Revista de Investigações Constitucionais
ISSN: 2359-5639
Universidade Federal do Paraná

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Revista de Investigações Constitucionais, vol. 5, no. 2, 2018, May-August, pp. 35-56
Universidade Federal do Paraná

DOI: https://doi.org/10.5380/rinc.v5i2.57577

Available in: https://www.redalyc.org/articulo.oa?id=534057838003

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Conventionality control and Amendment 95/2016: a Brazilian case of unconstitutional constitutional amendment*

Controle de Convencionalidade e a Emenda Constitucional nº 95/2016: Um caso brasileiro de emenda constitucional inconstitucional

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Recebido/Received: 25.01.2018 / January 25th, 2018
Aprovado/Approved: 24.04.2018 / April 24th, 2018

Abstract

This article presents reflections on Brazilian Constitutional Amendment 95/2016, which established the New Tax Regime and consequently the ceiling of public spending in Brazil for a period of twenty years, which has serious consequences for Brazilian public services. The hypothesis defended in the study is that Amendment 95/2016 is an unconstitutional constitutional amendment, since it violates the essence of the Social State present in the original text of the 1988 Constitution and has direct influences on the guarantee of fundamental rights, which constitute stone clauses (*cláusulas pétreas*). Thus, the study starts with the technical analysis of the Amendment. Next, the concept and content of the stone clauses in the Brazilian constitution are analyzed to propose the

Resumo

O presente artigo apresenta reflexão acerca da Emenda Constitucional n. 95/2016, que estabeleceu o Novo Regime Fiscal e, com ele, o teto de gastos públicos no Brasil pelo período de vinte anos, o que traz consequências graves aos serviços públicos brasileiros. A hipótese defendida no estudo é de que a EC n. 95/2016 é uma emenda constitucional inconstitucional, uma vez que viola a essência de Estado Social presente no texto original da Constituição de 1988 e tem influências diretas na garantia de direitos fundamentais, que constituem cláusulas pétreas. Assim, parte-se da análise técnica da referida Emenda. Em seguida, são analisados o conceito e o conteúdo das cláusulas pétreas na constituição brasileira para se propor a possibilidade de controle de convencionalidade como alternativa, com foco no Pacto de

Como citar esse artigo/*How to cite this article*: ROZNAI, Yaniv; KREUZ, Letícia Regina Camargo. Conventionality control and Amendment 95/2016: a Brazilian case of unconstitutional constitutional amendment. **Revista de Investigações Constitucionais**, Curitiba, vol. 5, n. 2, p. 35-56, mai./ago. 2018. DOI: 10.5380/rinc.v5i2.57577.

* The authors would like to thank Bárbara Mendonça Bertotti for assistance with this study.

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possibility of conventionality control as an alternative, focusing on the Intermerican Convention on Human Rights, UN Convention on the Rights of Persons with Disabilities and International Covenant on Economic, Social and Cultural Rights. It is concluded that conventionality control of the Amendment is imperative. The methodology used is the bibliographic analysis on the themes, as well as the projection of data on the economic and social effects of Amendment 95/2016.

Keywords: conventionality control; Brazilian Constitutional Amendment 95/2016; ceiling of public spending; stone clauses; unconstitutional constitutional amendment.

San José da Costa Rica, Convenção da ONU sobre os direitos das pessoas com deficiência e no Pacto Internacional sobre os Direitos Econômicos, Sociais e Culturais. Conclui-se pela necessidade de controle de convencionalidade da Emenda. A metodologia empregada é a análise bibliográfica sobre os temas, bem como da projeção de dados sobre os efeitos econômicos e sociais da EC n. 95/2016.

Palavras-chaves: *controle de convencionalidade; Emenda Constitucional n. 95/2016; teto de gastos; cláusulas pétreas; emenda constitucional inconstitucional.*

CONTENTS

1. INTRODUCTION

The project established by the Brazilian Constitution of 1988 is of a social State, focused on the guarantees of fundamental rights and the protection of human dignity. Indeed, thanks, inter alia, to the social demands of many organized groups of civil society during the constitution-making,[1] the Constitution ensures a broad commitment to social rights. We learn this from the Preamble, from the fact that "social values" is one of the constitution's fundamental principles (art. 1, IV); for the constitution's central purpose "to eradicate poverty and substandard living conditions and to reduce social and regional inequalities" (art. 3, III); and from the broad constitutional entrenchment of social rights (Title I, Ch. II) and the constitutional regulation of the state's social order in which everyone is granted, among others, the right to public health care, to education and to social assistance and security (Title VIII). Through the original constitutional text, the structure of the State compromises to an ideal of providing public services and attention to the citizen. It has also imposed a number of unamendability clauses, called *cláusulas pétreas*, that constrain the Legislative's power to formally change the Constitution by establishing certain themes that cannot be abolished from the original text.[2]

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[1] BENVINDO, Juliano Zaiden. The Forgotten people in Brazilian constitutionalism: Revisiting behavior strategic analyses of regime transitions. **International Journal of Constitutional Law**, vol. 15, n. 2, p. 332-357, 2017. p. 352.

[2] DALY, Tom Gerald. **The Alchemists: Questioning our Faith in Courts as Democracy-Builders**. Cambridge: Cambridge University Press, 2017. p. 185-186. On constitutional unamendability, more generally, see ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments – The Limits of Amendment Powers**. Oxford: Oxford University Press, 2017.

However, Constitutional Amendment 95 of December 2016 has changed such characteristics. Establishing a New Tax Regime, the amendment imposes a ceiling on public expenditures and prevents the expansion of investments in sectors such as health and education for twenty years. In other words, until the year 2036, public spending on public services will be frozen in Brazil. Beginning in 2017, the maximum possible variation for public spending corresponds to inflation for the year.

The present study aims to demonstrate that the Amendment 95 is an unconstitutional constitutional amendment and, as an alternative, intends to defend that it can be the object of conventionality control. On the basis of international human rights conventions to which Brazil is a signatory, in particular the United Nations Convention on the Rights of Persons with Disabilities and the Inter-American Convention on Human Rights (Pact of San Jose, Costa Rica), the intention is to demonstrate that the amendment in question violates not only the Brazilian constitutional project, but also international commitments ratified by the country. Therefore, these constitutional changes can be the object of conventionality control as an alternative to the ordinary constitutionality control.

