

Mandates of the Special Rapporteur on extreme poverty and human rights; Special Rapporteur on the right to education; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

REFERENCE:
AL BRA 7/2016

8 December 2016

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on extreme poverty and human rights; Special Rapporteur on the right to education; and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, pursuant to Human Rights Council resolutions 26/3, 26/17, and 33/9.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the possible adoption of Constitutional Amendment Bill No. 55 ("PEC 55/2016") and its impact on the realization of economic and social rights in Brazil.**

According to the information received:

The Federal Senate is currently debating the adoption of a Constitutional amendment, PEC 55/2016, also referred to as the 'New Fiscal Regime', which freezes federal spending at 2016 levels for the next 20 years, corrected for inflation. The calculation of the correction for inflation is based on the National Broad Consumer Price Index (IPCA), but this method of calculating the maximum spending increase per fiscal year may be changed after the tenth year of the New Fiscal Regime.¹

According to the Government, the amendment would lessen uncertainty over public finances, including growing public debt as a share of GDP, which is seen as the root cause of Brazil's current economic recession.² Brazil is Latin America's largest economy and has suffered its deepest recession in decades, with an unemployment rate that has almost doubled since the beginning of 2015.³ The stated aim of this 'New Fiscal Regime' is to regain the confidence of investors by reducing public debt and interest rates.⁴ The IMF has commented that this reform seeks to "overcome the effect of political fragmentation on Brazil's budgetary

¹ Article 102, paragraph 1, item II & Article 103 of the Temporary Constitutional Provisions Act to establish the New Fiscal Regime.

² Financial Times, 'Brazil plans budget freeze for up to 20 years', 19 June 2016, available from: <https://www.ft.com/content/af6a6ed8-34dc-11e6-8825-ef265530038e>

³ IMF Country Report No. 16/348, November 2016, p.4.

⁴ The Economist, 'Brazil's president weathers multiple storms', 3 December 2016, <http://www.economist.com/news/americas/21711071-scandal-and-further-contraction-economy-make-things-difficult>

process by imposing a hard budget constraint at the constitutional level.”⁵ Proponents have also pointed out how this spending freeze may incentivize the Government to cut down on the costs of the bureaucracy.⁶ And the Government has said that it sees the constitutional amendment as a “commitment device that would support the negotiation and approval of other necessary reforms in the fiscal area, including the social security reform.”⁷

However, available data indicate a negative impact of the proposed amendment on Government expenditure in the areas of health care, education and social security, especially set against the background of a rapidly growing and ageing population.

Research from the Institute of Applied Economic Research indicates that PEC 55/2016 may have a severe negative impact on the funding levels available to carry out the responsibilities of the Ministry of Social and Agricultural Development (MDSA). The Institute calculated that spending on social welfare policies would decrease by 8% (from R\$ 79 billion to R\$ 85 billion) in the first year after the amendment comes into effect and that social welfare spending would decrease by 54% by 2036 (a total cut in spending of R\$ 868 billion). Spending on social welfare would decrease from 1.26% of GDP in 2015 to 0.70% in 2036.⁸ This would affect such programs as the *Benefício de Prestação Continuada* (a minimum-wage pension for poor elderly persons who cannot support themselves or whose families cannot support them), the *Bolsa Família* programme and the country’s overall *Sistema Único de Assistência Social* (SUAS – social assistance administration system).

According to health professionals, the impact of the Constitutional spending freeze would be ‘disastrous’ for Brazil’s publicly funded healthcare system (SUS).⁹ Brazil is the only country of its size with a universal, public and free health care system. About 3 in 4 Brazilians depend on SUS for the provision of health services. If the New Fiscal Regime is approved, the reduction of health expenditure within the health system over the next 20 years is estimated at around R\$ 433 billion.¹⁰ This represents a 25% reduction in expenditure in a system that is already considered to be underfunded.¹¹ With a population that will be rapidly

⁵ IMF Country Report No. 16/348, November 2016, p. 17.

