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Federal Economic Measures to Combat the Pandemic Crisis and the Federative Pact

Audic Cavalcante Mota Dias [α] & Roberta Araújo de Sousa [σ]

Abstract- This article seeks to explain the economic measures adopted by the Federal Government in response to the pandemic caused by the novel Coronavirus (COVID-19). Constitutional Amendment No. 106 and Complementary Law No. 173 will be used as a reference basis, with the aim of demonstrating how the fiscal regime was changed, within the constitutional possibilities, to maintain the country's economic health and how the states were impacted by the actions of the Federal Government. This study will analyze the changes in budgetary and fiscal rules and the distribution of resources among the states as a way of compensating for the loss of tax revenue. From another perspective, spending containment assumes an important role in combating the crisis and economic recovery is now being discussed in actions such as the suspension of states' debts with the Union. Ultimately, the distribution of resources allocated for this purpose from the perspective of the federative pact and how balance should be maintained on its basis should be determined. The theoretical framework is provided through specialized doctrines, scientific articles, specific legislation and the qualitative and descriptive approach.

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Introduction

Since its enactment, the Federal Constitution has identified the federated entities as indivisible parts of a whole, despite being endowed with the autonomy due to each one, observing their competences. Thus, the Brazilian tax system establishes rules common to all entities and to each one individually. Thus, by the constitutional rules, tax competences are determined and revenues are distributed in order to guarantee fair and equitable federative harmony.

The article seeks to analyze the behavior of federated entities in situations where emergency measures are necessary. In this case, the basis of study will be the 2020 pandemic caused by the new coronavirus (COVID 19) and both economic and tax actions that were taken with the aim of remedying the negative effects of the crisis. In a brief analysis, the two main legal measures of a reparative and contingent nature will be analyzed.

In the first section, the approach discuss the point of view of the legal action of a tax nature issued by the Federal Government whose purpose was to provide conditions for rapid recovery after the crisis. Determinations for the purchase and sale of financial assets and simplified processes for hiring personnel and acquiring inputs and equipment are the measures focused on in the proposed constitutional amendment analyzed in this section.

In the second section, the focus will be on the analysis of Complementary Law No. 173 and the establishment of the Federal Program to Combat Coronavirus, as the second measure at the federal level to help address the difficult situation faced by Brazilian states, mainly with regard to the suspension of the states' debt with the Federal Union.

In the third and final section, the approach discuss the relationship between federal measures under the aspect of the federative pact and how the distribution of revenues constitutes an indicative basis for determining the legislation that is the object of this study. The fiscal and tax sustainability of the states and the need to allocate resources to combat the 2020 pandemic complement the aforementioned analysis.

I. Constitutional Amendment No. 106 – "War Budget PEC"

In 2020, the world experienced one of the biggest health crises in history. The new Coronavirus, which causes the infectious disease COVID-19, has left countless people dead and a growing number of infected people every day. Its rapid contagious capacity has challenged doctors and researchers in the search for a cure or vaccine to prevent its rapid spread, which has led laboratories around the world to race against time.

In the face of the pandemic, society demanded social and health protection measures from the state. The urge to isolation, in addition to businesses closure, caused a disruption of the way to work of an entire society, which led the government to intervene to maintain social well-being. Urgent measures were

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needed to contain the spread of the epidemic while guaranteeing the population's primary means of subsistence.

Actions aimed at changing the rules of the tax regime in Brazil were also put on the agenda. The main need was to make rules imposed by the Federal Constitution more flexible, which limit the actions of federated entities and provide general rules for hiring personnel, works, services and supplies, in addition to the extraordinary fiscal and financial regime, used on an exceptional basis, whenever the regular regime cannot meet the requirement, separating them from the Union budget.

The establishment of such rules was determined by Constitutional Amendment No. 106, of May 7, 2020. It began processing through constitutional amendment proposal No. 10/20, starting in the Chamber of Deputies, counting, in this Legislative House, 395 favorable votes and 63 in the Federal Senate, returning to the Chamber for approval of the modifications made to its text, having been promulgated by the National Congress, on May 7.

Its voters were Senator Antônio Anastasia and Federal Deputy Hugo Mota, resulting in Constitutional Amendment No. 106. The proposal, despite being constitutional, is not part of the body of the constitutional text, but consists of separate content, with a start and end date. In this discussion, it will be in force while the state of public calamity recognized by the National Congress continues, not affecting acts that occurred before the start of the exceptional state decreed by Decree-Law No. 06, on March 19, 2020.