The structure of the research is divided as follows: initially, we analyse Amendment 95, and briefly review the changes it brings about for public spending in Brazil; then we examine the amendment vis-à-vis the formal constitutional unamendability of the *cláusulas pétreas*, and argue how Amendment 95/2016 violates these clauses and can therefore be considered "unconstitutional"; finally, we propose an alternative to the constitutional scrutiny based upon control of the conventionality of the amendment.

2. AMENDMENT 95 AND THE "NEW TAX REGIME" IN BRAZIL

Brazil approved the Amendment 95 in December 2016, giving the Act of Transitional Constitutional Provisions a new writing: from that moment on, the country declared a "New Tax Regime" and all public expenses were frozen for 20 years. On the one hand, as the amendment violates the principles of prohibition on social setbacks, it is arguably an unconstitutional constitutional amendment. On the other hand, Amendment 95's main purpose is to limit the public expenses as a way to balance the government's funds and to relax the consequences of the economic malfunction effects (diagnosed as endemic) in the Federal Administration.[3]

The consequences of this Constitutional Amendment reach all the Powers of the Union and the federal agencies with administrative and financial autonomy, members

[3] VALLE, Vanice Regina Lírio do. Novo Regime Fiscal, autonomia financeira e separação de poderes: uma leitura em favor de sua constitucionalidade. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 1, p. 227-258, jan./abr. 2017. p. 234. For a recent collection of studies on the political economy of Brazil see, SCHNEIDER, Ben Ross (Ed.) **New Order and Progress: Development and Democracy in Brazil**. Oxford and New York: Oxford University Press, 2016.

of the Fiscal Budget and of the social security. The idea is to limit the primary expenses of an exercise to the value of the previous year, corrected by the variation of the National Extended Consumer Price Index (IPCA, in Portuguese). This new tax regime will last 20 years, starting in 2017, with the possibility of an Executive's amendment of the method of correcting the limits as of the 10th fiscal year. It is important to note that the government makes two types of expenditures: the primary and the payment of interest and the amortization of public debt. The primary ones are those spent on health, education, welfare, social assistance, culture, national defense, etc. The amendment only considers primary expenditure as the adjustment variable. The expenses with interest payments and public debt amortization have been left out of the limitation.[4]

The new regime fixed until the year of 2036 the ceiling of the state's expenses. The total budget for 2017 corresponds to the available budget for the expenses of 2016, plus the inflation that year. For expenses related to education and health the Amendment will start operating in 2018 and the base year is 2017 (meaning that the expenses for 2018 can be up to 2017's budget plus the year's inflation). Any change in the rules can only be made in a ten-year time from the Amendment's writing and shall be limited to the amendment of the annual correction index. This measure aims to keep Brazil under a permanent state of economic exception.[5]

For each year there is an individualized limit for total primary expenses of the Executive, Judiciary and Legislative Powers, as well as other public offices (such as the Public Defender's Office). State's social security budgets are also affected by the Amendment. This means that for each tributary exercise, individual limits for primary expenditure are set out. The only change that can be granted between one year and the next is the inflation correction. The opening of additional or special credit to expand the total amount of primary expenditure is prohibited, unless there are cuts on other areas to compensate for these changes.

Therefore, the new regime's rules do not allow the growth of the government's expenses above inflation, not even if the economy is doing well. This is what differentiates the Brazilian case from other foreign experiences that adopted the limitation of public spending. It will only be possible to increase investments in one area if other areas make cuts on their budgets. The new rules disregard rates of economic growth, as well as demographic growth rates for the next twenty years, which could lead to the scrapping of social policies, especially in the areas of health and education.[6] For example,

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[4] ROCHA, Flávia Rebecca Fernandes; MACÁRIO, Epitácio. O impacto da EC 95/2016 e da PEC 287/2016 para a Previdência Social brasileira. **SER Social**, Brasília, v. 18, n. 39, p. 444-460, jul.-dez./2016. p. 447.

[5] MARIANO, Cynara Monteiro. Emenda constitucional 95/2016 e o teto dos gastos públicos: Brasil de volta ao estado de exceção econômico e ao capitalismo do desastre. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 1, p. 259-281, jan./abr. 2017. p. 259.

[6] SOUZA, Luis Eugenio Portela Fernandes de. The right to health in Brazil: A Constitutional guarantee threatened by fiscal austerity. **Journal of Public Health Policy**, vol. 38, n. 4, p. 493-502, nov. 2017. p. 493–502. On the

it is predicted that the amendment will bring about a reduction of public spending *per capita* on health care, from 519 reals per person in 2016 to 411 reals per person in 2036 (taking into account that in 2036 it is predicted that the elderly population with double itself).[7] It privileges the payment of public debts over the maintenance of public policies and social programs, in an antidemocratic economic structure.[8]

For proponents of its constitutionality, Amendment 95 would be a temporary discipline, aimed at facing a moment of fiscal crisis. The major problems of the new tax regime lie in the possibility of payment of interest and amortizations of the public debt, which may freely increase – these expenses were not excluded from the ceiling. [9]

The new art. 103 of the Transitional Constitutional Provisions Act further provides that, in the event of non-compliance with the expenditure limit, the following measures will be applied to the power or body in the following financial year: a) to the granting of an advantage, increase or readjustment of remuneration, except those derived from a judicial decision or from a legal determination prior to the new tax regime; b) the creation of a position, job or function that implies an increase in expenses; c) the change of career structure that implies an increase in expenses; d) the admission or hiring of personnel, except for the replacement of managerial and management positions that do not entail an increase in expenses and those resulting from vacancies of effective positions; and (e) public procurement. In addition, the granting of tax exemptions will be prohibited.

The beginning of this regime lies on the political incapacity of the post-neoliberal governments of Lula and Dilma to break with the cycle of interest payments and public debt amortization, subordinated to the interests of financial capital. The consequence is that the 1988 constitutional project of the Welfare State found its limit in the system of

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protection of the right to health in Brazil, see: MAAS, Rosana Helena; LEAL, Mônia Clarissa Hennig. Modalidades de judicialização da saúde: análise na jurisprudência do STF. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 17, n. 69, p. 149-167, jul./set. 2017. DOI: 10.21056/aec.v17i69.355; PINTO, Élida Graziane; BAHIA, Alexandre Melo Franco de Moraes; SANTOS, Lenir. O financiamento da saúde na Constituição de 1988: um estudo em busca da efetividade do direito fundamental por meio da equalização federativa do dever do seu custeio mínimo. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 16, n. 66, p. 209-237, out./dez. 2016. DOI: 10.21056/aec.v16i66.366; DEZAN, Sandro Lucio; BRASIL JÚNIOR, Samuel Meira. A juridicidade do Estado-administração na concretização de políticas públicas de saúde – Um método para a justificação da eficácia horizontal dos direitos fundamentais. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 16, n. 63, p. 211-238, jan./mar. 2016.

