Tax Norm and Irrationality in the Decisions Federal Supreme Court (STF): Judges-Robots Solve?

Nelmo de Souza Costa
Universidade Regional Integrada do Alto Uruguai e das Missões - URI

Recently, decisions of the Federal Supreme Court (STF) in tax matters has been causing concerns in the legal community. Not infrequently, they reflect systemic irrationality and little case with the fundamental rights and guarantees of the taxpayer. In this context, this scientific article investigates whether the use of judges-robots in the Supreme Court can solve this problem or qualify the tax decisions made in it, or not. The approach is by phenomenological-hermeneutic method and the procedure adopted is the bibliographic and jurisprudential review restricted to the object of the proposed analysis. As conclusions surprise a non-negligible numerical progress of inconsistencies in the decisions of tax disputes examined by the Supreme Court, without indications or possibilities of reversal in the panacea of judges-robots, predictive models or algorithms programmed by the human mind.

Keywords: tax norm, irrationality, STF, judges-robots, legality

INTRODUCTION

In his classic *A Farewell to Truth*, Gianni Vattimo (2016) rejects the idea of truth as an objectively given order once and for all. This philosophical issue is adequately addressed in *Being and Truth* (Heidegger, 2007), but, since Plato, it has never ceased to question the metaphysical legal experience. The serious crisis of paradigms in which the Law finds itself in contemporary times is well evidence of its origins, and so many unsolved disagreements in theory and in the practical issues that involve the adequate and timely realization of the law that is or is not established.

The correct application of the law does not symbolize an unattainable ideal as advocated by epistemic positions based on the philosophy of conscience, of which Kelsenian positivism is an expression in the theoretical common sense of jurists (Warat) and in forensic practices. It is not a myth, as the most skeptical preach. On the other hand, in Brazil, at the normative level, *with the status* of fundamental right positively affirmed in the magnitude of the current legal-constitutional order, it has the effectiveness of such dignity; at the theoretical level, it is placed in a prominent position in the Critical Hermeneutics of Law - CHD (Streck), with promising elements in the search for the correct answer(s) far from the labyrinths attributed to the indeterminability of the Law, in particular.

In spite of the fact that post-positivism has given rise to new theoretical conceptions compatible with the Democratic Rule of Law, which was established in the Constitution of the Federative Republic of Brazil in 1988, the *Brazilian territorial* jurisdiction is reluctant to adjust to this new juridical-institutional reality.

This is the scenario in which the problem presented here arises.

As recently decisions of the Federal Supreme Court (STF) in tax matters has been causing concerns in the legal community. In addition to being notorious for their delay, they often go from paradoxical divergences in the grounds for decision to a lack of analysis of the cases in the light of constitutional legality and prior and effective adversary proceedings.

This systemic irrationality has a negative impact on the specific tax regulation and on the fundamental rights and guarantees of taxpayers, without the panacea of robot judges[1], predictive models or algorithms programmed by the human mind indicating its reversal. It deserves attention and consideration in the academic field in view of the possible answer-solution suggested at a theoretical and pragmatic level.

In this universe, to a certain extent, the *Law applied* eventually defines what is, or is not, *the Law itself*. Perplexity here has an intersection with the crisis of contemporary law: what the courts *say the law is* or was does not always reflect, correspond *or conform to what it really is.* This is the case when these judicial pronouncements do not also confront the concepts of democracy and the Democratic Rule of Law, founding elements of a rational, valid and *rationalized conception* of Law in the Federative Republic of Brazil and with which it should and must keep identity in what originates from them, derives from them and presupposes their expression.

Nowadays, the introduction and use of judge-robots (according to the concept used here) in the final product of the jurisdictional service (the concrete norm through which judges and courts pronounce the Law) is advancing without objective control, legal certainty and clear thinking, putting at risk the integrity of the Law itself. Old and new problems lack clear guidelines, regulatory discipline and reliable forensic practices. Assertive solutions are also not foreseen in the innovations of artificial intelligence (AI) in terms of the *correct application of the Law*. In Tax Law, the requirement of a *correct answer* (Dworkin) for the solution of conflicts of this nature finds binding and sufficient legal-constitutional rules, free of any judicial prevarication, solipsism or margen of discretion. This normative structure, incompatible with any regressive approach infiltrated by disruptive technologies alien to the constitutional frameworks in which the taxpayer and his/her fundamental rights are protected, is not within the reach of those who apply the Law. Much less from robot judges preset to say what is not law or "anything about anything" (Streck).

The problem to be faced is: does the use of robot judges in the STF solve or further aggravate the outcome of tax decisions made there in challenge to *rationality*, an old civilizing conquest that binds the State and its public agents in all constituted powers, especially the Judiciary?

The motivation for this scientific research arises from the existing gap in this innovative area of knowledge in view of the opportunity to evaluate the impacts of the use of robot-judges by the STF in the resolution of tax disputes.

The general objective is to analyze some of the STF's pronouncements on tax matters, in the aforementioned context.

The specific objectives are: a) to verify whether the STF decisions selected for analysis comply with the rationality required by the law when using robot judges; b) and whether this (ir)rationality is supported by tradition, by the positive legal system and by the intersubjective public language under which administrative and judicial decisions on tax matters are regulated and binding.

The approach is by the phenomenological-hermeneutic "method" and the procedure adopted is the bibliographical and jurisprudential review restricted to the object of the proposed analysis.

FUNDAMENTAL TAXPAYER RIGHTS AND TAX REGULATIONS: BRIEF NOTES

In tax matters, *fundamental rights* and other constitutional protections of great theoretical and pragmatic importance are important. They are of great interest, especially in judicial decisions.

And this imposes - at the very least - *taking rights seriously*, in Dworkin's (2007) successful expression. It is not about a *slogan* or an unappealable summons, but about not violating the democratic rule of law in its most precious expressions. To comply with this elementary premise (limit of limits) implies not undermining the normativity, content and effectiveness of the *fundamental rights and freedoms of the taxpayer* by the one who has the institutional duty to keep them undamaged, protected and with an effective, full, adequate and timely realization: the Judiciary.

At this time in history and in such a singular space of human life, judicial decisions of a tax nature conspire against the so-called Taxpayer's Statute as questionable or of changing effects in the criteria of the moment as those added in the obscure management of algorithms. The review of what has been happening is currently on the agenda, now even more urgent in view of the technological transformations adopted in the courts, now seen in this context.

Taking the fundamental rights of the taxpayer seriously is part of civilized societies. In Brazil, not so much. There is a gap between the concrete normative reality and that which is guaranteed in the terms of the legal-constitutional order. If this were not enough, the *legal uncertainty* and the *problems of "balancing"* infiltrated in the *application* transgress the fundamental *rights and freedom of the taxpayer* and increase the instability in contemporary legal-fiscal relations. It is the subversion of expected rationality.

In its maximum identity expression, law has always been an instrument for the control of power. In this regard, the fundamental rights of the taxpayer have a prominent theoretical and practical position and function. They must always be taken seriously. The science of tax law cannot be indifferent as to when and where this does not happen, nor can the integrity of positive law. The former is responsible for producing knowledge capable of restoring, sustaining and maintaining the latter. In other words: to be provocative, reactive and, when relevant, prescriptive source of the conditions of possibility of the second, without which it is difficult to have a legitimate and effective right.

When *freedom* and the *right to property* are subject to restrictions on *taxation*, but condition and limit it in a relationship of interdependence in which the inflexible protection of all the fundamental rights of the taxpayer stands out as an imperative, no tax levy subsists if it is at variance with its constitutional discipline.

