

## The relevance of the role of legal certainty in the taxation of the digital age<sup>1</sup>

### *A relevância do papel da segurança jurídica na tributação da Era Digital*

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#### Abstract

The purpose of the article is to correlate legal certainty with the new characteristics of taxation in the digital age. First, the concept and the importance of certainty for legal relations in a Democratic State of Law will be addressed. Then, the fundamentality of legal certainty in the field of Tax Law will be highlighted, in which it plays an essential role in the State-Taxpayer relationship. After these approaches, the new business reality faced by Tax Law will be presented in the search to previously indicate the manifestations of wealth object of taxation. Finally, the main challenges to maintain rigid legal and tax certainty will be enumerated in a period in which the economic bases of taxation are changing and renewed so quickly.

**Keywords:** tax law; legal certainty; Digital Age.

#### Resumo

*O objetivo do artigo é correlacionar a segurança jurídica com as novas características da tributação na Era Digital. Primeiramente, serão abordados o conceito e a importância da segurança para as relações jurídicas em um Estado Democrático de Direito. Em seguida, será destacada a fundamentalidade da segurança jurídica no campo do Direito Tributário, no qual exerce papel essencial na relação Estado-Contribuinte. Feitas essas abordagens, será apresentada a nova realidade negocial enfrentada pelo Direito Tributário na busca de previamente indicar as manifestações de riqueza-objeto da tributação. Por fim, serão enumerados os principais desafios para se manter rígida a segurança jurídico-tributária em um período em que as bases econômicas de incidência dos tributos se modificam e se renovam tão rapidamente.*

**Palavras-chave:** tributário; segurança jurídica; Era Digital.

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# 1 Introduction

Digital Era is already a reality. The era of great technological advances that were previously only part of the imagination of the most daring dreamers is now present.

The Digital Era – or Technological Era – has produced technologies that have drastically changed the way we communicate, interact and work, introducing new, more agile forms of negotiation, some of which even have the immediacy of a mere "click".

Both the dynamics and the societies in which they are inserted, these changes in the forms of interaction and negotiation require constant updating by society to try to achieve and predict all their effects. This dynamism, which benefits the economy and social relations, nevertheless represents a real challenge for regulatory institutions, especially with regard to the prior definition of the values and wealth in question.

It is understood, then, that the legal field is not different from the society it serves and also suffers from the reflections of this constant and accelerated evolution; Against this backdrop, it is necessary to analyse the role of the principle of legal certainty – which presupposes stability – in a society in which stability does not seem to be a value.

This article proposes to correlate legal certainty with the new characteristics of taxation in the Judicial Branch, especially due to economic aspects and technological advances.

To this end, the concept of legal certainty and its evolution over time will be addressed initially until the definition of its importance for legal relations in a Democratic State of Law. Next, we will proceed to analyse the role of legal certainty in the field of Tax Law, in which it plays an essential role in the State-Taxpayer relationship.

Once these approaches have been made, the new business reality facing Tax Law will be presented with the challenge of previously indicating, in this context, the manifestations of wealth that are subject to taxation.

Finally, the main obstacles to maintaining rigid legal and fiscal certainty in a period in which the economic bases for the incidence of taxes are changing and renewing themselves so rapidly and in which development in the technological, cultural and social fields has a huge influence on the regulatory system. this is understood as "a theoretical model created by man to organize taxation in the jurisdictional sphere" (Zilveti, 2017, p.31).

In this line, considering that the current conception of the tax demands certainty and refutes arbitrariness, this article seeks to answer the following question: do the new paradigms

that have emerged in the Tax Authority impact the principles of legality, precedence and isonomy, as the bases of tax legal certainty?

## 2 The importance of security in law

Security in law is presented in a very peculiar way: on the one hand, the institute gives rise to several debates and divergences due to its legal nature; On the other hand, the understanding of the importance of legal certainty for the rule of law brings together the divergents. The Declaration of the Rights of Man and of the Citizen of 1789 expressly indicated, in its article 2, legal certainty as a natural and imprescriptible right, along with freedom, property and resistance to oppression<sup>2</sup>.

Elevated to a general principle of European Union law by its Court of Justice since 1973, legal certainty was explicitly enshrined in the Charter of Fundamental Rights of the European Union on 6 December 2000, and was also included in the current European Convention on Human Rights (Perin-Dureau, 2020, p. 2).

