The Tax Power in the Tradition of the European Legal Systems

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1.1 The Tax Power in the European Tradition

1.1.1 The Tax Power as Distinctive Element of the Institutional Systems

Taxation—or more precisely the regulation of tax relations—is a distinctive feature of the institutional systems, since it is essential for the effective implementation of functions related to sovereignty. In fact only the actual availability of material resources—and specifically the financial resources—may help to achieve the purposes of government that the holder of sovereign power is required to seek. It

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seems so unquestionable in the general perception that the power of taxation is one of the closest features of the sovereignty, in order to make a decisive contribution to its own characterization under an ideological profile.

Indeed, the regulatory choices adopted for taxation in a legal system clearly show the core values and the beliefs about sovereignty in a social community. The relation between sovereignty and taxation is a distinctive feature of the constitutional arrangements of the European States, which is not expressed, however, according to uniform modules, but it takes many different forms and contents.

In this regard it is evident the contradiction between collective values, which address to the need for protection and development of the general community, and individual values, which refer to the protection and promotion of human rights and freedoms.

On one side, there is the public interest in the settlement of taxes in order to ensure the vitality and development of the community and to pursue the maximization of general goals, which can be called "*tax interest*" just to express the axiological connotation of the general value. On the other side, there are the protective values of the individual sphere, due both to the personal freedom (compared to the exercise of public power of taxation), and to the ability to pay.

The legal regulation of the power of taxation is thus shown as the fundamental transmission belt between the human wealth and freedoms and the care of the general interests and the developmental goals of the Welfare State, which is an evident index of the level of solidarity or individualism in the civil community, and, above all, an epiphenomenon of the fundamental relation between the "rulers" persons and the "ruled" persons.

This axiological relation, which is established between the collectivist and individual conflicting values, is the basic dialectic of the taxation system, according to which it can be identified the concrete unfolding of sovereignty in the several legal systems.

1.1.2 The Basic Features of the Tax Systems in Europe: Patterns of Affinity and Reason for Diversity

The power of taxation is the subject of legal regulation under several profiles. Firstly, a significant role is gained by the set of regulations regarding the taxation system and the implementation phase of the fiscal requirements (audits, collection, litigation, penalties) in which the general principles of taxation are customarily defined. In this regard it can refer to a *taxation macro-system*, indicating the collocation of the norms to an apical level of taxation directly into the Constitution or in constitutional laws (or in reinforced laws).

Secondly, the set of regulations that distinguishes the background structure of singles taxes is highlighted (with particular reference to the assumption, the taxpayers, the tax base and the tax rate). It is a set of rules which is placed intermediately between the macro-system (the set of principles and rules of general application) and the series of specific regulatory provisions relating to specific

individual cases (which can be defined as regulatory micro-systems) and therefore it can be conventionally described as *taxation middle-system*. Unlike the macro-system, the middle-systems shows a lower degree of stability, not because of the use of ordinary legal sources (which therefore have not the regulatory protection of constitutional sources or reinforced laws), but especially for the functionalization that is necessary to the needs of the economic policy and of public finance.

Now, it should be noted that in the European countries it is to be found a common background about the main medium-tax systems. Indeed it is possible to verify obvious similarities in the underlying structure of the taxes which are the backbone of European public finances.

Direct taxes are articulated anywhere in the tax on personal income (basically a personal and progressive tax) and in the tax on corporate income (usually a flat tax); the relations between the two taxes are set, even though different ways, in order to prevent (or attenuate) the economic double taxation of corporate earnings.

Among the indirect taxes, the most important one is undoubtedly the value added tax (VAT), which has a regulatory legislation substantially similar in several jurisdictions (as it has been built on the same archetype). Other taxes, which come from the old European legal tradition (registration tax, stamp duty, inheritance tax), are characterized by a nearly homologous regulatory structure. Even the discipline of duties and excises is evidently similar in different countries (especially for the impulse of the EU).

The main differences are found within the local taxation systems, which are very heterogeneous and influenced by historical social matters that highlight the differences between the countries. In any case it can also be seen in this regulatory system how structurally homogeneous the various taxing jurisdictions are regarding the balanced comparison between central State taxes and regional (or local States) taxes.

In view of the similarities regarding the middle-systems, it appears on the contrary a significant differentiation among the European taxation systems regarding the connotation of the macro-system. In fact, not only significant differences can be registered in relation to the discipline of litigation and penalties, the powers of investigation of the financial administration and the protection of taxpayers rights, but also a different ideological position comes out about the comparison among the conflicting values referring to the alternative of "individual-community" which, as mentioned above, is the key element of the axiological matters that intrinsically permeates the taxation system since the evolutions of the modern State.

On one hand, the interest tax is imposed as a structural rule of the taxation system, legitimizing some invasive or at least strongly reductive regulatory requirements with respect to the freedom of the individual consociates. On the other hand, it gains great importance the liberal values which, in addition to measuring the position of the individual within the social community with regard to the needs of allocating taxation, allow to protect the minimal core of wealth and freedom of each citizen.

