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Judicial activism and non-legal factor in tax law

Ativismo judicial e fatores não legais em direito tributário

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ABSTRACT: The aim of this paper is to propose legal bases for the influence of non-legal elements that are taken into account in a complex judicial decision. The first part will be expositive in order to demonstrate the incompatibility of legal theory and jurisprudence to guide the judicial reasoning as a whole. On the second part, eminently critical, the activism versus self-constraint doctrine shall be pointed out as an invalid approach to encompass all elements that involve judicial reasoning and constraint judicial

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discretion. On the third part, various approaches for a decision making will be disclosed – political, sociological, psychological, economical, legal and others – based on the studies of Richard Posner. After a quick brief on the non-legal elements that come to judicial reasoning, some few propositions will be presented for the Academy in order to engage the problem, as well as to the Judiciary.

KEYWORDS: Interpretation and application of law. Judicial activism. Legal reasoning. Non-legal elements that affect judicial reasoning. Tax law.

RESUMO: O objetivo deste artigo é propor bases jurídicas para influência de elementos não legais que são levados em consideração em uma decisão judicial complexa. A primeira parte será expositiva, a fim de demonstrar a incompatibilidade da teoria do Direito para orientar o raciocínio judicial como um todo. Na segunda parte, eminentemente crítica, a doutrina do ativismo e da autocontenção são apontadas como abordagens inválidas para abranger todos os elementos que envolvem raciocínio judicial e limitar a discricionariedade judicial. Na terceira parte, serão apresentadas várias abordagens para a tomada de decisões – políticas, sociológicas, psicológicas, econômicas, jurídicas e outras – baseadas nos estudos de Richard Posner. Após um breve resumo dos outros elementos que são levados em consideração na decisão judicial, algumas propostas serão apresentadas para a Academia, a fim de resolver o problema, bem como para o Judiciário.

PALAVRAS-CHAVE: Interpretação e aplicação do Direito. Decisão judicial. Ativismo judicial. Elementos não jurídicos que afetam a decisão judicial. Direito tributário.

1 Introduction

Neil MacCormick points out two common senses in Law. The first one is legal science works alongside legal reasoning for the full comprehension of Law as praxis. The second is Law presupposes the Rule of Law, i. e., it is the goal of a legal system to provide legal certainty and legal security for society, a condition to enable citizens to achieve autonomous lives based on mutual trust.[3]

One who follows the judicial decision making in Brazil might be puzzled by the constant use of other elements, not only the legal ones, or rather, not only the interpretation of the texts from the merely semantic point of view, have been used in many branches of law, like in criminal law and, as hoped by the authors to be demonstrated, in tax procedural law.

The divergent paths that have been followed by jurisprudence,[4] to the point of lack of increasingly acute communication between legal doctrine and judicial reasoning. The Academy – responsible for the construction of the science of law – and the Judiciary – responsible for constructing the legal norm – follow methodologically distinct paths, since the jurisprudence is descriptive and has as its object the positive law itself, with the role of explaining, from these general and abstract concepts that will be used – including by the judges – in the construction of the norm.

On one hand, the positive law is prescriptive and the judge is the competent authority that will construct the individual and concrete norm of the concrete case, recognizing legal relations between two or more people and imputing

3 MACCORMICK, 2010, p. 14-16.

4 The term "jurisprudence" in this article is used in the sense of the Common Law system tradition, i.e., legal doctrine or science of law.

to someone a sanction. Such divergence of foundations and methodology is evident. What is actually not so obvious is the mismatch between the legal guidelines used by the doctrine and those other guidelines – not necessarily legal ones – that are taken into account in the construction of the legal norm by the Judiciary. On the other hand, the theoretical and practical divergence between the judiciary and the academy is not new, or, in more common terms for the nomenclature adopted in Brazil, between jurisprudence and doctrine, both traditionally classified as formal sources of law. The present work revolves around the hypothesis that the legal doctrine is not sufficient to provide the judge with the necessary subsidies for the construction of a judicial decision based on more solid grounds.

Karl Larenz,[5] commenting on the main points of the jurisprudence of interests, advocated by Jhering, in his second phase of thought, "Jhering is the first of the modern juridical thinkers who completely relativizes the guidelines of law." Roughly speaking, Jhering's shift from the jurisprudence of concepts to the jurisprudence of interests represented the breaking of the paradigm in the dogmatic study of the science of law which, until then, had eminently theoretical content became, as Jhering argued, a pragmatic science having as a central factor the interests that would be, at the same time, cause and effect of the law. This new dogmatic approach to law was called by the doctrine "Jhering Pragmatism" or "social utilitarianism", as Jhering termed it and was summarized and criticized by Larenz in a polite manner.

Larenz concludes that the importance of Jhering's thought for the evolution of law lies in the recognition that law is founded on social reality and intends to order it, so that the teleological element is the reason of every legal

5 LARENZ, 1997, p. 61-62.

proposition, but adds that his doctrine did not address the question of the limits of social ends, that is, whether or not these limits were subject to a "hierarchical and evaluative objective order." In fact, to admit the pure submission of the law to the social facts that support it, without limiting the content and scope of the norm, is to conclude that the law would simply reflect a given cut of reality, being an instrument of power only to validate the interests of a group without the power to order a society.

According to Larenz, if Jhering's doctrine had the great merit of bringing to the science of law the sociological factor to be taken into account in the judicial reasoning; The same theory did not address the existence or even the need for limits to its own interests, embodied in law and which should be applied by the judge in the present case, which, to a certain extent, evidenced a certain colonization of law by politics or sociology, to the point where it is possible to fall into the same tautology of former formalist positivism, which identified justice and law, sociological positivism identified interest and law. In fact, the theory did not explain or analyze any limits to the interpretation of the law from the perspective of the so-called ideal interests such as freedom, legal certainty, equality and so many other principles of high axiological charge embodied in the German Constitution of 1949, Spanish Constitution of 1978, Portuguese Constitution of 1976 and Brazilian Constitution of 1988, as well as so many treatises dealing with human rights, just to name a few examples, which show a path towards recognizing, under the positive law plan, an objective order of values that constitute limits of State's performance in the legal sphere of the citizen. Certainly, such principles were gradually inserted into legal dogmatic without, however, being systematized in legal science.

