

Brazilian Tax Law: From the Science of Finance to interdisciplinary approach

Renato Lopes Becho¹, Rafael Kaue Feltrim Oliveira²

¹Bachelor in Law at UFMG (Belo Horizonte, Brazil, 1990), Cooperatives specialist at UNISINOS/RS (1994), Master Degree (1997) and PhD in Tax Law (2000) at Pontifícia Universidade Católica de São Paulo (PUC/SP). Visiting research at King's College, London (2016). Tax Law Professor at PUC/SP. Federal Judge in São Paulo/SP, Brazil.

²Bachelor in Law at PUC/SP (São Paulo, Brazil, 2016), Tax Law specialist at Instituto Brasileiro de Direito Tributário (IBDT) (São Paulo, Brazil, 2018), Master Degree in Constitutional and Procedural Tax Law candidate at Pontifícia Universidade Católica de São Paulo (PUC/SP).

Received: 16 Jul 2021,

Received in revised form: 23 Aug 2021,

Accepted: 30 Aug 2021,

Available online: 08 Sep 2021

©2021 The Author(s). Published by AI Publication. This is an open access article under the CC BY license (<https://creativecommons.org/licenses/by/4.0/>).

Keywords— *Brazilian Federal Constitution, Brazilian Tax Law, Post-positivism, academic autonomy, Interdisciplinarity.*

Abstract— *This article aims to do a retrospective analysis of Brazilian Tax Law. We started from the process of Law's consolidation as an independent science, under the foundation of Legal Positivism, moving away from Sociology and Moral and then; afterwards, we discuss the autonomy of the Brazilian Tax Law from the finance sciences and its consolidation through the Federal Constitution, understanding that the positivist paradigm was overcome with a broader perspective in the sense of the protection of Fundamental Rights and Justice as unshakable values. Finally, at the end of the article, we reach the new perspectives and challenges of the Brazilian Tax Law: the interdisciplinary approach.*

As a bibliographical methodology, we confronted classical books, specific statutes, as well as new academic works.

I. INTRODUCTION¹

1.1. Law as a Science: From Hans Kelsen to Konrad Hesse

Nowadays study and application of Law have been aimed at a paradigm shifted to bring to light, as an inescapable element, the plural and multifaceted reality of human society, the broad fulfillment of fundamental rights and the full realization of human well-being.

Moral and social values hitherto set aside, in favor of a scientific pursuit with pure pretensions, return to academic and jurisprudential discussions, especially after the advent of Brazilian 1988's Constitution, through which democratic institutions have been strengthened.

During the course of the late nineteenth to mid-twentieth centuries, numerous jurists, based on the legal positivism of Hans Kelsen, turned their eyes into the study of the law as a science, based on elements through which it could be empirically applied, leading to extreme ideas such as the separation of Moral concepts, considered as a foreign element of law's, arguing the lack objectivity and the supposed purity of the Law.

According to Kelsen, in the second edition of his Pure Theory of Law, the object of legal science would be human's conduct insofar, as it is determined by cogent norms, established through presuppositions and consequences, so that, such conduct could only be understood through legal rules. Thus, only inter-human

¹A Portuguese version of items 1 to 3 from this work, as well as parts of the conclusions, was published in Brazil as a chapter of the book "Direito constitucional tributário e tributação municipal: estudos em homenagem à professora Elizabeth Nazar Carrazza", by Quartier Latin (publisher), in Sao Paulo, 2021, p. 519-535.

relations present in legal norms would be the object of the Legal Science.²

Under this idea, legal propositions produced by science would then be statements (objective descriptions unrelated to meta-juridical values), under which, it could describe its relations and an hypothetical judgment stating that, in accordance to a given legal order, under certain conditions and assumptions set by it, certain predetermined consequences must intervene. Law scientist's answers, according to Hans Kelsen³, could only be statements about a conduct prescribed, prohibited, or permitted, and about competences.

On the other hand, legal norms, in Kelsen's view, are not enunciations about objects, but rather commandments, that is, imperative commands (permissions and attributions of power or competence) produced by legal bodies.⁴

Thus, with the function of juridical authority, its mission would be to produce the Law, known and described by Legal Science, not being true or untrue, but valid or invalid.

Then, by suggesting the Pure Theory of Law, Kelsen turns to positive law whereby, having the State's norm as its object and the segregation of foreign elements as a methodology, seeking to develop a science of law free from external influences, as Politics, Ethics and other Social Sciences.

It can be said that the Legal System, as viewed by Kelsen, would have the following characteristics: a closed positive normative system, validity structured and supported by the hierarchy of State norms, regulating the human conduct positively or negatively.

The classification of a closed legal system has two main characteristics: unity and self-production. Norms are produced within a single system, that is, operates within and with the Law, so that, it is produced with self-centered validity, maintaining cohesion and coherence.⁵

Therefore, Kelsen's Legal System is closed, dynamic, hierarchical and pyramidal, given by the supra-below order, under which the lower norm seeks its foundation of validity in the higher norm, leading to the fundamental hypothetical norm, as an assumption and logical-legal proposition that validates the whole system.

Thus, in its logic, there is no norm outside the system, as no norm would be valid outside it.

The legal norm for Kelsen is in the field of prescription (*Sollen*), which is the proper field of the Science of Law.

Under the Pure Theory of Law, Kelsen seeks to delimit what is proper to The Law and to the Science of Law, as an autonomous science. The idea of purity, therefore, removes everything that concerns the Natural, Social Sciences, the world of being and facts, and political or moral issues.