The dialectical relation between the fundamental values of the social community and those of the individual assumes a constitutional dimension which varies

according to the transformation of the relations between "rulers" and "ruled", and especially to the degree of contrast between the individual sphere and the State sphere, so as to result a typical corollary of the general relations of public law.

1.1.3 The Balance Between Fiscal Interest and Protection of Individual Freedoms in the Formation of Modern Taxation Systems

The power of taxation is so the subject of a legal regulation which is different in several European taxing jurisdictions, because of the different constitutional systems and the changing of the axiological balance between the general interest and the individual interest. This diversity finds its clear basis in the legal traditions of the main European constitutional systems.

In the England of the seventeenth century, within the contrast between the royal authoritarianism and the instances of bourgeois pluralism expressed by the Parliament, it was outlined the antithesis between the public interest in the collection of taxes and the interest of the individual citizens to protect the individual rights of property and freedom. In particular, during the crucial period of the English constitutionalism it emerges the maturing of a dual conceptual shift. At first, a conflicting tension was formed between the taxing interest, intended as the interest of the sovereign to the pursuit of the common wealth, and the individual interest, resulting especially in the development of the sphere of freedom and property; the axiological opposition simply concerned the identification of the individual rights of freedom and property as limit of the sovereign power to impose taxes; it was not brought into question the sovereign right to apply taxes, but there was required a prior approval by the Parliament as representative body of individual interests in the civil community.

Later, with the rise of parliamentary power as inspiration for the second revolution of 1689, the inversion of the relationship of the axiological priority was marked, and the rights of freedom and property assumed a preponderant nature, such as natural attributes of the individual which are co-essential to the full development of human personality, while the position of the monarchical power is considered subordinate and instrumental. On the ideological premise that the individual had to be freed from the constraints produced by an intrusive public power and by an authoritarian public law, it was consolidated the belief that the core of the legal system was made up of the fundamental values of the individual sphere intended to ensure the protection of a space of action against an outside interference (according to the traditional model of negative freedoms), with respect to which the tax burden itself assumed a recessive position which required a constant mediation and balance. The individual interests corresponding to the values of freedom and property were placed in dialectical opposition to the interest of the social community to acquire the financial resources essential for the collective survival, so to terminate completely the connection of taxing rights with the control functions or the capital prerogatives of the sovereign-person.

Therefore, the position of the Parliament as the guarantor of the legitimacy of tax laws was considered essential to the full protection of the values of freedom and property, recognizing the role of sovereignty basically in the administration or in the executive function regarding the choices on taxes which had to be applied practically in a given situation. The tax interest was considered therefore a value belonging to the collective sphere, although it was more properly identified as connotation of the sovereign public authority, namely subjected to the proper values of the individual, which rose to a cardinal point of reference for the development of tax law.

There is a clear conceptual reversal that takes place in France on the assumption of the Enlightenment theories. First of all, it was stressed that taxes had to gain a positive role in the social organization, losing those unfavourable elements that had denoted their old history: the tax should no longer be represented as the right belonging to the sovereignty as co-owner of the land, or worse, as the capital effect of an inferior social condition, but it had rather to be judged as the consideration of the political rights; the citizen was asked to participate equally to the formulation of his country policies with his own vote and to the economic needs through his fiscal contribution. The ethic and political conception of taxation was completely renewed: "*the tax payment is placed as one of the citizen's highest duties; the equality of all citizens before the tax is stated; taxation is no longer looked upon as the attribute of the sovereignty, but as the needed tool of the State to provide public services*".

Natural corollary of this ideological approach was a significant transformation of the fundamental principles of the taxation. The interest to the perception of the taxes could not be identified any longer as a value belonging to the sovereignty sphere, which was in clear contrast with the interest of the consociates to the protection of the individual values (and especially to the guarantee of the rights of property and freedom). It was, instead, elevated to the level of the fundamental public interests, essential for the conservation and development of the civil community, in respect to which the position of the individual could only be in a position of subordination.

It was consolidating indeed the idea that the conflict itself between the public taxing interest and the individual interest substantially faded until they annulled each other. In fact the tax interest was based on a concept of sovereignty which was profoundly changed from its original notion: the sovereign power was no longer to be identified with the royal power or with the power given to rulers; on the contrary it was brought back to the general will of the civil community, emerging from all the individual wills. The individual, with his own political tools, joined to the formation of the general choices regarding taxation, and was forming and realizing his personal interest to the civil participation to the social community. Accordingly, this emphasis on the public nature of the taxation rules led to mark the traits of dutifulness of taxation, resulting in the recognition of a subjective interest of the consociates to the public power.

