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Judicial Precedents in the Context of the Brazilian Tax Reform

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Abstract

This paper aims to analyze the application of the system of judicial precedents, originating in England and broadly disseminated by the United States of America (USA), widely adopted by countries where Common Law drives the legal framework, in the context of judicial decisions rendered by the Brazilian Supreme Federal Court (STF) in tax matters and its application to future cases considering the approval of the Tax Reform proposed by PEC n.˚ 45/2019 (Constitutional Act Project), highlighting its relevant aspects, especially in light of the replacement of some current taxes by the Tax on Goods and Services (IBS) and the Contribution on Goods and Services (CBS).

Keywords

Tax Reform, Judicial Precedents in Brazil, Tax Litigation, Constitutional Law

1. Introduction

For at least over a decade, the topic of "Tax Reform" has been discussed in Brazil, under the spotlight of demands from civil society, such as the 1) shift of the tax burden, which is currently concentrated on consumption, to income, as is the case in various countries like France, England, the United States, among others, 2) the amount of different taxes, and 3) the simplification of ancillary obligations, which presently require significant effort due to their capillarity.

Among various texts discussed, recently the National Congress (compound by a Chamber of Deputies and a Federal Senate) approved in two rounds, as required by the Brazilian Constitution, the Proposal for Constitutional Amendment n.˚ 45/2019, which, although far from being unanimous among legal experts and representatives of economic sectors, was the text that came closest to convergence in the political sphere.

Unfolded into 21 articles, the proposal's text is basically structured around 4

important pillars that can have a significant impact on Brazilian tax litigation, whether through the discussion of the applicability of precedents already established or through new legal actions given its innovative character. They are[1]:

1) Suppression of tax incentives: As established in Article 156-A, X, to be added to the Federal Constitution, the Tax on Goods and Services (IBS) will not be subject to the granting of tax or financial incentives or benefits, nor specific, differentiated, or preferential tax regimes, except for regional incentives provided for in the amendment itself.

2) Flexibilization of the tax constitutional system strength: Unlike the current scenario where tax matters are extensively regulated by the Federal Constitution, the reform to be promoted by Constitutional Act Proposal n.˚ 45/2019 delegates to infra-constitutional legislation the regulation of relevant and elementary aspects, such as the material criteria of the tax rule matrix.

3) Abolition of IPI, ICMS, ISS, PIS, and COFINS[2]: Starting in 2027, contributions to PIS and COFINS will be abolished, and in 2033, IPI, ICMS, and ISS will be removed from the tax system; and

4) Creation of IS, IBS, and CBS: In 2027, the Contribution on Goods and Services will come into effect, while the Tax on Goods and Services (IBS) and the Selective Tax (IS) will only take effect from 2033, with the first two starting their transition period in 2026[3].

Aside from the discussions surrounding the proposed changes, it is a fact that the current Brazilian tax system which was based for decades on the strict positivism proposed by Hans Kelsen presently can be considered one of the most complex in the world whether by the amount of ancillary obligations to be fulfilled by taxpayers, or even by the amount of legislation that is constantly changed, considering 27 States and approximately 5500 municipalities with different legislation[4], and that has prompted the Judiciary, especially the Brazilian Supreme Court (STF), to address issues of great relevance that, on several occasions, have secured important victories for taxpayers. However, in others, it ensured the constitutionality of levies imposed against taxpayers by the states.

In this sense, little has been debated about how judicial precedents in tax matters, which have been painstakingly built over the past decades and whose processes have dragged on for years, will be impacted, especially in terms of the

[1]The last two will be subject to further analysis in this work, as they are more closely related to discussions concerning potential changes in the environment surrounding established judicial precedents.

[2]IPI: Tax over manufactured goods; ICMS: state tax levied on goods and services; ISS: Municipality Tax on services; PIS/COFINS: Federal Social Contributions.

[3]Article 2: The Transitional Constitutional Provisions Act shall be amended to include the following articles:

(…)

"Article 124: In 2026, the tax provided for in Article 156-A shall be levied at the state rate of 0.1% (one-tenth percent), and the contribution provided for in Article 195, V, both of the Federal Constitution, shall be levied at a rate of 0.9% (nine-tenths percent)".

