

**SOCIAL AND ENVIRONMENTAL IMPACTS OF CONSTITUTIONAL
AMENDMENT 95 IN BRASIL: SHOULD THE BUDGET BE UNDERSTOOD AS A
COMMON RESOURCE?**

Clóvis Eduardo Malinverni da Silveira

Vagner Gomes Machado

ABSTRACT

In this paper we seek to study federal public budget as a common good, that is, something that should not be understood as a resource belonging to anyone, but to the general public, in a collective way. Since the State represents, at least in theory, the public interest, it is assumed that state decisions regarding public budget correspond to the interests of society. In many cases, like that of Constitutional Amendment 95 in Brazil, this reasoning is clearly false. Applying the *commons* paradigm to this subject provides an interesting conceptual tool to question the way that public budget is managed. Brazilian Constitutional Amendment 95 was enacted on December 15th, 2016. There were large popular demonstrations against its approval by National Congress. Popular dissatisfaction results from the fact that the Amendment changed the rules for the budget planning, imposing a limit on almost all expenses related to provision of social services and investments for 20 years, so that the next five governments will not be able to make relevant decisions on social and environmental areas. The limit became effective in 2017 having taken as reference the value corresponding to primary public expenditures of Federal Government in 2016, plus the inflation rate. This method is going to be used until 2036. It means that real public investments are going to be frozen up to 2036. That means a continuous dismantling of the public structures which serve the public in general (such as public health, education and environmental policies). Through this research we try to understand social and environmental impacts of Constitutional Amendment 95 from the point of view of the theoretical discussions about the *commons*. In other words, we seek to study this political and legal phenomenon considering the public budget as a common good. The method consists primarily of a bibliographical research on specific references to the amendment, followed by a documentary research, analyzing an array of government technical reports. We intent to organize, interpret and analyze data about public budget from the past years, as well as planned government expenditures for the years to come. We focused on the “thematic analysis”, suggested by Minayo’s (2014, p. 207), by which the following steps are performed: pre-analysis (floating reading, constitution of the corpus, hypothesis formulation); exploitation of the material (coding, classification, aggregation of data). The preliminary results suggest that the Brazilian public budget is controlled by financial interests opposed to the interests of the general public, in such a way that public power sometimes acts as a guarantor of private interests. Since the budget is not state property but a society-wide resource, we postulate that it should be managed for the benefit of society, with a more direct participation of the community in decision making, as well as developing forms of controlling decisions of public agents.

KEYWORDS: law of environmental commons, public budget, public policies, legal theory, environmental justice, environmental rights, social control.

1. INTRODUCTION

Since the approval of Constitutional Amendment 95, Brazilian population has been suffering the so-called “fiscal adjustment”. Constitution was changed in such a way that the functioning of the public budget was radically modified. Under the argument of avoiding the expansion of internal public debt, National Congress approved a “New Fiscal Regime” which imposes mechanisms to limit/reduce social spending and investments, in order to prioritize expenses related to public debt repayment.

This paper has three main objectives:

- a) describing a political and social context in which new budgetary rules were approved;
- b) reporting some of the main social and environmental consequences already verifiable of Constitutional Amendment 95;
- c) arguing that this subject can and should be understood by the lens of the common’s paradigm, to reshape problems related to the public budget according to a renewed democratic principle.

For this, we developed qualitative and exploratory research, through bibliography and documentary sources. The procedure was analyzing the content of legal norms, legal literature, journalistic texts and technical studies of governmental departments about the Amendment. Theoretical references about the commons were consulted to enable better understanding, interpretation and analysis of factual and institutional scenario. We focused on the “thematic analysis”, suggested by Minayo’s (2014, p. 207), by which the following steps are performed: pre-analysis (floating reading, constitution of the corpus, hypothesis formulation); exploitation of the material (coding, classification, aggregation of data).

The paper has three correlated parts. First one, devoted to exposing the political and social circumstances by which the Amendment was approved. The second one, devoted to detail the functioning of the Amendment, were and how constitutional text changed. The third one, devoted to giving a brief account of the social and environmental impacts already occurring in Brazil.

