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The Advent of Progressive ITCMD as a Limitation to the Effectiveness of the Principle of Contributive Capacity

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Abstract

Constitutional Amendment No. 132/2023 in Brazil added item VI to §1 of Art. 155 of the Federal Constitution, establishing that the ITCMD will be progressive based on the value of the share, legacy or donation. The progressivity of the ITCMD had already been recognized by the STF in RE No. 562.045/RS, even without express provision in the Constitution. The decision was in line with the STF's jurisprudence, which, after EC 29/2000, admitted the progressivity of real taxes such as IPTU, adjusting the rates according to the value of the property, its location and use. The enactment of EC 132/2023 raises doubts about the need to regulate progressive rates for real taxes. If the STF had already recognized this progressivity after EC 29/2000, its enactment would seem unnecessary. On the other hand, EC 132/2023 may signal the need for a specific provision to reaffirm constitutionality, in line with the STF's understanding prior to EC 29/2000. It seems to us that the first hypothesis is in line with the Brazilian legal system, since progressivity is an essential mechanism for realizing the principle of ability to pay. In the end, EC 132/2023 came to restrict the dimension of the ability to pay, establishing only the estate and inheritance as criteria for limiting the ability to pay.

Keywords

Brazil, Constitutional Amendment No. 132/2023, ITCMD, Progressivity, Constitutional Amendment 29/2000, Real Taxes

1. Introduction

Constitutional Amendment No. 132, dated December 20, 2023 (“EC 132/2023”), through its Article 1, added item VI to §1 of Article 155 of the Federal Constitu-

tion ("CF"), establishing that the Tax on Transfer Causa Mortis and Donation ("ITCMD") will be progressive based on the value of the share, legacy, or donation.[1]

At first, the progressive nature of ITCMD rates had already been accepted by the Federal Supreme Court (STF) through Extraordinary Appeal (RE) No. 562.045/RS[2], even without express provision in the Constitution.

The decision was in line with the change in the jurisprudence of the STF, which, by broadening the interpretation of Article 145, §1 of the Federal Constitution, admitted the constitutionality of progressive tax rates even with real taxes, recognizing the progressivity of the rates of the Urban Property Tax ("IPTU") after Constitutional Amendment No. 29, of September 13, 2000 ("EC 29/2000")[3].

EC 29/2000 amended the first paragraph of Article 156 of the Federal Constitution to allow the IPTU to be progressive based on the value of the property and to have different rates according to the location and use of the property[4].

Prior to its publication, the STF had consolidated the understanding[5] that, because it is a real tax, the rule of progressivity, arising from the principle of contributory capacity, did not apply to IPTU.

However, after the enactment of EC 29/2000, the Constitutional Court changed its jurisprudence[6], expanding the interpretation of Article 145, §1, of the Federal Constitution, allowing the constitutionality of progressive tax rates to be recognized, even in relation to real taxes.

In any case, the enactment of EC 132/2023 raises some questions regarding the constitutionality of progressive tax rates applied to real taxes. First, the indispensability of EC 132/2023 is questioned, since, if the progressivity of tax rates was already allowed for real taxes, without the need for a constitutional law providing for it—according to the understanding of the STF—its enactment was not necessary.

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[1]Art. 155 It is incumbent upon the States and the Federal District to levy taxes on: I—transfer causa mortis and donation of any assets or rights;
(...) 1 The tax provided for in item I:
(...) VI—shall be progressive based on the value of the share, bequest, or donation.

[2]Extraordinary Appeal. Constitutional. Tax. State Law: Progressive Tax Rate on Transfer Causa Mortis and Donation of Property and Rights. Constitutionality. Art. 145, § 1, of the Constitution of the Republic. Principle of Material Tax Equality. Observance of Taxpaying Capacity. Extraordinary Appeal Granted (STF, RE 562.045/RS, Full Court, j. 06/02/2013, red. Min. Carmén Lúcia).

[3]"Similarly, this Court has come to accept the progressive nature of the ITCMD tax rate, which is a real tax under the jurisdiction of the states, as the constitutional realization of material tax equality would be at stake." (STF, RE 602.347/MG, rel. Min. Edson Fachin, Full Court, j. 11/04/2015).

[4]Art.156. Municipalities are responsible for levying taxes on:
I—urban real estate and land;
§ 1 Without prejudice to the progressivity over time referred to in art. 182, § 4, item II, the tax provided for in item I may:
I—be progressive based on the value of the property; and
II—have different rates according to the location and use of the property.

[5]Precedent 668: Municipal laws that established progressive rates for IPTU prior to Constitutional Amendment 29/2000 are unconstitutional, unless intended to ensure compliance with the social function of urban property.

[6]STF, RE 423.768/SP, rel. Min. Marco Aurélio, Full Court, j. 12/01/2010; STF, ADI 2.732, Rel. Min. Dias Toffoli, Full Court, j. 10/07/2015.

On the other hand, if the derived constituent was obliged to enact a Constitutional Amendment to regulate the matter, even with constitutionality defined by the STF, it means that it made explicit the need for a specific provision to admit the progressivity of real taxes, ratifying the Supreme Court's position in relation to IPTU, before EC 29/2000.

It seems to us that the first hypothesis is more in line with the Brazilian legal system, since the mechanism of progressivity is intrinsic to the implementation of the principle of contributive capacity, provided for since the Federal Constitution of 1988.

In this sense, progressivity is the practical way to implement the principle of contributory capacity, since it determines through brackets how much the taxpayer must pay in taxes, adjusting the payment to the reality of taxpayer groups by measurement criteria.

