# REVISTA INTERNACIONAL
# CONSINTER
# DE DIREITO

Publicação Semestral Oficial do
Conselho Internacional de Estudos
Contemporâneos em Pós-Graduação

**ANO V – NÚMERO IX**

**2º SEMESTRE 2019**

## ESTUDOS CONTEMPORÂNEOS

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A presente obra foi aprovada pelo Conselho Editorial Científico da Juruá Editora, adotando-se o sistema *blind view* (avaliação às cegas). A avaliação inominada garante a isenção e imparcialidade do corpo de pareceristas e a autonomia do Conselho Editorial, consoante as exigências das agências e instituições de avaliação, atestando a excelência do material que ora publicamos e apresentamos à sociedade.

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## ESTUDOS CONTEMPORÂNEOS

Porto
Editorial Juruá
2019

# Instruções aos Autores
# Revista Internacional CONSINTER de Direito

## 1. DAS PUBLICAÇÕES

Para publicação na Revista Internacional CONSINTER de Direito os artigos científicos serão avaliados pelo sistema *double blind review*, no qual dois Pareceristas do CONSINTER avaliarão os trabalhos sem nenhuma identificação de autoria.

O enquadramento dos textos avaliados e aprovados para fins de publicação na Europa pelo Editorial Juruá Lda., e no Brasil pela Juruá Editora Ltda., obedecerão aos seguintes critérios:

## REVISTA INTERNACIONAL CONSINTER DE DIREITO

Conforme as exigências das agências e instituições nacionais e internacionais de investigação e docência que avaliam a atividade acadêmica e investigadora das Pós-Graduações, a Coordenação Executiva do CONSINTER, ao seu melhor juízo, selecionará uma determinada quantidade de artigos aprovados que serão agraciados com a Publicação no Periódico "Revista Internacional do CONSINTER de Direito", com ISSN de Portugal. Ainda:

a) Para cada artigo selecionado para a "Revista Internacional do CONSINTER de Direito", será atribuído um número de registro específico e único no Sistema DOI (*Digital Object Identifier*);
b) Também será atribuído um registro no Sistema DOI (*Digital Object Identifier*) para a "Revista Internacional do CONSINTER de Direito".

**OBS. 1:** Em face das normas técnicas, para fins de qualificação do periódico, somente poderão ser selecionados para a Revista Internacional CONSINTER de Direito os artigos aprovados nos quais pelo menos um dos autores e/ou autor tenha a titulação de Doutor.

**OBS. 2:** Ficará a critério do Comitê Organizador a indicação e o número da Revista em que o artigo aprovado será liberado para publicação.

## 2. PERIODICIDADE

Semestral.

## 3. CONDIÇÕES

a) A submissão do trabalho científico para análise está condicionada à confirmação da inscrição de todos os autores e coautores;
b) Somente serão publicados os artigos aprovados pelo Corpo de Pareceristas/Conselho Editorial do CONSINTER.

## 4. DOCUMENTOS OBRIGATÓRIOS PARA SUBMISSÃO

a) Inscrição;
b) Comprovante de pagamento da submissão/inscrição;
c) Cessão de direitos autorais assinada;
d) Artigo completo seguindo as orientações do item 5;
e) O artigo deverá ser encaminhado por um dos autores ao e-mail contato@consinter.org.

**5. NORMAS — OS ARTIGOS ENVIADOS DEVEM CUMPRIR OS SEGUINTES CRITÉRIOS:**

**a)** Ser inédito (não publicado em livros, revistas especializadas ou na imprensa em geral) e apresentar propriedade técnico-jurídica; relevância nacional e internacional do tema abordado, fluência redacional, correção gramatical e respeito a aspectos éticos e científicos;

**Obs.:** Textos inseridos em documentos de circulação restrita nas universidades serão considerados inéditos.

**b)** Ter sido produzido por Estudantes e/ou Professores de Pós-graduação *Lato Sensu* e/ou *Stricto Sensu* ou por Mestres, Doutores e Pós-Doutores;

**c)** Serão aceitos trabalhos em coautoria, com limitação máxima de 03 (três) participantes devidamente inscritos;

**d)** O artigo deverá estar identificado com um dos critérios de classificação conforme edital;

**e)** O(s) autor(es) que submeter(em) o mesmo artigo científico (com o mesmo título e conteúdo ou apenas mudando o título) para mais de um dos ramos do Direito acima indicados terão ambos os artigos científicos automaticamente eliminados da avaliação;

**f)** Conter no mínimo 15 páginas, e no máximo 25 páginas;

**g)** Ser redigido em formato Word em dois arquivos distintos, um com e outro sem identificação, ambos completos, contendo: Título em língua portuguesa, espanhola, inglesa, italiana ou francesa; Sumário; Resumo e Palavras-chave em língua portuguesa ou espanhola e inglesa, respeitando as normas técnicas;

**h)** Para o arquivo sem identificação é importante o autor certificar-se que no conteúdo do artigo a ser avaliado não conste nenhuma informação que possibilite a identificação do autor ou o Instituto ao qual esteja vinculado direta ou indiretamente;

**i)** O artigo poderá ser apresentado em língua portuguesa, espanhola, inglesa, italiana ou francesa, observando que o título, resumo e palavras-chave precisam, obrigatoriamente, estar indicados em dois idiomas, sendo peremptoriamente uma indicação no idioma inglês;

**j)** O texto deve estar salvo em arquivo Word, em versão recente, com as seguintes características: fonte Times New Roman; corpo 12; alinhamento justificado, sem separação de sílabas; espaço de 1,5 entrelinhas; parágrafo de 1,5 cm; não colocar espaçamentos especiais antes ou após cada parágrafo; margens superior e esquerda com 3 cm, inferior e direita com 2 cm; em papel tamanho A4; notas de rodapé explicativas na mesma página em que for citada a referência, sendo que as Referências deverão seguir as Normas Técnicas;

**k)** As páginas deverão estar numeradas;

**l)** Para cada título, subtítulos, todos alinhados à esquerda, deverá haver um texto correspondente;

**m)** Devem ser escritos de forma clara e objetiva, evitando-se parágrafos prolixos ou extenuantes e privilegiando as orações na ordem direta como: sujeito – predicado – complemento;

**n)** Não serão aceitos textos com figuras, ilustrações e/ou fotografias, à exceção de gráficos e tabelas que sejam imprescindíveis para a compreensão do trabalho e compatíveis com a impressão em preto e branco, sendo vedada a utilização de gráficos e tabelas se originarem de terceiros;

**o)** Conter Resumo (entre 100 e 250 palavras) em língua portuguesa ou espanhola e em inglês, assim como a indicação de Palavras-chave (entre 3 e 10 palavras) também em português ou espanhol e inglês;

**p)** Conter: Sumário a ser indicado na sequência da apresentação do Título, Resumo (entre 100 e 250 palavras – peremptoriamente com 02 idiomas), sendo um em Língua portuguesa ou espanhola e outro necessariamente em inglês, assim como a indicação das Palavras-chave (entre 3 e 10 palavras), obedecendo o mesmo critério de apresentação do Resumo;

**q)** O texto deve obrigatoriamente vir acompanhado do termo de autorização para publicação – cessão de Direitos Autorais/Patrimoniais – conforme modelo anexo e/ou disponível no *site*;

**r)** A qualificação do autor deverá ter no máximo 4 linhas, em nota especial de rodapé, indicando obrigatoriamente a formação acadêmica e citando a Instituição de Ensino Superior à qual esteja vinculado, quando for o caso;

**s)** A taxa de inscrição é individual e única para cada autor. Assim, cada autor deverá efetuar a sua inscrição e o pagamento da respectiva taxa;

**t)** Um autor poderá enviar quantos artigos desejar, no entanto, para cada artigo submetido deve haver o pagamento da taxa de inscrição/submissão;

**u)** Observando as normas de qualificação, somente poderá ser liberado para publicação na Revista Internacional CONSINTER de Direito um artigo por autor. Em caso de aprovação de dois ou mais artigos do mesmo autor para a Revista, ao melhor juízo da comissão avaliadora, os demais artigos serão direcionados para publicação no Livro Direito e Justiça ou para o(s) próximo(s) número(s) da Revista.

## 6. DOS SISTEMAS PARA A INDICAÇÃO DAS FONTES DAS CITAÇÕES

Para a indicação das fontes das citações, os artigos deverão adotar os sistemas:

**I) Trabalhos Estrangeiros:**

Trabalhos estrangeiros poderão utilizar as normas técnicas compatíveis com o seu país de origem, respeitando as normas de publicação dispostas nesse edital, inclusive o Estilo Chicago se assim o autor entender cabível e adequado.