Secondly, in an apparent opposite direction, the bourgeois component of the Enlightenment led to an improvement of the individual interests. From the relation

between the jus-naturalistic model and the bourgeois society descended the revaluation of the state of nature as a place for elementary relationships among the individuals, mostly presented as economical agents for the possession of primary goods. A higher level of importance was recognised to industrial instances and commercial aspirations of individuals regarding which the public interest had to withdraw, thus leaving space for private initiative; therefore, the discovery of the economic sphere represented the moment of emancipation of the bourgeois class, which was dominant in the production system, compared to the actual governing class. Consistently, it began to take shape the belief that legal criteria of the mandatory relations should be applied in the taxation system: also in relation to the theoretical contribution provided by the physiocrats school, taxes were classified as services rendered to the individuals in view of the enjoyment of public services issued by the State, as if there was a kind of market between sovereign and citizens regulated by the utilitarian settings.

The two conflicting theoretical lines—the presence of which is not surprising when compared with the alluvial production of the French Enlightenment—were found to coexist in the same general ideological context, expressing different settings even if they have a degree of complementarity. In essence, it began to be elaborated the idea of a compromise between individual consumers and general utility, between the ways of appropriation and transfer of property—the legal model of which could be found in the civil paradigm of the contractual relations—and the super-individual and almost metaphysical interest of the social community expressed by the regulations of the public law. The balance between conflicting public and private values was expressed in the search for a limit on the unconditional power of taxation, which was located in the principle of equality and in the bourgeois values of property and freedom of economic initiative, so that the distribution of the tax burden was traced back to the equal treatment of the consociates and to the abstention from producing a capital depletion, likely to limit significantly the sphere of the free initiative of the citizen. Thus, the mediation between the general interest to the perception of taxes and the protection of the individual values of bourgeois inspiration was realized through the setting of general regulatory parameters that would allow a reduction of taxing authority and, consequently, would lead to a protection of an individual area which would be impenetrable to the authoritative intrusions.

Tax interest, while remaining connected to the concept of sovereignty, was rebuilt within a different ideological context in relation to a different value of the community and not also to a value of monarchical power. In parallel, the individual interest lost considerable consistency, so that the values of freedom and property significantly faded at least in comparison with the fundamental values of the community (as opposed to the "*liberty and property clause*" of the English legal order). It has been suggested in this regard that the liberties of the Anglo-Saxon tradition would have been characterized as practical and effective rights to be compared to the French liberties, which were considered as abstract and subjective rights. This led in France to overcome the conflict between individual interests and general values (which remains, instead, well consistent in the English culture), from

which the tax interest emerges as a reference point of the taxation powers, compared to which the individual rights were traced to a marginal and subordinate position.

To the French setting it has been reconnecting, however in a logic of further overcoming, the public law theory of German formation of the nineteenth century. On the theoretical premise that the interests of the civil society are reported in full to the needs of the State, according to the idealistic paradigm of "ethical totality", the individual values were recognized as entirely subordinate to the values of the social community; the power of the State, considered in its totality as the bearer of all the values and interests of the people, aimed to meet the interests and purposes of the civil community. In fact the will of the State—to be identified with the general will of the whole national community—limits the direction and the development of the ethical foundation of the collective sphere, and consequently could be designated as an expression of sovereignty.

In this theoretical context, the duty to participate to the public expenditure was considered as a typical manifestation of the general state of legal subjection of the citizens to the State-person, and therefore to the general community. In particular, the taxation lost its private character, that marked the original relationship between the State and the taxpayer, in order to acquire, in the modern era, the traits of a very general obligation founded on the ethical and legal relationship which linked citizens to the State. The tax contribution, as an essential moment in the life of the civil community, was considered as a fundamental value of the State sovereignty.

Therefore the taxation matter was so clearly brought back, in accordance with the ethical foundation of the Hegelian idealism, to an area of primary and general interests of the civil community in which the legal situation of the individual became blurred. The tax relations were qualified primarily in relation to the fiscal interest of the State and not to the individual rights of the consociate. The taxation duty (identified by Gerber as an organic duty which each citizen has got towards the State as a member of the general community) was classified under the general state of subjection that characterized the public law relation between the citizen and the State.

The public law theory of German enactment appeared, therefore, characterized by the absolute priority assigned to the taxation interest, intended as a general interest of the civil community, as assessed in an ethical and totalitarian sense compared to individual interests and rights. On the premise of the State "ethical totality", into which all the individual situations inevitably flowed, the community matrix of the taxation interest went strengthening to the point to ensure an axiological pre-eminence in the constitutional system of the values involved in taxation. The State was then considered, on one side, as the guarantor of the preservation and development of the human personality, as the place where freedom only can be realized objectively; on the other side, the individual sphere was subjected to a deconstruction process, being reduced to a mere point of abstract reference of the evolution guidelines of public law, and in essence losing the real and effective protection in the relationship with the public power; therefore, the position of

individual was reduced to the mere obedience to the law and to the State jurisdiction.

Following the brief examination of those which can be considered the crucial moments of the developmental course of the European taxation systems, there can be explained two main different and opposed evolutionary directrixes: the first one connects to the idea of the prevalence of the individual rights on the power of taxation, and the second one, on the contrary, highlights the priority of the public power and the taxation interest compared to the individual sphere.