In conclusion, EC 132/2023 may have been created with the aim of restricting certain aspects, such as the definition of share, inheritance, and others, but without affecting the taxpayer's assets. Its main intention would not be to restrict the totality of the individual's assets, but rather to focus on specific issues related to inheritance and the division of assets.

In this sense, EC 132 is not redundant, nor does it contradict existing case law. Instead, it limits the application of progressivity, focusing on the analysis of the taxpayer's ability to pay. This means that the proposal seeks to establish a more specific approach to taxation, without invalidating already established legal principles.

The progressivity of the ITCMD, reflected in the adoption of different rates and calculation bases depending on the value of the share, legacy, or donation, illustrates how the tax system incorporates the principle of subjective tax capacity. In other words, the taxpayer's obligation is calibrated not only by the mere fact of receiving assets but also by the quantitative dimension of what is received, ensuring that those with greater inherited or donated wealth contribute proportionally more.

This demonstrates that the text of EC 132/2023 deliberately emphasized a quantitative analysis of the taxpayer's assets. By quantitative analysis, one refers to the measurement and assessment of objective, numerical data—such as monetary values, percentages, and tax brackets—that allow the tax system to set progressive rates in line with the value of each share or donation. In contrast, a qualitative analysis focuses on the broader, non-numerical aspects of taxation, such as examining the estate as an indivisible whole, considering legal principles like fairness, equality, or coherence, rather than isolating and measuring the value of specific assets. In this sense, EC 132/2023 privileges the numerical, segmented approach (quantitative) instead of the holistic and principle-driven perspective (qualitative).

2. Methodological Procedures

To prepare this scientific article, we used a qualitative method based on an exten-

sive interpretation of the principles of contributory capacity and progressivity, applying them to the case of ITCMD progressivity after Constitutional Amendment 132/2023.

The starting point was the post-positivist theoretical-methodological assumption of principle, that is, that it is a mandate for optimization, applicable to the greatest extent possible, limited only by factual and legal possibilities: principles and opposing rules.

The type of research involved the "Case Study" method, in which the research focuses on the study of a particular case, considered representative of a set of similar cases, as it is significantly representative.

This is because there was an analysis of judgments on the subject, more specifically extraordinary appeals from the STF; interpretation of EC 132/20230 and articles of the CF; reading of the explanatory memorandum of EC 29/2000; and study of doctrines on the progressivity of the ITCMD and the principle of contributory capacity.

Finally, the bibliographic research method was used, which utilizes data or theoretical categories already worked on by other researchers and duly recorded, resulting from previous research, in documents such as books, articles, theses, etc. The texts become sources for the topics to be researched.

This method was used to research the principle of contributory capacity from the perspective of progressivity, analyzing its interdependence in such a way as to enable the application of progressivity without express provision, only with the guideline of the principle of contributory capacity.

With this application, we sought to demonstrate the unnecessary nature of Constitutional Amendment 132/2023 with regard to the provision of progressive rates for the ITCMD. The enactment of Constitutional Amendment 132/2023 on this matter raised questions about the constitutionality of progressive rates applied to real estate taxes.

Thus, the methods employed sought to support the article's conclusion that progressivity is inherent to the application of the principle of contributive capacity, already guaranteed by the Federal Constitution of 1988.

3. Constitutional Amendment No. 132/2023 and the Jurisprudence of the Supreme Federal Court

The progressivity of ITCMD rates was accepted by the STF through RE 562.045/RS[7]. The ruling established that progressivity could be applied to taxes of a real nature, even if there was no express constitutional provision, and that applying different rates based on the value of the assets could violate the principle of tax equality.

Thus, the Constitutional Court considered the progressive ITCMD tax rate sys-

[7]Extraordinary Appeal. Constitutional. Tax. State Law: Progressive Tax Rate On Transfer Causa Mortis and Donation of Property and Rights. Constitutionality. Art. 145, § 1, of the Constitution of the Republic. Principle of Material Tax Equality. Observance of Taxpaying Capacity. Extraordinary Appeal Granted (STF, RE 562.045/RS, Full Court, j. 06/02/2013, red. Min. Carmén Lúcia).

tem, which was established by State Law No. 8,821/1989 of Rio Grande do Sul, to be constitutional.

Although the understanding regarding constitutionality was established on February 6, 2013, Constitutional Amendment 132/2023 was published on December 21, 2023, which, among other provisions promoting the so-called "Tax Reform," included item VI to §1 of Art. 155, establishing the progressivity of ITCMD rates based on the value of the share, bequest, or donation:

> Art. 155. ....
> § 1˚...
> ....
> ....
> VI—shall be progressive based on the value of the share, bequest, or donation;

A Constitutional Amendment is a type of legislation that aims to modify the text of the Federal Constitution, whether to update, remove, or add provisions, in accordance with the country's political, social, and economic needs and changes. By its very nature, a Constitutional Amendment represents a mechanism for altering the constitutional pact, allowing adjustments to the Constitution without the need to draft a new one.

The process of proposing an amendment is restricted to certain legitimate parties, precisely because of its relevance and impact on the legal system. Thus, the initiative may be taken by the President of the Republic, by at least one-third of the members of the Chamber of Deputies or the Federal Senate, or by more than half of the Legislative Assemblies of the states of the federation, provided that each of them expresses this position by a relative majority of its members. This requirement seeks to ensure that the proposal already has broad political and federal representation.

This strict and qualified procedure aims to preserve the stability and rigidity of the Constitution, preventing changes from being made hastily or due to circumstantial and temporary interests. Thus, Constitutional Amendments play a fundamental role in adapting the legal system, while ensuring legal certainty and respect for the sovereign will expressed in the original constitutional text.

