



MAX PLANCK INSTITUTE
FOR SOCIAL LAW AND SOCIAL POLICY

Social Law Reports

Ingo Wolfgang Sarlet

DEVELOPMENTS IN SOCIAL SECURITY AND SOCIAL PROTECTION IN BRAZIL

Reported Period: January 2016 – June 2018

Cite as: Social Law Reports No. 8/2018

© Max Planck Institute for Social Law and Social Policy, Munich 2018.

Department of Foreign and International Social Law

All rights reserved.

ISSN 2366-7893

Max Planck Institute for Social Law and Social Policy

Amalienstraße 33, D-80799 Munich, Germany

Tel.: +49 (0)89 38602-0

Fax: +49 (0)89 38602-490

E-mail: info@mpisoc.mpg.de

<http://www.mpisoc.mpg.de>

CONTENT OVERVIEW

| | |
|---|----|
| 1. INTRODUCTION..... | 1 |
| 2. RIGHT TO HEALTH AND HEALTH CARE SYSTEM..... | 1 |
| 2.1. HEALTH SERVICES IN CASES OF SPECIFIC VULNERABILITY | 1 |
| 2.1.1. WOMEN | 1 |
| 2.1.2. YOUNG CHILDREN UP TO THE AGE OF 18 MONTHS..... | 2 |
| 2.2. CONTROL AND AUTHORIZATION OF DRUGS | 2 |
| 2.3. FINANCING PROVIDERS OF COMPLEMENTARY HEALTH SERVICES | 3 |
| 2.4. NEW TRENDS IN THE SO-CALLED JUDICIALIZATION OF HEALTH..... | 3 |
| 2.4.1. GENERAL COMMENTS..... | 3 |
| 2.4.2. JUDICIAL PROTECTION OF THE RIGHT TO HEALTH UNDER THE PUBLIC HEALTH SYSTEM..... | 5 |
| 2.5. PROTECTION AGAINST WORK-RELATED HEALTH RISKS..... | 9 |
| 2.6. PRIVATE HEALTH INSURANCE SCHEMES | 9 |
| 2.6.1. CONSUMER LAW AND PRIVATE HEALTH INSURANCE COMPANIES..... | 9 |
| 2.6.2. (ABUSIVE) CLAUSES ON BENEFIT EXCLUSIONS | 10 |
| 2.6.3. CLAUSES REGARDING CO-PAYMENTS FOR PRIVATE HEALTH CARE SERVICES..... | 11 |
| 2.6.4. COLLECTIVE PRIVATE HEALTH INSURANCE | 11 |
| 3. OLD-AGE PENSIONS AND SURVIVOR'S PENSIONS | 12 |
| 3.1. THE DEBATE ABOUT A CONSTITUTIONAL REFORM OF THE BRAZILIAN PENSION REGIME | 12 |
| 3.2. PENSION RIGHTS | 13 |
| 3.2.1. ACCESS TO THE SPECIAL SCHEME FOR RURAL WORKERS | 13 |
| 3.2.2. PENSION FOR GRANDPARENTS IN THE ROLE OF PARENTS | 13 |
| 4. SOCIAL WELFARE | 14 |
| 4.1. CHILD WELFARE | 14 |
| 4.2. SOCIAL INCLUSION OF PERSONS WITH DISABILITIES..... | 14 |
| 4.3. PROTECTION OF MOTHERHOOD..... | 15 |
| 4.4. WELFARE AND HUMAN RIGHTS OF SENIOR PERSONS | 15 |
| 4.5. INCLUSION OF FOREIGN NATIONALS | 15 |
| 4.6. ON SOCIAL WELFARE PROGRAMS | 16 |
| 5. SELECTED LITERATURE | 16 |
| 5.1. HEALTH | 16 |
| 5.2. SOCIAL SECURITY AND SOCIAL WELFARE..... | 17 |

LIST OF ABBREVIATIONS

- ANVISA-----Agência Nacional de Vigilância Sanitária
- SCJ ----- Superior Court of Justice
- FSC----- Federal Supreme Court
- R\$ (BRL)-----Brazilian real

1. INTRODUCTION

From the beginning of 2016 until the time this report was finalized, no significant advances occurred in the field of legislation, public policies and government programs regarding social security, specifically not on the axes of social welfare and social security in Brazil. Also as regards case law in the Higher Courts, few noteworthy changes occurred. It should be noted that the main programs were maintained, including the so-called "Bolsa Família" [Family Allowance].

In the field of social security, especially regarding retirement pensions and survivor's pensions to dependents, the broad constitutional reform promised by the Federal Government aimed – at least according to the public justification sent to the National Congress – at correcting major dysfunctions, inequalities and at fighting privileges, did not come to pass, and even after some changes is still awaiting deliberation by the Legislative Power.

Some of the most relevant developments occurred in the sphere of the right to health and the public health system, affecting both the legislative sphere and government programs in case law and the specialized literature. In this respect, special mention should be made of the problem of underfunding of the health system, the insufficient quality and efficiency of its management, the reduction of a few relevant measures and the criteria adopted for this as well as the impact of the so-called judicialization of health care. For this reason, the focus of this report is on the axis of health, with some hints to the fields of social welfare and social security.