The first directrix (according to the doctrine expressed traditionally by John Locke) typically belongs to the Anglo-Saxon tradition, firmly oriented toward a pragmatic and utilitarian view of the public relations in which it is affirmed the logical prevalence of the individual sphere. This Anglo-Saxon tradition, inclined to recognize the self-regulation capability of the civil society, has always shown great care to avoid monist and centralist settings, making individual liberties the core of the jurisdiction. Therefore, the power of taxation will be judged as a declination of the essential term which recognizes and guarantees the liberty and property of the individual, and is placed in a serving position (or, at least, conceptually subordinate) to the individual rights.

The second directrix denotes instead the continental legal systems, in which the State and the general interest of the social community are identified as the supreme and totally prevalent values in an ethical and often transcending dimension. The public powers, as logical and legal tools of the general will of the civil community, are devoted to pursue the fundamental interests of the nation-State and to prevail over the individual rights. The taxation power, put in this context, is based on the fiscal interest and is destined to dominate over the individual interests.

1.2 The Power of Taxation in the Modern European Constitutions

1.2.1 The Age of the Constitution "Without Sovereignty". The Centrality of the Constitutional Values Involved in the Taxation Phenomenon

The legal and institutional evolution of the twentieth century has led to an exceeding of the notion of State sovereignty. Under the action of vigorous corrosive forces it has gradually been demolishing the superstructure of legal concepts that led to idealize the State as a model of political unity of a community.

On the one hand, there was the political pluralism, due to the formation of centres of power which were competitive and alternative to the State power, capable of operating in the fields of politics, industry, business, professions, culture and religion; on the other hand, there was the attribution of decision-making powers to supranational entities with respect to the regulatory framework of an increasingly wide range of circumstances, which led to a substantial attenuation of the State main function as holder of the monopoly of political decision.

The erosion of the principle of the political organization, represented by the loss of the predominant function of the State, has produced a transformation of the conceptual categories of public law.

In particular, a real starting platform for the identification of the developmental program of the common coexistence is traced in the Constitutions. In pluralistic societies, namely marked by interests, projects and ideologies highly differentiated and unable to be dominant factors compared to the State sovereignty (as it usually happened in the past), the Constitution presents itself as "the condition of possibility of life in common" and not as the bearer act of a pre-determined regulatory project of the community. Democratic pluralism thus imposes constitutional models in which rigid patterns are abandoned in favour of a "open" solutions of a possible coexistence (the "compromise of possibilities") which guarantee the spontaneity of social life.

In this perspective, the Constitution is no longer the corollary of the State sovereignty, from which all the regulations of legal system come as irradiation or automatic deduction, but it represents a developmental project of life in common with respect to which it is necessary to coordinate and to balance the system regulations according to the possible compromises.

Using a figurative formula, it can be defined as "*Constitution without sovereignty*" the historical period which modern institutional systems address in, indicating the shift from the State sovereignty to the "sovereignty of the Constitution", compared to which it is not detectable the presence of one or more material and political forces that could be able to assert themselves, if not unconditionally, at least in a decisive impact on decision-making rules.

The deep transformation of constitutional law, however, accompanies an historical change of the relationship between society and the State: unlike the Constitutions of liberal character, based on the principle of natural liberty, in which the main rule of distribution of social benefits was determined by the spontaneous breakdown of interest on the market while incorporated in the sovereign decision-making acts, in the current Constitutions the democratic and pluralist distribution of benefits and sacrifices among the associates is carried out according to the direction and control of the public authority in respect of the structure of values outlined in the constitutional level.

In the mono-class State the formation of the liberal legislative decision was designed to reflect the values substantially homogeneous shared by the ruling class, leading to a gap between the society in which it was drawn up from time to time the plot of the values and the State that limited to transpose uncritically the axiological choices made externally. In contrast, the presence of the multi-class State values—often heterogeneous expression of a the participation in political life of various classes and interest groups—determines the need to combine decisions and policies in a constant compromise between the majority and minorities, which is inspired and conducted according to the guidelines provided in the table of constitutional values.

The characteristic feature of the nineteenth century is the rule of law, namely the neutrality with respect to the values expressed by the civil society, which led to the

recognition of the validity of the decision-making of the sovereign by the mere fact that there was a parliamentary majority, thus founding the famous equation legitimacy/legality; this feature is reversed in the modern pluralistic and democratic State where it is established a "valued legality" suitable to serve as a parameter for controlling the legitimacy of the legislative activity. From this reversal setup it follows that the distribution of resources and sacrifices of those belonging to a community, which constitutes one of the main forms of exercise of government, is carried out under the reserve of public action, in accordance with the core values expressed in the Constitution of the pluralistic and democratic society.

As part of this reconstruction, the tax interest, which is attributable to a higher redistributive requirement, can be understood as one of the key concepts of State sovereignty that arises directly in conflict with other values and interests. In the context of the plurality of values of the community the tax interest links with the principle of equality, with the principle of ability to pay, with the fundamental requirements of protection and development about the person and the dignity of the individual.