Not merely as a warning, taking the fundamental rights of the taxpayer seriously presupposes the *rationality* of the tax legislation and -always- *in the judicial decisions that apply it*. All this in accordance with prior, adequate, objective, determined and determinable, exhaustive and identifiable legal provisions, both in the abstract *legal-tax regulation* and in the concrete one required in (and for) the satisfaction of the tax demand. The former is instituted by law within the limits, discipline and delimitations of the constitutional text; the latter, reflecting the former, to reveal the established legal-tax relationship. In fiscal matters, without this, the universal legitimizing binary code of law (licit-illicit) disappears, with corrupting consequences for the legal system and for life in society.

The non-realization of existing subjective rights (recognized in the legal system) acts against the very concept of law. In peripheral societies (in the Americas and the Caribbean, for example, and also in Brazil), it weakens the legal system, eliminates the minimum effectiveness required of it and shakes people's confidence in institutions. By direct and immediate derivation, it also relegates to neglect the citizenry and vast legions of social and economic indigents.

Precisely in order to finance these purposes and effects structured in the constitutional text, society contributes a substantial part of the financial and civilizing expressions of its fundamental rights of *property* and of a *freedom* so precious in the historical process, in the exigency of life and in modernity. It is worth highlighting: two of the fundamental rights raised to the highest relevance (particularly the second one) by the Federal Constitution by being positioned and densified in the *supreme values* (the case of freedom) and in the topography of art. 5, *chapter* of the FC (both). In their specific manifestations, they are projected in several other constitutional norms, such as, for example, those dealing with free enterprise, economic order and the exercise of lawful professional and economic activities.

As a logical consequence of this context and of the *tax obligation* and its high cost implications (social, economic, existential, legal) for those who are under the power of the State in this area, the protection of fundamental rights (and those of the taxpayer in particular) has also become essential constitutional. In this context, as opposed to the taxing power of the State, and as a way of containing it within the limits established in the constitutional text, the *fundamental rights of the taxpayer stand out.* In Brazil, spread over several articles of the Federal Constitution, they range from the general ones provided for in its article 5 to those classified as *constitutional limitations to the taxing power* (articles 150 and following of the FC), for example. Others are contained in several provisions of the FC, and even - although without the note of fundamentality - in several provisions of the law.

However, the greed for tax collection and the excesses of tax entities fulfills a secular destiny of transgressing the taxpayer's safety net.

The lack of correct, timely, adequate and effective application (with emphasis on compliance with the rule-decision under equal and unavoidable predicatives) of the Tax Law (and of any other law, since the Law is one and its divisions into disciplines are only a didactic resource for its study and understanding) frustrates the concrete compliance with the fundamental protections, rights and guarantees of the taxpayer. It simply shakes up the entire legal system.

An immediate paradox of such a contemplation under justified skepticism leads, in the limit, to the very uselessness of fundamental rights.

The law is not contained in the law, everyone knows that. But neither does it dispense with it, and often it does not even exist without it, except in the exceptional case of customs. Respect for the law and compliance with *legality* -and in tax matters legality is qualified as constitutional- are the genesis and the principal foundation of any democratic rule of law that is taken seriously; of any freedom and fundamental right of the taxpayer that is taken seriously. Otherwise, not even the minimum of law (in the licit-illicit code) would survive.

It is important to remember: in Brazil, everyone is subject to the Federal Constitution. A government of laws, not of men.

As a consequence of the hermeneutic critique of law emphasized in the research, and therefore of the theoretical contributions of Lenio Streck in Brazil and of the interpretative theory of law with North American roots, it is necessary to verify what treatment the mandatory compliance of the law receives in the latter, by its author, Ronald Dworkin (2007, p. VIII-IX):

> A general theory of law must be both normative and conceptual.
> [...]
> Law compliance theory must discuss and distinguish two functions. It should contain a theory of respect for the law, which discusses the nature and limits of the citizen's duty to obey the law as it appears in the different forms of the state and in its different circumstances, as well as a theory of law enforcement that identifies the objectives of enforcement and punishment and describes how public representatives should respond to different categories of crimes and offenses.

If the threefold imposition of legality and the links that arise from it (arts. 5, section II, 37, *chapter*, and specifically in tax matters, art. 150, section I, all of the FC) in Brazil were not enough, Ronald Dworkin's theory goes beyond this constitutional order and unconditional effectiveness to converge with it in the Theory of Law, *in conceptual formulations* appropriate to the examination of this issue and that point to the protagonism of the law.

The effective protection - taken seriously - of the taxpayer, of his/her freedom and of the other fundamental rights protected by this plexus and *constitutional legality* depends on the *correct* interpretation/application of the tax legislation, which has already been safeguarded.

In particular, it emphasizes the *fiscal standard* and its sanitary nature. Nowadays, there is no controversy in this regard. At least not after the *tax incidence matrix rule* as a theoretical paradigm established in the science of tax law. This theoretical norm of acknowledged practical applicability is defined by A. Carvalho (2013, p. 376) as: "[...] a logical-semantic scheme, revealing the normative content, which can be used in the construction of any legal norm (in the strict sense)".

As a methodical and methodological instrument, it was improved and has its current version in the theoretical constructions of P. Carvalho (2010, p. 413):

> The formal classification of the tax base rule has proven to be a very useful scientific instrument of extraordinary richness and fertility for the identification and in-depth knowledge of the irreducible unity that defines the basic phenomenology of the tax levy.

In other words: for years it has served in a coherent, effective and didactic way to define and reveal the legal-tax rule (in its structure and content) and in the constitutionality control of the requirements of the Internal Revenue Service, since if one or another of the *criteria of the tax base rule* is not met, the inapplicability of the tax will be the consequent result, in whole or in part, depending on the content, (in)validity and (in)effectiveness of the legal provisions that established it (art. 150, section I, of the FC).

The legal-tax norm (from the abstract level for those who admit it in this scope, or of the normative provisions that establish it for those who think differently, to the level of concreteness - individual and concrete norm) and the decisions by which it is made concrete and materialized in tax matters (in contentious-administrative and judicial matters) are governed, limited and conditioned by (and in) the paradigm of the Democratic Rule of Law, authentic autonomous protective guarantee of taxpayers and *locus* of many others. Enforcing it is a primary and constitutional requirement. It means taking the fundamental rights of the taxpayer seriously. An important part of the requirements that judicial resolutions (and also administrative ones, although these are under a partially different legal-procedural discipline) must meet in the aforementioned paradigm in which they operate and must transit is pointed out by Trindade (2017, p. 90):

> [...] would be the requirements that condition the judicial decision in the paradigm of the constitutional rule of law.
> These are, in short, four internal *requirements*, and not external ones, such as morality, economics, politics, etc. - and which are exclusively intended to guarantee the citizen against judicial arbitrariness: (1) requirement of reconstruction of the discursive chain; (2) requirement of consistency; (3) requirement of coherence; (4) requirement of integrity.

The administrative and judicial tax experience contrasts with these theoretical, democratic and institutional requirements imposed in the regulations of the fundamental rights of the taxpayer and which result from the protection ensured therein. Hence, the importance of the STF in terms of its decisions on tax matters, even before examining the influences of technology at this level.

An introductory remark is recommended: before thinking about the instrumental means of artificial intelligence and how they can or should be applied for a greater efficiency -qualitative in the first place, and quantitative afterwards- of the jurisdictional service, it is advisable not to neglect the obviousness required by the Law itself, whose effective, correct and qualified realization precedes and has ascendancy over cybernetic innovations. And that is why it must be prioritized and made a reality, regardless of the latter.