In this sense, there is a necessary distinction between what is and what must-be (*Sollen*). The concept of what is, is just realized in space and time in a sensibly perceptible way, an outward manifestation of human conduct, all that endowed with facticity. On the other hand, the concept of duty is an intentional act directed at the conduct of another, the way of conducting oneself in a certain way which does not imply that the other will, therefore, conduct himself in such a way, but so only as a duty.⁶

Positivists, in general, conceives the conduct as prescribed, prohibited, or permitted, so that conduct, prescribed by norms, can be positively or negatively regulated, or just an attribution of competence or permission (confer rights), which are the deontic modalities of the Legal Order.⁷

Thus, in the closed Legal System there would not be loopholes, as either conduct would be positively regulated through deontic modes, or negatively regulated by negative permission. Such a systematic enclosure gives us the idea that any conflict would be resolved within the Legal System itself, without any necessity of the recourse to any instrument outside the Law.

The Fundamental Hypothetical Norm as a logical-transcendental presupposition would mean a non-positivized but rather thoughtful legal norm that is accepted as valid and effective, regardless any empirical verification (since its logic is given just from the reason).

Therefore, the Fundamental Hypothetical Norm standard would function as a primordial condition of all the system's existence, since only through its presupposition (we must conduct ourselves as the Constitution prescribes, in harmony with the subjective sense of the act of constituent's will), any Law can be established.

² KELSEN, Hans. *Teoria Pura do Direito*. 2ª ed. São Paulo: Martins Fontes, 2012, p. 79.

³ KELSEN, Hans. *Teoria Pura do Direito*. 2ª ed. São Paulo: Martins Fontes, 2012, p. 80 – 81.

⁴ KELSEN, Hans. *Teoria Pura do Direito*. 2ª ed. São Paulo: Martins Fontes, 2012, p. 81- 84.

⁵ KELSEN, Hans. *Teoria Pura do Direito*. 2ª ed. São Paulo: Martins Fontes, 2012, p. 217.

⁶ KELSEN, Hans. *Teoria Pura do Direito*. 2ª ed. São Paulo: Martins Fontes, 2012, p. 86 – 91.

⁷ KELSEN, Hans. *Teoria Pura do Direito*. 2ª ed. São Paulo: Martins Fontes, 2012, p. 5 -10.

So, the Fundamental Hypothetical Norm could be understood not as a product of a free discovery, because its presuppositions do not operate arbitrarily, in the sense that we have a choice between different Fundamental Norms when we interpret the subjective meaning of constituent's acts and other acts put in accordance with the Constitution prescriptions. Only when we presuppose this Fundamental Norm, in reference to a fully determined Constitution, we can interpret the subjective meaning of constituent's acts and constitutionally posed acts as their objective sense, as objectively valid legal norms, and the relations constituted through these norms as legal relations. Concluding that, under the presupposition of the Fundamental Norm, no transcendent value could be affirmed as a positive Law.⁸

Notwithstanding such beliefs, which in some ways were important for the development of the study and affirmation of the Law, the study of law departed from these extreme position. According to Norberto Bobbio, other scientists realized that the human reality is wider and changeable than the whole system of norms, since the existence of the man has an infinite number of possibilities; so that there is no way to foresee all possibilities beforehand. They turn to the values hitherto set aside and the Law begins to be understood as undissociated to the cultural and social aspects of human society, under the effect of a constant process of improvement and nobility of humanity, appreciated not according to cause and effect relations, but means and ends; not in a structural, but in a functionalist way.⁹

Therefore, new studies, under the movement conventionally called post-positivism or neo constitutionalism,¹⁰ flourishes, and the Law turns to be a social discipline endowed with a function, in which society imposes on itself, in the person of its members, certain means, in order to achieve just and moral ends chosen by them, assuming, then, a new configuration.¹¹

Law, then, becomes humanized as part of society's idiosyncrasies, projecting values of justice, equity and morality, as a way to perpetuates a minimal dignified existence for the full realization of men.

In such a way, the whole of society is called upon to interpret the Law and this interpretation, then, assumes a fundamental role, so that the Law goes from the hands of

the scientist to the hands of the hermeneutic, who now has a creative function, not as a mere declarer of the Standards set.¹²

Thus, in the present day, the Science of Law rests on a pressing need to interrelate with the Social Sciences, and Law turns not only on a *structuralist* theory, important and still in force, but on a functionalist theory, which gives a new character to the jurist: no longer conservative and mere transmitter of a body of rules already given, he is now also a creator of rules that transform in order to integrate and innovate the given system, of which he is no longer mere receiver, but an active collaborator.

In the same sense, is absolutely clear to observe how the Theory of Positivism is in crisis nowadays, showing that the jurist is held no more to a unitary, coherent and complete system of rules, from which it is possible (and also obligatory) to extract the solution of any controversy (thesis of the so-called self-sufficiency of the normative system); but on the contrary, the spread, even in countries of codified law as in Brazil, of a realistic theory of the Law that focus its attention on the effectiveness rather than the formal validity and emphasizes all the interrelationships between the legal system and the economic, political and social systems.

What distinguishes the present situation are precisely those conditions which we find particularly favorable to the formation of a science of anti-traditionalist Law, which ultimately seeks the object itself, not so much in the rules of the given system, but in the analysis of social relations and values; from which the rules of the system are extracted, far from considering, as it was for a long time, that the Law is autonomous and a pure science, but seeking the alliance with the social sciences, to the point of considering itself as a branch of the general science of society.

The creative interpretive act takes a new form and importance from human reality and latent legal devices to create a new reality.

