

*THE ADOPTION OF PUBLIC POLICIES FOR THE DEMOCRATIZATION
OF HIGHER EDUCATION: AN ANALYSIS OF THE TAX RESPONSIBILITY
LAW*

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RESUMO

O Ensino Superior cumpre importância na sistematicidade constitucional brasileira, bem como na legislação infraconstitucional, mormente na lei de responsabilidade fiscal. Nesse sentido, os princípios constitucionais oponíveis ao tema merecem ser estudados, bem como as características basilares da lei de responsabilidade fiscal como norte para a inteligência da possibilidade de uma maior democratização no acesso ao Ensino Superior, respeitadas as determinantes citadas. Trata-se de indagar acerca da extensão de tais determinantes, e se estas encontram identificação com as demandas sociais, e com os requintes estruturais da democracia participativa que se alastram no decorrer das últimas três décadas, de forma incisiva, no caso brasileiro. Adota-se o método hipotético-dedutivo.

Palavras-Chave: Ensino Superior. Lei de Responsabilidade Fiscal. Constituição Federal. Democracia Participativa.

ABSTRACT

University education is important in the Brazilian constitutional system, as well as in infraconstitutional legislation, especially in the fiscal responsibility law. In

this sense, the constitutional principles opposable to the theme deserve to be studied, as well as the basic characteristics of the fiscal responsibility law as the north for the understanding of the possibility of a greater democratization in the access to University Education, respecting the mentioned determinants. It is necessary to inquire about the extent of these determinants, and whether they are identified with the social demands, and with the structural refinements of participatory democracy that have spread over the last three decades, incisively, in the Brazilian case. The hypothetical-deductive method is adopted.

KEYWORDS: University Education. Fiscal Responsibility Law. Federal Constitution. Participative Democracy.

1 INTRODUCTION

Democratization and its subsequent process of deepening in its nuances, under a participatory perspective, have proven to be an opposable reality in the Brazilian case in the last decades.

Within this expression, the understanding that can be made about one of the most essential nuances of a society is realized, and that also deserves to be welcomed as to its inclusive democratic situation, as portrayed. We are referring to the Higher Education, an integral figure in the quadrant of the national education.

In view of the importance that higher education assumes for the country, with exponential contributive capacity for the development and social inclusion, we are thinking about the normativity opposable to the theme, in terms of facilitating democratization which is expressed by a greater inclusion in this process of educational construction.

As a legal cut, therefore, this theme is approached from the perspective of the Federal Constitution and the Law of Fiscal Responsibility, as the main legal landmarks referring to the theme.

Obviously, other pieces of legislation can be included in the discussion, such as the Law of Directives and Bases of National Education, but this one can receive a parallel reception in the present work, which will scrutinize more incisively how the national budget detailing can reflect on the issue of inclusive democratization in Higher Education.

Therefore, the objective is to investigate how the cited legislation can provide the facilitation assumed, in order to meet the participatory democratization exposed in recent years in factual reality. Some ways may be traced under this

perspective, in order to understand the question posed. It can be understood that the broadening of the concepts embedded in the Fiscal Responsibility Law may suffer some prestige in the formulated study, in line with the constitutional principles, in order to provide a greater democratic access to university education. Furthermore, it is possible to speculate about the prohibition of this alternative and the construction of others that may provide more democratic inclusion, but without prejudice to the precepts of the cited infra-constitutional legislation. Weighting may remain an opposable tool for the understanding and achievement of the ends sought in the work presented here.

Finally, it is important to clarify that, in order to achieve the purposes of this work, the adopted approach method is the hypothetical-deductive one, because the intellectual work is based on the appreciation of the formulated hypothesis, comparing it with the existing knowledge, expressed by the national and international doctrines related to the theme, and, in complementary character, by the relationship of this knowledge with the practical cases that can be glimpsed in the theme and in what is pertinent. On the other hand, the method of procedure adopted in the research is based on the bibliographical survey, expressed by the argumentative-dissertative method, since the intention is to present the theme with due depth, based on the national and international doctrine on the theme, based on the study of the local and legislative reality. It is sought, with all the proposed, the building of the argument under appreciation of the solid and scientifically concatenated bases.

2 HIGHER EDUCATION AND THE FEDERAL CONSTITUTION

Education occupies an important space in the 1988 Federal Constitution. It finds an explicit approach starting in art. 206, systematizing itself in principles and concrete rules about its unfolding by the federative entities, namely, the Union, the States, the Federal District, and the Municipalities.

First of all, it assumes the nature of a fundamental right, with expression of a social right (art. 6), being up to the State to adopt the due public policies for its concretization. It is a fundamental right, but one that assumes a differentiated texture, relating to the basic postulates of the Constitution of the Federative Republic of Brazil, with respect to the affirmation of the dignity of the human person, according to the dictates of social justice. Indeed, one cannot think of

achieving this end without duly providing society with the education that will allow it to follow this path.

Generally speaking, education observes certain principles, such as those advocated in art. 206 of the constitutional document:

Art. 206. O ensino será ministrado com base nos seguintes princípios:

I – igualdade de condições para o acesso e permanência na escola; II – liberdade de aprender, ensinar, pesquisar e divulgar o pensamento, a arte e o saber;

III – pluralismo de ideias e de concepções pedagógicas, e coexistência de instituições públicas e privadas de ensino;

IV – gratuidade do ensino público em estabelecimentos oficiais;

V – valorização dos profissionais da educação escolar, garantidos, na forma da lei, planos de carreira, com ingresso exclusivamente por concurso público de provas e títulos, aos das redes públicas; VI – gestão democrática do ensino público, na forma da lei;

VII – garantia de padrão de qualidade.