Richard Posner, in turn, is immensely concerned about the distance between traditional doctrine and the judiciary, having devoted an entire book to addressing the problem, although the author himself expressed pessimism:

> Much is wanted in the formation, the education, of judges. The law schools are doing little to fill the empty space. They should do more. They can do more. But I am not an optimist that they will do more. Like other university faculties, law faculties are self-replicating, like amoebas.[6]

Despite a certain exaggeration in the use of meta-language in this quotation, Posner's work – generally not dogmatic but clearly critical – reveals some origins of the differences that distance the jurist from the judge, making it difficult, if not completely, impeding communication between them. Probably the biggest problem with this relationship lies in some obscurantism about how to address the judge's priors or preferences in judging cases. According to Posner, "A prior is a belief or inclination, conscious or (frequently) unconscious, that one brings an issue before obtaining any evidence concerning it."[7] An example of these priors can be illustrated by an example used by Posner himself:

> Recently I asked a lawyer friend of mine – a very successful litigator (Robert Hochman of Sidley Austin LLP, a former law clerk of mine and then of Justice Breyer) – how he would answer a prospective client who said to him: 'What are my chances of prevailing in this lawsuit [prospective or actual] that I am asking you to represent me in?' He said he would answer as follows: 'The way to approach the question is to set aside all the legal technicalities and ask: if this were a dispute submitted for resolution to a wise man who was not law-trained, but who simply applied his moral intuitions, would he resolve the dispute in your favor or your opponent´s? His suggested resolution might be blocked by some legal technicality – statutory language, precedents, what

6 POSNER, 2016, p. 5.

7 Idem, p. 17.

> have you – but I all likelihood we would be able to get around such obstacles.' (An alternative formulation he suggested was: the lawyer's 'position should be the one that would prevail if resort to traditional legal materials were disallowed.') [8]

The skepticism expressed is some sort of manifestation of the very core of Posner´s thought, that claims that public decisions must be made on the grounds of facts and consequences, not on conceptualisms and generalizations.[9] From another perspective, Posner still draws attention to the growing professionalization of non-legal areas and their development, often leaving legal science behind.

Tércio Sampaio Ferraz,[10] in a "Note to an Intrigued Reader", exposes his considerations about the change in the way the law is approached. If just over thirty years ago, the science of law focused, in his own words:

> On a kind of tension between decision-making and the work of the legislature, hence the controversy over the relevance of doctrinal interpretation (legal doctrine) in comparison with the authentic interpretation and about the secondary role played by the jurisprudence of the courts as a source of law (the judge limited to being the mouth of the law), over that time, world transformations, particularly judicial activism, a certain resurgence of natural law, exploding social movements around the world, and the transformation of constitutionalism, revealing the inefficiency of traditional mechanisms and the emergence of other mechanisms.

Finally, Ferraz Jr. detects a trend of deviation from contemporary law from its *exclusive mode of rulemaking (Legislative Power) to other social systems (economics, science, the media), hence the shift from law formation to within these systems.*[11]

8 Idem, p. 3.

9 POSNER, 1999, p. 227.

10 FERRAZ JR., 2018, p. 3. From the original: *Nota a um Leitor Intrigado* (free translation).

11 Idem, p. 3.

This kind of concern was somehow felt by San Tiago Dantas, in 1955, stands for a so called *reorientation of teaching towards the formation of legal reasoning itself*, holding an interdisciplinary study of Law, based on a whole new model putting the students not only exclusively in front of a bunch of body of norms, but rather searching solutions in the face of real controversies, which could be made thought a systematic study of judicial decisions.[12]

In this line of questioning and reassessing classical methods of interpretation and hermeneutic schools, Renato Becho[13] has as its object something defined: the elements that influence the judge that are not expressed in the decision or in the interpreted text, that is, the calls by the author of "case law which has no legal basis". In conclusion, Becho points out and explains four extra-legal elements that influence the formation of the tax decision that can be explored by the legal community. They are: (a) Political influences: The political-ideological link with decision-making seems to be less in Brazil than in the United States, basically for two reasons. The first is that, unlike the USA, where federal judges are chosen by the President of the Republic and state judges are elected; In Brazil, according to article 93, I, of the Constitution of the Federative Republic of Brazil (CFRB), magistrates are admitted into the career, with the initial post of substitute judge – a trial judge –, by means of a civil service entrance examination of tests and presentation of academic and professional credentials.

This is the general rule, although a few seats on appeal courts are exclusively nominated for non-trial judges: for one-fifth of the seats of the Federal Regional Courts, of the Courts of the states, and of the Federal District and the

12 DANTAS, p. 19.

13 BECHO, 2018, p. 174-175.

territories shall be occupied by members of the Public Prosecution and by lawyers (article 94 of CFRB), one-third of the Superior Court of Justice (article 104 of CFRB) and the all members of the Federal Supreme Court (article 101 of CFRB). On the other hand, in the US, there are only two political parties that effectively dominate the democratic-electoral process; while in Brazil there is a large fragmentation of political parties (currently totaling third-five), and successive party changes by some politicians are not uncommon. On the other hand, it is necessary to encourage lawyers and taxpayers to actively participate in the processes of choice of judges before the Federal Supreme Court, thus reducing the potential of the tax attorney's office to influence this process, ensuring some parity between tax authorities and taxpayers; (b) temporary instability on administrative tax courts: there are events of various kinds – corruption for example – that may, contingently, influence the decisions of administrative agents, as occurred with "Conselho Administrativo de Recursos Fiscais" - CARF after Operação Zelotes took place.[14] In this case, it is suggested that society must create mechanisms for judgments to occur. in that period; (c) News from newspapers: There are certain news stories that, if repeated repeatedly, can influence decisions. Examples are: drop in revenue, increased fiscal deficit or high tax evasion. In these cases, it's important that a counterevidence be produced in order to avoid a blind vision over reality, enabling the judge

14 Operação Zelotes, or Operation Zealots, was a two-year police investigation into administrative tax court corruption in Brazil that resulted in a complete overhaul of the tax court. More than seventy companies were investigated under the suspicion that they had paid bribes to Brazil's Administrative Council of Tax Appeals (Conselho Administrativo de Recursos Fiscais – CARF) to reduce, or avoid, fines for tax evasion. Since the court reopened, it was noted the court is reticent to judge in favor of the taxpayer. (https://www.internationaltaxreview.com/article/b1f7nj9zdsn4nd/global-tax-50-2016-operation-zealot), in 01/21/2020.

to see "the big picture" of the complexity that arises from the facts; (d) If the judges in Brazil are aware that business men, entrepreneurs, investors and other relevant decision makers take into account the consequences of judicial reasoning regarding the risks that Brazil economics offers, those same judges may tend towards strict legality in order to ensure stability.

The Brazilian Judiciary is nowadays a public opinion matter. From these simple data gathered from the doctrine, one can notice the progressive increase of the perception that legal theory falls short when it comes to producing the necessary grounds for the construction of the judicial reasoning based on other factors aside from legal propositions. On the other hand, there is a highly solid observation on the influence of non-legal elements on the construction of law created by judges, in Brazil, specially Justices, like Political Science, Ethics, Economics, Administration (like judicial decisions made in order to accomplish goal and statistics of the National Council of Justice),[15] Journalism and so on.[16] The paramount challenge at the moment is not to build dogmatic foundations to set the limits to this creation process, but to put some lights on this very problem: the use of non-legal

15 The National Council of Justice (Conselho Nacional de Justiça, do original em português), created by force of the Constitutional Amendment No. 45 of 2004 is an organ of Brazilian Judiciary that nevertheless has no proper jurisdiction functions, it is incumbent upon the Council to control the administrative and financial operation of the Judicial branch and the proper discharge of official duties by judges, and it shall, in addition to other duties that the statute of the judicature may confer upon it, according to Paragraph 4 of article 103-B of the Constitution of the Federative Republic of Brazil. Since the year of 2004, the National Council of Justice produces public statistics to map the efficiency (or inefficiency) of all Brazilian Judiciary, detecting, specially, the amount of caseload of suit laws in the whole country. In addition, NCJ elaborate goals for all judicial organs in order to tackle the caseload.

