



MAX PLANCK INSTITUTE  
FOR SOCIAL LAW AND SOCIAL POLICY

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# **Social Security in Brazil: Public Pension Reform and Responses to the COVID-19 Pandemic**

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## LIST OF ABBREVIATIONS

|        |  |
|--------|--|
| ADAPS  | Agência para o Desenvolvimento da Atenção Primária à Saúde |
| ADI    | Ação Direta de Inconstitucionalidade                       |
| ADPF   | Arguição de Descumprimento de Preceito Fundamental         |
| ANS    | Agência Nacional de Saúde Suplementar                      |
| Anvisa | Agência Nacional de Vigilância Sanitária                   |
| APS    | Atenção Primária à Saúde                                   |
| BNDS   | Banco Nacional de Desenvolvimento Econômico e Social       |
| BPC    | Benefício de Prestação Continuada                          |
| CNMP   | Conselho Nacional do Ministério Público                    |
| CF     | Constituição Federal                                       |
| Dje    | Diário de Justiça Eletrônico                               |
| DRU    | Desvinculação de Receitas da União                         |
| EC     | Emenda Constitucional                                      |
| FC     | Federal Constitution                                       |
| FGTS   | Fundo de Garantia do Tempo de Serviço                      |
| Funai  | Fundação Nacional do Índio                                 |
| GAVI   | Global Alliance for Vaccination and Immunisation           |
| ICU    | Intensive Care Unit  |
| INSS   | Instituto Nacional de Seguridade Social                    |
| IPEA   | Instituto de Pesquisa Econômica Aplicada                   |
| IRPF   | Imposto de Renda da Pessoa Física (Personal Income Tax)    |
| LOA    | Lei Orçamentária (Budget Law)                              |
| LOAS   | Lei orgânica de assistência social                         |

|        |  |
|--------|--|
| LTr    | Legislação do Trabalho                                 |
| MP     | Medida Provisória                                      |
| MPISOC | Max Planck Institute for Social Law and Social Policy  |
| MS     | Ministério da Saúde                                    |
| OMS    | Organização Mundial da Saúde                           |
| Pasep  | Programa de Formação do Patrimônio do Servidor Público |
| PCA    | Porposal for Constitutional Amendment                  |
| PEC    | Proposta de Emenda à Constituição                      |
| PIS    | Programa de Integração Social                          |
| PL     | Projeto de Lei   |
| PLOA   | Projeto de Lei Orçamentária                            |
| PT     | Partido dos Trabalhadores                              |
| R\$    | Reais  |
| RE     | Recurso Extraordinário                                 |
| RGPS   | Regime Geral de Previdência Social                     |
| RPPS   | Regime Próprio de Previdência Social                   |
| STF    | Supremo Tribunal Federal (Federal Supreme Court, FSC)  |
| STJ    | Superior Tribunal de Justiça                           |
| SUS    | Sistema Único de Saúde                                 |

## 1. INTRODUCTION

The period covered by this report, viz. June 2019 to December 2020, was marked by intense legislative, administrative and judicial activity with regard to fundamental social rights, namely the rights to health care, to social insurance and to social welfare which, according to the 1988 Brazilian Federal Constitution (FC), are part of the social security system. The most noteworthy activities encompass a substantial public pension reform, supported by a constitutional reform in the area of social insurance, and a great variety of issues linked to the prevention of and fight against the COVID-19 pandemic (coronavirus).

After several decades of failed reform attempts, the Proposal for Constitutional Amendment (PCA) No. 06/2019 was passed by the National Congress at the end of 2019 and became Constitutional Amendment (CA) No. 103/2019, which consolidated significant alterations in the Brazilian Constitution encompassing fundamental reforms of the country's public pension system. In early 2019, the newly elected Bolsonaro Government had promoted the highly controversial pension reforms as its main priority, based on the argument of huge deficits of the system<sup>1</sup> and of the rapid aging of the population. The government estimated that this reform would reduce public spending on pensions by R\$ 800 billion<sup>2</sup> over the next ten years. Unfortunately, soon after the controversial pension reform had entered into force and before any positive fiscal effects could become discernible, Brazil was hit by the coronavirus that challenged mainly – although not exclusively – the health care and social welfare system. As in many other countries, the pandemic has highlighted and exacerbated the many structural gaps and inequalities in social protection. Despite a number of measures adopted by the government in response to the effects of the pandemic, Brazil struggles with weak growth and falling tax revenues in this period of crisis and transition already described in the previous report.<sup>3</sup>

The pandemic has had a massive impact on public health and unprecedented social and economic consequences. In order to avoid a massive overload of the health care system, it was decided to close commercial and service establishments, and to prohibit access to public spaces. These measures affected not only the private economy's performance, but also the living conditions and livelihood of a considerable portion of the Brazilian population. Declining

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<sup>1</sup> The deficit of the pension system has increased every year, and reached a historical peak of R\$ 195.2 billion in 2018, BRASIL. Secretaria de Previdência. *Previdência Social teve déficit de R\$ 195,2 bilhões em 2018*. 8 June 2020. Available at: <https://www.gov.br/previdencia/pt-br/assuntos/noticias/previdencia/regime-geral/previdencia-social-teve-deficit-de-r-1952-bilhoes-em-2018#:~:text=A%20Previd%C3%Aancia%20Social%20registrou%20d%C3%A9ficit,7%25%20em%20rela%C3%A7%C3%A3o%20a%202017>. Accessed on: 19/07/2021.

<sup>2</sup> About 156 billion USD; historical exchange rates for the Brazilian currency: 1 BRL = 0.25 USD at the end of 2019, and 0.19 USD at the end of 2020.

<sup>3</sup> Social Law Report No. 6/2019, available at: [https://www.mpsoc.mpg.de/fileadmin/user\\_upload/data/Sozial-recht/Publikationen/Schriftenreihen/Social\\_Law\\_Reports/SLR\\_6\\_2019\\_Brazil\\_final.pdf](https://www.mpsoc.mpg.de/fileadmin/user_upload/data/Sozial-recht/Publikationen/Schriftenreihen/Social_Law_Reports/SLR_6_2019_Brazil_final.pdf)

tax revenues and rising spending on health care, business, and community support have also impacted public budgets and threatened the fiscal balance.

Political polarization gained a new arena with the emergence of the pandemic, as a polarization was effected between those who focus on the need for more restrictions to protect public health and those who advocate for an easing of restrictive measures to protect society's subsistence. Polemical statements by Brazil's President and the resulting clashes also gained a new platform. He first came into conflict with his former Minister of Health, and then with rival governors. Nevertheless, in spite of deficient coordination Brazil has been implementing measures to fight the coronavirus, to support the public and private economy, and to provide financial aid to individuals and businesses. It is important to mention that their real impact should still be the object of more specific studies.

The massive impact of the pandemic on different areas and the need for measures aimed not only at public health care but also at supporting the economy and society showed very clearly how important it is to affirm social security as a right with open boundaries. Social rights and the economy, even if presented as opposite poles, are part of one and the same sphere.

The focus of this report is on two main topics: the public pension reform on the one hand, and the legislative, administrative and judicial measures adopted to fight COVID-19 in the areas of health care, social insurance and social welfare, on the other.

## 2. EVOLUTION OF SOCIAL PROTECTION SCHEMES

### 2.1. Social Insurance Reform

On 22 October 2019, the Senate (Second Chamber of the Brazilian legislature) voted in favor of Constitutional Amendment 103/2019 on Social Insurance Provisions, which was needed to finalize the pension law reform process. The reform required, to be approved, a 3/5 majority both of the Senate and the House of Representatives, in a separate two-round voting process. Constitutional Amendment No. 103, enacted by the National Congress on 12 November 2019 (date of publication: 13 November 2019), is a result of PCA No. 06/2019 of 20 February 2019, and consolidated the reform process on social insurance schemes.<sup>4</sup> The most significant changes concern the *General Social Insurance Regime (RGPS)*, covering pension benefits for the majority of the Brazilian private sector employees, and the *Special Social Insurance Regime (RPPS)*, which regulates the pension scheme of federal public employees at the Union level. Thus, the reform will directly affect about 72 million individuals among the public and private

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<sup>4</sup> BRASIL. *Emenda Constitucional 103, de 12 de novembro de 2019 (EC 103/2019)*.

sector workers.<sup>5</sup> The reform introduced for the first time a minimum retirement age in Brazilian pension laws, provided for reductions of the pension amount in future public pensions and adopted changes in contribution rates.

Initially, the reform was to encompass also the special pension schemes of the states, the Federal District and the municipalities, but in view of the difficulties that arose in the process this segment was excluded from the proposal and the reform of the corresponding special pension schemes was left in charge of the federal entities themselves. It was decided to discuss the topic separately in a parallel PCA (No. 133/2019), which allows the entities to adopt the same rules that are applicable to public employees at the Union.<sup>6</sup> This additional proposal also provides for social security benefits for children living in poverty and is presently going through the Chamber of Deputies.<sup>7</sup> There are specific provisions for holders of elective offices in the Union, the states, the Federal District and the municipalities in Article 14 of PCA No. 133/2019. Adjustments to the special social insurance schemes of the armed forces have been submitted to Congress (Bill No. 1,645/2019) and are aimed at altering eligibility and contributions but raising the remuneration pattern, which reduces the reform's fiscal effects.<sup>8</sup> In January 2019, the Bolsonaro Government introduced Provisional Decree (PD) No. 871/2019, that is aimed at combatting fraud and irregularities in the granting of social security benefits from the National Social Security Institute INSS. This PD has been adopted as Act No. 13.846/2019 and has become part of the new social insurance system.<sup>9</sup>

### 2.1.1. Old-Age Pensions

Before the 2019 reform, parametrical pension reforms were approved in 1998, 1999, 2003 and 2005. The Brazilian public pension system used to be rather generous and one of the most fragmented in Latin America, consisting of four main subsystems and other separate special schemes at the Union level: the private sector General Social Security Scheme (RGPS), comprising the pension scheme for the urban population and the special scheme for the rural sector; the federal Pension Scheme for Union Government Employees (RPPS) which covers federal government officials, and the special scheme for the armed forces.<sup>10</sup> In addition to these public pension schemes, occupational schemes based on voluntary savings are available according to the Supplementary Pension Scheme, established either as closed schemes or as open schemes. Finally, a non-contributory minimum pension scheme (Continued Benefit, BPC)

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<sup>5</sup> DEUTSCHE WELLE. *Congresso promulga reforma da Previdência*. 12 November 2019. Available at: <https://p.dw.com/p/3Su1J>. Accessed on: 20/07/2021.

<sup>6</sup> AMARAL; ANSILIERO; COSTANZI. *Previdência Social. Políticas Sociais: acompanhamento e análise*. Instituto de Pesquisa Econômica Aplicada – IPEA, 2020.

<sup>7</sup> BRASIL. *Câmara dos Deputados. PEC 133/2019*.

<sup>8</sup> AMARAL; ANSILIERO; COSTANZI, op. cit., p. 13.

<sup>9</sup> BRASIL. *Lei nº 13.846, de 18 de junho de 2019*.

<sup>10</sup> Other public servants are covered by about 2,400 separate special schemes.

provides for a benefit equivalent to a minimum wage for poor persons over 65 years that lack a contributory pension.

The 2019 pension reform maintained differences between the various contributory public schemes, in particular different minimum retirement ages linked to professional activity. The new pension rules adopted in 2019 apply to the General Scheme for the (urban) private sector (RGPS) and to the Special Scheme for federal public employees (RPPS). CA No. 103/2019 tightened eligibility criteria to access old-age pensions by eliminating the provision of pension based only on contribution time, without any minimum age, and by introducing the retirement pension linked to a minimum age and a certain period of contribution.<sup>11</sup> The second most significant reform element concerns the calculation method for old-age pensions aimed at cutting down pension expenditure, in line with international pension retrenchment policies. The main features of the reform are:

*a) New eligibility criteria*

The reform abolished retirement by contribution time (length of service) regardless of age and introduced a minimum age, previously unknown in the Brazilian public pension system. and a contribution requirement, with variations according to professional activity. The minimum retirement age for women was increased (from 60 to 62), and the minimum contribution time of men in the urban sector was increased to 20 years. Previously, insurees could retire at any age if they had completed 30 years (women) or 35 years (men) of social security contributions. The new age requirement will be phased in over several years. After the end of the transition period which will last between 12 and 14 years, it will no longer be possible to retire for contribution time (length of service). Lower retirement ages are permitted for rural workers.

**Table – New Insurees**

| Insuree | Women                |                           | Men                                       |                           |
|---------|----------------------|---------------------------|---|---------------------------|
|         | Rural <sup>(1)</sup> | 55 years of age           | 15 years of rural activity <sup>(2)</sup> | 60 years of age           |
| Urban   | 62 years of age      | 15 years of contribution* | 65 years of age                           | 20 years of contribution* |

**Source:** Art. 201 § 7, items II and I of the FC in the wording of CA No. 103/2019; Art. 19 caput. \* Until the law provides for the period of contribution. <sup>(1)</sup> The category of rural worker includes family farmers, prospectors and artisanal fishermen (Art. 201 § 7 item II of the FC in the wording found in CA No. 103/2019). <sup>(2)</sup> Not included in the latter, thus remaining unaltered.