2. RIGHT TO HEALTH AND HEALTH CARE SYSTEM

2.1. Health Services in Cases of Specific Vulnerability

2.1.1. Women

In 2016, the government measures regarding medical care for women with disabilities were improved via the enactment of Federal Law No. 13,362 of 23 November 2016, according to which the conditions and equipment of the health services provided by the Single Health System [Brazilian Universal Health Care Program] must be adjusted in order to ensure true substantive equality regarding the actual implementation of the fundamental right to health, for instance for the prevention, detection and treatment of certain diseases, as in the case of cervical and breast cancers, within the sphere of the aforementioned public health system.

Through the same legislation mentioned above measures were also adopted to adapt the health centers and hospitals that serve these cancer patients through the Single Health

System in order to promote physical accessibility to these facilities and also to provide appropriate equipment to care for the physical needs of these patients. The measures aim at complying with the specific health policies contained in the International Convention on the Rights of Persons with Disabilities, enacted by Brazil on 25 August 2009, through Federal Decree No. 6,949.

As part of the public health policies, Federal Law No. 13,427 of 3 March 2017, amended the Brazilian Single Health System (Federal Law No. 8,080 of September 19, 1990), and established specific principles and guidelines for the health care of women who have suffered domestic violence, in order to ensure specific attention, access to psychological and surgical care for them, especially plastic surgery, due to the vulnerability of these victims.

Along the same lines, the State sought to diminish the obstacles regarding access to public health services for women in a situation of vulnerability due to their economic, social, geographic or cultural situation. To this end, Federal Law No. 13,522 of 12 December 2017 provides for the development of specific intersectoral strategies. These strategies are to be promoted by the social safety net and basic health care net that make up the Brazilian Single Health System.

2.1.2. Young Children up to the Age of 18 Months

Also in order to protect people in a vulnerable situation, Federal Law No. 13,438 of 26 April 2017 improves the medical treatment of children in the first eighteen months of life, and is aimed at the detection of risks to their psychological development. This measure was adopted in order to minimize the consequences of the recently increased number of babies with microcephaly due to the outbreak of the Zika virus which occurred in Brazil in the years 2015 and 2016. The law amended the Statute of Children and Adolescents (Federal Law No. 8,069 of 13 July 1990) by stipulating the obligation that all children of that age group are to be offered screenings for the detection of those risks, so that they can have access to a diagnosis and treatment as fast and efficiently as possible.

2.2. Control and Authorization of Drugs

In 2016, the National Congress took a relevant initiative to regulate actions for the control of production, importing and sale of drugs in Brazil. Initially, by means of Federal law No. 13,410 of 28 December 2016, the National Drug Control System ("Sistema Nacional de Controle de Medicamentos") was created. This system was to be implemented to improve the State's scope of action with a view to inspection and enforcement measures regarding the production, sale and dispensing of drugs for human use, as well as medical and dental prescriptions thereof. For this purpose, the law is to establish a federal public agency responsible for drafting specific standards for this type of inspection, designed to implement the various forms of control using an individual system of drug identification with technologies for data capture, storage, and electronic transmission. This information on

drugs is to be stored in a centralized database at a federal government institution, which in turn is fed with information sent by the members of the drug supply chain.

The National Congress, through Federal Law No. 13,411 of 28 December 2016, then partially overcame the problem involving the delay in updating the lists of drugs authorized by the National Agency of Sanitary Surveillance ("Agência Nacional de Vigilância Sanitária", ANVISA) by establishing shorter time limits and suppressing unnecessary bureaucratic measures in the administrative procedures to authorize new drugs. This line of action aims at improving the national public policies involved in supplying drugs via the Brazilian Single Health System, also in order to reduce the judicial actions that judicialize the right to health due to the lack of updated lists of drugs authorized by the mentioned regulatory agency.

2.3. Financing Providers of Complementary Health Services

Finally, as regards the practices of promoting philanthropic agencies that participate on a complementary basis in the health service in Brazil, a regulation has been issued to create the Program of Preferential Funding to Philanthropic and Non-Profit Institutions ("Programa de Financiamento Preferencial às Instituições Filantrópicas e Sem Fins Lucrativos") within the sphere of official federal financial institutions. This State program is directed at effecting economic subventions for these philanthropic organizations in order to allow them easier access to bank credits, regardless of their situation with regard to timely payment of previous credits or the existence of debt to other financial institutions, due to the extension of coverage and relevance of the medical and hospital services provided by them. Thus, the program provides for subventions granting bank credits based on interest rates and other financial charges at a lower percentage than those applied to ordinary credit operations.

2.4. New Trends in the so-called Judicialization of Health

2.4.1. General Comments

Regarding the case law evolution of the interpretation of the right to health in Brazil, major advances have been made, particularly in the acknowledgement of ways to protect this fundamental right. In this context, there is an outstanding number of decisions of the Superior Court of Justice (SCJ) and the Federal Supreme Court (FSC) confirming lower court decisions that sentenced the government, within the different spheres of the Federation, to supply a variety of different health goods and services.

It should be recalled that in the architecture of the Brazilian Constitution the right to health is a fundamental right to which a legal regime has been attributed that provides protection substantially equivalent to that of the so-called civil and political rights.

This means that the immediate applicability of the rules regarding the fundamental rights and the direct binding of State powers provided in Article 5, § 1 of the Federal Constitution

of 1988, and also the fact that the fundamental rights are irrevocable clauses – in other words, material limits to constitutional reform –, were also extended to social rights, especially the right to health and to education, which was supported in the majority of the legal literature and also in the case law of the Higher Courts.