Thus, the normative statements, their purposes and all the axiological contents that support them are analyzed, the facts are interpreted, in order to apply the fairer and egalitarian rule to the concrete case, so that all the law has a logical link with certain social values that come to be constitutionalized, and the constitution thereafter has greater importance in the legal scenario.

According to Konrad Hesse, the constitutional norm has no autonomous existence in the face of reality. Its essence lies in its validity, that is, the situation it

⁸ KELSEN, Hans. *Teoria Pura do Direito*. 2ª ed. São Paulo: Martins Fontes, 2012, p. 224 - 228.

⁹ BOBBIO, Norberto. *Da Estrutura à Função*. São Paulo: Manole. 1ª ed. 2006, p. 33-34.

¹⁰ BECHO, Renato Lopes. *Filosofia do Direito Tributário*. São Paulo: Saraiva, 2009, p. 242.

¹¹ BOBBIO, Norberto. *Da Estrutura à Função*. São Paulo: Manole. 1ª ed. 2006, p. 33-34.

¹² BOBBIO, Norberto. *Da Estrutura à Função*. São Paulo: Manole. 1ª ed. 2006, p. 37.

regulates is intended to be realized in reality. This claim to effectiveness (*Geltungsanspruch*) cannot be separated from the historical conditions of its realization, which are in different ways in a relationship of interdependence, creating their own rules that cannot be disregarded.

Natural, technical, economic and social conditions must be considered here. The claim of the effectiveness of the legal rule will only be realized if these conditions are taken into account. Equally, the spiritual substratum that is embodied in a given society must be contemplated, that is, the concrete social conceptions and the axiological basis that decisively influence the conformation, understanding, and authority of normative propositions.¹³

Thus, the legal system becomes open, since its norms can no longer be interpreted outside the political, economic and social context in which they are inserted. In fact, normative forecasting is open to the inflows of reality, both to substantiate its content and to motivate its eventual resignification.

II. AUTONOMY OF THE BRAZILIAN TAX LAW

As Law could, gradually, be established as an independence science, the Brazilian Tax Law, as an autonomous discipline, has also suffered major difficulties until its current consolidation, with its own principles, rules, legal relations and institutes and its own codification. Thus, today, we can say that the Brazilian Tax Law has autonomy.

First of all, we should highlight the differentiation between independence and autonomy. This is very important because the idea of independence turns the eyes into the of the whole, so that Law, even though an open system, can be considered independent of other branches of science and can create its own rules according to its dictates.

On the other hand, autonomy takes into account a didactic division, in the sense that the tax matter, by having its own elements, can be studied separately.

However, as a matter, it has no independence, since the creation and application of Tax Law depends on other branches, such as Constitutional Law - in the creation of its norms - Administrative Law and Procedural Law - in the collection of taxes - so the Science of the Law is independent, but Tax Law is just autonomous.

The autonomous status of the Tax Law discipline resulted from a long process of awareness and historical

improvement in Europe and Brazil, which initially started from its insertion as an object of the Financial Science, then to be recognized as part of Financial Law - under the auspices, relations, institutes, and principles of Administrative Law.

One of the major jurists of the Brazilian Tax Law, Geraldo Ataliba, states that didactically and practically, it was agreed to discern the part (the Tax Law) of the whole (Administrative Law), by the isolation of the fundamental institutions of that (the tax).¹⁴

Then, the Tax Law subsystem was recognized within the positive system of Administrative Law.

Around this notion, the Science of Tax Law was built, with didactic autonomy, under the study of objective Tax Law which is composed of the norms that create and regulate taxation (tax action, privately state), tax and legal relationships between the State and the people.

Only then, by the efforts of several Brazilian and international jurists, it comes to acquire autonomy, with the creation of chairs in the Faculties of Law, through which its structure and dogmatic was established, that is, the factors and behaviors of human society that could generate the tax obligations, developing its interpretation, the types of taxes and the principles, rules and institutes of Tax Law, endowed with broad emancipation.

It is possible to denote that initially the study of the Tax Law did not even have juridical character, since it was the Financial and Economic Sciences - therefore extra-juridical - that took all the pertinent discussions to the matter - the amount that the taxpayers should take to the State and the subsequent application of the amount collected.

Thus, Tax Law was a matter for financiers and accountants, not jurists, turning to the economic, actuarial and accounting aspects of the taxation phenomena.

The first attempts to organize the Tax Law as a *jurisprudence* topic took place in Germany and Austria, through Otto Mayer and Myrbach-Rheinfeld - in the late 19th and early 20th centuries -, which sought to move away from the Finance Sciences to create the Financial Law, through the systematization of the institutes and the establishment of sources of the former, with laws, regulations, administrative as well as judicial decisions and legal methodology that distanced it from the latter.¹⁵

¹⁴ ATALIBA, Geraldo. *Hipótese de Incidência Tributária*. 6ª ed. São Paulo: Malheiros, 2011, p. 41.

¹⁵ COSTA, Alcides Jorge. *Notas sobre a Relação Jurídica Tributária*. In: Luís Eduardo Schoueri; Fernando Aurélio Zilveti. (Org.). *Direito Tributário - Estudos em Homenagem a Brandão Machado*. 1ª ed. São Paulo: Dialética, 1998, p. 21-35.

¹³ HESSE, Konrad. *A Força Normativa da Constituição*. Porto Alegre: Sergio Antônio Fabris Editor. 1ª ed. 1991, p. 14-15.

For the German authors, the central core of the Financial Law centered on the idea of financial power, whereby the constitutional state, through a public budget, impose taxes, and both budget and taxes should be provided for by law.