As for its content, its rules deal with the possibility of special hiring of personnel, works and services. As for hiring personnel, its importance is due to the need to add to the staff of professionals in the Brazilian health system, the increase in the workforce in combating the pandemic. This emergency hiring will be carried out on a temporary basis, without a budget forecast, that is, the admission of personnel beyond the budget allocations is authorized, and may exceed the spending ceiling for this purpose.

Specifically regarding the contracting of works and services, in addition to purchases[1], on an exceptional basis, its justification is quite similar to that of admissions. The emergency need induces that the acquisitions must be rapid so that they can fulfill their objective. The purchases mainly concern health supplies, such as personal protective equipment, expansion of the health network and other materials to support the fight against the pandemic, although this is not explicit in the text.

The reason for the divergence between deputies and senators in the votes on the Constitutional Amendment Proposal (CAP) in both Houses of the National Congress was the measure authorizing the Central Bank of Brazil to buy and sell securities issued by the National Treasury as well as assets[2]. These actions were aimed at increasing market liquidity, a demand from the sector in view of the economic effects of the pandemic crisis.

The purchase and sale of National Treasury bonds, another determination established by the CAP, but acquired from other markets, is beneficial both for the forecasts that the Central Bank can make regarding the yield curve of the bonds issued, and for the control of the currency in circulation. And in compliance with the principle of transparency, the Central Bank must make public all information regarding the transactions carried out, reporting to the National Congress.

Regarding the purchase innovation private market assets sale by the Central Bank, these must be carried out in accordance with the positive assessments of at least one of the three largest risk agencies. This determination aims to avoid the purchase of invalid securities or securities with a high default rate, which is why they can only be acquired through negotiations with the secondary market, that is, assets that are already in circulation, preferably from micro, medium and small companies.

It should be noted that fiscal actions such as those explained in this section, aimed at mitigating the economic impact of the 2020 pandemic on the Brazilian financial system, are not innovations introduced by the current Government. Similar methods of fiscal actions of state intervention were used to combat the effects of the 2008 economic crisis that shook the world market.

[1] Art. 2. For the exclusive purpose of dealing with the context of the calamity and its social and economic effects, during its duration, the federal Executive Branch, within the scope of its powers, may adopt simplified processes for hiring personnel, on a temporary and emergency basis, and for works, services and purchases that ensure, when possible, competition and equal conditions for all competitors, waiving compliance with § 1 of art. 169 of the Federal Constitution in the contracting referred to in item IX of the caput of art. 37 of the Federal Constitution, limited to the situations dealt with in said item, without prejudice to the protection of the control bodies.
Sole paragraph. In cases of distribution of health equipment and supplies essential to dealing with the disaster, the Union shall adopt objective criteria, duly published, for their respective allocation to States and Municipalities.

[2] Art. 7º The Central Bank of Brazil, limited to dealing with the national public calamity referred to in art. 1º of this Constitutional Amendment, and with validity and effects restricted to the period of its duration, is authorized to buy and sell:
I - securities issued by the National Treasury, in the local and international secondary markets; and
II - assets , in national secondary markets within the scope of financial, capital and payment markets, provided that, at the time of purchase, they have a credit risk category rating in the local market equivalent to BB- or higher, granted by at least 1 (one) of the 3 (three) largest international risk rating agencies, and a reference price published by a financial market entity accredited by the Central Bank of Brazil.

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It is important to emphasize that exceptional breaches of legal rules that deal with budgetary security are authorized for specific purposes, such as extraordinary application in health. In other words, the rule of not carrying out credit operations to finance current expenses should not be trivialized nor should its use become commonplace. The non-application of a limit on hiring personnel or expenditures that exceed the definitions established in the Fiscal Responsibility Law are unprecedented in the current situation.