<sup>11</sup> CASTRO; LAZZARI. *Manual de Direito Previdenciário*. 2020, p. 992.

*b) New progressive contribution rates*

Social security contributions vary according to salary scales. The reform reduced the rate for the insureds with the lowest income and increased it on those with the highest income. From March 2020, contribution rates of employed insureds, including domestic workers and casual or self-employed workers (previously 8%, 9% or 11%) will vary from 7.5 % to 22 % depending on earnings. The new progressive table will apply to both private employees and civil servants. However, the maximum rate for private employees will effectively be 14% because contributions will be capped at a maximum monthly salary base (for public servants in the RPPS no upper limit applies). The reform changed the tax base to progressive aliquots, i.e. the percentage is not applied to the total salary, but to the exceeding salary in each scale.

For private sector employees the rates are:<sup>12</sup>

- up to 7.5% (down from 8%) of monthly earnings up to the legal monthly minimum wage
- 9% of monthly earnings above the legal monthly minimum wage and up to R\$ 2,000<sup>13</sup>
- 12% (up from 11%) of monthly earnings above R\$ 2,000 and up to R\$ 3,000
- 14% of monthly earnings above R\$ 3,000 and up to R\$ 6,101.06 (the maximum monthly earnings used to calculate employee social security contributions)

The contributions for employers (typically 20% of payroll in 2019, although with some variations depending on the type of employer) is maintained the same as under the old rules.

To obtain acknowledgment of the period of contribution to the General Pension Scheme the insured must reach a minimum monthly contribution, with the possibility of accumulating contributions (Art. 195 § 14 of the FC). Until a law on this topic is passed, insureds may supplement the contribution in the month in which they receive a salary below the required minimum, use a surplus from another month, and combine contributions from different months if they are in the same calendar year.<sup>14</sup>

*c) New benefit calculation method*

Under the new system, the rules for the calculation of the benefit amounts for insureds of both the General Scheme and of the Union's Special Pension Scheme tightened as they are now based on the average of *all* wages over the individual's working life<sup>15</sup>, up to the maximum

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<sup>12</sup> EC 103/2019, Art. 28, § 1, items I, II, III and IV. Progressive contribution rates are also set for federal public employees, see Art. 11 of EC 103/2019.

<sup>13</sup> Around 313 € (31 December 2020).

<sup>14</sup> EC 103/2019, Art. 29.

<sup>15</sup> Previously, 20% of the lowest salaries remained excluded from the calculation.

employee contribution salary of R\$ 6,101.06 established for the General Pension Scheme.<sup>16</sup> Compliance with the minimum contribution requirement guarantees only 60% (previously 70%) of the average of the insuree's salaries in the contribution period. In addition, future pensions will decrease because the previous deduction on the average of 20% of the lowest salaries was eliminated. Insurees who want to get a higher replacement rate have to considerably extend their working life beyond the minimum contribution requirements. In this case, the calculated pension is increased by 2% (previously by 1%) for each additional year of social security contributions.<sup>17</sup> Despite the higher percentage applied to additional contribution periods, the new calculation rules require the much longer contribution period of 40 years for men, and 35 for women, who want to achieve a 100% replacement rate, whereas previously, only 30 years of contribution were needed.<sup>18</sup>

#### *d) Transition rules*

The Social Security Reform provides for five transition rules to be chosen by workers who have entered the labour market before the reform of CA No. 103/2019 took effect. The text guarantees that employees can always opt for the most advantageous transition rule. Nothing changes for those who are already retired.

Both the Union's General Social Insurance Scheme (RGPS) and the Special Scheme (RPPS) assure the granting of pensions according to the criteria that were in force before the reform, provided that the insurees had already met the requirements previously applicable.<sup>19</sup> The calculation of the benefit amounts is made according to the legislation in force at the time when the requirements were met.<sup>20</sup> There are, however, cases of persons who were insurees at the date the CA came into effect but who have not yet met all the requirements to get the benefit. This situation is provided for in the transition rules which combine different eligibility criteria.

#### ***First transition rule: system of points***

Workers can opt for this rule if they have completed the minimum contribution time of 30 years (women) or, respectively, of 35 years (men). The sum of age and contribution time must reach a minimum quota of 86 points for women and 96 points for men. From 1 January 2020 onwards, 1 point is added each year to the required quota until the sum of 100 points for women and of 105 for men has been reached.<sup>21</sup>

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<sup>16</sup> EC 103/2019, Art. 26 § 1.

<sup>17</sup> EC 103/2019, Art. 26 § 2 and § 5.

<sup>18</sup> See AMARAL; ANSILIERO; COSTANZI, op. cit., p. 4.

<sup>19</sup> EC 103/2019, Art. 3, caput.

<sup>20</sup> EC 103/2019, Art. 3 § 1 and 2.

<sup>21</sup> EC 103/2019, Art. 15 § 1, items I and II.

***Second transition rule: combination of contribution time and minimum age***

This consists in a contribution time of 30 years for women and of 35 years for men. Additionally, the minimum age required is 56 years for women and 61 for men. From 1 January 2020 onwards, 6 months are added each year until the required minimum age has been reached: 62 years for women and 65 for men.<sup>22</sup>

***Third transition rule: minimum contribution time with a 50% reduction of the missing contribution time for near-retirement cohorts***

This rule was designed for insureds of the General Social Insurance Scheme who, when CA No. 103/2019 took effect, were less than two years away from attaining the minimum contribution time (30 years for women; 35 years for men), that is workers with more than 28 years of contribution in the case of women, and more than 33 years in the case of men. Under this rule, women may retire (with no minimum age requirement) after 30 years of contribution and when they meet the requirement of an additional period of 50% of the time left to complete 30 years, whereas men may retire after 35 years of contribution and when they meet the requirement of an additional period of 50% of the time left to complete 35 years.<sup>23</sup> This option entails a significant reduction of the pension benefit due to the application of a special social security factor<sup>24</sup> in the calculation.<sup>25</sup>

***Fourth transition rule: age and reduced contribution time***

This consists in 60 years of age for women, 65 for men and 15 years of contribution time for both. From 1 January 2020 onwards, 6 months are added each year until the required minimum age of 62 years for women has been reached.<sup>26</sup>

***Fifth transition rule: early pension access with extended contribution time***

This consists in the requirement of a minimum age lowered to 57 years for women and 60 for men, 30/35 years of contribution for women/men and completion of an additional contribution period of the time that was missing to reach the minimum contribution time of 30/35 years required under the new rules.<sup>27</sup>

## **2.1.2. Special Retirement Criteria for Public Servants**

### ***a) Public servants of the Union***

As a rule, public servants must observe the same age requirements to retire as private sector insureds covered by the RGPS, namely 62/65 years of age, with a minimum contribution period

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<sup>22</sup> EC 103/2019, Art. 16 § 1, items I and II.

<sup>23</sup> EC 103/2019, Art. 17, sole paragraph, item I and II.

<sup>24</sup> This factor is regulated by Art. 29 §§ 7 to 9 of Law No. 8.213 of 24 July 1991 and takes into account the worker's life expectancy after retiring and is determined by the Institute for Geography and Statistics.

<sup>25</sup> CASTRO; LAZZARI, op. cit. p. 1007.

<sup>26</sup> EC 103/2019, Art. 18, § 1, items I and II.

<sup>27</sup> EC 103/2019, Art. 20, items I, II, III and IV.

of 25 years, 10 years of actual work in the public service and 5 years of work in the position held.<sup>28</sup>

Similar transition rules as for private sector employees have been adopted for the public sector, including a system of points<sup>29</sup> or rules based on extended public service periods.<sup>30</sup>

Generous pension level amounts – equivalent to 100 % of the remuneration in the position held at the time of retirement – are maintained for those public employees who have taken up their actual position by 31 December 2003, have not opted to participate in the Special Social Security Regime (RPPS) created after this date and are at least 62 years of age (women) or, respectively, 65 (men).<sup>31</sup> In other cases, the pension amount shall correspond to 100% of the “benefit salary”, which is calculated according to the simple arithmetical mean of all contribution salaries since July 1994.<sup>32</sup>

#### *b) Teachers*

The rule introduced by the Social Insurance Reform established a minimum age of 57 years for women and 60 for men, of 25 years of contribution time, and exclusive and actual exercising of the teaching profession in preschool, basic or secondary education.<sup>33</sup> The new rule decreased the contribution time for men in comparison with the previous one.<sup>34</sup>

Teachers of federal educational institutions covered by the Special Scheme (RPPS) are subject to eligibility criteria and transition rules similar to those for federal public servants.<sup>35</sup>

The main common feature is the reduced minimum retirement age in the various transition arrangements. In the transitional points-based system, the minimum age is 51 for women and 56 for men (52 and 57 from 2022 onwards).<sup>36</sup>

#### *c) Police Officers*

Police officers organized within the Union’s competence, including federal prison officers and socio-educational agents, can retire at the age of 55 years, with 30 years of contribution time

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<sup>28</sup> EC 103/2019, Art. 10 § 1, item I “a” and “b”.

<sup>29</sup> Cf. EC 103/2019, Art. 4 § 1, § 2, § 3 and items I, II, III, IV and V.

<sup>30</sup> EC 103/2019, Art. 20, items I, II, III and IV, in conjunction with Art. 40 § 16 FC.

<sup>31</sup> Cf. EC 103/2019, Art. 4 § 6, item I, in conjunction with Art. 40 § 16 FC.

<sup>32</sup> EC 103/2019, Art. 20 § 2, items I and II, in conjunction with Art. 26 § 3, item I.

<sup>33</sup> EC 103/2019, Art. 19 § 1, item II, in conjunction with Art. 201 § 8 CF.

<sup>34</sup> See AMARAL; ANSILIERO; COSTANZI, op. cit., p. 5. The increased minimum contribution requirement of 30 years for men is maintained in the different transition regimes for teachers, for instance in the rule combining a minimum contribution time and minimum age for teachers of private institutions, see EC 103/2019, Art. 16, § 2.

<sup>35</sup> See EC 103/2019, Art. 10 § 2, item III.

<sup>36</sup> For the system of points, see EC 103/2019, Art. 4 § 5. The same conditions apply to teachers of private institutions, see EC 103/2019, Art. 15 § 3.

and 25 years of actual work in the relevant position.<sup>37</sup> According to the transition rules, early access to pensions is permitted at an even lower age.<sup>38</sup>

### **2.1.3. Special Pension for Exposure to Harmful Agents**

This pension is granted to insureds that prove the exercise of activities with effective exposure to agents that are harmful to health; characterization as relevant “exposure” by professional category or occupation is prohibited; age requirements are minimum age of 55 years in combination with 15 years of contribution time; or minimum age of 58 years in combination with 20 years of contribution time; or minimum age of 60 years in combination with 25 years of contribution time.<sup>39</sup> The previously existing more favourable regulation on taking account of such periods is guaranteed for RGPS insureds as far as the time completed at the date when CA 103/2019 entered into force is concerned.<sup>40</sup> The calculation basis for the benefit is the same as for old-age pension, but with the addition of 2% for the time that exceeds 15 years in the job.<sup>41</sup>

Specific eligibility and transition rules apply to federal public servants following exposure to harmful agents.<sup>42</sup>

### **2.1.4. Pension for Permanent Work Incapacity (Invalidity Pension)**

The new wording of Art. 201 I of the FC alters the designation of the benefit to pension for “permanent incapacity for work”. The major changes concern the calculation rules which are the same as for old-age pensions. Pensioners receive 60% calculated on their contribution salaries<sup>43</sup> plus 2% for each year that exceeds 20 years of contribution for men or, respectively, 15 years for women.<sup>44</sup> This involves a significant loss of protection for persons incapacitated for work<sup>45</sup>, including a potential reduction of the benefit amount in comparison with the one they may have previously received as sick pay; this violates the prohibition of reducibility of the benefit amount<sup>46</sup> and creates inequality in comparison with temporary incapacity for

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<sup>37</sup> See EC 103/2019, Art. 10 § 2, item I.

<sup>38</sup> EC 103/2019, Art. 5 caput and § 3.

<sup>39</sup> Cf. EC 103/2019, Art. 19 § 1, item I “a”, “b” and “c”, in conjunction with Art. 201 CF § 1, item II.

<sup>40</sup> EC 103/2019, Art. 25 § 2.

<sup>41</sup> EC 103/2019, Art. 26 § 5.

<sup>42</sup> See EC 103/2019, Art. 10 § 2, item II.

<sup>43</sup> The contribution salary is the value on which the contribution rate applies. Currently, the maximum value is R\$ 6,433.57 (about 1000 Euro).