This is a possibility condition for the law to be taken seriously.

STF: TAX RESOLUTIONS AND (IR)RATIONALITY.

Artificial intelligence is preceded by human beings. And ethics, respect for the legal-constitutional order in force and its assertive acts determine the effectiveness or not of the former in the scope of judicial decisions.

Legal certainty (Taveira Torres, 2019; Ávila, 2012), the integrity of the law and the effects of tax deliberations demand *rationality* and the preservation of the rule of law[2]. However, many of the STF's decisions in this area go against this legitimate expectation of taxpayers. Three different events illustrate this scenario very well:

a) the STF decision of 03/15/2017, taken in the Extraordinary Appeal (EA) 574.706/PR, by which the ICMS was excluded from the tax bases of the PIS and Cofins, deals with a controversy still without definitive solution (although closed in the STF, multiple divergences remain in the Brazilian Federal Revenue Secretariat) more than 20 (twenty) years after its arrival at the Supreme Court (via EA 240.785/MG - still in 1998);
b) In 2020 (until September), far from its face-to-face plenary session deactivated at the beginning of the Covid-19 pandemic, the STF, through plenary or virtual sessions in which the

contentious process borders on fiction or simply does not exist, brought to trial and decided the record sum of 37 (thirty-seven) tax questions/issues. In detail: 31 (thirty-one) of them in favor of the Internal Revenue Service, 6 (six) in favor of the taxpayer.

Meanwhile, the STF (through the general secretary of the presidency) disclosed its autonomy until 4/13/2020. One fact stood out: 99.4% of the appeals in the EA (of various appeal matters) were not heard by the Court. In other words, without overcoming the admissibility of the appeal, they were denied merit review;

c) In addition to these more illustrative events in terms of the academic research in progress, another more recent one responds to this purpose: the decision issued in EA 714.139/SC, which recognized the unconstitutionality of the increased rate of ICMS in electricity and telecommunications services.

We shall look at each of these legal-procedural situations, in order, with a slight critical review, without representing a case analysis (which, in scientific terms, would be more extensive), properly speaking.

The first of these occurrences (EA 574.706/PR) dealt with the *exclusion of ICMS from the PIS and Cofins tax bases.*

The Plenary of the STF decided, on 05/13/2021, when examining and partially accepting the request for modulation of effects made by the Federal Government - National Treasury in an Appeal for Clarification filed by the latter to the decision on the merits issued on 03/15/2017, that the exclusion of the Tax on Circulation of Goods and Services (ICMS) from the PIS/Cofins calculation basis is valid (producing effects in time) as of 03/15/2017, the date on which the general repercussion argument (Item 69) was established in the ruling of EA 574. 706/PR. On this occasion (May 12 and 13/2021) it also clarifies that the ICMS highlighted on the tax receipt is the one that is not included in the PIS/Cofins calculation basis, and not the one paid/collected as defended by the Internal Revenue Service based on the principle of non-accumulation.

The decision on the merits, which recognized the non-inclusion of the ICMS in the basis for calculating the PIS and Cofins, although correct from a technical and legal point of view in this key aspect, has received justified criticism - particularly after the modulation of effects adopted therein - in aspects in which it departs from what was expected to be the effective and definitive solution to a litigation that has lasted more than 20 (twenty) years.

In this sense, it is important to highlight some of these criticisms and their practical projections in the specific case because the fundamental rights of taxpayers continue to be violated to a large extent:

- In addition to the fact that the reasonable duration of the process (art. 5, section LXXVIII, of the FC) is non-existent in Brazil, this fundamental guarantee being ignored and violated by the State itself and the latter being unlawfully enriched in its conduct with the proportional losses and exponential damages caused to taxpayers by such situations, their consequences are not limited to this. The controversy under review (since its first presentation to the STF in another appeal - EA 240.785/MG) took more than 20 (twenty) years to be decided by the Supreme Court. Even worse: in the Judiciary and in the tax authorities, the result is still far -very far-from materializing (today, in the Brazilian Federal Revenue Service and in some situations in the Judiciary itself, taxpayers face several obstacles to enforce their rights to the collection of such undue tax payment, such as, for example, inaccurate criteria and methodology of calculation, doubtful or controversial elements of the amounts to be recovered, lack of official approval of the requests for offsetting and of the tax returns filed, vagueness in the tax incidences on the amounts to be recovered, uncertainties as to the moment of recognition and accounting of the amounts to be recovered or of those already offset...).
- In these cases (the incidence of which has increased in recent years), the actions of the Internal Revenue Service outside the law make the Federal Constitution symbolic as well as emblematic, taking into consideration the endorsement it receives from the Judiciary in this state of affairs: (i) by not excluding the unconstitutional tax rule from the legal system in a prompt, full and effective manner, allowing, by omission, the Internal Revenue Service to injure and continue to injure taxpayers for decades (the fundamental guarantees of Art. 5,

sections II, XXXV, LIV and LXXVIII of the Federal Constitution cease to exist due to the suppression of their normativity and effectiveness); (ii) for manipulating the taxpayer in a harmful, detrimental and illegal manner the effects of the decision under analysis (and many others in tax matters, mainly in the last two years) through the use of the modulation of effects in favor of the Internal Revenue Service without legitimate and constitutional criteria, both in the selective agenda and in the decisions taken and their effects.

- Given the relevance of the judgment of EA 574.706/PR (the case is known as the "thesis of the century") its analysis is not within the scope of this article and is not even its main objective. But a curiosity should be mentioned here when the topic is *rationality*, or what to do and what not to do with the Law, so badly treated in Brazil. In the absence of the real uprising of society to reverse what was happening in the STF on the eve of the trial that led to the modulation of the effects that occurred (only in small part in tune with the best Law in force), it would have been a much worse situation for taxpayers and the credibility (lack of) of the STF. The tension between the legal system and what the STF sometimes says it is - and is not - has reached the extreme of requiring an unprecedented initiative in defense of the Democratic Rule of Law: in the second week of April 2021, the Association of Presidents of the Tax Law Commissions of the Bar Association of Brazil wrote to the President of the Federal Supreme Court (STF), Minister Luiz Fux, with a public note reiterating its justified concern about what has been happening in the case of EA 574.706/PR. This institutional stance deserves careful consideration, as it warns the Judiciary about the concern of the class entity and lawyers with the legal certainty of taxpayers that must be observed (and not trivialized), the integrity of the subjective rights already recognized (with the effective implementation of the same), and the reputation of the institutions that must be safeguarded through the correct application of the Law in the specific case (maintaining the practical effects of the decision taken by the STF itself on 03/15/2017), so as not to violate the legitimate trust of all those deposited in the decisions of the Judiciary in this matter (including many with the character of firm and unappealable judgment in several courts) and that this does not demoralize, even blurring the Democratic Rule of Law.
- The modulation of effects adopted in the specific case is also objectionable and detrimental to taxpayers because: (i) except for the plaintiffs of lawsuits filed before 03/15/2017, it excludes from collection the amounts collected prior to said time threshold, restricting the repetition of the undue debt only to later ones; (ii) with this, almost all of the amounts unduly collected by taxpayers for almost three decades -since 1988- remained in the vaults of the Treasury, whose multi-million figure of this illicit enrichment of the Internal Revenue Service ends up having unconstitutional taxation as its cause and basis. Paradox to which serious answers are lacking.
- The most worrying thing in this case is the disregard for the Law applicable in the specific case when the custodian of the Federal Constitution (STF) allows and sanctions the state of affairs denounced above and adopts budgetary reasons and in the interest of the Treasury regarding the appropriation of amounts belonging to taxpayers and with prejudice to the same as grounds for applying the modulation of effects in the manner and (dis)criteria demonstrated above. The "impact on public accounts" argument has simply become a deck for the STF to violate constitutional limits in tax disputes between taxpayers and the Internal Revenue Service[3].
- A direct consequence of this new position of the STF, which is more inclined to deny or reduce tax debts through the modulation of the effects in detriment of taxpayers, is the increase in litigiousness, since it will force them to file lawsuits when doubts or possible unconstitutionalities are identified in the tax assessments to which they are entitled. Failing to do so will compromise best business management practices, jeopardize the results of business or corporate operations and, even worse, pay unconstitutional taxes without the ability to recover their amounts when and if they are recognized in court.

