



MAX PLANCK INSTITUTE  
FOR SOCIAL LAW AND SOCIAL POLICY

## Social Law Reports

**Addendum to Social Law Report**

**No. 7/2022**

**Evolution of Social Protection**

**Beyond Social Assistance**

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## 1. Income Protection via Social Insurance Schemes

### 1.1 Accumulation of Retirement Benefits and Salary Payments

Brazilian law allowed public employees<sup>1</sup>, if they met the requirement, to retire<sup>2</sup> and yet to continue on the job, accumulating the remuneration and the pension. Constitutional Amendment 103 of 2019, called Social Insurance reform amended a provision of the Federal Constitution (Art. 31, § 14) and eliminated that possibility not only for public jobs, but also for any public position or office. Regarding the public employees already retired under the General Pension Scheme (the pension scheme that protects the majority of Brazil's population) there is a provision that the accumulation was allowed until the social insurance reform came into force. The federal public administration, however, did not observe it and determined the layoff of retired employees who were on the job before the reform took effect. In the controversy between the Federal Administration, the Brazilian Post and Telegraph Company and the Federation of the Association of Members of the Post Company, the Brazilian Supreme Court decided in favor of the retired employees, ensuring the observance of the exception and their reinstatement.<sup>3</sup>

### 1.2 Invalidity

Act 8,213 of 1991, which establishes the Brazilian social insurance benefit plan, provides in Art. 45 that the amount of the pension for work incapacity shall be increased by 25%, if the insuree needs permanent assistance by another person. The supplementary amount is also known as “companion aid” and “aid for major invalidity”. The Supreme Court, when deciding on the benefit's extension to other modes of pension, considered the legislative action

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<sup>1</sup> In other words, employees of public companies ruled by the labor legislation of the private sector. Public companies constitute an exception in Brazilian law, and the activity of the state in the private market is subject to the same rules applicable to other companies. Public companies are also part of what is called indirect public administration.

<sup>2</sup> This case refers to the Brazilian Post and Telegraph Company's employees, a state-owned company. State-owned companies operate under the same rules as private companies. Therefore, the Brazilian Post and Telegraph Company's employees are protected through the General Pension Scheme, the Brazilian public pension scheme that covers employees of private entities as compulsory insurees. Before the Constitutional Amendment No. 103/2019 such insurees could retire: (1) at any age if they had completed 30 years (women) or 35 years (men) of social security contributions; (2) at 15 years of contribution and 60 years of age for women, at 15 years of contribution and 65 years of age for men. The new rule eliminates the first possibility and combines 62 years of age and 15 years of contribution for women and 65 years of age and 20 years of contribution for men. Special rules apply to rural workers, public servants (depending if they work in federal level, state or municipality), and some professions. For more details see for example: AMARAL, Aline Diniz; ANSILIERO, Graziela; COSTANZI, Rogério Nagamine. *Previdência Social. Políticas Sociais: acompanhamento e análise*. Instituto de Pesquisa Econômica Aplicada – IPEA, 2020; SARLET, Ingo. *Social Security in Brazil: Public Pension Reform and Responses to the COVID-19 Pandemic*. Social Law Reports No. 6/2021. Munich: Max Planck Institute for Social Law and Social Policy, 2021.

<sup>3</sup> BRASIL. Supremo Tribunal Federal (Pleno). Recurso Extraordinário 655.283 Distrito Federal. 16.06.2021. *Diário da Justiça Eletrônico* 238, 01.12.2021.

indispensable, which it cannot replace, although it acknowledges the purpose of protecting people, the observance of the principle of human dignity and equality before the law.<sup>4</sup>

### 1.3 Survivor Benefits for Minors Under Guardianship

Article 16 of Act 8,213 of 1991 provides a list of dependents of the insuree which are eligible for survivor benefits under the General Pension Scheme. Act 9,528 of 1997 had removed the inclusion of “minors under guardianship”<sup>5</sup> from the list of dependents in Art. 16 § 2, so that only stepchildren and “minors under custody” are taken into account, based on the declaration by the insuree and a proof of economic dependence. In the constitutional review of that change, the FSC recognized “minors under guardianship” as dependents of insurees provided the economic dependence could be proved. An important foundation for the decision is that the Constitution itself provides for the complete protection and the priority of the protection of minors due to their special status as persons in development (see Art. 227 of the FC). Another important element is that the status of dependents continues to be recognized in the Statute of Children and Adolescents (Art. 33, § 3 of Act 8,069 of 1990).<sup>6</sup>

## 2. Health Care Issues

### 2.1 Cancer Treatments

Act 14,238 of 19 November 2021<sup>7</sup> introduced the Statute of Persons with Cancer, which establishes the basic principles of state action concerning persons with cancer. The latter includes, among others, the following relevant ones: universal and equal access to adequate treatment; early diagnosis; transparency of information by agencies and entities regarding their processes and conditions; offer of systemic treatment based on an agreement with guidelines pre-established by competent agencies, broadening of the service network and its infrastructure, as well as sustainability of treatments.