Without the tax under the law, which in Mayer's view would be the cash payment imposed on the subject by permanent rule, an independent study would lose its essential characteristic, which can be denoted as an outline of what would then become the principle of legality.¹⁶

As a jurisprudence topic, taxation could be now ruled under the aegis of Administrative Law, as an appendix to the latter, so that, its relations, institutes, principles, and rules, would be regulate by it.

However, it is also important to remember that Administrative Law, in a way, has just gained disciplinary autonomy - compared to Private Law - the product of ancient Roman Law - only after the advent of the French Revolution, in the context of the Economic Liberalism, in which the "prince" becomes the State and would ever be restrained before the diverse prerogatives of the citizens. Under this conception, the Administrative Law gains prominence, separating the public patrimony - obtained through the collection - from the private patrimony.

Thus, the idea of duty and power, public interest, and public function is born as an activity exercised in the fulfillment of the will to achieve the public interest, through the use of the instrumentally necessary powers conferred by the legal order.¹⁷

Under the aegis of positivism, the gradual improvement of Financial Law spread throughout Europe, and gradually it became more prominent than the Administrative Law. Nevertheless, it was used support on a catastrophic event. The first step in separating these branches of law would occur only because of the advent of the First World War.

World War I drove countless European States into a total political, social and financial chaos. Germany - then called German Empire - the main representative of the Central Empires - together with the Austro-Hungarian Empire - was utterly destroyed, with a loss of 15.1% of its economically active male population¹⁸, the Hohenzollern dynasty, food shortages, and astronomical external debt. A

reform of the German Administrative System was then required.

In this context, by the hands of Enno Becker, the German Tax Code was created, which came into force from the year 1919, as a suitable measure to organize the German finances and tax collection.

The German Tax Code can be considered as a landmark of the scientific autonomy of the Tax Law in Europe, since then, a number of institutes, legal relations, principles, and tax rules have been organized systematically, separating it from Administrative Law.¹⁹

From then on, European Tax Law undergoes relevant theoretical deepening, extending studies on the chargeable events, tax obligations, interpretation of tax legislations according to its institutes, the prerogative of legality before the State, among many other topics that begin to thrive in Tax Law disciplines - recently established in Europe. With Brazil, it was no difference.

Despite the relative backwardness of the Brazilian Doctrine, in view of a broad and solid *civil law* tradition, as well as little contact with the German language, in the 1940s and 1950s began the - still shy - studies of Tax Law as an autonomous subject.²⁰

The publications, debates, comments and important works started by Rubens Gomes de Sousa, Aliomar Baleeiro, Gilberto de Ulhôa Canto, Amílcar Falcão, Tullio Ascarelli and, later, Ruy Barbosa Nogueira, Alfredo Augusto Becker, Alcides Jorge Costa, Geraldo Ataliba, José Souto Maior Borges, among many others, enriching the nascent tax literature, strongly influenced by Hans Kelsen's Legal Positivism.

Those factors led, in 1953, to the first attempt to create a tax code in Brazil, by Rubens Gomes de Sousa, with the National Tax Code draft sent to the National Congress in 1954. Nevertheless, despite heated debates, revisions and concerning to Gomes de Sousa's initial proposal - heavily influenced by the 1919 German Code - the Project remained suspended for 12 years, and only in 1966 a statute based on Sousa's project was approved, what we now know as the National Tax Code (CTN).²¹

Regarding to the Chair of Tax Law in the law schools of the country, it is considered as a historical

¹⁶ TEODOROVICZ, Jeferson. História Disciplinar do Direito Tributário Brasileiro – Série Doutrina Tributária Vol. XXI. São Paulo: Quartier Latin, 2017, p. 94-102.

¹⁷MELLO, Celso Antônio Bandeira de. Curso de direito administrativo. 26ª ed. São Paulo: Malheiros, 2009, p. 29.

¹⁸ KITCHEN, Martin. Europe Between the Wars. New York: Longman. 2000.

¹⁹ TEODOROVICZ, Jeferson. História Disciplinar do Direito Tributário Brasileiro – Série Doutrina Tributária Vol. XXI. São Paulo: Quartier Latin, 2017, p. 125.

²⁰TEODOROVICZ, Jeferson. História Disciplinar do Direito Tributário Brasileiro – Série Doutrina Tributária Vol. XXI. São Paulo: Quartier Latin, 2017, p. 131

²¹Trabalhos da Comissão Especial do Código Tributário Nacional: Disponível em <http://www2.senado.leg.br/bdsf/handle/id/511517>

landmark that occurred at the Pontifical Catholic University of São Paulo (PUC-SP), where, through the lectures of Professor Carlos Alberto Alves de Carvalho Pinto²², the Science of Finance was taught.

With the entrance of Professor Ruy Barbosa Nogueira, the name of the Chair was changed to "Financial Law" - although his study was absolutely focused on Tax Law - and in the 1970s, just under the mastery of Professor Geraldo Ataliba at PUC- SP, continued the birth of the first regular course of Tax Law in Brazil, which later occurred in several colleges of the country.

In the words of Ruy Barbosa Nogueira, as for university education, with the approval of the Faculty of Law of the Pontifical Catholic University of São Paulo – PUC- SP, was inaugurated the first course of Tax Law, which has been taught for many years, whose course continues today. So PUC -SP created in 1963, the first Chair of Tax Law.²³

From the 1950s until the advent of the Brazilian Constitution of 1988, the study of the Tax Law had grown exponentially, with numerous works towards the autonomous study of the subject. Still under a clear positivist bias, the academic productions about the tax institutes, principles and rules, the interpretation and application of the Tax Law, the taxes and their types, the tax obligation, the credit constitution, the launching and collection, the separation between Private Law and Tax Law, among other topics.