16 BECHO, 2021, p. 19.

elements in the construction of the judicial decision and, by consequence, the deviation of the judicial decision from strict legality and from legal dogmatics.

The expressions *strict legality* and *legal dogmatics* are not used here in vain, moreover when it comes to tax law. In Brazil, tax law is the most regulated branch of law in the Brazilian Constitution. There is a legal apparatus to limit the state powers to tax and, by consequence, a whole doctrine constructed standing for the fact that only statutory law is the source of tax law.

Nevertheless, judicial decisions in Brazil have put these two presuppositions in stake, pushing the limits of legal reasoning to another scenario, which raises the question: Is it possible to bring non-legal elements into legal reasoning and, even so, maintain a dogmatic view of law?

Although it is possible to elaborate an incomplete answer to that question with Ferraz Jr., insofar the jurist states legal dogmatics social function is to propose limitations on variations of possibilities on applying law, constructing an axis between the norm and the consistency of the decidability,[17] even though this procedure demands eventually – and due contingencies – openings in legal systems to other elements, in order to overcome gaps and then propose new paths of decision making.

2 Judicial activism in contrast of self-restraint: a poor way to measure discretion of judges

According to Craig Green's survey in an article entitled "An Intellectual History of Judicial," the term "judicial activism" was first conveyed in a *Fortune* magazine article,

17 FERRAZ JÚNIOR, 2015, p. 97.

published in January 1947 by journalist Arthur Schlesinger Jr.[18] In the publication, although there is no definite concept for the subject of the work, the journalist made some notes about the interviews with the then US Supreme Court Justices. The idea was, in general terms, to analyze the way the judges decided and to highlight any contradictions, from the point of view of the author's epistemological cut. Since then, although judicial activism has always been a hot topic, it is not generally approached from a semantic point of view, but rather from a pragmatic point of view and often used in a pejorative sense.[19] This paper does not intend to analyze the phenomenon from a critical point of view, but only to expose at least two definitions of the doctrine that try to encompass the main characteristics of what would become judicial activism. Following a more formal and narrow stance on a purely legalistic theory of law, Kenneth M. Holland states that:

> Judicial activism comes into existence when courts do not confine themselves to adjudication of legal conflicts but to make social policies, thus affecting many more people and interests than if they had confined themselves to the resolution of narrow disputes.[20]

Richard Posner prefers a definition based on the principle of separation of powers, and suggests that the "aggressive judge" approach ("judicial activism") expands the Court's authority on that of the other branches of government.[21] In this paper, we do not intend to follow this line. In fact, judicial activism will be treated as an objective and functional phenomenon, that is, it will be approached only to outline, albeit in general, the various aspects of how judges decide.

18 SCHLESINGER Jr., Arthur M. The Supreme Court: 1947. Fortune, New York, v. 35 (1), 1947, pp. 73/212 as cited in GREEN, 2009, 1199.

19 POSNER, 2013, p. 162.

20 HOLLAND, 1991, p. 1.

21 POSNER, 2008, p. 286-287.

On the other hand, classified as the opposite of judicial activism, is the judge's self-restraint attitude which, according to Posner,[22] can turn out in the following ways, either singly or cumulatively, namely: (a) the judge "the law made me do it" or the formalist judge, who is based on the idea that Judges are not legislators, so they simply apply the law and do not create it; (b) the deference approach, whereby the judge largely preserves the decisions of other authorities, which causes judges of the higher instance to defer to the decisions of the first instance judges and regulatory agencies and all judges, the acts the Legislative Power and the Judiciary Power; (c) the constitutional restraint approach reveals the reluctance to invalidity or nullify legislation on constitutional grounds.

The deference approach to elected representatives and legislators is also emphasized by Clifford Wallace as the judge's central attitude in adjudicating all cases, as well as the values of uniformity and predictability, stating that:

> The philosophy [of self-restraint] urges against innovation for the sake of innovation and against the substitution of the judge's own moral and political values and sociological theories for those of our elected representatives.[23]

Wallace points out that the judge cannot correct the errors of the legislator:

> A consequence of judicial restraint is that courts will not be able to right every wrong – even every genuine wrong. We can take consolation in the abilities of the states and the other branches of the federal government to handle many of the evils that are beyond the proper reach of the courts. It is true that they may fail and if they continue to do so, some wrongs may never be righted. Some may ascribe this to the human condition. But if it occurs, it is a

22 POSNER, 2013, p. 85-86.

23 WALLACE, 1981, p. 17.

> price we must pay for a system that does a better job overall of preserving our fundamental values than would a system making use of judicial activism's quick fix.[24]

On turn, Aharon Barak, a former President of the Supreme Court of Israel, does not take sizes on judicial activism or on self-restraint, affirming that none of them are correct or good, or their opposites, insofar only on the concrete level it is possible to evaluate the conformity of the decision to the Law. In this sense, Barak admits that judges invalid an unconstitutional statute invalidating, or a secondary legislation that conflicts with a statute, reversing a judicial precedent or even creating new law that did not previously exist, through interpreting the constitution or legislation, through developing the common law.[25]

Nonetheless, the facets of self-restraint are fundamental approaches to be taken into consideration when judging cases in general – especially regarding the improper substitution of the values chosen by the legislator for others of the judge himself – but they cannot, by themselves, explain the whole the phenomenon of decision making and, in many cases, fall short to construct the most appropriate solution of the case, especially if one considers the huge Brazilian legislative inflation, whose byproduct, among others, is the inconsistency of positive law itself.

Mauro Cappelletti proposes to answer the question "Does the judge create law?"[26] In his work, the author raises the causes, advantages and disadvantages of judicial activism, also tracing some limits in this activity. Already answering the question, Cappelletti states that creativity is inherent in the judicial interpretation of the law itself, and

24 WALLACE, 1981, p. 17.

25 BARAK, 2006, p. 271.

26 CAPPELLETTI, 1993.

it is negligible to differentiate ontologically the sense of creativity and interpretation. What should be questioned and studied are the degree of creativity and the manner, limits and legitimacy of the creation of the law by the courts. For Cappelletti, jurisdictional activity is subject to substantial limits and procedural limits. However, it points out that as regards substantial limits, these are not the fundamental distinguishing factor between the judiciary and the legislature, since both are subject to substantial limits in the exercise of their typical activities. The difference is one of degree, as the judiciary is subject to a larger and more detailed list of limitations imposed by ordinary (in the sense of unconstitutional) laws and ordinary judicial precedents, whereas the legislative branch is subject to less frequent and less precise limits, like the written Constitution and the decisions of constitutional justice. The Professor concludes that "the legislator's creativity may be, in short, quantitatively, but not qualitatively different from that of the judge." This is because for the author:

> The role of the judge is much more difficult and complex (than the purely logical formalism of law preaches), and of which the judge, morally and politically, is far more responsible for his decisions than traditional doctrines had suggested. Choice means discretion, though not necessarily arbitrariness; means valuation and 'balancing'; it means keeping in mind the practical results and moral implications of one's choice. This means that not only the arguments of abstract logic, or perhaps those arising from purely formal linguistic analysis, but also and above all those of history and economics, politics and ethics, sociology and psychology, must be employed.[27]

Renato Becho comes to the same conclusion, assuming that his kind of thought derives from a branch of scholars that

27 Idem, p. 33.

understands that o process of formation of law depends on the activity both of the legislator and the judges, and these ones play a creative role in law, as long as there is an iterated application of a judicial decision,[28] in Brazil, simply called as jurisprudence, not in the sense used by the common law countries, but in the sense of the French *jurisprudence constante* doctrine, which could be roughly associated with the *stare decisis* doctrine. In other words, for Becho, where there is not a real constant judicial decision, there is no actual law in a strict sense.

Sérgio Nojiri diverges partially at least from that statement. For Nojiri, despite assuming judges and Justices create law, also makes a difference between two kinds of law creation by judicial decision: law creation in a weak sense and in a hard sense. In a weak sense, it means judges create the individual norm that will be applied in the case brought to the Judiciary, solving the conflict between the parties, based on the pure elements given by the legislator. On the other hand, law creation in a hard sense is not a straight process of derivation, but rather a process that uses non-legal elements and a considerable load of valuation by the judge that can even manipulate the meanings and goals of the legislator, assigning a brand new sense to the law. That attitude, for Nojiri, is motivated by a subject sense of justice of the judge, that makes him soften the strictness of some body of law in order to give a different outcome to the case.[29] The problems stills remains insofar it is not proposed boundaries to this activity, moreover because Nojiri admits as a reality that the creation of law in the hard sense can exist even if this means deviate from all the *jurisprudence constante* built up to that moment, which puts the doctrine in a high perplexity,

28 BECHO, 2021, p. 66-67.

29 NOJIRI, 2005, P. 144-145 and 164-166.

because the decision of making justice in a particular case turns out a matter entirely on subjective grounds.

The curious aspect of how the so-called *jurisprudence constante* has been developed over the years in Brazil is that some judicial decisions are constructed out of thin air, without a systematic course of repetitive decisions. In this scenario, the debate about judicial activism loses its founding on the role of creating the law, but rather how the Judiciary is constructing by deviating the strict legality and the doctrine and using other reasons for decision making. If this attitude is – or is not – judicial activism depends on the grounds of the concept of this expression, but it certainly is an attitude that challenges the legal theory insofar the judicial decision is a source of law.

For these reasons, instead of just defining what would be the meaning of the expression *judicial activism* or merely watching passively – and with some skepticism – the process of judicial making, it is important to study analytically how the subjectivity of judges may appear on the cases decided, by naming or classifying the several ways the motives of the judges to take this or that decision. This is the proposition of the present work: Remove the veil of subjectivity of judges giving names to the non-legal elements involved and bringing some cases judged by the Federal Supreme Court or the Superior Court of Justice on tax procedure matters.

3 The elements that may influence judicial decisions

Non-legal elements that interfere in court decisions are revealed through values or preferences for one object over another in the judicial making process. So, for example, when it comes to the economic element, the values adopted are ef-

ficiency, cost-benefit; while in the political element, values are likely to be linked to governability or consensus around a certain interest. Therefore, these elements introduce values into law. Values that can have a great deal of importance for one judge in particular and no value at all for another, depending on how each one sees the law. The great challenge of legal doctrine is to build a legal theory in order to make these elements be analyzed and the values used by the judges scrutinized from the legal point of view and, finally, to construct the limits to this introduction, evaluating if are or are not legit or, at least aligned with the rule of law and the expectations of the parts in a process over the judicial decision.

There are several theories that try to explain how judges decide. Richard Posner[30] systematizes each line of thought in nine strands: the attitudinal, the strategic, the sociological, the psychological, the economic, the organizational, the pragmatic, the phenomenological and the legalist theory.

It is not the intent of this work to build lines of a legal theory that could encompass all these other elements that could be dragged to a judicial decision. Rather, its intent is to make an association with some of third party point of view of a judicial decision and use some examples based on tax procedure cases that could indicate Brazilian judges, specially, Justices, uses non-legal elements to judge even when it comes to tax law, a branch of law marked by the strict legality (a kind of hard statutory law), deviating, by far, from the legal theory constructed over the years in Brazil, particularly after the date of entry into force of the Brazilian National Tax Code, of 1966.[31]

30 POSNER, 2008, p. 19-57.

31 The Brazilian Tax Code, in Portuguese, *Código Tributário Nacional* (*CTN*) is a supplementary law – a special kind of body of laws that regulate

Addressing the nine strands cited, the attitudinal theory claims that judgments decisions are best explained by the political preferences that they bring to their cases, or in a more direct approach *the core idea of the attitudinal model is that ideology (and not the law) is the most important determinant of judicial behavior*.[32] Thus, there is skepticism about the logical structure of judicial decision making, and advocates of this approach understand that political preferences, whether partisan or nonpartisan, exert the greatest inspiration for the court decision. Posner states that, in the United States, studies on the influence of politics on judicial decisions establish causal relations between the President of the Republic who has chosen the judge and his decision in cases that are brought before the Judiciary, with the conclusion that, most often there is convergence between decisions and whether a judge has been appointed by a republican president or a democrat. Taking this relationship between the powers, Posner asserts:

> Justices and judges appointed by Democratic Presidents are predicted to vote disproportionately for "liberal" outcomes, such as outcomes favoring employees, consumers, small businessmen, criminal defendants (other than white-collar defendants), labor unions, and environmental, tort, civil rights, and civil liberties plaintiffs. Judges and Justices appointed by Republican Presidents are predicted to vote disproportionately for the opposite outcomes.[33]

constitutional norms – and under the article 146 of Brazilian Constitution, is the Brazilian law that defines most of the tax elements or aspects – for example, the taxpayer, the tax base, the tax rates – of all taxes in Brazil. For a brief history of the entry into force of the Brazilian National Tax Code, see BECHO, 2021, p. 133-135.

32 SOLUM, 2014, p. 2465.

33 POSNER, 2008, p. 20.

There are advantages to this judicial attitude: The Executive's control over the members of the judiciary and thus obtaining a certain consensus between these two powers, which can ensure governance and implementation of public policies. However, there are disadvantages: the eventual formation of a majority government, which may even lead to a crisis of democracy, caused, for example, by successive violations of rights and disregard of the Constitution at the institutional level by majority representatives. It occurred in Italy during the Berlusconi government from 2005, largely fostered by the rise of populism of the President of the Republic, as set out by Luigi Ferrajoli.[34] It should also be noted that the attitudinal approach has, in Brazil, another perspective and another scope, demanding that academic research that follows such an approach must be different, because, as already stated by Becho,[35] in Brazil the process of choosing judges is partially different from that adopted in the United States, with judges at first instance being submitted to public competition and those occupying the posts of magistrates in courts are promoted. Anyway, having made the appropriate adjustments, it is arguable that in Brazil, the doctrine can heed to the political element that influences the judicial decision not only to inform the legal community in this regard, which, in a way, would diminish the perplexity at non-purely judicial decisions.

