

Budgetary-financial erosion of social rights in the Constitution of 1988

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Abstract *Throughout the three decades of the Federal Constitution, normative and fiscal redesigns were introduced by the Union in the guarantees of solidary federative organization and of social rights costing, under the pretext of safeguarding the intertemporal sustainability of the Brazilian public debt. In order to equalize the tension between economic stability and the effectiveness of social rights and their repercussion for the indebtedness process, the health and education minimum spending and the social security budget were gradually mitigated, which operated both in the symbolic field and in the pragmatic, as a kind of fiscal balance to the need for allegedly unlimited cost for monetary and cambial policies. Unlink taxes, reduce the scope of minimum spending regimes and restrict the interpretative scope of intergovernmental equalization transfers of federative distortions has become a strategy, assumed – directly or indirectly – by the Union since the early 1990s, of macroeconomic stabilization policy, above all, monetary. Thus, a long and still ongoing process of budgetary and financial deconstruction of social rights has been undertaken, which restricts the structural identity of the FC/1988, under the pretext of increasingly demanding fiscal consolidation of the reduction of the size of the state.*

Key words *Social rights, Financing, Constitution, Fiscal austerity.*

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Although there was no formal reduction in the list of social rights included in article 6 of the 1988 Constitution, its defense instruments, also known as fundamental guarantees, have been submitted to a continuous emptying process over the three decades of its existence.

Such guarantees have shown to be “imperatives of protection” of fundamental rights and operate as state duties of “protection through organization and procedure”¹. Therefore, their mitigation, directly or indirectly, tends to reduce the operational arrangement responsible for the effectiveness of social rights.

On the pretext of recurring fiscal adjustments in Brazil, successive normative redesigns focused on two pillars (namely, budget binding and solidary federative organization) that should guarantee – in a reciprocal reinforcement – the objective dimension of health and education rights and the social security system.

Since 1988, the thesis primarily adopted by the political powers would be that public finances would tend towards an alleged intertemporal imbalance due to the behavior of primary expenditures, without concomitantly assessing the flow of financial expenditures² and the regressive trajectory of tax revenues³ and tax waivers.

Therefore, dozens of constitutional amendments came, which, directly or indirectly, had the scope reducing the normative framework governing the costing of fundamental rights in the Federal Constitution. The justification for such initiatives stated that, on the one hand, the monetary stabilization policies, floating exchange rates and the primary balance, theoretically capable of stabilizing the trajectory of public debt (which make up the so-called macroeconomic tripod), and on the other hand, the guarantee of social rights in the welfare state, constitutionally desired for the country, would be mutually exclusive.

As if they were antipodes in the dispute for the general budget of the Union, the tension between economic stability and the effectiveness of social rights was placed on a fragile legal-institutional balance, with direct or indirect effects for the indebtedness process.

Given the poorly equated existence of numerous distributive conflicts over the public accounts, the health and education minimum spending values and the social security budget operated, both in the symbolic and in the pragmatic fields, as a kind of fiscal balance to the need for the allegedly unlimited costs for the monetary and exchange rate policies.

To untie revenues, reduce the scope of minimum spending regimes and restrict the interpretative scope of intergovernmental transfers that equalize federative distortions, has become a strategy, implicitly assumed by the government since the early 1990s, of macroeconomic stabilization, mainly a monetary one.

It is interesting to note the trajectory of the Untying of Union Revenues (DRU, from *Desvinculação de Receitas da União* in Portuguese) in the Transitional Constitutional Provisions Act (ADCT), of which major repercussion is the reduction in the balance of social contributions destined to the Social Security Budget. The implementation of DRU was carried out through the Constitutional Revision Amendment No. 1/1994, under the pretext of being an allegedly transitory and exceptional measure; nevertheless, since then, it has been successively prolonged through seven (7) amendments to the ADCT to extend its validity until 12/31/2023 (Amendments No. 10/1996; 17/1997; 27/2000; 42/2003; 56/2007, 68/2011 and 93/2016).

On the other hand, it is worth recalling the emptying of the Union’s fiscal equalization responsibility concerning subnational entities in public education and health policies, of which organic arrangement constitutionally presupposes federative apportionment of resources as both the Fund for the Development of Basic Education and Valorization of Education Professionals (Fundeb), and the Unified Health System (SUS).

The federal omission regarding the duty of equitable complementation in compulsory basic education affronts art. 211, paragraph 1 of the Constitution, art. 60 of ADCT and strategies 7.21, 20.6 and 20.7 of the National Education Plan (Federal Law No. 13.005/2014). Such omission has already been diagnosed, although not completely remedied, by the control instances, as understood from the Original Civil Actions No. 648, 660, 669 and 700 – jointly judged as well-founded by the Federal Supreme Court (STF, in Portuguese) – and Judgments No. 618/2014, 906/2015, 1897/2017, 717/2019 and 1656/2019, delivered by the Plenary of the Federal Court of Accounts (TCU, in Portuguese).