**Estilo Chicago:**

Último nome do autor, primeiro nome, título do livro. (Cidade: editora, ano), versão. Por exemplo: Ninguém, José, Livro Exemplo. (São Paulo: Universidade de São Paulo, 1992), edição Juruá e-Books.

**II) Trabalhos Brasileiros:**

Para artigos brasileiros recomenda-se seguir as Regras da ABNT (NBR 10.520/2002) para as citações, as quais podem ser diretas ou indiretas.

Para a indicação da fonte das citações, o autor poderá optar pelo sistema numérico (notas de rodapé) **ou** pelo sistema autor-data, não podendo, portanto, utilizar os dois sistemas concomitantemente.

**A – Sistema Autor-Data**

As Referências deverão seguir a NBR 6.023/2002.

No sistema autor-data, a fonte da citação é indicada junto à mesma e de forma sucinta. Devem ser evidenciados apenas: a autoria, o ano de publicação e a página do trecho citado.

**Obs**.: Se a opção for pelo sistema Autor-Data, pode-se utilizar o rodapé para as notas explicativas, conforme assim autoriza a NBR 6.022/2003.

**B – Sistema em Notas de Rodapé**

Ainda, adotando o sistema brasileiro de referenciação, se a opção de citação das referências for pelo sistema numérico, ou seja, **em notas de rodapé**, estas deverão seguir a NBR 10.520/2002.

## 7. DA AVALIAÇÃO DOS ARTIGOS

Os artigos científicos serão analisados pelo Corpo de Pareceristas do CONSINTER, formado somente por renomados juristas Doutores e Pós-Doutores, nacionais e estrangeiros especialmente convidados.

**Os artigos científicos serão avaliados pelo sistema *double blind review*, no qual dois Pareceristas do CONSINTER avaliarão os trabalhos sem nenhuma identificação de autoria**. A apreciação inominada dos artigos científicos afiança a imparcialidade do seu julgamento, diminui a subjetividade e as preferências ideológicas. Dessa forma, o autor deverá evitar referências diretas a si mesmo e citações que possibilitem extrair da leitura do texto a sua autoria.

Em caso de admissão do artigo científico por um dos Pareceristas do CONSINTER e reprovação por outro, o texto, ao melhor alvitre do conselho diretivo, poderá ser submetido à apreciação de um terceiro Parecerista.

a) O conteúdo dos artigos científicos é de inteira responsabilidade dos autores e após submetido para avaliação não poderá sofrer qualquer substituição ou alteração, salvo solicitação do Corpo de Pareceristas;
b) Não é permitido plágio ou inserção de cópias literais.

**CONSINTER – CONSELHO INTERNACIONAL DE ESTUDOS CONTEMPORÂNEOS EM PÓS-GRADUAÇÃO**

**Coordenação Executiva** contato@consinter.org

www.consinter.org

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- **DOAJ**
- **LivRe**
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## Instructions To Authors

### 1. ABOUT THE PUBLICATIONS

For publication in the Revista Internacional CONSINTER de Direito, the scientific articles shall be evaluated by the double-blind review system, in which two CONSINTER Referees shall evaluate the papers without any author identification.

The framework of the evaluated and accepted articles for the purpose of publication in Europe by the Editorial Juruá Lda., and in Brazil by Juruá Ltda, will follow the following criteria:

### 1. FOR THE JOURNAL "REVISTA INTERNACIONAL CONSINTER DE DIREITO"

According to the requirements of national and international agencies of investigation and teaching that evaluate the investigative and academic activity of Post-Graduation, the CONSINTER Executive Coordination, at the best of their judgment, will select a certain amount of articles approved that will be awarded with the Publication in the Journal "Revista Internacional do CONSINTER de Direito", with ISSN from Portugal. Also:

a) For each article selected for the journal "Revista Internacional do CONSINTER de Direito", a number of the specific and unique register in the DOI (Digital Object Identifier) system will be assigned;

b) A register in the DOI (Digital Object Identifier) system will also be assigned to the journal "Revista Internacional do CONSINTER de Direito".

**NOTE 1**: In the face of the technical rules, for the purpose of qualification of the journal, only the articles approved in which a least one of the authors and/or author has a doctorate degree will be selected for the journal "Revista Internacional CONSINTER de Direito". The articles properly approved that do not fulfill this requirement will be published in the Book of CONSINTER.

**NOTE 2**: The Organizing Committee will be in charge of the nomination and the issue of the journal "Revista Internacional CONSINTER de Direito" in which the approved article will be authorized for publication.

### 2. PERIDIOCITY

Half-yearly

### 3. REQUIREMENTS

a) The submission of the scientific work for analysis is conditioned to the confirmation of subscriptions of all authors and co-authors;

b) Only articles approved by CONSINTER Referees Board/Editorial Board will be published.

### 4. REQUIRED DOCUMENTS FOR SUBMISSION

a) Registration;

b) Proof of payment of the Submission/registration;

c) Assignment of copyrights signed;

d) Full Article following the guidelines of item 5;

e) The articles must be forwarded by one of the authors by e-mail contato@consinter.org

**5. RULES — THE ARTICLES SENT MUST FULFILL THE FOLLOWING CRITERIA:**

a) Be original (not published in books, specialized journals or in the press in general) and present technical-legal property; national and international relevance of the theme approached, wording fluency, grammar correction, and respect to the ethical and scientific aspects;

**Note**: The texts inserted in documents of restrict circulation at universities will be considered original.

b) Have been produced by students and/or professors of Lato Sensu and/or Stricto Sensu Post Graduation courses, or by Masters, Doctors, and Post-Doctors;

c) Works in co-authorship will be accepted, up to the maximum of 3 participants properly registered;

d) Be identified with one of the criteria of classification to be informed in public notice;

e) The author (s) that submit the same scientific article (with the same title and content or only having the title changed) for more than one of the fields of Law above mentioned, will have both scientific articles automatically eliminated from the evaluation;

f) Have a minimum of 15 pages, and a maximum of 25 pages;

g) Be submitted in Word format in two distinct files, one with and the other without identification, both complete, containing: Title, Summary, Abstract and Keywords in Portuguese, Spanish, English, Italian or French; in Portuguese or Spanish and in English, respecting the technical rules;

h) For the file without identification it is important for the author to make sure that, in the content of the article to be evaluated, there is no information that makes it possible to identify the author or the Institution they are directly or indirectly bound to;

i) The article can be presented in Portuguese, Spanish, English, Italian, or French, observing that the title, abstract and keywords have to be written in two languages compulsorily, being one of them, peremptorily, English;

j) The text must be saved in a word file, in a recent version, with the following characteristics: Times New Roman font, size 12; justified alignment, without hyphenation; 1.5 spacing between lines; 1.5 cm paragraph spacing; do no insert special spacing before or after each paragraph; top and left margins with 3 cm, bottom and right margins with 2 cm; A4 size document; explanatory footnotes on the same page the reference is cited, and the references must follow the technical rules;

k) The pages must be numbered;

l) For every title, subtitle, all of them aligned on the left, there must be a corresponding text;

m) The text must be written in a clear and objective way, avoiding long-winded and strenuous paragraphs, giving priority to sentences in the direct order, such as subject-predicate – complement;

n) Texts with figures, illustrations and/or photographs will not be accepted, except for graphs and tables which are indispensable for the understanding of the work, and compatible with black and white printing, being prohibited the use of graphs and tables if originated from a third party;

o) It must contain an Abstract (between 100 and 250 words in Portuguese or Spanish and in English, as well as the Keywords (between 3 and 10 words), also in Portuguese or Spanish and in English;

p) It must contain: a Summary to be indicated in the sequence of the presentation of the title, Abstract (between 100 and 250 words, peremptorily in 02 languages, being one of them in Portuguese or Spanish and the other in English, just as the Keywords (between 3 and 10 words), in accordance with the same criterion of the presentation of the Abstract;

q) The text must be accompanied by the copyright form – according to the model attachment and/or available on the site;

r) The author's qualification must have a maximum of 4 lines, in a special footnote, indicating their academic background and citing the Higher Education Institution which they are bound to if that is the case;

s) Observing that CONSINTER is a non-profit organization, the submission/registration rate subsidize the articles' publication in the Revista Internacional CONSINTER de Direito. Submission/registration fee is individual and unique to each author. Therefore, each author must achieve the registration and make the payment of the respective fee. For example: For article submission in co-authorship with 02 authors – it will be mandatory the registration of the two authors and payment of 02 submission fees;

t) An author may submit as many articles as he pleases, however, for each submitted article there must be made the respective submission/registration fee payment;

u) Observing the qualification standards, only one article per author will be authorized for publication on the Revista Internacional CONSINTER de Direito. In case of one or more articles of the same author have been approved for publication on the Journal, to the better judgment of the evaluation commission, the other papers will be guided for publication on the Book Direito e Justiça or for future edition(s) of the Journal.

