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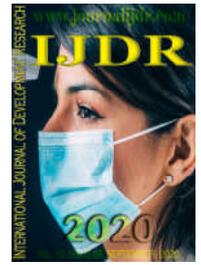
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COMPARING PROGRAMMATIC AND FULLY APPLIED NORMS: THE APPLICABILITY OF THE RIGHTS OF PERSONS WITH DISABILITIES IN BRAZILIAN ADMINISTRATIVE AND TAX LAW

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ABSTRACT

This study demonstrates that programmatic constitutional norms of tendemand additional measures to be fully aims to discover whether the existent rules have been sufficient (or not) to providefull effectiveness to the protection constitutionally guaranteed, specially through an overview of the current administrative and tax laws that should grant equity of access and movement – from being able to use public spaces to buying adaptable cars. With particular disabilities, along with regressive consumers'taxes,and certain inapplicability of the Statute of Cities Law, have resulted in harming precisely those people who the public policies should protect. The methodology is inductive documentary research, applied to observe how the government has been updating the administrative and tax legislation, and whether these have been sufficient to provide the effectiveness forthe constitutional forecasts. The findings demonstrate a delayin creating specific laws to enforce some prescriptions and updating the taxexemption tables. Consequently, these laws have resulted in making the constitutional forecasts programmatic (intentional) laws rather than fully and useful ones.

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INTRODUCTION

The Brazilian constitution (BRAZIL, 1988) is internationally known for ensuring several social rights for Brazilian citizens, resembling what has already been done in the German Constitutional Document. Despite the text provisions, constitutional material rights, such as equity, would have only been able to be fully and judicially demandable through specific mechanisms, that should be capable of providing them full effectiveness. In these terms, legal devices such as neutral material equity could only be juridically adequate through certain norms within procedural laws (formal equality). Therefore, the procedural legislation might be conceived to guarantee the material rights that have been reviewed by the primary legislator. However, if the constitutional provisions have are indeed total and full effectiveness, in consequence, many authors have, then, concluded that all other infra constitutional laws must obey the constitutional guidelines imposed by the primary legislator. Therefore, the focus of this article is to analyze whether the infra constitutional Brazilian

legislator has, indeed, respected this mandatory command, and, to do so, this article focuses on the persons with disabilities a) access, movement and consumption needs; b) the prescriptive administrative norms within the whole Brazilian legal system; b) the tax legislation and the fiscal policies – specifically the exemptions related to the acquisition of adapted vehicles. Nonetheless, it is almost impractical to analyze all the material guarantees revealed in the Brazilian constitutional document. Hence, this study is limited in analyzing whether the prescriptive administrative and tax norms have been truly capable of providing efficiency for persons with disabilities over time, and, mainly, it aims to research whether the updates of these laws might have been strictly engaged with the constitutional forecasts. The hypothesis is that, within a temporal framework, the updates have been insufficient to provide the maximum efficiency for persons with disabilities' rights and, consequently, they could have been distorting the main ideas imposed by the constitutional legislator. Furthermore, this research begins with the primary studies that may have already been produced about

constitutional effectiveness by European and Brazilian authors, which has the intention to provide the readers the necessary knowledge about the civil law system and its mandatory guidelines previewed in the constitutional texts among several countries. This study also shows what has already been produced in the administrative Brazilian legislation fields, as well as taxation over consumers' structure and the exceptions previewed, specifically those for persons with disabilities and its particular transportation and accessibility needs. The limitation of this study is that it has considered only two researchable areas: administrative and tax legislation (with an interface with consumption matters). At the end of this article, the reader will be able to analyze the discoveries as well as if the current law system, in these two areas, is sufficient (or not) to guarantee the persons with disabilities equity rights and what is the constitution forecast.