These three topics were investigated by the lens of the commons because we consider that a political regime cannot be truly democratic if public budget is controlled by special interests related to finance, to the detriment of the large majorities. Regardless of the

institutional arrangements that lead to budgetary decisions, the public budget is a requirement to make viable many social and environmental human rights. How is it possible that such a valuable resource is privately appropriated, even if through the State, by such narrow interests? As we would like to argue, this is a topic that can be better understood and discussed through the literature about the commons.

The approval of Constitutional Amendment 95 is one of the biggest dramas faced in recent years by the country. Understanding the context and what is causing the precariousness of essential public services is something worthy of attention. Technicalities presented around legal discussions about the public budget cannot hide the fact that the new rules are, essentially, political choices. The results of those choices are already affecting millions of people.

2. THE CONTEXT OF CONSTITUTIONAL AMENDMENT 95 APPROVAL: THE PROSPECT OF A 20 YEAR CRISIS

The year 2016 was politically atypical in Brazil. The period was marked by radicalization in politics. There was the impeachment of former President Dilma Rousseff, which for many was an important measure against corruption and for others was a coup, carried out by the Legislative and Judiciary Powers. The answer is much more complex than this. Anyway, the process divided public opinion and was massively reported by international press. There were street demonstrations involving millions of people, both to support and to oppose the impeachment procedure.

With the impeachment of Dilma Rousseff's on August 31th, 2016, the presidency was assumed by Michel Temer. One of his first movements was to declare the need for a fiscal adjustment. The *Constitutional Amendment Bill* (PEC n° 241/2016) took place at the National Congress. The purpose was to amend the *Transitory Constitutional Disposition Act* (ADCT) and establish a New Fiscal Regime for no less than 20 years.

According to the Explanatory Memorandum (Exposição de Motivos n° 83/2016), this measure aimed to reverse fiscal imbalance of public accounts. The document states that the deterioration of Federal Government's primary results for many years would lead to a deficit of up to R\$ 170 billion. It also says that the expenses related to social investments would have caused an unprecedented increase of federal public debt. According to the document, the gross government debt would have gone up to 51.7% of Gross Domestic Product (GDP) in 2013 to 67.5% in April 2016 (Brasil, 2016).

Thus, the root of fiscal problem would be the growth of so-called “primary public expenditure”, which would make essential to create a legal instrument able to curb the growth of these expenses (Brasil 2016a). This category of expenditures refers to those that pressurize the primary result, altering the government's net debt (non-financial public sector). They are also known as non-financial expenses. It corresponds to the set of expenses that make possible to offer public services to society. Examples of primary expenditures are personnel, costing, and investment expenditures. (São Paulo 2018).

Once the way found to attempt the purpose of preventing the debt growth was the creation of a mechanism that would act directly on the expenses of greater social interest, such as those related to investments in public health, public education, scientific and technological development, social assistance, environmental management, among others, the proposal announcement caused great social commotion.

The concern about the Amendment future implications were so significant that became commonly to refer it as “PEC da morte”, something like “Bill of death”. At that time, some entities came to public to express their concerns about the proposal. In this sense, the National Health Council, the National Council of State Health Secretariats and the National Council of Municipal Health Secretariats stated that the New Regime would imposes billionares losses on the Unified Health System (UHS). According to the National Health Council, the losses could reach R\$ 424 billions over the twenty years. For the Councils of the State and Municipal Secretaries, the losses would be slightly higher, reaching R\$ 433 billions. For the back then President of the National Health Council, Ronald Santos, the PEC n° 241/2016 would represent the UHS “death” (responsible for serving approximately 75% of the brazilian population, about 150 million people) (G1 2016a).

The fear of part of population about the consequences of adopting such fiscal policy triggered protests across the country. Hundreds of Teaching Units (Federal Universities, Federal Institutes and state and municipal public schools) were occupied by students and staff who mobilized in defense of public education (G1 2016b) (G1 2016c) (G1 2016d) (G1 2016e). There were also crowds of people in public parks and streets, as well as streets and highways blocked throughout Brazil. This movement counted on the participation of unions of workers of diverse segments that united around this same demand (opposition to the “Bill of death”). (G1 2016f) (G1 2016d)

Among the various manifestations occurred, there are two that deserve special attention. The first one was the occupation of the building where the Republic Presidency Office is based

in São Paulo city, October 10, 2016. The Brazilian Union of Secondary Students, National Union of Students and Union of State Students carried out the act. (UBES 2016).