As José Afonso da Silva (Silva, 2019: p. 67) teaches

> "Ultimately, however, the agent, or subject of the reform, is the original constituent power, which, through this method, acts indirectly, by granting authority to a constituted body to make changes to the Constitution in its place, as required by reality. In this sense, it is worth remembering, with Prof. Manoel Gonçalves Ferreira Filho, that the rigid Constitution is intended to modify itself by a method provided for and appropriate therein; there is no constituent power of revision in its terminology. Here, there is power inherent in the rigid Constitution that is intended to modify that Constitution according to what it establishes. In fact, the constituent power of revision ultimately aims to allow the Constitution to be changed, adapted to new needs, new im-

pulses, new forces, without resorting to revolution, without resorting to the original constituent power."

Although at first glance, it appears that Constitutional Amendment 132/2023 merely established an understanding already established by the Constitutional Court, its enactment raises several questions regarding the understanding of the progressivity of real taxes.

First, if progressivity was already recognized for real taxes, according to the STF's understanding expressed more than 10 years ago, what would be the reason for enacting a constitutional amendment to regulate the issue?

On the other hand, if the derived constituent recognized the need for a specific provision to formalize the admission of progressivity to real taxes, even with constitutionality already recognized by the Judiciary, would that mean that the enactment of EC 132/2023 was essential?

The discussion is aggravated by the fact that the STF's previous understanding, when discussing progressivity applied to the IPTU, was that a previous law would be necessary to admit progressivity to real taxes, as will be explained in the following topic.

This, incidentally, was the understanding given by Minister Ricardo Lewandowski, rapporteur of the judgment and defeated by the other Ministers[8]:

> "At this point, one might ask: Is progressivity, as a form of tax grading, prohibited for real taxes?
> The answer is no, but with some caveats. This is because, in the case of real taxes, progressivity can only be instituted when there is express authorization in the constitutional text. And even in these cases, it is only allowed to give effect to the extra-fiscal effects desired by the constituent, disregarding the economic capacity of the taxpayer."[9]

Thus, the enactment of EC 132/2023 could indirectly ratify the previous understanding of the Federal Supreme Court (with regard to IPTU), altering the understanding set forth in RE 562.045/RS.

Hence, it is demonstrated that EC 132 was introduced with the purpose of narrowing the scope of taxation, particularly regarding issues such as the definition of inheritance quotas, the partition of assets, and related matters, without extending its reach to the taxpayer's overall estate. Rather than targeting the individual's total patrimony, the amendment directs its focus toward more specific regulatory limits, concentrating on what is pertinent in the sphere of inheritance and its distribution. In this sense, it operates as a mechanism aimed at delineating certain tax aspects while avoiding interference with the entirety of an individual's wealth, as would occur under broader taxation schemes.

Furthermore, EC 132 cannot be understood as a redundant provision or as a

[8]together with Minister Marco Aurélio (STF, RE 562.045/RS, Full Court, j. 06/02/2013, red. Min. Carmén Lúcia, p. 81).

[9]STF, RE 562.045/RS, Tribunal Pleno, j. 06/02/2013, red. Min. Carmén Lúcia, pp. 20-21.

confrontation with the consolidated jurisprudence on the matter. Instead, it institutes a form of restriction framed within the principle of progressivity. That is, rather than enabling a broad assessment of the taxpayer's overall ability to pay, the amendment circumscribes the application of progressive taxation to more specific parameters. In doing so, it creates a regulatory path that safeguards fundamental legal principles while refining the application of tax rates in a more precise manner, seeking to prevent excessive burdens on taxpayers' assets without disregarding their contributive capacity.

4. Constitutional Amendment No. 29/2000 and the Jurisprudence of the Supreme Federal Court

Constitutional Amendment 29/2000 amended Articles 34, 35, 156, 160, 167, and 198 of the Federal Constitution and added an article to the Transitional Constitutional Provisions Act to ensure minimum resources for the financing of public health actions and services.

Without prejudice to the other amendments that the legal provision sought to implement, of particular interest is the amendment that its third article brought to Article 156, paragraph one, of the Federal Constitution. It was written as follows:

> Article 3. Paragraph 1 of Article 156 of the Federal Constitution shall now read as follows:
>
> "Art. 156"
>
> "§ 1 Without prejudice to the progressivity over time referred to in Article 182, § 4, item II, the tax provided for in item I may: "(NR)
>
> "I—be progressive based on the value of the property; and" (AC)*
>
> "II—have different rates according to the location and use of the property." (AC)
>
> "............................."

As a result, Constitutional Amendment 29/2000 amended the first paragraph of Article 156 of the Federal Constitution, allowing the IPTU to be progressive based on the value of the property and to have different rates depending on the location and use of the property.

Due to the lack of further explanation regarding the legislator's intention in specifically adding mention of the progressivity mechanism to the IPTU, the enactment of this normative instrument led to several questions within the legal community, mainly regarding the application of the IPTU progressivity mechanism.

Based on these questions, the matter was referred to the Federal Supreme Court, which, in turn, issued Precedent 668[10], rendering unconstitutional any municipal law establishing progressive rates for property tax (IPTU) prior to Constitutional

[10]Summary 668 Municipal laws that established progressive rates for property tax (IPTU) prior to Constitutional Amendment 29/2000 are unconstitutional, unless intended to ensure compliance with the social function of urban property.

Amendment 29/2000.

The central argument for such an institution would be the incompatibility of progressivity, based on the taxpayer's economic capacity, with the real nature of the IPTU, since real taxes do not consider the subjective characteristics of the taxpayer for their application, unlike personal taxes[11].