In this context, it is remarkable to mention what was decided on the Appeal on *Habeas Corpus* No. 163.334,[36] judged by the Federal Supreme Court. In short, the case had its start

34 See FERRAJOLI, 2014.

35 BECHO, 218, p. 156.

36 BRAZIL. Supreme Federal Court. Appeal on *Habeas Corpus* No. 163.334/SC, Rapporteur Justice Roberto Barroso. Plenary. Judged on 18/12/2019. Published on 13/11/2020.

in a district court of the State of Santa Catarina, Brazil, on a matter of tax misappropriation crime, in Brazil, described in article 2nd, Subparagraph II of Law No. 8.137/1990.[37] The lower level judge repealed a criminal action against the partners of a small family business called *Chalé do Bebê Comércio e Representações Ltda*.[38] for a total amount of R$ 36,000.00 of state taxes. Against the decision, the District Attorney appealed to the State Supreme Court, which, in its turn, reversed the decision and ordered the judge to proceed with the criminal action. Against this decision, the defendant filed a writ of *Habeas Corpus* before the Superior Court of Justice, alleging that they were being prosecuted not for willful tax evasion or tax fraud, but rather simply for not paying taxes. The STJ sustained the lower court decision. Finally, against this very decision, the defendants filed an *Habeas Corpus* Appeal before the Supreme Federal Court.

The Supreme Federal Court had a settled jurisprudence holding tax misappropriation crime described in article 2nd, Subparagraph II of Law No. 8.137/1990 demanded some kind of fraud scheme conduct in order to be fulfilled. Nevertheless, this understanding had changed in *Habeas Corpus* No. 163.334. For The Rapporteur – Justice Roberto Barroso

37 Law No. 8.137/1990 basically describes tax crimes in Brazil in its two first Articles. The most important difference between than is while Article 1st criminalizes the conduct of actually suppress or reduce the total amount of tax one has to pay thought any kind of fraud scheme; Article 2nd roughly criminalizes the conduct of simply withhold information from tax authorities or misappropriate others money when these had to be collected to the Treasure. For example, the crime occurs when an employer has the legal duty to withhold part of the employee salary on account of the latter Income Tax or Social Security contribution, but willfully does not pay the referred taxes. Another case occurs when the seller has the legal duty to withhold part of the value paid in a purchase on account of the tax on goods and services, but willfully does not collect the tax.

38 In a free translation, *Baby Lodge LLC.*

–, the case had to be assessed not only by the statute provisions, but also by the negative consequences for a competitive market of a special kind of taxpayer so called *stubborn debtor*. In short, it was held that tax misappropriation crime occurs only if the illegal withholding values due to Treasure is committed by a stubborn debtor, that is when someone repeatedly does not comply with one's tax obligations, or sells goods under the market prices as some kind of business model, or creates barriers to tax authorities in order to not pay taxes, or gets out of business with debts and without declaring bankruptcy etc.

In Brazil, the stubborn debtor is not yet a legal term, but rather a creation accepted for the first time by the STF in Extraordinary Appeal N. 550769/RJ.[39] The whole discussion could be summed up in the question: *what could be the legally acceptable treatment to a constant tax evader*? In short, even though there is not a clear statute norm suspending or criminalizing that conduct, to what extent the stubborn debtor could be penalized by the law. As seen before, if the Federal Constitution prescribes the tax elements ought to be described by a complementary law, and if the stubborn debtor is not described accordingly to this norm, it could be deduced that the legal treatment to the stubborn debtor is given by the courts, not by the legislator.

It is also important to notice that Justice Roberto Barroso described a short outline of the Brazilian tax evasion problem, associating the case – although a case based on a tax debt of R$ 36,000.00 – to the negative consequences of the impunity of the white-collar criminals, a fact that could be associated with some kind of ideology of the Rapporteur,

39 BRAZIL, Supreme Federal Court. Extraordinary Appeal No. 550769, Rapporteur Justice Joaquim Barbosa, Plenary. Judged on 22/05/2013. Published on 03/04/2014.

insofar liberals use to be more rigorous with white-collar defendants.

The second model of judicial decision making is the strategic theory of judicial behavior, that states judges decide not entirely based on their own understanding of a particular case, but rather on possible reactions to their decisions by other judges, legislators, jurists and even the general public. It is possible, in addition, to assert that the consequence of a judicial decision on the public treasure could be assessed when a judge or a Justice takes a decision on a tax lawsuit that could benefit the taxpayer against the tax authorities.

This observation is illustrated by a case decided by the Superior Court of Justice. Following several previews judicial decision about the subject, Justice Mauro Campbell Marques[40] held "dialogue of the sources" interpretative technique and judged the conflict of laws over time giving priority to principles that were not embodied in the legislation, namely, the material effectiveness of the executive enforcement process, the primacy of public credit over the private and the specialty of tax enforcement process. The aim of the interpretative effort was to overcome the apparent antinomy between §1st of article 739, and item I of article 791 and article 16, § 1st, of the Tax Enforcement Procedure Law,[41] to maintain the need for prior guarantee in the tax executive in any circumstance, even if the taxpayer doesn't postulate a

40 BRAZIL. Superior Court of Justice. Special Appeal (REsp) No. 1.272.827/PE, Rapporteur Justice Mauro Campbell Marques. First Chamber. Judged on 22/05/2013. Published on 31/05/2013.

41 In Brazil, there is a Nacional Statutory Law – Lei de Execução Fiscal (LEF) No. 6.830/1980 – that provides procedure rules for the judicial seizure of the Public Debt, most part by tax debt. The enforcement takes place when the taxpayer does not comply with one´s debt without any excuses to not so. The action is filed by public attorneys and aims to locate and levy properties and reverse them into money to pay the debts due.

provisory relief. In other words, it was granted to the public treasury an enhanced guarantee in tax enforcement law by a combination of two different bodies of laws, and without a specific legal norm commanding that.