THE EFFICIENCY OF CONSTITUTIONAL PRESCRIPTIONS: THEORIES FROM EUROPE TO BRAZIL

This study shall initially consider the leading authors in the field of effectiveness for all prescriptive constitutional norms. Such authors are found in German, French, and Italian literature, whose schools of thought have been indicated worldwide as being the most prominent ones and whose ideas primarily changed the conceptions on the theme. Consequently, according to authors such as Hesse (2019, pp. 40–70) or even Dürig (2016, pp. 55), the total normative effectiveness derived from any constitutional norms imposes several obligations over the whole legal system, resulting in a unification among civil and public devices. So, there should never be any distinction between these two legal systems, apart from what the primary legislator has precisely determined. Moreover, Dürig (2016, pp. 55) has concluded that, since it might be possible to consider German Constitution norms as being gifted with supreme commands, these assumptions would subsequently lead to the empirical understanding that any constitutional right has full and total effectiveness and, overall, regarding any attempt that may try to obstruct its applicability. These ideas were first conceived in German legislation and, subsequently, have influenced several Italian authors who, thus, have begun to share the same arguments with other international schools. One of these authors was Pietro Perlingieri (Perlingieri, 2018, pp. 20–92), whose ideas were based on the fact that civil law could no longer be used only to enrich certain groups across Italy, disrupting the main principles that have already been imposed by the constitutional legislator.

Another author that shared the same point of view is Aurélio Nogueira (Nogueira, 2010, pp. 583). This author has been studying the ideas of Pietro Perlingieri for more than four years and, subsequently, have concluded that it has been unthinkable to conceive any legal system that may segregate people or provide any discrimination which would, inevitably, result in distorting the fundamentals previewed in the supreme constitutional text. However, the idea that any constitutional prescription should have plenty of effectiveness, and, therefore, must impose obligations over the whole constitutional legislator system, so as not to disturb its central ideas, has also been shared by the most influential French authors. Among them, Legrand, and Wiener (Legrand & Wiener, 2017, pp. 10) have conceived the constitutional text as an origin of all other normative disposals, which owe it

supreme and total obedience. Furthermore, the German literature has been credited as being one of the most influential doctrines to the theme. One of the most recognized academics, Claus Wilhelm Canaris (Canaris, 1812, pp. 39–102) developed the theory of judicial systems, which determines that any interpretation extracted from the article 93 of the German Constitution text (*Grundgesetz für die Bundesrepublik Deutschland*) would lead to the conclusion that those fundamentals remain capable of provoking the judiciary power in order to inhibit any aggression to constitutional rights. Consequently, any disposal in the German Constitution ought to be conceived as having total effectiveness and, therefore, any law project attempting to disrupt the basis of the German Legal System should be immediately interrupted. Moreover, Favoreu's *et al.* idea (Favoreu *et al.*, 2019, pp. 221–231) is based on the fact that it remains unthinkable to consider any scenario that may try to exterminate (or decrease) any constitutional guarantee, even those that may not be fully and immediately applicable. In these terms, judicial constitutional principles, like freedom of speech or religious liberty, and even some programmatic norms, must have total neutrality of not being relativized or eventually extinguished.

Besides, even some programmatic and ideological disposals must have full applicability and, therefore, impose several obligations over the infra constitutional legislation. So, no matter the case or even the circumstances, they shall still have total intangibility from those who may want to abolish them. Brazilian doctrines also share the same principles. In this term, the analyses of the Minister of the Brazilian Supreme Court, Eros Roberto Grau (2006, pp. 220–225), are appointed to have influenced many constitutional studies worldwide. According to his thesis, the significant effect of all constitutional norms can be easily observed through several obligations imposed over Brazilian banks to share part of their resources with small and non-profitable businesses. Thus, whenever an explicit obligation over free-market areas is imposed, that empirically demonstrates evidence that the effectiveness of all the constitutional devices irradiates their applicability over the whole legal system. Thus, these authors share a point in common: the primary principles, values, and norms within the constitution text are not only intangible of being abolished but also impossible to be diminished. Consequently, considering the idea as generally accepted, then, the question arises: a) are these constitutional obligations guaranteed? b) Is the equity for all Brazilian citizens truly gifted with effectiveness? c) In other words, have these constitutional norms been fully applicable in the cases of persons with disabilities?

Hence, the objective of this article is to answer these questions in the next chapters through the investigation of what has been legally produced by Brazilian State, in order to guarantee the efficiency of the Constitutional equity prescription, particularly to those persons with disabilities in the administrative and the tax legislation.