The necessary coexistence of a plurality of values leads to the need to seek combined solutions through which the potential of the constitutional values are not amputated, but amplified by harmonic cohesion. Common development and harmonious constitutional principles transpose the theme of the conflict of values on a positive fit to accentuate the reasons for the coexistence of diversity inevitably present in a pluralistic society.

This produces an important implication of methodology, namely the need to highlight the system of relationships that weave between the different constitutional values involved in the taxation phenomenon. Accordingly, the notion of any constitutional value called by taxation receives an "open" structure, that is not supported by the predominance of a single interest, affirmation of a particular hegemonic vision, but rather determined by compromise solutions resulting from the mediation with a plurality of values of constitutional significance.

Thus the relation between sovereignty and taxation power is developing in accordance with the axiological dialectic of the tributary phenomenon, highlighting the centrality of the values as an engine of the training process of the taxation system.

1.2.2 The Adjustment of the Taxation Phenomenon in the Constitutional Charters of the European States

The constitutional charters currently in force in the European States show a significant convergence in the regulation of the phenomenon of taxation.

In particular, in all the Constitutions it is regulated expressly the consent to taxation, as it is expressly enunciated the need for the use of a legislative instrument (and therefore the need to proceed to the involvement of the representative bodies of popular election) in order to establish and to modify the taxation discipline.

This rule (commonly referred to as a "reserve of law") is expressed in the various Constitutions in different ways: sometimes through the explicit formulation of the principle of the supremacy of law as a result of the assertion of the exclusive competence of the legislative act for the regulation of taxes (as happens, for example in the constitutions of Austria, art. 13; Denmark, art. 43; Finland, art. 81; France, art. 34 and art. 14 of the "Declaration of the Rights of 1789"; Greece, art. 78; Italy, art. 23; Luxembourg, art. 99; Holland, art. 104; Portugal, art. 103; Spain, art. 31 and 133; as well as in the Fundamental Law on the Swedish System of Government, chap. VIII, art. 5); sometimes through the enunciation of the legislative procedure adoptable for the promulgation of rules to the tax content (in the Constitutions of: Belgium, art. 170; Germany art. 105 and 106; and Ireland, art. 21 and 22); finally there is the case of the United Kingdom, notoriously lacking in a written constitutional text, in which, however, there are constitutional conventions that clearly show the centrality of the principle of consent to the taxes and the consequent involvement of Parliament (consider, in addition to the *Magna Charta* of 1206, especially the *Bill of Rights* of 1688, in which it is expressly forbidden to the executive power to impose taxes without the prior parliamentary consent; this document is believed to constitute the first formal enunciation of the principle of "*no taxation without representation*").

In the new context of pluralist democracy assumed by European Constitutions the maintaining of the centrality of parliamentary power seems possible due not so much to the Anglo-Saxon safeguarding function, nor to the need to enhance the authority of public power continental experience, but rather to the needs of a pluralistic society in which the parliamentary debate appears to be the most mature form of definition and weighting of collective values.

Indeed the participation of all the members—or at least a large and significant majority—of the social political and cultural community is able to ensure the functionality of the rules formed in the parliamentary procedure with respect to the collective interest with a higher grade than other procedures (even though constitutionally permissible), where there is only a majority government to formulate policy choices. The evaluative judgment referred to the taxation laws can only be usefully formulated taking into account the historical and cultural background or the economic situation of a national community which only an institutional structure with an articulate and representative composition (precisely as the parliament) can effectively represent. It should be added that the choices regarding financial matters, and in particular those concerning the moving the regulatory pendulum in the direction of the taxation interest rather than to the area of individual interests, are not likely to be entrusted to the impromptu regulatory procedures of the executive power (expressed by the government), whose speed is often marked by an approximation of the evaluative judgments; undoubtedly, at this regard, it shows greater adequacy the parliamentary process in which the appreciation of the different needs of individual and collective spheres is mediated through the work of parliamentary committees with the involvement of representative bodies, which allows a balanced assessment of the dialectic of the basic phenomenon of taxation.

In this perspective, it could be said that the principle of legality loses its formalist connotation, which had denoted the inclusion in the constitutional authoritarian contexts, to take the essential function of an unavoidable technique for the balancing of interests and values of the social community.

On the other hand, the link between the centrality of parliament and the formulation of tax laws is a further recognition of the constitutional provision that excludes a referendum on tax matters (in this sense you can explicitly see the Constitutions of Denmark, Art. 42; Ireland, art. 27; Italy, art. 75). It is obviously a provision that expresses a structural apprehension towards the adoption of direct democracy mechanisms in order to the delicate balancing of values to be operated in the taxation system, in the belief that the individual assessment appears to be strongly conditioned by the inevitable inclination to evade the depletion resulting from the application of taxes.

With reference to the discipline of legal sources it is to be mentioned the rule that excludes the retroactivity of taxation laws, which expresses a form of protection in the custody of the citizen (this rule is present in the Constitution of Greece, art. 78, and Portugal, art. 103).

It is less frequently posed in the constitutional texts a rule intended to regulate the substance of the balance of values in the taxation matters, and therefore the content of legislative decisions to be taken in the conformation of the tax system.