In short: if this situation continues, judicial protection against the infringement or threat to the right enshrined in the fundamental guarantee of Article 5, section XXXV, of the FC becomes illegitimate, since it does not protect anything. The *constitutional limitations to the taxing power* are without normative and temporal effectiveness.

The *second of these events* (which occurred with greater intensity during the period of the Covid-19 pandemic in the virtual trials of the STF) consists of the trial of tax matters and the inadmissibility of appeals in the STF (of various topics) in a situation, time and circumstances that are questionable in the light of due process of law and the democratic rule of law. The ignored collegiate membership, the non-existence of oral arguments and the lack of access to important information and transparency during trials are just some of the confirmations of this anomaly.

A quick glance at the empirical level is enough to clarify situations that deserve further attention by legal theorists and other legal practitioners. Here are two examples:

- From the beginning of the Covid-19 pandemic in Brazil (02/2020) until September 2020, far from its face-to-face plenary session deactivated from that threshold, the STF, by means of plenary and/or virtual sessions in which the adversarial procedure certainly borders on fiction or simply does not exist[4], brought to trial and decided the record sum of 37 (thirty-seven) tax questions/issues. In detail: 31 (thirty-one) of them in favor of the Internal Revenue Service, 6 (six) in favor of the taxpayer[5]. This favorable score for Internal Revenue Service has remained unchanged since then. In this regard, it is important to highlight the sudden and significant increase in the number of rulings favorable to the Internal Revenue Service (including unprecedented reversals of jurisprudence), the inclusion in the agenda of a huge volume of tax appeals and, in the few rulings favorable to taxpayers, the cancellation or reduction of the practical effects of such rulings by totally or partially denying the refund of the amounts unduly paid.
- Not only this, meanwhile, the STF (through the general secretary of the presidency) disclosed its autonomy until 04/13/2020. One fact has caught the attention: 99.4% of the appeals in EA (of various appeal matters) were not heard (almost the entire percentage) or were dismissed (few of the percentage) by the Court. In other words, practically 100% of these appeals did not have a favorable appeal. These percentages border on incredulity even for the most hardened skeptics; much more so for those who believe that there is (was) a legal system and procedural law in force in Brazil. It is *Victor* (the STF's most prominent robot judge) exterminating cases and appeals to the best of his ability. Artificial intelligence in the service of... the solution of the law. Or more precisely: of the assets, guarantees and fundamental rights of the taxpayer. They were made artificial.

Meanwhile, the newspapers were reporting:

> **STF changes jurisprudence, strengthens the Union's treasury and raises tax burden in pandemic**
> Judicial rulings increased government revenue by R$563 billion
> [...]
> BRASÍLIA. Changes in previously consolidated understandings in the Federal Supreme Court in tax cases have bolstered the Union's treasury during the pandemic period by at least R$225 billion, according to estimates by tax experts.
> The amount is equivalent to a 15% increase in tax payments, an increase that occurred from nine decisions of general repercussion in which the Supreme Court changed the jurisprudence or the grounds on which similar discussions were based in the past.
> [...]
> These cases were judged between mid-March 2020, when the effects of the coronavirus pandemic [...]proved most damaging to the economy due to social isolation, and early March of this year.

During this period, the STF gave priority to cases concerning the pandemic and began to make more consistent use of the virtual plenary, a digital platform where the justices can deposit their votes. (WIZIAC, 2021, author's italics).

What Can I Say?

If the above news is true - and there is no reason not to believe it is - something seems to be wrong. Or quite wrongly.

For these reasons and others, confidence in institutions is definitely gone. And in law as well.

The *third of these occurrences* (EA 714.139/SC) lies in the STF's decision by which it recognized the unconstitutionality of the increased ICMS rate on electricity and telecommunications services. Here is a brief overview of the concrete case: in the judgment of the aforementioned EA (Theme 745) completed on 11/22/2021 (the appeal was submitted to the Court on 10/3/2012) the STF members, by 8 votes to 3, recognized the unconstitutionality of a higher ICMS tax rate for telecommunication services and electricity in comparison to the general (ordinary) rate practiced for other goods and services by the State of Santa Catarina. The federated entity applies an ICMS rate of 25% for these segments/services, compared to a general rate of 17%. A similar situation occurs in the other states and in the Federal District (in some of them ranging from 25% to 35%) since the promulgation of the Federal Constitution in the distant year of 1988.

What Is the Problem?

- The recognition of the undue collection of ICMS in the excess of the ordinary rate for the ICMS hypotheses addressed is surprising. Not because of the obviousness of the evident, but because of the delay of the Judiciary in pronouncing itself in this sense. As a consequence of the unconstitutionality of the legal rules that established it or raised it to this increased standard in confrontation with the constitutional principle of selectivity (art. 155, § 2, section III, of the Federal Constitution), according to which essential services and goods must observe differentiated (lower) rates, favorable to taxpayers and consumers, the prohibition of the rapture of revenue finally censured has always had an express constitutional provision. In other words: these services and goods have always been subject to taxation at mitigated rates equal to or lower than the ordinary 17% for internal operations, which, however, have never been respected by the taxing entities over these more than 30 (thirty) years. Thirty years of unconstitutionality and the Judiciary has not seen anything wrong...
- The unconstitutionality maintained undisturbed for so many years stems from fiscal voracity with disregard for the constitutional-tributary discipline of the ICMS, through the institution, increase, and collection of the tax beyond the amounts owed by taxpayers and consumers, as well as from judicial error in the examination of this matter for decades, when it refused to observe and apply the principle of selectivity under the *unfounded* argument that it would be optional, and not a cogent and binding rule for the federated entity. A poor interpretation, far from the normativity and effectiveness contained, clearly and sufficiently, in the aforementioned magna precept.
- Worse than the undue collection for more than three decades is the unusual modulation of effects imposed in this late decision by the STF. When all the ethical, moral, financial and legal imperatives determined and ensured the restitution of the unduly paid tax - which should be done ex officio - to the injured taxpayers and consumers, creditors of the amounts not yet reached by the statute of limitations (less than 1/5 of what they unduly paid, considering that the restitution is restricted to the last five years), what the STF has done is impressive. In addition to not safeguarding the refund of undue tax payments except for those who filed a lawsuit with this purpose before the judgment's starting date (February 5, 2021), four facts surprised even more in its final result, all related to the modulation of effects applied in the case: a) the first: data from the STF's information systems and statements from jurists that have not been denied at any time point to the manipulation of the trial and judgment outside the due process of law when, after the trial was concluded on February 12,

2021 (Plenary, Virtual Session from February 5, 2021 to February 12, 2021) without examining or applying modulation of effects, since this was not even requested by the interested party (State of Santa Catarina), "two days later, however, they updated the status of the trial from 'concluded' to 'suspended'"; [7]b) the second: in addition to being surreal and an atypical situation, the ex officio initiative to analyze a non-existent request for modulation of effects, with the case records being put back on the agenda in record time and examined in the virtual plenary session from December 10 to December 17, 2021, accepting it in order to establish the year 2024 as the initial term of effects of the unconstitutionality decision rendered, stunned us all; c) the third: the sudden change in the vote of Justice Dias Toffoli, who on 12/10/2021 was for the effectiveness of the decision as of 2022 and then changed it to as of 2024, was also unprecedented; d) the fourth: the presence of representatives from 22 states and the Federal District at the STF for a meeting with the minister-rapporteur (Dias Toffoli), on 12/1/2021, also goes beyond the equanimity and practices that should (or must) guide decision making in these circumstances, especially when the judgment on the merits that has already been handed down rivals the change or prospective efficacy conferred upon it later[7].