[4]Brazilian Institute of Statistic Geography (IBGE) is responsible for this information gathering. Available at https://www.ibge.gov.br/cidades-e-estados.

possibility of extending their effects to the proposed new tax order or their summary invalidation considering that the taxes they encompass will simply be abolished.

Considering the strength held by the system of precedents (which, in its essence, takes into account the propositions of philosophical pragmatism) in reducing the filing of new lawsuits and ensuring guarantees for litigants, combined with the high rates of court congestion in the overwhelmed Judiciary and the growing environment of uncertainty in the political-economic context, the consequences of a rupture can be of undeniable importance to the country's context.

Given the strength held by the precedent system in reducing the filing of new lawsuits and maintaining guarantees for litigants, coupled with the high rates of court congestion in the overwhelmed Judiciary and the growing atmosphere of uncertainty in the political-economic context, the consequences of a rupture can be of undeniable importance for the country's context.

With the aspirations of the Brazilian Tax Reform duly contextualized and the issues arising from it, the study will be directed towards the effects of signed judicial precedents, their maintenance or suppression and consequently their impacts related to the changes outlined in items "c" and "d" mentioned above.

2. The Importance of Brazilian Precedents System

Until the year 2015, provisions regarding the Precedent System in Brazil were relatively modest, as the then-existing Code of Civil Procedure (CPC/1973) contained a single chapter consisting of 4 provisions (Articles 476 to 479), then named "Uniformization of Jurisprudence," which could not be properly considered a precedent system.

With the advent of the Code of Civil Procedure of 2015 (CPC/15), the procedural system began to define clearer rules on the requirements to be observed by the courts for the establishment of precedents with binding nature (Didier Jr., 2017). Once established, these precedents would fix a legal thesis that must be mandatorily applied by all judges, thus conceiving, in a systematic manner, the system of judicial precedents currently in force.

Article 926 of the Code of Civil Procedure, in fact, establishes that "courts must standardize their jurisprudence and keep it stable, intact, and coherent," endorsing the concern of the relatively recent Brazilian precedent system. The main objective of this legal statement shall be comprehended as a way to provide legal certainty to the system, avoiding sudden and unmotivated changes on precedents (Bueno, 2017).

In this sense, considering this movement observed during the reform of the Code of Civil Procedure, the directed shift in the Brazilian procedural system towards assigning Jurisprudence the role of a legal source is undeniable.

Historically connected to the Roman-Germanic system and rooted in the positivist logic of Austrian jurist Hans Kelsen (Kelsen, 1998), Brazilian law has favored its operability over the past decades based on laws originating from social

facts that prompted their creation by the Legislative Power, considering it as its exclusive source. In the words of Professor Renato Lopes Becho, "as ideology or doctrine, positive law preaches absolute respect for the law. According to it, the legislator and the law can do anything." (Becho, 2009).

According to this theory, the only allowed value judgment in legal operations is what its author calls "values of Law," according to which legal subjects classify certain conduct as lawful or unlawful, by indicating a legal command that relates positively or negatively to the behavior in question (Kelsen, 2001). The author refutes the possibility of applying any other judgments that attempt to ideologically attribute a sense of justice to positive legal norms.

In this scenario, judges would exclusively perform the mechanical subsumption of social facts to legal norms, using a deductive logic in which the norm prescribes certain conduct and the sanction for its violation. If the subject transgresses the normative prescription, their behavior is punished by the defined sanction, without any room for other elements in the decision-making process.

Despite the roots it was fixed in, it is observed that the systemic orientation that was once directed toward strict positivism has experienced a change in its course, predominantly guided by the behavior of the Judiciary, which has begun to act as a positive source of law and intensify the valuation of judicial precedent (Becho, 2021).

Regarding this last point, it has been possible to notice an attempt to bring Brazilian law closer to practices adopted in legal systems based on common law, especially by the justices of the Supreme Federal Court.

An example of this behavior can be seen in one of Justice Teori Zavascki's votes[5], stating that:

At this point, Brazil is following a movement similar to what is also happening in various other countries that adopt the civil law system, which are gradually approaching what could be called the culture of stare decisis, typical of the common law system. Doctrine has noted this phenomenon, which occurs not only in relation to constitutional control but also in other areas of intervention by higher courts, indicating that the approximation between the two great legal systems (*civil law and common law*) *is a phenomenon in the process of generalization* […].