⁶ IMF Country Report No. 16/348, November 2016, p. 21.

⁷ IMF Country Report No. 16/348, November 2016, p. 26.

⁸ Andrea Barreto de Paiva et al. ‘*O novo regime fiscal e suas implicações para a política de assistência social no Brasil.*’ Instituto de Pesquisa Econômica Aplicada, September 2016, available from: https://www.abrasco.org.br/site/wp-content/uploads/2016/09/nt_27_IPEA_regime_fiscal_assistencia_social.pdf

⁹ Notas conjuntas CONASS e CONASEMS sobre a PEC 241, available from: <http://www.conass.org.br/nota-conjunta-conass-e-conasems-sobre-a-pec-241/>

¹⁰ Notas conjuntas CONASS e CONASEMS sobre a PEC 241, available from: <http://www.conass.org.br/nota-conjunta-conass-e-conasems-sobre-a-pec-241/>

¹¹ R. Marten et al., ‘An assessment of progress towards universal health coverage in Brazil, Russia, India, China, and South Africa (BRICS)’, *The Lancet*, April 2014, available from:

ageing in the coming decades, it has been suggested that increased public health care expenditure of 37% will be required to deal with the resulting demands.¹²

According to a joint analysis prepared by the National Collegiate of Municipal Social Welfare Managers (CONGEMAS), National Council of Municipal Health Secretaries (CONASEMS) and the National Union of Municipal Education Directors (UNDIME), the constitutional amendment will cut federal spending on education by more than R\$ 45 billion between 2017 and 2025. According to these important stakeholders, the constitutional amendment thereby undermines the objectives of the National Education Plan 2014-2024 (NEP) that was adopted by the National Congress in June 2014. The NEP, through the Cost of Initial Quality Education per Student mechanism, requires an additional R\$ 37 billion annually, in part to address the estimated 3.8 million children aged 4 to 17 who remain out of school.¹³

The NEP has been welcomed by the Committee on the Rights of the Child (CRC) in its concluding observations on the combined second to fourth periodic reports of Brazil under the Convention of the Rights of the Child.¹⁴ The CRC also expressed concern over earlier budget cuts in the education sector and their negative effects on the implementation of the National Education Plan. It recommended, in light of its General Recommendation No. 1 on the aims of education, that funds to the education sector be increased “in order to strengthen public education and to prioritize the implementation of the National Education Plan.”¹⁵ The extent of the opposition to cuts to the education budget as a result of PEC 55 is exemplified by the 200,000 students who organized a nationwide occupation of at least 1,108 public schools and universities across 19 states in Brazil.¹⁶

[http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)60075-1/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)60075-1/fulltext); Plus55, ‘Temer’s Economy Plan Could Jeopardize Public Healthcare’, 27 May 2016, available from: <http://plus55.com/business/2016/05/temer-economy-plan-jeopardize-public-health-care>; Deloitte, 2015 health care outlook: Brazil, available from:

<https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Life-Sciences-Health-Care/gx-lshc-2015-health-care-outlook-brazil.pdf>; Carnegie Council, ‘Public Health in Brazil’, 15 December 2014, available from:

http://www.carnegiecouncil.org/publications/articles_papers_reports/0236

¹² See: <http://www2.camara.leg.br/camaranoticias/noticias/SAUDE/500989-CUSTO-DA-SAUDE-VAI-ENCARECER-37-COM-ENVELHECIMENTO-DA-POPULACAO,-APONTA-PESQUISADOR.html>

¹³ https://www.unicef.org/about/annualreport/files/Brazil_Annual_Report_2014.pdf, p. 6.

¹⁴ Committee on the Rights of the Child, Concluding observations: Brazil, 30 October 2015, CRC/C/BRA/CO/2-4, para. 5.

¹⁵ Committee on the Rights of the Child, Concluding observations: Brazil, 30 October 2015, CRC/C/BRA/CO/2-4, para. 74 (c).