VIII – piso salarial profissional nacional para os profissionais da educação escolar pública, nos termos de lei federal.

IX – garantia do direito à educação e à aprendizagem ao longo da vida.

Single Paragraph. The law will provide for the categories of workers considered to be professionals in basic education and for the establishment of a deadline for the preparation or adaptation of their career plans, at the level of the Union, the States, the Federal District, and the Municipalities.

It should be clarified that some of these are more applicable to higher education. Free education is closer to basic and secondary education, where its universalization is a government objective. University autonomy, by itself, is a remarkable feature of higher education, although it is a prerogative to be adapted to other forms of education.

University autonomy is defined as the possibility of its own direction, based on superior normatization and exercised by exclusive rules (CEZNE, 2006, p. 124). It is limited by the ordinary legislation, especially the arts. 53 and 54 of the Law of Directives and Bases of the National Education (LDB) – Law No. 9.394, 1996. It must also adapt to the constitutional limitations, stipulated as follows: didactic

autonomy, scientific autonomy, administrative autonomy, and autonomy of financial and patrimonial management.

The didactic autonomy is dedicated to the relevance of the knowledge and to the form of its transmission.

The didactic autonomy is dedicated to the relevance of knowledge and the form of its transmission. The scientific autonomy is associated with the former and is related to the Article 206, item II, which establishes the faculty of the professor to research and teach contents in accordance with what he understands to be true in the curriculum. The administrative autonomy, on the other hand, refers to the university self-organization, with the freedom to establish the appropriate means to achieve its ends. It is an instrument for teaching-scientific autonomy and a prerequisite for the financial and patrimonial management autonomy. The latter, finally, can be understood as the ability to manage resources, and there must be a careful allocation of these, materializing the institutional responsibility, which can be evaluated through accountability, under the terms provided by art. 70 of the Federal Constitution of 1988 (CEZNE, 2006, p. 124-125).

The Law of Directives and Bases of the National Education contributes to the realization of the constitutional principles pertaining to education, as far as possible, not only with regard to the qualification of autonomy, but also in the stipulation of the funding sources, even more vital for early childhood, elementary, and high school education (SILVA, 2017, p. 127):

(...) concordamos que a LDBEN 9.394/96 possibilitou avanços no financiamento da educação, principalmente no que se refere à vinculação de recursos, porém, é evidente que os vinte anos da sua implementação foi e é permeada por desafios cotidianos, principalmente no que se refere à manutenção e à ampliação dos recursos financeiros. Concordamos que sem recursos não há como garantir os avanços previstos, principalmente no que se refere ao acesso a todas as modalidades, a equidade e a qualidade da educação para todos.

Finally, it is worth clarifying that, unlike primary and secondary education, higher education is not obliged to be free of charge, in the terms set forth in the art. 213 of the constitutional document. It speaks of the need for self-financing by private entities of higher education. The sole paragraph of the constitutional provision in question brings an important warning, which allows the financing of

private entities, not restricted to the public universities. It is about the possibility of allocation of public resources for research and extension activities, not limited to public teaching entities, community, confessional and philanthropic entities able to do so.

3 HIGHER EDUCATION AND THE LAW OF FISCAL RESPONSIBILITY

The Law of Fiscal Responsibility (Complementary Law no. 101, of 2000) can be considered a normative related to the issue of the development of Brazilian Higher Education, even more so because of the legal nature of the university units.

In effect, the cited complementary law was delimited as a legislative response to the process commonly observed, in the Brazilian case, of the deterioration of the public finances to the detriment of meeting the pressing social needs, expressed by the rights catalogued in the constitutional and infra-constitutional normativity.

It ended up perpetrating, on the way traced by the legislation, a certain concern not only with budgetary and fiscal control, but also with the transparency of the expenses made by the direct and indirect Public Administration, encompassing the Union, States, Federal District and Municipalities. The aim is to implement a process of accountability in public accounts, therefore, of a lasting, rather than temporary, nature.

It is mirrored, so to speak, in a democratic process (MOREIRA NETO, 2001, p. 5), essentially participatory, engendered with more vehemence from the 21st century on, in the Brazilian case, as an even more effusive consolidation of the redemocratization process that began in the 1980s. As a logical consequence, the relevant legislation assumes a role that seeks to incorporate the new demands of democracy itself in its volatile movement:

A Lei de Responsabilidade Fiscal é um código de conduta para os administradores públicos que passam a obedecer às normas e limites para administrar, prestando contas sobre quanto e de que maneira gastam os recursos da sociedade. Esta lei representa um importante instrumento de cidadania para o povo brasileiro, onde todos os cidadãos terão acesso às contas públicas, podendo manifestar abertamente sua opinião, com o objetivo de ajudar a garantir sua boa gestão (SIMÃO, 2004, p. 6).

It is not exhausted in these points the main objective of the consigned legislation, it can also be understood that the issue of the financial control presupposes the assistance of society in order to demand from the public authorities and public institutions of higher education, the efficient performance of their functions, which requires the instrumentalization of mechanisms able to facilitate the public evaluation of performance in accordance with the purposes of the institution specifically considered (ARAGÃO, 2001, p. 98–99). It refers to this evaluation process as the own consolidation and guarantee of the realization of the right to education (JUNQUEIRA, 2011, p. 94).

Public universities, as members of the indirect administration (as municipalities), are also subject to the effects named here, as well as to the main objective stipulations of the legislation.