- Despite the controversial constitutionality of art. 27 of Law 9.868/99 and the exceptionality that should be its application if it is considered valid, incident and opportune in specific concrete cases, it is certain that exotic effects modulation is not acceptable, for budgetary reasons, exactly the reason adopted in the concrete case to maintain the tax. Furthermore, such modulation of effects could not preserve and protect the enforceability of an increased rate that was recognized as unconstitutional for two more years (in addition to the more than thirty (30) years preceding the recognition), as if the declared nullity simply did not exist. For the STF, the Tax Authorities to institute, collect and continue to collect an unconstitutional tax (increased rate) for a period invented *ad hoc* is not only possible, but it (the STF) itself authenticates such unconstitutionality. What the Federal Constitution says to the contrary and in express form... does not count.
- It is not excessive to mention the *ex tunc* effectiveness of decisions rendered in control of the constitutionality of unconstitutional laws or normative acts, according to the prevailing theory and the majority understanding of the courts. The premise is simple and has been supported in our legal system since the studies of Pontes de Miranda: unconstitutional law is null and void, and nullity is absolute (a centuries-old tradition, inherited from the famous *Marbury V. Madison case*, from the U.S. Supreme Court); therefore, it has no effect. The exception requires restraint and respect for the exceptional nature that characterizes it, admitting only in extraordinary cases the preservation of the effects of the unconstitutional provision or some aspect or temporality thereof for reasons of *legal security* or *exceptional social interest*, and this when the presence and effective materiality of the facts and empirical elements that configure them and the most favorable consequences to be honored in these cases are proven beyond doubt. This is definitely not the case with the denial or suppression of the return of taxes unduly and unconstitutionally collected, particularly under alleged budgetary reasons or in the interest of the state entity in breach, particularly when the direct effect of this distorted modulation of effects - it is urgent to modulate the effects of modulation - results in the illicit enrichment of the one who has benefited from its own illicit conduct (the taxing entity). Inversions like this destroy any democracy and the rule of law.

As can be seen from a sampling, there is little *rationality*[8] in the STF's decisions on tax matters and in the admissibility of appellate challenges of issues in general.

TAX LAW AND ROBOT JUDGES IN THE STF: SOLUTION OR NEW PROBLEMS?

Even though in Estonia robot-judges already "judge" small claims, here in Brazil there is still an oceanic distance to be bridged between the foreign experience and our reality. And not only due to operational obstacles inherent to cybernetics and its limits in the forensic universe. The fact is that the unrestricted, uncontrolled, or inappropriate use of artificial intelligence (AI)[9] in the courts impacts or has the potential to negatively influence the final product of judicial delivery: the concrete norm. And this is no small thing.

The *rationality of Law* precedes technology, and technology does not necessarily (or almost never) solve or will be able to solve the problems of the former.

With or without a legal crisis or unbalanced public accounts, the hard core of the taxpayer's constitutional protections and the soundness of the Democratic State of Law must always be safeguarded, promoted, and observed in the fullness of its normativities. And even more against any arbitrary act or other irrationalities. However, the decisions of the STF have been frustrating this legitimate expectation of taxpayers, as the three occurrences that illustrate this scenario analyzed above demonstrate. What there is less of in the STF's decisions on tax matters is rationality. On the contrary, irrationality - whatever the standard of rationality adopted - has been taking over the judicial decisions issued therein, a situation that is widening and worsening with the arrival of the Covid-19 pandemic.

The massive and growing adoption of AI in the legal environment is positive under several aspects (not discussed here because it is beyond the scope of this study), but this does not authorize transgressions of the legal order, hidden or ostensible cognitive shortcuts in the application of the Law, or any irrationality incompatible with its functionality, nature, and bonds. In this, subjectivism in all its forms and manifestations is, or should always be, denied and kept at a distance, particularly the discretion and solipsism that so plague forensic environments and courts.

In the scope of Tax Law and its specificities (as well as Criminal Law...) any extravagance in the Law applied (or that should be and is not) demands increased disapproval, not only because it is denied by the Democratic State of Law, but also because it determines the fundamental freedoms, rights and guarantees of the taxpayers, which are well established in the fundamental clauses of the Federal Constitution.

Taxation in Brazil is governed by a rigid, judicious, and analytical Constitution, which cannot be disregarded or made flexible in any way. It is, by nature, an ethical imperative and a non-negotiable historical-civilizational achievement, the minimum to be observed in all times and courts, with or without robot judges. In any event, Law and the normativity that characterizes it and gives it functionality must be protected from any subversion in which this irreducible unity is replaced by the electronic machine, by cybernetic programs or decisional constructions based on algorithms dressed up as magistrates, or operating as mere automaton decision-makers.

The issue is still fairly new, but of outstanding relevance. And it requires further reflection and deepening on the part of jurists, data scientists, and those responsible for the provision of jurisdiction in its broad organic conception. Regarding exclusively the expected *rationality* of judicial decisions before, during and after the use of AI Peixoto and Bonat (2020) envision the "precedents" system adopted in Brazil under the amalgamation of an artificial intelligence project. This is what has been gradually taking place in Brazilian courts, with problems and deficiencies in democratic terms (society and lawyers are excluded from this cybernetic construction, and the application of the Law is the exclusive competence of the authorities legitimated for this purpose, and not of robots), normative (the Law cannot be confused, nor can it be replaced by algorithms), and assertiveness (judicial decisions have been losing quality and need to reverse this situation; never make it worse).

This first point highlights the *correct application of the Law* in tax disputes. And this is due, among other reasons, to the fact that the normative regulation of taxation is primarily and largely rooted in the constitutional text, in an analytical manner and under strict guidelines, a particularity that does not exist in other western countries. It is because of such an original conception that tax disputes are almost always decided in the STF, which is responsible for giving the last word on constitutional issues. Therefore, its tax decisions often form "precedents", and then the problems begin when the Law is not well applied or does not have a rational end result, as exemplified above. Tropicalized "precedents" in Brazil are still very distant from those identified in their etymology and of American origin, under *common law*. Here, in contrast to the United States, besides the usual lack of consideration of relevant legal grounds for the correct decision of the case, not even the circumstances and particularities of the concrete case are all analyzed, verified and considered in their entirety, let alone with effective, adequate and sufficient motivation (fundamentation), in spite of the rule of art. 93, section IX, of the Federal Constitution and the structural provisions of art. 489, paragraph 1, sections I to VI, of the CPC. The *ratio decidendi* is not objective, express and recognizable, but replaced by a number of individual votes of the STF ministers, sometimes disparate and

even contradictory to each other. In the end the *leading case* speaks little. And if it is *wrong*, projections contrary to those expected from it will come out, sabotaging the very Law that it is supposed to realize and protect.