Despite the importance of legal certainty, it is noted that its definition is quite stormy and goes beyond the discussion *of whether it consists of a state of mind or whether it constitutes the certainty of each individual as to what was or was not determined by the text of the law*.

For those who (Silva, 2005, p. 15) conceive it as a legal value, security informs and grounds positive law, since the character of positivity would be a requirement of order and legal certainty. However, it creates a tension with another legal value, justice. This is because security demands the positivity of the Law, seeking to impose unconditional validity and obligation, regardless of its justice. Often, this excessive imposition will lead to an unjust right, "but it is the value of what is just that must deserve primacy, because law, especially constitutional law, must be the means of its realization" (Silva, 2005, p. 29).

Obviously, there is also a respectable current (Ávila, 2017, p. 51) that maintains that legal certainty has the character of a norm. And, in this way, it would have the effectiveness of a structural condition, which prevents its non-observance, guaranteeing the knowability, reliability and calculability of the Law in favor of the subjects.

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<sup>2</sup>Article 2. *Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression.* » Available at: <https://www.legifrance.gouv.fr/contenu/menu/droit-national-en-vigueur/constitution/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789> accessed on 12 jun. 2021.

The knowability aspect requires a law that is as clear and precise as possible. For this reason, in the criminal and tax spheres, there is the element of material typicity, guaranteed by the rule of reservation of law established especially for these cases, in which the State restricts the fundamental rights of liberty and property of its citizens or appropriates these rights.

On the other hand, the reliability aspect refers to the relationship of the Challenge over time. This point will require the stability of legal relations, with regard to the rules that are issued, the business concluded and the judicial proceedings that are finally judged. In terms of calculability, legal certainty refers to the predictability of the law for the future. Legal changes, over time, that have a major impact on life and business cannot thwart legitimate expectations that were previously considered.

It is also interesting to note that, despite its importance for the legal system, the expression "legal certainty" does not exist in the 1988 constitutional text. For this reason, it is argued that, "since it is not expressly established, but, in any case, is revealed in the constitutional text, the principle of legal certainty is presented as an implicit constitutional principle" (Paulsen, 2005, 25).

It should be noted that, for some scholars (Carvalho, 2003, p. 175), legal certainty is a super-principle in the legal system. And this nature is made effective through the application of the principles of legality, precedent, equality and non-retroactivity, among others.

However, although it is not explicitly indicated in the constitutional text, it is possible to point out (Silva, 2005, p. 17) that the current Brazilian Constitution presents four aspects of legal certainty. The first consists of security as a guarantee of the person and is provided for in the *paragraph* of Article 5, as a set of rights that instrumentalize situations, prohibitions, limitations and procedures aimed at guaranteeing some fundamental right of the person.

The second "refers, not to objective law, but to the protection of subjective rights, in the face of formal mutations of established law, especially in the face of the succession of laws over time and the need to ensure the stability of acquired rights" (Silva, 2005, p. 19). It is provided for in Article 5, XXXVI, of the Constitution and reflects the aforementioned aspect of the reliability of legal certainty.

Security as a type of social right, in turn, represents the third aspect. This social security, contained in article 6 of the Constitution, consists of the provision of means capable of guaranteeing individuals and their families decent social conditions. The last aspect is security through law, which would be deployed in security and defense of the State, concretely and

institutionally considered, and personal security related to public order and criminal guarantees in relation to individuals.

As already pointed out above, legal certainty has even greater relevance in Constitutional Law, as a legitimate means of expropriating the assets of the individual to finance state activities that are carried out for the benefit of society. Knowability, reliability and predictability are, therefore, essential aspects in the field of taxation and their respect and valuation will distance any authoritarian adventure of the State.

In addition, security in law must exist in a society whose interpersonal and commercial relations are constantly changing. This has shown that the old conceptions and paradigms can no longer keep pace with social and economic relations, particularly those directly affected by the Progressive Economy we are experiencing.

Therefore, the following topics will address legal certainty in objective and subjective aspects, more specifically, in Tax Law and the impacts and difficulties of taxation in Tax Law.

### **3 Legal certainty as a pillar of tax law**

Once its importance for Law has been demonstrated, it is necessary to delve into the subject in a more specific way and examine legal certainty within the field of Constitutional Law.

As noted above, legal certainty becomes more relevant in cases where the State is empowered to restrict or appropriate the fundamental rights of liberty and property of its citizens. Thus, after the Legislative Law, the tax field is probably the legal field that most demands respect and the realization of security in legal relationships.