As a result, the Federal Supreme Court ruled that the most appropriate resolution for the case would be to maintain the tax liability, reducing the impact on the taxpayer's assets to a minimum, i.e., applying the minimum rate as provided for in the tax law.

The solution would be justified because the IPTU charged by the municipal entity would not be unconstitutional, since the rate adopted would be proportional to the variation in the calculation basis. This was the opinion of the reporting judge, Justice Edson Fachin:

> "Therefore, the most appropriate solution to the controversy would be to maintain the enforceability of the tax while reducing the burden on the taxpayer's assets to a minimum, that is, by adopting the minimum rate as a requirement of the tax law. This is because the IPTU charged by the Municipality would not be unconstitutional, as the rate would become proportional to the variation in the calculation basis."[12]
>
> (...)
>
> "In summary, I believe that establishing the enforceability of IPTU at the minimum rate provided for by law, referring to the period prior to EC 29/2000, even if the progressivity of the rates has been declared unconstitutional by the Court of Justice, is the only possible solution that reconciles the tax jurisdiction of municipalities and the least burdensome tax possible for the taxpayer, all without incurring unconstitutionality, since the IPTU would be charged proportionally."[13]

However, after Constitutional Amendment 29/2000, the jurisprudence[14] of the Federal Supreme Court began to admit the progressivity of IPTU rates, since the derived constitution expressly admitted them:

> "Constitutional Amendment No. 29, as already noted, brought about a substantial change, removing the premises that led this Court to consider the

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[11]"In this regard, it should be noted that the aforementioned case law was based on the following reasons: (i) incompatibility of the progressivity resulting from the taxpayer's economic capacity with the real nature of the IPTU;" (STF, RE 602.347/MG, rel. Min. Edson Fachin, Full Court, j. 11/04/2015, p. 7).

[12]STF, RE 602.347/MG, rapporteur Minister Edson Fachin, P, j. 11-4-2015, DJE 67 of 4-12-2016, Theme 226, p. 13. Available at: https://portal.stf.jus.br/processos/downloadPeca.asp?id=309151967&ext=.pdf.

[13]STF, RE 602.347/MG, rapporteur Minister Edson Fachin, P, j. 11-4-2015, DJE 67 of 4-12-2016, Theme 226, p. 15. Available at: https://portal.stf.jus.br/processos/downloadPeca.asp?id=309151967&ext=.pdf.

[14]STF, RE 423.768/SP, rel. Min. Marco Aurélio, Full Court, j. 12/01/2010; STF, ADI 2.732, Rel. Min. Dias Toffoli, Full Court, j. 10/07/2015.

progressivity of the IPTU (property tax) to be inappropriate."[15]

Furthermore, the Court ruled that this provision would not violate entrenched clauses, since the constitutional text already addressed tax progressivity and the taxpayer's economic capacity:

> "However, Constitutional Amendment No. 29/2000 did not remove any individual rights or guarantees. It did not do so because the original text of the Constitution already dealt with the progressivity of taxes and consideration of the taxpayer's economic capacity, and therefore did not introduce any innovation that would remove something that could be considered part of the patrimony.
> (...)
> In summary, these data did not imply the removal of what can be considered an entrenched clause, but simply gave real meaning to what was previously provided for regarding the grading of taxes."[16]

This jurisprudential inconsistency, by admitting, on the one hand, the progressivity of IPTU rates only after express manifestation by the derived constituent, and, on the other hand, admitting the progressivity of ITCMD rates without any statement by the constituent legislator at the time, even though both are real taxes, results in today's doubt with EC 132/2023.

If a constitutional amendment was necessary for the progressivity of real taxes to be admitted, as stated in the judgments concerning EC 29/2000 in relation to IPTU, the progressivity of ITCMD could not be admitted in 2013.

On the other hand, if the progressivity of the tax was admissible from the outset, due to the constitutionality of the progressivity of the rates, in accordance with the principle of contributory capacity, EC 132/2023, with regard to the ITCMD, was unnecessary.

It seems to us that the enactment of EC 132/2023 is unnecessary, since, as Eros Grau[17] argued in RE 562.045/RS, all taxes, regardless of their nature, must be graded according to contributory capacity, and progressivity is not prohibited for real taxes.

Although some could counterargument that EC 132/2023 provides legal certainty, preempting potential future shifts in judicial interpretation, given the STF's history of changing its position on the progressivity of real taxes like the IPTU, it is our understanding that the constitutional amendment appears unnecessary.

This position will become clearer once it is demonstrated how progressivity is a tool for achieving contributory capacity, applied to all taxes without distinction, as discussed in the following topic.

Nevertheless, independent of the conclusions to be subsequently outlined, it is evident that EC 132 cannot be understood as a redundant measure or as a contra-

[15]STF, RE 423.768/SP, rel. Min. Marco Aurélio, Full Court, j. 12/01/2010, p. 8.
[16]STF, RE 423.768/SP, rel. Min. Marco Aurélio, Full Court, j. 12/01/2010, p. 9 and p. 10.
[17]STF, RE 562.045/RS, Full Court, j. 06/02/2013, red. Min. Carmén Lúcia, p. 30.

diction to established jurisprudence on the matter. On the contrary, its function is to establish restrictions within the framework of the principle of progressivity. Thus, instead of allowing an extensive assessment of the taxpayer's ability to pay, the amendment narrows this examination to more precise and delimited terms. In doing so, it proposes a form of regulation that, while safeguarding fundamental legal principles, adjusts the application of tax rates in a more targeted manner, seeking to prevent excessive burdens on property without disregarding the taxpayer's economic capacity to contribute.