Along these lines Peixoto and Bonat (2020) proceed by warning of a major problem: the existence of doubts about the compatibility, or not, of the algorithmic black box with fundamental rights. As far as this research is concerned, there is no doubt about the operational possibility of robots replacing judges or acting as "judges" in several activities and functions, performing certain acts more efficiently (often, but not always) than human-judges. The issue is different: in the legal-constitutional order there is no authorization (therefore, it is forbidden) for robots to be judges or to act as judges in the judicial function *stricto sensu*, as can be seen in the provisions of art. 5, sections XXXVII, LIII, and LIV, of the FC. Therefore, the use of robots or robot judges in disagreement with these fundamental guarantees is and will be unconstitutional[10]. Furthermore, any irrationality or errors in judicial decisions caused or arising from these rejected hypotheses will lead to invalid judicial practices and acts, or give rise to ex officio or provoked revision. In Brazil, the use of AI under the terms and limitations of the existing regulations (especially when the regulation foreseen in Bill 21/2020 - approved by the House of Representatives on September 29, 2020 and currently in progress in the Federal Senate - and whatever comes into law) does not exclude the criticisms made here, which are diverse and specific in the issues addressed in this text.

Does the hybrid figure of the judge-robot really hold up, or do the robots used in courts today amount to mere consultation machines? This extremely important question has concerned scholars such as Silva and Silva Filho (2020), whose observations are: (i) a society seeking more assertive and quicker answers from the bodies responsible for judicial provision; (ii) the inseparable characteristics of laws and judicial decisions are "the idea of certainty, predictability, rationality, consistency and uniformity", presupposing a multiplicity of distinct complex cognitive abilities proper to human beings, not machines; (iii) the image of a judge-robot with the capacity to decide, according to the authors quoted by them, would be more of a utopia than a reality; (iv) the artificial intelligence systems existing in the courts today would be "weak", and there would be no way for a machine (judge-robot) to even make human evaluations or to sentence and reason any decision.

Fair enough.

There are also those researchers (and some judges) who maintain that there is indeed the possibility of a judge-robot performing various acts that are proper of the judiciary and of the judicial function. Per all Boeing and Rosa (2020), envisioning differentiated robot-judges with these predicatives as follows: (i) *Robo-classifier*: algorithm capable of locating and classifying court documents and proceedings, finding jurisprudence and legal provisions to help the judge to base their decision, with minimal human intervention and transparency in the decision-making process, under the judge's reasoning; (ii) *reporter-robot*: an algorithm capable of locating documents, extracting important information from documents or court records, and with the ability to suggest and prepare decisions for the judge, to act as a lay judge in cases within its competence, and to predict court decisions (Jurimetrics), with moderate human intervention and the transparency of the decision-making process depending on whether or not the judge accepts the machine's suggestions; (iii) *judge-robot*: with similar functional abilities to the immediately previous model, but with the difference that the decision (decision proposal) brought by the algorithm will be the judicial decision itself, subject to a human judge who may refer/maintain the automated sentence, or not.

As sampled, the possibility of a robot judge in the context, limits, and circumstances outlined in this scientific approach transitions between an accelerating dystopian-alien dimension and a real[11] world, without clear delineations between one and the other. The *robot-judge* presented above (as in decisive respects also the robot-reporter) is much more of a *robot-judge* than a simple robot, or even than a robot-judge classified only as a machine is or can be. Nothing surprising to the wanderers in the dark, but worrisome.

In such a challenging scenario, it remains to be seen whether the use of robot judges in the STF and by its members will be able to *solve* the *irrationality* seen in the decisions it makes on tax matters by recovering the inexcusable premise dictated by the *tax rule* in light of *constitutional legality*, *democracy*, and the *Democratic State of Law*. Or, conversely, whether the use in question will remain and insist on it

(irrationality) and further exacerbate this already intolerable situation. In any case, a constant has erupted in the forensic environment and needs to be addressed: the correlation between (ir)rationality in judicial decisions and AI is broad and so far without diagnoses, empirical verifications, and timely, effective controls.

Everything is more and more in a haze. And this reality, the lack of commitment (political responsibility of the magistrate) to the correct, valid and transparent application of the Law and to the integrity of the legal-constitutional order in the decisions on tax matters handed down by the STF in the last two years (more than before) violate or weaken the Taxpayer Statute, in an unprecedented escalation.

Despite the surreal paradoxes of these strange times in which we live (min. Marco Aurélio, STF), it is never or will ever be too late to shed light on and reverse this irrationality in a gray zone, the antithesis of good Law. After all, except in the British TV series *Black Mirror*, who said that "darkness is enlightening"?

FINAL CONCLUSIONS

Decisions on tax matters have direct and critical repercussions on two fundamental taxpayer rights that have always been of great importance: *freedom* and the *right to property*. The tax legislation is dynamic, complex. Precisely because of these and other unfavorable contingencies, it does not always anticipate with desirable clarity, measurability, and precision the content of the tax obligation to be met by taxpayers. Therefore, it is up to the STF to apply the law governing the specific recurring situations in this area, and not the other way around.

The abnormality reproached herein (not the correct application of the Law, but *irrationality* compromising the tax rule and decisions on tax matters) has been occurring in a not insignificant numerical progression in recent decisions on tax controversies examined by the STF. Decisions are often inconsistent. And robot judges only tend to aggravate this already irrational situation. The superficial information, the lack of transparency, and the denials of the reality that was previously printed as an illustration are not convincing, when the forensic daily routine shows it to be ostentatious and taken over by structural problems, now enhanced with robots operating beyond the simple execution of bureaucratic and repetitive activities that are said to be contained, but are not. Not least because biased algorithms can also serve and have lent themselves to erratic "judgments" and simulations programmed by humans (data doesn't come out of nowhere) or other algorithms (predictions *via machine learning*, for example) that are biased, selective in their analysis, and have predetermined results and answers before questions (Streck). The *correct application of the Law* loses twice: once, in the irrationality that has weakened it too much; the other, in the worsening of this irrationality by the influences of artificial intelligence (AI) used in the courts without assertive standards, transparency, control, and valid and/or reliable criteria.

The *truth* lies in the *constitutional legality* to be respected, promoted, and its effectiveness made concrete in each and every tax dispute in which the taxpayers are right. It is as simple as not forgetting that we live in a democracy - albeit incipient and with its problems - and in a Democratic State of Law. It is important here to repeat a mantra not always remembered in the courts: *Law is what it is*, and not or not always what they say or believe it to be. With or without robot judges; with or without rationality.

In short: in the situation under investigation, the application of the Law and the actions of the Judiciary need to be reviewed. Otherwise - in this and in so many other cases in the daily life of the courts - the legal-constitutional order and the federal legislation in force are undermined and the subjective rights of the taxpayers are unduly violated, disregarded and extinguished, so that the law ceases to have autonomy and effectiveness and, in the limit, any relevance whatsoever. The consequences are serious and irreparable. And robot judges don't solve that.