Art. 165, item II, paragraph 9, and art. 169 of the Federal Constitution assert the establishment of supplementary law as the basic budgetary guideline for the conduct of public spending activities, especially with regard to the limitation on personnel expenditures.

Following this mean time, the Law of Fiscal Responsibility, especially in its Article 19, limits that spending on personnel must be within the range of 60% of net current revenue, as a way to establish a responsible control in the finances. This is a legal provision that seeks the rationalization of expenses by the federative units, unraveling situations that aim, in principle, the appropriate use of these expenses in terms of salary expenses and the like.

It is not considered, for the last topic raised, that this 60% limit refers only to spending on public educational institutions, directly. On the contrary, it encompasses the entire universality of the public administration, direct and indirect, in the scope of all federal entities. It is observable, therefore, at this point, an important issue for the perpetration and use of resources in a more effective way by the public universities. From this moment on, the resources earned are appropriated by such entities, without losing their essentially public nature, although they become institutional assets (RANIERI, 1994, p. 130).

A major focus that should be attributed to the Law of Fiscal Responsibility refers to the balance of the primary public accounts, it means, a balance that is intended to be self-sustaining, in which credit operations should not enjoy a very favorable position in the balance sheet, for the benefit of the public non-indebtedness. In other words, it is said that, although the proposed legal limit of 60% is not imperative, the basic principles of the Law of Fiscal Responsibility

(listed in its article 1), such as the balance of the accounts and compliance with legal limits, crowning the principle of legality, lead to the knowledge that the spending of these institutions cannot occur outside the legal and constitutional guidelines mentioned. Carlos Valder do Nascimento addresses this issue objectively to the terms proposed in this paper:

Os princípios básicos de gestão fiscal, que consubstanciam a responsabilidade das finanças públicas, configuram instrumentos essenciais à administração racional dos recursos financeiros postos à disposição do Poder Público. Permeando o atuar da União, Estados, Distrito Federal e Municípios, aos quais se vinculam na formação do sistema de responsabilidade fiscal montado pela lei complementar e constitucional e pelas resoluções do Senado Federal, tais princípios buscam embasar a atividade financeira estatal, imprimindo-lhe eficiência e operacionalidade. No plano jurídico, poder-se-iam eleger como princípios fundamentais da gestão fiscal: prevenção de déficits, prudência fiscal, segurança, planejamento e publicidade ou transparência. Os déficits fiscais, na visão clássica dos que se ocupam com o direito financeiro, têm sua inserção no orçamento público, corporificando o conteúdo receita e despesa, de cuja junção resultam os estudos e análises sobre o desempenho da gestão administrativa (NASCIMENTO, 2014, p. 57).

Nina Beatriz Stocco Ranieri (2015, p. 41) speaks in a confluent sense to the above:

Não se pode perder de vista, porém, que as universidades estão submetidas aos princípios do art. 1º. Logo, embora o limite de 60% não seja cogente, os princípios da LRF o são, e algum limite deve ser estabelecido. O equilíbrio entre receitas e despesas é mandatário.

The Federal Supreme Court Jurisprudence can be cited to deepen the conception detailed by the reported doctrine, especially Nina Beatriz Stocco Ranieri:

Ação Direta de Inconstitucionalidade. AMB. Lei nº 14.506, de 16 de novembro de 2009, do Estado do Ceará. Fixação de limites de despesa com a folha de pagamento dos servidores estaduais do Poder Executivo, do Poder Legislativo, do Poder Judiciário e do Ministério Público estadual. Conhecimento parcial. Inconstitucionalidade. 1. Singularidades do caso afastam, excepcionalmente, a aplicação da

jurisprudência do Supremo Tribunal Federal sobre a prejudicialidade da ação, visto que houve impugnação em tempo adequado e a sua inclusão em pauta antes do exaurimento da eficácia da lei temporária impugnada, existindo a possibilidade de haver efeitos em curso (art. 7º da Lei 14.506/2009). 2. Conquanto a AMB tenha impugnado a integralidade da lei estadual, o diploma limita a execução orçamentária não apenas em relação aos órgãos do Poder Judiciário, mas também em relação aos Poderes Executivo e Legislativo e do Ministério Público, os quais são alheios à sua atividade de representação. Todos os fundamentos apresentados pela requerente para demonstrar a suposta inconstitucionalidade restringem-se ao Poder Judiciário, não alcançando os demais destinatários. Conhecimento parcial da ação. 3. Conforme recente entendimento firmado por esta Corte, “[a] lei não precisa de densidade normativa para se expor ao controle abstrato de constitucionalidade, devido a que se trata de ato de aplicação primária da Constituição. Para esse tipo de controle, exige-se densidade normativa apenas para o ato de natureza infralegal” (ADI 4.049/DF-MC, Relator o Ministro Ayres Britto, DJ de 8/5/09). Outros precedentes: ADI 4.048/DF-MC, Relator Ministro Gilmar Mendes, DJ de 22/8/08; ADI 3.949/DF-MC, Relator Ministro Gilmar Mendes, DJ de 7/8/09). Preliminar de não conhecimento rejeitada. 4. Apenas o art. 2º da lei impugnada coincide com o disposto na lei de diretrizes orçamentárias. Essa semelhança, contudo, não impede, por si só, o conhecimento da ação, uma vez que a Lei de Diretrizes Orçamentárias, em tese, não conteria os mesmos vícios apontados pela AMB, pois contou com a participação do Poder Judiciário na sua elaboração. 5. A expressão “não poderá exceder”, presente no artigo 169 da Constituição Federal, conjugada com o caráter nacional da lei complementar ali mencionada, assentam a noção de marco negativo imposto a todos os membros da Federação, no sentido de que os parâmetros de controle de gastos ali estabelecidos não podem ser ultrapassados, sob pena de se atentar contra o intuito de preservação do equilíbrio orçamentário (receita/despesa) consagrado na norma. 6. O diploma normativo versa sobre execução orçamentária, impondo limites especialmente às despesas não previstas na folha normal de pessoal. Tais limites, conquanto não estejam disciplinados na lei de diretrizes orçamentárias e na lei orçamentária anual, buscam controlar a forma de gestão dos recursos orçamentários já aprovados. A participação necessária do Poder Judiciário na construção do pertinente diploma orçamentário diretivo, em conjugação com os outros Poderes instituídos, é reflexo do status constitucional da autonomia e da independência que lhe são atribuídas