5. The Application of the Principle of Contributive Capacity and Progressivity to Real Taxes

According to Humberto Ávila, principles are defined as finalistic norms, whose application necessarily requires an analysis of the state of affairs to be promoted by their application and their effect when applied (Ávila, 2006: p. 70):

> "The principles are immediately finalistic norms, primarily prospective and intended to be complementary and partial, whose application requires an assessment of the correlation between the state of affairs to be promoted and the effects resulting from the conduct deemed necessary for its promotion.".

Thus, principles are intended to provide practical guidance, that is, a directive function for determining conduct in order to achieve a desired outcome. That is why it is said that principles establish an ideal state of affairs to be achieved, as a general way of framing various outcomes within a goal.

For this reason, they differ from the values (Ávila, 2006: p. 72):

> "It is clear that principles, although related to values, are not to be confused with them. Principles relate to values insofar as the establishment of ends implies a positive qualification of a state of affairs that one wishes to promote. However, principles differ from values because, while principles are situated on the deontological plane and, consequently, establish the obligation to adopt behaviors necessary for the gradual promotion of a state of affairs, values are situated on the axiological or merely teleological plane and, therefore, only attribute a positive quality to a given element.".

In any case, it is clear that, within the conceptualization of principles, knowing which situations constitute the ideal state of affairs to be sought and which behaviors are necessary for its realization are the key points for defining each constitutional principle.

In this sense, the principle of contributory capacity, established by Article 145, paragraph 1, of the Federal Constitution[18], is one that advocates the idea that each taxpayer is taxed according to their contributory capacity, that is, according to

[18]§1 Whenever possible, taxes shall be personal in nature and shall be graded according to the taxpayer's economic capacity. The tax administration shall be empowered, especially in order to achieve these objectives, to identify, with due regard for individual rights and in accordance with the law, the taxpayer's assets, income, and economic activities.

their ability to make the contribution. In this sense, each taxpayer bears the highest tax burden the greater their ability to bear that burden (Conti, 2000: p. 29).

With this, it is possible to denote that there is an implicit notion of legal sacrifice, that is, every tax payment is a sacrifice, and, therefore, the tax must be paid in a manner that ensures an equal sacrifice for each taxpayer, that is, proportionally.

Furthermore, the principle is closely linked to the principle of equality, in its positive dimension. In the words of Elizabeth Nazar Carrazza (Carrazza, 2000: p. 57):

> "Therefore, differential treatment of individuals is authorized, based, once again, on their economic capacity. The principle of contributory capacity is 'the tax expression (in terms of the type of tax) of the requirements of the general principle of equality enshrined in Article 5, caput and its item I.'"

For this reason, Renato Lopes Becho begins his discussion of the principle of contributory capacity with the principle of equality (Becho, 2015: p. 380), explaining that Celso de Bastos treated the principle of equality and the principle of contributory capacity as if they were practically one and the same (Becho, 2015: p. 380).

And Roque Antonio Carrazza (Carrazza, 2025: p. 88/89), corroborating with the authors, especially Renato Lopes Becho, states:

> "We would add that the principle of contributory capacity is rooted in the principle of equality and helps to realize republican ideals in the field of taxation. Indeed, it is fair and legal that those who, in economic terms, have a lot should pay proportionally more tax than those who have little. Those who have greater wealth should, proportionally, pay more tax than those who have less wealth. In other words, they should contribute more to the maintenance of public affairs. People, therefore, should pay taxes in proportion to their assets, that is, their wealth indices.
>
> In addition, the interpretation of tax rules that aim to financially burden taxpayers must be done in perfect harmony with the principles of contributory capacity and equality. This is what Humberto Ávila rightly emphasizes, verbis: "Tax rules that aim to describe individual tax purposes (Fiskalzwecknorm) or collection or financial rules (Steuerzwecknorm) must be evaluated according to a parameter of justice—the ability to pay. For the interpretation of these tax rules, the purpose—obtaining revenue—is not adequate, because it cannot clarify why a particular provision was configured in this or that way. The pursuit of this objective would lead to an even greater expansion of tax obligations. Therefore, these rules must be measured by the parameter of equality."
>
> We insist that the principle of contributory capacity, closely linked to the principle of equality, is one of the most effective mechanisms for achieving the much-desired tax justice in tax matters. In short, it is this principle that

brings about tax equality and tax justice in the field of taxation."

Applying this to tax law, we can say that taxes should be graded according to the taxpayer's economic capacity, which imposes discrimination in terms of the requirement and quantification of the type of tax referred to (Rohenkohl, 2006).

The way the principle of contributory capacity is described in the Federal Constitution raises a problem. According to this principle, taxes must be personal in nature when they are assessed (Article 145, paragraph 1, Federal Constitution). However, legal norms are characterized by their generality. And, since it is impossible to enact specific laws to address each individual case, assessing, on a case-by-case basis, each person's ability to contribute to the public coffers, although ideally convenient, is impractical (Carrazza, 2000: p. 50).

And, since it is impossible to enact specific laws to address each individual case, the most satisfactory alternative found by tax legislators was to create a common denominator to guide the enactment of laws: progressivity.

In this regard, Elizabeth Nazar Carrazza (Carrazza, 2000: p. 58) states:

> "It is therefore undeniable that it is logically impossible to abandon progressive taxation in order to comply with the constitutional principles of equality and respect for economic capacity."

Thus, it can be inferred that the mechanism of progressivity is intrinsic to the principle of contributory capacity, and is a prerequisite for its implementation, given the problem of personal characterization of taxes encountered by tax legislators.

In this regard, Misabel Derzi (Derzi, 1998, RDT, vol. 15/16: p. 176) reiterates that, by virtue of the principle of equality, taxes must be quantified according to the taxpayer's ability to pay, and for this reason, there is a need for diversification of tax rates (positive side of equality—duty to distinguish inequalities) and identical taxation of those with equal contributory capacity (negative side of the principle of equality—duty not to discriminate).