The inconsistency caused by these two provisions in the system should have been dealt with by the legislature, but it was not, leaving the Judiciary to resolve a debate at least curious: for lack of incoherence of the statutory law, the tax authority was in an apparently disadvantageous position in relation to the taxpayer, which was certainly not foreseen by the legislature and, if it were, would be avoided. On the other hand, the Source Dialogue technique is of German origin, conceived by Erik Jayme and internalized in Brazil by Claudia Lima Marques,[42] specifically in relation to the antinomies between the Civil Code and the Consumer Protection and Protection Code. It seems, however, that such a technique would not apply to tax law. First, because the foundation of consumer law is the protection of the vulnerable party in the consumer relationship; whereas the foundation of current tax law is the freedom of the taxpayer and the protection of his rights against the tax authorities. Secondly, it follows from the first reason that, as a matter of logic, the Dialogue of Sources should not be used to restrict taxpayer rights, but, if it were to extend them, an option that would better fit the incidence of human rights in positive law. Such decision created a breach of the very assumption of Tax Law, causing legal uncertainty, violation of due process of law, since it did not guarantee parity of arms between tax authorities and taxpayers and led to the abuse of a figure not foreseen in the law itself, but accepted by case law. Precisely because there is no need for warranty: the exception of pre-

42 MARQUES, 2017, p. 107, footnote "7".

execution.[43] This simple fact reveals that doctrine based on the dichotomy between judicial activism and self-restraint is not sufficient to explain the phenomenon of judicial decision let alone guide it.

Another example of a creative decision that innovated statutory law and, by consequence, favored tax authorities despite taxpayers can be seen on Special Appeal (*Recurso Especial*) No. 1.120.295.[44] In discussion, was the initial term for reckoning the statute of limitations for the tax public attorneys to file a tax enforcement action based on Nacional Statutory Law – *Lei de Execução Fiscal* (*LEF*) No. 6.830/1980. Article 174, single paragraph, I of the Brazilian Tax Law defines the day a tax enforcement action is actually served on the defendant as the final mark of reckoning the term of statute of limitations, which is 5 (five) years from the day the tax is definite. On the other hand, Article 219 of the former Brazilian Civil Procedure Law determines the day the judge issues a claim to be served on the defendant as the final mark of reckoning. In practice, for Civil Procedure Law, the tax public attorneys just have to file a tax enforcement action to automatically interrupt statute of limitations reckoning, as long as the tax public attorney manages to serve the claim form on the defendant within the arbitrary terms defined on Paragraphs 2, 3 and 4 of the same Article.

This discussion was brought to the Superior Court of Justice under Special Appeal (*Recurso Especial*) No. 1.120.295 and Justice Luiz Fux held the Article 219 should be applied to tax enforcement procedures, but even then, did not deter-

43 The exception of pre-execution is a kind of defense filed in the tax enforcement procedure intended to block the judicial process for lack of minimal requisites to issue the claim.

44 BRAZIL. Superior Court of Justice. Special Appeal No. 1.120.295/SP, Rapporteur Justice Luiz Fux. First Chamber. Judged on 12/05/2010. Published on 21/05/2010.

mined the application of the terms to serve the claim form on the defendant. Until today, the decision has binding effect to all Brazilian judiciary organs and, in practice, the tax public attorneys just have to file a tax enforcement action to automatically interrupt statute of limitations reckoning, no matter how long it gets to serve the form of the claim on the defendant, moreover, in Brazil, with the high caseload, it is usual to take a long time to actually serve the claim. By deciding on these grounds, Justice Fux created a whole different whole for the reckoning of statute of limitations on tax law, applied only half of Article 219 of Civil Procedure Law and, by consequence, favored the public authorities regardless of the authority of Brazilian Tax Code.

Continuing Posner's summary of the various theories that aim to explain the formation of the judicial decision, the author points out that the sociological theory of judicial behavior is a combination of the previous two theories applied to small group dynamics in the context of a panel of judges – as, in Brazil, a class of a Regional or Superior Court or a Chamber of the Court of Justice of the States. In this case, the subject's scholar aims to disclose other elements of the judicial decision such as "strategic calculation, emotion (intensity of preference for an outcome or another will often reflect or create an emotional commitment), and group polarization."[45] According to the theory, the majority of the collegiate body tends to be a strong influence for other judges who are not particularly part of that group, especially in cases that evoke that factor, which may be political, gender, social or economic.

In its turn, psychological decision-making theories focus on the unconscious decision-making process of the human mind. According to Posner:

45 POSNER, 2008, p. 34-35.

> Psychology embraces the study of cognition in the large, including the cognition of normal people, the cognitive shortcuts that substitute for formal reasoning, and the social influences at work in group polarization and dissent aversion. A promising psychological approach focuses on strategies for coping with uncertainty, a fundamental characteristic of the U.S. legal system. This approach highlights the importance and the sources of preconceptions in shaping responses to uncertainty, is supported by studies of judges, and plays a starring role in the theory of judicial behavior developed in this book. The radical uncertainty that besets judges in many of the most interesting and important cases makes conventional decision theory largely inapplicable to judicial decision making and necessitates eclectic theorizing.[46]

The economic theory of judicial behavior, according to Posner, "treats the judge as a rational, self-interested utility maximizer." According to the author, the judge would have a "utility function" and include consideration of elements such as "money income, leisure, power, prestige, reputation, self-respect, intrinsic pleasure (challenge, stimulation) of the work, and the other satisfactions that people seek in a job". In this sense, not only the economic factors taken into account in decision-making, but the judge's own thinking and ruling would have economic fundamentals and purposes, often balancing the costs and benefits of one decision over another. It is the economic analysis of law, which since the 1960s and 1970s has largely occupied the legal debate, although it finds criticism in the sense that an external element – in this case the economy - was being used as a 'correction factor' of law.[47] Without any pretension to enter into the merits of

46 Idem, p. 35.

47 RODRIGUES JÚNIOR, 2011, p. 44-45: "There are, however, other movements such as legal realism, Law and Economics and theories of argumentation. In Constitutional Law and Private Law, the last two movements are more strongly felt. We begin to use concepts and tools typical of the economic analysis of law and to talk about weighting or balancing principles and values, according to the taste, respectively, of writings of Richard Posner

the debate, it is considered that if the judge's activity is a decision-making, it can be concluded with Posner that the judge – like everyone else - makes decisions even when he is not acting, as a consumer in the marketplace, making their choices based on concepts of opportunity cost and maximizing results.

> It is plausible to suppose that people are rational only or maily when they are transacting in markets, and not when they are engaged in other activities of life, such as marriage and litigation and crime and discrimination and concealment of personal information? Or that only the inhabitants of modern Western (or Westernized) societies are rational? If rationality is not confined to explicit market transactions but is a general and dominant characteristic of social behavior, then conceptual apparatus constructed by generations of economics to explain market behavior can be used to explain nonmarket behavior as well.[48]

Inserted in the economic context are the statistics, or rather the use of statistical data in the formation of the court decision. In this scenario, until the beginning of the last decade, the Brazilian Judiciary lacked systematic empirical studies that demonstrated by means of numbers the reality of the jurisdictional organs and the way Brazilians litigated. Until that date, the judge model was still cloistered in eminently legal issues, to the detriment of the reality that surrounds them, so that it was impossible to clearly map the consequences of judicial decisions. Since 2004, the National Justice Council (CNJ) broke with the previous paradigm and began to promote statistical studies to describe the concrete reality of the Judiciary in the country. As a result of a meeting of the efforts of numerous professionals related to the social

and Robert Alexy. In this scenario, situations of unpleasant methodological syncretism, inappropriate importation and appropriation of concepts and categories, all in name of grandiloquent arguments, which often hide fallacies, play on words or voids grounds." (free translation)

48 POSNER, 1981, p. 1.

sciences, the *Justice in Numbers Report* has been published since that year. In this context, the judges have access to an apparatus that reveals some aspects that controls the number of ongoing proceedings in Brazil, the congestion charge, the main issues that are brought to the judiciary, which are the main litigants and what would be the impact, for example, of the State in social demands, among other aspects. The relevant question then arises as to whether the judge can use this data in decision making and, more importantly, what is the limit of the use of the data in interpreting the law. Could the judge restrict the semantic range of a rule based on this data? Or in other words, what are the limits to making the meaning - not the authority – of law based on statistical data more flexible? The answer to this question thus goes through an epistemological analysis of law, particularly in the area of legal argument theory, which should include openness to the inflows of other sciences in law and, especially, decision-making.

