Tax regressivity as indirect discrimination

An analysis of the Brazilian tax system in light of the principle of non-discrimination

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Abstract: The link between taxation and human rights is complex. Without revenue, States cannot meet their human rights obligations. Human rights treaties, simultaneously, limit the range of permissible tax policies. In this context, is it possible to apply the principle of non-discrimination when analysing a tax system compliance with human rights? Is there any connection between tax regressivity and discrimination? This paper addresses these questions in the United Nations Human Rights System. Presenting the Brazilian case as an example, we investigate the relationship between taxation and the principle of non-discrimination. The analysis of the structure and effects of Brazilian tax legislation allows us to conclude that it has a disproportionate impact on the poorest. This shows a failure to comply with the principle of non-discrimination.

Keywords: Non-discrimination. Taxation. Economic and social rights. Tax regressivity. Indirect discrimination.

Regressividade tributária como discriminação indireta: uma análise do sistema tributário brasileiro à luz do princípio da não discriminação

Resumo: O vínculo entre tributação e direitos humanos é complexo. Sem receitas os Estados não podem cumprir suas obrigações de direitos humanos. Tratados de direitos humanos simultaneamente limitam o escopo de políticas tributárias permissíveis. Nesse contexto, é possível aplicar o princípio da não discriminação para analisar a adequação de um sistema tributário aos direitos humanos? Há alguma conexão entre tributos regressivos e discriminação? Este trabalho aborda essas questões no contexto do sistema de direitos humanos das Nações Unidas. Apresentando o caso brasileiro como exemplo, investiga-se a relação entre tributação e

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o princípio da não discriminação. A análise da estrutura e dos efeitos da legislação tributária brasileira permite concluir que ela tem um impacto desproporcional sobre os mais pobres, o que demonstra a incapacidade de cumprir com o princípio da não discriminação.

Palavras-chave: Não discriminação. Tributação. Direitos econômicos e sociais. Regressividade tributária. Discriminação indireta.

1 Introduction

Over the past decade, the interest of human rights activists in the public budget has increased. In the vast array of articles, reports, monographs and toolkits published on the subject, the primary focus is on public expenditure analysis. These studies have drawn attention to the fact that (i) human rights have a cost and consequently (ii) by investigating public spending one can make inferences about the implementation of human rights obligations. Recently, researchers and practitioners have been focusing on public revenue, more precisely on taxation. A landmark of this taxation turn, within the United Nations Human Rights System, is the Report of the Special Rapporteur on the extreme poverty and human rights of 2014. Written by Magdalena Sepúlveda Carmona, the report was the first to address exclusively the subject of taxation and human rights. According to the former Special Rapporteur, although human rights obligations do not prescribe specific tax policies, they do "impose limits on the discretion of States in the formulation of fiscal policies" (para. 4) (UNITED NATIONS, 2014, p. 3).

Starting from this premise, we examine the principle of non-discrimination to identify its semantics and the limitations it may impose on tax policy. We then explore the significance of the principle for understanding the relationship between taxation and economic and social rights. This led us to apply the principle to the Brazilian tax system to assess whether it complies with non-discrimination. Through the study of the Brazilian case, this paper describes the State responsibility for the effects of tax legislation and suggests that tax regressivity is an example of indirect discrimination.

We will structure the article in six main parts. In Section 2, we explore the normative framework of non-discrimination and its interpretation. To provide a comprehensive view we consider the authoritative interpretation of the Committee on Economic, Social and Cultural Rights (CESCR) and

the scholarly literature. We do not aim at this stage to present a comprehensive assessment of the bibliography on non-discrimination, but only to highlight the complexity of the subject and point out how the general theory of non-discrimination can contribute to the growing debate on taxation and human rights. In Section 3, we show how economic and social rights intersect the connection between tax policy and human rights. We address the issue using the concepts of precarity and precariousness developed by Judith Butler. Those concepts allow us to understand how taxation relates to the achievement of the State's objectives, including the reduction of vulnerability via economic and social rights. Still, in this section, we examine the material and normative links between taxation and human rights. In Section 4, we describe the structure of the Brazilian tax system to show its regressivity. In Section 5, we argue that the (tax) legislator is accountable for the effects of the legislation he creates, which in the international sphere is reflected in the State's obligation to monitor and correct the effects of its acts. We present the effects of tax regressivity in Brazil and argue that it is a form of indirect discrimination. In Section 6, we conclude with general reflections on the role of tax law to minimize vulnerability.

2 Non-discrimination in the United Nations Human Rights System

The right not to be discriminated against, a corollary of equality, is present in all human rights treaties (UNITED NATIONS, 2017, p. 30) and "have been at the centre of international human rights law since its origins" (SCHUTTER, 2010, p. 561). The Charter of the United Nations includes the prohibition of discrimination in Article 1 (3). As this article states, it is the purpose of the organisation "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (UNITED NATIONS, 1945, p. 3). The prohibition appears again in The Universal Declaration of Human Rights (UNITED NATIONS, 1948). It stipulates that the entitlement to the rights it proclaims is universal and, therefore, prohibits discrimination of any kind in its Article 2 (1). Similarly, Article 3 of the International Covenant on Civil and Political Rights (ICCPR) establishes an obligation for States Parties to take the necessary measures to achieve gender equality, so that men and women enjoy civil and political rights equally. It is, however, in Article 26[1] of the ICCPR that formal equality – "persons are equal before the law" – and substantive equality – "persons […] are entitled without any discrimination to the equal protection of the law" – are conceptualised (UNITED NATIONS, 1966a).