## 6. ABOUT THE SYSTEMS TO INDICATE THE SOURCES OF CITATIONS

To indicate the sources of citations, the articles must adopt the systems:

**I) For Foreign Work:**

Foreign works can use the same technical rules compatible with their country of origin, respecting the publication rules displayed in this notice, including the Chicago style, if the author finds it applicable and appropriate.

**Chicago Style:**

Author's last name, first name, title of the book. (City: Publisher, year), version. Example: Someone, José, book example. (São Paulo: Universidade de São Paulo, 1992), edição Juruá e-Books.

**II) For Brazilian Works**

For Brazilian articles, it is recommended to follow the ABNT rules (NBR 10520/2002) for the citations, which can be direct or indirect, by Author-Date or in Footnotes.

For citation source's indication, the author may choose the number system (footnotes) or by the author-date system, therefore he/she cannot choose to use both concomitantly.

**A – Author-Date System**

The references must follow NBR 6023/2002.

In the author-date system, the source of citations is indicated alongside with it and in summary form; Point out, only: authorship, publication year and page of the piece cited.

**Note**: If the choice is the Author-Date system, explanatory notes can be used as footnotes, as authorized by NBR 6022/2003.

**B – Number System (Footnotes)**

Still, adopting the Brazilian System of references, if the choice of citation of references is by the number system, or else, in footnotes, they should follow NBR 10520 /2002.

## 7. ABOUT THE ARTICLE REVIEW

The scientific articles are analyzed by the CONSINTER Referees Board/Editorial Board, formed only by renowned Doctors and Post-Doctors, jurists, Brazilian and foreigners, especially invited. The scientific articles will be evaluated by the double-blind review system, in which two CONSINTER members of the board will evaluate the works without any authorship identification. The assessment of scientific articles by anonymous authors guarantees the impartiality of judgment and decreases subjectivity and ideological preferences. This way, authors must avoid direct references to themselves and citations that make it possible to extract its authorship from the reading of the text.

If the scientific article is accepted by one of the CONSINTER members and failed by another, the text, at the suggestion by the Director Council, can be subjected to the assessment by a third party.

a) The content of the scientific articles is the authors' full responsibility, and after subjected to assessment cannot go through any changes or replacements, except if requested by the Referees Board/Editorial Board;
b) Plagiarism or the insertion of verbatim copies are not allowed.

**INTERNATIONAL COUNCIL OF CONTEMPORANY IN POST-GRADUATE STUDIES**

**CONSINTER – CONSELHO INTERNACIONAL DE ESTUDOS CONTEMPORÂNEOS EM PÓS-GRADUAÇÃO**

**Executive Coordination** contato@consinter.org

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# APRESENTAÇÃO

A **Revista Internacional CONSINTER de Direito** é uma publicação de cariz periódico do **CONSINTER – Conselho Internacional de Estudos Contemporâneos em Pós-Graduação** que tem por objetivo constituir-se num espaço exigente para a divulgação da produção científica de qualidade, inovadora e com profundidade, características que consideramos essenciais para o bom desenvolvimento da ciência jurídica no âmbito internacional.

Outra característica dos trabalhos selecionados para a **Revista Internacional CONSINTER de Direito** é a multiplicidade de pontos de vista e temas através dos quais o Direito é analisado. Uma revista que se pretende internacional tem o dever de abrir horizontes para temas, abordagens e enfoques os mais diversos e, através deste espaço, colaborar com um melhor diálogo acadêmico.

Resultado de um trabalho criterioso de seleção, este volume que agora se apresenta destina-se a todos aqueles que pretendem pensar o Direito, ir além da sua aplicação quotidiana, mas sem deixar de lado o aspecto prático, tão característico das ciências.

# THE EQUALITY TEST APPLIED TO THE BRAZILIAN LIMITED TAXATION SYSTEM FOR MICROENTREPRENEURS

# APLICAÇÃO DO TESTE DE IGUALDADE APLICADO AO REGIME DE TRIBUTAÇÃO DOS MICROEMPREENDEDORES INDIVIDUAIS

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**Abstract:** Most Legal Principle varies in time and space, influenced by social values of a given society at a given time. It is precisely what happens with the Principle of Equality. While at first, equality solely demanded the law to be applied uniformly in all cases, it later became, in many jurisdictions, a guideline to Governments, demanding the promotion of equal opportunities to all citizens.

When it comes to taxation, the Principle of Equality requires the tax burden to be divided fairly among taxpayers, what implies that differences, whether imposing a higher or lower taxation, may never be made on arbitrary basis but rather on Constitutional grounds. Taking the Principle of Equality seriously can assist in building simpler and more fair tax systems.

It is not always easy to observe the Principle of Equality on taxation, as it may be difficult to stablish comparability criteria and framing taxpayers as equals, once taxpayers are hardly equal.

While difficult, it is possible to establish a few premises that can assist on the task of comparing taxpayers and understanding if the differences on the law are compliant with the Principle of Equality.

This is precisely the purpose of our article: drawing a few premises that can help us understand in concrete cases if the discriminations promoted by the legislation are compliant with the Principle of Equality. After drawing such premises, we will try

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applying our “equality test” to a concrete case: the microentrepreneurs taxation regime.

**Keywords:** Brazilian Tax System. Principle of Equality. Equality Test. Special Microentrepreneurs Taxation Regime.

**Resumo:** A maior parte dos Princípios Jurídicos variam no tempo e no espaço, influenciados significativamente pelos valores sociais de uma determinada sociedade em determinado tempo. É precisamente o que ocorre com o Princípio da Igualdade, cujo conteúdo, inicialmente voltado para uma aplicação constante da lei para todos, em muitas jurisdições foi transformando-se em um Princípio a exigir do Estado condutas positivas aptas a promover uma igualdade de oportunidades para os administrados.

Em matéria tributária, o Princípio da Igualdade exige que a carga tributária seja suportada de forma justa entre os contribuintes, o que implica que diferenciações, positivas ou negativas, não podem ser meramente arbitrárias, mas sim fundadas em necessariamente em motivações constitucionais. Observar o Princípio da Igualdade, em matéria tributária, pode auxiliar na construção de sistemas tributários por vezes mais simples e sempre mais justos.

Contudo, enquanto recomendável a observância do Princípio da Igualdade, nem sempre é fácil estabelecer critérios de comparabilidade e igualdade entre os contribuintes, uma vez que dificilmente dois contribuintes são idênticos.

Embora desafiador, é possível estabelecer algumas premissas que podem nos auxiliar a traçar parâmetros de comparabilidade entre contribuintes e verificar se as diferenciações realizadas atendem ao Princípio da Igualdade.

É precisamente este o objeto de nosso estudo: traçar algumas premissas que nos permitam identificar, em casos concretos, se as discriminações tributárias atendem ao Princípio da Igualdade. Para tanto, aplicaremos nosso “teste de igualdade” a um caso concreto: a tributação de microempreendedores individuais (MEI).

**Palavras-chave:** Sistema tributário brasileiro. Princípio da Igualdade. Teste de Igualdade. Regime especial de tributação para microempreendedores.

## 1 INTRODUCTION

Many modern legal systems are organized in a pyramidal way, where rules and principles, to be valid, must observe not solely a formal procedure to be introduced in the legal system, but also be materially compatible with the content of the rules and principles hierarchically superior.

Atop of such pyramidal structure, we will likely find the national Constitution. This means that every norm, in order to be valid, must necessarily observe the rules and principles disposed in the Constitution, as they are hierarchically superior.

Constitutions are often filled with guidelines for the state, the so-called principles. Principles are by nature general guidelines, significantly influenced by the values of a certain people, influencing the entire legal system. Like any value (e.g. moral, social, etc.), the content of a legal principle may vary on time and space and its precise content may be difficult to define.

While a certain idea of equality may be intuitive at this point of time, defining its precise legal content and, most important to us, its consequences from a tax standpoint is not an easy task. Equality is a broad, subjective value and most certain the concept of equality from a legal and tax standpoint may only be found within a systematic interpretation of each jurisdiction’s values and legal system.