7 BERTOTTI, Bárbara Marianna de Mendonça Araújo. **Constitutional amendment 95/2016 and the limit for public expenses in Brazil: amendemnt or dismemberment?**. Presented at the "Constitutionalism in a Plural World" Conference, Universidade Católica Portuguesa, Porto. November 22, 2017 (copy with authors).

8 MARIANO, Cynara Monteiro. Emenda constitucional 95/2016 e o teto dos gastos públicos: Brasil de volta ao estado de exceção econômico e ao capitalismo do desastre. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 1, p. 259-281, jan./abr. 2017. p. 261.

9 MARIANO, Cynara Monteiro. Emenda constitucional 95/2016 e o teto dos gastos públicos: Brasil de volta ao estado de exceção econômico e ao capitalismo do desastre. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 1, p. 259-281, jan./abr. 2017. p. 266.

public debt, which today is a constraint on the Constitution and on public services. The Amendment 95/2016 is a translation and a deepening, therefore, of this debt system.[10]

The Amendment 95/2016 is consequently a measure of fiscal adjustment that meets the logic imposed by the neoliberal consensus for underdeveloped or developing nations, which can be synthesized on the tripod "primary surplus, inflation target and floating exchange rate", whose result is already known: deepening social inequality and economic recession and generating exclusive and exorbitant profits for very few.[11]

This constitutional change represents, after all, the reaction of the conservative political and economic sectors of Brazilian society, who never accepted a constitution that intended to establish a Social State in Brazil, determining the social function of property, the intervention of the State in the economic and social spheres. In fact, they have never accepted the role of the country in the strategic exploitation of its natural resources, as demonstrated by the successive approvals to Bill No. 4567/16, by José Serra, the current Minister of Foreign Affairs.[12]

Aimed at imposing a limit on primary expenditures, the amendment aims to garner funds for services of interest to the most vulnerable sections of the population in order to guarantee resources for the payment of interest on debt, which, by the way, is the true origin of the Brazilian budget deficit. This measure goes hand in hand with maintaining one of the highest interest rates in the world - which favors the financial sector and, above all, holders of public debt securities.[13]

3. *CLÁUSULAS PÉTREAS* – THE BRAZILIAN UNAMENDABILITY CLAUSES

The Brazilian Constitution was the result of a process of plurality and disputes.[14] It states the possibility of constitutional amendments with a simple procedure: the proposal has to be approved in two rounds by the Two Houses (Senate and Chamber of

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[10] MARIANO, Cynara Monteiro. Emenda constitucional 95/2016 e o teto dos gastos públicos: Brasil de volta ao estado de exceção econômico e ao capitalismo do desastre. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 1, p. 259-281, jan./abr. 2017. p. 261.

[11] MARIANO, Cynara Monteiro. Emenda constitucional 95/2016 e o teto dos gastos públicos: Brasil de volta ao estado de exceção econômico e ao capitalismo do desastre. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 1, p. 259-281, jan./abr. 2017. p. 267.

[12] MARIANO, Cynara Monteiro. Emenda constitucional 95/2016 e o teto dos gastos públicos: Brasil de volta ao estado de exceção econômico e ao capitalismo do desastre. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 1, p. 259-281, jan./abr. 2017. p. 276.

[13] ROCHA, Flávia Rebecca Fernandes; MACÁRIO, Epitácio. O impacto da EC 95/2016 e da PEC 287/2016 para a Previdência Social brasileira. SER Social, Brasília, v. 18, n. 39, p. 444-460, jul.-dez./2016. p. 447.

[14] On the process of the constitution-drafting, see ROSENN, Keith S. Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society. **The American Journal of Comparative Law**, vol. 38, n. 4, 773-802, autumn. 1990. p. 775-777.

Deputies) with a qualified quorum (3/5 of each).[15] However, it is impossible to change the constitutional core: the so-called *cláusulas pétreas*, or stone clauses. These clauses give a list of unamendable themes. Article 60, paragraph 4, states that

"No proposal of amendment shall be considered which is aimed at abolishing: I – the federative form of State; II – the direct, secret, universal and periodic vote; III – the separation of the Government Powers; IV – individual rights and guarantees." There are basic constitutional principles of the Brazilian constitutional order. As Prof. Salgado notes, "These entrenched clauses represent the essence of a hard constitutionalism. They reflect the heart of political decisions that demanded a new constitutional moment, a refounding of the state. (…) The permanence of the immutable spine in the constitution depends on the respect for the rules of constitutional reforms, normally ensured by judicial review."[16] In addition to assuring the immutability of certain values, as well as preserving the identity and continuity of the constitutional project, these clauses also share the inalterable essence of this project. To eliminate a concrete clause means diminishing the basic principles guaranteed by the original constituent power.[17] The stone clauses are an expression of self-commitment, whereby popular sovereignty limits its power in the future to protect democracy against the destructive effect of passions, interests and temptation.[18] The *cláusulas pétreas* – meaning 'stone clauses' or 'petrous clauses' – to express their rigidity, cannot block or limit extra-constitutional changes by a completely new constitution-making process since, as one of us written elsewhere "even rocks cannot withstand the volcanic outburst of the primary constituent power."[19] However, they can block constitutional amendments. And in Brazil, like in several other countries, the unamendable provision is enforced through substantive judicial review of constitutional amendments, aimed to ensure that the constitutional amendment power does not exceed its limits.[20] True, while the Constitution does not entrench an

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[15] On the constitutional amendment procedure in Brazil, see MAIA, Luciano. The Creation and Amending Process in the Brazilian Constitution. In: ANDENAS, Mads (Ed.). **The Creation and Amendment of Constitutional Norms**. London: The British Institute of International and Comparative Law, 2000. p. 54- 86.