Tax legal security, as it is known today, is the result of a long process of social struggles as a form of resistance by individuals against the exaggerations promoted by a disproportionate, unpredictable and unreasonable taxation implemented by various governments throughout history.

Heleno Taveira Torres records well the evolution of the conception of legal certainty over time:

In the formation of the first constitutional states, the mere existence of a minimum of legality and the provision of administrative and judicial processes or procedures for the protection of rights already served to define legal certainty (i). Subsequently, the effects of the stability and preservation of subjective rights, legal positions or legal relationships were produced, generally confused with the acquired right, the perfect

legal act or *res judicata* (ii). At a later stage, security would become not only the certainty of the law, but also the guarantee of equality in the actions of the organs and authorities in accordance with the previously established legal procedures (iii). Secondly, the certainty of the law requires not only formal accessibility, but also the clarity of the normative texts (cognitive accessibility) (iv). Hence, efforts have continued to see legal certainty as the protection of the legal system itself and the expectations of legitimate expectations, although many of the above meanings remain incorporated into this new model of treatment (v). And so, preserving all these achievements, the legal certainty of the constitutionalism of the Democratic Rule of Law is assumed as the legal certainty of the principles, removing the notion of legal certainty from the equivalent of the mere protection of the violation of the peace, physical integrity, morality or property of people. (Torres, 2016, p. 29).

Based on this historical evolution, the legal certainty established in the Brazilian constitutional text, in particular in the limitations on the power to impose taxes contained in Articles 150 et seq., protects individuals and economic agents from any excessive advance by the State through tax impositions without prior provision and based on the financial needs of the State of the occasion. Legal certainty, in this sense, is essential for the existence of a stable and predictable social and economic environment where individuals can evolve, generating the prosperity of society.

Broadly speaking, tax legal certainty serves mainly to protect the confidence of the individual, as a taxpayer, in relation to the State. In addition, "legal certainty is the foundation of the legal system that, in tax matters, requires clarity, stability, reliability and predictability, based on respect, on the part of the legislator and the executor of the rules, for constitutional principles and the limits of the power to tax" (Martins, 2017, p. 155).

In this way, with the passage of time and as a requirement for the very materialization of the concept of legal certainty, principles such as legality, anteriority, non-retroactivity and isonomy have gained strength in Constitutional Law. It should be noted that the aforementioned principles are related to the guarantees of knowability, reliability, and calculability in favor of the subjects, mentioned in the previous item (Ávila, 2017, p. 51). It should be reiterated that these guarantees make legal certainty an unavoidable norm, of effectiveness of a structural condition in the legal system.

Thus, as we have seen, the tax system imposes the need for stability, clarity and predictability of the legal system for the citizen's own security. Needless to say, prior knowledge of the taxes that will be levied on their economic relations is fundamental for the individual and for the economy of a society itself.

Thus, due to the principle of tax legality, as a corollary of legal certainty, "the legislator, when formulating the law, must exhaustively and completely define the taxable situations, the

occurrence of which will be necessary and sufficient for the creation of a tax obligation, as well as the criteria for quantifying taxes" (Cabral, 2020, p. 148).

At this point, it is worth noting that the principle of legality goes beyond the common understanding that no legal person under public law can institute or increase taxes without a law that establishes it. The interpretation given to paragraph I of article 150 of the 1988 Constitution is broader and more incisive. The legislator, in the performance of his or her function, is expected to describe the elements necessary for taxation, as clearly and precisely as possible. Thus, the dimension of knowability of the principle of legal certainty is guaranteed.

Equally essential is the temporal aspect of the legal norm. In the construction of legal relationships, essential for the dynamics and evolution of society, the aspect of non-surprise is fundamental. The Brazilian legal system elevates to constitutional nature the prohibition in which the law infringes the acquired right, the perfect legal act and *res judicata*.

In the field of taxation, the requirement of precedence and non-retroactivity of the law has the function of providing greater legal certainty to the natural person, as a taxpayer. It is related to the need for the Law to be prospective. In this way, the possibility of planning the business with prior knowledge of the tax burden is protected.

To this end, the constitutional text provided in the paragraphs of paragraph III of its article 150 some rules of tax precedence, by means of which, in general, the law enacted at a given time may only give legal meaning to taxable events that occur in the year following its enactment and 90 days after its publication.