In the International Covenant on Economic, Social and Cultural Rights (ICESCR), there is a broad definition of equality in Article 2 (2). This article requires States to "guarantee that the rights […] will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The Article 3 of ICESCR establishes equality, in the form of gender equality: "the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of

[1] "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (UNITED NATIONS, 1966a).

all economic, social and cultural rights set forth in the present Covenant" (UNITED NATIONS, 1966b). Several other articles of the ICESCR also include equality, which is intended to stress that the enjoyment of the rights specified in the treaty must occur in a non-discriminatory and egalitarian manner. In the International Convention on the Elimination of All Forms of Racial Discrimination, equality is expressed as the duty to promote the enjoyment of human rights without distinction of race, colour, nationality or ethnicity (UNITED NATIONS, 1965). In the Convention on the Elimination of All Forms of Discrimination against Women, equality is defined, *a contrario sensu*, through the concept of gender discrimination, in Article 1.[2]

2.1 Non-discrimination in General Comment No. 20 of the Committee on Economic, Social and Cultural Rights

While the ICESCR guarantees the exercise of rights without discrimination, it does not define "discrimination". The task was carried out by the CESCR, the treaty body charged with monitoring the implementation of the ICESCR and with producing authoritative interpretations of its text. Formally, General Comments (GC) are not legally binding. However, as Keller and Grover (2012, p. 129) explain, they (i) "increase the density of international practice on the interpretation of the Covenant"; (ii) "contribute to the emergence of customary international legal norms"; (iii) "may be useful to judges trying to resolve hard cases by setting out important background principles against which a law may be analysed"; and (iv) "can also assist legislators who are trying to draft laws in compliance with the Covenant". Hence, in 2009, CESCR published the GC No. 20: Non-discrimination in economic, social and cultural rights. In this document, its first attempt to address broadly non-discrimination, the CESCR approaches the principle analytically. In its interpretation, it is possible to notice that three elements are the basis of the concept of discrimination: (i) form; (ii) grounds; and (iii) effect (para. 7) (UNITED NATIONS, 2009a, p. 3). Regarding (i) form, discrimination may take place through distinction, exclusion, restriction, preference or differential treatment. The form is how one will convey discrimination. Thus, in theory, discrimination in the form of a distinction will differ from discrimination in the form of exclusion or restriction and will require different remedies. Concerning (ii) grounds, the means listed above will always be based (ii.1) directly or (ii.2) indirectly on prohibited grounds of discrimination. This is a logical requirement for discrimination to fit into the type (*Tatbestand*) of discrimination prohibited by the human rights system.[3] The following are prohibited grounds for discrimination according to the ICESCR: (a) race, (b) colour, (c) sex, (d) language, (e) religion, (f) political or other opinion, (g) national or social origin, (h) property, (i) birth or (j) other status. As stated in Limburg Principle No. 36[4], this list is non-exhaustive, as we can deduce from its open-ended text ("other status"). Finally, the discrimination should have (iii) the effect of (iii.1) nullifying or (iii.2) impairing

[2] "For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (UNITED NATIONS, 1979).

[3] Although this debate seems to be resolved, we must remember that there is no ban on positive discrimination in the human rights system.

[4] "36. The grounds of discrimination mentioned in article 2 (2) are not exhaustive" (UNITED NATIONS, 1987, p. 4).

the (iii.a) recognition; (iii.b) enjoyment; or the (iii.c) exercise (on an equal footing) of economic, social or cultural rights.

GC No. 20 also differentiates formal from substantive discrimination through explicit definitions (para. 8) (UNITED NATIONS, 2009a, p. 3-4). Discrimination, just as equality, is always relational (see below). Hence, to verify the existence of formal discrimination, the ICESCR interpreter should compare the formal treatment granted to groups or individuals in the Constitution, laws, policy documents and others. The search for material discrimination will, in turn, require sensibility to the effects of the norm. The analysis of effects will also apply to distinguish direct from indirect discrimination. In the first scenario, the individual is the object of disadvantageous treatment (distinction, exclusion, restriction, preference or differential treatment) that affects him directly (para. 10, a) (UNITED NATIONS, 2009a, p. 4). In the second scenario, the unfavourable treatment is pervasive: laws, policies or practices neutral at face-value ultimately affect certain groups disproportionately because of factors external to the norm (para. 10, b) (UNITED NATIONS, 2009a, p. 4). Direct discrimination is easily perceived and is often provided for at the lexical level of legislation, an administrative act or sentence. Indirect discrimination, by contrast, is perceived only through its consequences. Thus, a black-letter analysis of the law, policies or practices could not reveal the existence of this form of discrimination.

In addressing indirect discrimination (para. 13) (UNITED NATIONS, 2009a, p. 5), the interpreter should consider the pervasive damage (para. 8) (UNITED NATIONS, 2009a, p. 3-4) and historical neglect suffered by a particular group. Considering these social factors does not represent a deviation from what we expect of an interpreter of the law. Quite the contrary. As longstanding hermeneutical approaches to law stress, every legal norm refers and relates to empirical elements. This compels the interpreter to consider all the relevant data to which the rule refers. To disregard the factual reference of the norm would turn the interpretation of human rights treaties into a parody of syntactic analysis, in which the axiomatic reduction of reality to normative utterances would obliterate the relationships between signifier, signified and context in these texts. Regarding the principle of non-discrimination, the notion of indirect discrimination recalls that international treaties are not axiologically neutral. Instead, they are justified only as an instrument for combating the multiple and pervasive threats to human life around the globe. For this reason, the principle of non-discrimination comprises a prohibition of systemic discrimination. GC No. 20 defines "systemic discrimination" as the pervasive discrimination that disproportionately affects certain social groups through practices or cultural attitudes dominant in the public or private sphere (para. 12) (UNITED NATIONS, 2009a, p. 5). Besides, CESCR also recognizes the existence of multiple discriminations (para. 17) (UNITED NATIONS, 2009a, p. 6), which is consistent with the concepts of intersectionality (CRENSHAW, 1989) and interdependence (see below). Vandenhole (2005, p. 68) stresses that CESCR does not differentiate between deliberate and non-intentional discrimination. The Committee prefers the terms "discrimination in purpose" and "discrimination in effect", supporting the opinion that "discriminatory intent is not a necessary element" (SEPÚLVEDA CARMONA, 2003, p. 388) to characterize discrimination (see Section 4).