With this, the number of lawsuits brought against the government at the three levels of the Federation (Union, States and Municipalities) underwent a huge growth over the years, both in the sphere of State Justice and Federal Justice. To illustrate this, it can be pointed out that according to the Justice in Numbers Report ("Relatório Justiça em Números") of the National Council of Justice¹ 1,346,931 lawsuits were handled by the Brazilian Judiciary in 2016 on the subject of health, comprising specifically the granting of demands for medications, which is an increase of 1,300% over the last seven years.

Moreover, according to the aforementioned Report, during the years from 2010 to 2016 the Union spent around R\$ 4.5 billion to comply with legal orders to purchase drugs, dietary food, food supplements, and to make legal deposits. The expenditures of the States, Municipalities and the Union are also expected to reach a figure of R\$ 7 billion (BRL) by the end of 2017.

The actions of the Judiciary Power, here particularly the Higher Courts, namely the SCJ and FSC, are highly controversial with regard to the acknowledgment of subjective rights to services or benefits in matters pertaining to health, which covers both drugs and prostheses, medical procedures and other goods and services of many different kinds.

In this context, there has been recurrent criticism of an exacerbated judicial activism and of a process of judicialization of health policies, even though the dysfunctions of the public health system are significant and the quantity and quality of health services relative to the demand vary greatly, in view of regional inequalities, among other factors.

This point cannot be developed here, but it should, nonetheless, be underscored that although the large number of lawsuits involving health services provided by the government within the sphere of the Single Health System aim at goods and services already provided for by the existing public policies – which means that they refer to derived rights to benefits or services –, the so-called original rights to benefits or services continue to be assured. Thus, via judicial proceedings there is an imposition of obligations on State actors to provide services that have not been specifically provided for in the already implemented public policy system, and that are founded directly on the constitutional provision of the right to health.

¹ Brasil, Conselho Nacional de Justiça, *Justiça em números 2017: ano-base 2016/* (Brasília: CNJ, 2017). Available at <http://www.cnj.jus.br/programas-e-aco/es/pj-justica-em-numeros>. Retrieved on 5 September 2017.

In the most recent case law, this guidance has been maintained, so that the right to health, as a subjective right, is considered both a derived right and an original right to benefits or services.

Thus, there continues to be controversy regarding a few specific aspects. It substantially concerns the criteria adopted by the Judiciary Power to acknowledge or not to acknowledge a subjective right to particular health benefits or services and its respective limits. Although these issues do not exhaust the range of actions of the Judiciary in the field of protection and promotion of health, they have had the greatest repercussion. Therefore, as an illustration, a case can be cited in which the issue was the declaration of unconstitutionality of a federal law that required that the government supply a given drug; a law which, in turn, had been preceded by a legal decision in this sense, although it had not been agreed on by the majority of judges in the FSC. Besides, there is still a great number of lawsuits directed against the operators of private health insurance.

2.4.2. Judicial Protection of the Right to Health under the Public Health System

2.4.2.1. Case Law on the Provision of Drugs

One of the most important cases tried in the last two and a half years that deal with the right to health was decided by the FSC in a trial that took place on 19 May 2016, involving the declaration of unconstitutionality of Federal Law No. 13,279, of 13 April 2016, which authorized the distribution of a drug called synthetic phosphoethanolamine to patients with a diagnosis of malignant neoplasia, despite the lack of conclusive studies regarding side effects in human beings and also the absence of a sanitary record of the substance registered at the appropriate agency². At the time, the Court recognized that distribution thereof would not be admissible, since registration was a condition for monitoring the safety, efficacy and therapeutic quality of the product, without which it is presumed to be inadequate. The law was declared unconstitutional, therefore, as suspending the requirement of sanitary registration of the drug specifically violated the duty of the State to reduce the risk of disease and other health problems among its citizens.

Besides, although the FSC is still issuing decisions to guarantee access to drugs and medical treatments, the duty of the State to offer drugs to the population is connected to the constitutional responsibility of ensuring the quality and safety of products circulating in the national territory, i.e. to the prohibitive action of the State to prevent access to certain substances that have not undergone strict scientific analysis.

This, however, does not mean – also according to the view so far held by the SCJ and the FSC – that the State can under no circumstances be compelled to supply drugs that are not on

² Direct Action for the Declaration of Unconstitutionality No. 5,501, MC/DF, Judge-Rapporteur Marco Aurélio Mello, 19 May 2016.

lists organized by the Ministry of Health and its auxiliary agencies and should be mandatorily dispensed within the Single Health System.

On the contrary, in an exceptional case, the precedents of both courts, especially since the decision about the Suspension of Interlocutory Relief ("Suspensão de Tutela Antecipada") No. 175 on 10 March 2010 by the FSC³, point to the possibility of requiring from the State the dispensation of drugs that are not on the official list even when these drugs have not been approved by the Federal Government's National Agency of Sanitary Surveillance ("Agência Nacional de Vigilância Sanitária").

It was precisely at this trial that the FSC took a position (which it confirmed on declaring unconstitutional the law that imposed supplying an experimental drug to treat cancer) in requiring that a distinction be made between what it called a new drug not yet approved by the National Agency of Sanitary Surveillance but already released for sale by the appropriate Sanitary Surveillance Agency in the drug's country of origin, and an experimental medicine that was still in the stage of research and testing but had not yet been officially released for distribution.