<sup>44</sup> See Art. 26 § 3, item II of CA 103/2019. Only in case of occupational accidents, occupational or work-related illnesses, they receive 100% calculated on their contribution salaries, see Art. 26 § 3, item II of CA 103/2019.

<sup>45</sup> Because they probably receive a benefit calculated on less than 100% of the contribution salaries. In case of an occupational accident, occupational or work-related illness, the benefit remains calculated on 100% of the benefit salaries.

<sup>46</sup> See Art. 194, sole paragraph, item IV FC.

work, which may entitle insured people to receive a benefit of 100% calculated on their contribution salaries.<sup>47</sup>

These standards also apply to federal public employees, but the federal public employees may only retire if vocational rehabilitation is not possible; additionally, they must undergo regular assessments.<sup>48</sup>

### **2.1.5. Pension of Persons with Disabilities**

Until a supplementary act regulating this topic is enacted, this type of pension continues to be granted to persons with disabilities covered by the RGPS and to federal public employees with disabilities, according to the provisions of Supplementary Act No. 142 of 8 May 2013 which also determines the calculation criteria. The disabled public servants of the Union must complete a minimum time of 10 years of actual work in the civil service and 5 in the actual position entitling them to pension.<sup>49</sup> Thus, the criteria and the possibility of retirement in line with age and contribution time previously provided for have been maintained.<sup>50</sup>

### **2.1.6. Survivor's Pension**

The Social Insurance Reform reduced the protection for dependent family members covered by the RGPS or the RPPS. The benefit was lowered from 100% to 50% of what the insurees would be entitled to if they were retired for permanent incapacity on the date of their death.<sup>51</sup> 10% per dependent person are added to this quota up to the limit of 100%.<sup>52</sup> The quotas per dependent will cease with the loss of this quality and will not entail an increase of the benefits paid to the remaining dependents, however the maximum amount of 100% of the pension due to death is guaranteed when there are at least 5 dependents.<sup>53</sup> It is not transition rules that are applied to survivor's pensions, but the rules applicable and in force at the date of death of the insuree.<sup>54</sup> However, the topics of 'applicable legislation' *ratione tempore* and 'possibility of quota reversal' have a great potential for court discussions in cases where the insuree had died before the reform entered into force and dependents lost their protected status after that date.<sup>55</sup>

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<sup>47</sup> See CASTRO; LAZZARI, *op. cit.*, p. 1153 et seq.

<sup>48</sup> EC 103/2019, Art. 10, item II.

<sup>49</sup> EC 103/2019, Art. 22 caput, in conjunction with Art. 201 § 1, item I CF; Art. 40 § 4-A CF.

<sup>50</sup> CASTRO; LAZZARI, *op. cit.*, p. 1071 et seq.

<sup>51</sup> See Art. 23 caput of CA 103/2019. It is necessary to take the pension for permanent incapacity as a guide and realize that not all cases involve the receipt of 100% of the contribution salary.

<sup>52</sup> EC 103/2019, Art. 23 caput.

<sup>53</sup> EC 103/2019, Art. 23 § 1.

<sup>54</sup> CASTRO; LAZZARI, *op. cit.*, p. 1186.

<sup>55</sup> CASTRO; LAZZARI, *op. cit.*, p. 1214.

If there is an incapacitated dependent or a dependent with intellectual, mental or severe disability, the amount of the survivor's pension is equal to 100% of the old-age pension received by the insured, up to the maximum benefit limit of the RGPS.<sup>56</sup>

The reform stipulates that, for the purpose of survivor's pension, only stepchildren or minors under tutelage are equated with own children, provided that there is evidence of economic dependence, whereas minors under guardianship are not mentioned.<sup>57</sup> As the provision does not cover this vulnerable group of minors, it is not in conformity with the duty to protect children, adolescents and youth provided for in Art. 227, caput of the Constitution.<sup>58</sup>

Regarding police officers organized within the Union's competence, including federal prison officers and socio-educational agents, the survivor's pension for spouses and life partners shall be life-long and equivalent to the remuneration of the deceased's former position, when the death is the result of an assault suffered by the deceased insured while performing his or her job.<sup>59</sup>

### **2.1.7. Accumulation of Pensions or Survivor's Pensions**

As a general rule, the accrual of more than one survivor's pension of one Social Insurance Regime is prohibited, except for positions that may be held simultaneously according to the Constitution. However, three situations are provided for: accrual of survivor's pensions from the RGPS with pension from the RPPS or with pension from military service; of survivor's pension with pension of the RGPS or RPPS or pension payments from military service after active service; of pension from military service with pensions from the RGPS or RPPS. The beneficiary receives 100% of the highest benefit, added to a percentage of the total amount of the other benefits: 10% of the amount that exceeds four minimum wages; 20% of the amount that exceeds three minimum wages up to four; 40% of the amount that exceeds two to three minimum wages; and 60% of the amount that exceeds one to two minimum wages.<sup>60</sup> According to some scholars, the provisions limiting the accumulation of benefits should be applied to all RPPSs rather than only to those of the Union.<sup>61</sup>

### **2.1.8. Family Benefits**

The general family benefit is a social insurance benefit paid on a monthly basis to low-income workers according to the number of children up to the age of 14 or for disabled dependent

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<sup>56</sup> EC 103/2019, Art. 23 § 2, items I and II.

<sup>57</sup> EC 103/2019, Art. 23 § 6.

<sup>58</sup> CASTRO; LAZZARI, op. cit., p. 1204.

<sup>59</sup> EC 103/2019, Art. 10 § 6.

<sup>60</sup> EC 103/2019, Art. 24 § 1 and § 2.

<sup>61</sup> RIBEIRO; QUIRINO. *Reforma da Previdência Comentada*. 2020, p. 131.

family members without age limit. The gross monthly income of the insuree must not exceed R\$ 1.364,63, and the entitlement is limited to R\$ 46.54 per child.<sup>62</sup>

The special imprisonment benefit<sup>63</sup> is granted only to those insurees who have a gross monthly income equal to or of less than R\$ 1.364,63, which is adjusted by the RGPS's rates<sup>64</sup>. The calculation of the benefit is the same as the one applicable to the survivor's pension but cannot exceed one minimum wage.<sup>65</sup> The income limit for eligibility is higher than previously. The limitation of the benefit value to the minimum wage is new. The linking of the benefits calculation to the method used in the survivor's pension is also new and probably reduces the benefit to a value below the minimum wage, which is highly controversial in constitutional terms.

### 2.1.9. Assessment of the Social Insurance Reform

Brazil is following the international trend toward pension reforms with more restrictive access criteria, but has refrained from a Chilean-style structural reform. As we could see, in Brazil the minimum age is combined with the minimum time of contribution, which guarantees only a pension of 60% of average salaries. To increase this percentage, the worker has to continue working after the minimum contribution time, and for each year, he receives 2% additionally. This calculation method causes a significant reduction in the value of pensions in Brazil. Yet a certain minimum standard is essential for persons receiving an old-age pension, a pension for permanent work incapacity, and a pension granted under special rules.

Among the special rules, for example concerning occupational accidents, occupational or work-related illnesses, the calculation of the pension for permanent work incapacity is based on 100% of the average salaries. If special rules do not apply, the calculation is based on only 60% of average salaries and, if applicable, 2% for each additional year above the minimum contribution time. This calculation rule also applies to non-work-related accident or illness (see 2.1.4. Pension for Permanent Work Incapacity). The survivor's pension takes this as a basis for its calculation. The family quota of 50% plus 10% per dependent is possibly calculated on not much more than 60% of average salaries. In this case, the reduction could be impressive.

Diverse or additional standards are established according to the special provision for federal public servants, teachers, police officers, and for the special pension for exposure to harmful agents. Some of the special rules can be attributed to pressure from well-organized social

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<sup>62</sup> EC 103/2019, Art. 27 § 2.

<sup>63</sup> The "*auxílio-reclusão*" is a social insurance benefit to support dependent family members of insurees in prison.

<sup>64</sup> The social security benefits are updated annually based on the National Consumer Price Index (INPC), and the new values are made official every year through an ordinance. For example, the ordinance SEPRT/ME nº 477 (Portaria SEPRT/ME nº 477), for the year 2021.

<sup>65</sup> EC 103/2019, Art. 27 § 1.

groups.<sup>66</sup> Although the special provisions have the general RGPS rules as a reference, the maintenance of special rules impacts the harmonization of the pension system.

Initially, the reform was to apply to public servants at federal, state, and municipal level. However, due to difficulties related to political negotiation, the reform now applies only to the federal public servants.<sup>67</sup> Each federated entity has its separate RPPS and states, municipalities, and the Federal District must each approve their own reform. In Brazil, there are more than two thousand RPPS. To approve these reforms is a big challenge.<sup>68</sup> The pension reform did not touch the retirement of the armed forces' military staff, a public service covered by a specific legislation approved in 2019 granting retirement with full salary and no minimum age. The voting was symbolic because it had already been agreed upon, and the bill's processing was swift (only 8 months).<sup>69</sup>

There were indeed catastrophic projections about the financial situation of the Brazilian Pension System with a significant impact of an increased percentage of older adults. However, Brazil has historical problems: (1) For a long time, the revenues of social contribution were invested instead of used for benefits or to form reserve funds. The construction of Brasília as the new capital (1957-1960) and stadiums for the Soccer World Cup 2014 are two examples, and it is not clear if these projects had any positive effect on social security in Brazil<sup>70</sup>. (2) There are exemptions of social contributions for some sectors of the economy<sup>71</sup>. (3) The social security budget is also being overburdened with the payment of benefits from the RPPS and military medical expenses.<sup>72</sup> (4) For many years it had been possible to divert social contribution revenues in order to use them for other purposes.<sup>73</sup> This option was finally closed by EC 103/2019.<sup>74</sup> (5) The INSS seems to be a bad payer: Pension recipients complain about lengthy disputes with the social security agency because it tends to go through all judicial instances and to use all possible appeals. However, in the end, INSS has to pay much more

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<sup>66</sup> See for example: AZEVEDO; TORRES; TUNES. Sob pressão de categorias, reforma da Previdência pode mudar ainda mais. *Correio Braziliense*. 16 June 2019.

<sup>67</sup> Among other factors, we noted that 2019 was the year before the municipal elections.

<sup>68</sup> AMARAL; ANSILIERO; COSTANZI, op. cit., p. 3.

<sup>69</sup> TIMÓTEO, Antonio. Senado aprova aposentadoria militar com salário integral e sem idade mínima. Brasília: UOL, 12 May 2019.

<sup>70</sup> See: LAZZARI; CASTRO; ROCHA, et al., op. cit., 2020, p. VII et seq.; BARBOSA, Grenzziehung und Verhältnis zwischen der privaten Krankenversicherung und der öffentlichen Absicherung gegen Krankheit in Deutschland und in Brasilien, 2018, p. 134 et seq.

<sup>71</sup> There is, for example, a payroll tax exemption, which was a great discussion in 2020. The government did not want to renew the measure, however the congress approved it. Important sectors of the Brazilian economy do not have to pay 20% contribution on payroll, but instead just between 1% and 4.5% of their gross income. This applies, for example, to civil construction, road and metro rail transport, communication, information technology. The arguments are, on the one side, the labor costs and, on the other side, the limits of the fiscal budget. See for example: AZEVEDO, Alessandra. Votação do veto à desoneração da folha é adiada e não tem data definida. *Correio Braziliense*. 1 October 2020.

<sup>72</sup> See: LAZZARI; CASTRO; ROCHA, et al., op. cit., 2020, p. VII et seq.

<sup>73</sup> See: BARBOSA, op. cit., p. 193 et seq.

<sup>74</sup> See below: [3.1. Interventions Regarding the Financial Basis of Social Security](#).

due to currency updates.<sup>75</sup> The pension reform is just one step with minimum impact as long as Brazil's administration of social security does not assume a responsible profile.

The constitutionality of this reform is being discussed in the Brazilian Judiciary. As shown in section [4.1.1](#), "Lawsuits Against the 2019 Social Insurance Reform", it is noteworthy that most lawsuits are filed to discuss the impact of reform on the special schemes (RPPS) and just two are mainly dedicated to the general scheme RGPS. This seems to indicate a greater mobilization of public employees. In fact, it can be said that the promises to reduce inequality and poverty through the pension reform are perhaps more of a symbolic nature than a reality.