Finally, according to GC No. 20 non-discrimination is an immediate obligation (para. 7) that can take the form of either negative (refraining from discriminating on prohibited

grounds) or positive (adopting concrete and deliberate measures to eliminate discrimination). As Sepúlveda Carmona (2003, p. 397-404) systematises, these are obligations: (1) "to abstain from denying or limiting equal access for all persons to the enjoyment of the rights"; (2) "to review national legislation in order to assess the existence of any discriminatory impact and to repeal or amend legislation that is found to be discriminatory"; (3) "to take legislative measures to combat discrimination"; and (4) "to take special protective measures and affirmative action for the benefit of vulnerable and disadvantaged groups". Among the necessary measures, adopting legislation is indispensable (para. 2) (UNITED NATIONS, 2009a, p. 1). This obligation includes both the duty to produce new legislation or policies and the duty to review all existing legislation and policies (obligation to monitor) (para. 41) (UNITED NATIONS, 2009a, p. 13). The purpose of this monitoring is to amend the legislation when necessary to eliminate formal or substantive discrimination. As seen, the latter will manifest themselves in the effects of apparently neutral laws or policies.

A fertile scientific literature complements the authoritative interpretation of the principle of non-discrimination.

2.2 The multidimensional nature of equality and non-discrimination

In *Discrimination law*, Fredman (2011) states that substantive equality is a multidimensional norm. Her approach distances itself from monolithic conceptions because she understands equality as a right with four dimensions: (i) redistribution, (ii) recognition, (iii) transformation and (iv) participation. Since these dimensions are intertwined without "any lexical priority" (FREDMAN, 2019, p. 84), the realization of equality depends on the fulfilment of all of them.

The dimension of redistribution requires that the State addresses the inequality experienced by particular social groups. In this form, substantive inequality amounts to the unequal distribution of resources between people. In the sense adopted here, we cannot understand inequality only regarding the distribution of material goods. Distributive inequality always encompasses the unequal distribution of "social structures such as decision-making power, the division of labour and culture, or the symbolic meanings attached to people, actions, and things" (FREDMAN, 2011, p. 29). Fredman's theory draws not only on Iris Young, Amartya Sen and Martha Nussbaum, quoted by the author but also on Nancy Fraser. Both theories seek to integrate redistribution and recognition. The latter (recognition) is the second dimension of equality and concerns the enjoyment of another important principle of human rights: dignity. Fredman links equality in this second dimension to the "respect for

the equal dignity and worth of all" that "speaks to our basic humanity". As Fraser argues, there is no contradiction between these two demands. Fredman (2011, p. 29) reaches the same conclusion when she states that "these two dimensions of equality should pull together rather than against each other". Hence, both the classical issues of redistribution and the issues usually described as "identity issues" are part of the same problem: social justice (FRASER, 2002). That is because in the praxis of social movements, questions traditionally related to the Welfare State and questions raised by feminism, the gay movement, queer theory and the anti-racist movement merge (FRASER, 2011, p. 45). By aggregating the two analyses we can argue that the first dimension of equality (redistribution) comprises "the transformation of fundamental economic structures" (FRASER, 2011, p. 45, our translation), such as income redistribution and the reorganisation of labour division, to combat stigma as well. As we will see below, these two dimensions relate to vulnerability in its political form.

Recognition is tied to the third dimension (transformation) since Fraser recognises that patterns of domination based on race, gender, sexuality, or physical ability result from complex historical and social variables. These variables are markers of difference saturated with social meaning. Thus, through the transformative dimension of equality, the aim is to alter the social processes through which difference becomes discrimination. According to Fredman (2011, p. 30), "the problem is not so much difference per se, but the detriment which is attached to difference". As Ferrajoli (2010, p. 75, our translation) explains, a reductive analysis of equality can cause the "juridical homologation of differences". When the law ignores differences, it universalises equality falsely. This leads to *de facto* sanctioning of the ignored differences, which contributes to the naturalisation of substantive inequality under the appearance of formal equality. By contrast, the transformative dimension requires States to connect "differences to equality" and to contrast differences "with inequalities and discrimination" (FERRAJOLI, 2018, p. 82, our translation).

The fourth dimension (participation), as Fredman (2011, p. 32) explains, concerns not just political participation but also participation in community life. Here the author returns to both Young and Fraser to give centrality to the processes of participation that manifest themselves in various forms. This dimension is associated with the public-private divide. As decades of feminist studies warn us, this division operates as a *dispositif*[5] – in the Foucauldian sense – to reduce the participation of women in the public space. Following a tenacious discriminatory logic, the woman must occupy the space of home and family. On the other hand, the man, who "rises above passion and desire" (YOUNG, 1990, p. 111), is especially suited to public space. Particularly in the case of Brazil, this scheme becomes more complex. According to Souza (2019, p. 122-137), between the 1920s and 1930s, the Brazilian public sphere was born already colonised by economic capital (something that does not happen in Europe), ensuring the persistence of symbolic domination in public discourse. In the global South, in general, we can also associate the dimension of participation with a deficit of democratic representation of marginalised groups, such as the poor workers, indigenous and black people.

