to observe that the effects of taxation rules are much more extensive than what it tries to delimit. When analyzing Brazilian taxation, it is possible to recognize an essentially regressive character, which is due to the primacy of taxes on consumption over taxes on income and wealth, which makes it even more difficult to fulfill the constitutional objectives of promoting an egalitarian society. and to reduce inequalities.

Furthermore, it is recognized that Brazilian taxation is not low, so that, in a context in which low-quality public services are present or where there are numerous shortages, the direct consequences of popular dissatisfaction and distrust in public institutions.

Thus, in a simplistic analysis, it is possible to see that Tax Law cannot be thought of separately from Constitutional Law, Financial Law and / or Administrative Law, as if taxation had no relation to the allocation of public resources, with the fulfillment of social needs, with the fulfillment of constitutional objectives and with the need to balance income and expenses.

It is necessary, therefore, to recognize that the destination of the proceeds from the collection of taxes, especially taxes, which are the focus of this study, is based on the collection itself and on the grounds that justify its imposition. The lack of clarity regarding these can hurt budget transparency, the legitimacy of representatives and the guarantee of basic and fundamental rights.

6 CONCLUSIONS

Considering the initial inquiries presented by the research, we sought to identify the fundamentals, impacts and problems arising from the application of the principle of non-affectation of tax revenues and of the institutes of binding and untying, within the scope of Public Law and representative public institutions.

The existing criticisms about an excess of shares and untying were highlighted, which unite as institutes that violate the principle of non-allocation of tax revenues and remove its normative force, in view of the fact that they circumvent the application of the principle and its constitutionally determined exceptions.

Untying increases the difficulty of verifying compliance with the priorities listed in the Constitution, reduces the transparency of public accounts and, as a consequence, contributes to increasing citizens' disbelief in representative powers.

It was then possible to identify that, with the current application of the principle and the institutes, the risk of loss of legal security, legitimacy and representativeness of the Legislative and Executive Powers is increased, since the constitutional rules, already with excess of reservations, they are made more flexible by infraconstitutional legislative measures and perpetuating administrative measures. This whole context breaks the relationship of trust that is built between the citizen who fulfills his tax obligations and awaits efficient public policies, since it is the product of this collection that finances them, and the Legislative and Executive Powers, who have a duty to effect policies and guarantees to meet public needs.

As a first conclusion, there is a need that the different branches of law are not seen only as a set of specific rules and that are not related to other spheres. In particular, that Public Law must be oriented towards the realization of primary public interests and the fulfillment of fundamental principles and rights, in an integrated manner. The Legislative and Executive Powers must guide their legal action in each of these branches, with the perspective that they are complementary and that, if one of them fails to orient itself according to common and hierarchically superior foundations, it compromises the legal security of the system as a whole. In these terms highlights the teacher Misabel Derzi:

It can be seen that distributive justice in law is not achieved by handling only one legal branch, Tax Law, for example. Justice is one and the efficiency of constitutional values depends on the concerted performance of all Law, in particular, Financial Law, Labor and Social Law, but also private Law. Furthermore, the other human social sciences must work together with the Law, under penalty of mutual frustration, as a result of which the adopted economic and social plans, which lead to unemployment, recession and increased poverty, even though they implement greater balance budget, are unconstitutional. [...]¹¹¹

Then, it is worth noting that the constitutional principle of non-allocation of tax revenues and the institutes of binding and untying can only be preserved in the legal system if they contribute to the realization of the objectives to which they were proposed. Untying, as well as sharing, instead of representing a facilitating instrument for the Executive Power, clearly becomes new obligations, which complement the principle of non-affectation and which require action geared to constitutional purposes. In this sense, explains the teacher Élide Graziane:

¹¹¹ DERZI, 2014. *Op. cit.* p. 647.

If the rule of untying revenues (as an exception measure included in the Transitional Constitutional Provisions Act) was not enough to have become habitual due to its ad hoc extension, between the Executive and Legislative Powers. Such a fragility goes against the “setback forbidding” in the achievement of social rights, since without guarantee of budgetary resources to face the expenses with actions in health, education, assistance and social security - which are public policies that have a budgetary connection of either minimum spending, be it a source of revenue - the character of a progressive advance in state benefits is objectively mitigated.¹¹²

And the obligations do not fall only to the public manager, but above all to the Legislative Power, which instituted them. It is, then, as the last conclusion of this study, that the Legislative and Executive Powers must also guide their performance so that the allocation of public resources is efficient in fulfilling the constitutional desideratum. Only in this way will it be possible to reinforce the bonds of trust in the representatives and the Powers and their legitimacy in the implementation of public policies.

It is necessary to recognize the product of tax collection as the result of citizen work and, therefore, that should be primarily aimed at meeting social needs, rather than merely maintaining a functionalism that does not value them. It is necessary to ensure proportionality between the tax burden and the quality that is expected in the provision of public services, so that it is possible to verify a correspondence between social participation and the performance of the government.

¹¹² PINTO, E. G. 2008. *Op. cit.* p. 532.

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