Even if the concept of equality varies according to each jurisdiction, it is safe to say that, under the rule of law, it may not be accepted that a certain class of individuals benefit from tax privileges without fair justification or that a certain class of individuals are subject to a more burdensome taxation without reason.

Applying the Principle of Equality is challenging in every aspect of Law. When it comes to subjects related to human rights, it is often possible to find a certain uniformity in individuals, even in minorities. However, when it comes to taxation, it is extremely hard to find two exactly equal taxpayers. Taxpayers differ in location, revenues, expenses, profits, business activities, number of employees, corporate structure, environmental impact of the business they develop and so on.

All those particularities lead us to two possible situations. Often the legislator will understand that a certain group of taxpayers are not equal to others because of certain characteristics (e.g. social relevance), providing them a reduced taxation in comparison with the general rule, forgoing public revenues. On the other hand, certain groups of taxpayers may be subject to a heavier taxation in comparison to the general rule, also based on certain individual characteristics (e.g. increased taxation on products that are harmful to health) increasing public revenues but possibly impairing the business environment.

Trying to find a definitive, unique criterion for equality in tax is an impossible effort. Applying the Principle of Equality always requires, at least, the comparison between two situations (or individuals) in a certain moment of time and concrete cases, turning it, hence, impossible to be measured precisely in advance.

While difficult to apply, the Principle of Equality is a founding principle in any fair legal and tax system. In our article, we propose to apply what we called the "Equality Test", based on the lessons of one of the most important scholars in Brazil, Professor Celso Antônio Bandeira de Mello, specifically on the legislation that regulated a taxation regime limited to microentrepreneurs.

## 2 ALL SHALL BE EQUAL BEFORE THE LAW

It is a fairly common disposition from old, traditional constitutions to newly enacted ones to state that "all shall be equal before the law". While the expression "rule of law" is somehow broad and may accommodate a wide range of concepts[3], it is fair to say that equality before the law should be a unanimous criterion when qualifying any country as being under the rule of law.

In fact, it is highly intuitive at this point in western civilization to believe that every citizen, regardless of its personal conditions, gender, religion or social status should be treated equally before the law.

[3] Professor Tom Bingham, former president of the Supreme Court of the United Kingdom, explains in its' book "The Rule of Law" the difficulties involved in defining its' concept: "[…] So one might have expected the Constitutional Reform Act to contain a definition of so obviously important a concept as the rule of law. But there is none. […] More probably, I think they recognized the extreme difficulty of devising a pithy definition suitable for inclusion in a statute. Better by far, they might reasonably have though, to omit a definition and leave it to the judged to rule on what the term means if and when the question arises for decision".
BINGHAM, Tom. **The Rule of Law**. 1st. Ed. London: Penguin Books, 2011, page 14.

However intuitive at this point that equality has this broad range, prohibiting any kind of discrimination; can we say that it is has always been so? Can one say that equality, by the time the Frenchman have enacted the Declaration of the Rights of Man and of the Citizen, in 1789[4] stating that "men are born and remain free and equal in rights" has the same meaning as the equality set by the French Constitution of 1958[5]?

It does not take much effort to say that the answer to such question is a peremptory "no". To illustrate our point, let's look for a second at the United States of America. Despite the fact that the Declaration of Independence of 1776[6] expressly stated that "all men are created equal" and, that the 14th amendment from 1868[7] sets the "equal protection of the law", the country has only fully abolished slavery in 1865[8], almost a hundred years after the Declaration of Independence. Voting rights for women was only conquered nationally by 1920[9] and racism as a state policy (including limitation of rights) was in force until the second half of the 20th century.

These brief examples show that while the idea of equality before the law has been introduced in several countries for quite some time, it does not necessarily mean that the concept of equality has remained unchanged.

In fact, the idea of equality changes constantly and even nowadays it is difficult to set a universally accepted standard. World Justice Project[10] – an NGO dedicated to monitor and measure the rule of law throughout the world – ranks 126 countries based on criteria such corruption (lack of), regulatory enforcement,

4 Article 1er Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune.

5 "Art. 1º. La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances. Son organisation est décentralisée".

6 "The unanimous Declaration of the thirteen united States of America**,** When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness […]".

7 Section 1**.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

8 While slavery was not adopted in many states, only with the 13th amendment, dated 1.865 it was prohibited nationally. Section 1 of the afore mentioned legislation provided that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convinced, shall exist in the United States, or any place subject to their jurisdiction".

9 The voting right for women was only fully grated on August 18, 1.920, with the 19th Amendment which stated: "The right of citizen of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have the power to enforce this article by appropriate legislation".

10 WORLD Justice Project (WJP). Washington D.C., 2006. Available at <https://worldjusticeproject.org>. Access on April 29, 2019.

criminal justice and fundamental rights, which includes a sub criteria: the "effective enforcement of laws that ensure equal protection".

Surprisingly, by looking at the bottom 10 countries ranked under the "equal treatment & absence of discrimination" indicator of 2019's report, all of them have granted in the constitution with very similar wording, equality before the law[11]. A closer look at those very same countries however, reveals that none of them recognizes same-sex unions (some in fact punishes same sex activities with death penalties[12]). It seems that even today, in those countries, some are more equal than others.

Equality, thus, does not necessarily have the same legal interpretation throughout the world. Not only does it depend on the time (most likely the ideas of Aristoteles and John Rawls on equality are severely different), but also depends on space. Equality in the United States by the time of the Declaration of Independence is fundamentally different from equality in 2019. Alike, equality in Sweden and in Pakistan are most certainly different, despite both countries having similar provisions for equality in their Constitutions.

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[11] All references below were extracted from: CONSTITUTE Project. Austin, 2005. Available at <https://www.constituteproject.org>. Access on April 20, 2019.

Pakistan: Section 25.1. All citizens are equal before law and are entitled to equal protection of law.

Ethiopia: Section 25. 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 guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.

Bolivia: Section 14.II. The State prohibits and punishes all forms of discrimination based on sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political affiliation or philosophy, civil status, economic or social condition, type of occupation, level of education, disability, pregnancy, and any other discrimination that attempts to or results in the annulment of or harm to the equal recognition, enjoyment or exercise of the rights of all people.

Cameroon: Section 1.2. The Republic of Cameroon shall be a decentralized unitary State. It shall be one and indivisible, secular, democratic and dedicated to social service. It shall recognize and protect traditional values that conform to democratic principles, human rights and the law. It shall ensure the equality of all citizens before the law

Egypt: Section 53. Citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason

Mauritania: Section 1. Mauritania is an Islamic, indivisible, democratic, and social Republic. The Republic assures to all citizens without distinction of origin, of race, of sex, or of social condition, equality before the law.

Afghanistan: Section 22. Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law.

Democratic Republic of Congo: Section 15. All Congolese citizens are equal before the law and have right to the protection of the State.

Cambodia: Section 31. […] Khmer citizens shall be equal before the law, enjoying the same rights and freedom and obligations regardless of race, color, sex, language, religious belief, political tendency, national origin, social status, wealth or other status.

Venezuela: Section 21. All persons are equal before the law, and, consequently: […]

[12] AMNESTY International. London, 1961. Available at <https://amnesty.org>. Access on April 25, 2019.

In the following pages, we will try to understand the concept of "equality" in Brazil and its impacts in the Brazilian tax system. Prior to that, however, we will briefly introduce the current Brazilian tax scenario and how equality can be a decisive factor in simplifying it (or making it even more complex).

## 3 TAXATION IN BRAZIL – COMPLEX AND COSTLY

When it comes to taxation, Brazil is often described as one of the most complex countries to navigate. Brazil, despite being one of the top 10 largest economies in the world, is relegated to a distant 109th place in the World Bank "Doing Business Report"[13] (a report prepared to analyse the difficulties of doing business in each jurisdiction) from a total of 190 countries.

The same report shows that, when it comes to taxation, the situation is even more dramatic, with Brazil ranking the 184th place amongst the same 190 countries.

In fact, by the report, Brazilian companies dedicate 1,958 (one thousand, nine hundred and fifth eight) hours per year to comply with tax obligations, giving the country the unfortunate leadership in the ranking, with nearly two times the number of hours of the "vice-champion", Bolivia (1,025 hours) and grossly 12 times more the number of the best ranked South American country in this criteria, Uruguay (163 hours).

While the data gathered by the World Bank reflects 2017, it is safe to say that not much has changed since. The country still lives a deeply complex tax system, which compromises the business environment and ultimately, the much-needed improvement in social conditions of the population.