## 2.2. Coping with COVID-19 and its Social Consequences

The effects of the pandemic cut across society and demanded responses from the national, state and municipal legislative powers. The fact that 43,115 municipal laws and 2,056 state laws on the new coronavirus have been created indicates an intensive legislative activity.<sup>76</sup> Data from the federal legislative power show that 74 bills have already become laws.<sup>77</sup>

### 2.2.1. Measures to Protect Employment and Wages

Act No. 14.043/2020 instituted an *Emergency Job Support Program* that basically consists in the concession of credit for the payment of salaries and mandatory labor charges to employers (businesses, general partnerships, companies, cooperative corporations, civil society organizations and rural employers) that have an annual gross income higher than R\$ 360,000 and up to R\$ 50 million. The credit may cover the whole payroll, but it is limited to 4 months and 2 minimum wages per employee. These amounts are earmarked for this purpose and the employers may not discharge employees without cause before a period of 60 days after the last loan tranche has been released. According to Art. 7, the credit concession policies remain in force. An amount of R\$ 17 billion was allocated to this program.<sup>78</sup>

Provisional Measure No. 936 of 1 April 2020, subsequently inserted into Act No. 14.020/2020, established the *Emergency Program for the Maintenance of Employment and Income (Programa Emergencial de Preservação do Emprego e da Renda – BEM)*. It was aimed at preserving employment and employee income; ensuring the continuity of work and business activities; and reducing social impacts (Art. 2). The program provided for a proportional reduction of working hours and the salary, or the temporary suspension of the employment

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<sup>75</sup> See: LAZZARI; CASTRO; ROCHA, et al., op. cit., 2020, p. VII et seq.

<sup>76</sup> Data collected from Portal Leis Municipais: <https://leismunicipais.com.br/coronavirus>. Accessed on 24/03/2021.

<sup>77</sup> Counting made by the author based on the list available on the Panel "Combate ao Coronavírus" of the Chamber of Deputies. BRASIL. Câmara dos Deputados. *Combate ao Coronavírus*. Available at: <https://www.camara.leg.br/internet/agencia/infograficos-html5/procorona/index.html>. Accessed on 24/03/2021.

<sup>78</sup> BRASIL. *Lei 14.043, de 19 de agosto de 2020 (Lei 14.043/2020)*.

contract, and for a special emergency benefit (BEM) to compensate for the loss of income incurred (Art. 5, I and II).<sup>79</sup> The monthly benefit is granted to employees on a temporary basis during the period of reduced salary (up to 90 days) or the suspension of the labor contract (up to 60 days) at the corresponding level of the unemployment insurance benefit to which the worker would be entitled (Art. 6). Under the emergency legislation, the agreement on the reduction of working hours and salaries (Art. 7, I) and temporary suspension of the employment contract could be stipulated by an individual agreement between the parties without any collective agreement (Art. 8, § 1).<sup>80</sup>

The Brazilian government also established *special labor regulations to cope with the state of public emergency and to preserve the employment relationship*: (1) possibility of written individual agreements between employer and employee which will take precedence over other norms and are limited only by the Constitution; (2) possibility of remote working (home office); (3) possibility of anticipation and use of individual vacations; (4) possibility of concession of collective vacations; (5) possibility of extended banking of hours; (6) suspension of administrative requirements for safety and health at work; (7) referral of workers for additional training (8) deferment of the payment of the employee federal severance fund (Guarantee Fund for Length of Service (FGTS)).<sup>81</sup> These measures<sup>82</sup> were in force until 19 July 2020.<sup>83</sup>

### 2.2.2. Minimum Income Support for Vulnerable Groups

The Continuous Cash Benefit (Benefício de Prestação Continuada, BPC) of the Organic Law of Social Assistance (Lei Orgânica da Assistência Social, LOAS) guarantees a monthly minimum wage to older persons or persons with a disability who can prove that they do not have the means to provide for their own maintenance, nor to have it provided for by their family. To be eligible, the income per person in the family group must be less than 1/4 of the minimum wage. Act No. 13.981/2020 raised the limit of per capita family income to half the minimum wage to receive the Continuous Cash Benefit. The National Congress rejected the President's veto against a higher income limit. The issue is under discussion at the FSC and the application of the alteration is suspended. In a provisional examination the Court did not recognize any exception to the rule of specifying the funding source for the increase in benefits, especially

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<sup>79</sup> The matter is still being discussed at the FSC, but the analysis of a provisional measure by the full court is already favorable to the measures: BRASIL, STF, ADI 6363 MC-Ref/DF.

<sup>80</sup> BRASIL. *Lei 14.020, de 06 de julho de 2020*. Trade union participation was limited to an obligation of information about such individual agreements.

<sup>81</sup> BRASIL. *Medida Provisória 927, de 22 de março de 2020*.

<sup>82</sup> The matter is still under discussion by the FSC. In the analysis of the provisional measure by the full Court only two aspects were suspended, viz. the requirement for the evidence of a causal connection so that contamination by the coronavirus can be considered an occupational occurrence and the suspension, for 180 days, of the activity of labor tax auditors: BRASIL, STF, Ref-MC/DF ADI 6342.

<sup>83</sup> BRASIL. *Ato Declaratório do Presidente da Mesa do Congresso Nacional 92, de 2020*.

considering its continuous and permanent character.<sup>84</sup> After this, Act No. 13.982/2020 introduced an additional restrictive parameter for assessing the social vulnerability of persons eligible, limited for the time up to 31 December 2020. Nevertheless, to facilitate access to the BPC benefit during the pandemic, the threshold of the per capita income may be raised to half the minimum wage, taking into account a regulation that takes into consideration (1) the degree of disability; (2) dependence on third parties for basic activities; (3) personal, familial, environmental and socioeconomic factors that diminish full participation in society; (4) expenditures for health care, diapers and special foodstuffs that are not made available by public systems.<sup>85</sup>

The same Act also established an *emergency grant* of R\$ 600.00 per month, initially for a three-month period, for independent or informal workers with a monthly per capita income of less than half the minimum wage and a household income of less than three times the minimum wage. Eligible workers must be older than 18 years of age, with the exception of adolescent mothers; do not have a formal active employment; receive no other benefit from social insurance, social welfare, unemployment insurance or other federal income transfer programs, with exceptions related to the Family Allowance Program. In addition, their taxable income must not have exceeded R\$ 28,559.70 in 2018. The target group includes individual micro-entrepreneurs, individual contributors to the RGPS or informal workers registered at the Single Registry of Social Programs of the federal government on the basis of a self-declaration.<sup>86</sup> Subsequently, the benefit was extended until 31 December 2020 but with a monthly amount reduced to R\$ 300.00.<sup>87</sup>

The cultural sector is one of the most severely affected by the containment measures during the pandemic. Act No. 14.701/2020 provided special support for workers in this field. The support consisted in (1) a monthly emergency income in the amount of R\$ 600.00 (Art. 5); (2) the maintenance of spaces and institutions with an amount of between R\$ 3,000.00 and R\$ 10,000.00; (3) incentive to and support of productions transmitted through digital platforms. One of the conditions to receive the monthly emergency aid is to demonstrate the absence of an active formal employment (Art. 6, item II). Furthermore, the Act also establishes income limits (Art. 6, items IV and V), among others.<sup>88</sup> For this program, the states, municipalities and the Federal District have been allocated an amount of R\$ 3 billion (Art. 2, items I, II and III).

Some concerns emerged regarding a concentration of benefit cuts of the Family Allowance Program observed in the northeast of Brazil. In a provisional decision, the Supreme Court requested the Union to provide data explaining these benefit cuts which contradicted the

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<sup>84</sup> BRASIL. *Lei 13.981, de 23 de março de 2020 (Lei 13.981/2020)*. BRASIL, STF, ADPF 662 MC/DF.

<sup>85</sup> BRASIL. *Lei 13.982, de 02 de abril de 2020*.

<sup>86</sup> BRASIL. *Lei 13.982, de 02 de abril de 2020*.

<sup>87</sup> BRASIL. *Medida Provisória 1000, de 02 de setembro de 2020*.

<sup>88</sup> BRASIL. *Lei 14.017, de 29 de junho de 2020 (Lei 14.017/2020)*.

principle of equal treatment of the federated entities and the suspension of benefit cuts during the state of public emergency.<sup>89</sup>

### 2.2.3. In-Kind Benefits and Social Services

The responses to the COVID-19 pandemic included also in-kind transfers and the provision of basic services:

To prevent contagion and dissemination of COVID-19 in indigenous territories, Act No. 14.201/2020 established social protection measures based on the *Emergency Plan for the Fight against COVID-19* in these territories, comprising in particular support measures for the communities of *quilombolas* (Afro-Brazilian residents of settlements first established by escaped slaves in Brazil until the abolition of slavery in 1888), artisanal fishermen and other traditional groups and communities. It set forth interventions designed for isolated indigenous peoples and those indigenous who came in contact with the outside world only recently, as well as those who live inside or outside of indigenous territories (see Art. 11 and following).<sup>90</sup>

The Act dealt with the provision of drinking water, materials for hygiene, disinfection and cleaning; the use of adequate tests, medicines and equipment; the provision of services for indigenous peoples by adapting structures available in urban centers; transportation of indigenous peoples by water, land or air; building of field hospitals close to the most severely affected communities; establishment of protocols to enter indigenous territories; social participation of and control by indigenous peoples; distribution of food staples.<sup>91</sup>

From April to July 2020, a 100% discount on electricity consumption below 220 kWh/month was granted for low-income households. The Union allocated R\$ 900 million to cover the granting of this discount.<sup>92</sup>

The distribution of foodstuffs through the National School Feeding Program (PNAE) to parents or guardians of students of public basic education schools was authorized during the period when classes were suspended.<sup>93</sup>

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<sup>89</sup> BRASIL, STF, ACO 3359 Ref-MC/DF.

<sup>90</sup> BRASIL. *Lei 14.021, de 07 de julho de 2020 (Lei 14.021/2020)*.

<sup>91</sup> Lei 14.021/2020, Art. 5 and Art. 9 § 3.

<sup>92</sup> BRASIL. *Medida Provisória 950, de 08 de abril de 2020*.

<sup>93</sup> BRASIL. *Lei 13.987, de 07 de abril de 2020 (Lei 13.987/2020)*.

### 3. ORGANIZATION, ADMINISTRATION AND FINANCING ISSUES

#### 3.1. Interventions Regarding the Financial Basis of Social Security

Constitutional Amendment No. 103/2009 attempted to strengthen the financial resources of the social insurance system by eliminating the possibility of decoupling revenues obtained through social security contributions for other purposes, which is known as the “Untying of Federal Revenues (DRU)”, and decreased the amount of resources allocated from the Social Integration Program (PIS) and the Public Service Employee Fund (PASEP) to the National Bank of Economic and Social Development (BNDES).<sup>94</sup> The binding of social contributions to social security purposes was an important initiative, as it leads towards a more consistent system. In this way, more resources are made available to finance social insurance, health care and social welfare.

Act No. 13.932/2019 established the possibility of (1) withdrawing the total balance from PIS-PASEP (Social Integration Program (PIS) and Public Service Employee Fund (PASEP)) by holders; (2) annually withdrawing from the account connected to the Guarantee Fund for Length of Service (FGTS)<sup>95</sup> in the employee’s birthday month, at a rate ranging from 50% of the lowest balance to 5% of the highest; (3) withdrawing up to R\$ 500.00 per account until 31 March 2020 (Art. 6, caput). The amount is automatically credited to the holder’s savings account and in case the former is opposed to this, (s)he must require the operation to be undone (Art. 6, § 3). The Act also extinguished the additional social security contribution of 10% owed by employers in the case of discharge without cause.<sup>96</sup> These measures aim to assure more financial resources for the private economy and reduce the costs with the workforce in Brazil.

The PIS is a social contribution from enterprises.<sup>97</sup> This contribution was created for funding social security, unemployment insurance and one bonus on wages. The FC provides a bonus of one minimum wage per year for workers earning up to two minimum wages.<sup>98</sup> Therefore, this contribution is bound to social security but with great flexibility in its use.<sup>99</sup>

On 31 May 2020, the PIS-PASEP fund was extinguished. The amounts corresponding to individual workers were transferred to accounts connected to the FGTS. The holders were also

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<sup>94</sup> EC 103/2019, Art. 2 and Art. 239 § 1 FC, with the wording given by Art. 1 EC 103/2019.

<sup>95</sup> This fund was created in 1966 to provide severance payments to workers on account of their time of service, and to finance urban development. The FTGS is funded by monthly deposits of the employer, equivalent to 8% of the employee’s salary, and can be accessed mainly if the worker is dismissed without just cause or when the employment relation is terminated. It is a mandatory benefit of the employer, with functions similar to unemployment insurance or to an occupational pension.

<sup>96</sup> BRASIL. *Lei 13.932, de 11 de dezembro de 2019 (Lei 13.932/2019)*.

<sup>97</sup> See CASTRO; LAZZARI, *op. cit.*

<sup>98</sup> See Art. 239 caput and § 2 FC.