Administrative law system of Brazil and its relationship with persons with disabilities

The authors usually describe the administrative law system as a group of laws that imposes the public administration the duty to provide significant applicability to the prescriptive constitutional norms. In these terms, Cavalli (2000, pp. 20–30) points out that, contrary to the private sector, even

programmatic constitutional prescriptions are obligatory for the public sector. Also, several legal disposals in the Brazilian administrative and legal system have been produced to provide full effectiveness to the constitutional command. These authors point out many tools in the administrative system that may be used whenever it becomes necessary, such as a) the administrative servitude—a mechanism which allows public authorities to use temporary private property—, b) administrative limitations—a mechanism available to impose burdens over private properties—; as well as c) expropriations. All these regulations have been conceived to assure common use for private properties. However, only recently has the Statute of Cities Law been published to regulate these cases, which, therefore, has become an essential norm available for the Brazilian authorities in implementing real equity over private properties. In this Statute, especially the article n. 39, several obligations have been imposed on all citizens to provide social responsibility for their private properties efficiently. Additionally, any negligence may result in its total expropriation.

This law also authorizes a gradual increase, in five years, for those that may want to remain using their private properties only for speculative purposes. Moreover, after this deadline, if these private properties remain without any social interest, then the public administration shall be legally authorized to promote its expropriation and whose payment shall not be demanded before ten years (Carvalho, 2015, pp. 15–78). Equally important, there has been an academic debate whether these norms should also be applied to the public propriety or, instead, should be mandatory strictly for the private sector. Despite several arguments against its full applicability, Silvio Luís Ferreira da Rocha (Rocha, 2005, p. 55), has concluded that these principles shall also be applied to all proprieties, whether public or private. Hence bearing in mind the perception that the Statute has just regulated the constitutional forecast; consequently, there should never be any distinction between public or private proprieties concerning the applicability of the Statute. Consequently, the public administration has been obligated not to maintain any eventual vacant land or unfinished buildings. In other words: the public administration should no longer be considered apart from the critical and mandatory constitutional commands.

Although these prescriptive norms might be useful instruments in applying social equity overall properties, many empirical types of research have demonstrated a different perspective. For instance, the studies of Pacheco *et al.* (Pacheco *et al.*, 2010, p 55) found out that in many peripheral areas of the city of Porto Alegre, the lack of accessibility in schools or parking areas seems to be the general rule. In these terms, apart from these disposals within the Statute of Cities Law, many of its commands remain without effectiveness, such as the absence of access ramps or even elevators. Sharing the same point of view, Renato da Silva Lima (Silva Lima, 1998, pp. 1–80) has analyzed the effectiveness of mobility for persons with disabilities in the cities of Araraquara and São Carlos. He has also concluded that a disorderly growth in both cities has resulted in a significant level of inaccessibility in central areas, and thus, has resulted in depriving persons with disabilities from exercising their civil and constitutional assurances. In conclusion, despite all the legislative norms that may have been produced in the Brazilian administrative sector, which ought to have provided real efficiency to all proprieties and adequate mobility for persons with disabilities, these tools are

still far away from what might be considered as minimally desirable. It remains, however, necessary to analyze how other norms, in other fields, such as taxes' laws, have minimized these problems.