The complexity of the Brazilian Tax system is also reflected in the judiciary power, leading to constant tax disputes, be it due to tax assessment, be it due to tax disputes filed by taxpayers claiming for tax refunds.

In a report prepared by the National Council of Justice, for instance, it is said that the Brazilian Supreme Court had over 100,000 new cases in 2017[14]. Out of this total, cases related to taxes accounted for more than 21,000 thousand, the third most common subject, following administrative and labour law. The situation is even worse in lower courts, with over 1 million new cases regarding tax law in state courts and nearly 650,000 in federal courts.

Needless to say, these outstanding numbers require a judiciary power much larger (and more expensive) than one would expect in a developing country. A quick research can reveal some astonishing numbers published on the media: Brazilian judiciary branch costs 3.5 times more than the German system (in percentual numbers)[15] and expenses with the judiciary branch accounts for 2% (two percent) of the Brazilian Gross Domestic Products, more than four times the average of OECD's countries[16].

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13 WORLD Bank. Doing Business 2019: Training for reform. Washington D.C.: World Bank, 2019.

14 JUSTIÇA em Números 2018: ano base 2017. Brasília: CNJ, 2018, page 43.

15 JUDICIÁRIO brasileiro é 3.5 vezes mais caro que o alemão. DW Brasil, c. 2019. Available at: <https://www.dw.com/pt-br/judiciário-brasileiro-é-35-vezes-mais-caro-que-o-alemão/a-42522655>. Access on April 19, 2019.

16 GASTO com judiciário chega a 2% do PIB, quatro vezes média da OCDE. Exame, c. 2018.Available at: <https://exame.abril.com.br/economia/gasto-com-judiciario-chega-a-2-do-pib-quatro-vezes-a-media-da-ocde/>. Access on 04/25/2019.

While we do not intend in our article to go deep in the roots of the complexity of the Brazilian tax scenario, as they are debatable and diverse, we feel it is important to point out at least four fundamental reasons.

First, the Brazilian tax system is based on taxes that may be created by municipalities, states and the federal government, depending on the tax triggering event. For instance, only the federal government is entitled to create taxation on profits and industrialized products, while states may tax the sale of goods and municipalities may tax for services rendered.

This often means that the same taxpayer must comply with (and collect) tax rules enacted by three different governmental bodies that often conflict. For instance, a taxpayer domiciled in São Paulo selling a merchandise to a taxpayer located in Rio de Janeiro may have to observe the VAT (ICMS) regulation from both states, in addition to complying with Tax on Industrialized Goods (IPI), Corporate Income Taxes (IRPJ/CSLL) and different social contributions (most commonly, PIS/COFINS).

In addition to collecting such taxes, often each tax has one or more ancillary obligation to be filed and they are often different on each state/municipality, meaning that a company that has branches in different states/municipalities may have to be familiar with a countless number of ancillary obligations.

The problematic is even worse as sometimes the limits between what may be taxed by each entity is not quite straight forward. For instance, for years, taxpayers disputed whether restaurants provide services (and hence, taxed by municipalities) or sell goods (taxable by states). The same discussion is ongoing right now in consideration for streaming services.

Second, Brazil is a continental country with deep differences of social and economic development. This means that, despite recent efforts to reduce the problem, the so-called tax war is fairly common in Brazil. States and municipalities, in order to attract investments, create tax incentives – sometimes not in accordance with the law – or even create barriers for taxpayers from distinct municipalities/states.

While many of those conducts are clearly illegal, leading to challenges in judicial courts by states, municipalities and taxpayers that feel jeopardized in some way, those same disputes often take years to be solved and, sometimes, with unsatisfactory results.

A third reason that may be pointed out is that tax laws are changed in Brazil on a daily basis. A study directed by the Brazilian Institution of Tax and Planning (Instituto Brasileiro de Planejamento e Tributação) revealed that from 1988 to mid 2016, Brazil has created more than 363,000 laws and regulations regarding tax matters[17].

In fact, Brazil has dozens of tax incentives, special taxation regimes, tax calculation basis reductions, different rates based on both the purchaser and the

[17] QUANTIDADE de Normas Editadas no Brasil: 30 anos da Constituição Federal de 1988. Instituto Brasileiro de Planejamento e Tributação. 2018. Available at: < https://ibpt.com.br/noticia/2683/Quantidade-de-NORMAS-EDITADAS-NO-BRASIL-30-anos-da-constituicao-federal-de-1988>. Access on April 25, 2019.

seller and ancillary obligations that makes the task of calculating and collecting taxes extremely difficult, even for small business.

In fact, even for large companies with legal departments and accountants dedicated to taxes, it is common that professionals just can't keep up with the constant changes, leading to tax leakages or tax disputes.

Finally, we highlighted the outstanding number of judicial disputes involving tax law in Brazil. The problem is even greater as judicial decisions, even those based solely on the interpretation of laws (i.e. despite any specific facts), are often different based on the interpretation of each judge, and years (if not decades) passes by before the Superior Court of Justice of the Supreme Court issues a final binding decision to every case.

This means that tax litigation is, in a certain way, a kind of lottery, where some taxpayers may have favourable decisions while others may have the very same case decided the other way around. As taxpayers are well aware of this fact and litigation costs are not as expensive as in other jurisdictions (i.e. expenses for litigation in federal courts are typically limited to around USD 500), there is an incentive to present continuous appeals in search of a favourable decision.

Those often-contradictory decisions, in addition to having a negative impact on the general business environment, have created a sort of "litigation industry", whose only beneficiaries are law firms, with both taxpayers and tax authorities trying to convince judicial authorities of its' interpretation of the law.

All reasons we briefly pointed out above — specially the last one — in one way or the other, compromise the notion of equality from a tax perspective. Each of the branches (legislative, executive and judiciary) have their share of responsibility. The legislative branch often enacts laws that are not uniform and create specific tax regimes; executive branch often does the same when acting as a legislator; and finally, in the judiciary power, judges often opt to prioritize their independence rather than to observe jurisprudence[18].

In the following pages, we will try to identify the concept of equality in Brazil and, from a concrete case, understand how the compliance with the Equality Principle can help making Brazilian taxation system simpler. While we believe most of our comments could be taken into consideration to all of the government branches, we will focus our work solely on the legislative role as a promoter of equality.

## 4 EQUALITY IN BRAZILIAN CONSTITUTION AND TAX CONSEQUENCES

The first Brazilian Constitution dates back to 1824, deeply inspired by the ideals of the USA's constitution. As from that time, the Brazilian Constitution already provided that "all shall be equal before the law"[19]. A similar or identical

[18] In Brazilian legal system, judges have a significant degree of independence from higher courts. While recommended, higher court decisions, even from the Superior Court of Justice and the Supreme Court are generally not binding to every case.

[19] Section 179, XII. "Law shall be equal to all, whether it protects or punishes, it shall reward it in proportion to the merits of each.

provision existed in all following six Constitutions, even during the times of military dictatorship[20].

The current Brazilian Constitution was enacted in 1988, after twenty-one years of military dictature. It is a vast, detailed document, with 250 Sections and 97 "Temporary Constitutional Provisions", many of them still in force.

While not perfect and criticisable for many reasons, Brazilian current Constitution has undeniable merits. By the time it was enacted, Brazilian Constitution was celebrated as one of the most modern in the world, indicating that the state should as from that point on, pursue the construction of a welfare state.

Countless examples may be found in the Constitution, e.g. a free health care system to be insured to all citizens[21] and free public education, including universities[22].

Our considerations above lead us to two considerations. The first is that the concept of equality has changed deeply from 1824 to nowadays. While the first constitution was concerned mostly if everyone would be treated equally when the law was to be applied, regardless if such law was fair or not (the best illustrative example is perhaps to think that slavery and equality existed at the same time under the legislation), currently, the equality requires the state not only to apply fairly and equally existing laws, but also drawing public policies aimed at reducing the unequal opportunities between citizens.

As a logical consequence, our second understanding is that, if a welfare state demands a burdensome taxation to provide public policies aimed at reducing unequal opportunities between citizens, taxation – although still an instrument of obtaining funds – must still observe certain parameters in order to be considered just. It simply would make no logical sense to understand the state as a promoter of welfare, attributing the responsibility of reducing inequality gaps and, at the same time, taxing taxpayers regardless of any individual particularity.

What are those parameters? We will try to explain in the following topics.

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[20] Brazil has been subject to a military dictatorship from 1964 to 1985 and a new constitution was enacted in 1967. Despite many authoritarian elements, such as the abolition of the *habeas corpus*, equality before the law was preserved on Section 150.