However, considering that the lawsuits that claim health benefits or services from the government are not limited to supplying drugs, and also taking into account that a set of criteria has been established, which is used by judges and courts (based on the binding case law of the Superior Courts) to justify both the granting and refusal of requests, one finds that over the years there has been a consolidation of several of the guidelines and criteria adopted by the decision of 2010, while additional criteria have also been discussed and used.

These criteria, in turn, although partly suggested or at least supported by the specialized legal literature, have also been the subject of major criticism, be it because of the criteria per se or because of the way in which the criteria are handled. The purpose of establishing binding criteria is to rationalize and standardize, in terms of a general rule, the decision process in this matter. Moreover, this also involves an attempt to at least significantly reduce the levels of legal uncertainty and lack of predictability and, thus, to enable prior, adequate planning by public officials.

For this reason, the following inventory of the main criteria acknowledged and so far consolidated in case law as regards the judicial decision involving health benefits or services can be drawn up:

³ An explanation for non-Brazilian readers: Suspension of Interlocutory Relief refers to a kind of appeal to the Supreme Court with the purpose of obtaining the suspension of a decision made by lower courts that granted some provisional and anticipatory remedy against the State that may significantly affect the public interest, such as is the case with budget-related issues.

(1) The right to health, as a subjective right, is simultaneously individual and collective, so that individual lawsuits are admissible.

(2) The judicial imposition on the government of benefits or services that are not provided for in law or in the public policies that have already been implemented – in this case as part of the Single Health System – should be an exception.

(3) The government's responsibility and its status as a legitimate party for a lawsuit is solidary, so that the suit may be directed against any of the members of the Federation, specifically the Union, the States, the Municipalities or the Federal District.

(4) Whereas a private person must prove the need for a benefit or service, the State must prove that there are real obstacles to supplying it, including the allegation of insufficient resources (financial, human, logistic), or the unavailability of existing resources, that have not been allocated to the health sector.

(5) If the benefit or service claimed is denied and this creates a situation of real risk to the life or dignity of the human person (and, thus, to the existential minimum) of the plaintiff (or of the beneficiaries if it is a class action proposed by a legitimate body), even the objection of the precondition of the possible (*Vorbehalt des Möglichen*) should be set aside.

(6) The non-satisfaction of the State regarding the so-called existential minimum involves a violation of its duty of protection within the sphere of social rights, especially of the right to health, according to the prohibition of insufficient protection.

In this context, it should also be noted that the criteria invoked, as far as they are not exclusive to the case of drugs, have also been invoked in other lawsuits aiming at social benefits in education (especially in the case of access to day care centers maintained in public establishments and of the right to mandatory and free basic education), but also regarding the environment, basic sanitation, protection of children and youths, among others.

But even though the criteria listed above are still often used as references in the field of lawsuits referring to health matters, their application and justification in concrete cases has ultimately led to new decisions by the SCJ and FSC on the topic.

A recent decision of the SCJ⁴ stands out in a case related to repeated lawsuits in which criteria were defined to acknowledge the obligation of the State to supply drugs that were

⁴ Special Appeal No. 1,657, Judge-Rapporteur Benedito Gonçalves, judged on 25 April 2018.

not included in the respective lists of the Brazilian Single Health System. According to the Court, the following criteria must be proved in lawsuits:

- (1) A well-founded and detailed medical report, issued by the physician in charge of the patient, must state that it is essential or necessary to have that particular drug, and that the drugs supplied by the Single Health System are ineffective for the treatment of the patient's illness;
- (2) Financial incapacity of the patient to bear the cost of the prescribed drug; and
- (3) The drug must be registered at the National Sanitary Surveillance Agency.

Due to the type of appeal in which the trial was held, the decision established a guideline to be followed by the other Judiciary bodies, including the Special Civil Courts, thus influencing the very admissibility of the special appeals filed before the SCJ.

2.4.2.2. Current Debate on Criteria for the Provision of Drugs by the Judiciary

Also at the FSC, the discussion about the criteria to acknowledge subjective rights for the provision of drugs vis-à-vis the government once again became prominent. It should be noted that the FSC acknowledged the "General Significance" (Repercussão Geral)⁵ of the issue at stake, be it as regards supplying drugs that were not on the lists of the Single Health System, be it as regards supplying drugs that have not been registered at the National Agency of Sanitary Surveillance (ANVISA). The judgment of the respective Extraordinary Appeals, No. 566,471 and No. 657,718, is still pending.

For the time being, the thesis of the "General Significance" has been elaborated as follows, although it should be underscored that a definitive decision has not been made yet:

"In no case can the State be obliged to supply experimental drugs without proven efficacy and safety. On the other hand, for drugs that have not been registered at the National Agency of Sanitary Surveillance, but whose efficacy and safety have been proved, the State can only be obliged to supply them if there is an unreasonable delay of the Agency in deciding on the request for registration (a period of more than 365 days), when three requirements are met: (1) existence of a request for registration of the medication in Brazil; (2) existence of a registration of the drugs at well-known regulatory agencies abroad; and 3) lack of a therapeutic substitute registered in Brazil. The lawsuits that demand the supply of medications that have not been registered at the National Agency of Sanitary Surveillance (ANVISA) must necessarily be brought against the Union."

⁵ An admissibility criterion for the extraordinary appeal (recurso extraordinario) before the FSC, introduced by the Constitutional Reform of 2004. The appeal case must deal with important economic, political, social and juridical problems that transcend the individual complaint.