Like the concept of legal certainty, the principle of precedence in the Brazilian legal system has been evolving since the promulgation of the 1988 Charter in the search for effective calculability and predictability. This fact becomes evident when one observes that paragraph III of its article 150 has already been modified by two constitutional amendments.

Non-retroactivity also ensures that the dimension of reliability in the legal system is not frustrated in the future. Distrust in the stability of the legal system through the enactment of laws with retroactive effects can lead to the devaluation of the entire regulatory system, greatly impacting commercial and social relations.

Thus, "the principles of non-retroactivity and precedence of tax law are sentinels of the over-principles of legal certainty, not surprise and trust, which protect taxpayers in relation to the State and, precisely because they represent fundamental rights of citizens and of the administered, must be interpreted with observance of teleology, and these principles and rights must be endowed with the greatest possible effectiveness" (SARAIVA FILHO, 2020, p. 62).

Finally, the constitutional text also gave shelter to the principle of tax isonomy, another aspect of the super-principle of legal certainty. In this sense, tax equality consists of one of the limitations on the power to tax, provided for in paragraph II of Article 150 of the 1988 Constitution, to prohibit taxpayers who are in an equivalent situation from being treated unequally, and any distinction on the basis of their occupation is prohibited. whatever the legal denomination of the income, titles or rights.

Applied to economic activities, tax equality ensures that taxpayers in an equivalent situation have the same tax burden. In this way, it is guaranteed that commercial competition will be equal, without disproportionate privileges that favor a certain competitor or group, protecting confidence in the order through the calculation of business risks in a stable system.

It is worth concluding, from all of the above, that legal certainty is the true pillar of Constitutional Law. The aspects presented here play an essential role in the relationship between the E-State and Contribution, since, ensuring the legal-regulatory-tax stability achieved slowly and firmly in the past, they must point to and constitute the concrete and secure basis for the construction of new business models in the Era Digital. Indeed, "if in a given tax legal system there is a coalescence of guidelines with that of legality, equality, non-retroactivity, universality of jurisdiction, precedent, etc., we will say that it contains the super-principle of legal certainty in tax matters" (Carvalho, 2003, p. 180).

The so-called Era Digital poses the challenge to the Law of regulating in advance the new manifestations of wealth that are subject to taxation, as a way of guaranteeing legal certainty.

## **4 Taxation in the Digital Age and Tax Legal Security**

Law, in general, is facing an unprecedented challenge today. Social transformations and technological advances have reached an unimaginable speed, creating several situations for which the Law was not prepared. These developments have presented many difficulties for legal operators, who need to face new businesses and legal relationships for which, many times, there is no adequate legal provision.

The world economy naturally follows this movement and society is experiencing a new period in which old concepts such as territory and sovereignty have been questioned and resignified. The impact of these new social and economic paradigms also reaches the law, since it needs to provide adequate and rapid responses to new demands.

On this point, Luiz Guilherme de Medeiros Ferreira and Marcos Nóbrega state that:



The digitalisation of the economy largely involves the intangibility of new offers. In other words, what is being negotiated becomes much more abstract and difficult to understand and apprehend, due to the lack of the important physical aspect. A classic example of this difficulty of apprehension is cloud offerings. What was once a data processing activity, performed from a physical server, sold as a commodity and accounted for in companies' physical assets, over time became part of infrastructure *outsourcing* contracts that, although in the form of a service contract, could still be identified with a physically individualized server. (Ferreira; Nóbrega, 2020, p. 105).

In Private Law, where there is a greater autonomy of the will tempered by constitutional principles such as the social function of property and the dignity of the human person, since it is faced with new contractual forms unknown by the Civil Code, contemplated by extravagant legislation, which incessantly seeks to keep up with the new reality. And yet, without keeping pace with the extraordinary speed of new forms of social and economic interaction, legal texts become obsolete and gaps; causing a mismatch between Law and Economics.

A worse situation is observed in the branches of law that require greater certainty and predictability in relation to future events. They are those in which fundamental rights such as freedom and property are directly affected. Tax Law, in this sense, requires legislative anticipation that is currently more challenging.

Obviously, the main function of the tax is to finance the activities of the State. This is done through the prior legal qualification of hypotheses of incidence referring to future events that, as a general rule, represent a manifestation of wealth. Luhmann teaches that the tax, as a structural coupling between the economy and politics, requires an instrument of connection between the economic and political systems that balances the possibility of withdrawing, directly from the economy, the resources that finance political structures (Luhmann, 1990).