In some Constitutions, mostly in those ones dated longer ago, even reconnected to the texts issued in the full climate of the French Revolution, it is expressly prohibited the adoption of privileges in taxation, as if to specifically reiterate the application of the principle of equality to the taxation system (Constitutions of Belgium, art. 172; Luxembourg, art. 101; as well as the French Declaration of the Rights of 1789, art. 13 and 14).

More vigorously in the Constitutions of the Latin countries it is formulated a rule which establishes a criterion of ability to pay (or economic capacity) as a rule of redistribution of tax burdens among the associates, to be placed in opposition to the taxation interest (Constitution of Italy, art. 53; Portugal, art. 103; Spain, art. 31; and the French Declaration of Rights, art. 13). It is thus made explicit in the text of the Constitution the dialectic underlying basis of the taxation power, as if the axiological conflict in the definition of the regulatory institutions of a fiscal nature may find useful compositional criteria based on the expressed legal drafting. It is to point out that these rules take in the laws of the mentioned countries a strong legal weight as a result of the constant application of the courts from reviewing the legality of the regulatory choices made by the ordinary legislation.

Sporadically in the Constitutions there are further rules on the specific conformation of the tax system: this is sometimes enshrined in the progressivity of the taxation system (Constitution of Italy, art. 53; Spain, art. 31) or in the overall function of the conditions of individual taxes (Constitution of Portugal, art. 104).

1.3 The Coexistence of a Plurality of Taxation Systems and the Taxes Market

1.3.1 The Crisis of the Taxation Function Resulting in the Fragmentation of the Taxation Systems

The legal and institutional evolution of the twentieth century led to the overcoming of the usual rules of tax relations and especially to the idea of the coincidence of the taxation system with the national State. Under the action of vigorous corrosive forces it has been gradually demolishing the superstructure of legal concepts that led to idealize the State as a model of political unity of a social community.

The political pluralism due to the formation of competitive and alternative centres of power with respect to the State power, able to operate in the political, economic and industrial life, and the attribution of the decision powers to supranational entities regarding the regulatory framework of an increasingly wide range of circumstances have led to a substantial attenuation of the main function of the State as holder of the monopoly of political decision.

Democratic pluralism and the plurality of sources of law thus impose "open" models of legal system, namely where rigidly determined patterns are abandoned in favour of a flexible design of legal regulations, inspired by the logic of co-existence of the plurality of legal systems and capable of ensuring the spontaneity of social life and the variety of feasible solutions for policy decisions.

The taxation function, therefore, can no longer be identified with the centrality of the State, but it must also be attributed to a number of supranational jurisdictions (such as the European Union) or local jurisdictions (as that expressed by the local authorities minors).

The erosion of the principle of unity of the political organization, represented by the predominant function of the State, has so undetermined the unity of the same tax function resulting in the fragmentation of the taxation system in a plurality of systems, each corresponding to the list of values expressed by several legal systems. That was the transition from a monolithic State-like structure, which corresponds to a single tax system, to a pluralist structure characterized by the coexistence of multiple tax systems belonging to different forms of territorial an political community.

1.3.2 The Coexistence of a Plurality of Taxation Systems: European Legal System, National Legal System and Regulations of the Minor Local Authorities

In the current historical phase different legal systems related to different forms of territorial community coexist in the same context: the European Union legal system, the national legal system and the regulations of the minor local authorities.

Each of these legal systems is characterized primarily by a list of values assumed and shared by the social and political community which constitutes the referring

macro-system and that assumes a conditioning role compared to the whole development of the vertical relationships between the different parts of the legal system.

With regard to tax matters, in the national Constitution it is evident a dialectic between the opposing values of ability to pay and taxation interest which expresses essentially the need to seek forms of balance of the values relating to the sphere of collective needs and the values corresponding to the protection and promotion of individual freedoms. Therefore, it must be identified the form of the distribution of tax burdens among the citizens in order to distribute over the entire national community the costs to be incurred for the development of the Welfare State. That produces an axiological tension innervating the legal system characterizing the substantial and procedural tax rules.

In local finance system, there are different needs. In the case of exponential institutions with a wide territorial base (as Regions) are pursued wide developmental aims that, despite not having the characteristics of the general purposes of the State, however, are related to the primary needs of a civil community (such as the protection of health or environment). Taxation is so essential for ensuring a relevant amount of revenues to be distributed among the associates according to general criteria for social redistribution. In this perspective it is noticeable that in the regional systems there are tax dimensions conceptually similar to those ones applicable to the State.

In the case of minor exponential institutions (such as Municipalities and Provinces) the expenditure functions shall be given, mainly, to the intervention for infrastructural or other local needs. This results in a smaller scale of financing needs and requires the adoption of criteria for the distribution of tax burdens centred around the commutative diagram of the exchange between tax and public services according to the principle of "benefit".