Consumption tax and the public policies for persons with disabilities

In the formal perspective of constitutional equity, it has been determined equal treatment for consumers under the same conditions. Therefore, the concept of equity must also include a material perspective that imposes fair treatment to consumers with unequal social conditions and, consequently, obligates the infra constitutional legislator to take these particularities into account on taxation over consumption. Thus, taxation, in general, shall be conducted by formal equality. In these terms, the Brazilian constitution forbids any unequal or unjustifiable treatment over taxpayers apart from what has already been previewed by the primary legislators (article 150, II, CF/88). Additionally, article 145, § 1º of the Brazilian constitution establishes the personal aspects of taxation, which leads to the necessity to calibrates taxation according to the economic capacity of each citizen. Other constitutional norms also enunciate the obligation for compliance with tangible equity in the context of tax legislation. Furthermore, to specify and clarify what material and formal equity are supposed to be, the primary legislators have imposed two main principles. The first is progressivity on taxation, which is expressly envisaged for Income Taxes (art. 153, § 2º, I). The second one is selectivity, which is obligatory for taxes over Industrialised Products (art. 153, § 3º, the item I) and shall be recommended for taxation over consumption. Among such taxes, the ICMS—taxation over goods and services, as well as over transportation, communications, energy, and oil—(art. 155, §2º, III) - might be considered as the most significant for the financial health of the 27 Brazilian States. Therefore, in general terms, exceptions to formal tax equality are allowed (and even required) whenever necessary to guarantee material equity between individuals or regions with particularities that must be considered in tax rates.

However, the subject of maintaining equality over-taxation is a complicated matter for many reasons. First, a dual dimension is required: on the one hand, taxation is the most significant source to finance public needs, and, on the other hand, tax relief is a way of promptly balancing situations of disparity. So, the real challenge would be to establish the ideal measure between these two dimensions, so that neither the State nor the citizens shall be overcharged. Besides, tax distinctions should also observe economic neutrality which interfaces economic and consumer laws. Furthermore, the tax system should reflect the most considerable economic interests of the consumers regarding their ability to contribute to the State's finances, and, in terms of tax rates, this must always take into account the situation of any economic or vulnerability of the taxpayer.

In these terms, tax legislation shall also observe the principle of tax capacity, which can be defined as an individual's economic suitability to bear taxation without overcharging the patrimony of taxpayers in a way they may not be expropriated from what is considered to be essential to human dignity (BALEIRO, 1972, pp 272). Thus, in the case of persons with disabilities (PWDs), who need to adopt many of their goods for their unique consumption demands, the additional economic burden can be observed in their specific cases, which, also, allows different tax treatment according to their

specific demands in an attempt to provide efficient material and formal equity. Hence, in Brazil, there remain 5 (five) classic indirect taxes: IPI (Tax over Industrialised Products); ICMS (Taxation over Consumption and goods); ISS (taxation over services), PIS and COFINS (both social security contributions). Although they are charged directly from the supplier of goods, those taxes are, at the end of the chain, paid by the final consumer, considering that the supplier will overprice the products with the tax rates that he had already paid.

It is also vital to notice that these taxes are the most relevant for Brazilian revenues, which are mainly sustained by consumption, as can be demonstrated by the revenue matrix of taxation for the year of 2017 (Secretary of Treasure of Brazil, 2017). In these terms, the matrix of taxation in Brazil mostly consists of 48.44% of taxation on consumption, including goods and services (Secretary of Treasure of Brazil, 2017). Consequently, Brazil is one of the countries that has one of the highest consumption taxes in the world, according to the data from OECD (OECD, 2016) overcharging goods despite incomes. On the other hand, a taxation matrix based on incomes are mostly adopted by the most developed countries, such as Japan and Germany, and that is one of the reasons why they are becoming internationally competitive while Brazil has fallen behind. Thus, considering that it would not be possible to establish for buyers the same progressivity as is defined for income taxes, then, taxation on consumption and economic inequality must be seen as interrelated and complementary like two faces of the same coin. Additionally, it is vital to consider the size of the tax rates on consumer goods – applicable equally to all citizens – that inevitably result in a higher burden for the low-income earners. Thus, any distortion in the system, consequently, highlights the importance of equity-based public policies and, above all, for the person with disabilities due to their unique demands.