[16] SALGADO, Eneida Desiree. Brazilian Legislators at Work: Constitutional Amendments as Electoral Strategy. **Election Law Journal**, Vol. 16, Num. 2, p. 325-333, jun. 2017. p. 328.

[17] MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. **Curso de direito constitucional**. 9. ed. rev. e atual. São Paulo: Saraiva, 2014. p. 123.

[18] On the expressive and functional aims of unamendable provisions see ALBERT, Richard. Constitutional Handcuffs. **Arizona State Law Journal**, vol. 42, num. 3, p. 663-715, 2010, p. 663; ALBERT, Richard. The expressive function of constitutional amendment rules. **Revista de Investigações Constitucionais**, Curitiba, vol. 2, n. 1, p. 7-64, jan./abr. 2015. DOI: http://dx.doi.org/10.5380/rinc.v2i1.43100; ROZNAI, Yaniv. Unamendability and the Genetic Code of the Constitution. **European Review of Public Law**, vol. 27, num. 2, summer 2015. p. 775-825.

[19] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments – The Limits of Amendment Powers**. Oxford: Oxford University Press, 2017. p. 129.

[20] On judicial review of constitutional amendments in Brazil, see MENDES, Conrado Hübner, Judicial Review of Constitutional Amendments in the Brazilian Supreme Court. **Florida Journal of International Law**, Vol. 17, num. 3, dec.2005. p. 449-461. For a comparative and theoretical exploration of judicial enforcement of

explicit authority of judicial review of constitutional amendments, as the Supreme Federal Court's power goes only as far as the authority to invalidate "federal or state law or normative acts" (Article 102, I, a), since 1993 the Court itself declared that it has an inherent power to review the constitutionality even of constitutional amendments approved by Congress.[21] This can be done after an amendment has been promulgated, in concrete cases, by any judge, and also by the Supreme Court in an abstract control through direct action of unconstitutionality.[22]

Since Article 60, paragraph 4 protects general constitutional principles that are open to varied interpretations, when analysing the constitutionality of constitutional amendments one has to define what is the protected content of the immutable clauses; "The mainstream answers usually consist of extensive interpretations of these restriction clauses, and depending on the conception of democracy they are based on, they can be detrimental to democracy itself."[23]

Does Amendment 95/2016 violate the stone clauses? If appears that in the analyzed case, there are two clauses that are allegedly violated by the amendment: State's federalist form and fundamental rights. As the tax changes influence the autonomy of the government and can mean a great cutback on Brazilian's investments on public policies, these two *cláusulas pétreas* are at risk of being infringed.

To be considered invalidated by a violation of the material limit to the constitutional amendment power, an amendment will have to affect the essential nucleus of the federative principle, depriving the state entity of substantive powers, depriving it of autonomy or impeding its participation in the formation of the federal will.[24] In other words, if the amendment gravely infringes division of powers between the parts of the Federation, the autonomy of each one of them or participation in the formation of the will of this entity, it would violates the characterization of federalism – and therefore violates the unamendable clauses.

The ultimate meaning of the immutability clauses is to prevent an "erosion" process of the Constitution.[25] In view of that, the Constitution prohibits not only amend-

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unamendability see ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments – The Limits of Amendment Powers.** Oxford: Oxford University Press, 2017. p. 179-225.

21 SALGADO, Eneida Desiree. Brazilian Legislators at Work: Constitutional Amendments as Electoral Strategy. **Election Law Journal**, Vol. 16, Num. 2, 2017. p. 329.

22 MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. **Curso de direito constitucional**. 9. ed. rev. e atual. São Paulo: Saraiva, 2014. p. 126.

23 SALGADO, Eneida Desiree. Brazilian Legislators at Work: Constitutional Amendments as Electoral Strategy. **Election Law Journal**, Vol. 16, Num. 2, 2017. p. 328. On the idea of democracy, see: SALGADO, Eneida Desiree. Essay on the constitutional promises of democracy and republic. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 3. p. 85-100, set./dez. 2017. DOI: 10.5380/rinc.v4i3.54373.

24 BARROSO, Luís Roberto. **Curso de Direito Constitucional Contemporâneo**. 4. ed. São Paulo: Saraiva, 2013. p. 193.

25 MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. **Curso de direito constitucional**. 9. ed. rev. e atual. São Paulo: Saraiva, 2014. p. 123.

ments that expressly state they aim to abolish one or more of the clauses of Article 60, but also any amendment that modifies a conceptual element of these clauses. Accordingly, if the amendment derogates from the States their capacity of self-organization, self-government and self-administration, for example, it would violate federalism and accordingly, would be considered as violating a *cláusula pétrea*.[26]

Concerning the violation of fundamental rights, it can be said that prima facie Amendment 95/2016 is an unconstitutional change to the Brazilian Constitution. Following the same standard as the violation of Federalism, Article 60, paragraph 4, prohibits proposing constitutional amendments that aim at abolishing individual rights and guarantees. Title II of the Constitution provides a long list of fundamental rights and guarantees, within which chapter I lists individual and collective rights, chapter II lists social rights, chapter III concerns nationality, and chapter IV lists political rights (chapter V concerns political parties). Through its jurisprudence, the Brazilian Constitutional Court extended the unamendability protection of right to almost all constitutional rights that protect or advantage individual to also include socio-economic rights. As Justice Carlos Velloso stated: "Individual rights and guarantees ... are spread through the Constitution. ... It is known today that the doctrine of fundamental rights is not restricted to individual rights and guarantees but also social rights and guarantees relatively to nationality and political rights. Today we do not speak only about individual rights or first generation rights. We speak about first, second, third and even fourth generation of rights."[27]

The unamendability prohibits abolishing rights. Thus, if the amendment aims to include more fundamental rights or improve the protection of existing rights there is no violation of *cláusulas pétreas*. On the examined case, what happens is the opposite: reducing considerably the amounts of public spending on social programs and public policies leads inevitably to a stage of violation of fundamental rights and, consequently, violates these clauses.

Now, not every violation of an unamendable principle or right would be considered as unconstitutional: "Unamendability is not aimed at preventing minor changes that contradict unamendable principles or deviate from them. Its main function is to preserve the constitutional order and protect against revolutionary changes. Also, it ensures that amendments do not destroy the constitution so that it is replaced with a new one. Unamendability thus applies to those extraordinary and exceptional circumstances in which the constitutional change strikes at the heart of the constitution's basic principles, depriving them of their minimal conditions of existence. The impact

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[26] SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 32. ed. São Paulo: Malheiros, 2008. p. 67.