In addition to a coupling between the political and economic systems, the tax is also a connecting factor between these systems and the law. In this sense, the legal system plays an important role in harmonizing them. Hence the need for taxation to be duly ordered in constitutional and legal texts.

In fact, the Tax Authority and the new forms of negotiation have caused great difficulties for the tax field. Since the legislative process naturally cannot keep pace with the increasingly rapid and unprecedented changes in society, as questions have arisen more frequently. New legal transactions not provided for in the current regulations have been subject to taxation by the State, giving rise to various lawsuits filed by taxpayers.

As an example, and because it is an emblematic case, it is worth mentioning the judgment that took place in the Federal Supreme Court – STF of ADI No. 1945/MT. In short, the

aforementioned direct action of unconstitutionality had as its object a state regulation that established the ICMS tax on the granting of licenses or assignments of the right to use *software*.

Without going into the details of the trial and for the purposes of this article, it should be noted that the lawsuit was filed by a political party in January 1999, when a precautionary measure was dismissed. In this way, the state regulation was kept in force and the collection of ICMS by the State was allowed under the terms of the legislation subject to the action for control of constitutionality. Subsequently, more than 20 years after its filing and the rejection of the request for precautionary measures made therein, its judgment was concluded<sup>3</sup>, in order to accept the arguments of the lawsuit to, in short, reject the understanding that *the software* would be a commodity and reject its taxation by the ICMS.

It is easy to understand that in 1999 the use of *software* was not yet so widespread and diversified. On the other hand, at the time of the resolution of the judgment, the discussion raised in the ADI 1945/MT case was already outdated in the economic-technological field, and there were already other innovative tools on the market that emerged while the definition of that claim was still awaited.

It is notorious that industry, commerce and the provision of services have undergone relevant changes and the known models have been and continue to be greatly altered at a much faster speed than the legal systems tried to maintain some time ago. In the words of Klaus Schwab, "the scale and breadth of the current technological revolution will unfold in economic, social and cultural changes of such phenomenal proportions that it is almost impossible to predict them" (Schwab, 2016, p. 24).

In this order of ideas, Luiz Guilherme de Medeiros Ferreira and Marcos Nóbrega state that:

The current Brazilian tax system is based on the postulate of strict legality, or closed typicity as some prefer, and on the definition of competencies based on materialities. Such a system presupposes, in the context of the definition of constitutional taxing powers, clear boundaries between industry, commerce and services and, specifically with regard to services, regulatory exhaustiveness. What is observed in the digital economy is a very large gap between normative assumptions and business practice. The provisions of Articles 153, 155 and 156 of the Federal Constitution have lost their relevance to the business reality of the digital economy, as the new economy has no clear boundaries between industry, services and goods. (Ferreira; Nóbrega, 2020, p. 107)element.

It cannot be forgotten, as has been pointed out in the previous points, that legal certainty is the true pillar of Constitutional Law. In this case (Ávila, 2017, p. 51), it has the effectiveness

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<sup>3</sup> STF – ADI 1945/MS. Judgment available at: <http://portal.stf.jus.br/processos/downloadPeca.asp?id=15346473741&ext=.pdf>. Accessed on 18 feb. 2022. Pensar, Fortaleza, v. 28, n. 3, p. 1-16, jul./set. 2023

of a structural condition, which prevents its non-observance, ensuring the knowability, reliability and calculability of the Law in favor of taxpayers.

In this environment of great changes and advances promoted by Era Digital, the aspects of knowability and calculability are significantly affected. Knowability, as a prior guarantee of clarity and foresight, is directly affected in the new digital economy characterized by constant changes in the forms of communication, work, business, income generation, consumption and economic transactions.

The same can be observed with respect to the aspect of calculability, which consists of the predictability of the Law for the future. The predictability of new social and business interactions is a legislative challenge of the first order that, of course, cannot exhaust them. However, expectations that were previously considered legitimate and that often underlie the decisions that run a business, end up, in some cases, immersed in a swampy and uncertain terrain, ending up frustrated, which tinges the necessary legal certainty, especially with regard to taxation.

Returning to the aforementioned ADI 1945/MT judgment, it was said that the definition of the legal nature of *software* took 20 years to complete. Meanwhile, many commercial relationships related to this technology have suffered the consequences of the lack of definition. This uncertainty and legal uncertainty translate into an increase in business costs as a result of the lack of calculability of the operations carried out.