Based on this statement, the issue began to be tried, and so far (June 2018) the opinions of three Justices have been presented, but no final date to render judgment and publish the decision has been set yet.

2.5. Protection against Work-Related Health Risks

In one of the cases highlighted here, the SCJ acknowledged the need to reduce working hours from 40 to 24 hours a week for Federal Government employees, both civilian and military, as well as for the employees of autarchic public bodies who habitually work with X-ray equipment and radioactive substances close to sources of radiation. It was considered that the *mens legis* of the normative provisions contained in a federal law published before the 1988 Federal Constitution, which provided for this form of working hour reduction, consisted in a better protection of the health of these public servants, regardless of their professional qualification⁶.

2.6. Private Health Insurance Schemes

2.6.1. Consumer Law and Private Health Insurance Companies

In the field of so-called supplementary health involving the participation of private organizations in the form of health insurance operators, the decisions made by the SCJ were also relevant, especially as concerns the definition of whether these legal relations constitute consumer relations and to what extent their content has repercussions on the effectiveness of the fundamental rights of those insured.

First of all, it should be underscored that the SCJ, in 2016, modified its view of the self-managed type of health insurance organizations. This term is given to those organizations in the composition of which the Government participates, so that they are not allowed to offer their health insurance on the consumer market as other health insurance operators would do.

Thus, the Court treated the self-managed health insurance operators on par with closed private social security organizations, and for this reason the consumer rules were no longer applied to the former, based on the same arguments according to which it recently no longer applied these rules to relations between insureds and these organizations. As the Court saw it, although all health insurance operators enter into contracts with the aim to provide private health care, only the commercial ones operate according to a market regime and may profit from the contributions paid by the participants (economic advantage), and there is no legal imposition to participate in the management of the benefit plans or of the entity itself.

⁶ Internal Appeal in Special Appeal No. 1,569,119-SP, Judge-Rapporteur Humberto Martins, judgment of 7 April 2016.

However, just as occurs in the case of closed private social security entities, the values allocated to the common fund maintained by the self-managed entities belong to the participants and beneficiaries of the insurance, and there is an explicit mechanism of solidarity, so that the entire surplus of the pension fund is used in favor of its own members. For this reason, the health insurance contracts of self-managed entities cannot be equated to those in which it is allowed to have economic gains; it is thus inappropriate to talk about consumer relations and therefore not even about applying the aforementioned consumer protection rules⁷. Following this line of reasoning, in 2018 the Court published Precedent No. 606 that defined the following: "The Consumer Protection Code applies to health insurance contracts, except those managed by self-managed entities."⁸

2.6.2. (Abusive) Clauses on Benefit Exclusions

As regards the contractual clauses of private health insurance plans, it is necessary to point out a decision of the SCJ considering valid the reimbursement to the holder of health insurance of medical expenses incurred in a situation of urgency and emergency, although limiting their value to that established in the table of reference of prices for medical and hospital services practiced by the health insurance entity. Thus, it did not consider abusive the contractual clause that restricts the coverage contracted for to physicians and hospitals of the entity's system or to those that have an agreement with them. However, in cases of urgency and emergency in which it is not possible to use one's own, accredited or agreed-on medical services, the health insurance company, by reimbursement, takes responsibility for the costs and medical expenses of the contracting party under these conditions, limited to the values established by its table of reference⁹.

Another relevant decision issued by the SCJ in the same year consists of acknowledging a life partner as equivalent to the husband or wife for purposes of applying the clause of Remission by Death in relation to health insurance contracts, even if the normative provision does not mention it expressly. The Court espoused the view that, by a constitutional normative provision, the notion of family had been expanded to include other types of family entities, such as those formed by both hetero-affective and homo-affective steady unions. In this case, the decision enabled the partners, as dependents of the dead insuree, to have the guarantee of continuity of the provision of supplementary health services for a certain time period that will vary according to what is provided in the contract, without them needing to pay monthly fees, so as to support the family nucleus that is economically dependent on the deceased insurance holder as regards access to medical and hospital services in such a situation of loss.

⁷ Special Appeal No. 1,285,483-PB, Judge-Rapporteur Luis Felipe Salomão, judgment of 22 June 2016.

⁸ Precedent approved on 11 April 2018.

⁹ Special Appeal No. 1,286,133-MG, Judge-Rapporteur Marco Aurélio Bellizze, judgment of 5 April 2016.

Also as regards the exclusion of benefits or services, in 2017 the SCJ published Precedent No. 597, whose wording is: "The contractual clause of a health insurance plan that provides for a waiting period for the use of the medical care services in situations of emergency or urgency is considered abusive if it goes beyond the maximum of 24 hours from the day of signing the contract."¹⁰

2.6.3. Clauses Regarding Co-Payments for Private Health Care Services

The SCJ also analyzed the legality of clauses that provide for co-participation of the user in medical and hospital expenses as a percentage of the cost of medical treatment performed as an outpatient and did not consider them abusive, as long as the co-participation was not characterized by full financing of the procedure through the user and was not a serious obstacle to the access to health services. Besides, it underscored that the franchise deductible and financial limits had to be established clearly and precisely in the contract. Finally, the Court considered that it was not admissible to pass on to the health insurance user, disguised as co-participation, the payment of most of the medical expenses, preventing them from enjoying the health care services that they have contracted for¹¹.