[27] ADI 939/93 DF, p. 275. cited in MOHALLEM, Michael Freitas. Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority. **The International Journal of Human Rights**, vol. 15, n. 5, p. 765-786, jun. 2011. p. 773.

of the conflict between the amendment and the unamendable basic principle must be of such intensity, and to such an extent, that it modifies the principle's essence."[28] It must be considered as not merely affecting the unamendable right but fundamentally abandoning it.

Indeed, it appears that this amendment is not a mere minor contradiction of protected fundamental rights but a deliberative disassemble of one of the constitution's elemental parts. Richard Albert describes this phenomenon as a 'constitutional dismemberment'. As he writes particularly with regard to Amendment 95/2016: "Brazil….has recently completed a successful effort to dismember a constitutional right. … The realization of social rights is likely to be severely compromised with the spending cap now in force. This is not a change of modest proportion; it will impact an entire generation and its effects could reverberate far beyond that period. … The impact of this Public Spending Cap Amendment on the next generation of social rights enjoyment in Brazil combined with how directly it undermines the Constitution's founding and continuing commitment to the social rights suggests that it may be more than a simple amendment. Its purpose and effect suggest that it should instead be called a constitutional dismemberment."[29] The gravity of the violation appears to one that the test of fundamental abandonment of the previously protected rights.

For those who consider Amendment 95/2016 as constitutional, it is seen as a consequence of the democratic principle. The ones that agree with the basis of the Amendment believe that the change is in accordance with the Brazilian stone clauses and that it can give a balance in public expenses. Since the public funds are limited, so should be the public spending – and the Amendment would work on this matter, insuring that the amount of money the State puts into its activities does not exceed its incomes. Moreover, the process of approval of the Amendment observed due process of law and is therefore legitimate. The observance of the principle of equilibrium of the public spending is also constitutional value, therefore the aprioristic imputation of problems in the proposition of limits for the public expenses cannot be considered as valid.[30]

Advocates of the amendment also understand that assuming as premise that the construction of the budget can be uncompromising with the fiscal balance enter a frontal collision with the principle of balanced budget. It is necessary to take into account both the stone clauses and the balanced budget that also has symbiotic relations with the democratic principle as a guarantee of transparency and legitimacy in relation

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[28] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments – The Limits of Amendment Powers**. Oxford: Oxford University Press, 2017. p. 222.

[29] ALBERT, Richard. Constitutional Amendment and Dismemberment. **Yale Journal of International Law**, vol. 43, forthcoming 2018, https://ssrn.com/abstract=2875931

[30] VALLE, Vanice Regina Lírio do. Novo Regime Fiscal, autonomia financeira e separação de poderes: uma leitura em favor de sua constitucionalidade. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 1, p. 227-258, jan./abr. 2017. p. 251-252.

to the *sensu lato* State action programs. For these constitutionalists, transparency and balance of public spending are as important as the stone clauses.

Given the unequivocal finiteness of public resources, the ones that argue for the constitutionality of the Amendment believe that social programs can only be assured considering the amount of the State's incomes. The public spending – even if it aims to guarantee fundamental rights – cannot exceed the amount of earnings.[31]

The new article 105 of the Transitional Constitutional Provisions Act establishes a prohibition on any legal disputes arising from the new tax regime, providing that prohibitions introduced by the new tax regime will not constitute an obligation of future payment by the Union or the rights of others on the treasury. This provision is contrary to the constitutional principle of infeasibility of judicial control, which also constitutes a stone clause, written in article 5, XXXV, of the Brazilian Constitution.[32]

The Brazilian Supreme Court, when considering the request for injunction in MS 34.448-MC/DF (writ of mandamus), which objected to the suspension of the procedure of the former Proposal of Constitutional Amendment 241, denied the precautionary protection. The grounds of the decision were summarized denial of injury to the separation of powers, guaranteed voting, secret, direct, universal and periodic and the right of access to the Judiciary for the purpose of preserving the remuneration structure of public servants. The Court has not yet considered the merits of the proposal.

Although there are defenders of the Amendment 95, it is important to recognize that a supposed balance in public spending cannot be a reason for violating the Constitution. A research conducted by Institute of Applied Economic Research (IPEA) shows that the current rule of application of resources in actions and public health services by the federal government establishes that in 2016 the minimum application should be 13.2% of the current net income, up to 15.0% of the current net income by 2020. Assuming that this rule was valid as from 2003, and the amount equivalent to 13.2% of 2002 to calculate the minimum for that year, the loss between 2003 and 2015 would have been R$ 257 billion compared to the application made in the period.[33] It is clear that health care will be precarious over the next twenty years in Brazil.

Regarding the public assistance for persons with disabilities, the Brazilian government created a program called "Benefício de Prestação Continuada", or BPC, (translated as "Uninterrupted Provision Benefit"). This program aims to cover the necessities of disabled ones, providing them with a monthly minimum wage – so they can live in

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31 VALLE, Vanice Regina Lírio do. Novo Regime Fiscal, autonomia financeira e separação de poderes: uma leitura em favor de sua constitucionalidade., Curitiba, vol. 4, n. 1, p. 227-258, jan./abr. 2017. p. 255.

32 Art. 5, XXXV of the Brazilian Constitution provides that "the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power."

33 VIEIRA, Fabiola Sulpino; BENEVIDES, Rodrigo Pucci Sá e. **Os impactos do novo regime fiscal para o financiamento do Sistema Único de Saúde e para a efetivação do direito à saúde no Brasil**. Brasília: IPEA, 2016. (Nota Técnica 28).

dignity. As the social security's budget will also be affected because of the changes promoted by the Amendment, this spending will suffer with the consequences of the New Tax Regime as well. Brazil has ratified the UN Convention on the rights of persons with disabilities and has approved its entering on the legal system on the same basis as a Constitutional Amendment. This issue will be analysed in the following section.