The second one occurred on November 29, 2016 in front of the National Congress. At that time, people linked to workers unions and student movements were heavily repressed during a protest against the Project. About fifty thousand people gathered peacefully in front of the Congress until a car from a television station was dropped. After the incident, the military police threw up more than a hundred of moral effect and tear gas bombs, advanced with the cavalry towards the manifestants, and used other violent tactics for the dispersion of crowds. With the conflict, the manifestants depredated several historic buildings. In addition, the Ministry of Education was invaded, had its glasses broked and its equipments damaged. There were about forty people injured, two police officers. One stabbed in the back and the other stoned in the head. At least four people were arrested. The proposal was approved by the Federal Senate in its first stage of proceedings a few hours later (El Pais 2016).



Figure 1: Popular manifestation in front of National Congress against the Constitutional Amendment Proposal, which freezes social investments for 20 years. (Source: Mídia Ninja 2016.)

Both the population's fears and the representative entities manifestations that expressed their fears about the negative Amendment impacts were based on official government documents.

PEC n° 241/2016 has not only established a limit for primary public expenditure, but also changed the calculation method for definition of the minimum values to be invested in the areas of health and education. The Technical Study n° 12/2016 of the Budget and Financial Inspection Consultancy of the Chamber of Deputies, for example, tried to discriminate the damages expected for these sectors. The document purpose was to simulate the evolution of the constitutional minimums for these areas if PEC n° 241/2016 was in force by the period 2010-2016 (the year the research was carried out). In addition, the Study also presented projections for the period 2016-2025 (Brasil 2016b).

The document revealed that if the criteria set out by PEC n° 241/2016 had been applied since 2010, public education would have received less resources. The difference between the minimum defined by the calculation method provided by article 212 of Federal Constitution for the model established by the New Fiscal Regime, would be about R\$ 23.5 billions. In comparison with the amount effectively allocated to this area in the respective period (above the minimum), the difference would reach R\$ 94.8 billions. The projected resources for 2016-2025 registered a decrease of R\$ 32.2 billions if compared to the minimum that would be expected in compliance with the original constitutional text. However, these differences could be even greater with the resumption of economic growth. (Brasil 2016b).

As in the case of education, it was also observed that there would be reductions in the allocation of resources to the health area. In a fictional scenario, which since 2010 the criteria for calculating the minimum investments in public health actions and services were those defined by PEC n° 241/2016, the difference would be R\$46.6 billions until 2016. The projection for the period 2016-2025 showed that the difference would be much larger, of approximately R\$ 311 billions. (Brasil 2016b).

Therefore, despite the known shortcomings of public health and education services in Brazil, the Study has shown a future aggravation of the difficulties of these sectors due the mechanism imposed by the Amendment. (Brasil 2016b).

Another Federal Government document that corroborates with the perspective of crisis of the public services is the Technical Note n° 27 of 2016 of the Institute of Applied Economic Research - institution linked to the Ministry of Planning, now incorporated by the Ministry of Economy.

The Note aimed to measure the impact of the New Fiscal Regime on financing of the Brazilian Social Assistance Policy. The study was designed to project the Amendment impact from 2017 to 2036, considering only the changes in population dynamics and the expected aging of the population. There were no new demands arising from worsening poverty rates. (Brasil 2016c)

The document predicted that there would be gradual reductions on resources available for financing the social assistance by 2036. The Institute indicated that in the first year there would be an 8% decrease of resources. However, the losses would not remain at this margin. There would have been a progressive increase, reaching 54% in 2036. This means that in order to achieve the same level of achievement that would be expected of Social Policy in 2016, the Ministry of Social and Agrarian Development would have less than half of the resources in 2036. The total amount of losses on social assistance services projected for the entire duration of the Amendment, could reach approximately R\$ 868.5 billions (Brasil 2016c).