Thus, Elizabeth Nazar Carrazza (Carrazza, 2000: p. 64) states that

> "Understand, therefore, that progressive tax rates are essential in order to comply with the principle of contributory capacity."

In this regard, Roque Antonio Carrazza (Carrazza, 2025: p. 88) corroborates the idea:

> "Indeed, people must pay taxes so that their fundamental rights, as well as those of their economic dependents, to food, housing, clothing, education, culture, leisure, and so on, are not compromised. Each taxpayer must, as far as possible, pay taxes according to their respective ability to pay (Adam Smith)."

For this very reason, Minister Ricardo Lewandowski, in the aforementioned judgment of RE 562.045/RS, ruled that

> "The essential function of progressivity is to give concrete expression to the

principle of contributory capacity in order to promote social justice in tax matters, serving as an important instrument for the redistribution of wealth."[19]

Thus, having demonstrated that the principle of contributive capacity already presupposes, as a mechanism for its existence, the application of progressivity, it can be said that, regardless of other constitutional provisions, the existence of this constitutional dictate already authorizes the tax legislator to apply progressivity to the taxes under his jurisdiction.

In this regard, Elizabeth Nazar Carrazza (Carrazza, 2000: p. 55) states that

"The recipient of the principle of contributive capacity is, therefore, first and foremost, the tax legislator itself. The principle of contributive capacity is yet another constitutional limitation on the power to tax established by the Federal Constitution."

It should be added that, rather than a limitation, the principle of contributory capacity becomes a legal duty for legislators, who must apply it to the greatest extent possible, as a mandate for optimization (Alexy, 2008).

In this sense, it should be noted that the application of progressive taxation requires caution to avoid distortions in the tax system and ensure a fair distribution of the tax burden. Progressivity, as a taxation mechanism, seeks to ensure greater tax fairness by placing a greater burden on those with greater economic capacity. However, its application must respect constitutional principles, such as equality and contributory capacity, to avoid excesses that could lead to counterproductive effects.

As a result, poorly planned progressive taxation can create unnecessary complexities, reduce the efficiency of the tax system, and even discourage economic activity. There must be a balance between progressivity and proportionality, bearing in mind that the main objective is to ensure that taxes are distributed equitably, but without compromising economic dynamism and the functionality of the tax system.

Thus, although progressivity plays an important role in the redistribution of the tax burden, its effectiveness depends on well-defined public policies and a tax system that is consistent and aligned with constitutional principles.

In any case, with progressivity established as a mechanism of the tax system that establishes that the tax burden should increase in proportion to the taxpayer's ability to pay, we offer some considerations on actual taxes.

The ITCMD is a state tax that must be paid by anyone who receives assets or rights through inheritance or donation. The tax is levied on the transfer of any asset or right obtained through legitimate or testamentary succession, including provisional succession or donation[20].

Because it focuses on property rights, the ITCMD's contributory capacity is objective in nature, that is, it is objectively expressed in the wealth of the estate and

[19]STF, RE 562.045/RS, Tribunal Pleno, j. 06/02/2013, red. Min. Carmén Lúcia, p. 16.
[20]Article 2, items I and II of State Law/SP No. 10,705, dated December 28, 2000.

donation. Thus, it matters little if the taxpayer is not subjectively able to pay the tax, as their capacity is revealed by the very acquisition of the property.

For example, a larger donated property in a region considered to be wealthier in São Paulo for logistical, commercial, residential, and security reasons has more economic and social value than a smaller property in an area where these elements are not present, or are present to a much lesser extent.

However, despite the objectivity that the acquisition of assets presupposes in terms of tax capacity, the fact is that it still requires a personal character, as different types of assets, depending on the inheritance or donation acquired, demonstrate different economic situations.

Thus, the progressivity of the ITCMD, taking into account different rates and different calculation bases according to the value of the share, bequest, or donation, is an expression of subjective tax capacity within the system for collecting this tax.

This demonstrates that the text of EC 132/2023 sought a quantitative analysis of the taxpayer's assets, as opposed to a qualitative analysis, which looks at the estate as a whole, rather than the value of the assets themselves.

This finding will be of paramount importance in establishing the limits that EC 132/2023 has set for taxpayers, as will be seen in the conclusion.

In any case, it is worth remembering that the constitutional text begins by stating that taxes should be personal "whenever possible,"[21] demonstrating that the principle and its personal nature should be applied to the greatest extent possible—that is, as an optimization mandate (Alexy, 2008). This means that they require something to be realized to the greatest extent possible, in accordance with the factual possibilities (what is concretely feasible) and the legal possibilities (the limits established by the legal order). In this sense, the principle constitutes a binding duty, reinforcing the argument that progressivity is an inherent requirement of the tax system, not an optional feature.

Given that even in real taxes such as ITCMD, the taxpayer's ability to pay can and should be considered, as there are values such as inheritance, bequests, or donations that indicate the taxpayer's wealth, it is clear that the progressivity of ITCMD should already have been accepted based on the constitutional principles of equality and ability to pay, without the need for a constitutional amendment.

Concluding the topic definitively, Elizabeth Nazar Carrazza (Carrazza, 2000: p. 63) states

> "Progressivity, far from being harmful to the system, is the only way to eliminate tax injustices, which are prohibited by the Federal Constitution. Without progressive taxation, tax equality can never be achieved."