In the EU the taxation plays a very peculiar role: due to the pursuit of the four EU freedoms (free movement of goods, persons, services and capital) and to the fundamental aim of promoting market liberalization and competition among enterprises, the use of tax leverage is considered as a possible obstacle likely to produce distortions and impediments; so the taxation is concerned with distrust by EU institutions, as a bearer of a load of potential obstruction with respect to the free action of business and to the natural capacity of the market to be adjusted around the natural balance of economic forces. The EU rules demonstrate a notion of "negative" taxation, to alleviate the taxation power of the national States in order to avoid discriminatory or protectionist use of national tax rules.

The diversity of macro-systems inevitably means that the consequent variation of the tax laws is distinct and specific for each system of law, in response to a juridical logic (or rather, to a system of vertical relationships) which is self-centred and inherent to the principles and to the basic values of the social community. Therefore, it is not applicable an interpretative procedure or the analogy that lead to export institutions or legal categories from a system of law to another legal system.

Evidently, the sources of law tend to take significantly different connotations for each jurisdiction, by reason of the attribution rules of regulatory powers to the various institutional centres. Just the comparison of rules generated from sources

belonging to different legal orders determines the problem of establishing the diriment criterion of possible conflicts and, therefore, the logic of coexistence of the plurality of legal orders.

1.3.3 The Horizontal Coordination of Different Systems

The relations between the different legal systems are inspired by the research of a combination of regulatory solutions through which the systems can develop forms of harmony or at least harmonious coexistence of the different tables of values. In terms of positive law, the conflict between the various legal systems must be solved through forms of legal relations that allow the coexistence of diversities.

In a structure characterized by the equal ordination of the various systems it is not possible to find a rule of higher grade (a sort of "meta-norm") that governs the contrast between the rules belonging to different systems—and thus the conflict of sources of law—in accordance with a hierarchical criterion. Deductive logic, which requires solving the contrasts according to the principle of the superiority of a source with respect to the other, is in fact only applicable in systems of the vertical type, namely where it is established the dependency of a legal system with respect to another one.

Therefore it is necessary to find a criterion of horizontal coordination that allows to resolve any conflict of regulations without penalizing a type of source than the others and consequently allows to maintain the integrity of each legal system. This criterion seems to be identified typically in the "principle of competence", under which each legal system (and therefore each corresponding type of source of law) has an area of relevance to be managed in exclusive form without permitting the interfering of other sources relating to other legal systems.

However, where the principle of competence does not remedy the overlapping of various regulatory authorities, producing some regulatory "grey areas", the conflict resolution should be sought by the dialectic of values and interests, according to a model of coexistence typical of the regulatory framework inspired to the pluralism. The axiological antinomy represents an inevitable corollary of the power imbalances arising from the free play of social forces and uncertainties determined by the spontaneous mechanisms of the market, and generates an instability of the structure of the values bound to grow as a result of the acceleration of cultural dynamics, economic and policies found in pluralist democracies. In a pluralistic society in which it has failed the sovereignty of a single dominant political and legal centre (that is, the nation-State), interests and values underlying the rules no longer represent the sedimentation of the principles of universal significance, as if it were transcendental conditions of living in common, but they express the volatility and instability of the social system according to the game of political and economic forces.

Therefore it seems essential to find solutions to these contradictions that contribute to building a harmonious order through compositions and combinations of

conflicting rules with the purpose of finding equilibrium points, changeable and unstable, but still oriented to allow the preservation of legal systems.

Inevitably abandoned the option to formalistic and deductive models, the solution of conflicts between norms moves to the sensitivity of the interpreters and practitioners of law (judges, directors, professionals, taxpayers) with the aim to identify the possible combinations suitable to preserve the coexistence of diversities. The classical legal thought has to be deconstructed in order to permit "open" solutions feasible for appropriate regulatory compromises to mediate conflicting interests and values depending on the historical circumstances and economic situation. It is therefore necessary to abandon the rigid and bivalent logic of "true/false" in order to adopt the logic of "possible", "likely", "reasonable" and to bring out the mediation and the balance as possible forms of solution of the conflicts between the legal orders.

1.3.4 The Crisis in the Ethical Consideration of the Taxation System

In the older public law models, the coincidence of the taxation system with the State entails that the tax function is typically controlled by the pursuit of the general interest taken as the reference basis for the development of the national community without other ideological elements may be involved in the determination of the conditions of use of taxation.

The State, considered in its entirety as the bearer of all the values and interests of the people, becomes the linchpin of the development of civil society posing as entity in which the affiliates get to enhance all ethical forces for the common good. The decision-making capacity of the State is thus its limits and the direction of the ethical foundation of their being (that is to say the identification with the will of the general community).

In this context, the duty to participate in the contribution to the public expenditure is considered as a typical manifestation of the general state of subjection of the citizens from the State-community, founded precisely on the ethical and legal relationship of belonging to the State. Thus, the payment of taxes, saved by the remote connotation of prejudice and discrimination, is regarded as a fundamental obligation of citizenship necessary for the survival of the civil community.