Also, as an example of a break with the strictly positivist tradition that guided the course of Brazilian law, the Supreme Federal Court has been establishing positions that are not restricted to the application of the deductive syllogism from fact to norm but instead using evaluative judgments condemned by Hans Kelsen, employing an abductive logic for the justification of judicial decisions.

The votes of Justices Roberto Barroso and Luiz Fux during the trial of HC No. 152,752/PR, which discussed the application of the presumption of innocence principle established in Article 5, LVII, of the Federal Constitution, stating that "no one shall be considered guilty until the final judgment of a convicting criminal sentence," were in the sense that, although the constitution expressly establishes that guilt in criminal matters can only be imputed after the final judgment,

[5]Brazil. Supremo Tribunal Federal. Reclamação n.° 4.335 Acre. Justice Teori Zavascki (pp. 3-21).

being a principle, its application must be compared with other guiding principles of the legal system.

Furthermore, Justice Luís Roberto Barroso's[6] vote points out data indicating that a minimal percentage of extraordinary resources in criminal matters is accepted in favor of the defendant, so the relaxation of the principle at this procedural stage would effectively have little impact on the right to freedom. It would not make sense to shape the system based on the exception to the rule's detriment. In the same vein, Justice Luiz Fux[7] argued that the expansive interpretation of the presumption of innocence principle has led, in several cases, to hostile behavior by the defense regarding the reasonable duration of the process, leading to injustice, the ineffectiveness of criminal laws, and also the legal system as a whole.

It is essential to note that, despite the procedural discussions raised by some indoctrinators criticizing positions expressed by Justices of the Supreme Federal Court (Abboud, 2016), exploring their intrinsic technicalities is not the purpose of this study. The main objective here is related to the applicability or non-applicability of precedents formed prior to the tax reform.

3. Key Judicial Rendered Decisions

Naturally, not all matters discussed under the current tax regime will be self-applicable in the new reform context, especially because various controversial topics have become an integral part of the constitutional text itself. This includes, among others, the calculation by inclusion of ICMS and PIS/COFINS, which, aiming at simplification (one of the main drivers of tax reform), were expressly abolished.

On the other hand, other discussions that have dragged on for years and have been the subject of positions by the Supreme Federal Court (STF) may or may not be extended to the new tax regime, depending on the legal construction related to the discussed thesis and its reception to the new system, especially in terms of interpretation according to the philosophical current, whether more positivist or more pragmatic.

To better illustrate the extent of the proposed issue, it is essential to contextualize two emblematic decisions whose themes can be directly affected, along with the reasons that may lead to future conflicts.

1) *Motion for Declaration of Constitutionality* (*ADC n.°* 49)—*Incidence of ICMS on the transfer of goods*

After years of dispute between taxpayers and state administrations, in September 2017, the State of Rio Grande do Norte proposed Motion for Declaration of Constitutionality (ADC) n.° 49, which aimed to declare the legitimacy of charging ICMS on the transfer of goods between establishments belonging to the same company.

[6]Brasil. Supremo Tribunal Federal. HC n.° 152.752/Paraná. Plenário. Justice Luís Roberto Barroso vote. p. 21.

[7]Brasil. Supremo Tribunal Federal. HC n.° 152.752/Paraná. Plenário. Justice Luiz Fux vote. p. 48.

The action was unanimously judged as unfounded, declaring the tax on these operations unconstitutional. The argument was that a change of ownership of the goods is a prerequisite for the incidence of ICMS, with consequences starting from January 2024 due to the modulation of the effects of the decision.

Regarding the issue of the incidence of the tax on transfer operations, the upcoming Tax on Goods and Services (IBS), which will replace the ICMS from 2033, has a wider definition of its material criterion:

Article 156-A. A complementary law will institute a tax on goods and services of shared competence among States, the Federal District, and Municipalities.

In this sense, the power delegated by such Constitution provision raises a elementary question: could the simple change of the tax that burdens the same operations/transactions overcome the judicial precedents established during the validity of the predecessor tax, either by action (inclusion in the complementary law of a provision determining the incidence of the tax) or omission (by the generic indication in the complementary law that the tax will be due in physical circulation operations of goods)?