[21] Article 198. Health actions and public services integrate a regionalized and hierarchical network and constitute a single system, organized according to the following directives: (CA No. 29, 2000; CA No. 51, 2006; CA No. 63, 2010)

[…] Paragraph 1. The unified health system shall be financed, as set forth in article 195, with funds from the social welfare budget of the Union, the states, the Federal District and the municipalities, as well as from other sources. Paragraph 1. The unified health system shall be financed, as set forth in article 195, with funds from the social welfare budget of the Union, the states, the Federal District and the municipalities, as well as from other sources.

[22] Article 208. The duty of the State towards education shall be fulfilled by ensuring the following:

I – mandatory basic education, free of charge, for every individual from the age of 4 (four) through the age of 17 (seventeen), including the assurance of its free offer to all those who did not have access to it at the proper age;

[…] V – access to higher levels of education, research and artistic creation according to individual capacity;

Paragraph 1. The access to compulsory and free education is a subjective public right.

4.1 Equality and Taxation: the Economic Capacity as a Founding Principle

We have said before that the Brazilian Constitution is prolific in content, having over 200 Sections. When it comes to tax law it is no different. The Brazilian Constitution has an extensive, detailed text that comprises all the fundamental taxation structure.

We also have said before that Brazil could be understood as a social welfare state (at least ideally) and that equality under Brazilian Constitution must take into consideration this statement. This alone could enable us to infer some of the particularities of the Principle of Equality in Brazil and its consequences on the tax system.

While possible to make such inferences, Brazilian Constitution makes our efforts much easier, as it draws most of the principles and rules that must be taken into consideration when it comes to understanding and applying the Principle of Equality.

For instance, when it comes to income taxes, would the Principle of Equality be compatible with a flat rate (formal equality) or a progressive rate based on the economic capacity of each taxpayer (material equality)? Framing Brazil as a social-welfare state would most likely makes us presume the later is correct.

As to avoid any doubts, Section 145, Paragraph 1 of the Brazilian Constitution states that "whenever possible taxes shall have an individual character and shall be graded according to the economic capacity of the taxpayer".

The economic capacity is, hence, the first and main discrimination measure to be elected by Public Authorities when concerning taxes. This means, from one side, that taxes may be validly charged exclusively when the tax triggering event established by the legislation is based on an event that somehow reveals economic capacity of the taxpayer. In other words, this means that taxes may not have triggering events such as the "beard tax"[23] for example.

Additionally, taxes must not only be charged based on "signifiers of wealth" but also must be graded accordingly. How to grade such "signifiers of wealth" vary depending on each tax and its triggering event. For instance, when it comes to income tax, the signifier of wealth is, as one could presume, the income and, based on what we said above, the higher the income, the higher the taxation rate that should be applied[24]. When it comes to property taxes, the signification of wealth is the value of the property and when it comes to ICMS (VAT), the signification of wealth is the "essentiality" of the goods (meaning that essential goods, such as fruits and vegetables should be less taxed than videogames, for instance).

We note, once again, that the Principle of the Economic Capacity requires tax rates to be progressively higher based on the "signifier of wealth" demonstrated by the taxpayer and not solely proportional.

Brazilian Constitution, however, does not limit the understanding of equality to Economic Capacity. Section 150, II, sets that the Union, the states, the Federal

[23] In Russia, Peter I instituted a "beard tax".

[24] In Brazil, income tax rates may vary from 0% to 27,5% depending on the income.

District and the municipalities are forbidden to "*institute unequal treatment for taxpayers who are in an equivalent situation, it being forbidden to establish any distinction by reason of professional occupation or function performed by them[...]*".

While intuitive and straightforward, this disposition is essential to the analysis of our concrete case, which will be developed in our following chapter.

When it comes to the tax system, the Principle of Equality is not limited to those two Sections. A deeper analysis would reveal that there are at least a few more legal provisions which could be included as being part of the Principle of Equality framework. We have opted to let them out of our analysis as we understand they will not assist us in our concrete case.

We have said above that the economic capacity should be the main distinguishing criteria to be adopted by the legislation when creating and measuring taxes. We also said that certain criteria, such as professions, are expressly prohibited from being adopted as discrimination criteria. One could infer, hence, that without exception, taxes in Brazil must observe the economic capacity.

Such an assumption would be a mistake. The Principle of Equality obviously admits certain relativization when in conflict with other fundamental rights. It would not be different with the Principle of Economic Capacity.

Basically, the Principle of Economic Capacity may not be observed (or may be partially observed) when taxes are being used with the purpose of stimulating certain behaviours on taxpayers or when regulating the market. For instance, taxes are often used as to increase the price (and, hence, discourage consumption) of certain unhealthy products, such as alcoholic drinks or cigarettes or to protect local industry from imported goods.

In such cases, the Principle of the Economic Capacity may be validly mitigated, provided that taxation is fulfilling another constitutional principle (e.g. the purpose increasing health of the population by taxing heavily cigarettes could be deemed valid while the purpose of "increasing entertainment" by reducing taxes on video-games could not be deemed valid as it does not lay on constitutional grounds).

From what we said above, we may initially understand that: (i) all taxpayers should be treated equally; (ii) equality in Brazil means observing the economic capacity of each taxpayer, meaning that if two taxpayers reveals the same economic capacity, in principle, they should be treated (taxed) equally; (iii) economic capacity may be disregarded, partially or entirely when taxes are being used with a stimulatory purpose.

We have also stated that even when taxes are used based on a "stimulatory purpose", certain criteria must be observed for a valid discrimination. We will go further on such criteria in the following topic.

## 4.2 Criteria for Discrimination

We have seen above that the Brazilian Constitution recognizes the state as promoter of the welfare. This means that Brazilian government is a relevant player in promoting well-being, sometimes acting directly (e.g. through wholly-owned state companies), sometimes indirectly (e.g. by creating tax incentives).

While it is true that the state is a relevant player in the economy, it also must observe all principles wrote in Brazilian Constitution, among which, the Principle of Equality. Here, we have an apparent incongruence: from one side, Brazilian government is demanded to have a constant and active participation in the promotion of the purposes set by the Brazilian Constitution, often using taxes as an instrument to differentiate taxpayers, and, on the other side, it must observe the Principle of Equality.

For instance, every Brazilian citizen is entitled to health and healthcare[25]. By reducing or even eliminating taxation on medicines, government is treating pharmaceutical industry on an unequal way, while promoting health and healthcare. Is this discrimination allowed? It is safe to say that pretty much everyone would agree that "yes". Reducing taxation is a way to make medicines more affordable and, hence, improve the health of the population.

While we intuitively understand that some discriminatory situations are in principle compatible with the Constitution, many cases are not that clear. What would our conclusion be if instead of reducing taxation on medicines, the government decided to exempt from income tax physicians and nurses? Is this discrimination valid? One might argue that yes, as physicians, if not subject to income taxes, could reduce the price of their services. Others could argue that no, as there is no guarantee that physicians will in fact reduce the cost of their services rather than just increasing profits; or that they are not anyhow different from dentists or nurses in terms of promoting health, for instance.

In fact, equality is a constant argument in tax disputes. Taxpayers often, when claiming the extension of a certain tax regime or a tax benefit available to other taxpayers will say that they should be treated equally *vis-à-vis* other taxpayers. The same equality, however, is often used by tax authorities when disregarding certain tax planning strategies, arguing that if not challenged, those strategies would promote inequality in the tax system, as other taxpayers are not benefiting from the same strategy.

Professor Celso Antônio Bandeira de Mello, one of the most prominent specialists in public law in its' book "The Legal Content of the Principle of Equality[26]" (*"O Conteúdo Jurídico do Princípio da Igualdade")* tried to identify what are the criteria that could be adopted to legally discriminate individuals or situations.

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[25] Brazilian Constitution mentions health several times. We merely indicate below a few examples:
"Article 6. Education, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, as set forth by this Constitution".
Article 23. The Union, the states, the Federal District and the municipalities, in common, have the power:
II – to provide for health and public assistance, for the protection and safeguard of handicapped persons;
Article 194. Social welfare comprises an integrated whole of actions initiated by the Government and by society, with the purpose of ensuring the rights to health, social security and assistance.

[26] BANDEIRA, Celso Antônio Bandeira de. **O Conteúdo Jurídico do Princípio da Igualdade**. 3ª Ed. São Paulo: Malheiros, 2015.