The BPC program is of a great importance for people with disabilities, as it guarantees a minimum of dignity and a regular income despite if they are working or not, meaning they can live without the instability of lost of jobs and other problems caused by economic crises. With the reduction of the program, many of these people will be left without State's assistance. This social regression is counter to the Brazilian legal system's implicit clause of non-regression (or non-retrogression). The principle of non-regression, according to the UN Committee on Economic, Social and Cultural Rights, obliges the authorities of the state not to adopt measures, policies or rules that would reduce, unjustifiably, the level or status of social rights and benefits grated to the public.[34] Surely, if one considers the principle of non-regression as absolute, this amendment, which has a profound retrogressive effects on social order, would be considered inadmissible. However, even if one considers the principle of non-regression to be of a relative nature – as we believe it is ought to be construed –Amendment 95/2016 would not result in a "minor setback", allowed on exceptional circumstances, but in a major disproportionate harm.[35]

After analyzing the content of the Amendment 95/2016 and Brazilian legal system, it appears clear that this new provisions violate the original Constituents' project and represent a setback on fundamental rights, in contrast with the guarantees of the *cláusulas pétreas*. Aside the legal question, there is also the question of political decisions whether a vice-president elevated to the status of president by an impeachment could then impose a new fiscal regime that represents, as Amendment 95/2016 does, a political-constitutional reform diametrically opposed to the original constitutional project of 1988.[36]

4. CONVENTIONALITY CONTROL AS AN ALTERNATIVE

In this section we would like to suggest an alternative for evaluating the constitutional amendment through a 'conventionality control', i.e., evaluating whether a

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[34] SCHWARZ, Rodrigo Garcia. On Social Rights: Some Premises for a New Approach. **American International Journal of Social Science**, vol. 15, n. 1, p.20-30, feb. 2016, p. 28.

[35] On Absolute and relative perspectives of the "non-regression" principle see MAIA, Matheus Medeiros; MOURA, Rafael Soares Duarte. Analysis of the (Im)Possibility of Social Retrogression in the Brazilian Constitutional Order. **Sociology Study**, vol. 5, n. 11, p. 875-882, nov. 2015. p. 878.

[36] MARIANO, Cynara Monteiro. Emenda constitucional 95/2016 e o teto dos gastos públicos: Brasil de volta ao estado de exceção econômico e ao capitalismo do desastre. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 1, p. 259-281, jan./abr. 2017. p. 279-280.

constitutional or sub-constitutional norm is in accordance with international commitments to which the country is obliged. This evaluation seems adequate since even if limitations on constituent power from the perspective of constitutional law are problematic, from the perspective of international law they are trite.[37]

Regarding international law and their entry into the Brazilian legal order, article 5 paragraph 3 of the Constitution states that international treaties and conventions on human rights approved in each House of the National Congress in two rounds, by three fifths of the votes of the respective members, shall be equivalent to constitutional amendments. In other words, they carry a constitutional status.

An important part of Brazilian legal theorists dictates that the human rights foreseen in international conventions would configure not only norms of constitutional value, but also concrete clauses. At first, this thesis did not obtain adhesion of the Brazilian Federal Supreme Court as several times rejected constitutional status to the individual rights foreseen in conventions such as the Pact of San José. Constitutional Amendment 45/2004 changed it by stating that the international conventions on human rights approved in each House of the Brazilian National Congress in two rounds, for three fifths of the votes of the respective members, shall be equivalent to the Constitutional Amendments. Thus, the Supreme Court started to admit this constitutional status of international conventions on human rights.[38]

Brazil has ratified the UN Convention on the rights of persons with disabilities following the procedure of article 5 paragraph 3 of the Constitution. This means that the Convention integrates Brazilian law on the same level as a Constitutional Amendment and has the same hierarchy as constitutional law. Article 19 of the Convention is especially relevant to the matter. It states the necessity of living independently - which relates to the BCP strategy. Also, Article 28 protects an adequate standard of living and social protection, considering it necessary to ensure access to assistance from the State, including financial assistance, to people with disabilities.

Moreover, as Professor Philip Alston, the current UN Special Rapporteur on extreme poverty and human rights, remarked, the Amendment 95/2016 violates the International Covenant on Economic, Social and Cultural Rights as it "has all the characteristics of a 'deliberately retrogressive measure'" and "will undoubtedly result in retrogression with regard to the realization of economic and social rights".[39] Alston notes that auste-

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[37] CAHIN, Gérard. Limitation du pouvoir constituant: le point de vue de l'internationaliste. **Civitas Europa**, Vol. 32, p. 55-79, 2014.

[38] MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. **Curso de direito constitucional**. 9. ed. rev. e atual. São Paulo: Saraiva, 2014. p. 130.

[39] ALSTON, Philip. **Some reflections on Brazil's approach to promoting austerity through a constitutional amendment**. Remarks prepared for presentation at a colloquium on constitutional austerity, p. 1, Sao Paulo, October 3, 2017. Available at: <http://www.ohchr.org/Documents/Issues/Poverty/Austeritystatement_Alston3Oct2017.pdf>. Access on: 30.12.2017.

rity measure must be of a temporary nature to the duration of a crisis only and that the government had not satisfactory showed that it comprehensively examined alternative measures and that the proposed measure is necessary and proportionate.[40]

The country is obliged on a regional level by the American Convention on Human Rights (the Pact of San José, Costa Rica). This international compromise puts Brazil into the Inter-American Court of Human Rights' jurisdiction, and also obliged the country to respect the rights protected in the Convention, such as human dignity and the necessity of progressive development. Both of those provisions are clearly being infringed by Amendment 95/2016.

The Inter-American Court has recognized the possibility of conventionality control of countries' norms that violate regional conventions.[41] Conventionality control is as a highly effective tool for the respect, assurance and enforcement of the rights described in the Convention.[42] It guarantees compatibility of local norm with international norms.[43]

As previously shown, the Brazilian New Tax Regime violates compromises ratified by the country not only on a global level, but also on a regional one. The judicial control of conventionality advocated by the Inter-American Court appears as a legal mechanism by which judges invalidate rules of hierarchy inferior to the convention,

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40 ALSTON, Philip. **Some reflections on Brazil's approach to promoting austerity through a constitutional amendment**. Remarks prepared for presentation at a colloquium on constitutional austerity, p. 4, Sao Paulo, October 3, 2017. Available at: <http://www.ohchr.org/Documents/Issues/Poverty/AusteritystatementAlston3Oct2017.pdf>. Access on: 30.12.2017.