<sup>99</sup> Some basic remarks on the complex (and confusing) Brazilian system of social contribution may be found in BARBOSA, *op. cit.*, p. 130 et seq.

authorized to withdraw, from 15 June to 31 December, an amount of up to R\$ 1,045.00 from their FGTS-connected accounts.<sup>100</sup> The funds PIS-PASEP and FGTS have the similar purpose of forming a savings account for the worker. However, since 1989 the revenues of PIS-PASEP are not being transferred to worker's accounts because the Federal Constitution introduced a new destination for these financial resources (Art. 239 FC). The transfer of the remaining resources of PIS-PASEP to the FGTS individual account of the worker is a measure to improve administrative effectiveness. The possibility of withdrawing these resources is a measure to make more money available in the private economy and assure financial support to workers during the pandemic.<sup>101</sup>

### 3.2. Containment Measures and Public Finances during the COVID-19 Pandemic

The pandemic's impact on the budget is enormous. From the Union's budget the following amounts, in billion Real (R\$ = Brazilian currency), were allocated in 2020: (i) R\$ 229.91 for emergency aid to the population; (ii) R\$ 63.04 for residual emergency aid (continuity of the emergency aid in lower amounts); (iii) R\$ 60.15 for financial aid to the other federated entities; (iv) R\$ 58.09 to support micro, small and mid-size enterprises; R\$ 43.93 to cope with emergencies in the public health care system; (vi) R\$ 15.1 to supplement the Participation Funds of the other federated entities.<sup>102</sup>

#### 3.2.1. Derogations from Ordinary Budget Rules of the Federation

For 2020, a *Federative Program for the Fight against the Coronavirus SARS-CoV-2* (COVID-19) was established. It comprehends the following: (1) suspension of payment of the debt contracts between the federated entities; (2) restructuring of internal and external credit operations, including an easing of the demands applicable by the Union; (3) transfer of resources from the Union to states, municipalities and the Federal District in four tranches totaling R\$ 60 billion. It should be stressed that the Union demands that federated entities discontinue lawsuits that may have been filed after March 20 and involve the pandemic. It also established that during the period of public emergency the restraints of the *Fiscal Responsibility Act* will be suspended as regards the increase of expenditures and the sources of estimated revenues related to the measures designed to cope with the pandemic.<sup>103</sup>

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<sup>100</sup> BRASIL. *Medida Provisória 946, de 07 de abril de 2020*. The provisional presidential decree lost its effectiveness and there is no information about its conversion into a law. BRASIL. *Ato Declaratório do Presidente da Mesa do Congresso Nacional 101, de 2020*.

<sup>101</sup> For more details see: BRASIL. *Medida Provisória 946/2020. Exposição de motivos*. Available at: [http://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2020/Exm/Exm-MP-946-20.pdf](http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/Exm/Exm-MP-946-20.pdf). Accessed on 28/07/2021.

<sup>102</sup> BRASIL. Câmara dos Deputados. *Coronavírus*. Available at: <https://www.camara.leg.br/temas/coronavirus>. Accessed on 24/03/2021.

<sup>103</sup> BRASIL. *Lei Complementar 173, de 27 de maio de 2020*.

The prospect of a decrease of the Union's tax revenues and of a significant impact on the amounts received by states, municipalities and the Federal District through the Participation Funds led the Union to establish an aid designed to cover those losses in comparison with the amounts received in 2019. The total amount of the aid is R\$ 16 billion, which are distributed according to the criteria set by Act No. 14.041/2020.<sup>104</sup>

The Federal Supreme Court's (FSC) position was that the federated entities that declared a public emergency due to the COVID-19 pandemic were not required to demonstrate budgetary adjustment or compensation for the creation or expansion of public programs to address the crisis.<sup>105</sup> At the legislative level, CA No. 106/2020 instituted an extraordinary fiscal, financial and contractual scheme to meet the needs that was limited to the period of public emergency.<sup>106</sup> However, the FSC stressed the transitory character of the easing and its targeting at the fight against the pandemic and prohibited the assumption of continuous expenditures. In this sense, it decided against the claim of a state governor who had intended to suppress the restraints on expenditures with human resources, contracting, an increase in wages and fringe benefits for health care workers.<sup>107</sup>

States, municipalities and the Federal District were authorized to shift and transfer surpluses from prior periods: first, with respect to transfers from the Department of Health contained in their health funds,<sup>108</sup> and second, with respect to surpluses originating in federal transfers through the National Fund for Social Welfare. These funds are exclusively intended for use in emergency social protection actions aimed at homeless persons or persons in a state of extreme vulnerability due to the public emergency, as well as for the expansion of the Social Registry.<sup>109</sup>

Act No. 14.018/2020 provided for the allocation of R\$ 160 million from the Union to long-term care institutions for the elderly as an emergency aid.<sup>110</sup>

### **3.2.2. Financing of Interventions in Public Health**

Act No. 13.995/2020 established the possibility of granting financial support to non-profit-making mercy and philanthropic hospitals that play a role supplementary to the Single Health

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<sup>104</sup> BRASIL. *Lei 14.041, de 18 de agosto de 2020*. BRASIL. *Exposição de Motivos da Medida Provisória 938, de 02 de abril de 2020*.

<sup>105</sup> BRASIL. STF. ADI-6357 MC-Ref/DF.

<sup>106</sup> BRASIL. *Emenda Constitucional (EC) 106, de 07 de maio de 2020*.

<sup>107</sup> BRASIL. STF. ADI 6394.

<sup>108</sup> BRASIL. *Lei Complementar 172, de 15 de abril de 2020*.

<sup>109</sup> BRASIL. *Lei 14.029, de 28 de julho de 2020 (Lei 14.029/2020)*.

<sup>110</sup> BRASIL. *Lei 14.018, de 29 de junho de 2020 (Lei 14.018/2020)*.

System (SUS) so that they are able to act in coordination with the SUS operators in the fight against the pandemic. The emergency aid to be distributed may amount to R\$ 2 billion.<sup>111</sup>

Without excluding the possibility of adopting other alternatives and the need to fulfill minimum formalities, the Executive Power was authorized to adhere to the Global Access to Vaccines Tool called “COVID-19 – Covax Facility,” an international initiative to facilitate access to safe and effective vaccines administered by the Gavi Alliance. The institution’s key partners are the World Health Organization, UNICEF, the World Bank and the Bill and Melissa Gates Foundation.<sup>112</sup> The estimated amount of resources to be made available for this purpose is R\$ 2,513 billion.<sup>113</sup>

In December 2020, an extraordinary credit line of R\$ 20 billion was opened for the Ministry of Health to cope with the emergency in public health<sup>114</sup> and an amount close to R\$ 1.9 billion, also designed to face the crisis, was allocated to Fiocruz, an acknowledged national institution of research on and production of vaccines.<sup>115</sup> The responsibilities of the Ministry of the Economy, Ministry of Citizenship and Ministry of Health concerning the demands for social protection in the fight against the epidemic were also defined.<sup>116</sup>

### 3.3. Organization of Sanitary Surveillance during the Pandemic

The COVID-19 pandemic had a significant impact on the federative organization of health care services, particularly as far as sanitary surveillance is concerned. The health crisis started to become more intensive in March 2020. The federal government recognized the state of public emergency through Legislative Decree No. 6 of 20 March 2020.<sup>117</sup> States and municipalities also formally recognized the situation.<sup>118</sup> Initially, there was no extensive planning, including criteria for the division of states into geographical areas, enabling stricter measures in areas with a higher exposure, nor an establishment of guidelines for the suspension or resumption of activities. Later, there was improvement concerning these criteria, but with variations among the federated entities.<sup>119</sup> These variations are due to (1) a weak national coordination; (2) a strong leadership by the states; and (3) a conflict between the President and his Health

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<sup>111</sup> BRASIL. *Lei 13.995, de 05 de maio de 2020 (Lei 13.995/2020)*.

<sup>112</sup> BRASIL. *Medida Provisória 1.003, de 24 de setembro de 2020*. GAVI, the Vaccine Alliance. *About our Alliance*. Available at: <https://www.gavi.org/our-alliance/about>. Accessed on 07/12/2020.

<sup>113</sup> BRASIL. *Exposição de Motivos. Medida Provisórias 1.003/2020*.

<sup>114</sup> BRASIL. *Medida Provisória 1.015, de 17 de dezembro de 2020*.

<sup>115</sup> BRASIL. *Lei 14.107, de 03 de dezembro de 2020*.

<sup>116</sup> BRASIL. *Resolução 10, de 25 de novembro de 2020*.

<sup>117</sup> BRASIL. *Decreto Legislativo 6, de 20 de março de 2020*.

<sup>118</sup> PEREIRA; OLIVEIRA; SAMPAIO, Heterogeneidades das políticas estaduais de distanciamento social diante da COVID-19: aspectos políticos e técnico-administrativos. *Rev. Adm. Pública*, vol. 54, Nr. 4, jul./ago. 2020.

<sup>119</sup> MORAES; SILVA; TOSCANO, *Covid-19 e Medidas de Distanciamento Social no Brasil: Análise Comparativa dos Planos Estaduais de Flexibilização*. Nota Técnica 25. Dinte. Instituto de Pesquisa Econômica Aplicada (Ipea). August 2020.

Minister at the beginning of the pandemic and later between the President and governors. The latter focused on public health and the former on the protection of the economy.<sup>120</sup>

In spite of disputes in the political arena, some measures were taken, viz. measures (a) of social isolation and distancing; (b) of increasing the capacity of health care services; and (c) of economic aid to citizens and businesses.<sup>121</sup> Act No. 13.979/2020 regulates the more direct coping with the pandemic through norms regarding isolation and quarantine, compulsory use of masks, epidemiological study and handling of corpses, tests, treatments and vaccines, restrictions on movement, essential activities, public procurement as well as more flexible rules for tendering and import.<sup>122</sup>

The following points have to be highlighted: (i) actions of three federal ministries to issue provisions on restrictions in roads, ports and airports and on the need for technical recommendation<sup>123</sup> by the National Agency of Sanitary Surveillance (ANVISA) (on entering and leaving the country and on interstate movement) or by the state surveillance agency (on inter-municipal movement); (ii) duty of the public-utility public transportation companies to make sure masks are worn;<sup>124</sup> (iii) duty of cooperation by the private sector: compulsory use of masks at the national level, in spaces of public access, on public roads and streets, in remunerated transportation and at venues of meetings;<sup>125</sup> provision of masks by employers;<sup>126</sup> duty of disinfecting surfaces and tools and provision of hand sanitizer;<sup>127</sup> duty of reporting to the authorities;<sup>128</sup> (iv) duty of establishing and regulating fines (including grades) by the federated entities;<sup>129</sup> (v) recognition of the need for handling situations of domestic violence against women, children, adolescents, older persons and persons with disabilities as an essential public service<sup>130</sup> and recognition that restrictions should not hamper the supply of products.<sup>131</sup>

Administrative Rule No. 758 of 9 April 2020 established the procedure for the compulsory registration of hospital admissions of cases in which there is suspicion or confirmation of

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<sup>120</sup> PEREIRA; OLIVEIRA; SAMPAIO, op. cit.

<sup>121</sup> PIRES, *Os Efeitos sobre Grupos Sociais e Territórios Vulnerabilizados das Medidas de Enfrentamento à Crise Sanitária da COVID-19: Propostas para o Aperfeiçoamento da Ação Pública*. Nota Técnica 33. Diest. Instituto de Pesquisa Econômica Aplicada (Ipea), April 2020.

<sup>122</sup> BRASIL. *Lei 13.979, de 06 de fevereiro de 2020 (Lei 13.979/2020)*.

<sup>123</sup> Lei 13.979/2020, Art. 3 § 6 and § 6-B.

<sup>124</sup> Lei 13.979/2020, Art. 3-G.

<sup>125</sup> Lei 13.979/2020, Art. 3-A, items I, II and III.

<sup>126</sup> Lei 13.979/2020, Art. 3-B § 1, § 2, in conjunction with Art. 3-C.

<sup>127</sup> Lei 13.979/2020, Art. 3-H.

<sup>128</sup> Lei 13.979/2020, Art. 5.

<sup>129</sup> Lei 13.979/2020, Art. 3-A § 1, § 2, § 6 and § 7, in conjunction with Art. 3-C; Art. 3-B § 1, § 2, in conjunction with Art. 3-C; Art. 3-G sole paragraph; Art. 3-H.

<sup>130</sup> Lei 13.979/2020, Art. 3 § 7 C.

<sup>131</sup> Lei 13.979/2020, Art. 3 § 7 C, § 9 and § 11.