Diante dos resultados encontrados, o trabalho conclui que o NRF representará perdas expressivas para o campo assistencial. O esforço de ajuste fiscal proposto na PEC 241/16 poderá comprometer os avanços realizados em relação ao combate à pobreza e à desigualdade, e à promoção da cidadania inclusiva. As ações assistenciais, notadamente o Benefício de Prestação Continuada, o Programa Bolsa Família e o Sistema Único de Assistência Social colocaram o Brasil em patamar civilizatório mais elevado, ao afiançar direitos e proteção ao público em situação de vulnerabilidade, seja pela situação de pobreza, seja devido à violação de direitos. Logo, o Novo Regime Fiscal poderá impor uma descontinuidade da oferta socioprotetiva, o que constringerá as proteções já afiançadas pela política assistencial. (Brasil 2016c).

Even during the Constitutional Amendment Proposal on National Congress, it was already known that its way of functioning would cause a gradual decline in the performance of Public Power in carrying out the obligations imposed by the Constitution. However, neither the popular demonstrations throughout Brazil nor the Governments technical studies were enough to prevent the PEC nº 241/2016 from being approved on December 15, 2016. The result of its approval was the publication of Constitutional Amendment 95.

3. THE FUNCTIONING OF CONSTITUTIONAL AMENDMENT 95

The Amendment inserted a series of commandments on Transitional Constitutional Provisions Act (TCPA). The rules of the transitional provisions are part of the Constitution and have the same legal value as the rest of the text. However, its transient nature denotes that these norms regulate individual and specific situations. Once the regulated interests are applied and

terminated, the standards are exhausted and must no longer apply in the future. These rules regulate well-defined situations and solve exceptional issues. This leads to the understanding that it is not possible to abstract arguments for interpretation of the permanent part of the Constitution from these devices (Silva 2008).

It is necessary to point out that the public budget in Brazil consists on forecasting the revenues and determination of expenses for the period of one year (article 165, §8, of the Federal Constitution). In fact, the public budget is the concrete face of state planning. In other words, it is the consolidation of a political and legal option adopted by State through the definition of financial revenues and expenses. (Noce 2018).

Despite the legally transient character of the Amendment, its effects can be understood as permanent if observed from a historical point of view. By introducing such comprehensive norms, with such great repercussions, covering such a long term, what is done is introducing permanent rules in the constitutional order disguised as if they were temporary. This argument is based on the fact that, in addition to the first Brazilian Constitution (1891) and the current Constitution (1988), all the others have been in force for less than twenty years (Brasil 201b).

By inserting Article 107 on ACDT, the Amendment set limits on primary expenses within the three State Power spheres (Executive, Legislative, and Judiciary), the Federal Public Prosecution Service and the Federal Public Defender Service. (Brasil 2016d).

For the Judiciary, each one of its composing agencies had its limits set on a individualized way. It happened to the Supreme Federal Court, to the Superior Court of Justice, to the National Council of Justice, to the Labour Justice, to the Electoral Justice and to the Federal District and Territory's Justice. (Brasil 2016d).

In the Legislative, the limits of the Federal Senate, the Chamber of Deputies and the Federal Court of Audit were individualized. For the Public Prosecution Service was individualized the limit of the Federal Public Prosecution Service itself and the National Council of the Public Prosecution Service. The Federal Public Defender Service also had its limit individualized (Brasil 2016d).

Finally, the Executive. In this case there's a peculiarity, for unlike the Legislative and Judiciary powers, which had individualized the limits of the agencies that composes them, it was determined a generic limit to the "Executive Power" as whole. This means that any organ, entity, fund or foundation that is linked to the Executive responds to the same limit of expenses. (Brasil 2016d).

From 2017 the limit started to be calculated based on the amount correspondent to the primary expenses incurred in 2016 (primary expenses paid, including other operations that

affected the primary result). It was set that on each year this budget would be updated by the official inflation indicator until 2036, according to §1, II of article 107. (Brasil 2016d).