Therefore, on the premise of the ethical foundation of the State, even the tax system suffers from this ethical connotation, taking on a leading role in the constitutional order of a State. The tribute comes as an instrument to achieve the fundamental goals of the State and to pursue the protection and the growth of the community of citizens.

The slippage of fiscal sovereignty by the State to a plurality of territorial entities has led to a deep transformation of the ethical concept of the taxation system: as compared to the plurality of jurisdictions, it is no longer possible to detect the presence of one or more material forces and policies that are able to impose itself predominantly on regulatory choices.

In the mono-class State the formation of liberal legislative decision was designed to reflect the values substantially homogeneous shared by the ruling class, leading to a deep gap between the civil society, in which it was drawn up from time to time the plot of the values, and the State, which was limited to transpose uncritically the axiological choices made externally.

On the contrary, in the modern multi-class State the presence of heterogeneous values, which is expression of a broadening of participation in political life for various classes and groups, determines the need to combine decision-makers in a constant compromise between majorities and minorities, which is inspired and conducted according to the guidelines provided in the table of the constitutional values.

The characteristic of the State in nineteenth-century—consisting of the neutrality with respect to the values expressed by civil society that led to the recognition of the validity of the decision-making by the mere fact of the existence of a parliamentary majority, according to the famous equation "legitimacy/legality"—is reversed in modern democratic and pluralist community which states a "legality for values" suitable to be a criterion for the judgement of legislative activity.

The taxation system of the liberal State really represented, like other sectors of the legal system, a legal instrument to achieve the purposes assumed by the ruling class and therefore arose as a means to serve the ideological beliefs of the civil society. This required, as mentioned, an ethical conception of the taxation system as a factor of institutional aid and support to the ideas and the needs of the society.

In the modern era we are witnesses to a cancellation of this ethical conception of the taxation: the crushing in a plurality of legal systems undermines the correspondence between the tax system and the ideological and axiological background, making clear that the tax instrument can be adopted at a flexible manner for a wide number of purposes and collective aims.

The tax system thus becomes one of the institutional factors, fundamental for the implementation of the values expressed by each legal system, according to a relation of instrumentality that highlights the "neutrality" of the tax with regard to ideological beliefs of a civil society, enhancing the correlation with the values of the constitutional order of a community. It emerges therefore the "neutralization" of the ethical function of the taxation system, as part of a process of disclosing the many instances coming from an ontologically pluralist society.

Consistent with the transformation of the general framework, the notion of the taxation receives an "open" conformation, that is not supported by the pre-eminence of values from one social class (and therefore, by a particularistic and hegemonic vision of society), but rather determined by compromised solutions resulting from the political and social mediation of a plurality of instances emerging from the civil community.

The crushing of the unique taxation system in the various "taxation systems" thus produces an ideological deconstruction consentaneous to the dynamic situation of a pluralistic society, not ossified around dominant ideas, but oriented toward forms of harmonious coexistence of the values of civil society.

1.3.5 The Market of Taxes

The spread of globalization and the harmonization of markets have determined a significant impact on the mechanisms for defining the taxing choices by the States. Indeed, the tax burden becomes an important factor in the competition between enterprises, because it affects directly or indirectly on the criteria of price formation, as well as it determines the position in relation to the demand curve formulated by the market.

Therefore, decisions about the shape of the tax system and the incidence of the tax burden on economic activities are crucial to facilitate the localization of the initiatives of enterprises and the production plants in some States than others. So, it can be argued that the reductive manoeuvre of taxation represents an element of attraction of foreign investments in the national territories.

It follows that, in addition to the typical function of collecting the revenue for the maintenance and the development of the national community, the tax becomes a tool for encouraging the allocation of foreign investment.

In this context, it is possible to recognise a logic of competition between States measured on the basis of the attractiveness of taxation, namely the ability to define a level of overall taxation that is attractive to foreign companies in order to favour a location of productive initiatives in the State.

This establishes a real "market of taxes" in which the offer of a reduced tax burden is the "commodity" for attracting the settlement of the business in the country.

The lack of regulatory mechanisms for the heteronomous processes of globalization and the serious risk that tax competition assumes the characters of the wild contest between the States with the aim to mark down the tax burden led to a general rethinking about the existence of an indiscriminate freedom to conform the taxation system exclusively according to the reasons of the particular convenience of the single State.

Particularly in the European Union it has been hollowing out the conviction about the importance of greater coordination of tax policies for the countries in order to avoid that the Member States could issue legal regulations whose main effect consists in the erosion of the tax base in other States. The fiscal bleeding, coming from the erosion of the tax national base, has increased the awareness that tax competition between States not only alienates the EU integration, but also hampers the identification of a balance of taxation, creating situations of "fiscal crisis of the State".

Therefore, a solicitation to the transformation of the taxation system may be identified as a result produced by the changes generated by other taxation systems because of the processes of tax competition, according to a logic of osmosis of the international standards. The research of a calibrated level of taxation for the attraction (or even just the maintaining) of the substrate business within the territory of the State is a brake and a limit for the identification of a standard tax at the European level.