One of the doctrinal milestones of Brazilian Tax Law - which dates back into 1973- was the launching of the book "Hypothesis of Tax Incidence" by Geraldo Ataliba, which nowadays extends over time.

Geraldo Ataliba's work marked the definitive consolidation of the country's tax knowledge and from it, a school of great jurists was formed, which, as we will treat below, from the work of the Professor and the new times brought after the State of Exception that prevailed in the country until the advent of the Charter of 1988, gave a new face to the Brazilian Tax Law, thus starting the studies of Constitutional Tax Law.

In the words of Professor Ataliba, the concept of tribute is constitutional. No law can widen, reduce, or modify it. It is a key concept for the demarcation of legislative powers and underpins the "tax regime", a set of constitutional principles and rules for the protection of the taxpayer against the so-called "tax power", exercised,

within their respective limits of competence, by the Union, the states, and municipalities. Hence the disproportion of this legal definition, the admission of which is dangerous as potentially harmful to the constitutional rights of taxpayers. Constitutionally presupposed or defined rights cannot be "redefined" by law. To admit it is to allow constitutional demarcations to risk their effectiveness is compromised.²⁴

III. TAX LAW AS A CONSTITUTIONAL SUBJECT AND NEO CONSTITUTIONALISM

The promulgation of the Federal Constitution - on October 5, 1988 - is the milestone by which the Social and Democratic State of Law will permeate the study of all branches of law, especially tax law.

The Citizen Charter, in its Chapter I, Title VI, affirmed the whole skeleton of the National Tax System, establishing the General Principles of Taxation, Limitations on the Power to Tax and a whole division of competences among the Federation Entities. Interestingly, in the 1970s and 1980s, important studies were emerging in the sense of the Tax Law as a constitutional subject, such as those of Elizabeth Nazar Carrazza²⁵ and Roque Antonio Carrazza.²⁶

According to the author, the tax legislator, at the moment of exercise of its competence, is restricted to the normative parameters established by the Major Law:

Whenever the constituent legislator elects a fact as a presumptive sign-fact of wealth, granting competence to the political persons to create taxes, the ordinary legislator, in exercising his enforceable competence, must remain within the parameters of reasonableness, so that the constitutional principle of

²⁴ ATALIBA, Geraldo. *Hipótese de Incidência Tributária*. 6ª ed. São Paulo: Malheiros, 2011. Pg. 32 – 33.

²⁵ CARRAZZA, Elizabeth Nazar. *Sistema Constitucional Tributário Brasileiro*. Revista de Direito Público, São Paulo, v. 25, p. 197, 1971.

²⁶ CARRAZZA, Roque Antonio. *Princípio Federativo e Tributação*. Justitia, São Paulo, v. 130, p. 162-180, 1985.

CARRAZZA, Roque Antonio. *Princípios Constitucionais Tributários e Competência Tributária*. 1. ed. São Paulo / SP: Malheiros Editores, 1986.

CARRAZZA, Roque Antonio. *Curso de Direito Constitucional Tributário*. São Paulo: Editora Revista dos Tribunais, 1989.

²² *Dicionário Histórico Biográfico Brasileiro pós 1930*. 2ª ed. Rio de Janeiro: Ed. FGV, 2001.

²³ NOGUEIRA, Ruy Barbosa. *O Surgimento e Evolução do Ensino Científico do Direito Tributário no Brasil*. São Paulo, 2002, p. 726.

contributory capacity will not be retracted.²⁷

The advent of the Constitution as the Law's higher document, which is now matured (constitutionalization process), is the process by which the interpretative paradigms of all legal branches turn to the Magna Carta - more democratic and social, bringing in its core an exhaustive list of Fundamental Rights, Political and Social - getting from their devices the guidance needed to achieve their greater end: building a free, just and supportive society, ensuring national development, eradicating poverty and marginalization and reducing social and regional inequalities and promoting good of all, without prejudice of origin, race, gender, color, age and any other forms of discrimination.

As we look at European law, we can list some of the legal documents through which constitutionalization has paved its way in Europe: the German Constitution, called the Bonn Fundamental Law, in 1949 and the creation of the Federal Constitutional Court in Germany in 1951, the 1947 Constitution of Italy and the creation of the Constitutional Court of Italy in 1956, and the constitutions of Portugal - in 1976 - and Spain in 1978.

This process of constitutionalization of the Law, which in the 21st Century comes to be called neo constitutionalism, brought to light the division between principles and rules, with their predominance, the supremacy of Fundamental Rights and the dignity of the human person, the axiological and creative interpretation of the law, the predominance of judicial activity and the approximation of the Morality, bringing a huge opportunity to an interdisciplinary approach.

For Luís Roberto Barroso, neo constitutionalism has three major theoretical pillars: a) the recognition of the normative force of the Constitution; b) the expansion of constitutional jurisdiction; and c) the development of a new dogmatic of constitutional interpretation.²⁸

In this context, it is of great importance to recognize the normative force of the constitutions, which must address the social reality and the plan of effectiveness.