no artigo 2º do Diploma Maior. Esse é o entendimento que decorre diretamente do conteúdo do art. 99, § 1º, da Constituição Federal. 7. A autonomia financeira não se exaure na simples elaboração da proposta orçamentária, sendo consagrada, inclusive, na execução concreta do orçamento e na utilização das dotações postas em favor do Poder Judiciário. O diploma impugnado, ao restringir a execução orçamentária do Judiciário local, é formalmente inconstitucional, em razão da ausência de participação desse na elaboração do diploma legislativo. 8. Ação direta de inconstitucionalidade julgada parcialmente procedente para declarar, com efeitos extunc, a inconstitucionalidade da expressão “e Judiciário” contida nos arts. 1º e 6º da lei impugnada e para declarar a inconstitucionalidade parcial sem redução de texto dos demais dispositivos da Lei nº 14.506/09 do Estado do Ceará, afastando do seu âmbito de incidência o Poder Judiciário (grifo nosso) (STF – Ação Direta de Inconstitucionalidade n. 4.426, Plenário – Rel. Min. Dias Toffoli – j. 09.02.2011, DJE 18.5.2011).

Faced with the issue of democratization of higher education and about one of the facets that has been assuming the university education itself today, concerning its character of autonomy, we scrutinize the applicability of the Fiscal Responsibility Law in the strict terms proposed by its dictates. The constraints of the mentioned normativity have inspired different behaviors on the part of the educational institutions:

(...) antes da LRF muitos municípios que atendiam diretamente a educação já gastavam 60% ou mais dos recursos orçamentários em folha de pessoal. Com a LRF, para que os dirigentes pudessem garantir essa obrigação legal e até mesmo ampliar o atendimento, a alternativa encontrada foi a terceirização dos serviços de limpeza, segurança, apoio administrativo, não realização de concurso público de títulos e provas para a admissão de pessoal, congelamento da remuneração dos profissionais da educação e em alguns casos, a transferência da educação de jovens e adultos e a educação infantil para grupos filantrópicos, comunitários e ONGs, sob o discurso de que a folha de pagamento não poderia ultrapassar a 60%, o que não contribuiu para a melhoria da qualidade da educação (SILVA, 2017, p. 124–125)

The question is, consequently, in comparison to the university autonomy and other auxiliary elements that can be glimpsed for the perpetuation of a greater democratic access to higher education, as a construction discussed by society and as a product of access to its members (through the insertion of facilitating

fiscal instruments in the pertinent normativity itself), whether the fiscal responsibility deserves to be accepted as a watertight principle, which does not hold flexibility in order to achieve the proposed mission, or whether its applicability should highlight a hard core and more responsive compartment.

The next section of this paper will deal more assiduously with these raised issues.

4 PUBLIC POLICIES AND THE BROADENING OF THE CONCEPT OF THE FISCAL RESPONSIBILITY LAW: UNIVERSITY AUTONOMY AND OTHER ALTERNATIVES

There is a talk about the extension of the reach of the Fiscal Responsibility Law for its more refined interpretation. In view of the evaluation that the Federal Supreme Court presents on the subject, an evaluation of hypotheses that allow a greater insertion of individuals in the universities, as well as the proper funding for such, is in order.

It must be kept in mind that, initially, investments were made during the 1990s to expand higher education, and under the aegis of the Fernando Henrique Cardoso government. The Lula Administration promoted the maintenance of this investment, in the wake of guaranteeing a market need. The need for a greater professional qualification, coupled with internal popular pressures, endorsed the investment made, despite its relapse in recent years, especially after the Dilma Rousseff Government.

The Federal Institutions of Higher Education (IFES), despite the university autonomy as one of its main arms of action, observe a great dependence on federal resources. At the beginning of the first decade of the 2000s, more than 80% of the total transfers from the Union were directed to spending on personnel and employees (SANTOS, 2013), a situation that has not found much change in current days. The Federal Institutions of Higher Education, as well as the State institutions of higher education, have a key role for research and innovation, contributing to the flourishing of scientific work and research that provide new utilities for all sectors of the economic field, from the oil field to the development of new medicines.