Moreover, a person with physical disabilities, such as those with locomotion difficulty, would have a higher requirement to buy a vehicle, because they shall have to pay for their adaptations. Therefore, the need for these additional expenses also creates other additional tax burdens, which makes their financial sacrifice even higher in contrast to other individuals. In this context, it is crucial to notice that, even if it has been assumed that tax selectivity (*for example* the incidence of the higher tax rates over superfluous goods and lower taxation on the essential ones) it can be shown that, the essentiality, itself, still not be sufficient to provide material equality to all citizens, considering some peculiarities within the demands for adaptation by persons with disabilities (PWDs). In other words, whenever taking into account that the taxation over goals of PWDs and the rest of the population are inevitably the same, this will lead to the conclusion that, despite their particular demands for adaptations and further expenses, they will be charged equally to the rest of the population. This distortion, thus, demonstrates the necessity to provide a way to overcome this inconsistency, which is inherent to the Brazilian matrix of taxation, mostly based on consumption. Therefore, policies for exemptions are especially relevant for this specific group of consumers and must not be confused with charity (or even government subsidies), as Allison Christians and others have precisely pointed (Christians, 2009, p. 229). In this regard, as means to achieve equity, the infraconstitutional legislator has established several tax benefits for the acquisition of vehicles by Persons with Disabilities in

attempting to equalize the problem of the fiscal policies with their particular needs and further expenses. These benefits must also be seen through two different dimensions. Firstly, it is required to analyze these benefits by the federal government on their tax legislation, such as IPI. Additionally, it is also required to analyze the benefits by the 27 Brazilian states for PWDs, especially on taxation over consumption. Moreover, it is fundamental to analyze, whereas these benefits have indeed achieved its goals or, instead, they remain useless.

Federal tax exemptions for the acquisition of vehicles

Federal tax policies for any acquisition of new automotive are the same to PWDs and to professionals who carry out autonomous driving activities, whether for companies or rural producers. The exemption of the IPI is provided by the Brazil Law 8.989/95, and the exemption of IOF - Tax on Financial Operations - (which may be required whenever necessary to finance the vehicles' acquisition) -, is provided by the Law 8.383/91. In both cases, the benefit only applies if the vehicle is manufactured in national territory, and, also, it is limited for engines up to 2,000 cm³. For IPI, it is also required for the vehicle to have at least 4 (four) doors, and those benefits are limited up to 127 HP (one hundred and twenty-seven horsepower). Hence, the objective is to allocate the benefit only for the acquisition of vehicles that shall not exceed the level of the requirement from PWDs, so that the State does not bear with non-taxation on luxurious vehicles.

Also, it is only allowed to request the benefit for IPI exemption for *a person with physical, visual, severe or profound mental disabilities, or autistic, even if under eighteen (18) years, directly or through his legal representative's* (art. 1^o, IV, Lei 8.989/95), within the limit of a single-use and just in two years (art. 2). Once this time is respected, another vehicle can be purchased with the benefit, regardless of whether the previous one has been sold or not. This exemption can, consequently, represent more than 30% (thirty percent) of the value of the vehicle (Secretary of the Treasure of Brazil, 2017) – which also, for the IPI benefit case, has no maximum limit. The same applies to the IOF, with the particularity that the benefit can be required exclusively (art. 72, §1^o, *a*, Lei 8,383/91) for persons with physical disabilities, with total inability to drive conventional cars and that must have specific license to drive adapted vehicles (art. 72, IV, *a* and *b*).

States' tax exemptions for the acquisition of vehicles

The exemption scenario is more complicated when it comes to State's level and its legislation over taxes since there are 26 (twenty-six) the Brazilian States along with one Federal District (capital Brasilia) that have their tax competences. Subsequently, each one has the power to predict and apply its tax policies, which is also particularly crucial concerning the IPVA legislation (tax on the property of automotive vehicles). Furthermore, the IPVA tax ends up influencing and burdening the owner of a vehicle directly, as it remains an annually chargeable tax over the vehicle's consumer. So, the benefit of IPVA for PWDs may represent a significant amount over their expanses. Moreover, the ICMS benefits carry an extra challenge for States which is known in Brazil as tax war and is conceived as the predatory tendency of states to adopt lower tax rates in order to guarantee their investments and which, inevitably, may harm other States that might also need to lower their own so that they can also attract investments. In other words: financial concurrence among states might occur

in order to attack investments. In an attempt to avoid this, the article 155, § 2º, XII, 'g' from Brazilian constitution, determines that complementary national Law should regulate how States and Federal District must deliberate about granting or revoking any exemptions, or even incentives, related to tax benefits so that no state suffers from any deterioration in its finances. This Law has been published with the number 24/1975. This Law allows benefits concessions only in cases it has been authorized by internal agreements among all States and, additionally, its approval must be unanimous by the Council for Business Policy (CONFAZ). Thus, the benefit for Persons with Disabilities has been established by the Council with the Agreement of ICMS n. 38/2012 (Secretary of Treasure of Brazil, 2012), and still currently applicable.