41 See generally OSWALDO, Ruiz-Chiriboga. The Conventionality Control: Examples of (Un)Successful Experiences in Latin America. **Inter-American and European Human Rights Journal**, vol 3, n. 1 & 2, p. 200. 2010; DULITZKY, Ariel E. An inter-american constitutional court the invention of the conventionality control by the inter-american court of human rights. **Texas International Law Journal**, vol. 50, n. 1, p. 45-94. 2015; MAC-GREGOR, Eduardo Ferrer. Conventionality Control the New Doctrine of the Inter-American Court of Human Rights. **American Journal of International Law Unbound**, vol 109. p. 93. 2015; CONTESSE, Jorge. The International Authority if the Inter-American Court of Human Rights: a critique of the conventionality control doctrine. **The International Journal of Human Rights.** forthcoming 2018.

42 SAGÜES, Nestor Pedro. Obligaciones internacionales y control de convencionalidad. **Estudios Constitucionales,** ano 8, n. 1, p. 117-136, 2010. Available at: <http://www.cecoch.cl/docs/pdf/revista_ano8_1_2010/articulo_4.pdf>. Access on: 18.11.2017; SAGÜÉS, Nestor Pedro. Nuevas fronteras del control de convencionalidad: el reciclaje del derecho nacional y el control legisferante de convencionalidad. **Revista de Investigações Constitucionais**, Curitiba, vol. 1, n. 2, p. 23-32, maio/ago. 2014. DOI: http://dx.doi.org/10.5380/rinc.v1i2.40509; HERNÁNDEZ-MENDIBLE, Victor Rafael. El control de convencionalidad como expresión del control de constitucionalidad: originalidad y desaciertos. **Revista de Investigações Constitucionais**, Curitiba, vol. 2, n. 3, p. 137-168, set./dez. 2015. DOI: http://dx.doi.org/10.5380/rinc.v2i3.44532.

43 LEAL, Mônia Clarissa Hennig; ALVES, Felipe Dalenogare. O controle de convencionalidade e o Judiciário brasileiro: a sua aplicação pelo Tribunal Superior do Trabalho como forma de proteger a dignidade da mão-de-obra (vedação de terceirização de atividade-fim) no case Carneiro Távora v. Telemar Norte Leste e Contax. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 1, p. 109-128, jan./abr. 2017. DOI: 10.5380/rinc.v4i1.48212; ALIANAK, Raquel Cynthia. El renovado Derecho Administrativo, a la luz del control de convencionalidad. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 15, n. 59, p. 29-46, jan./mar. 2015; SANTOS, Gustavo Ferreira; TEIXEIRA, João Paulo Allain. Diálogo entre tribunais e proteção de direitos humanos: dificuldades e perspectivas. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 16, n. 66, p. 267-282, out./dez. 2016. DOI: 10.21056/aec.v16i66.369.

which have not been dictated in conformity with it, taking into account not only the Convention itself, but interpretation made by the Inter-American Court.[44] Since the Amendment 95/2016 violates not only the Brazilian *cláusulas pétreas*, but also international law, it should be considered in incongruity with the international compromises taken by the country regarding both the Inter-American Convention and the UN Convention on the rights of persons with disabilities.

Brazil, as any other state, must comply with its international law obligations and cannot absolve itself from its international legal obligations by reference to its domestic constitutional law. This is a matter of customary international law as reflected in Art. 27 of the Vienna Convention on the Law of Treaties. From the perspective of international law, clearly it is superior domestic law, even constitutional law, Accordingly, supranational law may pose limitations to constitutional amendments.[45] Not only that, but international human rights may act as a supra-constitutional reference in judicially reviewing constitutional norms as it is clear, precise, has effective judicial review mechanisms through supra-national human rights bodies, and is even procedurally accessible by often allowing individual petitions.[46]

However, the challenge is that the principle of the superiority of supranational law over domestic constitutional law only means that constitutional norms cannot be a ground for excusing a state's responsibility. Therefore, in a conflict between an international standard and an internal constitutional standard, the latter can be declared unenforceable and the state can be found responsible. Nevertheless, such unenforceability only applies in the international sphere but the constitutional norm would still be valid under domestic national law.[47] As André Nollkaemper writes, "the claim to supremacy of international law is confined to the international level. It is at that level that states cannot invoke domestic law to justify the non-performance with an international obligation and it is at that level that international courts, by virtue of their establishment under international law, have to give precedence to international law over domestic law. This has no necessary legal consequences domestically ... The general understanding is that international law cannot itself realize supremacy at the domestic level."[48] However, what can be the role of domestic courts?

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[44] SCHEPIS, Marcelo. La influencia de los tratados internacionales en el derecho interno. El control de convencionalidad. **XXV Congreso Nacional de Derecho Procesal**. Buenos Aires, 11-13 nov. 2009. Available at: <http://www.procesal2009bsas.com.ar/ponencias-consti-proceso.html>. Access on: 18.11.2017.

[45] ROZNAI, Yaniv. The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments. **International and comparative Law Quarterly**, vol. 62, n. 3, p. 557-597, 2013. p. 577-580.

[46] GARLICKI, Lech; GARLICKA, Zofia A. External Review of Constitutional Amendments? International Law as a Norm of Reference. **Israel Law Review**, vol. 44, n. 3, p. 343-368, 2011. p. 359-363.

[47] GÖZLER, Kemal. La Question de la Superiorité des Normes de Droit international sur la Constitution. **Ankara** *Üniversitesi* **Hukuk Fakültesi Dergisi**, vol. 46, n. 1-4, p. 195-211, 1996, p. 200.

[48] NOLLKAEMPER, Andre. **National Courts and the International Rule of Law**, Oxford University Press, 2012, p. 199-200.