Initially, it is important to say that no discrimination factor, *per se,* is illegal. While as a rule discrimination due to gender is illegal (in fact Brazilian Constitution expressly says so), such discrimination could be perfectly legal and justifiable depending on the situation (e.g. the creation of a public police formed only by women, responsible for dealing with victims of sexual abuse). Trying to bring it to a tax perspective, we could say that no tax exemption or special tax regime is *per se* incompatible with the Constitution.

In a brief summary, professor Bandeira de Mello identifies three criteria to understand if a discrimination factor is Constitutional:

(i) The law cannot elect as a discrimination factor a criteria which is so specific that allows the identification of the beneficiary. This does not mean, for instance, that all discrimination must be general. It is perfectly valid, for instance, that the legislation creates a prize money to be paid for the person who first develops an effective vaccine against SIDA, as to stimulate researchers, as anyone who develops the vaccine is entitled to the prize.

From a tax perspective, this means that based uniquely on this criteria the creation of a benefit for industries installed in a certain region of the country could be valid, even if at the time a single company is therein installed; however that very same benefit would be deemed illegal if it is created specifically for this company or if the criteria elected is so specific that only such company will ever benefit from it (e.g. a tax incentive for companies incorporated on street "x", being certain that company "y" occupies the entire street).

(ii) There must be a logical relation between the discrimination factor adopted and the purpose of the discrimination, whether the discrimination brings a more beneficial situation compared to the general rule, whether it brings a more burdensome situation.

We have previously said that taxes may be an important instrument to improve health. There is a broad range of measures that may be taken in this sense. The legislator could opt to tax on lower rates low-fat or low-sugar food or reduce taxes on medication or even reducing taxes on investments in basic sanitation.

All those examples at a glance intuitively seem to be valid measures, as they have a logical relation between the measure adopted and the purpose of the discrimination. The same could not be said if the legislation, for instance, in order to improve health, reduced the tax rates applicable on the sale on automobiles.

(iii) Finally, the general rule is that all situations and individuals should be treated equally. Discrimination should be made only when discrimination is necessary to achieve a certain interest protected by the Brazilian Constitution. For instance, one could say that discrimination is allowed to protect the environment or education, but it does not seem that discrimination would be allowed in order to increase profits of tax lawyers.

Hence, we have seen that under the Brazilian Constitution all shall be equal under the law, which includes the tax burden. We also have seem that as a general rule, taxes shall have an individual character and shall be graded according to the economic capacity of the taxpayer. We now have seem what criteria may be validly

used to create exceptional situations in which the taxpayer shall not be subject to the general taxation.

## 5 CASE ANALYSIS – INDIVIDUAL MICROENTERPRENEURS TAXATION REGIME

We will now try to apply our considerations above to a particular case and understand if the legislator has complied with the Principle of Equality in a specific taxation regime dedicated to individual microentrepreneurs.

Brazilian economy has a significant informality rate, with a high number of autonomous workers and even small business operating completely off the radar of tax authorities[27]. This means not only that those business avoid taxation but also that entrepreneurs working on an informal manner typically do not contribute to social security, creating a deferred problem to the government, as eventually they will try to retire or rely on social assistance.

Aware of the problem, since 1996, Brazil has been creating incentives and making simpler for small business to comply with tax regulations. On 2008, for the first time, a specific taxation regime was created specifically for microentrepreneurs ("MEI"). At the time, the microentrepreneurs regime was destined to small business (or autonomous workers) earning up to R$ 36,000 (around USD 12,000) per year. This limit has been changed a number of times and is currently set on R$ 81,000 per year (around USD 27,000).

Provided the revenue threshold is observed, MEI taxation is limited to a fixed monthly amount of around R$ 50 (approximately USD 18), comprising all taxes. In addition, MEI's are dismissed from basically any ancillary obligation.

Better than that, the contribution mentioned above also counted as a contribution for the social security, meaning that the owner of the MEI could use such contribution to retire in the future. With a simple, cheap and efficient regime, the legislator aimed at bringing back to formality a countless number of informal business.

However, in addition to the revenue threshold, another two criteria existent in the legislation draws our attention.

The first is that the MEI must be characterized as an "entrepreneur" as defined by the Civil Code and the second is the authorization given to executive authorities to limit taxpayers allowed to elect for MEI regime, "as to avoid deterioration of labour relations".

In relation to the concept of "entrepreneur", the Civil Code defines it as someone who carries out professionally organized economic activities for the production or circulation of goods or services. Typically, professionals carrying out intellectual professions of a scientific, literary or artistic nature (such as lawyers) are not deemed "entrepreneurs".

[27] By the end of 2017, Brazilian Institute of Geography and Statistics estimated that around 37 million workers were working informally.

In relation to the possibility of excluding certain professions based on the possible "deterioration of labour relations", executive authorities have the power to limit the access to the MEI taxation regime of certain professions – for instance, it could (as in fact it did) prohibit personal trainers from applying for the MEI taxation regime. We imagine the legislator's purpose was to avoid that companies, instead of hiring employees, would force workers to open a company, subject to the MEI taxation regime and provide services as service providers[28].

We have then, three apparent challenges to equality. The first is if the MEI taxation regime is as a whole offensive to equality, as it provided a more beneficial taxation in comparison with the general taxation regime. If the answer to the first question is no, then we have to try understanding whether discrimination between "entrepreneurs" and "non-entrepreneurs" or based on the purpose of avoiding "deterioration of labor relations" are Constitutional.

We have stated earlier that taxes could have two different purposes, being the first simply to provide the much-needed resources the State needs to provide public services; and the second, trying to stimulate or discourage certain conducts by taxpayers (which we have called the stimulative function). We have also stated that even when the taxes are used for the stimulative function, the discrimination provided by the law may be illegal.

We will now try to apply the validation based on professor Bandeira de Mello's lessons to the microentrepreneurs taxation regime.

## 5.1 First Test: The Revenue Criteria

Based on Bandeira de Mello's lessons, we have identified three criteria that must be met for discriminating situations and individuals:

(i) The law cannot elect as a discrimination factor something so specific that makes possible to identify its beneficiary: pursuant to this criterion, there is no doubt that the MEI taxation regime is compliant, as it is available to all those compliant with the requirements of the law.

(ii) There must be a logical relation between the discrimination factor adopted and the purpose of the discrimination: from the explanatory memorandum of bills related to microentrepreneurs[29]'we can see that different reasons justified the creation of a special taxation regime to small business and, particularly, microentrepreneurs. Those reasons are mainly related to the complexity of Brazilian tax regime (as explored in Item 2); the importance of small business to the economy and the high informality rate.

It seems to us that there is a logical connection between the revenues of the company and its' capacity to comply and pay with the complex and costly Brazilian tax system. It is only logical to imagine that if a microentrepreneur would have to dedicate 1,958 hours (as brought by the Doing Business Report prepared by the World Bank) to comply with tax obligations, it simply would opt for the informality or would find very difficult to prosper.

[28] Brazil has a high taxation on payroll. Hiring a MEI instead of an employee could mean a significant reduction in the tax burden.

[29] Basically, Complimentary Laws 123/2006; 128/2008; 139/2011; 147/2014 and 155/2016.

Hence, from this standpoint, it also seems that the microentrepreneurs taxation regime complies with Equality.

(iii) Discrimination should be made only when discrimination is necessary to achieve a certain interest protected under Brazilian Constitution. This criterion requires that equality may only be set aside when favouring another legit Constitutional right.

We have said before that Brazilian Constitution is extensive, including when it comes to taxation. Identifying and measuring if a discrimination was based in accordance with a constitutional right is sometimes a challenge, as those rights can be based on abstract concepts such as "morality" or "human dignity".

Fortunately, it is not our situation. Brazilian Constitution provides at least three strong justifications for the MEI taxation regime. First, Section 170, IX, clearly states that the economic order should provide for a "preferential treatment for small enterprises organized under Brazilian laws […]".

Let alone, this could be justification enough for creating a simplified and cheaper taxation regime for small enterprises.

Section 179, in turn, reinforces the idea by stating that "the Union, the states, the Federal District and the municipalities shall afford micro-enterprises and small enterprises, as defined by law, differentiated legal treatment [..]".

Finally, Section 146 "d" establishes that a complimentary law shall provide for "the definition of a differentiated and favourable tax treatment to be given to micro and small businesses, including special or simplified tax regimes […]".

Hence, the MEI taxation regime is without a doubt based on constitutional grounds and seems to comply with the three requirements provided by Bandeira de Mello: it is not specific for certain individuals; the discrimination factor adopted (revenue) has a logical relation with the purpose of the discrimination and the purpose of the discrimination has constitutional grounds.

We will now move to our second test.