In the words of Konrad Hesse, if it does not want to remain 'eternally sterile', the Constitution - understood here as "legal constitution" - should not seek to construct the state in an abstract and theoretical way. It does not

succeed in producing anything that is no longer grounded in the singular nature of the present (*individuelle Beschaffenheit der Gegenwart*). If these assumptions are lacking, the Constitution cannot lend "form and modification" to reality; where there is no force to be awakened - force that derives from the nature of things - the Constitution cannot lend it direction; if cultural, social, political and economic laws impose are ignored by the Constitution, it would lack the indispensable germ of its life force. Normative discipline runs counter to these laws, it fails to materialize.²⁹

In this way, the meaning of the Constitution, previously seen as a mere formal document by which the Powers of the States were divided and organized, and a few rights were granted, were altered in order to achieve the greatest possible effectiveness of its text - which becomes extensive, establishing a whole set of Fundamental Rights - which will govern all the facts of life, a role that had previously occupied by the Civil Law.

We see, then, that the constitutionalization process was based on two important assumptions. Initially, on the one hand, its principles, rules, and institutes are raised to a constitutional level so that the taxpayer - through respect for his fundamental rights - could be protected from an undue invasion of the State through the collection of taxes.

In this context, that vertical relationship, whereby the individual is compelled to bring money to the State, either by the existence of presumptive signs of wealth or by the regulatory exercise of police power, or the use of the public service, must now occur clearly, in accordance with the Constitution and through a series of principles, such as legality, equality, contributory capacity, among others.

On the other hand, the collection, management, and application of the amount brought to the State by way of taxes should take place democratically, fairly and with the ultimate goal of eradicating social and regional inequalities and ending poverty in the construction of a society aligned with social welfare. Thus, there is a resignification of administrative practices in order to transform the Law, including Tax Law.

According to Roque Antonio Carrazza, we note, furthermore, that our Constitution, in the laudable purpose of transforming the Brazilian Republic into a Democratic Rule of Law, has subjected the tax action of the State to an extensive list of principles (federative, legality, equality, precedence, security), which protects taxpayers, as much

²⁷CARRAZZA, Elizabeth Nazar. *Progressividade e IPTU - igualdade e capacidade contributiva*. 1ª.ed. Curitiba: Juruá, 2001, p. 51.

²⁸BARROSO, Luís Roberto. *Neoconstitucionalismo e constitucionalização do Direito. O triunfo tardio do Direito Constitucional no Brasil*.

²⁹ HESSE, Konrad. *A Força Normativa da Constituição*. Porto Alegre: Sergio Antônio Fabris Editor. 1ª ed. 1991, p. 18.

as possible, against possible abuses. Moreover, it is the constitutional principles that drive the content of tax laws and their modes of application.³⁰

Thus, the collection of exactions and the lawful invasion of private property by the State must necessarily take into account the protection of Fundamental Rights, that is, respect for strict legality, proportionality, and reasonableness, contributory capacity, material equality, confiscation, priority and non-retroactivity.

Therefore, in this constitutional turn, a logical-semantic interpretation of Tax Law, aligned with the Legal Positivism and an already outdated reality, besides representing an innocuous formalism, is not in line with the social needs of the country and the maximum purposes of the Federal Constitution.

The plan of reality and the effective construction of a fraternal society, based on material equality, with the full guarantee of rights for all and liberation from poverty and injustice, demand, in fact, a logical-syntactic shift, with focus on interrelationship between individuals and institutions, a look at the reality of the subjects and not the dead letter of words, and there is, undoubtedly, a need for openness to an interdisciplinary approach.³¹

The interdisciplinary openness in tax law represents a new paradigm whereby the whole phase of separation of the science of law and the autonomy of tax law has already been consolidated in such a way that there is no need for separation, but on the contrary, in a postmodern society, in which reality is advancing at a rapid step, the search for answers to the effectiveness of law and rights can often be found in other sciences, such as accounting, economics, psychology, medicine, computing, Sociology, and Morality.

In this sense is Law No. 13655/18 - which includes in Decree-Law No. 4,657 of September 4, 1942 (Law of Introduction to the Rules of Brazilian Law), provisions on legal certainty and efficiency in the creation and application of public law - through which an epistemological opening can be glimpsed towards effectiveness and practicality, which are in line with the idea of functionalism in law.

Therefore, beyond the phase of birth, separation, consolidation, and constitutionalization of Tax Law, its new perspectives tend precisely to a contrary movement, towards epistemological openness and the possibility of interpenetration of other sciences through an

interdisciplinary approach, as an aggregating and enriching value that, in fact, will enable the fulfillment of fundamental tax constitutional values in line with a rapidly evolving multifaceted reality, as we will explain on the next item.

IV. LEGAL ACTIVISM IN TAX LAW AND THE NECESSITY OF AN INTERDISCIPLINARY APPROACH

The current Brazilian Federal Constitution was promulgated in 1988 and contains a plea of principles to protect taxpayers, led by the principles of legality and equality. From it, the Legislative Branch has the competence to create and change the taxation. The Judiciary applied the Federal Constitution as well as the statutes in tax matter. On this time, the subsumption was used in the majority of the judicial decisions. Reducing the subsumption as its minimum, we could explain those decisions as: 'the statute disciplines that, in occurring the situation X, a tax must be payed; if the situation was different than X (if the situation was Y or Z, for instance), the tax must not be payed'.

However, to work properly, the law must be clear on the subsumption process of applying the rule. In other words, the interpret needs to identify the elements of the law with no doubt. If the rule is uncertain, imprecise or the words used by the legislator are indeterminate, before the subsumption, the rule must be constructed.