2.6.4. Collective Private Health Insurance

Another important topic decided on by the SCJ concerns access to a collective entrepreneurial health insurance plan and refers to the possibility of migrating from a collective insurance plan that has expired to an individual or family insurance plan. In this case, it is not admissible to maintain the values of monthly fees established in the original plan, considering the peculiarities of each regime and type of contract, which generate different prices. What should be avoided, according to the Court, is excessive onerousness, and for this reason the market value is employed as a reference so as to prevent potential abuse¹².

According to the SCJ, in the case of collective health insurance paid exclusively by the employer, employees who have retired or been laid off without cause do not have the right to stay insured under the collective entrepreneurial health insurance, even if co-participation was provided for to pay for medical, hospital and dental care procedures – unless there is an express provision to the contrary in a contract or a collective labor agreement.

The Court has acknowledged that workers who have been discharged without cause or retired persons who contributed to the health insurance plan as a result of the employment have the guaranteed right to remain beneficiaries under the same conditions of coverage that they enjoyed during the work contract, as long as they take over the full payment

¹⁰ Precedent approved at the Second Panel on 8 November 2017.

¹¹ Special Appeal No. 1,566,062-RS, Judge-Rapporteur Ricardo Villas Bôas Cueva, judgment of 21 June 2016.

¹² Special Appeal No. 1,471,569-RJ, Judge-Rapporteur Ricardo Villas Bôas Cueva, judgment of 1 March 2016.

through their contribution, which characterizes one of the conditions required to acquire this right. This contribution consists of the payment of a monthly fee, regardless of whether or not medical services are actually used, which is not to be confused with co-participation, which means a share paid by the insuree only when they make use of the plan, as a form of discouraging excessive and unnecessary use of the medical services offered¹³.

3. OLD-AGE PENSIONS AND SURVIVOR'S PENSIONS

3.1. The Debate about a Constitutional Reform of the Brazilian Pension Regime

Currently there is a Proposal of Constitutional Amendment ("Proposta de Emenda à Constituição", No. 287/2016) going through National Congress that aims to bring about changes in the Brazilian Social Security Regime as a way of reducing the costs of the payment of retirement benefits, so that a general rule will be created for all workers, independently of the area where they work (urban or rural) or of who employs them (private or public sector).

The aforementioned change provides for a single modality of retirement at the age of 65 for men and 62 years for women, with a minimum of 15 years' contributions to be paid in, with the amount of the benefit comprising 60% (sixty per cent) of the average salary for a person who has contributed for 25 years, so that the value of the benefit calculated based on the average salary will have its percentage increased proportionally to the increased time of contributions paid, until the limit of 35 years of contributions is reached. However, only with a contribution higher than this limit will it be possible to receive the full value of the benefit in relation to the amount of the mean salary received while working.

Moreover, the aforementioned proposal contains transition rules to cover workers who are already of a certain age (on this point there was no consensus between the Executive and Legislative Powers) on the date the bill is enacted.

The main intention of this reform is to reduce the budget deficit relating to the expenditures of the payment of social security benefits, whose annual value ranges between R\$ 52 billion and R\$ 92 billion, considering that there are divergences between the values presented by the current and the previous government, and also by the National Association of Fiscal Auditors of the Federal Revenue of Brazil ("Associação Nacional dos Auditores Fiscais da Receita Federal do Brasil").

One of the main points of discussion about the aforementioned changes, especially as regards the probability of the fundamental guarantees of the current insurees being

¹³ Special Appeal No. 1,594,346-SP, Judge-Rapporteur Ricardo Villas Bôas Cueva, judgment of 9 August 2016.

violated, is 1) the fact that government employees in general will lose their right to receive full retirement benefits, unless they contribute for a period longer than 35 years, which includes, for instance, the maximum limit established in the current rules, and 2) the lack of consensus regarding the content of the transition rules.

After discussions with members of several sectors of society, and also between the parliamentary groups or benches of the Federal Chamber of Deputies (the Legislative House that began the aforementioned Proposal of Constitutional Amendment), the processing of this Proposal was interrupted from February 16 until December 31 of the year 2018, because federal intervention was decreed in the Member State of Rio de Janeiro within the sphere of public security, considering the prohibition to make changes in the Federal Constitution while federal intervention is underway in one of the members of the federation, according to the rule contained in § 1 of Art. 60.

3.2. Pension Rights

3.2.1. Access to the Special Scheme for Rural Workers

According to the SCJ, although the Federal Constitution advocates a distributive and universal system of social security, safeguarding the equality of rights between urban and rural workers in favor of social justice, it is not possible to acknowledge the right of special insureds to rural retirement by age if the latter leave rural activities in the period immediately preceding the request to be granted the aforementioned social security benefit. It should be underscored that, although there are non-constitutional rules that establish various requirements for insured rural workers to obtain the social security benefits, these have to be complied with for the acknowledgment of actual rural work, since the social security norm on this topic aims at benefitting exclusively those who are truly under the transition rule, that is, working in a rural activity at the time they meet the age requirement¹⁴.