Thus, the so-called "golden rule" of public accounts must be observed when making exorbitant investments so that the use of special credit operations does not create future deficits that are difficult to solve . The issue of public debt will be addressed later. As can be seen from the text below:

> Dieter W. Benecke asserts in this vein that public credit should be used for profitable production purposes, opening up new prospects, generating jobs (or at least maintaining existing ones), introducing innovations and allowing for an increase in income, in order to put the country in a better position to pay the principal and debt services. The use of public credit for non-profit purposes, for consumption purposes or to alleviate past debts, as a rule does not create new income and tends to aggravate the problem in the future, even though it may temporarily provide a respite for the public accounts. (ANDRADE *apud* BENECKE , 2012, P. 113)

II. Complementary Law Nº 173, of May 27, 2020

Initiated by Complementary Bill No. 39/2020, in the Federal Senate, authored by Deputy Antônio Anastasia, and approved with amendments and partial presidential veto of its text, the matter deals with the intention of parliamentarians to establish a large program in the areas of health and social assistance to aid states and municipalities, aiming to face the crisis caused by the new Coronavirus, and the balance of federated entities in maintaining their economic health.

The first measure concerns the suspension of payment of debts owed by states and municipalities to the federal government[3]. The debts agreed upon can hardly be called recent. They were agreed upon decades ago and did not exclude any state from participating; all of them owe the federal government. Given that the provisions defining criteria for payment of debts are very old, there was a need for new measures to update the criteria for refinancing obligations agreed upon between the entities.

The legal decision included in the Complementary Law analyzed here follows the understanding given in the precautionary measure issued by the Supreme Federal Court, whose rapporteur was Justice Alexandre de Moraes, which suspended, for a period of 180 (one hundred and eighty) days, the debt of the State of São Paulo with the Federal Union, during the crisis. The installments totaled R$ 1.2 billion reais and should be fully applied to actions aimed at health.

Obviously, decisions regarding the reallocation of resources during the new Coronavirus pandemic are guided by the defense of the greatest constitutionally protected asset, which is health. This even guided the vote on the Precautionary Measure mentioned in the previous section, as seen below:

> The claim of the State of São Paulo that it is unable to fulfill its obligation to the Union due to the "current extraordinary and unpredictable moment related to the COVID-19 pandemic and all the circumstances involved" is absolutely plausible; therefore, in the case, there is a need for strict observance of the principle of reasonableness, since, observing the necessary proportionality, justice and adequacy of the requested measure and the current situation of the COVID-19 pandemic, which demonstrates the imperativeness of allocating public resources to mitigate the serious risks to health in general, leading to the need for its concession, since the action of the Public Authority will only be legitimate if rationality, prudence, proportion and, mainly, at this moment, real and effective protection of the fundamental right to health are present (MORAES, 2020, P. 4-5)

Refinanced by Law 9,496 of September 11, 1997, the new debt negotiation was based on the debtors' reality in the face of the economic and financial context they were experiencing. With this law, not only was it possible to refinance debts arising from loans or those already refinanced by the Union, authorized by the Federal Senate, but also to consolidate the total amounts and assume part of the debts, payable for the period established by law, by the Federal Union.

The negotiation reported above was important to maintain the economic balance of the debtor entities and to allow fiscal and financial stability. However, the determination instituted by Complementary Law 173 guarantees states and municipalities the use of amounts that would be used to pay amounts arising from installments that would go directly to the accounts of the Federal Government, preventing the latter from executing the refinancing contracts until December 2020.

The control of public debt, since it indirectly affects the entire financial system and economic

[3] The Federative Program to Combat the SARS-CoV-2 Coronavirus (Covid-19) is hereby established, pursuant to art. 65 of Complementary Law No. 101, of May 4, 2000, exclusively for the financial year 2020.
§ 1º The Program referred to in the caput is composed of the following initiatives:
I - suspension of payments of debts contracted between:
a) on one side, the Union, and, on the other, the States and the Federal District, supported by Law No. 9,496, of September 11, 1997, and Provisional Measure No. 2,192-70, of August 24, 2001;
b) on one side, the Union, and, on the other, the Municipalities, based on Provisional Measure No. 2,185-35, of August 24, 2001, and Law No. 13,485, of October 2, 2017;

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stability, can and should be controlled by the Federal Senate, in accordance with constitutional precepts, which determines its limits but not the details of credit operations. In fact, failure to comply with the debt within the two-year period established in the constitutional text constitutes grounds for federal intervention in debtor entities. In this sense, it is important to maintain financial austerity for the benefit of the entire system:

> The lack of control over public accounts creates distrust in the market regarding the solvency of entities, scaring away foreign investors. Often, the debts of subnational entities end up being assumed by the federal entity – as has already occurred in Brazil on three occasions – which harms fiscal policy and its austerity efforts . (ANDRADE, 2012, p. 62)

However, these are specific situations that do not fall within the scope of the legal exemptions provided for in the supplementary law. The use of this portion of the budget that would be allocated to the payment of the internal debt with the Union, those arising from credit operations and social security, as referred to in Law No. 13,485, of October 2, 2017, due to the renegotiation, may be reallocated to actions to combat the pandemic. In this period of high costs of maintaining health and social assistance, all resources are welcome. Thus, the amounts for payment of the debt may be allocated to these operations to support health and maintain the well-being of the population.

In order to ensure maximum effectiveness of the provisions of the law, the measures took effect immediately, regardless the contractual situation in force at the time of the law's enactment, whose effects are retroactive to the beginning of the pandemic period. Furthermore, no debtor entity will be included in a default registry during this period. All performance, however, must be publicized in accordance with the assumptions of the principle of transparency.

The waiver of conditions for waiving tax credits, such as compensation measures through increased revenues, provided for in the Fiscal Responsibility Law and other laws that impose criteria for receiving voluntary transfers. These waivers can only be applied with a view to the effectiveness of the Federal Program to Combat Coronavirus. An important provision to ensure that the receipt of amounts and transfers of resources are not compromised.

The loss of tax revenue by the states and the need to intensify the allocation of resources to combat the new Coronavirus (COVID 19) have placed the federated entities in a precarious financial situation. In view of this situation, the complementary law in question subsidized aid [4]of a considerable sum to be distributed in four monthly installments, of equal value, totaling R$ 60,000,000,000.00 (sixty billion reais) under the terms of art. 5 and subparagraphs.

Of these amounts, a specific portion (10 billion) should be allocated to the health sector and payment of professionals working in the health system, and the annex to the law provides for the amount to be distributed among the states, which will be in accordance with population data from the Brazilian Institute of Geography and Statistics (BIGS), with the exception of the Federal District. Furthermore, the remaining amount will be allocated to the states and municipalities, with the distribution taking into account the most recent population data.

Finally, it should be noted that, in return, States, Municipalities and the Federal District are prohibited from promoting any salary adjustments for their public servants, holding public competitions, creating positions and granting benefits. In other words, no increase in personnel expenses will be permitted, except in cases of benefits to be paid to professionals in the health and social assistance areas who are directly involved in combating the cause of the state of emergency.

III. The Tax System and The Federal Pact

The Brazilian republican division into federated entities is responsible for decentralizing the government and providing the entities with administrative and financial autonomy, balancing and maintaining their independence among themselves. In this way, powers are divided in a way that grants equitable federative divisions. Such as the function and legal power, tax powers and revenue distributions are also defined by the Federal Constitution, regulated by scattered legislation.

Taxation is an essential activity carried out by the state, from which comes the main sources of revenue responsible for funding the functioning of the public sector, maintaining essential activities and investments, in addition to implementing public policies of a positive nature for social well-being. These expenses are organized by budget laws: Multi-Year Plans, Budget Guidelines Laws and Annual Budget Laws, drawn up at the three levels.

The idea of a fiscal state may even impose certain restrictions on taxpayers' assets due to the compulsory nature of taxes; however, it is the form of

[4] Art. 5º The Union will deliver, in the form of financial aid, to the States, the Federal District and the Municipalities, in 4 (four) equal monthly installments, in the fiscal year 2020, the amount of R$ 60,000,000,000.00 (sixty billion reais) for application, by the local Executive Branches, in actions to combat Covid-19 and to mitigate its financial effects, as follows:

I - R$10,000,000,000.00 (ten billion reais) for health and social assistance actions, being:

a) R$7,000,000,000.00 (seven billion reais) to the States and the Federal District; and

b) R$3,000,000,000.00 (three billion reais) to Municipalities;

II - R$50,000,000,000.00 (fifty billion reais), as follows:

a) R$30,000,000,000.00 (thirty billion reais to the States and the Federal District;

b) R$ 20,000,000,000.00 (twenty billion reais to the Municipalities

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funding used by the Brazilian economic system. Therefore, the price paid by taxpayers must be fair for the maintenance of public services and the set of assets corresponding to the classic functions of the state, while preserving the minimum freedom of citizens with due observance of their tax capacity. (NABAIS, 2018).