According to this agreement, the benefit shall be conceived for persons with 1) autism and 2) physical, 3) visual, and 4) mental disabilities every four years (Clause Five, I). Additionally, the agreement establishes that States must grant the benefit within its exact limits imposed in aim to ensure that its suitability for persons with particular disabilities' demands shall not be distorted. So, this benefit has been thought out for attending just a person with particular disabilities demands and shall not be granted for luxurious vehicles.

Nowadays, this limit is restricted for vehicles up to R\$70,000.00 (Clause 1, § 2º). However, the question remains: May this price might not be out of date considering an eventual inflationary effect? In other words, unlike the technical qualifications of the vehicle, its sale price might change over time. So, while descriptions such as 'an engine up to 2,000 cm³' remains unchangeable, that does not occur with the prices of vehicles that deteriorate with the lapse of time in case its nominal value is not annually updated. Furthermore, that delay in updating the prices of vehicles has been pointed out as one of the most significant negative factors related to tax benefits. In the case of people with disabilities, in Brazil, this lack of updating vehicles' prices by government authorities have been pointed out to be delayed by more than a decade. So the original price of 70,000, assumed to be the maximum value of the vehicle that could be acquirable for persons with disabilities (ICMS Agreement 03/07) has no longer been updated since 2009, the last time the Council for Business Policy of ICMS agreed to add R\$60,000.00 (sixty thousand reais) to its initial value (according to the ICMS Agreement n 52/09), resulting in a final value of R\$120,000.00.

The nominal value still currently applicable; therefore, since July 2009, and then, its purchase price has gradually undergone due to the inflationary corrosion, so it can no longer preserve its nominal value. That means that, in the current year of 2020, the person who would be entitled to benefit from the incentive might not be capable of acquiring the same vehicle he could have in 2009 as a direct consequence of the absence of adjustments in its nominal value by more than a decade by Brazilian authorities. On the contrary, the R\$70,000.00 (seventy thousand reais) correspond, in current values, to less than R\$20,000.00 (twenty thousand reais), considering accumulated inflation at almost 80% (eighty percent) during this period (Federal Bank of Brazil, 2020). This statement is based on the National Broad Consumer Price Index – IPCA –, which is the official inflationary index for the Brazilian government and whose values are calculated annually by the Brazilian Institute of Geography and Statistics – IBGE –.

This parameter allows, therefore, to identify the losses of real value over the acquisition on vehicles for persons with particular disabilities, especially whenever it has been considered their particular demands for adaptations whose prices also increases due to the inflation effect, apart from the benefit that remains the same during the years. Therefore, after a simple calculation, it can observe the absence of adjustments and several distortions in tax legislation benefits, especially regarding the purchasing power of goods. This distortions concerns, after all, to the demands of persons with particular disabilities, implying in an average devaluation of more than 80% (eighty percent) in the benefit related to their acquisitions and, inevitably, overcharging them with the increasing prices due to inflationary effect.

Conclusion

Considering all the facts that have been exposed, it is possible to conclude that, despite all the legislation that has been produced in the administrative and tax fields, the effective material equity is not sufficiently provided to persons with disabilities in Brazil. It has also been demonstrated that, apart from a variety of prescriptive administrative norms, many rules are still ineffective, not updated and/or not being correctly and systematically used as they were supposed to.

At the same time, it is shown that international entities point out that the matrix of Brazilian taxation is mostly composed of taxes on consumption, what results not only in several losses in competition for its products but also, ends up harming, directly, the portion of the population the State was supposed to safeguard and grant equity – which has a big impact in persons with disabilities, specially regarding the consumption of accessible vehicles, for which, even though that are specific public policies (exemptions), it's not being enough to ensure the protection the constitution guarantees.

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