## 5.2 Second Test: The Entrepreneurs Discrimination Factor

We have concluded that the discrimination factor adopted to create the MEI taxation regime is fully in compliance and based on Constitutional grounds. Now we will try to compare whether the discrimination based on the "entrepreneurs" criterion is also valid. This means that, while in principle all professions could elect to adopt the MEI regime, provided it complies with the "revenue" criterion, the legislator has opted to let out certain professions, namely, those not framed as "entrepreneurs".

In order to work on a concrete case, we will compare two different professions: personal trainers and tutors. Personal trainers were eligible for the MEI taxation regime until 2018, when they were excluded from the regime along with a few other professions. Tutors, on the other hand, were and remain allowed to opt for the MEI taxation regime. Exclusion of Personal Trainers was based on the grounds that they do not figure as "entrepreneurs".

We will now try to apply our test based on Bandeira de Mello's criteria:

(i) The law cannot elect as a discrimination factor something so specific that makes possible to identify its beneficiary: again, there is no offense based on this first criterion. The authorization for tutors to elect for the MEI taxation regime is general, as it is the exclusion of personal trainers.

(ii) There must be a logical relation between the discrimination factor adopted and the purpose of the discrimination: we have said before that the MEI taxation regime is initially based on a revenue criterion. This criterion has a logical relation with the capacity of the companies to comply with the complex and costly Brazilian tax system.

The legislator, however, understood that professionals not framed as "entrepreneurs" under the civil code could not elect for the MEI taxation regime. The concept of "entrepreneurs" when it comes to intellectual professions (as both personal trainers and tutors seem to be) is somehow tricky and not uniform.

By consulting the list of professions prohibited from adopting the MEI taxation regime, one similarity seems to exist: they are all professions with organized associations (e.g. bar association or medical associations). The rational could arguably be that these organized associations are entitled to supervise the "technical capabilities" of its affiliates, which would prove that they carry "intellectual professions".

Now, is this enough reason for not treating equally tutors and personal trainers? Are there any evidences that reveal that tutors have more necessity of the benefits of the MEI taxation regime in comparison with personal trainers? Don't they seem to carry pretty much the same activities, being the difference solely what they teach? Does the existence of an "organized association" implies a material difference between tutors and personal trainers?

It is important to bear in mind that the Principle of Equality is a keystone of Brazilian Constitution. Any differences should be made based on material differences and not solely on formal distinctions (such as the existence of an organized association). Intuitively, it seems that Personal Trainers and Tutors should not be treated differently for tax purposes.

Hence, we believe "entrepreneur criterion" is not compliant with the Principle of Equality.

(iii) Discrimination should be made only when discrimination is necessary to achieve a certain interest protected under the Brazilian Constitution: the creation of the MEI taxation regime is based on strong Constitutional grounds. Excluding personal trainers (or other intellectual professions) from the regime should be a decision based on equally strong grounds. So far, we could not identify a plausible argument based on the Constitution for doing so.

### 5.3 Third Test: "Deterioration of Labor Relations"

Finally, one could argue that the exclusion of the personal trainers from the MEI taxation regime was not based on the "entrepreneur" criterion, but on the "deterioration of labour relations" criterion. Let's see if this argument is valid in face of our equality test:

(i) The law cannot elect as a discrimination factor a criteria which is so specific as to make possible to identify its beneficiary: again, there is no offense based on this first criteria.

(ii) There must be a logical relation between the discrimination factor adopted and the purpose of the discrimination: the discrimination factor is the professional activity, while the purpose of the discrimination, as brought in by the law, is to avoid the "deterioration of labour relations".

In principle, there is a logical reasoning between the discrimination factor and the purpose to be achieved. One could argue that certain professions are more prone to "deterioration" than others. For instance, technical arguments provided by the Ministry of Employment could show that personal trainers are more often hired as "service providers" (rather than employees) than tutors. If that was the case, then perhaps one could conclude that the discrimination based on the profession is valid.

(iii) Discrimination should be made only when discrimination is necessary to achieve a certain interest protected under Brazilian Constitution: while the protection of personal trainers "labour relations" could surely be understood as a strong constitutional basis for the discrimination adopted, a closer look reveals that there are several arguments in the sense that this discrimination is not valid under Brazilian Constitution.

The first is that, as we said before, Brazilian Constitution expressly prohibits discrimination based on professional criteria. Given that , the expected "deterioration of labour relations" should the MEI taxation regime be available to personal trainers would have to be specially intense as to justify not applying the Principle of Equality. Such expected risk would also need to be more evident to personal trainers than to tutors.

Second is that, while there is no doubt that certain employers could force their employees to open small businesses and provide services as legal entities, there are also several personal trainers that are not in the same condition. They are actually autonomous workers who would most likely benefit from the MEI taxation regime. On this scenario, while "outsourced" personal trainers could rely on the judicial branch to seek the recognition of the employment relationship, personal trainers who would benefit from the MEI taxation regime don't have the same opportunity.

Again, only technical evidences could demonstrate that the personal trainers potentially harmed by a possible "deterioration of labor conditions" outnumber the benefits brought by the very same regime.

In addition to that, if the intention of the legislator to protect certain categories from potential outsourcing was initially valid, later changes in the legislation force us to review our understanding. As far as 2017, Brazil was strict when it came to outsourcing, with labour rules that prevented the outsourcing of core activities. However, profound changes have been introduced in Brazilian labour laws, and outsourcing — including in core activities — is now widely accepted. That being so, while the "deterioration of labour relations" due to the risk of outsourcing could be seem as a valid reason for discrimination in the past, later changes in the legislation must be taken in consideration.

Finally, it is important to point out that personal trainers were allowed for a significant amount of time to elect for the MEI taxation regime. This means that many personal trainers elected to organize their business under this model, spent time understanding how to comply and collect taxes, possibly spent money with accountants or other experts and expected to have profits based on this taxation regime. Any change in a consolidated situation has a negative impact on the legal certainty and must be approached very carefully. It is not difficult to imagine that other taxpayers were discouraged from applying for the MEI regime afraid that they could be excluded later. It is also not difficult to imagine that, once excluded, rather than adopting another (more costly) taxation method, personal trainers simply opted to run informal.

In our concrete case, if the legislator had taken into consideration the Principle of Equality, it would be possible to conclude that the decision of excluding personal trainers from the MEI taxation regime was not the right thing to do, as excluding personal trainers from the MEI regime increased legal uncertainty and complexity.

## 6 CONCLUSION

In the previous pages we have tried to demonstrate that Brazil has a number of different reasons for being a complex business environment, specially when it comes to taxation. One of the main reasons for such complexity is the existence of a vast number of special taxation regimes, applicable to different taxpayers and different industries.

Brazilian business environment is so used to living with this deeply complex system that most organized sectors try to influence the government to create tax incentives of some kind. As a result, ranging from hotels to car manufacturers, there are specificities on the taxation of basically any relevant sector.

This deeply complex system not only compromises competitiveness, but also often leads to tax disputes initiated both by tax authorities and taxpayers. Costs with the judiciary branch, as a result, are far greater than the average spent by other jurisdictions.

While many times these tax specificities are justifiable from a technical standpoint, in many others they could simply be the result of political pressure. In fact, it seems to us that the very notion of Equality is not yet fully absorbed in Brazil.

We then tried to understand how to measure Equality and why taking the Principle of Equality seriously could lead to the adoption of more uniform and simple tax policies. Equality is surely not a precise, determined concept and does require a certain effort as to extract its juridical content. However difficult, it is safe to say that the notion of equality in Brazil should take into consideration the desire of a welfare state. This notion requires equality to be not only the uniform application of the law, but also that the state should proactively act as to provide equal opportunities to all individuals (material equality).

The legislator should always take into consideration this notion of material equality when establishing public policies, including the ones regarding taxation.

Taking the Principle of Equality seriously requires assuming that all taxpayers are in principle equal and should be treated according to their economic capacity. Any differences should be made exclusively based on technical criteria able to demonstrate the existence of a significant difference between taxpayers or based on the use of taxes on the stimulative function.

What we have tried with the "equality test" was to demonstrate that taking the Principle of Equality seriously can many times lead to a simpler, less complex taxation system. While many times understanding if a discrimination is valid may require more than intuitive thinking, this is perhaps a positive measure to be adopted vis-à-vis the potential improvements in the business environment and the reduction of political influences on public policies regarding taxation.

Modern democracies requires transparency and public engagement in governmental decisions. Obliging legislators to comply with the Principle of Equality, justifying exceptions based on technical evidences could be a positive measure for a simpler and more fair business environment.

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