Thus, the mere existence of the principle of contributory capacity in Article 145,

[21]§1 Whenever possible, taxes shall be personal in nature and shall be graded according to the taxpayer's economic capacity. The tax administration shall be empowered, especially in order to achieve these objectives, to identify, with due regard for individual rights and in accordance with the law, the taxpayer's assets, income, and economic activities.

paragraph 1, of the Federal Constitution already authorizes state legislators to establish progressive ITCMD rates, making it unnecessary to enact a Constitutional Amendment expressly providing for this mechanism for the tax to be applicable.

So much so that Roque Antonio Carrazza (Carrazza, 2025: p. 92/93) teaches:

> "In fact, in property taxes (such as IPVA, IPTU, ITR, tax on large fortunes, etc.), economic capacity is revealed by the asset itself.
>
> Incidentally, at a conference we had the opportunity to state:
>
> "With regard to property taxes (rural land tax, urban property tax, motor vehicle tax, etc.), the ability to pay is revealed by the asset itself, because wealth does not come only from currency, but from assets as a whole. If a person has, for example, an apartment worth a million dollars, they have contributory capacity, even if they have nothing else. It's just that their contributory capacity is immobilized. At any time, however, this person can convert that real estate into cash.
>
> "Everyone will agree with me that it makes no sense to say that someone who has been given a brand-new Mercedes-Benz car as a gift should pay less IPVA because they are poor. No. If this person cannot afford to pay the IPVA tax on their luxury vehicle, they should, at worst, sell it. However, they should never be exempt from paying IPVA due to lack of ability to pay. This is because they do have the ability to pay, since, as I said, the ability to pay is revealed in the assets as a whole, and not only through an examination of the bank account.
>
> "I knew someone who inherited a valuable painting by a 17th-century Flemish painter. One day, she sold her painting and used the money to buy a beautiful apartment. This person, who, apart from the painting, could be considered poor, had—thanks to that same painting—the ability to pay taxes. So much so that, by converting the painting into cash, she was able to purchase a luxury property.
>
> "I am saying all this to reinforce the idea, just mentioned, that the mere ownership of a luxury property already indicates the existence of the ability to pay taxes.".

Based on this argument, it is clear that EC 132/2023 was unnecessary, since progressivity is already inherent in real taxes, rendering its enactment unnecessary. EC 132 was designed to limit the reach of taxation, especially with regard to specific points such as how inheritance shares are defined, how property is divided, and similar issues. The amendment does not affect the taxpayer's entire estate. Instead, it narrows the focus of taxation to rules that are directly relevant to inheritance and succession, acting as a tool that defines boundaries without extending into the taxpayer's overall wealth, which would be the case under broader taxation models.

At the same time, EC 132 should not be seen as an unnecessary rule or as a challenge to existing judicial precedents. On the contrary, it introduces limits within the concept of tax progressivity. Rather than authorizing a general exami-

nation of an individual's financial capacity, the amendment confines progressivity to more specific aspects. In this way, it regulates taxation by preserving legal principles, adjusting the way tax rates are applied, and ensuring that taxpayers are not disproportionately burdened, while still recognizing their responsibility to contribute according to their means.

6. Conclusion

As stated, EC 132/2023, through its Article 1, added item VI to Paragraph 1 of Article 155 of the Federal Constitution, determining that the ITCMD will be progressive based on the value of the share, bequest, or donation.

Initially, the progressivity of ITCMD rates had already been recognized by the STF in RE No. 562.045/RS, even though this provision was not expressly recognized by the CF. The decision was in line with the progressive change in the jurisprudence of the STF, which, by broadening the interpretation of Article 145,1 of the CF, recognized the constitutionality of progressive rates, including for real taxes. This change was evidenced by the recognition of the progressivity of IPTU rates after EC 29/2000.

As demonstrated, prior to the publication of EC 29/2000, the STF had consolidated the understanding that, because it was a real tax, the rule of progressivity, arising from the principle of contributory capacity, did not apply to IPTU. However, with the enactment of EC 29/2000, the Constitutional Court revised its jurisprudence, broadening the interpretation of Article 145, §1, of the Federal Constitution, and began to admit the constitutionality of progressive rates, including for property taxes.

Further expanding this understanding, RE No. 562.045/RS admitted the progressivity of ITCMD rates without even a previous constitutional law recognizing it.

Given this scenario, the enactment of EC 132/2023 raised questions about its necessity and possible recognition of previous STF case law, prior to EC 29/2000, in the sense that only with express law is it possible to recognize progressive rates for real taxes.

As mentioned, the first hypothesis is more in line with the Brazilian legal system, since the mechanism of progressivity is essential for the realization of the principle of contributory capacity, enshrined in the Federal Constitution of 1988.

All signs of wealth, within the capitalist system, carry with them burdens of luxury or humility. Inheritance, donations, and legacies, which are subject to ITCMD taxation, are no different.

Thus, as mentioned, it would be reasonable to assume that more sumptuous inheritances and donations belong to people with greater economic capacity, and therefore greater contributory capacity, than more modest properties, so that the progressivity of the tax rate would be a way of making the tax burden more equitable.

In this sense, as demonstrated above, it is entirely possible that the ITCMD relates to the person liable for the obligation, since the taxpayer's economic condi-

tion is directly related to the material assets he or she has inherited.

For this reason, the text that highlights the principle of contributory capacity begins by stating that taxes should be personal in nature "whenever possible," emphasizing that it should be applied to the greatest extent possible.

This is so true that we note in the judgment of RE 562.045/RS the interpretation of Article 145, §1 of the Federal Constitution as essential to substantiate the constitutionality of the progressivity of the ITCMD, regardless of express provision.

This is because the framers of the Constitution recognized that the more personal taxes can be assessed, the better fiscal justice can be achieved, which is why they should be preferred in relation to their application.