The mere schematisation of these dimensions shows the complexity of equality and non-discrimination. To understand

[5] There is not a satisfactory English translation for "dispositif". It is frequently translated as "deployment", "device", "mechanism", etc.

how the redistributive dimension of equality and substantive discrimination associates with taxation, it is necessary to analyse their connection to substantive human rights. We suggest that this analysis starts with the right to life, as we do in this paper. First, because of its importance to human rights as a whole. According to the Human Rights Committee, the right to life is the "supreme right" (para. 2) (UNITED NATIONS, 2019, p. 1). Such an approach is also justified because the right to life, although formally included in the ICCPR, allows easy identification of the interdependence between human rights and the importance of economic and social rights. These latter are more directly associated with the fiscal activity of the State (see below).

3 Vulnerability, tax policy and human rights policy

In *Frames of war*, Butler (2009) distinguishes "precariousness" and "precarity". The former is an ontological quality of all living organisms, a "more or less existential conception" (BUTLER, 2009, p. 3). Based on the premise that all bodies are exposed in the world – "bodies are not self-enclosed kinds of entities" (BUTLER, 2015, p. 72) – and are subject to destruction, Butler calls this vulnerability inherent to living being's "precariousness". The possibility of being extinguished, which is characteristic of all biological bodies, including human bodies, suggests that human agency depends on numerous supports. At the same time, the relationship between agency and the conditions that make life possible – "conditions for persisting and flourishing" (BUTLER, 2009, p. 29) – indicates that vulnerability has also a political modality. This is what she calls precarity: an induced condition that leads to an unequal distribution of the very possibility to live.

Even the existential modality of human vulnerability presupposes some sociability. Thus, one can say that "one's life is always in some sense in the hands of the other" (BUTLER, 2009, p. 14). Precariousness is thereby a pervasive condition which, ultimately, concerns the fragility of life that is always subject to the impending nature of death. Ethically (Butler's area of concern is philosophy) precariousness refers to obligations "to the conditions that make life possible" (BUTLER, 2009, p. 23). These obligations encompass the provision of material goods and the more comprehensive duty "to minimize precariousness and its unequal distribution" (BUTLER, 2009, p. 22). While Butler does not use human rights terminology (for reasons entirely comprehensible in her work) it is easy to note the convergence of Butler's discourse with economic and social rights. This alignment becomes even more striking when the author states that these obligations include positive social duties as "food, shelter, work, medical care, education,[6] rights of mobility and expression, protection" (BUTLER, 2009, p. 22).

Turning away from liberal and proceduralist theories, Butler (2009, p. 35) assimilates the right to life to a question of "sustaining social conditions". This entails, in her philosophical project, questioning individual responsibility, which is one tenet of neoliberalism (BROWN, 2015; HARVEY, 2005, p. 51). Following a Lévinasian orientation, Butler takes responsibility away from consensus and bases it directly on intersubjective bonds. This implies a reassessment of the overvaluation of the formal dimension of participation rights in civil life at the expense of economic and social rights. It also

[6] Rights established under Articles 6, 11, 12 and 13 of ICESCR (UNITED NATIONS, 1966b).

implies rethinking the substantial dimension of equality. In this regard, the fundamental political task is to minimize "the condition of precariousness in egalitarian ways" (BUTLER, 2009, p. 54), which means to fight precarity. This dispute can only take place in the political arena. In fact, according to the vigorous Latin America critical thinking, the role of human rights is precisely to deconstruct "that which does not allow living" (DUSSEL, 2006, p. 369, our translation) and to denounce "the presence of death in concrete reality" (HINKELAMMERT, 1984, p. 38, our translation).

According to Butler (2004, p. 20), it is as members of a society that we become the subject – "each of us is constituted politically in part by virtue of the social vulnerability of our bodies". For this reason, the fight against discrimination is a collective struggle in which "we argue as a group or a class" (BUTLER, 2004, p. 24). Here we can return to the multidimensional nature of equality to emphasise that the dichotomy between recognition and redistribution is false. It is as a group – which presupposes some prior sense of identity – that we organise ourselves to make political claims. Democracy depends, therefore, on the recognition of the fundamental bond of dependence and the obligations we have toward one another. As we have seen, the redistributive dimension of equality implies recognition, something that Fredman and Fraser both defend. The concept of vulnerability (precariousness and precarity) presented here overcomes the limitations of the redistribution-or-recognition dualism. Pragmatically, "identitary" features and economic structures blend themselves to make "certain human lives […] more vulnerable than others" (BUTLER, 2004, p. 30). This unequal distribution of vulnerability is precisely what the human rights system stands to prevent, aiming at the "advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people" (UNITED NATIONS, 1948). This vulnerability, as Butler claims, derives of our social condition: "vulnerability should not be considered as a subjective state but rather as a feature of our shared or interdependent lives" (BUTLER, 2020, p. 45) so we can only understand equality within the framework of our precarity (BUTLER, 2015, p. 218) and of the obligations that we can derive from it. That is why equality is always "equality among individuals" (BUTLER, 2020, p. 44-45), as the Theory of Law has long asserted (see Perelman (1963)).