The *Justice in Numbers Report* was brought into judicial reasoning by Justice Mauro Campbell Marques of the Superior Court of Justice. Following several preview judicial decisions about the subject, Justice Mauro Campbell Marques on Special Appeal No. RESP 1.340.553.[49] in judgment, the interpretation of Article 40 of Brazilian Tax Enforcement Procedure Law.[50] The Justice used the expressive number

49 BRAZIL. Superior Court of Justice. Special Appeal No. 1.340.553, Rapporteur Justice Mauro Campbell Marques. First Session. Judged on 12/09/2018. Published on 16/10/2018.

50 Art. 40 - The judge will suspend the course of execution, while the debtor is not located or assets on which the attachment may fall, and, in such cases, the statute of limitations will not run.
§ 1 - If the course of execution is suspended, the judicial representative of the Public Treasury will be able to view the records.
§ 2 - Assets elapsed or with a maximum term of 1 (one) year, without the debtor being located or found to be seizable, the Judge will order or file the vehicles.

of tax enforcement judicial procedures that existed in Brazil. According to the National Justice Council report, this kind of judicial suits represented around more than 30% (thirty percent) of the whole caseload. This data was stressed by the Justice and it may be assessed that this huge amount could be the *ratio decidendi* of the holding insofar not only the Superior Court of Justice deviated from its own jurisprudence, but also innovated on how the tax enforcement judicial procedures worked, until that day, in Brazil. Previously, when the debtor or assets were not located, it was necessary an explicit decision of the judge in order to suspend the procedure, because that was the initial term to start the reckoning of statute of limitations term, which is five years. After the decision, it is not necessary the judicial suspension insofar the mere fact the debtor or assets were not found is sufficient to start that reckoning, since the tax public attorney is aware of that fact. Although an undeniable purely legal argument was used – the purpose of law – the number of lawsuits in Brazil weighed more on justice balance. The consequences of a decision like that is not entirely assessed, but it is valid to conclude that the porpoise of it was not exactly comply with law requirements, but rather to tackle the huge caseload that tax enforcement procedure represents in Brazil, what would be classified as an economic or consequentialist decision.

§ 3 - If they are, at any time, the debtor or the assets, the records will be unarchived for the continuation of the execution.

§ 4 If the statute of limitations has elapsed from the decision ordering the filing of the statute of limitations, the judge, after hearing the Public Treasury, may, ex officio, recognize an intercurrent determination and decree it immediately. (Included by Law No. 11,051 of 2004)

§ 5 The implementation of the Public Treasury provided for will not be provided for in article 5 of the Public Treasury provided for in the case of minimum collection, whose State value article will be provided for the act of the Minister of State. (Included by Law No. 11,960 of 2009)

In turn, theories of organizations that seek to explain the behavior of the judge pay attention to the relationship between the judge and the organization he represents, and particularly the way this "employer" controls his agent. It is undeniable that the functional independence of the judge is presupposed by the rule of law, however, it is undeniable that there is, to a greater or lesser extent, a political impact of the judicial decision that includes, even, the State, the organization that the judge represents. For Posner, the precedent system is a control model that reveals the organizational aspect of judicial behavior, stating:

> An example of how the judicial process is structured to motivate the judge agents is the doctrine of precedent. Although precedents can be distinguished and even overruled, they have some authority, which means that there is a cost to circumventing or eliminating a precedent. Since any published decision of an appellate court is a precedent, the doctrine raises the cost of judicial error and so can be expected to make judges more careful in deciding a case and explaining the decision in an opinion that will create an appropriate precedent. Consistent adherence to precedent by appellate judges also makes it more likely that lower courts will be the faithful agents of those judges, because they will be receiving clearer directives.[51]

Thus, the precedent acts, among other ways, as inducing the behavior of the judge, since the doctrine highlights the cost of judicial error, which makes the judge, in theory, be more careful in setting the precedent. On the other hand, the constancy and persistence in the application of the precedents themselves indicates and encourages lower court judges to apply the precedents of a certain court, as it is recognized that the precedents are not only properly set, but also respected by the court that produces them. It is thus clear that the precedent does not only produce legal certainty for

51 POSNER, 2008, p. 39-40.

the court, but to a large extent fosters behavior at the heart of the judge. The challenge for expert doctrine would be to conduct an empirical study of how judges produce and enforce precedents, analyzing why a decision is more likely to be lasting or, on the contrary, tends to be overcome quickly.

Pragmatic theories of study of the behavior of judges is a term that has no univocal meaning.[52] Posner himself approaches the subject at least twice. On one occasion, he emphasizes:

> (…) the word [pragmatism] refers to basing judgments (legal or otherwise) on consequences, rather than on deduction from premises in the manner of a syllogism. Pragmatism bears a family resemblance to utilitarianism and, in a commercial society like ours, to welfare economics, but without a commitment to the specific ways in which those philosophies evaluate consequences. In law, pragmatism refers to basing a judicial decision on the effects the decision is likely to have, rather than on the language of a statute or of a case, or more generally on a preexisting rule. So it is the opposite of legalism — or so it seems; the reality is somewhat different, as we shall see in subsequent chapters.[53]

On another occasion, in a work devoted to the subject, Posner[54] states that pragmatism, which is not confused with consequentialism, involves judicial reasoning techniques of empirical methodology, based on reasonableness, in the sense employed in Common Law countries, while still applying the Aristotelian rhetoric models of argumentation,

52 For logical-legal constructivism, for example, pragmatics address the study of the construction of the legal norm focusing on how the law (object) is used by the user, particularly the judge (subject): The 'Logic-semantic Constructivism', based on the studies by Vilanova and Barros Carvalho, applies Charles Sanders Peirce's cenopitagoric categories through Charles Morris, who, using Linguistics, coined the 'syntactic, semantic and pragmatic' triad. (TOMÉ and FAVACHO, 2017. p. 274).

53 POSNER, 2008, p. 40.

54 POSNER, 2003, p. 59-60.

which take into account the overall systemic results of the decision, looking at the effects of the decision on any future cases, not just the consequences for the concrete case.