¹⁶ Telesur, ‘Brazil Students Are Now Occupying over 1,000 Schools, Colleges’, 3 November 2016, available from: <http://www.telesurtv.net/english/news/Brazil-Students-Are-Now-Occupying-over-1000-Schools-Colleges-20161103-0025.html>

It is estimated that the inevitable impact of the amendment on spending levels in the areas of social security, health care and education will negatively affect the lives of many Brazilians severely. More particularly, estimations indicate that it will especially affect the poorest and most vulnerable strata of Brazilian society and will increase inequality levels in an already very unequal society.¹⁷ According to the International Monetary Fund (IMF), inequality has already increased since the start of the current recession, thus “bucking a decade-long trend” towards a more equal division of income.¹⁸

Furthermore, there are concerns that the debate on PEC 55 has been rushed through National Congress with limited participation of individuals and groups who may be affected by it and without properly assessing its impact on their human rights. In that context, it is worrying that a recent survey shows that 43% of Brazilians are not aware of the existence of the current plan to freeze public spending and there are more Brazilians opposed to the spending freeze than that support it.¹⁹

While we do not wish to prejudge the accuracy of the above, we express our serious concern about the potential impact of PEC 55/2016 on the realization of economic and social rights in Brazil.

As a State Party to the International Covenant on Economic, Social and Cultural Rights (‘Covenant’), Brazil has pledged to recognize a range of economic and social rights, including the rights to work, social security, an adequate standard of living, education and health, and has furthermore undertaken to guarantee that these rights will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The spending freeze resulting from PEC 55/2016 is likely to impact the enjoyment of these economic and social rights, as austerity measures often do,²⁰ and is likely to disproportionately impact the poorer and most vulnerable strata of the Brazilian population.

As indicated in the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR), there are a number of specific obligations assumed by States Parties to the Covenant that are applicable in this context of proposed fiscal consolidation.²¹

¹⁷ “Measured by the Gini coefficient inequality of disposable income in Brazil in 2013 was 0.47, almost 50% higher than the OECD average (0.315).” OECD, Brazil Policy Brief: Inequality, November 2015, available from: <https://www.oecd.org/policy-briefs/brazil-improving-policies-to-reduce-inequality-and-poverty.pdf>

¹⁸ IMF Country Report No. 16/348, November 2016, p.4.

¹⁹ Plus55, ‘Four in Ten Brazilians Don’t Know About Federal Spending Cap’, 1 December 2016.

²⁰ Office of the High Commissioner for Human Rights, ‘Report on Austerity Measures and Economic and Social Rights’ (2013), p. 11.

²¹ For an overview, see also: Office of the High Commissioner for Human Rights, ‘Report on Austerity Measures and Economic and Social Rights’ (2013), p. 12-13.

No deliberately retrogressive measures

We would like to bring to the attention of the Government of your Excellency that, article 2 (1) of the Covenant requires State Parties to take steps “with a view to achieving progressively the full realization of the rights recognized” in the Covenant. According to the CESCR, this phrase “must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.

In recent decades Brazil has built up an impressive system of social protection policies anchored in the 1988 Constitution that aims to eradicate poverty and social exclusion and explicitly recognizes the economic and social rights to education, health care, work and social security.²² Since the 1990s, poverty, extreme poverty and inequality have all shown a downward trend.²³ These trends are an indication of the impact of these social protection policies,²⁴ and ECLAC has written that these policies have managed “to contribute substantially to declining levels of poverty and inequality”. Other research has shown that specific programs such as *Bolsa Família* have been associated with decreases in income inequality in Brazil.²⁵

However, the spending freeze proposed by PEC 55/2016 appears likely to severely affect the achievements that have been made in the progressive realization of economic and social rights in Brazil and in the reduction of poverty and inequality. Research published by the International Monetary Fund on the effects of fiscal consolidation (policies to reduce government debt and deficit) in comparable situations gives cause for significant concern in the current context. The research concludes that “fiscal consolidations typically have the short-run effect of reducing incomes and raising unemployment”.²⁶ The authors of the research call for a balancing of these short-term consequences against potential longer-term benefits.