We can understand the rights under ICESCR as a response to our interdependence and vulnerability. The Covenant seeks to create a minimum framework for a dignified life. As Butler (2020, p. 46) claims, "one is vulnerable to the social structure upon which one depends, so if the structure fails, one is exposed to a precarious condition". It is not a question of utopianly imagining a way to overcome interdependence. Rather, it is about assuming vulnerability and interdependence as "condition[s] of equality" (BUTLER, 2020, p. 44) and as a condition of our humanity. This is the view expressed by the Human Rights Committee when it adopted GC No. 36 in 2018. Approaching vulnerability as a trait of our "constitutive relations to other humans, living processes, and inorganic conditions and vehicles for living" (BUTLER, 2015, p. 130). GC No. 36, in its third section, exemplifies tangible everyday threats to the enjoyment of the right to life:[7] hunger and malnutrition; the prevalence of life-threatening diseases; extreme poverty; homelessness; degradation of the environment; pervasive industrial accidents; structural patterns

[7] For an overview, see Joseph (2019).

of violence especially against children in street situations, unaccompanied migrant children and children in situations of armed conflict; members of ethnic and religious minorities and indigenous peoples, lesbian, gay, bisexual, transgender and intersex persons, persons with albinism, alleged witches, displaced persons, asylum seekers, refugees and stateless persons (UNITED NATIONS, 2019, p. 5-6).

If we ask – as the Human Rights Committee did – what conditions make life possible? And how are these conditions distributed? Inevitably we will encounter the economic and social rights guaranteed by the ICESCR. If life depends on material conditions and if one cannot think of an ontology outside these socially shared conditions, the right to life becomes the right to demand from the State the fulfilment of these material conditions. By pointing to the possibility of understanding life as "a conditioned process, and not as the internal feature of a monadic individual" (BUTLER, 2009, p. 23) and, considering that there is no life without access to a minimum material structure, the positive dimension of the right to life is highlighted. Its realisation will, therefore, depend on State intervention to correct the unequal distribution of these material elements, which draws attention to the positive aspect of the non-discrimination obligation. This brings us into the sphere of the State's fiscal activity. This activity is the instrument that enables, through revenue collection, the necessary expenditures to realise human rights.

3.1 Tax policy as human rights policy

The link between fiscal policy and the enjoyment of human rights is the subject of a vast bibliography. As this literature shows the "idea that fiscal policy is a technical matter best left to public finance experts" (BALAKRISHNAN; HEINTZ; ELSON, 2016, p. 53) is wrong. In reality, the connection between human rights and the public budget – "government's most important policy document" (REISCH, 2019, p. 36) – is both material and normative.

3.1.1 The material dimension of the relationship between taxation and human rights

Without revenue, States cannot meet their obligations under human rights treaties. At least since the publication of "The crisis of the tax state" by Schumpeter (1991), we know that taxation is the political institution par excellence, besides being the major source of revenue in contemporary States. This link between taxation and human rights is most clear in economic, social and cultural rights, but it also exists in civil and political rights, since all rights have an economic cost (HOLMES; SUNSTEIN, 1999).

Human rights are therefore a matter of public finances. Except for States that completely depend on the exploitation of natural resources or financial aid from international institutions, the majority rely on taxation as a source of revenue (SAIZ, 2013, p. 82). Analysed in this macro dimension, taxes prove to be an indispensable instrument to maintain the stability of the legal system. Holmes and Sustein (1999, p. 59) summed it up in the adage "no property without taxation". The tax system is also the instrument to realise the ideal of social justice that the government will pursue (MURPHY; NAGEL, 2002). Therefore, it is in this context that we should assess taxation: fair is the tax system that makes a just society possible (GALLO, 2007, p. 102); adequate from the human rights point of view is the tax system that enables States to fulfil their human rights obligations.

From an instrumentalist perspective, the tax system is the institution[8] whose function is to transfer resources from individuals to the treasury. Hence its political character.[9] Its purpose is to finance the fulfilment of the State's constitutional obligations, among which the realisation of civil, political, economic, social and cultural rights deserves to be highlighted. Naturally, this vision contrasts with the conventional thought that sees taxation as a burden.[10]

3.1.2 The normative dimension of the relationship between taxation and human rights

Taxation determines (economically) the realisation of human rights and human rights obligations, although they do not prescribe specific tax policies they do "impose limits on the discretion of States in the formulation of fiscal policies" (para. 4) (UNITED NATIONS, 2014, p. 3). Thus, while it is true that the choice of a tax system, like the choice of any other element of the economy, is political and therefore not inexorable (POLANYI, 2001), it is also true that the alternatives are limited. And it could not be otherwise since human rights treaties are hierarchically superior to domestic laws and the acts of both the Executive and the Judiciary. Those are manifestations of the will of the State or mere facts (PERMANENT COURT OF INTERNATIONAL JUSTICE, 1926). Hence, the design of a tax system must consider the obligations arising from such treaties because (i) the legal and political legitimacy of contemporary States depends on the compliance with international (human rights) law and (ii) the implementation of a tax system that does not comply with human rights obligations subjects the State to international responsibility. Canotilho (2001, p. 244, our translation) argues, regarding the legislator's binding to the Constitution, that "the law […] is a positive and negative act determined by the fundamental law". Similarly, human rights treaties impose positive and negative limits on State sovereignty. While in domestic constitutional law the determination of these limits is complex and subject to challenging theoretical matters, in the international sphere of human rights it is the wording of the treaties that establishes a "space for legislative prognosis". These texts use clear expressions to establish that implementing the rules prescribed by them is mandatory (positive

[8] For a definition of institution in the sense used here, see Mumford (2019) and Oats (2012).

[9] "L'argent et son inégale répartition constituent l'objet social total par excellence, et ne peuvent être étudiés d'une façon exclusivement économique" (PIKETTY, 2015, p. 127).