COVID-19 at the public and private institutions that provide services for the Single Health System (SUS).<sup>132</sup>

Community Reference Centers for the fight against COVID-19 in the sphere of Primary Health Care (APS) were instituted and federal financial support for this purpose was provided for as long as the emergency scenario in public health lasts. These centers must be built by the municipalities in poor residential areas not classified as urbanized according to the Brazilian Institute of Geography and Statistics (IBGE), and must perform an early identification of suspected cases of COVID-19, quickly treat and refer cases, monitor people in home isolation and risk groups, carry out the registration, carry out tests for risk groups, make notifications, provide orientation and disseminate information, and establish partnerships with relevant institutions. If municipalities and the Federal District implement these centers, a modality of funding of R\$ 60,000.00 per month and another one of R\$ 80,000.00, besides an additional per capita incentive, are provided for.<sup>133</sup>

In November 2020, the Crisis Committee on the Oversight and Monitoring of COVID-19 Impacts instituted a work group to coordinate the actions of protection and payment of benefits necessitated on grounds of the pandemic.<sup>134</sup>

## **4. CASE LAW ON THE PROTECTION OF SOCIAL RIGHTS**

### **4.1. Social Insurance**

#### **4.1.1. Lawsuits Against the 2019 Social Insurance Reform**

In the period covered by this report, eleven lawsuits were filed with the purpose of challenging the constitutionality of CA No. 103/2019. Most of them predominantly concern the RPPS system and two of them mainly the RGPS system.<sup>135</sup> The questions raised in these lawsuits dealt with a broad range of provisions, including an increase in mandatory insurance contribution, a tightening of pension access criteria, various forms of discriminatory treatment, various deteriorations in pension eligibility criteria for federal public servants, as well as flaws in the legislative process as such. Controversial provisions under scrutiny concerned:

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<sup>132</sup> BRASIL. Ministério da Saúde. *Portaria 758, de 09 de abril de 2020.*

<sup>133</sup> BRASIL. Ministério da Saúde. *Portaria 1.444, de 29 de maio de 2020.*

<sup>134</sup> BRASIL. *Resolução 11, de 25 de novembro de 2020.*

<sup>135</sup> Survey done on the FSC's News portal: <http://portal.stf.jus.br/listagem/listarNoticias.asp?ori=1>, using the keyword "Reforma da Previdência" and filter selected from 01/11/2019 until 31/12/2020. Accessed on 03/03/2021.

- (1) the institution of an extraordinary social insurance contribution (see Art. 149, § 1, B in the wording given by Art. 1 and Art. 9, § 8 of CA 103/2019) for active, retired public servants and survivor's pension recipients that may be imposed for 20 years;<sup>136</sup>
- (2) the institution of progressive contribution rates (see, for example, Art. 1 of CA 103/2019 [alteration of Art. 179 § 1 and Art. 195 of the FC] and Art. 11 of CA 103/2019);<sup>137</sup>
- (3) the institution of a social insurance contribution in the case of actuarial deficit to be paid by recipients of old-age and survivor's pensions for pension amounts that exceed the minimum wage (see Art. 149, § 1 A in the wording given by Art. 1 of CA 103/2019);<sup>138</sup>
- (4) the repeal of previous transition rules (see Art. 35, items III and IV of CA 2013/2019);<sup>139</sup>
- (5) the annulment of already granted pensions with special counting time (granted by the RPPS to public employees with reciprocal counting of the RGPS) (see Art 25, § 3 of CA 103/2019), forcing the federal public employees to return to work until they have completed the contribution period;<sup>140</sup>
- (6) the differential treatment of women affiliated to the RPPS and to the RGPS in relation to the addition in the pension benefit (see Art. 26, § 5 of CA 103/2019);<sup>141</sup>
- (7) the increase of the contribution period and rates;<sup>142</sup>
- (8) for public servants affected by serious disabling conditions, the abrogation of the contribution levy only on the amounts of pensions and survivor's pensions that exceed the double of the maximum limit of benefits of the RGPS. Thus, this group of pensioners shall henceforth be treated the same way as the other beneficiaries;<sup>143</sup>

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<sup>136</sup> BRASIL. Supremo Tribunal Federal (STF). *STF recebe as primeiras ações contra a Reforma da Previdência*. 19/11/2019. BRASIL. STF. *Entidade de auditores questiona dispositivos da Reforma da Previdência*. 08/04/2020.

<sup>137</sup> BRASIL. Supremo Tribunal Federal (STF). *STF recebe as primeiras ações contra a Reforma da Previdência*. 19/11/2019. BRASIL. STF. *Unafisco Nacional questiona pontos da Reforma da Previdência*. 09/04/2020.

<sup>138</sup> BRASIL. Supremo Tribunal Federal (STF). *STF recebe as primeiras ações contra a Reforma da Previdência*. 19/11/2019. BRASIL. STF. *Entidade de auditores questiona dispositivos da Reforma da Previdência*. 08/04/2020.

<sup>139</sup> BRASIL. Supremo Tribunal Federal (STF). *STF recebe as primeiras ações contra a Reforma da Previdência*. 19/11/2019. BRASIL. STF. *Juizes contestam mudança de regras sobre contagem recíproca promovida pela Reforma da Previdência*. 09/01/2020.

<sup>140</sup> BRASIL. Supremo Tribunal Federal (STF). *STF recebe as primeiras ações contra a Reforma da Previdência*. 19/11/2019. BRASIL. STF. *Juizes contestam mudança de regras sobre contagem recíproca promovida pela Reforma da Previdência*. 09/01/2020.

<sup>141</sup> BRASIL. Supremo Tribunal Federal (STF). *STF recebe as primeiras ações contra a Reforma da Previdência*. 19/11/2019. BRASIL. STF. *Juizes contestam mudança de regras sobre contagem recíproca promovida pela Reforma da Previdência*. 09/01/2020.

<sup>142</sup> BRASIL. STF. *Ação de auditores contra Reforma da Previdência terá rito abreviado*. 09/12/2019.

<sup>143</sup> BRASIL. STF. *Questionado trecho da Reforma da Previdência que revoga isenção a servidores com doença incapacitante*. 26/03/2020.

(9) a reduced pension benefit for public employees who become permanently incapacitated for work due to a serious illness corresponding to only 60% of their average salary with an annual addition of 2% for any period that exceeds 20 years, whereas those who become incapacitated for work due to a labor accident receive 100% of their average salary as pension (see Art. 26, § 3 of CA 103/2019);<sup>144</sup>

(10) the calculation of the amount of the survivor's pension in the case of federal public servants corresponding to a family quota of 50% of the pension or of the amount that the deceased person would have received if (s)he had retired due to permanent incapacity for work at the time of his/her death, with an addition of 10% for each dependent up to 100% (see Art. 23, caput and § 1 of CA 103/2009). Besides the limitation of quotas, the calculation would be based on the last remuneration, which would entail an additional decrease<sup>145,146</sup>

(11) the lack of proper examination of some amendments that were passed without observance of the due legislative process by both Chambers of Congress, so that unexamined provisions ended up being passed.<sup>147</sup> This occurred in case of

- Art. 1 of CA 103/2019, which changed certain provisions of the Constitution;
- Art. 19, § 1, item I, “a”, “b” and “c” of CA 103/2019, which contains transition rules for the retirement of insureds exposed to agents that are harmful to health;
- Art. 20, item IV, which establishes for persons who had entered the public service before the 2019 reform entered into force an additional contribution period corresponding to what was still lacking for the completion of 30 years of contribution in the case of women and 35 for men; and
- Art. 26, which establishes the new calculation method for pensions.<sup>148</sup>

(12) the introduction of a minimum age for a special pension on ground of exposure to agents that are harmful to health and physical integrity: Art. 19, item I, Art. 25, § 2 and Art. 26, § 2, item IV of CA 103/2019.<sup>149</sup> The reasoning here is that the minimum age may force workers to

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<sup>144</sup> BRASIL. STF. *Associação de delegados da PF ajuíza duas ações contra Reforma da Previdência*. 17/04/2020.

<sup>145</sup> The calculation follows the method of the pension for permanent work incapacity: the pensioner would also receive 60% plus 2% for each year that exceeds 20 years of contribution (men) or, respectively, 15 years (women). The same calculation method applies to the 50% per family and 10% additionally for each dependent. It is very complicated for the family if the deceased man or woman has not completed the time required to get a 100% pension. Based on this calculation, the family receives a 50% pension and 10% additionally for each dependent. For example, if the federal public servant died after 20 years of contribution (men) because of a non-work-related accident, and if the servant had just a wife as a dependent, the wife receives a mere 60% calculated on 60% of her husband's average salaries. Here we can see that the problem is not the last remuneration itself, but the criteria for the calculation.

<sup>146</sup> BRASIL. STF. *Associação de delegados da PF ajuíza duas ações contra Reforma da Previdência*. 17/04/2020.

<sup>147</sup> BRASIL. STF. *PT questiona trechos da Reforma da Previdência não aprovados em dois turnos*. 16/12/2019.

<sup>148</sup> BRASIL. STF. *PT questiona trechos da Reforma da Previdência não aprovados em dois turnos*. 16/12/2019.

<sup>149</sup> BRASIL. STF. *CNTI questiona trecho da Reforma da Previdência que exige idade mínima para aposentadoria especial*. 04/02/2020.

remain exposed to risk for a period longer than what is tolerable, thus violating Art. 7, item XXII, of the FC (“reduction of employment-related risks by means of health, hygiene and safety rules”).<sup>150</sup>

The arguments underpinning the claims point to the following:

(i) abusive contribution rates that have a disproportional impact, besides the disproportion between contributions and benefits;<sup>151</sup>

(ii) a lack of consideration of the contributive capacity, of the prohibition of confiscation (Art. 150 of the FC) and of the principle of previous funding (Art. 195, § 5 of the FC);<sup>152</sup>

(iii) the violation of a vested right and of legal certainty due to the retroactive application of tightened conditions to valid benefits, and lack of consideration of the contribution period provided for in special laws or in laws in force prior to CA 19/1998;<sup>153</sup>

(iv) violation of the principle of equality; due to the differential treatment of federal public employees and of state public employees in a similar situation;<sup>154</sup> due to the identical treatment of completely different situations, afforded healthy retired public servants and those with incapacitating illnesses;<sup>155</sup> and due to the unequal treatment given to public employees incapacitated by serious illness and those incapacitated by labor accidents;<sup>156</sup>

(v) non-observance of the principle of irreducibility of salaries of public servants;<sup>157</sup> violation of the protection of families, of human dignity and of the prohibition of social retrogression.<sup>158</sup> Specifically regarding the progressiveness of the contribution rates of public employees, the judge-rapporteur at the FSC denied, in four direct actions for the declaration of unconstitutionality, a preliminary injunction on the matter by (a) arguing that in principle they

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<sup>150</sup> BRASIL. STF. *CNTI questiona trecho da Reforma da Previdência que exige idade mínima para aposentadoria especial*. 04/02/2020.

<sup>151</sup> BRASIL. Supremo Tribunal Federal (STF). *STF recebe as primeiras ações contra a Reforma da Previdência*. 19/11/2019. BRASIL. STF. *Ação de auditores contra Reforma da Previdência terá rito abreviado*. 09/12/2019. BRASIL. STF. *Entidade de auditores questiona dispositivos da Reforma da Previdência*. 08/04/2020.

<sup>152</sup> BRASIL. Supremo Tribunal Federal (STF). *STF recebe as primeiras ações contra a Reforma da Previdência*. 19/11/2019. BRASIL. STF. *Ação de auditores contra Reforma da Previdência terá rito abreviado*. 09/12/2019. BRASIL. STF. *Entidade de auditores questiona dispositivos da Reforma da Previdência*. 08/04/2020.

<sup>153</sup> BRASIL. Supremo Tribunal Federal (STF). *STF recebe as primeiras ações contra a Reforma da Previdência*. 19/11/2019. BRASIL. STF. *Ação de auditores contra Reforma da Previdência terá rito abreviado*. 09/12/2019. BRASIL. STF. *Entidade de auditores questiona dispositivos da Reforma da Previdência*. 08/04/2020. BRASIL. STF. *Juizes contestam mudança de regras sobre contagem recíproca promovida pela Reforma da Previdência*. 09/01/2020.

<sup>154</sup> BRASIL. STF. *Ação de auditores contra Reforma da Previdência terá rito abreviado*. 09/12/2019.

<sup>155</sup> BRASIL. STF. *Questionado trecho da Reforma da Previdência que revoga isenção a servidores com doença incapacitante*. 26/03/2020.

<sup>156</sup> BRASIL. STF. *Associação de delegados da PF ajuíza duas ações contra Reforma da Previdência*. 17/04/2020.

<sup>157</sup> BRASIL. STF. *Unafisco Nacional questiona pontos da Reforma da Previdência*. 09/04/2020.