A paper recently published in the *IMF Economic Review* also concludes that fiscal consolidations tend to increase income inequality: “On average, a consolidation of 1 percentage point of GDP is associated with an increase in the disposable income Gini coefficient of around 0.4–0.7 percent over the first 2 years. Spending-based consolidations tend to significantly worsen inequality, relative to tax-based consolidations. So do large-sized consolidations. The paper also found that unemployment is an important channel through which consolidation increases

²² ECLAC, ‘Social Protection Systems in Latin American and the Caribbean: Brazil’, 2013, p. 7.

²³ ECLAC, ‘Social Protection Systems in Latin American and the Caribbean: Brazil’, 2013, p. 12.

²⁴ ECLAC, ‘Social Protection Systems in Latin American and the Caribbean: Brazil’, 2013, p. 13.

²⁵ Helder Ferreira de Mendonça and Diogo Martins Esteves, ‘Income inequality in Brazil: What has changed in recent years?’, *Cepal Review* 112, April 2014, p. 122.

²⁶ Laurence Ball et al., ‘Painful Medicine’, *Finance & Development*, September 2011, p. 21-22.

inequality.”²⁷ This paper furthermore states that the composition of austerity measures matters: “better-designed tax and social benefits policies can help mitigate the adverse effects on income inequality of fiscal adjustments. Indeed, progressive taxation and social benefits are consistently associated with lower inequality for disposable income.”²⁸

Therefore the likely negative impact of PEC 55/2016 on poverty and inequality levels in Brazil and related economic and social rights protected under the Covenant would seem to constitute ‘deliberately retrogressive measures’ as defined by the CESCR. The CESCR has made clear that there is a strong presumption of impermissibility of such retrogressive measures²⁹ and that they require “the most careful consideration” and would need to be “fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.³⁰

The CESCR has clarified in this regard, in relation to the right to social security, that it will look carefully at whether: “(a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.”³¹

In the Brazilian context this means, at a minimum, that the State undertakes the following steps: (1) ensure that the debate about PEC 55/2016 is given sufficient time to give full consideration to the arguments for and against it, is fully transparent, and accessible to every Brazilian citizen, and allows for genuine participation of affected groups; (2) ensure that the impact of PEC 55/2016 on the economic and social rights protected by the Covenant is assessed in a separate, preferably independent, study that argues (a) why PEC 55/2016 is justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources;

²⁷ Jaejoon Woo et al., ‘Distributional Consequences of Fiscal Adjustments: What Do the Data Say?’, *IMF Economic Review*, 2016.

²⁸ Jaejoon Woo et al., ‘Distributional Consequences of Fiscal Adjustments: What Do the Data Say?’, *IMF Economic Review*, 2016.

²⁹ CESCR, General Comment No. 13, para. 45.

³⁰ CESCR, General Comment No. 3, para. 9.

³¹ CESCR, General Comment No. 19, para. 42. The CESCR has also stated that for austerity measures to be compatible with States’ obligations under the Covenant, they “should (a) be a temporary measure only covering the period of crisis; (b) be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be even more detrimental to economic, social and cultural rights; (c) not be discriminatory and not disproportionately affect the rights of the disadvantaged and marginalised individuals and groups; (d) identify the minimum core content of rights, or a social protection floor as developed by the International Labour Organisation, and ensure the protection of this core content at all times”. Ariranga G. Pillay, Chairperson, Committee on Economic, Social and Cultural Rights, Letter to States Parties, 16 May 2012, <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf>

(b) discusses alternative measures; (c) explains whether the measures proposed are directly or indirectly discriminatory. None of these requirements currently appears to have been met.