[10] For an example of the traditional view that associates taxation with a burden, see Bentham (1843), Hayek (1948), Jaucourt (2015), Malthus (1836), Musgrave and Musgrave (1989), Nozick (2012), Rothbard (2009), Say (2003) and Smith (1977).

limits) and to prohibit the creation of norms that contradict them (negative limits). Under this framework, the tax legislator has both positive and negative obligations, whose implementation may generate repercussions in the sphere of international human rights law. The freedom to legislate on the domestic level is equivalent, from the international perspective, to the "margin of appreciation".[11] In any case, the tax legislator, under the non-discrimination principle and other rights established in the ICESCR, has a duty to perform. This duty is, above all, the duty to legislate to give maximum protection to human rights and the duty to review its legislation to adjust it to ICESCR. At the same time, before these obligations, the State's inaction characterizes omission.[12]

Despite what we have stated above, there is a presumption that tax laws are neutral.[13] Nothing could be more distant from reality, after all, "money, and its distribution, can never be anything other than political questions" (KETER, 2012, p. 167). Tax laws, as laws governing any other matter, can have discriminatory effects, even though they appear to be neutral. Indeed, discrimination in tax laws is particularly serious. Since taxation is the instrument for the realisation of human rights, especially economic and social rights, the discriminatory effects of tax policy have a negative impact on the enjoyment of these rights. If we take seriously the statement that tax policies are human rights policies, a discriminatory tax system becomes very problematic. Here, discrimination in tax legislation matches systemic inequality to reinforce pre-existing patterns of vulnerability. This turns the tax system into a device for creating precarity, via the unequal distribution of precariousness. Such is the case with the Brazilian tax system, as we will show later.

4 The regressivity of Brazilian tax system

Economics classify tax systems as progressive or regressive based on vertical equity (TRESCH, 2015, p. 182): "progressive taxation meaning that taxpayers should be treated appropriately differently according to their ability to pay might, therefore, be a type of vertical equity" (FREDMAN, 2019, p. 83). Tax systems that put more burden on labour than capital are regressive. Indirect taxes predominate in these systems, which means

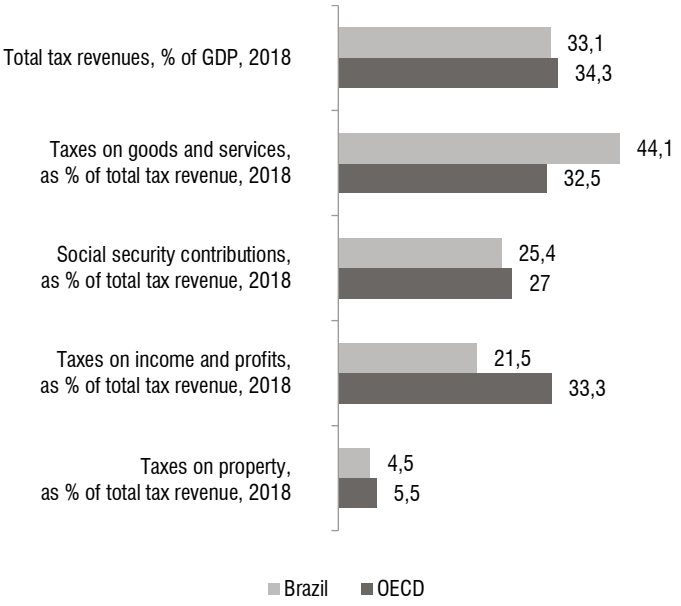
[11] For a discussion in the context of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, see Griffey (2011).

[12] See, particularly, Maastricht Guideline No. 15 (INTERNATIONAL COMMISSION OF JURISTS, 1997).

[13] For a critical view of the political nature of taxation, see Alston and Reisch (2019), Crawford (2014), Infanti and Crawford (2009), Knauer (2014) and Philipps (2009).

that they use consumption as their principal tax base. A progressive tax system, on the other hand, concentrates taxation on income and capital (SALVADOR, 2016, p. 8).

Figure 1

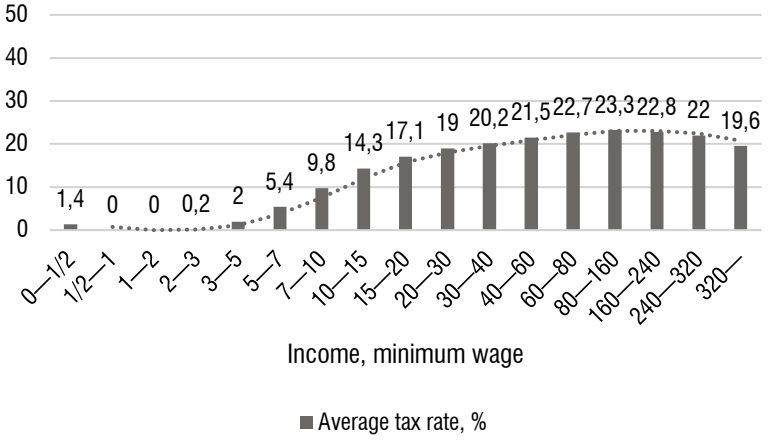


Source: elaborated by the author based on Organisation for Economic Co-operation and Development (2020).

In the case of Brazil, experts have been showing repeatedly the regressiveness of the tax system in recent years. Recently, the federal government itself concluded that approximately 72.13% of Brazil's tax revenue results from consumption taxes (BRASIL, 2020). According to Organisation for Economic Co-operation and Development (OECD) (2020) data, the percentage of revenues derived from regressive taxes among its members is 59.5%, while in Brazil the percentage is 69.5%. The federal government also acknowledges the discrepancy between Brazil and OECD members. In the same study, the federal government asserts that "when comparing taxation by tax base we observe that in relation to 'income' base Brazil taxes less than the average of OECD countries, while in relation to 'goods and services' base it taxes, on average, more" (BRASIL, 2020, p. 6, our translation). In other words, despite having a tax rate similar to that of OECD members, Brazil concentrates its incidence on consumption. The lack of progressivity of the Personal Income Tax (MORGAN, 2018) makes even more critical the predominance of indirect taxes. The federal government also recognises the low progressivity of

this tax. A recent study by Receita Federal do Brasil – the agency which oversees the collection of federal taxes – shows that in 2018 the average PIT rate for those who declared incomes higher than 320 minimum wages was 19.6%. This rate is close to that of those who declared incomes between 20 and 30 minimum wages (19%) and lower than the rate of those who declared incomes between 30 and 40 minimum wages (20.2%) (BRASIL, 2019).