<sup>158</sup> BRASIL. STF. *Associação de delegados da PF ajuíza duas ações contra Reforma da Previdência*. 17/04/2020.

are constitutional and must be so deemed until a definitive decision is made, in order to avoid differing decisions at other instances; (b) ordering a fast-track procedure for a judgment upon the merits and claiming that a judicial review of a CA is only possible in cases involving a violation of an entrenched clause.<sup>159</sup>

There are already responses to the developments of CA 103/2019. While states of the Federation began to push their social insurance reforms through, lawsuits already challenge their constitutionality. The underlying problems can be seen in two actions against the violation of a constitutional fundamental right filed against Administrative Rule No. 1,348/2019 by the Special Secretary of Social Insurance and Labor of the Ministry of the Economy that stipulated parameters and terms for the states to demonstrate the adjustment of their RPPSs under penalty of having the transfer of funds and loans from the Union suspended.<sup>160</sup> The actions are based mainly on arguments related to the constitutional balance of power: (1) the violation of the federated entities' autonomy and of the concurrent competence in social insurance matters (Art. 18, Art. 24, item XII and Art. 40, § 22 of the FC); (2) the non-observance of the limits on regulatory power by disregarding the need for a supplementary law (Art. 9 of CA 103/2019); infringement of the separation of powers, the Federative Pact, the legal tax reserve and the lawfulness of regulatory administrative acts.<sup>161</sup>

#### **4.1.2. Constitutional Case-Law on Various Social Insurance Benefits**

*Cap on survivor's pension upon the death of a civil servant:* The FSC had to decide on benefit caps applied to survivor's pensions due to the death of a civil servant. According to Article 40, § 7, items I and II of the FC, in the version of the 2003 pension reform (CA No. 41/2003), the pension for survivors is limited to the total earnings (100%) of the deceased civil servant, up to the maximum limit established for the welfares of the General Social Insurance Regime (RGPS), plus 70% of the portion exceeding this limit. The Court declared the validity of the limits. However, the Court held unanimously that the provision had become obsolete due to the 2019 pension reform (implemented through CA 103/2019), which substantially altered the topic. It also defined as consonant with the Constitution the different treatment given to working and retired public servants, according to which those who are still working pay a contribution on the total amount of their salaries and those already retired on the amount that exceeds the ceiling of the General Scheme (RGPS). The Court also established that there

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<sup>159</sup> BRASIL. STF. *Ministro nega liminar contra alíquota previdenciária progressiva para servidores públicos*. 18/05/2020.

<sup>160</sup> BRASIL. STF. *Partidos questionam prazo para entes federados comprovarem adequação de regimes de previdência*. 28/07/2020.

<sup>161</sup> BRASIL. STF. *Partidos questionam prazo para entes federados comprovarem adequação de regimes de previdência*. 28/07/2020.

is no benefit exempt from taxation and, concerning the ceiling of the RGPS, no entitlement to funds that is not in accordance with the Constitution.<sup>162</sup>

*Pension levels and pension indexation for retired public employees:* CA 41/2003 abolished the parity of remuneration of working and retired public employees, notably the possibility of automatic increase of pensions in line with the salary increase of active civil servants and the possibility of retirement with the payment of the full amount of the civil servants' last remuneration. It also prohibited that the pension amount exceeds the remuneration of the position held at the time of retirement. States of the Federation had enacted laws that were opposed to those provisions and even granted an additional bonus to civil servants at the time of retirement. The majority of the FSC judges declared the unconstitutionality of the respective state laws.<sup>163</sup>

*Gender equality and survivors' pensions:* The FSC also declared the unconstitutionality of different eligibility criteria in the access to survivor's pensions by male and female spouses or partners of former public employees. The requirement that men must prove their incapacity for work and economic dependence on their deceased spouses or partners whereas women do not have to do so infringes the principle of equality of men and women (Art. 5, item I of the FC), and recent studies conducted by the Institute of Applied Economic Research (IPEA) debunk such an assumption of dependence.<sup>164</sup>

## 4.2. Health Care Sector

### 4.2.1. Decisions on Measures to Contain the COVID-19 Pandemic

The pandemic has led to a series of discussions about the constitutionality of government actions and omissions. Updated information from the Brazilian Supreme Court's "Panel of Actions related to COVID-19" shows that there are 7,791 cases pending in the Court.<sup>165</sup>

#### *a) Conflicts about legislative or administrative competences*

According to a decision by the FSC, Act No. 13.979/2020 results from the Union's competence to legislate about epidemiological surveillance, whereas Congress may legislate for the sake of coordinated actions.<sup>166</sup> In another decision, however, the Court pointed out that the Union

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<sup>162</sup> BRASIL. STF. ADI 3133/DF.

<sup>163</sup> BRASIL. STF. ADI 5039.

<sup>164</sup> BRASIL. STF. RE-659424.

<sup>165</sup> BRASIL. STF. *Painel de Ações COVID-19*. Available at:

[https://transparencia.stf.jus.br/extensions/app\\_processo\\_covid19/index.html](https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html). Accessed on 24/03/2021. Here we supply more current data but otherwise the report is limited to the period until December 2020.

<sup>166</sup> BRASIL. STF. ADI-6341 MC-Ref/DF.

cannot regulate all measures to be taken against the pandemic, as it must observe the autonomy of federated entities and is not familiar with regional peculiarities.<sup>167</sup>

The President may issue provisions about public services and essential activities without prejudice to the other federated entities (Art. 198, item I of the FC), which may adopt measures within their competence about isolation, quarantine and restrictions on international, interstate and inter-municipal highways, in ports and airports (concurrent competence according to Art. 23, item II of the FC).<sup>168</sup>

The Union may take measures based on general interest, but there must be room for the states to regulate inter-municipal transportation and set up sanitary barriers according to the regional interest, without violating the municipalities' autonomy.<sup>169</sup> The measures may be adopted by all federated entities, under observance of the competences, and there is no need for prior approval by the Union.<sup>170</sup>

States and municipalities do not need the Union's authorization to adopt restrictions on inter-municipal and interstate transportation, provided the restrictions are based on technical reasons, and must guarantee the movement of essential products and services.<sup>171</sup> However, the closing of borders by these entities would exceed their competences.<sup>172</sup>

A Court's decision had ordered, on short notice and under penalty of a daily fine, that a state of the Federation should provide all materials, inputs and medications necessary for the provision of medical services to the population in state hospitals, protection equipment for health care professionals, opening of ICU beds, demonstration of the implementation of the investment plan, isolated rest areas, room for meals, toilets etc. for doctors. This decision, however, constituted an invasion of the Executive Power's attribution by the judiciary.<sup>173</sup>

The same decision was made in relation to a municipality that was forced to continue implementing actions for the adaptation of a maternity hospital's structure. In this case, the need to redirect resources to fight the pandemic was highlighted.<sup>174</sup> The FSC also decided to suspend the enforcement of a court order ruling that a municipality, along with the Federation's state, should be included in the obligation to supply an expensive medicine to a patient under the penalty of a daily fine. It should also be stressed that the person did not live

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<sup>167</sup> BRASIL. STF. ADI-6343 MC-Ref/DF.

<sup>168</sup> ADI-6341; BRASIL. STF. ADPF 672.

<sup>169</sup> ADI-6343.

<sup>170</sup> ADI-6341; ADI-6343.

<sup>171</sup> ADI-6343; BRASIL. STF. RCL 39.871.

<sup>172</sup> ADI-6343.

<sup>173</sup> BRASIL. STF. SL 1321/PI.

<sup>174</sup> BRASIL. STF. SL 1348/PI.

in that municipality and that the latter had emergency expenditures due to a flood and the pandemic.<sup>175</sup>

A provisional court decision ordering a municipality to carry out a civil-service examination and related procedures and prohibiting the renewal of labor contracts of temporary employees in the health sector or the hiring of temporary employees in the area of health care was suspended because it would hinder the municipality's actions in the context of emergency and was in contradiction with the current legislation.<sup>176</sup>

In the case of a court decision that, in contrast with a municipal ordinance, ordered the reestablishment of the limitation in the municipal public transportation to half of the seated passengers, as previously provided, the FSC granted suspension because of the local competence in this case. In this way it reestablished the limit of 100% of seated passengers, which is equivalent to 50% of the total number of passengers.<sup>177</sup>

The judiciary also confirmed the decision of a municipality that, in light of the state plan to resume activities, had ordered the return of 100% of the public transportation fleet. The measure was considered as justified by the local interest, technical support and coordinated action.<sup>178</sup>

*b) Obligations imposed on private and public actors*

In a provisional decision, the Supreme Court confirmed the validity of a state ordinance imposing on companies to supply masks to their employees.<sup>179</sup>

Regarding the case of a municipality that refused to participate in the state plan for the fight against COVID-19, the FSC's position was favorable to the state's claim, as it acknowledged the obligation of having a networking and coordination system between the federated entities.<sup>180</sup>

The Brazilian President had vetoed some provisions of Act 13,979/2020 about the compulsory use of masks. There was no veto on the more general provision of Art. 3 A, which established the compulsory use in public and private spaces accessible to the public, but on item 3, which specified the compulsory use in "commercial and industrial enterprises, religious temples, educational institutions and other closed spaces where people are gathered."<sup>181</sup> Art. 3 B, § 5 on the duty of disclosure in relation to the limit of capacity and the use of masks in businesses

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<sup>175</sup> BRASIL. STF. STP 174/MG.

<sup>176</sup> BRASIL. STF. STP 396 MC/RJ.

<sup>177</sup> BRASIL. STF. STP 296 MC/SP.

<sup>178</sup> BRASIL. STF. STP 669 TP/SP.

<sup>179</sup> BRASIL. STF. RCL 40.473/SC.

<sup>180</sup> BRASIL. STF. STP 442/MG.

<sup>181</sup> BRASIL. STF. ADPF 714, 715, 718.

was also vetoed, as well as Art. 3 F on the compulsory use of masks by workers of prisons and institutions of socio-educational measures.<sup>182</sup> A provisional measure was granted in the relation to the two latter provisions because the vetoes had not been presented at the first publication, but only at the second one, which was a mere rectification, so that the President had exhausted the possibility of vetoing. As far as Art. 3 A, item III is concerned, the provisional measure was not granted due to a lack of urgency, specially taking into account the above-mentioned more general provision.<sup>183</sup> After the National Congress rejected the vetoes, the provision was reintroduced into the Act.<sup>184</sup>

*c) Restrictions on individual and collective mobility*

As to the competence of municipalities of ordering restrictions on the circulation of persons older than 60, the Supreme Court decided to suspend such a measure because it was not underpinned by a technical recommendation of ANVISA.<sup>185</sup>

*Actions at airports:* When one of the states requested a preliminary injunction against a restriction on the entry of international flights imposed by the Union, the Court's position was against the state.<sup>186</sup> In a conflict between one of the states and the ANVISA concerning the competence to carry out sanitary control activities in the reserved areas of airports, the FSC's position was favorable to the surveillance agency.<sup>187</sup>

*Actions related to rivers:* The prohibition of fluvial transportation in the state of Amazonas was upheld, since the court decision that motivated the complaint is related to river tours and the state ordinance under discussion had to do with fluvial transportation of passengers, with the exception of cases of emergency or urgency, which include essential services and activities.<sup>188</sup>

*d) Actions regarding essential activities and services*

A state ordinance that limited the opening hours and days of businesses that sell foodstuffs and use any artificial form of air circulation was considered as being at odds with the federal norms on essential activities and therefore suspended through a preliminary injunction.<sup>189</sup> The

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<sup>182</sup> BRASIL. STF. ADFP 714, 715, 718.

<sup>183</sup> BRASIL. STF. ADFP 714, 715, 718.

<sup>184</sup> BRASIL. *Promulgação de Partes Vetadas*. Lei 14.019, de 02.07.2020. Available at: [http://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2020/lei/L14019.htm#derrubadaveto](http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L14019.htm#derrubadaveto). Accessed on 30/03/2021.

<sup>185</sup> BRASIL. STF. STP 175/SP.

<sup>186</sup> BRASIL. STF. ACO 3425 MC/DF.

<sup>187</sup> BRASIL. STF. STP 172/BA; BRASIL. STF. STP 173/MA.

<sup>188</sup> BRASIL. STF. RCL 39.871/DF.

<sup>189</sup> BRASIL. STF. SS 5365/RN.

same applies to a municipality that only allowed the opening of stores selling natural products in a drive-through system.<sup>190</sup>

In the case of a municipal ordinance that prohibited the opening of convenience stores at gas stations, going against a state ordinance which, in accordance with federal norms, excluded that activity from restrictions, the provisional judgment was against the municipal ordinance.<sup>191</sup> A similar decision was made in the case of a municipality that limited the opening hours and days of gas stations.<sup>192</sup>

A municipal ordinance limiting the opening hours and days and the capacity for patients in health facilities was reestablished through a provisional decision. In this case, the measure was seen as lying within the municipality's regulatory competence and as being in harmony with the federal administrative rule that classifies the activity of such facilities as essential.<sup>193</sup>

The execution of a decision against the limitation of the opening hours of supermarkets established in a municipal ordinance was suspended. The adoption of more restrictive rules than those provided in federal laws was regarded as being based on local interests and not hampering the exercise of an activity considered essential.<sup>194</sup> The same position was taken in the case of a municipality that interdicted all commercial and service provision activities, whether essential or not, on Sundays.<sup>195</sup>

On the issue of gyms, whose activity was considered essential by a federal decree, the FSC's decision suspended its judicial execution, which reestablished the effects of a municipal ordinance that prohibited their activity. The most important reason was the possible lack of national interest in including gyms in the list of essential activities.<sup>196</sup>

#### *e) Relaxation of restrictions adjusted to incidence of the pandemic*

The current case-law of the FSC shows a tendency to respect the autonomy of municipalities.