It is important to notice that the Amendment, setting the limits based on 2016 result, promoted a disconnection of budget planning in relation to fiscal performance. Thus, regardless of how much taxes the Government receive after 2016, the real value available for public services will always be the same. Even if Brazil presents an economic growth similar to China (7%, 8%, 9% per year), there would be no greater capacity to invest in essential services. All the surplus collected by the Federal Government would be used to pay the rising financial expenses. In addition, 2016 was a year of economic and fiscal crisis for the country. Taking 2016 as parameter for the establishment of limits means making the deficit reality of 2016 lasts more 20 years.

This scenario points to a continuous dismantling of public structures that serve the public services. The restrictions on the possibilities of admission or hiring of staff are a representation of that. It is not even possible to think about public services without effective employees. If a server retires and its position becomes vacant, there is the possibility that another person may be hired to fill this role. However, the retirement payments of those whom are not working anymore is going to be accounted as primary expenses. Even after the server leaves its position, his remuneration is going to keep pushing the limit to which it is linked. Consequently, it is impossible to remain within limits and to restore positions that become vacant over the next 20 years. There will be a progressive deterioration of state structures and services.

The amendment was not restricted to the creation of individualized limits. The new rules also promoted changes on the method of calculating the constitutional minimum to be allocated on health and education areas.

The article 110 of Transitory Constitutional Provisions Act determined that during the New Fiscal Regime the minimum investment in public health actions and services and maintenance and development of education should be equivalent to 2017's minimum applications. (Brasil 2016d).

Until that date, the minimum that should have been allocated on these areas was defined by articles 198, §2, I and article 212, of the Constitution. For investments in public health, the Constitution permanent part determines that the value should correspond to 15% of the net current revenue of the respective year. On the other hand, the minimum for education should represent 18% of income from taxes (Brasil 1988).

In addition to this provision, according to the section II of article 110 of the TCPA, from 2018 the calculation of the minimum applications in both should take as reference the 2017 amount corrected by the inflation variation, following the same correction parameters of the individualized limits (Brasil 2016d).

Nevertheless, these kinds of investments respond to the same limit, Executive's. Thus, for investments to occur above the minimums established by the Amendment without exceeding the limit assigned to the Executive, a proportional reduction of other actions performed would be necessary. The more it is invested in health and education, the less can be invested in other areas. Therefore, the new rules have a great destructive potential for social policies, putting at risk the quality of life of Brazilian population.

4. BRIEF REPORT ON THE SOCIAL AND ENVIRONMENTAL IMPACTS OF THE NEW FISCAL REGIME

At present (2019) it is possible to perceive the effects of the Amendment 95. Brazil is going through a time of marked precariousness of public services. This process was accelerated when President of the Republic, Jair Messias Bolsonaro, came to power.

The objective of this section is to identify the main restrictive measures that have been adopted recently due to spending limits and the consequent social repercussion. The data sources used are journalistic and depict the current situation at the time that the present scientific paper was made. It is not intended to present all measures (or announcements of possible restrictions), but to point out some of the main actions of the Government to reduce primary spending in 2019. The mentioned dates listed refer to the journalistic publications. The institutional acts (subject of the reports) may have occurred at an earlier time.

- *September 24, 2018* - Draft Annual Budget Law of 2019 reduces by 50% the resources to be allocated to the Unified Social Assistance System (CRESS/SC 2018).
- *March 10, 2019* - The Minister of Economy, Paulo Guedes, defended the Proposal for Constitutional Amendment that unlinks revenues and expenses from the Budget. The amendment would aim to “flexibilize” the budgetary management and end up with, for example, with the minimum investments in health and education (Valor 2019).