2) *Extraordinary Appeal* (*RE No.* 174.478)—*Reduction of the tax base and the reversal of ICMS credits*

Article 155, §2, II, "b" of the Federal Constitution determines that in the operations of circulation of goods subject to ICMS exemption or non-incidence, the corresponding tax credits related to previous operations must be annulled.

During the trial of RE No. 174,478 by the STF, the understanding was established that reductions in the ICMS tax base are equivalent to partial exemptions granted by tax administrations. In these cases, proportional annulment of tax credits would be required, in accordance with the constitutional provision contained in Article 155, §2, II, "b" of the Federal Constitution.

This is precisely the scenario that follows the tax reform proposed by PEC No. 45/2019: despite the abolition of granted fiscal benefits, the institute of reducing rates (rarely used in the current system) for the IBS was conceived, according to Article 9 of the PEC:

Article 9. *The complementary law that institutes the tax referred to in Article* 156-*A and the contribution referred to in Article* 195, *V, both of the Federal Constitution, may provide for the differentiated tax regimes provided for in this article, provided they are uniform throughout the national territory and the respective adjustments to the reference rates are made to rebalance the collection of the federal sphere.*

§ 1. *The complementary law will define the operations benefited by a* 60% (*sixty percent*) *reduction in the rates of the taxes referred to in the caput among those related to the following goods and services*: […]

Following the same direction as the decision rendered in ADC n.° 49, which was favorable to the taxpayer, there are precedents that ensured the state's right to maximize its revenue, based on the interpretation of the set of constitutional precepts then in force.

Given the constitutional silence resulting from the act of the derived constituent power, should the application of the understanding related to proportional reversal in cases of partial exemptions be maintained, or, considering a new tax order, should a new dispute be initiated to address the issue?

4. Upcoming Challenges to Be Addressed

Considering the presented hypotheses, the resolution of the dichotomies related to the application or non-application of established precedents should be carefully evaluated by the Judiciary, given that different paths can be taken.

This is because, invariably, it can be argued that there has been a change in the constitutional tax structure, with the abolition of existing taxes and the creation of new ones, which will largely have close relationships with their predecessors.

On one hand, guiding conclusions based on the deductive syllogistic method proposed by strict positivism, one could easily argue that precedents established under the current regime would be outdated. This is because there would be a repeal of the existing tax system and the start of a new regime that can be indiscriminately altered by the will of the derived constituent power, which, according to this theory, has the authority to do anything (Becho, 2009).

On the other hand, considering the perspective of abduction proposed by pragmatic approaches to law, as demonstrated by some ministers as previously mentioned, the inference process follows the abductive method. In this method, there is not merely the subsumption of the fact to the norm, but rather conjectures that will be tested and validated by deduction and subsequent induction into the normative system.

In other words, the abductive method proposed by Charles Sanders Peirce[8] takes into account the values, convictions, and personal elements intrinsic to the judge, who will decide, considering contextualism[9] and consequentialism in forming their conviction.

Due to this, and regarding the recent positions of STF Justices, there is an important space to defend that these decisions can invariably be applied to the new constitutional tax order, even changing both the regulatory texts and the denomination of the taxes.

This dichotomy is not a recent development. Richard Posner (Posner, 2008) already proposed this opposition between what he calls originalists (faithful to positive law) and pragmatists (adherents to precedents):

There are two basic legalist tools for achieving a reasonable degree of certainty in a case law system. One is constitutional and statutory texts; the other is precedent. But these are in tension. An originalist has to be suspicious of precedent, because at best it is a judicial gloss of an authoritative text and at worst it is judicial creation

[8]Flavianne Fernanda Bitencourt Nóbrega (Nóbrega, 2013) made important and didactic notes about the abductive theory in "A proposta do raciocínio abdutivo para o Direito. In Um método para a investigação das consequências: a lógica pragmática da abdução de C. S. Peirce aplicada ao Direito". João Pessoa, Ideia, 2013, pp. 105-117.