Table 1 – Resources released by MEC for the Federal Universities – top 10 institutions with the largest budget increase (2019)

University	Capital Resource	Distributed Amount	Additional Amount	Additional Percentage
Federal Rural University of the Amazon	R\$ 828.824	R\$ 2.418.965	R\$ 3.247.789	292%
Federal University of the city of São Carlos Foundation	R\$ 1.259.043	R\$ 1.995.646	R\$ 3.254.689	159%
Federal University of ABC Foundation	R\$ 1.926.563	R\$ 3.023.706	R\$ 4.950.269	157%
Federal University of the State of Rio Grande do Sul	R\$ 1.483.352	R\$ 2.177.068	R\$ 3.660.420	147%
University of the International Integration of Afro-Brazilian Lusophony	R\$ 1.000.000	R\$ 1.451.379	R\$ 2.451.379	145%
Federal University of the city of Ouro Preto Foundation	R\$ 1.862.306	R\$ 2.418.965	R\$ 4.281.271	130%
Federal University of São Francisco River Valley Foundation	R\$ 1.628.029	R\$ 2.056.120	R\$ 3.684.149	126%

Federal University of Jequitinhonha and Mucuri Valleys	R\$ 1.522.561	R\$ 1.814.224	R\$ 3.336.785	119%
Federal University of Great Dourados Foundation	R\$ 1.538.257	R\$ 1.814.224	R\$ 3.352.481	118%
Federal University of the State of Rondônia Foundation	R\$ 1.800.000	R\$ 2.056.120	R\$ 3.856.120	114%

Source: Ministry of Education

Due to the importance presented for the concretion of the tripod research-teaching-extension, and having in parallel the need for social inclusion in mind, the higher education institutions need to vehemently resort to alternatives to maintain their functioning, despite the federal transfers, which, according to the Ministry of Education, grew until the year 2019, despite the projections of budget decreases by the federal universities (the federal government announced the cut of R\$ 1.4 billion from the budget of federal universities and institutes in 2021), as is the situation of the Federal Institute of the State of Rio Grande do Sul (IFRS) – an example of several public educational and research institutions that find themselves in the same situation. The promotion of extension courses, offering workshops for technical improvement, among other measures, are undertaken by these institutions with the focus on obtaining the proper financial framework to properly sustain their activities. In this way, the risk of capture by private donors is something present, since they continue to invest in these institutions¹.

In this vein, it is worth noting that public educational institutions with high standards of research and teaching were those that adopted a position by valuing exclusive dedication and basic research, maintaining a high degree of independence in reference to the nefarious influences of the market. This reality has been perpetuated even with the external pressures (LEOPOLDO E SILVA, 2001, p. 299).

Table 2 – Fall in the budget of the Universities. Case of the Federal Institute of the State of Rio Grande do Sul (IFRS)

Year	Costing Budget (in R\$ million)	Budget Investment (in R\$ million)	Student Assistance Budget (in R\$ million)	Costing + Investment (in R\$ million)	Total (in R\$ million)	Students Registered in Regular Courses
2015	42,56	36,56	10,29	79,12	89,41	17.790
2016	45,23	12,29	10,22	57,52	67,74	20.517
2017	45,60	3,89	10,30	49,49	59,79	21.352
2018	43,24	3,50	11,16	46,74	57,90	21.008
2019	43,41	5,44	12,97	48,85	61,82	21.859
2020	41,97	5,26	12,53	47,23	59,76	23.082

¹ No caso brasileiro, segundo dados apresentados pela Confederação Nacional da Indústria e o Ministério da Ciência, Tecnologia e Inovação, em 2010 cerca de 50% do investimento na área era feito pelo setor público, cabendo o restante ao setor privado, percentagens que mantiveram essa média nos últimos anos.

2021*	36,58	1,20	10,35	37,78	48,13	24.305
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Projeção Fonte: IFRS

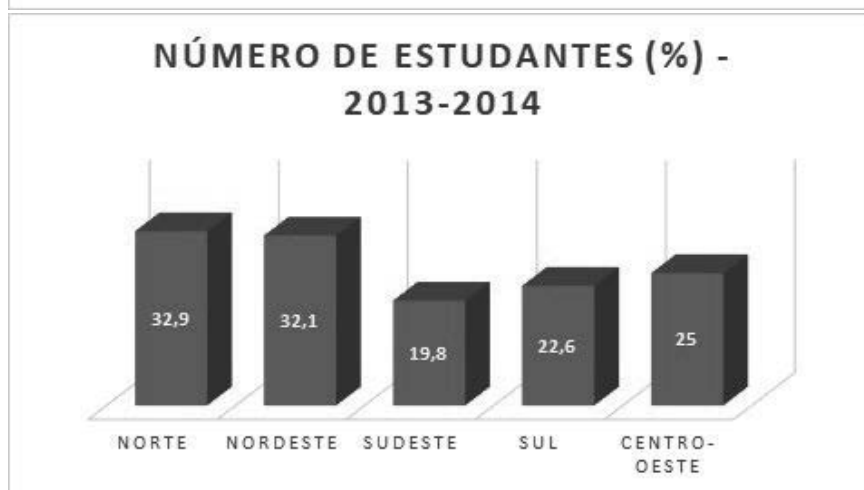
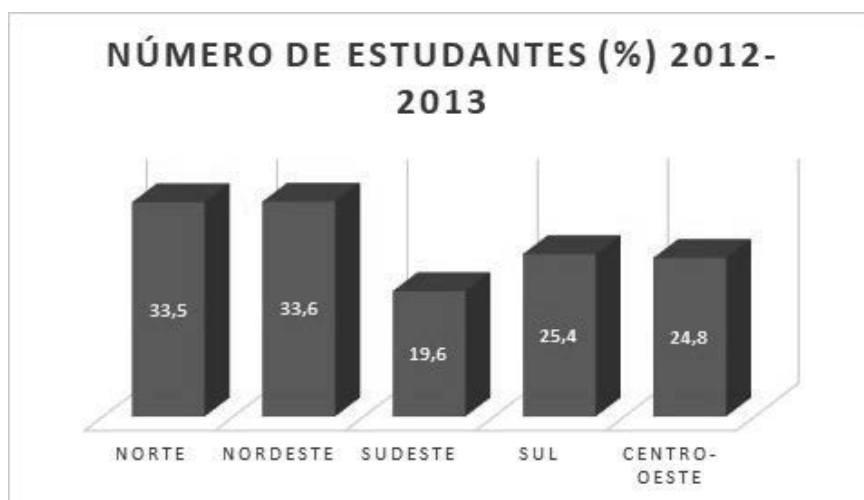
The Fernando Henrique Cardoso and Lula governments centered the public investments, with a view to achieving social inclusion, through programs such as the University for All Program (PROUNI), and the Program in Support of Plans for Restructuring and Expansion of Federal Universities (REUNI), expanding vacancies for people with a lower purchasing power, extending the supply of undergraduate courses, extending the supply of night courses, combating evasion and including the provision of housing for poorer students (PRESTES; JEZINE; SCO- CUGLIA, 2012). Given this scenario, according to data collected by INEP and IBGE, one finds a greater reach of higher education in society (see Table 3 and Graphs), which makes a rethink whether the extra measures adopted by the universities are sufficient to fulfill their social function, or whether the limits imposed for investment by the Fiscal Responsibility Law can be relaxed in order to meet the fundamental right of access to education.