Figure 2



Source: elaborated by the author based on Brasil (2019).

Meanwhile, the distribution of profits and dividends – which, according to the same study, totalled R$280.56 billion – was not subject to any taxation. The exemption of distributed dividends results from the incorporation, in the 90s, of economic theories that sought to relieve the capital and attract investments. As Gobetti (2019, p. 763, our translation) argues,

> three decades have passed since these commandments were established, and both the concentration of income has increased significantly in most parts of the world, and academic reflection has advanced, producing a reassessment of tax theories and practices.

According to a database published by Oxfam Brazil in 2019 (O REAL…, [2019]), people with an average monthly income between 265 and 570 Brazilian Reais have, on average, 28% of their income compromised with the payment of taxes. On the other hand, people with an average monthly income of 175.000 Brazilian Reais have, on average, 7% of their income compromised with the payment of taxes. Again, domestic

governmental institutions acknowledged the phenomenon. Another study by the Federal Senate in 2017 found that

> the higher the income, the lower the burden of indirect taxes. Although direct taxes in Brazil are progressive, they are not as progressive as in other countries. This, together with the heavy taxation of consumption of goods and services, reinforces the regressiveness imposed on the population by the system (BRASIL, 2017, p. 14, our translation).

Similarly, a report by the Economic and Social Development Council – a body linked to the Presidency of the Republic – concluded in 2011: "the tax system is regressive and the burden is poorly distributed" (BRASIL, 2011, p. 7, our translation).

5 The tax legislator as addressee of the principle of non-discrimination

From a domestic perspective, legislation is the implementation of constitutional law (SIECKMANN, 2013, p. 108). We should remember that these same laws (and the Constitution itself) are mere facts under international law. But from a human rights perspective, these very facts must be aligned to the State's human rights obligations. Therefore, the legislation is "highly desirable and in some cases […] indispensable" (para. 3) (UNITED NATIONS, 1990, p. [1]), as CESCR has already stated in the past. According to the legisprudence, the legislator has obligations that derive either from the Constitution (and the principle of the separation of powers) or from a general requirement of rationality (WINTGENS, 2012, p. 304). Without delving into the peculiarities of the debate that fall beyond the scope of this article, we believe that this discussion is important to understand the limitations imposed on the tax legislator considering the principle of non-discrimination. According to Morand (1988, p. 396), the legislator must: (a) establish adequately the facts that will give rise to the legislation; (b) assess the data and alternatives to legal regulation; (c) evaluate prospectively the creation of the legislation and (d) observe and correct the legislation whenever necessary. The last two obligations are equivalent to a duty to anticipate and optimise effects.

Wintgens (2012, p. 294-304) recovers Morand's deontology and associates the duty to anticipate and the duty to optimise effects to the temporality of laws. Given that the legislator is not omniscient and cannot predict all the effects of the law, and given that the legislation is part of a dynamic reality, he must ask himself: is the justification that led to the adoption of the legislation still valid? Has the legislation achieved the expected effects? If not, the duty to correct the legislation arises (WINTGENS, 2012, p. 303). This "responsiveness to changing or emerging circumstances" (OLIVER-LALANA, 2016, p. 259) integrates a "responsible law-making" sensitive to the influence of time on the legal system.

The three axioms that Wintgens derives from this principle of temporality (duty to prospection, duty to retrospection and the duty to review) are in line with the duty to monitor and, above all, with the duty to investigate aims and effects of legislation. The latter is also a requirement of the principle of non-discrimination.

5.1 Tax regressivity as indirect discrimination

To identify the violation of the principle of non-discrimination by the tax system,

we must answer two questions: (a) does the tax system produce a disparate impact on certain groups of people based on prohibited grounds? (b) the position of those who are worse off is worsened after taxation? If the answer is positive, we are facing a challenge to the principle of non-discrimination. In this case, the State should "refashion its policy choices" (FREDMAN, 2019, p. 94) to redress the situation, since inaction results in liability. As literature and jurisprudence have long-established, the intention of a State in relation to the discriminatory measure is irrelevant to establish its responsibility (SEPÚLVEDA CARMONA, 2003, p. 398). This means that to assess the existence of discrimination it is unnecessary to investigate the existence of malice. Discrimination is measured objectively.[14] According to the Draft Articles on State Responsibility proposed by International Law Commission (UNITED NATIONS, 2000, p. 287), to configure international responsibility is sufficient that there be an act or omission that "(a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State". Thus, "States must carefully examine the effect that the implementation of any legislation, procedures or practice actually has on the enjoyment of these rights" (SEPÚLVEDA CARMONA, 2003, p. 398).

Although there are no different tax rates in Brazilian tax legislation based on gender or race (formal discrimination), the discriminatory effects of the tax system are widely documented. Here the notion of "disparate impact" (SCHUTTER, 2010, p. 627) is fundamental. The predominance of indirect taxes causes poorer people to consume a greater proportion of income with the payment of taxes, in relation to the proportion of income consumed by the richest (SILVEIRA; FERREIRA; ACIOLY; CALIXTRE; STIVALI; SANTOS, 2011). Taxation as a whole is disproportional on the black population, more specifically on black women who are over-represented among the poor. In 2014, a study by Oxfam in partnership with the Brazilian Institute of Socio-Economic Studies concluded that black women pay proportionally more taxes than white men (SALVADOR, 2014, p. 26). This answers the first question affirmatively: the Brazilian tax system produces a disproportionate impact on the poorest. In short, the regressiveness of the tax system means that taxation is more heavily focused on those with less economic capacity. In theory, we could justify this disparate impact if the answer to the second question were negative. However, this is not the case.