In the health system, the lack of consolidation of the federative agreements carried out by the Tripartite Interagency Commission for approval by the National Health Council and publication by the Ministry of Health, essentially restricts the scope of art. 198, paragraph 3, II of the Constitution, as established by Judgment 2888/2015, also of the TCU.

Added to this is the fact that the federal minimum spending in public health actions and services – initially established by art. 55 of the ADCT as 30% (thirty percent) of the Social Security Budget – was redesigned in a reductionist manner by Amendments 29/2000, 86/2015 and 95/2016, which made the proportional participation of the Union in SUS funding decrease by almost 25% (twenty-five percent) in the global volume of public resources transferred by the three levels of the federation^{4,5}.

Last but not least, it is worth mentioning the Argument of Non-compliance with Fundamental Precept No. 523, created by most state governments against the absence of public agencies, in accordance with art. 159 of the 1988 Constitution, regarding the portion of social contributions that are no longer intended for social security under the DRU.

This is the context in which it is necessary to recognize, as the two sides of the same coin, the proportional regressivity of the Union's costing of fundamental rights, on the one hand, and on the other hand, the weakening of the equitable decentralization of federal responsibilities and transfers that support public policies structurally defined in the constitutional text.

In the historical series of its thirty-one years of existence, it has been observed an implicit process of deconstruction of the ruling constitutionalism established in the FC/1988, under the pretext of increasingly demanding fiscal consolidation of the reduction of the size of State. This is the process of reversing constitutionally defined allocative priorities, perhaps showing an entire “inverted ruling constitution”⁶.

This trajectory has been critically accentuated since the enactment of Amendment 95, of December 15, 2016. This is because the supposedly transitory and exceptional “New Fiscal Regime” has imposed a twenty-year global cap on primary expenditures in order to contain, above all, the progressivity of costing proportional to the state collection in public health actions and services and in the activities of education maintenance and development (respectively, arts. 198 and 212 of the Constitution).

It is a matter of constitutionalizing the final orientation that budget execution should produce a positive primary result through the global containment of primary expenditures up to 2036, allegedly in favor of the intertemporal sustainability of the Brazilian public debt. As well stated by Streeck⁷,

The primary objective of States' creditors in conflict with their citizens is to ensure that, in the

event of a crisis, their rights are given priority over the rights of the state's people – debt service priority over the provision of services of general interest. The best way to achieve this is to create instruments – preferably enshrined in the constitution – such as the “debt brake”, which restrict the sovereignty of voters and future governments regarding the public finances. [...] In principle, this is a central problem of insolvency law, designed for state financial policy: which rights have the priority in the event of bankruptcy? (Streeck⁷)

What is in dispute, structurally, is the interpretation of the scope of the norms that both distribute federative responsibilities in organic arrangements to achieve public policies as well as set minimum spending duties on health and education, and a specialized social security budget. In this regard, it must be clear that:

[...] the interest service constrains public policies of the central government, as it mandates the maintenance of a primary surplus compatible with the sustainable trajectory of public debt indicators elected by the financial market.

[...] In this context, the existence of bindings between spending on social programs, health, education and social security, functions as a counterbalancing mechanism, which cushions the pressure of the primary surplus target and its achievement in the budget process of the Union. The distributive conflict expressed in the General Budget of the Union (OGU, in Portuguese) is resolved through a crowding out effect on the federal budget, which compresses other discretionary expenditures, especially public investment. The bindings are a symptom of the intensified distributive conflict in the Union's budget process, in the presence of a high fiscal cost of the public debt management.

The approval of Constitutional Amendment (CA) No. 95/2016, which freezes the real growth of primary spending for at least ten years, radicalizes the centrality of the interest service in the Union budget process. The fiscal regime created by this CA predicts a gradual and enforceable reduction in the primary expenditure in GDP and, consequently, the increase in the primary surplus during its validity. The Brazilian fiscal policy is conditional on the cap of primary tax expenditures and the primary surplus target regime. (Magalhães e Costa⁸)

Meanwhile, no effective progress has been made in regulating the limits on the federal security and consolidated debt (an unconstitutional omission regarding Articles 48, XIV and 52, VI of the FC); in the reckless relationship between the Treasury and the Central Bank (of which fiscal costs and risks from exchange and monetary policies are poorly equalized in the budget cycle);

or in containing tax waivers, despite art. 14 of the Fiscal Responsibility Law (LRF, in Portuguese) and art. 113 of the ADCT, plus Amendment 95.