Table 3 – Numbers of completers and registers in face-to-face and distance undergraduate courses, according to geographic regions – Federal Institutions of Higher Education (2018)

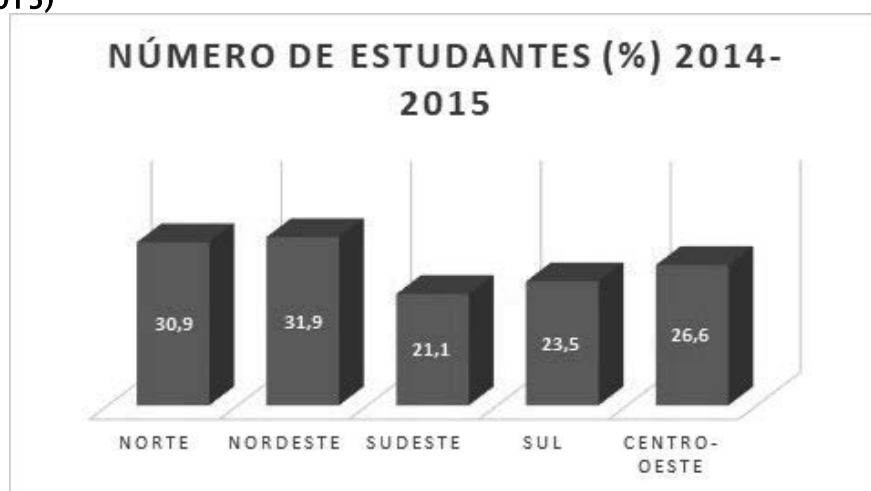
	Completers (presential graduation)	Completers (distance graduation)	Registration (presential graduation)	Registration (distance graduation)
North	18.574	564	144.868	6.855
Northeast	40.165	5.080	376.830	33.506
Southeast	46.979	3.839	372.554	38.238
South	24.721	706	209.820	8.550
Mid-west	15.434	856	127.837	5.926
Brazil	145.873	11.045	1.231.909	93.075

Source: INEP

Graphs – Number of students, by major regions, in Federal Public Higher Education



(2012-2015)



Fonte: IBGE. Gráficos feitos pela autoria

As for the last statement, we must focus on the implementation of the New Fiscal Regime, promoted by the Constitutional Amendment No. 95, which promotes the freezing of primary expenses (which includes spending on

education and the effective consolidation of social rights), reserving intact the payment of debts, which serves the interests of the financial sector (ANDRÉA; GUNDIM, 2020). Due to this reality, the National Education Plan (PNE), 2014–2024, is compromised as to its goals, which presumes that public higher education may not achieve its objectives in this period. The occurrence of pandemic in 2020 seems to compromise this reality even more. Thus, the 10% of GDP that should initially be directed to education will not find the destination in its entirety (AMARAL, 2017, p. 19).

Pode-se afirmar, portanto, que, analisando a evolução dos recursos financeiros associados ao MEC nos anos de 2014, 2015, 2016 e 2017 — quatro anos dos dez anos do PNE (2014–2024) —, a possibilidade do cumprimento do conjunto de suas metas é muito remota, uma vez que os valores financeiros não foram reajustados por percentuais nem iguais à inflação medida pelo IPCA nos anos de 2015 e 2016 e, no ano de 2017, a LOA 2017 também não previu recursos financeiros que propiciassem o desenvolvimento de ações que objetivassem a execução das metas do PNE (2014–2024).

Table 4 – Executive Power Bodies: difference between the annual variation and inflation in the years 2016 and 2017, contained in the Annual Budget Laws, in percentage points

Executive Power Bodies (structure created by Law No. 13,341, of 2016)	Current Values In Billions (LOA 2016 and LOA 2017, respectively)	Variation in the Period (%) (a)	Inflation for the Period (%) (IPCA) (b)	Difference between the Period Variation and Inflation in Percentage Points (a-b)
Presidency of the Republic	2,6 and 6,8	161,54	11,1	150,44
Ministry of Agriculture, Livestock and Supply	12,8 and 12,3	(3,91)	11,1	-15,01
Ministry of Environment	3,1 and 3,9	25,81	11,1	14,71
Ministry of Education	106,0 and 107,3	1,23	11,1	-9,87
Ministry of Culture	2,6 and 2,7	3,85	11,1	-7,25
Ministry of Sport	1,7 and 1,5	(11,76)	11,1	-22,86