It is important to clarify that the reference to the significant period of time for the resolution of said lawsuit does not imply a criticism of the Judiciary. In fact, the latter cannot even act as a legislator in the regulation of new lawsuits, which increasingly requires the jurist to be creative in the solutions with existing legal tools.

The problem is bigger, it is systemic. The Legislative Branch, in its normative production, does not keep up with technological advances. On the other hand, demands arise from society that continually need to be regulated. Conflicts must be resolved. Rather than a satisfactory jurisdictional offer for conflicts, there is a need for a safe and predictable environment in which new businesses can be undertaken and economic and social development can be promoted.

In the case of ADI 1945/MT, the STF used the tool of modulating the effects of the judgment as a way to minimize the impacts of time<sup>4</sup> on the resolution of the issue, seeking to preserve a minimum of security for the relationships already established.

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<sup>4</sup>In this case, the aforementioned modulation was quite detailed due to the significant effects of the aforementioned judgment, as indicated below: Decision: In continuity with the judgment, the Court, by majority, modulated the effects of the decision, attributing to it *ex nunc* effectiveness, from the publication of the minutes of the judgment

In the context of Tax Law, legal certainty, represented by the principles of legality, prior, non-retroactivity and isonomy, addressed in the previous point, must be the subject of further reflection in the face of the emerging digital economy. If, on the one hand, in order to put these principles into practice, it would be necessary to anticipate all the transactions that would arise shortly after the issuance of the standard (which in the world economy stage is not feasible), on the other hand, its relativization would lead to a weakening of legal certainty, which would represent a real setback for the conceptual evolution described in the previous items. Shaking the pillar of tax legal certainty could serve to favour adventurous measures that violate the fundamental rights of citizens and the rule of law itself.

In fact, we are facing an arid and challenging problem that demands great efforts and studies to equalize it. As Celso de Barros Correia Neto, José Roberto R. Afonso and Luciano Felício Fuck well record:

The tax system also needs to change: adapting to the challenges imposed by the digital revolution. There are growing signs that many of today's taxes will soon become obsolete, given the dynamism of e-commerce and the new economy. Income, consumption and employment have been profoundly affected by today's new values, forms of business and work. The three pillars of taxation in the twentieth century have been shaken by the ongoing digital revolution (...)element. For the scenario that is being drawn, both nationally and internationally, it is difficult to know what the new taxes will be and what they will be like. What is already certain is that the current forms do not seem sufficient or adequate to face the new economic and social reality. There is a lot to change: concepts, theories, practices and legal structures." (Correia Neto; Afonso; Fuck, 2020, p. 42 and 43).

Adhering to this statement, it is also possible to foresee that the necessary security for the legal-tax order will experience strong tensions until the changes caused by the Legal-Tax

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on the merits in question to: a) to make it impossible to impose the undue payment of the ICMS levied on software transactions in favor of those who paid this tax, until the eve of the date of publication of the minutes of the judgment on the merits, prohibiting, in this case, the municipalities from collecting the ISS in relation to the same taxable events; b) prevent States from charging the ICMS in relation to taxable events that occurred up to the eve of the date of publication of the minutes of the judgment on the merits. The exceptions are (i) ongoing lawsuits, including recovery of improper payments and tax foreclosures in which the ICMS lien is discussed, and (ii) cases of proven double taxation, in which case the taxpayer will be entitled to recovery of undue ICMS. In turn, the ISS is taxed in the event of non-payment of the ICMS or the ISS in relation to taxable events that occurred up to the eve of the date of publication of the minutes of the judgment on the merits. Finally, it modulated the effects of the decision to also establish *ex nunc effectiveness*, as of the date of publication of the minutes of the judgment on the merits, with regard to the declaration of unconstitutionality of the expressions "adhesion, access, availability, activation, qualification, signature" and "even if they are preparatory", contained in Article 2, paragraph 2, I, of Law No. 7.098/1998, as amended by Law No. 9.226/2009; and, with regard to the expression "subject to the other criteria determined by the regulations", present in Article 13, paragraph 4, of Law No. 7.098/1998, which had already been suspended in the judgment of the precautionary measure (session of 19/4/1999), the declaration of unconstitutionality must have extinguishing effects, in the terms of the vote of Judge Dias Toffoli, rapporteur of the judgment, with the defeat of Judge Marco Aurélio, who did not modulate the effects of the decision. Presided over by Judge Luiz Fux. Plenary, 24/02/2021 (Session held by videoconference – Resolution 672/2020/STF). Available in: <http://portal.stf.jus.br/processos/downloadTexto.asp?id=5276591&ext=RTF>. Accessed on 18/02/2022.