With the forecast of tax collection and the preparation of the public budget, it is clear how expansive social rights and their maintenance can be, especially in a system where the presence of the state is fundamental, whether to ensure basic rights or to remedy the harmful effects of crises that alter social well-being.

> In effect, the costs of social rights are materialized in public expenditure with immediate expression in the sphere of each of their holders, a sphere that thus expands to the exact extent of these expenditures. An individualization that makes such costs particularly visible both from the point of view of those who bear them, that is, from the point of view of the state, or rather, of the taxpayers, and from the point of view of those who benefit from them, that is, from the point of view of the holders of social rights. (NABAIS, P. 20)

The taxes under the jurisdiction of the Federal Government, States, Federal District and Municipalities are those provided for in art. 153 of the Federal Constitution and following. However, of a different nature, the revenue sharing refers to the sharing of resources resulting from tax collection provided for in the provisions cited above. These are provided for in article 157 and following of the Federal Constitution, and provide for the percentages shared of Federal Taxes to States and Municipalities and from States to Municipalities.

Although the above distributions are made directly, the constitutional provisions also provide for the possibility of reallocating fund resources. The two most relevant funds for the allocation discussed here are the State Participation Funds (SPF) and the Municipal Participation Fund (MPF). The coefficient is calculated using population data provided by the BIGS, i.e, states with a larger population receiving a larger volume of fund resources.

Such issues involving tax jurisdictions have brought into vogue ideas about tax reform and how the possibility of its implementation would affect the incidence of state and municipal tax collection. The discussions involve grouping together several taxes, including those between different entities, into one and dividing them proportionally among those responsible for collecting them. This determination is clearly contrary to the current rules already established in the Constitution.

Taxation based on sources other than those already determined in the legal text, whose sources will be variable, possibly aggregated, not observing the provisions of the federative pact, nor respecting the jurisdictions of States and Municipalities, violates the precepts of federative autonomy. The tax-paying capacity of these and their collection continues to be part of the origin of the inviolability of the federative pact. Therefore, any attempt to the contrary must be viewed with caution by the system operators.

In line with the idea of equitable federal division, criticism is made regarding the suspension of installments of debts owed by states and municipalities to the Union. The exemption from payment during the pandemic period did not meet the equitable criteria for revenue distribution, by exempting the payment of installments proportionally. Instead of strengthening the federal pact, it directly benefited defaulting states that did not comply with the obligations agreed upon to fully settle their debts.

In other words, states and municipalities that had honored their obligations ended up receiving, proportionally, smaller amounts than states with larger debts. All because the intention of the legal provision is to reduce the debt so that it can be reallocated for use in measures to combat the new Coronavirus (Covid 19). Therefore, if the criteria for reducing and distributing the debt were different, the amount used would have been considerably higher for those in good standing.

IV. Conclusion

The conclusions drawn in this article came from the technical analysis of the two federal measures to combat the current pandemic. The relations between the Federal Union and the States, Municipalities and Federal District were strengthened with the distribution of revenues aimed at granting the aforementioned entities the necessary conditions to combat the health crisis.

The measures mentioned, which included the suspension of payments resulting from debts with the Union, public and private loans, social security debts and spending contingency such as the non-superlative change in their payrolls, were justified based on the greater good of health. Thus, their tax losses were offset by the non-payment of the debts described. In this way, the resources would be used for measures such as special hiring and acquisitions.

Although efficient and necessary to support States and Municipalities in combating the Coronavirus, situations could have been legally arranged to better adapt to the reality of the entities, such as the situation of debt suspension, which would have been better used if it had been proposed by analyzing the payers' compliance and, based on this basis, redistributing the amounts, after considering a fixed-value payment exemption. Despite this slight observation, the payment exemption still remained as a relief to the debtors.

In general terms, the inviolability of the federative pact, despite constant attempts to reform its structure, must be maintained in strict compliance with

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the provisions of the Federal Constitution, both regarding the administrative and financial autonomy of the federated entities and their tax collection capacity, with strict observance of the balance and harmony that should govern the relations between the Union, States and Municipalities. Actions such as those analyzed in this article are a demonstration of this premise.

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