Domestic courts can assume an important role "to review the legality of national acts in the light of international obligations and to ensure rule-conformity".[49] They can, in other words, 'domesticate' the supremacy of international law. As developed by the Inter-American Court of Human Rights, control of conventionality should be conducted by domestic judges would become guardians of the convention: "when a State has ratified an international treaty … the judges are also subject to it; this obliges them to ensure that the effect utile of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary should exercise not only a control of constitutionality but also of 'conventionality' ex officio between domestic norms and the American Convention."[50]

The obvious problem of course is that when an international obligation contradicts the constitution itself, courts would tend to defer to the national constitution.[51] As a constituted organ, the judiciary must abide by the national constitution, the 'supreme law of the land'. That is especially when the contradiction is may explicit at the constitutional level.[52]

However, arguably, governed by the principle of *pro homine* domestic courts *should* prioritize instruments of international human right law even over explicit national constitutions when the former are more favorable to human beings and provide a better protection to persons.[53] As Ximena Fuentes Torrijo stated, "if international law does not provide tools for preventing States from enacting norms incompatible with treaties, then, the solution should be sought within domestic law … domestic legislation should not be allowed to untie what have been tied through the incorporation of international law into domestic law. In order to achieve this, rules contained in international treaties had to be placed somewhere beyond the reach of domestic law. How can this be accomplished? By placing international treaties at a higher level

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[49] NOLLKAEMPER, Andre. **National Courts and the International Rule of Law**, Oxford University Press, 2012, p. 10.

[50] IACtHR, Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru, Judgment (Preliminary Objections, Merits, Reparations and Costs), 24 November 2006, para. 128; cited in NEGISHI, Yota. The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control. **European Journal of International Law**, vol. 28, n. 2, p. 457-482, 2017, p. 458.

[51] See e.g. the Rafael Chavero Gazdik case, Sala Constitucional del Tribunal Supremo de Justicia de Venezuela, Sentencia no. 1942/2013, 13 November 2003, in which the Supreme Court of Venezuela held that if international court decisions contradict the national constitution they should not be executed. Cited in NEGISHI, Yota. The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control. **European Journal of International Law**, vol. 28, n. 2, p. 457-482, 2017, p. 462.

[52] See SCJN, Sentencia 293/2011, Contradicción de Tesis 293/2011, 3 September 2013, at 64–65, in which the Mexican Supreme Court held that is such cases the Constitution has the priority; cited in NEGISHI, Yota. The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control. **European Journal of International Law**, vol. 28, n. 2, p. 457-482, 2017, p. 475.

[53] NEGISHI, Yota. The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control. **European Journal of International Law**, vol. 28, n. 2, p. 457-482, 2017, p. 474.

internally."[54] Judicial prioritization of certain international human rights rules that protect and advance rights better than the constitution would provide such international obligations a supra-constitutional status. It would materialize the understanding of "convention rights as minimum constitutional guarantees" which limit constitutional rule-making.[55]

This seems particularly feasible in light of the 'stone clause'. True, when national courts are asked to enforce international law vis-à-vis a contradictory constitutional amendment, they face "mixed loyalties", in which case the national judge will usually prefer the national constitutional law over international law. It is here, that the constitutional unamendability can strengthen judicial enforcement of international law. When the constitution protects individual rights and guarantees through an unamendable stone clause, this could provide the national judge with domestic anchoring and the legal legitimacy in order to protect international human rights obligation and prioritize it over conflicting constitutional amendments. In other words, "limitations within the constitution itself may be used in order to render supranational standards valid limitations on the amendment powers."[56] In that respect, taking together the *cláusulas pétreas* and international human rights conventions to which Brazil is obliged strengthen the claim that the Amendment is unconstitutional/unconventional and that domestic court can invalidate it. The whole is greater than the sum of its parts.

5. CONCLUSION

Our analysis shows that the Brazilian Constitution of 1988 is a result of a democratic process that is committed with human dignity, fundamental rights and the provision of a number of public policies by the State. The constituent power imposed a number of pre-compromises – the *cláusulas pétras* – stipulated in article 60 paragraph 4 of the Constitution. State's federalism; direct, secret, universal and periodic vote; separation of powers; and individual rights and guarantees are the protected themes. Any change made on Brazilian Constitution cannot tend to abolish any one of those.

Despite this provision, the country's Legislative has approved Amendment 95/2016, stating a New Tax Regime, freezing public spending and imposing a difficult situation for public managers, since the only variation on the expenses will be the

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[54] TORRIJO, Ximena Fuentes. International and Domestic Law: Definitely and Odd Couple. **Revista Juridica UPR**, vol.77, n. 2, p. 483-505, 2008, p. 491.

[55] ALTWICKER, Tilmann. Convention Rights as Minimum Constitutional Guarantees? The Conflict between Domestic Constitutional Law and the European Convention on Human Rights. In: BOGDANDY, Armin von; SONNEVEND, Pál (Eds.). **Constitutional Crisis in the European Constitutional Area - Theory, Law and Politics in Hungary and Romania**. Oxford and Portland Oregon, Hart Publishing, 2015. p. 344–363.

[56] ROZNAI, Yaniv. The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments. **International and comparative Law Quarterly**, vol. 62, n. 3, p. 557-597, 2013. p. 596.

economic inflation for the year. From 2017 to 2036, Brazilian's public policies will not be able to grow – which means a great recession and a decrease of social programs and State's actions.

This Amendment disrespects both the *cláusula pétrea* regarding State's federalist form (since it imposes an amount of spending and does not give the states the necessary autonomy on instituting their own public programs) and fundamental rights (because public policies focused on these rights will be unable to grow for 20 years).

Brazil has international commitments of human rights on a regional level, having ratified the Inter-American Convention on Human Rights, and also on an international one. It is important to consider that, on an exception economic state, the first ones to suffer are the ones who need more. The BPC, provision payed to people with disabilities to ensure a minimum of dignity, is a program risking to be severely affected by these expense cuts. Since Brazil has signed the UN Convention on the right of persons with disabilities – and that it specifically states the need of financial aid for these people – it is evident that the Amendment 95/2016 violates this international commitment. Furthermore, its retrogressive effect on the realization of economic and social rights infringes the International Covenant on Economic, Social and Cultural Rights. Accordingly, Amendment 95/2016 is unconventional considering the Conventions mentioned previously. Moreover, the New Tax Regime violates an explicit provision of the Pact of San Jose, that is, the prohibition of social setbacks. Thus, an alternative for solving the unconstitutionality of que Amendment is conventionality control – even by domestic judges.

The *cláusula pétrea* taken together with international obligations lead to the conclusion that Amendment 95/2016, a political decision taken by a government without democratic legitimacy (since it ascended to power through an impeachment and introduced a different government program), is unconstitutional for its attempt to change the Constitutional project of a Social State and its disregard for the country's international human rights obligations.

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