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ENDNOTES

1. A conceptual matter needs to be elucidated: strictly speaking, there are not (yet) officially any *robot judges* in the classical conception of the expression and its etymology. Just as there is no such thing as Dworkin's Hercules, except as a metaphor. However, the word does not fail to express the idea articulated in this scientific essay and the entity that dwells in the courts we wish to identify, as do other researchers working on the subject from the same perspective and with the same purpose, such as, for example, in the area of Criminal Law, Professor Dr. Luis Greco, of the Humboldt University of Berlin.
   Here the expression provisionally denotes the figure of the non-human being who performs the activities of the judiciary in its different forms, dimensions and possibilities, or who is in some way responsible for them in the forensic field. The different spellings used to name this figure under construction reflect the different meanings attributed to it according to the multiple formats or meanings it can or may represent.
2. These binding premises for the enforcers of the law, together with the requirement of a *correct answer* in the uniqueness of the concrete case, supported by the Critical Hermeneutics of Law (CHL), surpass the *theories of argumentation* followed in Brazil by a considerable part of the doctrine and the courts (particularly after the lessons of Robert Alexy). Those provide from the *pre-understanding* (an anticipated understanding, shaped in the practical world of fatigue - Streck, 2017) the substantial objective elements that define the norm-decision *prior* to the *justification* offered by it (theories of argumentation). *Justifying arguments come late* and cannot deny or alter by irrational subjectivism *what is already produced/defined* in the "things themselves" (Gadamer). The *phenomenology* of *tax incidence* is not at the disposal of any act of will or discretionary position of the enforcer of the tax rule (expressions of positivism), but in the materiality of the incidence according to its empirical manifestations and its strict coincidence (or not) with the abstract criteria of the *tax rule* (parent rule of tax incidence) under the *strict constitutional legality and the principle* of typicality. In the light of the philosophical hermeneutics recognized in this study, the *rationality* defended here is not satisfied with the *reasonable answers* of the *theories of argumentation* (of a procedural nature, centered on the arguments used and without concern for the correctness of the results in the enforcement of the law), considering them to be overcome and surpassed, in addition to being insufficient (Chaïm Perelman had already come up against these limitations by limiting himself to investigating the validity of arguments) and incompatible with contemporary democracy, the rule of law and the autonomy of the law and its *correct application*, especially in fiscal matters.
3. In this sense the lesson of Taveira Torres (2019, p. 388) states: "[...] there is no opportunity, in the Brazilian Constitutional Tax System model, for consequentialist arguments, similar to "treasury breakdown", "treasury difficulties" or "economic crises" as a pretext to disregard the Constitution."
4. This is the news reported in the press: "The *STF judges 95% of the cases through virtual sessions* - This year [year 2021 - until 05/10], 8200 cases were analyzed in the Virtual Plenary and 132 in the face-to-face sessions. [...]For 12 years used only to analyze cases with peaceful jurisprudence, the Virtual Plenary of the Federal Supreme Court (STF) took a turn in 2020 due to the pandemic. It now covers all cases within the jurisdiction of the Court. A change that increased the pace of trials but decreased the transparency of decisions." Disponível em: <https://valor.globo.com/legislacao/noticia/2021/10/05/supremo-julga-95-dos-casos-por-meio-de-sessoes-virtuais.ghtml>. Accessed on: October 5. 2021.
5. See: "*Virtual judgments imposed defeats on the taxpayer in 2020*. [In most cases, the position adopted by the Superior Court of Justice and the Federal Supreme Court has set aside the arguments defended by the taxpayers. Until September 2020, the National Treasury won 31 of the 37 tax lawsuits in the STF, including the prohibition of crediting the additional 1% Cofins-Import (EA No. 1.178.310), which directly affects the

automotive chain, and the constitutionality declaration of the imposition of contributions to third parties on the payroll after Constitutional Amendment No. 33/01 (EA No. 603.624).” Available at: <https://www.conjur.com.br/2021-jan-07/direito-tributario-julgamentos-virtuais-ano-2020≥. Acesso em: 10 jan. 2021.

6. Cf. This indignation was reported in *Valor Econômico* newspaper: “Toffoli answers to States and changes vote on ICMS reduction on electricity and telephone bills. [...]Judgment. There is a lot of criticism, in legal circles, about the way this trial has been conducted. The ministers decided on November 22 that states cannot charge differentiated rates, higher than the standard rate, on energy supply and telecommunications services. Two days later, however, they updated the status of the trial from ‘finalized’ to ‘suspended’.” Disponível em: <https://valor.globo.com/legislacao/noticia/2021/12/10/toffoli-atende-estados-e-muda-voto-sobre-reducao-de-icms-em-contas-de-luz-telefone-e-internet.ghtml≥. Acesso em: 11 dez. 2021.

7. This is how it was reported in *Valor Econômico* Newspaper: “Toffoli answers to States and changes vote on ICMS reduction on electricity and telephone bills Minister proposes that rates be reduced only in 2024; he already has the support of Gilmar Mendes [...] Minister Dias Toffoli, of the Federal Supreme Court (STF), gave in to pressure from the States and, on Friday, presented a new proposal for a date to reduce the ICMS charged on electricity, telephone and internet bills. He had initially suggested the year 2022. Now it has changed to 2024 - meeting the request made by the governors.” Available at: <https://valor.globo.com/legislacao/noticia/2021/12/10/toffoli-atende-estados-e-muda-voto-sobre-reducao-de-icms-em-contas-de-luz-telefone-e-internet.ghtml≥. Accessed on: December 11 2021.

8. Beyond the positivist conceptions (in Kelsen and Hart) in which the binary classification between *rationality* (scientific issue) and *irrationality* (political issue) is not sustained by relegating judicial decisions to the latter (as an act of will, and thus subject to value judgments without the possibility of certification as to validity or otherwise), contemporary constitutionalism and the legal order in force in Brazil deny both theoretical conceptions (science of law) of such a nature and - most importantly - the application of law in any way whatsoever. The criticism of irrationality does not presuppose merely explaining (descriptive theory) the *irrational* behavior of judges and the *decisions* they make, but demonstrating how the *Law* is and should be applied (normative theory), the true and most important mission of jurists committed to democracy. Law is a phenomenon under intersubjective public language, of which (and the meaning of the norm) the judge is not the owner, nor is it at his/her disposal: one cannot say anything about anything (Streck, 2017).

9. A concept of artificial intelligence (AI) comes with Peixoto and Silva (2019, p. 20-21): “AI is a subfield of computer science and seeks to make simulations of specific processes of human intelligence through computational resources. It is structured on knowledge of statistics and probability, logic and linguistics.”

10. The understanding expressed here is similar to that of Prof. Luís Greco, in which the professor concludes that it is *legally impossible* to have robot judges because (among other reasons) the power to judge without the judge’s responsibility is unfeasible. Available at: <https://www.youtube.com/watch?v=NAKMwdKpYqI>. Accessed on: December 15. 2021.

11. Identifying and enforcing - realizing - the Law in its normativity, core of intangible objectivity and autonomy according to the legal order in force requires fighting its internal and external predators mentioned by Streck (2011, p. 585-586) and the sharp action of jurists aligned with democracy and the rule of law against any form of discretion and solipsism that plague judicial decisions, particularly in tax matters and by the STF. This reality under criticism - dystopian or not - has been deepening the already acute crisis of Law with the arrival of artificial intelligence in the courts, so that before being a problem of technology (or only of technology) it is a big problem to be faced and solved by Law. Philosophy in Law has contributions to make in this quadrant the tenor of the perspective provided in the present scientific investigation (in the sense that *Law is what it is* - a *happening* in Heidegger (2005), and not what is in the judge’s mind), as well noted by Campos (2017): “The question about the status of reality is fundamental to Philosophy. The questioning of what is real or not, as well as its ultimate meaning, is one of the basic questions that instigates philosophical inquiry.”