In fact, this tension is not exclusive to the Brazilian reality, nor does it correspond to a recent phenomenon. The questioning of the protective framework of the Welfare State (as created by countless democratic nations around the world) has occurred since the 1970s, based on the fiscal austerity agenda that seeks to reduce its scope in favor of the prevalence of funding financial expenses:

[...] as long as the ability of States to repay their creditors can be relied upon, permanent partial financing of states' activity through indebtedness is in the interest of the owners of monetary resources. The triumph of the winners in the struggle for market distribution and the struggle with the division of finances will only be total when they can safely and profitably invest the capital they have earned from the State and society. Therefore, they have an interest in a State that not only leaves its money in their possession [through a general reduction of the tax burden or through tax waivers], but also absorbs it as credit, keeping it in a secure manner and pays them interest for the borrowed money (rather than confiscated [by tax]), and finally gives them the ability to transfer this money to the next generation of their family – by paying an inheritance tax that has long become non-significant. Thus, the State, as an indebted State, contributes significantly to the perpetuation of social stratification and the resulting social inequality, while subjecting itself, as well as its activity, to the control by its creditors, which appear under the form of "markets". (Streeck⁷)

If there was any equity in the Brazilian debate about intertemporal adjustment in public accounts, to make it in line with the current constitutional order, and as long as the federal debt limits are not fixed, according to art. 48, XIV and art. 52, VI of the Federal Constitution, the following should be prohibited:

- (1) the creation or expansion of financing programs and lines,
- (2) the write-off, renegotiation or refinancing of debts that implies an increase in expenses with subsidies and grants and
- (3) the granting or extension of tax incentives or benefits.

In this regard, it should be recalled that, given the risk that had been anticipated since 2018 of a breach of the "golden rule" contained in art. 167, III of the Constitution, in which the paragraphs 3 and 4 of art. 21, as well as articles 116 and 139 of the Union Budget Guidelines Law for 2019 (Law

13.707/2018), provided for the need for regulation on the reduction of tax waivers during this financial year, as a result of:

(1) term of validity for each benefit (as a rule, not exceeding five years);

(2) schedule for aforementioned reduction "by at least 10 per cent a year and that the act be accompanied by the objectives, targets, and indicators related to the fostered public policy, as well as the indication of the agency responsible for the supervision, monitoring and evaluation", aiming at halving the stock of federal tax waivers, so that:

(3) "the total waiver of revenue, within 10 (ten) years, does [would] not exceed 2% (two per cent) of the gross domestic product", since in 2017 it had reached 4%. (four percent) of the GDP, as diagnosed by the TCU in the annual accounts of the Presidency of the Republic.

To the same extent, federal Budget Guidelines Law (LDO, in Portuguese)/2019 predicted, in articles 147 and 148, the need for the Central Bank to clarify, in a more detained and comprehensive manner, not only the analysis and justification of the evolution of agreed operations in the period but also the impact and costs of (1) National Treasury availabilities' remuneration; (2) maintenance of foreign exchange reserves, demonstrating the composition of international reserves with methodology for the calculation of their profitability and funding costs; as well as (3) the profitability of its securities portfolio, highlighting those issued by the Federal Government.

In an effort to refine the duties already included in article 7, paragraph 2 and article 9, paragraph 5, both from the LRF, the 2019 federal LDO strongly indicated the centrality of the costs of agreed operations and international reserves for the results of foreign exchange, monetary and credit policies carried out by the Central Bank.

None of this, however, has advanced – in fact – in the ordering of Brazilian public finances. There was only a fleeting diagnosis that the fiscal adjustment routes had to be widened, but unfortunately such resolution measures in the control of tax waivers and financial expenses are yet to be foreseen together with a broad equalization plan of the "golden rule" and, therefore, these measures still exist only as "budgetary guidelines".

Although it is undeniable the need to improve the quality of primary spending to better adhere to the respective sectoral planning in terms of physical and financial goals, as well as the need to pursue minimum productivity control of public servants in personnel spending, "the structural fiscal fragility of the Brazilian state does not end

with the problem of the primary expenditures growth, especially those classified as social expenditures²⁸.

The root of the Brazilian fiscal impasse lies in the lack of coordination between the fiscal, monetary and exchange rate policies, with severe institutional and normative frailty for the public debt management:

The effect of the inertia of the institutional arrangement of public debt management and its complementarities is the high fiscal cost of the interest service supported by the Brazilian State. This cost compresses the social spending and public invest-

ment of the three government spheres, in addition to reducing the space for formulating and implementing public policies and, therefore, the public space itself for the democratic discussion of the application of resources from taxes charged from society. (Magalhães e Costa⁸)

Without broadening the focus of fiscal adjustment so that it also comprises the impasses in the management of financial income and expenditure, this will only result – in an even faster and more evident manner – in the budget-financial erosion of social rights, in the deconstruction of the identity axis of the 1988 Constitution.

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