Concerning a state executive order that classified a municipality as stage 2 (orange) of its social distancing plan, the municipal administration was given a favorable decision by the Court of Appeals, which ordered a less restrictive classification. The FSC granted a suspension favorable to the state executive order in the light of the need for regional planning and coordination.<sup>197</sup>

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<sup>190</sup> BRASIL. STF. SS 5370/RS.

<sup>191</sup> BRASIL. STF. SS 5364/RJ.

<sup>192</sup> BRASIL. STF. SS 5369/SP.

<sup>193</sup> BRASIL. STF. SS 5394 MC.

<sup>194</sup> BRASIL. STF. STP 492 MC/SP.

<sup>195</sup> BRASIL. STF. STP 501 MC/RJ.

<sup>196</sup> BRASIL. STF. SS 5402/SP; along the same lines, with emphasis on the contradiction between the federal and the state decree: BRASIL. STF. STP MC/SP.

<sup>197</sup> BRASIL. STF. SS 5403 MC.

There was a similar development when a sector of the economy rebelled against the restrictions of stage red.<sup>198</sup>

Regarding municipal ordinances that, due to reduced and controlled numbers of infections, eased restrictions on commercial activities, the FSC's decision suspended the enforcement of a provisional court order contrary to those measures. It found that the municipality had acted within its local competence and in harmony with the actions of the other federated entities, particularly the state executive order.<sup>199</sup> In another case in which there was a contradiction between the municipal ordinance that established a complete return to commercial activities and the state executive order that established a gradual return to these activities, the state executive order prevailed because it was based on the critical situation of the public health care system and the need for coordination.<sup>200</sup>

When the Court provisionally granted a request to reopen educational institutions, with technical support and based on protocols, the request for suspension was denied. The decision was grounded on the fact that both the municipal ordinance and the request of the educational institutions were supported by technical recommendations.<sup>201</sup>

#### *f) Requisition of equipment for ICUs and of structures*

The international context of scarcity and dispute over inputs, materials, and products for health care exacerbated the federal conflicts in the Brazilian health care system, which involved not only the Union, states and municipalities but also charity and private hospitals. Even the idea of a need for approval by the Health Ministry for the other federated entities to be able to requisition private goods in emergency situations was raised in this context.<sup>202</sup> This idea was even discussed at the FSC, which took a position against such claim. The Union's competence to plan and promote measures to combat public emergencies, as provided for in Art. 21, point XVIII of the FC, implies that the Union has a coordinating role. This, however, does not imply that the federated entities have to ask for the Union's approval to make requisitions, which would even prevent them from quickly responding in crisis situations.<sup>203</sup>

Mention should be made here of the example of a municipality that at the beginning of the pandemic, when the first case occurred, requisitioned a private hospital that had been deactivated. There was a provisional decision against that measure because it was considered

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<sup>198</sup> BRASIL. STF. SS 5456 MC/SP.

<sup>199</sup> BRASIL. STF. STP 401/BA; along the same lines, although including an easing in other areas besides commerce: BRASIL. STF. STP 417 MC/MT.

<sup>200</sup> BRASIL. STF. STP 516/SP.

<sup>201</sup> BRASIL. STF. SS 5436/PR; the same applies to the divergence between a state plan of easing social activities and of a municipality concerning the direction of a military school: BRASIL. STF. STP 676/MG.

<sup>202</sup> FIUZA; SANTOS; LOPES; et al., *Revisão do Arranjo das Compras Públicas para um Contexto de Crise*. Nota Técnica 68. Diset. Instituto de Pesquisa Econômica Aplicada (Ipea), June 2020.

<sup>203</sup> BRASIL. STF. ADI 6362/DF.

exaggerated, but that decision was stayed at the FSC, which reestablished the requisition's effects, due to the duty of precaution.<sup>204</sup> The same thing occurred in relation to a municipality that requisitioned goods from a private hospital, which was not operating its ICUs, to equip a public hospital.<sup>205</sup>

When the Union requisitions goods that have potentially already been bought by a state of the Federation, the FSC has protected these acquisitions.<sup>206</sup> This happened, for instance, in the case of mechanical ventilators that had been bought by a state but were requisitioned by the Union from the private company that would deliver the equipment necessary to equip Intensive Care Units.<sup>207</sup>

#### *g) Disclosure of epidemiological data*

The FSC's full bench confirmed a preliminary injunction ordering the Ministry of Health to maintain the total disclosure of epidemiological data on the pandemic and forbidding the Ministry and the Federal District to use a new methodology to record the number of cases and deaths. The FSC's stance is mainly based on the government's duty of publicity and transparency.<sup>208</sup> In relation to the same topic, the FSC had already confirmed a preliminary injunction against provisions contained in Act No. 13.979/2020 limiting the duty of publicity and the right to information, making possible, among others, the denial without the possibility of appealing and the suspension of terms for the answer. In this case, the Court even acknowledged a greater intensity of the duty of disclosure and provision of information, taking into account the limitations to public control imposed by the pandemic.<sup>209</sup>

#### *h) Accountability of officeholders*

Direct actions for the declaration of unconstitutionality have also been filed against the Provisional Presidential Decree No. 966/2020, which limits the liability or accountability of officeholders during the pandemic for gross errors. The Court made a distinction between the legitimate concern of officeholders dealing with an unstable situation and those who intend to commit illegal and corrupt acts. For this reason, it gave a constitutional interpretation and considered administrative acts that give rise to violations of the right to life, health, a balanced environment, or adverse effects on the economy as gross errors if they fail to observe technical and scientific criteria or the principles of prevention and precaution. It also pointed out that officials must require that technical opinions explicitly discuss the technical and

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<sup>204</sup> BRASIL. STF. STP 393 MG.

<sup>205</sup> BRASIL. STF. STP 192/SP.

<sup>206</sup> BRASIL. STF. ACO 3.385. BRASIL. STF. ACO 3.393. BRASIL. STF. ACO 3.398. BRASIL. STF. SS 5.382.

<sup>207</sup> BRASIL. ACO 3385.

<sup>208</sup> BRASIL. ACO 3385.

<sup>209</sup> BRASIL. STF. ADI 6351 MC-REF.

scientific criteria recommended by recognized national and international institutions, as well as the principles of prevention and precaution.<sup>210</sup>

*i) Protection of vulnerable groups*

The protection of indigenous communities has also been a matter of concern, so much so that the FSC ordered the Union to work out and monitor a plan to fight COVID-19 among the indigenous peoples, creating also a Situation Room, which had already been provided in Joint Administrative Rule No. 4,094/2018 of the Health Ministry and Funai (National Foundation for Indigenous People); both measures should include the participation of the indigenous population and other institutions.<sup>211</sup>

There is also a case in which a warrant of repossession was issued against an indigenous community. The measure was issued in contradiction to the FSC's decision to suspend lawsuits for possession and administrative demarcation processes that potentially affect the territorial rights of indigenous peoples until the end of the pandemic or a final judgment. In this case, the court's preliminary ruling was in favor of the indigenous people.<sup>212</sup>

In another case, a state court granted a preliminary injunction against a state law that suspended all warrants for repossession, evictions in cases that began during the pandemic and whose occupation is prior to the publication of the act, which also suspended contractual penalties and interest for late payment of rent or installments of the payment of housing units if absolute necessity is proven, during the pandemic. The provisional decision reestablished the application of the act's provisions because apparently it was contrary to the FSC's case law.<sup>213</sup>

The situation of the prison system is a cause of concern and led the National Council of Justice to write Recommendation 62, directed to the Brazilian courts and judges.<sup>214</sup> In view of this, the FSC has been making decisions on requests for house arrest and revocation of pre-trial detentions. In the case of a person aged 78 who was in poor health, the majority decision was that there was no reason to grant house arrest, as treatment and prevention were compatible with the prison environment.<sup>215</sup> But in another case the request for house arrest was granted because there was a medical certificate stating that that person belonged to the group with high risk of infection.<sup>216</sup> The request for house arrest was also granted in the case of an older person with hypertension and diabetes who had committed crimes without resorting to

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<sup>210</sup> BRASIL. STF. ADI 6421 MC.

<sup>211</sup> BRASIL. STF. ADPF-709 Ref-MC/DF.

<sup>212</sup> BRASIL. STF. RCL 43907 MC/RJ.

<sup>213</sup> BRASIL. STF. RCL 45319 MC/RJ.

<sup>214</sup> BRASIL. *Conselho Nacional de Justiça (CNJ)*. Recomendação 62, de 17.03.2020.

<sup>215</sup> BRASIL. STF. Agravo Regimental na Ação Penal (AP) 996.

<sup>216</sup> BRASIL. STF. Extradicação 1.601/DF.

violence or serious threat.<sup>217</sup> This case law attests that the FSC has been paying special attention to the health protection of inmates.<sup>218</sup>

#### **4.2.2. Case Law regarding Safety at Work and the Provision of Drugs**

##### *a) Hazardous work conditions of pregnant and breastfeeding women*

The majority of the FSC's judges declared the unconstitutionality of a change made in the labor legislation in 2017 on the occasion of the labor law reform, which introduced the need for the submission of a medical certificate by pregnant and breastfeeding women in order to be removed from hazardous work-related activities. Before the reform, they were automatically removed from such activities. The change resulted in the admission of the possibility for pregnant women to continue to carry out activities of a minimum and medium degree of unhealthy work, and for breastfeeding women to perform activities of a maximum degree of unhealthy work. That change violates fundamental social and employee rights (Art. 6 and 7 of the FC) in connection with the protection of maternity and the absolute priority of full protection of children, including unborn and newly born children (Art. 227 of the FC).<sup>219</sup>

##### *b) Conditions for supplying drugs*

The FSC held that as a rule the Judiciary cannot order the provision of medicines that are not part of the SUS list of drugs. The criteria for allowing exceptions to this rule are still under discussion at the Court.<sup>220</sup>

Act No. 13.269/2016, which authorized the use of synthetic phosphoethanolamine by patients with malignant types of cancer was declared unconstitutional by the majority of the FSC's judges because by passing that act the National Congress ignored the competence of ANVISA, which is the regulatory agency subordinated to the Executive Power that is in charge of the control and examination of the matter based on scientific criteria.<sup>221</sup>

### **4.3. Social Welfare**

#### **4.3.1. Case Law concerning the Pandemic and its Social Consequences**

*School meals:* Concerning a provisional decision that ordered a municipality to supply food through the National School Meals Program (PNAE) to 13,055 students, the decision on the

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<sup>217</sup> BRASIL. STF. Medida Cautelar no Habeas Corpus 182.596/ES.

<sup>218</sup> Further this can be seen at: BRASIL. STF. RCL 41.199 AgR/SP (The case of an inmate to whom was given progression to confinement in a minimum-security facility. The lack of places in prisons must be solved through alternative measures, such as house arrest); BRASIL. STF. STP 648 MC/GO (an order to transfer inmates was suspended because of their dangerousness, and there were inmates with positive test results for COVID-19).

<sup>219</sup> BRASIL. STF. ADI 5938/DF.

<sup>220</sup> BRASIL. STF. RE-566471.

<sup>221</sup> BRASIL. STF. ADI 5501/DF.

request for suspension of the order was favorable to the municipality since the amount of resources transferred by the Union was approximately R\$ 100,000 and the cost estimate was R\$ 300,000. Among the factors taken into account are the limitation of resources, the increase of expenses and the decrease of revenues. The decision considered that there was an invasion of the Executive Power's attributions and that the shift from consumption at the school to the delivery of food kits required significant alterations.<sup>222</sup>

*Prohibition of power cuts:* The majority of the FSC's judges denied a request for a provisional measure against a law of a state of the Federation that forbade power cuts during the period of the public health emergency.<sup>223</sup> There is a federal law containing the same prohibition. The judgment on the merits is still pending.

However, a preliminary decision ordered the restoration of electricity supply to residential customers who had been disconnected from supply due to non-payment of bills.<sup>224</sup>

#### **4.3.2. Case Law on Minimum Income Provision**

Regarding a law passed by a state of the Federation instituting a minimum income benefit for persons in situation of vulnerability, the FSC acknowledged the formal unconstitutionality in relation to provisions designed to create a public agency and to administrative organization because that law resulted from a parliamentary initiative, but the competence for this matter belongs to the governor. Concerning the connection of the benefit to the minimum wage, the Court attempted to avoid a declaration of unconstitutionality by making an interpretation in accordance with the Constitution. It did acknowledge the minimum wage as the benefit's initial amount but rejected the connection to it for the inflation adjustment.<sup>225</sup>

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<sup>222</sup> BRASIL. STF. SL 1342/RJ; along the same lines: BRASIL. STF. STP 495 MC/RJ.

<sup>223</sup> BRASIL. STF. ADI 6406.

<sup>224</sup> BRASIL. STF. STP 272/RN.

<sup>225</sup> BRASIL. STF. ADI 4726.

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