REFERENCES

Advogados pedem que STF não module exclusão do ICMS da base do PIS e Cofins. (2021, April 12). *Consultor Jurídico*. Retrieved April 14, 2021, from https://www.conjur.com.br/2021-abr-12/advogados-sao-modulacao-exclusao-icms-piscofins

Ávila, H. (2004). *Sistema constitucional tributário*. São Paulo: Saraiva.

Ávila, H. (2012). *Segurança jurídica: Entre permanência, mudança e realização no Direito Tributário* (2. ed.). São Paulo: Malheiros.
Bacelo, J. (2021, December 10). Toffoli atende Estados e muda voto sobre redução de ICMS em contas de luz e telefone. *Jornal Valor Econômico*, *on-line*, Rio de Janeiro. Seção Legislação. Retrieved December 11, 2021, from https://valor.globo.com/legislacao/noticia/2021/12/10/toffoli-atende-estados-e-muda-voto-sobre-reducao-de-icms-em-contas-de-luz-telefone-e-internet.ghtml
Boeing, D.H.A., & Rosa, A.M.da. (2020). *Ensinando um robô a julgar: pragmática, discricionariedade, heurística e vieses no uso de aprendizado de máquina no judiciário.* Florianópolis: Emais.
Campos, É.B.V. (2017). A realidade para além do espelho de Narciso. Retrieved April 27, 2021, from http://pepsic.bvsalud.org/pdf/eip/v8n2/a10.pdf
Carvalho, A.T.de. (2013). *Curso de teoria geral do direito tributário: O construtivismo lógico semântico* (3. ed. rev. e ampl). São Paulo: Noeses.
Carvalho, P.d.B. (2010). *Curso de direito tributário* (22. ed). São Paulo: Saraiva.
Carvalho, P.d.B. (2008). *Direito tributário, linguagem e método*. São Paulo: Noeses.
Costa, A.S.d. (2009). *Teoria da incidência da norma tributária: Crítica ao realismo lingüístico de Paulo de Barros Carvalho* (2. ed. rev. cor. e ampl.). São Paulo: Malheiros.
Diniz, M., & Rypl, V. (2021, January 7). Julgamentos virtuais impuseram derrotas ao contribuinte em 2020. *Consultor Jurídico*. Retrieved January 10, 2021, from https://www.conjur.com.br/2021-jan-07/direito-tributario-julgamentos-virtuais-ano-2020
Dworkin, R. (2007). *Levando os direitos a sério.* Tradução de Nelson Boeira. São Paulo: Martins Fonte.
Dworkin, R. (2014). *O império do direito. Tradução de Jefferson Luiz Camargo*. São Paulo: Martins Fonte.
Gadamer, H.-G. (2011). *Verdade e método: Traços fundamentais de uma hermenêutica filosófica. Tradução de Enio Paulo Giachini* (6. ed.). Petrópolis: Vozes, v. II.
Gadamer, H.-G. (2012). *Verdade e método: Traços fundamentais de uma hermenêutica filosófica. Tradução de Flávio Paulo Meurer* (12. ed.). Petrópolis: Vozes, v. I.
Greco, L. (2020, May 2). *A Impossibilidade Jurídica de Juízes Robôs - Prof. Dr. Luís Greco* [Video]. YouTube. Retrieved December 15, 2021, from https://www.youtube.com/watch?v=NAKMwdKpYqI
Heidegger, M. (2005). *Ser e tempo (Parte I). Tradução de Marcia Sá Cavalcante Schuback* (15. ed.). Petropólis: Vozes.
Heidegger, M. (2007). *Ser e verdade: 1. A questão fundamental da filosofia; 2. Da essência da verdade*. Tradução de Emmanuel Carneiro Leão. Petrópolis: Vozes; Bragança Paulista: Universitária São Francisco.
Hommerding, A.N., & Lyra, J.F.D.d.Costa. (2016). *Direito penal e hermenêutica: uma resposta constitucional ao estado de exceção*. Curitiba: Juruá.
Kelsen, H. (1999). *Teoria pura do direito. Tradução de João Baptista Machado*. São Paulo: Martins Fontes.
Machado, H.d.B. (2009). *Direitos fundamentais do contribuinte e a efetividade da jurisdição*. São Paulo: Atlas.
Martins, L., & Peron, I. (2021, October 5). STF julga 95% dos casos por meio de sessões virtuais. *Jornal Valor Econômico.* Rio de Janeiro. Seção Legislação. Retrieved October 5, 2021, from https://valor.globo.com/legislacao/noticia/2021/10/05/supremo-julga-95-dos-casos-por-meio-de-sessoes-virtuais.ghtml
Motta, F.J.B. (2012). *Levando o direito a sério: uma crítica hermenêutica ao protagonismo judicial* (2. ed. rev. e ampl.). Porto Alegre: Livraria do Advogado.
Motta, F.J.B. (2018). *Ronald Dworkin e a decisão jurídica.* (2. ed. rev. e ampl.). São Paulo: JusPodivm, 2018. (Coleção Hermenêutica, Teoria do Direito e Argumentação, coord. por Lenio Luiz Streck).
Peixoto, F.H., & Bonat, D. (2020). *Racionalidade no direito: Inteligência artificial e precedentes*. Curitiba: Alteridade.
Peixoto, F.H., & Silva, R.Z.M. (2019). *Inteligência artificial e direito*. Curitiba: Alteridade.

Silva, R.A.F., & Silva Filho, A.I. (2020, October). Juiz robô ou mera máquina de consulta? Inteligência artificial aplicada a decisões judiciais. Retrieved October 23, 2021 from https://www.researchgate.net/publication/344661048_Juiz_Robo_ou_mera_maquina_de_consulta_Inteligencia_Artificial_aplicada_a_decisoes_judiciais

Streck, L.L. (2011). *Verdade e consenso: Constituição, hermenêutica e teorias discursivas* (4. ed.). São Paulo: Saraiva.

Streck, L.L. (2013). *O que é isto – decido conforme minha consciência?* (4. ed. rev.) Porto Alegre: Livraria do Advogado, 2013. (Coleção O que é isto? v. 1).

Streck, L.L. (2017). *Dicionário de hermenêutica: Quarenta temas fundamentais da teoria do direito à luz da crítica hermenêutica do direito*. Belo Horizonte: Livramento; Casa do Direito.

Torres, H.T. (2019). *Direito constitucional tributário e segurança jurídica: metódica da segurança jurídica do sistema constitucional tributário* (3. ed. rev. atual. e ampl.). São Paulo: Thomson Reuters; Revista dos Tribunais.

Trindade, A.K. (2017). Garantismo e decisão judicial. In Streck, Lenio Luiz (Org.), *A discricionariedade nos sistemas jurídicos contemporâneos*. Salvador: JusPodivm. (Coleção Hermenêutica, Teoria do Direito e Argumentação, coord. por Lenio Luiz Streck). p. 75–103.

Vattimo, G. (2016). *Adeus à verdade. Tradução de João Batista Kreuch*. Petropolis: Vozes. (Coleção Textos Filosóficos).

Wiziac, J. (2021, March 20). STF muda jurisprudência, reforça caixa da União e eleva carga tributária na pandemia. *Folha de São Paulo.* Retrieved April 10, 2021, from https://www1.folha.uol.com.br/mercado/2021/03/stf-muda-jurisprudencia-reforca-caixa-da-uniao-e-eleva-carga-tributaria-na-pandemia.shtml