The Brazilian tax system also actively contributes to the deepening of inequality. It achieves this through the predominance of taxes on consumption combined with the low progressivity of PIT. The latter does not contribute to change income inequality between men and women or between black and white people (SALVADOR, 2016, p. 42). On the contrary, taxation in Brazil favours income concentration (GOBETTI; ORAIR, 2016, p. 28; MORGAN, 2018). This reversed redistribution is even more aggressive when one concludes that

[14] As an example, see that this is also the conclusion of the Inter-American Court of Human Rights. In Paniagua Morales *et al. v.* Guatemala, the Court established that "[u]nlike domestic criminal law, it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed. The sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention. Moreover, the State's international responsibility is also at issue when it does not take the necessary steps under its domestic law to identify and, where appropriate, punish the authors of such violations" (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1998, p. 50). See also Inter-American Court of Human Rights (1997).

the country has "one of the highest" – if not the highest – top income concentrations worldwide (GOBETTI; ORAIR, 2017, p. 268). This leads taxation in Brazil to function as a maintainer of a poverty quota (MAGALHÃES; SILVEIRA; TOMICH; VIANNA, 2001, p. 22), blocking the transformative dimension of equality (see above 2.3).

The symbiosis between discriminatory revenue generation and inefficiency in public spending suggests that the Brazilian tax system contributes to increasing structural inequality (MEDEIROS; SOUZA, 2013, p. 28). The adoption of severe fiscal consolidation policies in recent years has aggravated the situation. Since 2016 Constitutional Amendment (CA) No. 95 (BRASIL, 2016) is in force, limiting spending on public services and investments by the inflationary variation over 20 years.[15] The Amendment, which civil society organisations have strongly condemned,[16] has reduced investments in health and education.

As Rossi and Dweck (2016) state, the practical effect of the measure, considering the expected population growth, is the reduction of public spending per capita in relation to GDP in health and education. The aim is to reduce the State by eliminating the universal nature of these rights, which potentially[17] challenges the ICESCR.

The prevalence of an orientation towards austerity and biased taxation binds this form of indirect to substantive economic and social rights (FEITAL, 2020). As we have argued above, we should understand the rights under the ICESCR as devices for reducing vulnerability (precarity, in its political form). However, in the Brazilian case, this does not happen. Currently, the observation made by Olivier de Schutter in 2009 – at that time Special Rapporteur on the right to food – unfortunately no longer corresponds to reality. Schutter stated that social programs in Brazil "are essentially funded by the very persons whom they seek to benefit, as the regressive system of taxation seriously limits the redistributive impact of the programmes" (para. 36) (UNITED NATIONS, 2009b, p. 14).[18] What we see today is even more serious: fiscal policy works in reverse, since the country "is one of the countries that transfer most to the richest, and the least to the poorest" (FRAGA NETO, 2019, p. 618, our translation). Hence, taxation aggravates the position of the poor, which also suggests a failure to comply with the principle of non-discrimination.

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[15] See Alston (2017).

[16] On March 18th 2020, human rights organizations submitted a request to suspend the effects of CA No. 95 to the Brazilian constitutional court (Supremo Tribunal Federal).

[17] "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources" (para. 9) (UNITED NATIONS, 1990, p. [3]).

[18] See Derzi (2014).

6 Conclusions

We have argued in this paper that tax regressivity is a form of indirect discrimination. The semantics of the principle of non-discrimination – which we have established through the analysis of existing legal provisions, academic literature and the authoritative interpretation of the CESCR – includes the prohibition of disadvantageous treatment resulting from the effects of laws, policies or practices neutral at face-value. The CESCR affirms, accompanied by the most relevant literature, that States should consider the existence of systemic, pervasive and multiple discriminations on certain social groups. In this way, the State must review and repeal the legislation that generates a discriminatory impact. This obligation to monitor the effects of legislation to redress it also applies to tax legislation.

Tax legislation is directly related to human rights, as the scholarly literature has pointed out in recent years. First, because taxation is instrumental in obtaining revenues for the State to fulfil its international obligations. Second, because human rights treaties establish the limits of the discretion of States in the formulation of tax (or fiscal) policies. This relationship is more pronounced in economic and social rights. As we have shown, these rights are material conditions that make life possible. Using Judith Butler's concepts of precarity and precariousness, it is possible to link economic and social rights to redistribution and recognition (intertwined dimensions). Since taxation is a financial determinant of human rights policies, we can say it that "tax policy is human rights policy", as the literature currently does.

The study of the Brazilian case – through the analysis of the structure of its tax system and the effects caused by this structure – illustrates the relationship between tax regressivity and indirect discrimination. The data, including official reports, show a strong concentration of income in Brazil. Besides, black people (especially black women) are over-represented in the population with lower economic capacity. This group suffers disproportionately from the impact of indirect taxes. The Brazilian case is interesting because the State itself has admitted the existence of these discriminatory effects on more than one occasion. Since the measurement of discrimination in international law is objective, it is unnecessary to determine the State's intentionality. For the discrimination test, it is enough to identify if the tax system produces a disparate impact on certain groups of people based on prohibited grounds and establish if it worsens the position of those who are worse off after taxation. Applying the test to the Brazilian case, we conclude that the country's tax legislation challenges the principle of non-discrimination.

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