[9]Antonin Scalia (Scalia, 1997: p. 37), american jurist, also made relevant notes about the importance of the contextualism on legal interpretation, specially about Constitution text.

ab nihilo. Justice Scalia's acceptance of precedent is avowedly pragmatic. In a world governed by originalism, as in a civil law system (*in which detailed legal codes make textualism a more feasible strategy than in our system*), *the role of precedent as a stabilizing force in the law would be diminished. Pragmatists, loose constructionists, and "living Constitution" buffs reject literal interpretation of authoritative texts, subordinating the language of the texts to their purpose. But they tend to have a greater respect for precedent than originalists do, because to them constitutional law is a creature of precedent rather than of text.*

Thus, from this perspective, beyond the express provision or lack thereof of 1) the need for proportional reversal or 2) the incidence of the IBS on transfer operations, the application of previously established precedents dealing with any issue that may have potential applicability after the effective date of the tax reform provisions would be based on similarity of the legal nature of the ICMS that was perfectly detailed by Professor Roque Carrazza (Carrazza, 2010), which applies to operations related to the legal and commercial circulation of goods, and the IBS, which, in the reports prepared by the rapporteurs of the legislative houses, seems to have the same essence, at least in the portion that concerns the states and that will tax operations with goods.

An undisputed fact is that, on the one hand, especially in tax matters, positive law serves as an unequivocal guarantee to taxpayers against the state`s revenue appetite, while pragmatic logic, provided its concepts are not applied in an entirely simplistic manner, also has the power to ensure taxpayers the predictability expected from the legal system, including the application of precedents established during the existence of the old tax order.

5. Conclusion

The doctrine of precedents based on the common law, adopted by various countries with an Anglo-Saxon legal tradition, notably England and the United States, presents several positive aspects that contribute to the stability, predictability, and development of the legal system. This is primarily because it is not strictly bound to the positivized text in the legal system, considering other aspects for decision-making, which will be tested over time, regardless of a simple legislative change.

In this sense, the binding nature of precedents creates a more consistent and uniform legal environment, emphasizing the need to adopt the results of previous judgments for future cases. The uniformity of the model points to a greater ability to promote legal certainty, considering the predictability of judicial understanding for specific legal facts. This is an essential factor for parties involved in legal proceedings, lawyers, and other legal professionals, providing a clear guide on how similar cases will be adjudicated.

Moreover, the precedent system plays an essential role in the efficiency of the judiciary by avoiding unnecessary rehashing of legal arguments previously addressed by the courts and already subject to decisions. This model tends to re-

duce the workload of the courts and streamline dispute resolution, providing a faster and more effective justice system. Especially higher courts can devote more attention to the most relevant cases.

Also, legal practitioners' ability to rely on previous decisions allows parties to anticipate potential outcomes more accurately in litigation. This can encourage extrajudicial settlements and reduce litigation, as several actions may be avoided.

Some of these characteristics widely verified in the Anglo-Saxon system and that can strengthen the legal system were imported, although not fully, into Brazilian procedural law which despite has evolved significantly with the reform of the Civil Procedure Code in 2015, still moves slowly toward a robust system of precedents, given that the predictability of judicial decisions can be considered low.

Despite this, Brazil, with its predominantly normative-positivist tradition, still faces severe resistance in transitioning to a structure where the flexibility of legal text (or the absence of provision) is supplemented by a judicial decision capable of imposing an effective solution on the parties.

Undeniably, from the recently approved constitutional tax reform in the Brazilian Parliament, various questions will arise regarding its content, especially if public authorities contradict concepts built during the validity of the current legal tax order by the doctrinal community and also by the judiciary, which has been the subject of extensive debates over the years.

Considering this, the Supreme Federal Court (STF) will, in the not-so-distant future, be called upon to decide on 1) the possibility of under the bias of strict positivism annulling all discussions faced over the past decades with the simple change in the guise of taxes promoted by constitutional tax reform which gave them a new designation and attempted to smooth out some rough edges but, in essence, has an intrinsic connection to its predecessors justified by the argument that the concepts are no longer applicable due to the revocation of the norm that supported them or 2) whether precedents will be given the necessary force they demand, by maintaining them using all the concepts proposed by philosophical pragmatism.

In any case, it is essential that the position adopted by the Supreme Court occurs in a comprehensive manner, keeping intact its coherence duty, not to favor only one side of the tax relationship, preventing taxpayers from being placed between both positivist rock and pragmatistic hard place.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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