However, the legalistic theory and the formalist approach of Law is not completely eliminated. The formalism– use of deductive logic and maximum interpretation – and deference - is admitted – and even recommended – when the Judiciary confines itself to the decision of the specialized and competent administrative body, restricting itself to the analysis of rules of procedure for the award of the particular case. In this sense, it is necessary, even with some urgency, that the doctrine addresses the theme of legal pragmatism in order to create some new foundations of legal reasoning to establish limits to interpretation in order to avoid undue balancing of the statutory law when facing any concrete case.

The phenomenological theory of judicial behavior would be, for Posner, located between psychological and pragmatic theories, it is the analysis of judicial reasoning based on the individual experience of each judge, taking into account all the elements by which the judge perceives the reality. The theory is interesting in that it could scrutinize how experience forms the judge's decision-making model, a far more prevalent factor in a decision than the mere formal interpretation of legal texts.

Finishing the analysis of the judge's behavioral theories, Posner deliberately brings up the legalist theory of judgment, pointing out that *battered though it has been by legal realists and pragmatists, critics, political scientists, economic analysts of law, and other skeptics, it remains the judiciary's 'official' theory of judicial behavior*.[55] In Posner's definition:

55 POSNER, 2008, p. 41.

> Legalism, considered as a positive theory of judicial behavior (it is more commonly a normative theory), hypothesizes that judicial decisions are determined by "the law," conceived of as a body of preexisting rules found stated in canonical legal materials, such as constitutional and statutory texts and previous decisions of the same or a higher court, or derivable from those materials by logical operations.
> (…)
> The ideal legalist decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion. The rule might have to be extracted from a statute or a constitutional provision, but the legalist model comes complete with a set of rules of interpretation (the "canons of construction"), so that interpretation too becomes a rule bound activity, purging judicial discretion.[56]

In these terms, the formalist judge would be the ideal model of legalism, frankly debated in the information age, new constitutionalism, and the communicational theories of law. Through the legalistic attitude, the text of the legal norm is already pre-established, it is a given fact, it is up to the judge, simply, through a logical process, to adjust the fact to the norm, usually in the purely semantic plane and using of the methods of interpretation systematized by Savigny. However, in spite of the severe criticism regarding legalism, the fact is that it is a theory that, as a result, or as a consequence, fulfills the aim of restricting judicial activity, with the exception of its anchoring before the legislator and in compliance with the principle of separation of powers. On the other hand, the present work evidenced, based on the doctrine, that, on a pragmatic level, the legalist theory proves to be insufficient to frame, systematize and encompass the judicial activity, which concludes that, although the theory is far from being surpassed, the legal doctrine should insert other elements that participate in the judicial decision

56 Idem, idem.

in order to ensure that the Academy and the judiciary can walk more compassionately. The way to achieve this end is precisely to bring to the legal debate the complexity that emerges from the social fact, always with biases and political, social, economic, psychological, among others.

A clear example of this in tax law is the treatment given to the tax liability of the so called *economic groups* by Brazilian courts. There are two kinds of economic groups. One, the formal kind, addresses all the cases companies relate with each other in order to legally achieve their specific goals. On the other hand, there are situations in which legal entities are used to evade legal obligations, including paying taxes. Just like the stubborn debtor, this specific kind of economic group does not have a legal treatment in Brazil. However, this scenario did not hinder Brazil from ascribing tax liability to the natural persons or legal entities that make up the economic group.

Indeed, over the years, the Superior Court of Justice went on to admit charging natural persons or legal entities that make up the economic group either when there is a common interest on the situation described as a taxable event[57] or *confusion of assets, fraud, abuse of rights and bad faith to the detriment of creditors*.[58] It is not the intent of this work to delve into the details of the construction of these decisions, but it is important to stress that economic groups for tax law purposes ought to be described by a complementary law in Brazil. In addition, if one could take a brief look at the Brazilian National Tax Code, it could be seen the legislator

57 BRAZIL. Superior Court of Justice. Special Appeal No. 859.616/RS, Rapporteur Justice Luiz Fux. First Panel. Judged on 18/09/2007. Published on 15/10/2007.

58 BRAZIL. Superior Court of Justice. Special Appeal No. 767.021/RJ, Rapporteur Justice José Delgado, First Panel. Judged on 16/08/2005. Published on 12/09/2005.

was very precise on a whole bunch of situations that could arouse tax liability, but in no case is it described the liability of economic groups. Again, in this case, considering these facts, it could be concluded that Judiciary created a treatment for that matter using factors other than pure legal reasoning and moreover deviating from the classic dogmatic basis of tax law.

4 Conclusion

Law is made part of legal science, part of legal reasoning. That means Law demands on one hand some kind of a theoretic system and an argumentative praxis. Moreover, Law presupposes limits imposed by the rule of law, especially legal certainty and coherence.

It is possible to conceive legal dogmatics, because dogmatics does not presuppose a closed system, but rather a system to solve problems with some elements constructed by deduction and by experience, which means the norm to be applied to a present case may be constructed taking into account the complexities that dwell within.

To promote a complete opening of the system to other elements – other than legal elements – these elements must be disclosed as long as the judge intends to be understood. The difficulties and perplexities in the phenomenon of judicial activism lie precisely in the disregard of the non-juridical elements that influence the judicial decision. If such elements are unknown – or even avoided by much of the doctrine – there is obviously no field in legal science that can build dogmatic foundations to the point of establishing the limits of influence of political, social, economic, and psychological factors in constructing the legal norm.

Based on the premise that Brazil complies to the rule of law, the judge's role is to ensure, through the process, the observance of fundamental rights, always to observe the legal order and complexity that emanates from the specific case and to properly construct the precedents and, if they become binding, follow them, except in the case of justified distinction or overcoming, on the basis of the complexity of the social fact.

In this work, it was demonstrated by some important judicial decisions that the judge builds the legal rule that will be applied to regulate the concrete case, and the judicial decision is not merely syllogistic reasoning before a general rule already given by the legislator. Moreover, it is also the premise of this study that any and all legal support or legal text in a broad sense is surrounded by a given legal culture and it will be up to the law enforcer – particularly the competent authority – to construct the meaning and scope of the legal norm taking into account the legal system.

Indeed, the great difficulty of decision-making is choosing which values should be met in the specific case. In fact, these values, although chosen by the legislature and introduced into the legal system through prescriptive language, have no meaning in themselves, but are transplanted from the systems of the social sciences.

This is the case, for example, with legal certainty. Legal certainty arises from social, particularly economic, fact, and is directly related to the intended purposes and obviously has an underlying interest that is generally linked to the reduction of transaction costs in a microeconomic and national development sense, in a macroeconomic sense. In this sense, legal certainty can be a value that increases investment and produces wealth. Such value is embodied in the constitutional text, since one of the objectives of the

Federative Republic of Brazil is the eradication of poverty. Rich countries have lower transaction costs and have legal certainty as a foundation of law and the economy. It can be concluded, therefore, that legal certainty must be observed in the construction of the rule by the judge.

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