Actually, under the basis of an interdisciplinary approach, interpreting a law means, beforehand, understanding it in the fullness of its social purposes, in order to be able, in this way, to determine the meaning of each of its provisions. Only then is it applicable to all cases that correspond to those objectives. As can be seen, the first care of the contemporary hermeneutic consists in knowing the social purposes of the law, as a whole, because is the purpose that makes it possible to penetrate the structure of its particular meanings.³²

The legal positivism works with some possible sense of the words used by the legislators. The interpret is not free to adopt other sense for the same words, as we can denote in the words of Paulo de Barros Carvalho³³, who says that:

It is the human being who, in contact with the expressed manifestations of the positive

³⁰ CARRAZA, Roque Antonio. Curso de Direito Constitucional Tributário. Ed. Malheiros, São Paulo: 2010, p. 64.

³¹ HESSE, Konrad. A Força Normativa da Constituição. Porto Alegre: Sergio Antônio Fabris Editor. 1ª ed. 1991, P. 18.

³² REALE, Miguel. Lições Preliminares de Direito. 22ª. Ed., São Paulo: Saraiva, 1995, p. 285.

³³ CARVALHO, Paulo de Barros. Curso de Direito Tributário. 13ª. Ed. São Paulo Saraiva, 2000. p. 120.

law, produces the respective meanings. Hence the peremptory assertion that it is interpretation that gives rise to meaning, inserted in the depth of the context, but always driven by the literal formulas of the objectified law.

In this same way, Sergio Nojiri, quoting Nicola Abbagnano, states that interpretation is the possibility of referring a sign to what it designates and the operation by which a subject establishes the reference of a sign to its object. The author continues, now quoting Roberto J. Vernengo, stating that interpreting a sign means expressing its meaning, using signs different from those used originally. In other words, it is the logic of a system of signs so that a set of signs is unveiled by other signs that make understanding easier.³⁴

Nevertheless, some meanings change from time to time, showing us that legal positivism fails when confronted with a post-modern society, which demands, from the interpreter, an interdisciplinary openness, that is, the literal formulas of the positive objectified law are not enough to achieve the social purposes of the constitution.

The Brazilian Federal Constitution from 1988 contain many indeterminate stipulations, included on principles of law. These principles are indeterminate and required constructions as well as ponderations in situations on which they can collide. The post-positivism works with these social values that impregnate the constitutional principles, always searching for justice. For that, the rules of interpretation applied during the positivism era do not properly work in those cases.

We can briefly say, according to Kauffmann, justice is a fundamental, absolutely irreducible concept of ethics, social and legal philosophy, as well as political, social, religious and legal life, affirming that justice in a broad sense has three aspects: equality (justice in the strict sense) where the form of justice is found; the adequacy (social justice or the common good) which is the content of justice; and legal security (legal peace) which is the function of justice. It is fundamentally linked to the idea of justice, the concept of equality, because as its highest guiding idea, to think about justice is to seek an evaluative concept of a balance, a balance between certain parameters that are set by an observer.³⁵

In this way, under the post-positivism, and its interdisciplinary approach, the act of interpretation is not declaratory, but constitutive. That is, the judge, when deciding, innovates the legal system, individualizing and implementing the general and abstract rule. In this way, the judge does not declare, unravel or discover the content already expressed previously in the law, but gives it a meaning to the legal statement with the interpretation, based on multiple topics out of the ruled law.

During the long time that judges used the subsumption as a model of decisions, jurists and professors rarely mentioned judicial decisions on their works. Judicial decisions applied the *law* in a positivist sense (Constitution and statutes), as presented on item 1 of this article. It was redundant to construct the interpretation of the rules quoting judicial decisions. However, after an undefined moment of this century, the reality has changed.

Brazilian judges have, sometimes, departed from the subsumption system and started to use more rhetoric elements to justify their decisions, even because on post-positivism, it is essential to identify the social purposes of the constitutional principles considered by the Judiciary.

For the juspositivism, only the senses of the positive law could be used to construct the rules. Moral or ethical elements, as well as politics or economics were banned for the *correct* interpretation. For the post-positivism, these elements, mainly the moral and ethics are largely considered by jurists, lawyers and judges.

As we mentioned before³⁶, nowadays, academic discussions on the formation of the decision of Brazilian judges is beginning, including decisions taken in tax proceedings, in the administrative and judicial spheres, even because, as we said, the classic subsumption of the fact to the norm has no longer been sufficient to demonstrate how decisions have been taken, which points to the participation of other elements, which may be interpretative, not evidenced in the decision or even non-legal.

Nevertheless, some of the current problems are in situations under which the subsumption process could be used, but judges, instead of applying precedents or even the literal text of the positive law, avoid previous interpretations and started to create new rules. On these situations, elements included on constitutional principles do not help, demanding the critics of these events a research in politics, economics or even in psychology to

³⁴ NOJIRI, Sérgio. A interpretação Judicial do Direito. São Paulo: Revista dos Tribunais. 1ª ed. 2005, p. 121-125.

³⁵ KAUFMANN, Arthur. Filosofia do Direito. 2d. Lisboa: Fundação Calouste Gulbenkian. 2004, p. 225.

³⁶ BECHO, Renato Lopes. Considerações sobre dados extrajurídicos que podem estar influenciando os julgamentos tributários. Revista Brasileira da Advocacia, v. 8, 2018, p. 155.

identify what or why the judges ruled the cases on that new way.

As we said before³⁷, one of the traits currently expected from the academic community is the multidisciplinary search for knowledge, since not always just one scientific branch is enough to know the reality, especially considering the recent transformations.