Ministry of Health	120,9 and 125,4	3,72	11,1	-7,38
Ministry of Social and Agrarian Development	694,2 and 743,2	7,06	11,1	-4,04
Ministry of Science, Technology, Innovations and Communications	15,9 and 15,6	(1,89)	11,1	-12,99
Ministry of Finance	26,5 and 25,3	(4,53)	11,1	-15,63

Ministry of Industry, Foreign Trade and Services	3,0 and 2,7	(10,00)	11,1	-21,10
Ministry of Justice	15,7 and 14,2	(9,79)	11,1	-20,89
Ministry of Mines and Energy	8,3 and 4,0	(51,81)	11,1	-62,91
Ministry of Foreign Affairs	3,6 and 3,6	-	11,1	-11,10
Ministry of Transportation, Ports and Civil Aviation	34,2 and 27,6	(19,30)	11,1	-30,40
Ministry of Planning, Development and Management	6,2 and 8,0	29,03	11,1	17,93
Ministry of Defense	86,4 and 94,7	9,61	11,1	-1,49
Ministry of National Integration	7,8 and 7,2	(7,69)	11,1	-18,79
Ministry of Cities	13,1 and 16,0	22,14	11,1	11,04
Ministry of Tourism	1,1 and 0,77	(30,00)	11,1	-41,10

Source: AMARAL (2017)

Thus, one speaks of the role of the State being an agent in search not of the concretion of the constitutional document, but of its opposite, and backed by the activity of the Supreme Court's control of constitutionality (DUTRA; FREITAS, 2019, p. 166-167):

(...) podemos afirmar que o próprio estado é o agente inconstitucional, ou seja, o próprio órgão responsável pela inconstitucionalidade no contexto da EC 95. Tendo em vista a circunstância de se aprovar esta medida, é notório considerar que a educação e o aumento de seus recursos não é evidenciada como prioridade. Assim, concordamos com Gonçalves (2018) quando ele afirma que mesmo que a EC 95 não exclua totalmente o financiamento da saúde e educação, é possível constatar que os padrões mínimos desses direitos a sociedade são, em comum, abaixo das expectativas. Além disso, ele destaca que a contenção de recursos acarretará em um risco maior de precarização, e não da eficácia da gestão pública. Tomando como base essa discussão, corroboramos com as considerações de Gonçalves (2018) quando ele sinaliza que não podemos apontar a certeza da efetividade da Emenda Constitucional 95. Não há indícios de um quadro de sucesso que vislumbre sanar a dívida pública do nosso país, o que existe, são apontamentos de um cenário de redução de gastos públicos e seus impactos desastrosos nas áreas sociais.

Given the circumstances mentioned above, it is important to clarify that, in view of the own vision that the Federal Supreme Court has about the specific applicability of the Fiscal Responsibility Law, as well as the budgetary situation of the Brazilian State, it is difficult to understand that the cited normativity can find flexibilization, even if it represents unconstitutionality, since the effectiveness of the fundamental right is not allowed based on the binomial reserve of the possible – existential minimum. Art. 5, paragraph 1 of the Federal Constitution ends up being affected in the examination of the question, despite the acquiescent position of the Brazilian Supreme Court.

For the possible correction of distortions, there are two paths to take. The first one advocates for the adoption of public policies that are accessory to the national programs planned for social inclusion in universities, and with quality performance for students in higher education, and without reserving quotas for the invested elites (BORTOLANZA, 2017). In this vein, the performance of the federative entities can be associated, seeking to assist the financial facilitation to those wishing to attend public higher education.

On a second level, we can mention the example provided by the Federal University of the State of Paraíba (PRESTES; JEZINE; SCOCUGLIA, 2012). This educational institution, suffering the same difficulties as the others, obtained additional funds from the Treasury to carry out specific programs, in order to conduct its activities with the greatest possible inclusion and, on the other hand,

turned to the private sector for a support. The courses offered doubled between 2009 and 2010, going from 465 to 775 students involved. Also remarkable is the Program of Scholarships for Extension, with an increase of 27% of students awarded in the same period, as well as institutional programs aimed at improving the pedagogical quality, such as the Program for Consolidation of Graduations (PRODOCÊNCIA), the Institutional Program of Scholarships for Initiation to Teaching (PIBID) and the Program for Research Projects in Graduation (PROLICEN), contributors to the reduction of evasion and retention in their respective undergraduate courses (FEDERAL UNIVERSITY OF THE STATE OF PARAÍBA, 2010).

The result of this forms positive data presented by the University, as shown below:

(...) uma política de expansão institucional, que objetiva a democratização do acesso não se pode realizar-se e sustentar-se sem haver uma disponibilidade financeira que garanta o ensino, a pesquisa e a extensão o intercâmbio com a sociedade e a possibilidade de agregar grupos diferenciados de estudantes na produção do conhecimento. Para propiciar essa expansão, do ano de 2004 até 2010, a receita orçamentária da UFPB cresceu em 61,2%, havendo um incremento em mais de 80,9%, como se observa no quadro que segue. Parte desses recursos destinada a UFPB, segundo Souza Junior (2011:9), proveio da receita orçamentária do Tesouro, além de outras fontes públicas e privadas, oriundas de emendas parlamentares ao Orçamento Geral da União e de convênios com bancos públicos e privados que atuam no interior do campus I, em João Pessoa. Deste crescimento orçamentário é possível inferir que a política de expansão do ensino superior, via o setor privado, que atingiu as universidades públicas nos finais da década de 1990, no contexto de reforma do Estado brasileiro, e estimulou a redução do quadro docente e de funcionários, bem como a redução orçamentária da união tenha chegado ao fim com o REUNI, pois possibilitou às universidades públicas federais reestruturações importantes relacionadas à política expansionistas de natureza democrática (PRESTES; JEZINE; SCOCUGLIA, 2012, p. 213-214).