With this finding in mind, it is possible to observe that the distinction between real and personal taxes is artificial and inappropriate, since even real taxes, such as the ITCMD, can and should have their contributory capacity considered, since inheritance and donations received, depending on the types of material goods acquired, are an indication of wealth.

Again, in the words of Roque Antonio Carrazza (Carrazza, 2025: p. 93):

> "In short, in our view, a tax law that takes into account the abstract ability to bear the financial burden does not violate the principle of contributory capacity. In more practical terms, we believe that no taxpayer can obtain judicial protection by demonstrating, for example, that, although they own a luxury property, they do not have, at the time of their personal situation, the economic ability to bear the property tax (IPTU) or the IPTU relating to their property, or will be foreclosed, even running the risk of losing it, despite Law 8.009/1990, which provides for the exemption of family property from seizure and aims to guarantee shelter for the person subject to foreclosure and their family."

As stated by Justice Eros Grau in the judgment of RE 562.045/RS, paragraph 1 of article 145 of the Constitution allows for progressivity in all taxes, whenever possible, regardless of their nature (real or personal). Again, in the words of the Justice:

> "Allow me to emphasize this point: Paragraph 1 of Article 145 of the Constitution determines how all taxes should be levied. Not just how some of them should be levied. Not just how personal taxes should be levied. That is clear."[22]

As Celso Antonio Bandeira de Melo states, it is unacceptable, in view of equality, to discriminate against people, situations, or things—which ultimately results in discrimination against people—based on a distinguishing feature that is not inherent to them. Therefore, different regimes determined in view of factors unrelated to them are inadmissible (Bandeira, 2021: p. 30).

Corroborating this understanding, Roque Antonio Carraza (Carrazza, 2025: p. 96/97) stated:

[22]STF, RE 562.045/RS, Full Court, j. 06/02/2013, red. Min. Carmén Lúcia, p. 30.

> "Finally, in the context of tax relations (notably those in which the fiscal nature of the tax prevails), the criterion of discrimination (from the Latin discrimen, i.e., that which separates, differentiates) permitted by the Federal Constitution is, par excellence, the ability to pay, as revealed in its Article 145, § 1, 1st part; verbis:"
> (...)
> "We are in full agreement with the Iberian master, because it is precisely in the ability to pay that there is a logical correlation between the factor of discrimination (manifestation of wealth capable of being taxed) and the end that is intended to be achieved through it (collection for the financing of the public machine and the realization of fiscal justice).
> Regarding contributive capacity as a criterion for discrimination in tax matters, the lessons of Humberto Ávila are noteworthy, verbis:
> "When taxes have a justification and a fiscal purpose, while instituted with the primary aim of obtaining revenue from individuals, the constitutional order allows for the election of this criterion, and the principle of contributory capacity will be the measure of differentiation between taxpayers. (...) It is important to note that the criterion for applying equality among taxpayers for the purpose of tax collection is the ability to pay. Based on its own and final taxation purposes, it is the equal distribution of the tax burden itself that ensures, through the adjustment of the tax burden, the distribution of the burden of tax payments according to the ability to pay. This is why we speak of an internal end.
> It should be noted that the principle of contributory capacity is a valuable parameter for achieving tax equality.

In the case of tax law, the discriminating factor used is the economic capacity of the person, which, as seen previously, can be measured in different ways. Thus, applying this to tax law, we can say that taxes should be graded according to the economic capacity of the taxpayer, which imposes discrimination in terms of the requirement and quantification of the type of tax in question.

In short, it is essential to understand that the progressivity of the ITCMD is indispensable for the application of the principle of contributory capacity, requiring an analysis of the criteria used to determine taxpayers' contributory capacity and how this relates to the different tax rate brackets.

Furthermore, EC 132/2023 demonstrated the assessment criteria it would use to analyze the taxpayer's ability to pay. By establishing that progressivity would be based on the value of the share and inheritance, as opposed to a total analysis of the taxpayer's assets (qualitative analysis), it established a quantitative criterion for examining the taxpayer's ability to pay.

Thus, EC 132 may have been created with the aim of restricting certain aspects, such as the definition of inheritance and other matters, but without affecting the taxpayer's assets. Its main intention would not be to restrict the entirety of an individual's assets, but rather to focus on specific issues related to inheritance and

the division of assets.

In this sense, EC 132 may not be redundant, nor does it contradict existing case law. Instead, it limits the application of progressivity in relation to value, focusing on the analysis of the taxpayer's ability to pay. This means that the proposal seeks to establish a more specific approach to taxation, without invalidating already established legal principles.

In other words, EC 132 was proposed with the intention of restricting the scope of taxation, especially in relation to specific aspects such as the definition of inheritance shares, the division of assets, and related issues, without, however, affecting the taxpayer's total assets. In other words, instead of focusing on the individual's overall assets, the amendment concentrates on more restrictive regulations, focusing on what would be relevant in the context of inheritance and its distribution. In this sense, it presents itself as a mechanism that seeks to delimit certain aspects of taxation without directly interfering with a person's total assets, as would occur, for example, in broader taxation.

In addition, EC 132 is not a redundant measure or a direct challenge to established case law on the subject. On the contrary, it establishes a form of restriction within the understanding of progressivity, that is, instead of allowing a more comprehensive analysis of the citizen's ability to pay, the amendment seeks to limit tax progressivity in more specific terms. As such, it proposes a form of regulation that preserves certain legal principles while adjusting the application of rates in a more focused manner, seeking to avoid tax overload on the taxpayer's assets, without disregarding their financial capacity to contribute to the system.

Conflicts of Interest

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

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