Regime are completely assimilated, absorbed and balanced by society and by the tools of the Law.

## 5 Challenges and conclusions

Already rooted in the heart of society and even presenting itself as a conditioning factor for choices and behaviors, Era Ditaís already a reality. The new generations no longer know how to behave according to the standards established a few decades ago. The gears of Era Digital have destroyed the old models, and it is necessary to look to the future and adapt to changes.

With a single "click" connections and negotiations are formed far away and anywhere on the planet, just because of the presence of the internet. On the other hand, such a simple form of social connection represents a tormenting legislative and legal challenge.

If, on the one hand, the new forms of social interaction and negotiation in fact need to evolve - and any regression in this area is no longer accepted - on the other hand, these same negotiations must be based on secure environments, which offer knowability, reliability and calculability of the law in favour of the social partners.

Regardless of the discussion about whether legal certainty consists of a state of mind or in the certainty of each individual about what was or was not determined by the text of the law, the truth is that it requires positivity of the Law, to impose an unconditional validity of the norm, and its observance is mandatory. regardless of whether it is fair or not

In this scenario of apparent conflict between the speed and agility of social transformations and the stability necessary for the development and maintenance of businesses, the role of legal certainty as a factor in promoting this necessary stability is far from obsolete.

Although there has already been a lot of debate on the subject, which gives the impression that it is an outdated topic, we are in the middle of Era Dital, facing new discussions in which legal certainty is once again the protagonist.

In fact, in the tax field, this type of discussion is more relevant, since, as we have seen, this area is one of the most sensitive in terms of the protection of the legitimate expectations created and the stability of the legal system itself.

In this sense, security in law must exist in a society whose interpersonal and commercial relations are constantly changing.

If, on the one hand, the old conceptions and paradigms no longer keep up with the speed of social and economic relations, in particular those directly impacted by the Intellectual Reality that we experience, on the other hand, legal certainty is essential for the existence of a stable and predictable social and economic environment where individuals can evolve, generating the prosperity of society.

We have seen that, during the historical evolution of the theory of taxation, principles such as legality, anteriority, non-retroactivity and isonomy have been gaining strength, precisely because they are cases of legal certainty. These principles are related, as can be seen, to the guarantees of knowability, reliability and calculability in favor of citizens, and characterize legal certainty as an inescapable norm, of effectiveness of a structural condition in the legal system.

Therefore, legal certainty is the true pillar of Labour Law. Its aspects, presented in this study, play an essential role in the E-State relationship, since, by guaranteeing legal-regulatory-tax stability, they constitute the concrete and secure basis for the construction of new business models in the Region.

Thus, in the face of the new reality of trade and the new forms of negotiation, great challenges arise. The apparent dichotomy of "evolution versus security" must be resolved for the good of society itself and economic development; Since the legislative process naturally cannot keep up with the increasingly rapid and unprecedented changes in society, questions have arisen more frequently. New legal transactions not provided for in the current regulations have been subject to taxation by the State, giving rise to various lawsuits filed by taxpayers.

Industry, commerce and the provision of services have undergone significant changes and the known models have been and continue to be greatly altered at a much faster speed than the legal systems were trying to follow some time ago.

In this scenario, the speed and even creativity of legislative production have proven to be insufficient to meet the growing demand for agile and satisfactory responses, which ends up being the responsibility of the Judiciary, requiring the jurist to be creative in the solutions. We cannot lose sight of the structural pillar that is legal certainty, under penalty of its relativization. Shaking the pillar of tax legal certainty could serve to favour adventurous measures that violate the fundamental rights of citizens and the rule of law itself.

The natural conclusion that can be reached is that the new paradigms that have emerged in Tax Law require solutions that go beyond the principles of legality, precedence and isonomy, the basis of tax legal certainty. Thus, until the changes brought about by Tax Law

are completely assimilated, absorbed and balanced by society and by the tools of law, the security necessary for the legal-tax order will experience strong tensions. However, historical conquests cannot be renounced under the pretext of the search for evolution, on pain of turning this (evolution) against society itself, which represents a setback in the protection of fundamental rights.

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