3.2.2. Pension for Grandparents in the Role of Parents

The SCJ decided that grandparents could be the beneficiaries of a pension when an insured grandchild dies if they have been responsible for the grandchild's upbringing and truly acted as parents. The decision underscored that it did not imply the extension of the list of dependents by judicial decision, (since the legal provisions do not treat grandparents as dependents of an insured), but that it was rather based on the need to interpret the rules inherent to the social security benefits according to the constitutional norms concerning the concept of family, especially because the Federal Constitution of 1988 related the principle of affectivity to this concept. Accordingly, the main purpose of the family was social

¹⁴ Special Appeal No. 1,354,908-SP, Judge-Rapporteur Mauro Campbell Marques, First Panel, judgment of 9 September 2015.

solidarity to provide the conditions necessary for human improvement and progress, and the family unit was ruled by affection. In this case it was clear that the insuree's grandparents truly acted *in loco parentis* and that they and the insuree had become a family unit.

4. SOCIAL WELFARE

4.1. Child Welfare

Federal Law No. 13,257 of 8 March 2016, called Framework of Early Childhood ("Marco da Primeira Infância"), effected relevant changes to the rules contained in the Statute of Children and Adolescents ("Estatuto da Criança e do Adolescente") as a way of improving the practice of adoption in Brazil and also of regulating the concept of sponsorship as one of the ways to placing abandoned or orphaned children and adolescents into a family. Besides, this law made it possible to grant pregnant women or women with minor children house arrest in cases of provisional detention, as a way of implementing the rights of children and adolescents to avoid breaking their contact with their mothers during early childhood.

4.2. Social Inclusion of Persons with Disabilities

A major legislative innovation came about with the enactment of Federal Law No. 13,409 of 29 December 2016, dealing with the reservation of places for persons with disabilities to access technical courses at the Federal Institutes of Education. In the same way as access to places within the Federal Universities, the new law aims to provide more effective material equality in implementing the fundamental rights of persons with disabilities.

In the sphere of case law the FSC acknowledged the constitutionality of a provision of Federal Law No. 13,146/2015 that makes it mandatory for private schools to offer adequate and inclusive education to students with disabilities. The Court underscored that the responsibility for diversity was a structuring element of the Constitution and presupposed the action of the State in including persons with disabilities. The underlying idea is that this action is a two-way street, i.e. it benefits the entire population. The Court also underscored that, even in the field of private enterprise, when the issue at stake is the right to education, the State must authorize and assess the quality of the services rendered by private parties, as well as compliance with the general rules of national education, which includes the fulfillment of the requirement of accessibility for persons with disabilities¹⁵.

As regards the fundamental right to social welfare, the SCJ rejected discriminatory interpretations of the requirements to grant the continuous cash benefit provided for in Art. 203, item V of the Federal Constitution of 1988, emphasizing that the Brazilian Organic Law

¹⁵ Direct Action for the Declaration of Unconstitutionality No. 5,357, MC-Referendo/DF, Judge-Rapporteur Edson Fachin, judged on 9 June 2016.

of Social Welfare (Federal Law No. 8,742 of 1993) did not make any distinction regarding the kind of disability, so that absolute incapacity of persons with disabilities was not a requirement to be granted the said benefit. This absence of a legal provision forbids any limitation imposed by Public Administration regarding the nature of the disability of the person assisted for the purpose of refusing to grant the said benefit¹⁶.

4.3. Protection of Motherhood

As to protection of motherhood, it should be underscored that Federal Law No. 13,434 of 12 April 2017 has now forbidden the use of handcuffs on pregnant women during labor and delivery and during their stay in hospital after delivery, when their child is born during a period in prison or some other form of provisional detention. This aims to follow the principle of human dignity in a delicate phase for women.

4.4. Welfare and Human Rights of Senior Persons

Regarding protection of the elderly, Federal Law No. 13,535 of 15 December 2017 determined that institutions of higher education should offer specific courses and extension programs, including formal and informal activities, for senior persons in order to provide lifelong education opportunities. Besides, it determined that the Government should support the establishment of an open university for the elderly and publish books and periodicals with content adequate to senior persons.

Through Federal Law No. 13,646 of 9 April 2018, Brazil instituted the Year of Enhancement and Advocacy of the Human Rights of Senior Persons, referring to the process of Brazil's ratification of the Inter-American Convention on Protecting the Human Rights of Older Persons, which determined that steps should be taken to disseminate this international treaty among the Brazilian population. It also established the articulation between the agencies of Public Administration, together with the Legislative and the Judiciary Power, to encourage actions designed to enhance the value assigned to senior persons, within their competencies, besides other measures that will make the overall population generally more sensitive to the rights of elderly persons.

4.5. Inclusion of Foreign Nationals

In an important decision, the FSC acknowledged that foreigners resident in Brazil had social rights, so that they could request the benefit of social welfare (continuous cash benefit) provided for in Art. 203, item V of the Federal Constitution, as long as the requirements established in this norm and the legislation were met.

¹⁶ Special Appeal No. 1,404,019-SP, Judge-Rapporteur Napoleão Nunes Maia Filho, judgment by unanimous decision on 27 June 2017.

Thus, the universal character of the right to social welfare is supported by the protection of the dignity of the human person and the duty to ensure that everyone has the minimum material conditions to build themselves a decent life, especially in situations of human fragility, e.g. when depending on a social benefit or service. The thesis of the need for reciprocity was rejected, as well as the prevalence of legal budgetary constraints as a way of limiting the extent to which this kind of social program is made available to resident foreigners, although it was stressed that only a foreigner who is legally registered in the country and has met the requirements involving lack of money could be acknowledged as a beneficiary of social welfare in Brazil. Finally, it was pointed out that the country had always tolerated and encouraged the participation of immigrants in forming the nation¹⁷.