So than, if subjunction methods were identified and explored in the past, but no longer lend themselves to explaining all present decisions, we can seek to identify the elements that are influencing today's decisions, the legal science needs to be able to explain such decisions, even though it also making use of knowledge gained in other disciplines, because, one of the traits currently expected from the academic community is the multidisciplinary search for knowledge, since only one branch is not always enough to know reality, especially in light of the most recent transformations.

V. CONCLUSION

Law is not a starting point or a point of arrival, but a path, a trajectory to be profiled every day, through the changes and challenges that societies and human historical mindsets impose on individuals who interrelate in community.

The pursuit of the scientific purity of the law, independent of all other sciences and meta-juridical values, was the product of the needs of its time and an important instrument for the study of Law.

However, such a position is not in line with the plural and multifaceted reality of modern, or rather post-modern times.

Similarly, if it were not for the process of autonomy of Tax Law before the Science of Finance and later Administrative Law, we might not have been commenting on this legal branch, which today undeniably has its own principles, rules, institutes, relations, and ways of interpretation.

But the world has changed, and with it, new needs come. The constitutionalization of the Tax Law represented the transmutation of the previous paradigms, in favor of the construction of something bigger: a free, just and egalitarian society, free from prejudice, which aims to give the individual the minimum conditions of well-being and dignity, so that it can be realized and fully attain its fundamental right to happiness.

In conclusion, it is now up to the taxpayers - and perhaps all the legal operators - the new challenge: interdisciplinary approach.

Now, if there is no doubt that reality of the Law is broader than the statutes(as legal positivists imagined) and is developing at a rapid pace, we must follow the opposite path with epistemological openness, bringing again the values of Morality, Justice, Sociology, Economics, Politics, and Culture into the Law.

REFERENCES

- [1] ATALIBA, Geraldo. *Hipótese de Incidência Tributária*. 6ª ed. São Paulo: Malheiros, 2011.
- [2] BARROSO, Luís Roberto. *Neoconstitucionalismo e constitucionalização do Direito. O triunfo tardio do Direito Constitucional no Brasil*. (Disponível em: <http://jus2.uol.com.br/doutrina/texto.asp?id=7547>)
- [3] BECHO, Renato Lopes. Considerações sobre dados extrajurídicos que podem estar influenciando os julgamentos tributários. *Revista Brasileira da Advocacia*, v. 8, 2018.
- [4] BECHO, Renato Lopes. *Filosofia do Direito Tributário*. São Paulo: Saraiva, 2009
- [5] BOBBIO, Norberto. *Da Estrutura à Função*. São Paulo: Manole. 1ª ed. 2006.
- [6] CARRAZZA. Elizabeth Nazar. *Progressividade e IPTU - igualdade e capacidade contributiva*. Curitiba: Juruá. 1ª ed. 2001.
- [7] CARRAZA. Roque Antonio. *Curso de Direito Constitucional Tributário*. São Paulo: Malheiros. 26ª ed. 2010.
- [8] CARVALHO, Paulo de Barros. *Curso de Direito Tributário*. 13ª. Ed. São Paulo Saraiva, 2000.
- [9] COSTA, Alcides Jorge. *Notas sobre a Relação Jurídica Tributária*. In: Luís Eduardo Schoueri; Fernando Aurélio Zilveti. (Org.). *Direito Tributário - Estudos em Homenagem a Brandão Machado*. São Paulo: Dialética. 1ª ed.1998.
- [10] *Dicionário Histórico Biográfico Brasileiro pós-1930*. Rio de Janeiro: Ed. FGV. 2ª ed. 2001.
- [11] HESSE, Konrad. *A Força Normativa da Constituição*. Porto Alegre: Sergio Antônio Fabris Editor. 1ª ed. 1991.
- [12] KAUFMANN, Arthur. *Filosofia do Direito*. 2d. Lisboa: [Fundação Calouste Gulbenkian](http://www.fundacao-calouste-gulbenkian.org/). 2004,
- [13] KELSEN, Hans. *Teoria Pura do Direito*. São Paulo: Martins Fontes. 2ª ed. 2012.
- [14] KITCHEN, Martin. *Europe Between the Wars*. New York: Longman. 2000.
- [15] MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo*. São Paulo: Malheiros. 26ª ed. 2009.
- [16] NOGUEIRA, Ruy Barbosa. *O Surgimento e Evolução do Ensino Científico do Direito Tributário no Brasil*. São Paulo. 2002. Pg. 726.
- [17] (Disponível em <https://www.revistas.usp.br/rfdusp/article/download/67573/70183/>)

³⁷BECHO, Renato Lopes. Considerações sobre dados extrajurídicos que podem estar influenciando os julgamentos tributários. *Revista Brasileira da Advocacia*, v. 8, 2018, p. 158.

- [18] NOJIRI, Sérgio. A interpretação Judicial do Direito. São Paulo: Revista dos Tribunais. 1ªed 2005.
- [19] REALE, Miguel. Lições Preliminares de Direito. 22ª. Ed., São Paulo: Saraiva, 1995
- [20] SCHOUERI, Luís Eduardo. *Direito tributário. São Paulo: Saraiva Educação. 8ª ed. 2018.*
- [21] SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel. *A constitucionalização do Direito: fundamentos teóricos e aplicações práticas. Rio de Janeiro: Lumen Juris, 2007.*
- [22] TEODOROVICZ, Jeferson. *História Disciplinar do Direito Tributário Brasileiro – Série*
- [23] *Doutrina Tributária Vol. XXI. São Paulo: Quartier Latin, 2017.*
- [24] *Trabalhos da Comissão Especial do Código Tributário Nacional: Disponível em <http://www2.senado.leg.br/bdsf/handle/id/511517>*