We would like to also bring the attention of your Excellency's Government to CESCR General Comment 14 which indicates that violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. The adoption of any retrogressive measures incompatible with the core obligations under the right to health constitutes a violation of the right to health. Violations through acts of commission include the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health³².

Minimum core obligation

We would like to draw the attention of your Excellency's Government to the minimum core obligation under the Covenant which requires that a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party."³³ The CESCR has furthermore provided that, in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, "it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."³⁴

In the Brazilian context this means, at a minimum, that the State undertakes the following steps: (1) identify minimum essential levels of the relevant economic and social rights that may be affected by PEC 55/2016; a requirement which currently does not appear to be met; (2) if it is likely that minimum essential levels of the relevant economic and social rights will not be satisfied as a result of PEC 55/2016: make every feasible effort to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations; this may, for example, include looking at alternative measures, such as ways to increase federal revenues.

In addition, core obligations in terms of the right to health include, inter alia, ensuring access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups and to adopt and implement a national public health strategy and plan of action which shall be devised, and periodically reviewed, on the basis of a participatory and transparent process, giving particular attention to all vulnerable or marginalized groups. Retrogressive measures incompatible with these core obligations under the right to health are a violation of the right to health.³⁵

³² CESCR, General Comment No. 14, para 48.

³³ CESCR, General Comment No. 3, para. 10.

³⁴ CESCR, General Comment No. 3, para. 10.

³⁵ CESCR, General Comment No. 14, para 43 and 48.

Measures targeted at vulnerable groups

We would like to additionally bring to the attention of your Excellency's Government CESCR General Comment 3, in which the Committee has stated that, "even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes."³⁶

In the Brazilian context this means, at a minimum, that the State undertakes the following steps: (1) identify vulnerable members of society who may be affected by PEC 55/2016, including people living in poverty and extreme poverty; (2) adopt targeted programs to ensure that these groups are protected against the impact of PEC 55/2016.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned concerns.
2. Please indicate whether your Excellency's Government has comprehensively considered alternative measures. Please provide any information demonstrating that PEC55/2016 is a necessary and proportionate measure in the circumstance, fully justified by reference to the totality of the Covenant rights and in the context of the full use of the maximum available resources.
3. Please indicate whether there was any study to identify the minimum essential levels of economic and social rights that must be guaranteed to the population pursuant to the Covenant, as well as an independent review of the impact on the economic and social rights of the people in Brazil of the proposed amendment at the national level. If so, please provide details and summaries of the findings.
4. Please indicate whether the Government has fully considered a potentially discriminatory or disproportionate impact of PEC55/2016 on the enjoyment of economic and social rights of certain individuals and groups, particularly those living in poverty. Please also indicate whether the Government has proposed or intends to propose any measures to mitigate such impact and details of such measures, if any.
5. Please explain how PEC 55/2016 will allow Brazil to uphold affordable access to quality public health care for the people in Brazil at present and

³⁶ CESCR, General Comment No. 3, para. 12.

in the next 20 years, especially vis-à-vis the rapid ageing of the population and the estimated 37% increase in public health care expenditures that this will require.

6. Please explain how PEC 55/2016 will not cause Brazil to reduce access to education, and how it will allow Brazil to ensure the right to education of all children, including universal access to a quality education, without discrimination, with particular regard for all out-of-school children.
7. Please provide details on any measures, including public consultations, that have been or will be taken regarding PEC 55/2016, to ensure that people in Brazil are fully aware of the proposed amendment, and that the economic and social rights of the people in Brazil are duly respected. If no such measures will be taken, please explain why.
8. Please indicate whether the Government has carried out meaningful consultations with individuals and groups whose enjoyment of economic and social rights is likely to be affected by PEC55/2016. If so, please indicate the results of the consultations and how their views may have been taken into account.

We would appreciate receiving a response within 60 days.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Philip Alston
Special Rapporteur on extreme poverty and human rights

Boly Barry Koumbou
Special Rapporteur on the right to education

Dainius Puras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health