4.6. On Social Welfare Programs

Regarding social welfare programs, there have been no major innovations. The most important programs that had already been created, such as PROUNI [University for All Program], Bolsa Família [Family Allowance], Minha Casa Minha Vida [My Home, My Life] and other social programs involving health have been retained.

As to new programs, it should be mentioned that the Federal Government created the 2018 Social National Driving License to benefit people who are not able to pay for the costs of obtaining their driving license. This will provide access to other forms of work and commercial activity for low-income persons who would otherwise not be able to obtain their license.

5. SELECTED LITERATURE

5.1. Health

ALVES, Daniele Garcia; CARDOSO Henrique Ribeiro. *Direito à saúde: por uma prestação ética do Estado*. Rio de Janeiro: Lumen Juris, 2017.

AVELÃS NUNES, Antônio José; SCAFF, Fernando Facury. *Os Tribunais e o direito à saúde*. Porto Alegre: Livraria do advogado, 2016.

BARROS, Livia. *Fornecimento judicial de medicamentos sem registro na Anvisa e de uso Off-Label. Judicialização do direito à saúde*. Belo Horizonte: Editora Juruá, 2017.

CARNEIRO, Bernardo Lima Vasconcelos. *A Efetivação Jurisdicional do Direito à Saúde: para uma análise da temática sob a ótica tópica e concretista*. Rio de Janeiro: Lumen Juris, 2016.

¹⁷ Special Appeal No. 587,970-SP, Judge-Rapporteur Marco Aurélio Mello, judgment of 19-20 April 2017.

CARVALHO, Laura Bastos. *Direito global da saúde*. Belo Horizonte: Editora Juruá, 2017.

FARIAS, Rodrigo Nobrega. *Direito à saúde e sua judicialização*. Belo Horizonte: Editora Juruá, 2018.

FIGUEIREDO, Mariana Filchtiner. *Direito à Saúde*, 5ª ed., Salvador: Jus Podivm, 2018.

FOGAÇA, Vitor Hugo Bueno. *Judicialização da Saúde & Audiência Pública no STF - Soluções de Conflitos à Luz do Diálogo Social*. Belo Horizonte. Editora Juruá, 2017.

GARCIA, Lara Rocha. *Inovação Tecnológica e Direito à Saúde - Aspectos Jurídicos, Econômicos, Tecnológicos e de Políticas Públicas*. Belo Horizonte: Editora Juruá, 2017.

GONÇALVES, Sandra Krieger. *Judicialização do Direito à Saúde e o Sistema de Saúde Suplementar no Brasil*. Rio de Janeiro: Lumen Juris, 2016.

LIMA DE QUEIROZ, Rodrigo C. Falcão. *Planos de Saúde - De Seu Direito e Regulação - Atuação da ANS como Instrumento de Acesso e Efetivação da Saúde*. Belo Horizonte: Editora Juruá, 2017.

MARTINS, Thiago Penido. *Contratos de Planos de Saúde - O Direito à Saúde nas Relações Jurídicas entre as Operadoras de Planos de Assistência à Saúde e Seus Beneficiários*. Belo Horizonte: Editora Juruá, 2016.

SCHULZE, Clenio Jair; GEBRAN NETO, João Pedro. *Direito à Saúde à Luz da Judicialização*. Porto Alegre: Verbo Jurídico, 2017.

SOUSA LIMA, Fernando Rister (Coord.). *Saúde & Judiciário - A Atuação Judicial - Limites, Excessos e Remédios* - Biblioteca de Filosofia, Sociologia e Teoria do Direito. Belo Horizonte: Editora Juruá, 2016.

SOUSA LIMA, Fernando Rister. *Saúde e Supremo Tribunal Federal*. Belo Horizonte: Editora Juruá, 2018.

SOUSA, Isa Felipa António de (Coord.). *Direito à saúde: dilemas atuais*. Belo Horizonte: Editora Juruá, 2017.

5.2. Social Security and Social Welfare

AMADO, Frederico. *Curso de Direito Previdenciário*. Bahia: Editora Juspodvim, 2018.

KERTZMAN, Ivan. *Curso Prático de Direito Previdenciário*. Bahia: Editora Juspodvim, 2018.

LEITÃO, André Studart et all. *Manual de Direito Previdenciário*. São Paulo: Sariaiva, 2016.

MARTINS, Sergio Pinto. *Direito à seguridade social*. São Paulo: Saraiva, 2016.

MENDONÇA, Jurilza Maria Barros. *Idosos no Brasil: Políticas e cuidados*. Belo Horizonte: Editora Juruá, 2016.

ROCHA, Daniel Machado da. *Comentários À Lei De Benefícios da Previdência Social*. 16ª Ed. São Paulo: Atlas, 2018.

ROMERO, Eliane Costa. *Previdência e Velhice - Direito ao Trabalho e à Seguridade no Processo de Envelhecimento*. Belo Horizonte: Editora Juruá, 2016.

SAVARIS, José Antonio. *Direito Processual Previdenciário*. Belo Horizonte: Editora Juruá, 2016.

TANAKA, Eduardo. *Direito Previdenciário*. São Paulo: Editora Método

Prof. Dr. Ingo Wolfgang Sarlet
Escola de Direito da Pontifícia Universidade Católica
do Rio Grande do Sul (PUCRS)
Porto Alegre, RS
Brasil
Email: iwsarlet@gmail.com