The Law of Directives and Bases for National Education still expresses certain alternative paths. The first one previews the possibility of increasing the percentage of resources tied to education:

Ainda sobre a vinculação de recursos, a LDBEN 9.394/96 possibilita o aumento do percentual de recursos vinculados à educação, pois prevê que municípios, estados e distrito federal possam aumentar os índices vinculados conforme Constituições Estaduais e Leis Orgânicas, reconhecendo a possibilidade e necessidade de aumento do percentual mínimo estabelecido na CF/88. Desta forma, o percentual vinculado na LDBEN 9.394/96 é mínimo e não máximo, e possibilita que estados, distrito federal e municípios aumentem os investimentos para atender às necessidades educacionais da população (SILVA, 2017, p. 124).

Finally, it also comments on the supplementary and redistributive action of resources by the Union, this activity acquiring a compensatory character:

Concomitante à vinculação dos recursos, a LDBEN 9.394/96 define a ação supletiva e redistributiva da União e estabelece no caput do art. 75 que esta e também dos estados deverá corrigir as disparidades de acesso e garantir o padrão mínimo de qualidade. Atualmente a ação redistributiva tem se pautado nas políticas de fundos de natureza contábil, a princípio pelo Fundo de Manutenção e Desenvolvimento do Ensino Fundamental e de Valorização do Magistério (FUNDEF) com vigência de 1996 a 2006 e posteriormente pelo Fundo de Manutenção de Desenvolvimento da Educação Básica e Valorização dos Profissionais da Educação (FUNDEB) com vigência de 2006 até o final de 2020 (SILVA, 2017, p. 125).

It can be seen, therefore, that the university autonomy can enable a broadening of the concept of "public investment in higher education" in comparison with the current jurisprudential understanding that governs the Law of Fiscal Responsibility. A broadening that implies creativity to obtain extra financial resources that allow public universities to achieve their constitutional and legal duties, a work that can be built with the help of the private initiative, civil society, and public initiative, in a scenario of compliance with their constitutional obligations.

5 CONCLUSION

Several factors are posed for the application of the Fiscal Responsibility Law as a limiting factor for investment in higher education. The Federal Supreme Court itself embraces a restrictive and literal interpretation of the normativity, heading

the concern with a more rectilinear administration of the public resources, as well as transparent in the eyes of the citizens.

Notwithstanding that fact, the right to education is covered by the mantle of a fundamental right, a factor that cannot be neglected, even more so in view of what the Federal Constitution of 1988 advocates. Faced with external elements to its realization, the Public Administration must make the necessary effort to implement it.

Observing the limit set by the Law of Fiscal Responsibility, it is highlighted that the Law of Directives and Bases of National Education provides other sources for higher education institutions to be able to offer courses, with sufficient vacancies, leaving over a social inclusion in higher education. The university autonomy itself has been composed in the sense of instrumentalization of elements for this inclusion, in the sense that the investment is reverted to the inclusion and quality of education, although present the limitation for spending by the Public Administration, and with the support of the Brazilian Supreme Court.

This analysis reverses the understanding that the instrumental measures allowed by university autonomy are not sufficient. The data demonstrate this assertion, and private investments are needed for the proper performance of these institutions, as can be seen in the example of the Federal University of the State of Paraíba. The implementation of the Constitutional Amendment No. 95, coupled with the economic and social crisis caused by the pandemic, only further deteriorated the picture, highlighting the positioning that the fulfillment of this goal of the National Education Plan (PNE) will not be achievable.

In view of the data and facts listed, the need for the Public Administration can be seen, in a scenario of sharing among the federative units, to adopt the due measures for the public higher education to achieve its purposes, calling the private sphere to compose this responsible part, but with limitations expressed in the Federal Constitution of 1988, regarding the exercise of economic and financial power. The dignity of the human person, according to the dictates of the social justice, must prevail.

Moreover, the implementation of public policies deserves more elucidation, as a creative way of complying with the constitutional precept, over and above the limited framework of public policies carried out for the establishment of the circumscribed task. The Judiciary, in this frame, recognizing the flexibilization of the application of the Fiscal Responsibility Law, regarding the pandemic, as

manifested by the minister Alexandre de Moraes, in the first semester of 2020, needs to recognize the necessary and immediate applicability of fundamental rights without unreasonable infra-constitutional limitations, even more so when they prevent the access to such a range of rights. The modulation of effects needs to overcome the binomial reserve of the possible – existential minimum, reserving to the legal device an application inherent to the realization of the dignity of the human person, a norm-mandate imposed by the constitutional document.

In the last acclaimed sense, it is said that the interpretative technique of the ponderation of interests deserves more interpretation by the highest Court in the country, so that the principle of proportionality seeks adequacy of the fact to the rule. The control of public spending should be limited to points of less importance in the Public Administration, which permeates the reform of the State itself. Social rights and fundamental rights demand the reverence required by the constituent legislator, and the Law of Fiscal Responsibility must fulfill its function with accountability, but in the context of the dignity of the human person, the greatest light that should influence its application. Instruments such as public policies can facilitate access to a quality higher education; however, the effective concretization of access occurs with interpretation by the Public Administration and the Judiciary, in line with the immediate applicability of fundamental norms, whose content can not be emptied in the ponderative process that downgrades fundamental and human rights.

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