



The New Fiscal Regime and the mitigation of minimum spending on health and education

Novo Regime Fiscal e a mitigação dos pisos de custeio da saúde e educação

Nuevo Régimen Fiscal y mitigación de bases contables en la salud y educación

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The *Constitutional Amendment Proposition 241/2016* (PEC 241) was presented to Brazilian Congress by the Executive Power on 15/ Jun/2016. It was approved in two voting sessions in the House of Representatives and sent to the Brazilian Senate for appreciation as PEC 55/2016 little over four months later. This initiative seeks to institute, within the 1988 Constitution's Transitory Constitutional Dispositions Act (ADCT, in Portuguese), the New Fiscal Regime, anchored in establishing a global limit to primary expenditures and respective conditions in terms of sanctions, exceptions and delimitations of its rules.

Its structure was designed over three pillars, to wit: the temporal delimitation of twenty years (in order to meet the transitory character that justifies its inclusion in the ADCT), the mitigation of the execution requirements of mandatory primary expenditures and the removal of the proportional relation between revenue and expenditures as the objective fiscal limit for annual budget laws.

However, instead of actually establishing a transparent and universal global limit on expenditures, as budgets do, PEC 241 establishes a sort of preventive contingency of primary expenditures, in which even mandatory spending with active and retired personnel is included, as well as the minimum health and education spending duties. Its proposed methodology is that the fiscal limit to the global primary expenditures be equal to 2016 expenditures corrected by an in-

flation index, the IPCA (Extended National Consumer Price Index).

This proposal was presented to the Brazilian Congress as an imperative and as the only strategy for fiscal adjustment, but its conception is selective and restrictive, because, among other reasons, it does not address revenues or financial expenditures, that is, those related to public debt payments.

We should note that the limits to the consolidated and internal debt are still awaiting national normative standards, due to the Senate's omission regarding its constitutional attribution to establish these limits. Had the Senate approved a resolution establishing the federal debt limits within the parameters established by the *Constitution* since 1988 (art. 52, VI) and later reiterated in the Fiscal Responsibility Law, the general federal budget would already be subjected to an actual universal limit, since it would also cover the financial expenditures, which compromise around half of the global volume of revenues.

The reach of the fiscal adjustment under consideration resides primarily on the incremental and predictable situation of uncoupling growing revenues from stagnated primary expenditures over the next 20 years. A potential positive balance from that equation will apparently be put towards paying off the public debt, in order to maintain its intertemporal sustainability.

The most controversial point is article 105, to be inserted into the ADCT, since it will exclusively



assure, from 2018 onwards, corrections based on the inflation for minimum expenditures on public health actions and services, described in article 198 of the *Constitution*, and on maintaining and developing public education, established in article 212 of the *Constitution*.

The stagnation, in real values, of the federal global primary expenditure and, above all, of the required minimum health and education spending contained in that limit will be more accentuated the greater the expansion of revenue, in a scenario of economic recovery over the twenty years PEC 241 covers.

This change in health and education funding will lead the Brazilian society to experience, over a short period of time, the incremental conversion of the constitutional minimums which sustain these basic rights into an increasingly significant volume of legal settlements. There is, thus, a grave fiscal risk in terms of the magnification of the so-called “judicialization”¹ in these areas if PEC 241 is approved with the restriction imposed on the progressive proportionality contained in the nucleus of the minimum expenditure duties. Smaller minimums will mean greater litigation in the search for the effectiveness of both rights.

Based on the principles of prohibiting setbacks and prohibiting insufficient protection, a new methodology for calculating minimum spending on health and education is only justified – before society and in light of Brazilian constitutional order – if it is an alternative solution that better protects the fiscal priority with which they are endowed^{2,3}. It would never be admissible to deprive them of the progressiveness route, decoupling them from the country’s level of wealth and from the State’s revenue.

The minimum health and education spending must be proportionally progressive in light of the economic recovery and the expansion of the State’s revenue levels, if only to prevent a continuity solution in public services.

The rhythm and methodology of the public budget adjustment must equally consider the equitable distribution of responsibilities and resources among federal entities. This is because one entity cannot balance its budget by transferring – whether directly or indirectly – its obligations to the others, without due and negotiated apportionment.

Regarding the judicial control of the effectiveness of basic rights, Supreme Court Justice Celso de Mello’s warning⁴, when examining the Argument of Noncompliance of a Fundamental Principle n. 45 (ADPF, in Portuguese), is absolutely paradigmatic. In it, Justice Mello emphatically signaled that the right to health should

not be infringed in the name of misrepresented budget restrictions.

The jurisprudence legacy of ADPF 45 is sufficiently strong and clear to reach PEC 241 (renamed PEC 55/2016 in the Senate): that the Brazilian society does not admit the thesis of a lack of financial resources as an argument for legitimating the State’s desire to rid itself of its constitutional obligations toward the civilizing pact contained within the notion of human dignity and within the Constitution’s chapter on Social Order.

In this new context, we argue that PEC 241, which establishes the New Fiscal Regime, affronts the systemic arrangement of constitutional and infra-constitutional devices which support providing funding for basic rights, notably through minimum spending, as is the case of social security and health and education rights⁵.

This evaluation of non-conformity is justified in light of the conviction that the minimum funding for the basic right to health and education, as well as the social security budget, are eternity clauses⁶, due to the confluence of three normative prisms which are mutually reinforced:

- a) They reveal the objective dimension – the State’s funding duty – of subjective, unavailable public rights, materialized in essential public services which cannot suffer continuity solutions, which are supported by the immediate application established in article 5, §1 of the 1988 *Constitution* and against which one cannot oppose the “reserve of what is possible” clause⁷;
- b) They have the legal nature of fundamental guarantees (constitutional remedies), comparable to habeas corpus, habeas data, injunctions^{2,6} etc, and, last, but no less important;
- c) They behave like sensible principles of the 1988 *Constitution*, the violation of which may lead to federal intervention on the States and the Federal District (a hypothesis so serious it prohibits, in the terms of article 60, §1, the appreciation of PEC during the period of the intervention) or the state’s intervention on its cities.

Under any of the perspectives above, we may only reach one conclusion: one may not impose, through ADCT, a sort of “fiscal state of siege”⁸ which suspends the efficacy of basic rights for 20 years, under the pretext of a global primary expenditure limit, as established by the New Fiscal Regime, regardless of the state of the economy, government revenues and the limited nature of financial expenditures.

In light of these fundamental principles, the current challenge faced by all is to conciliate, republicanly and democratically, the continuous search for fiscal responsibility so that the State, among other constitutional finalities, promotes more and better education and health for Bra-

zilian citizens⁹. We should note that, in several international treaties and in article 5, §2 of the 1988 *Constitution*, the country has taken on the duty progressively to develop social, economic and cultural rights, in full accordance with the principle of human dignity^{7,10}.

Beyond any fiscal adjustment calculations and methodologies, what is at stake is the 1988 Constitution's very integrity in its identity and

immutability. No proposal of constitutional reform can intend to substitute the *Constitution* itself. Here is the last frontier which guarantees the survival of the Democratic State, as the Brazilian society established it in 1988 and which it is the current generation's duty to defend in all possible instances, even within the realm of republican countermeasures.

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