- *March 30, 2019* - Decree blocks 22.8% of Ministry of Environment resources for the 2019. The Ministry of Education also suffers with the block of 24.7% of its resources (Direto da Ciência 2019).
- *April 2, 2019* - New budget cut on the Ministry of Science, Technology, Innovations and Communications. The measure threatens the payment of scholarships and Brazilian scientific production. The main agency for promotion of scientific research in the country (National Council for Scientific and Technological Development) suffered a contingenciament of 42.2% of the resources expected for 2019 (O Globo 2019a).
- *April 15, 2019* - The Secretary of Finance, Esteves Colnago, stated that there is not going to have public tender for the Federal Government in 2020. “The premise at this moment is not to hold public tenders” he said. There are also no provisions to salary adjustments for public servants. The only exception is the military, which may receive increases on the Armed Forces Pension reform (UOL Economia 2019).
- *May 7, 2019* - Climate change programs have 95% of resources blocked. The initiative coincides with the initial idea of President Jair Bolsonaro to withdraw the country from the Paris Agreement (O Globo 2019b)
- *May 16, 2019* - The National Association of Directors of Federal Institutions of Higher Education in Brazil states that the resources blocking on Ministry of Education represents a reduction of up to 54% destined to some Universities. Several institutions foresee the lack of resources even to pay for expenses like water and electricity (G1 2019) (El País 2019).
- *May 18, 2019* - Government blocks 100% of resources from 140 projects in 11 ministries. The following organs were affected: Ministry of Education; Defense Ministry; Ministry of Infrastructure; Ministry of Regional Development; Ministry of Economy; Ministry of Science, Technology, Innovation and Communications; Ministry of Mines and Energy; Ministry of Citizenship; Ministry of Justice and Public Security; Ministry of Agriculture, Livestock and Supply; Ministry of Foreign Affairs; Ministry of Environment; Civil House of Republic Presidency; Ministry of Tourism; General Advocacy of Union, among others (Estadão 2019).

- *June 4, 2019* - Economy Minister Paulo Guedes confirms that the government has chosen to not promote public tenders in the coming years. “In recent years, there have been surplus hirings. The wages have risen fiercely [...] In our accounts, 40% of public servants are expected to retire within the next five years. There is no need to fire them. Simply decelerate the entries that this excess goes away naturally. Let's stay without hiring for a while and let's computerize”. (Jovem Pan 2019).

The increasing reductions in social expenditures, structural reforms of the Brazilian state under way (such as social security system reform, for example), privatizations, among other measures, are foreshadows of a social, economic and environmental crisis of immeasurable proportions.

The damages to the population are already perceived. Manifestations as expressive as those occurred in 2016 happened in May in protest of the measures announced by the Federal Government. Across the country, people took to the streets, blocked streets and highways, occupied schools and universities in protest to the dismantling of public services that is being carried out. (UOL 2019).

5. EPILOGUE

Examining the events occurred after 2016, it is noticeable that Brazilian experiences a political, economic and social crisis. Despite all popular manifestations and demonstrations opposing the budgetary restrictions occasioned by Constitutional Amendment 95, Federal Government has been adopting highly damaging measures to the well-being of most of the population.

Negative consequences are not limited to funding decreases for the Health System, social assistance, public education and environmental management. Brazilian fiscal policy represents the absolute denial of any social development for the next 20 years. It is a deliberated project, with political and economic consequences, that sacrifices the country's sovereignty in order to increase interest gains concerning public debt.

Even though the budget is, in theory, a public good, the case shows that the State acts to privatize public resources, guaranteeing the speculative gain of a small number of investors.

Half of the resources in this country are destined to pay holders of public debt with one of the world highest interest rates, with no technical explanation or justification.

The privatization "de facto" of the public budget is clear. Brazilian public budget is controlled by financial interests clearly opposed to the interests of the general public, in such a way that public agents commonly act as guarantors of private interests. Since the budget is not state property but a society-wide resource, it should be managed for the benefit of society, with a more direct participation of the community in decision making, as well as developing forms of controlling decisions of public agents

Once the budget is a crucial resource belonging to society, public wealth should be understood as a common resource. Thus, we shall criticize the enclosure of this commons through the enclosure of the State itself and postulate institutional changes, in the sense of its effective social control. The task for democratic forces is turning State mechanisms and public services into commons, applying the principles and lessons from the literature. Of course, the commons operate according through the idea of autonomy. But it's a mistake to conceive a society apart from the State apparatus, as if it was possible to exchange, once and for all, a certain powerful institution for alternatives ones. The problem is to reshape these structures, that is, changing the principles by which they operate. That is a challenge to rethink democracy at the Century XXI.

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