There is also the guarantee of a special treatment for children and adolescents. Moreover, fundamental rights of persons with cancer are expressly recognized, including the obtainment of an early diagnosis, social assistance, and legal assistance. Besides, the act recognizes that these rights generate duties for the family, the community, society and government, including the protection against negligence, discrimination and violence. Citizens have the duty to

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<sup>4</sup> BRASIL. Supremo Tribunal Federal (Pleno). Recurso Extraordinário 1221446 Rio de Janeiro. 18.06.2021. *Informativo 1022*, 25.06.2021.

<sup>5</sup> In brief, guardianship only limits the power of biological parents, since custody inserts minors in substitute families.

<sup>6</sup> BRASIL. Supremo Tribunal Federal (Pleno). Ação Direta de Inconstitucionalidade 4.878 Distrito Federal. 08.06.2021. *Diário da Justiça Eletrônico 157*, 05.08.2021.

<sup>7</sup> BRASIL. *Lei nº 14.238, de 19 de novembro de 2021*. Brasília, DF: Presidência da República, 2021. Available at: <https://tinyurl.com/2fsynpu7>. Access on: May 18, 2022.

report violations of the law to the authorities, and topics that the state’s policies should cover are defined.

## 2.2 Provision of Non-registered Medicines and COVID-19 Vaccines

Brazil’s Supreme Court recognized the existence of exceptional situations that justify the government to provide cannabidiol-based medicines to patients with “chronic encephalopathy due to congenital cytomegalovirus and hard to control epileptic crises”. Although the medicine does not have a sanitary register at the National Agency of Sanitary Surveillance, the patient in question obtained an individual authorization to import it. Additionally, proof was given that the treatment was essential, that it could not be replaced by similar treatments contained in the dispensation lists and the protocols of the Unified Health System, and that the person concerned could not finance it. These were, in brief, the circumstances that led the Court to recognize a duty to provide a medicine not registered in Brazil and also not contained in the official lists of the public health care system.<sup>8</sup>

Provisional Presidential Decree 1,026 of 6 January 2021, which was converted into Act 14,124 of 10 March 2021, established exceptional measures for the acquisition of supplies and vaccines and the National Plan for the Implementation of Vaccination against COVID-19. According to this piece of legislation, the vaccination can only occur following an emergency use exemption or sanitary registration granted by the National Agency of Sanitary Surveillance. The other federated entities can acquire, distribute and apply vaccines registered, authorized for emergency use or with exceptionally authorized import if the federal administration does not acquire and distribute the number of vaccines necessary to cover the priority groups of the immunization plan.<sup>9</sup> The Ministry of Health<sup>10</sup> has set up a website for the National Plan for the Implementation of Vaccination against COVID-19 and a table defining the priority groups, which was updated several times.<sup>11</sup>

The whole process was accompanied by the global difficulties in the fight against the pandemic, namely, the dispute for access to an initially very limited quantity of vaccines produced, as well as the relative delay and inequality in the vaccination process. In Brazil, in addition, there were political conflicts and polarizations that impacted on the organization of

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<sup>8</sup> BRASIL. Supremo Tribunal Federal (Pleno). Recurso Extraordinário 1.165.959 São Paulo. 21.06.2021. *Diário da Justiça Eletrônico*. 22.10.2021.

<sup>9</sup> BRASIL. *Lei 14.124, de 10.03.2021*. Brasília, DF: Presidência da República, 2021. Available at: <https://tinyurl.com/2hjny6s>. Access on: March 30, 2022.

<sup>10</sup> BRASIL. *Plano Nacional de Operacionalização da Vacinação contra a Covid-19 – PNO*. Brasília – DF: Ministério da Saúde. Available at: <https://tinyurl.com/2p9fa5nj>. Access on: March 30, 2022.

<sup>11</sup> BRASIL. *Plano Nacional de Operacionalização da Vacinação contra a Covid-19. 12ª edição*. Brasília – DF: Ministério da Saúde, 01.02.2022. Available at: <https://tinyurl.com/794m8k3x>. Access on: March 30, 2022.

public health.<sup>12</sup> The process was significantly marked by a strong judicialization and several decisions and orders by the Supreme Federal Court.<sup>13</sup>

## 2.4. Funding of Health Care Services

Since 2000, the Brazilian Constitution determines that the municipalities have to invest 15%<sup>14</sup> of their tax revenues in health care services. In 2012, a new Statute<sup>15</sup> was enacted foreseeing punishment for municipalities that don't fulfill this percentage, precisely that the federal administration can deny financial transfer to the municipality<sup>16</sup>. However, the Federal Supreme Court understood that already since 2000 it was possible for the Judiciary to enforce the percentage's accomplishment, obligating the municipality to comply with the percentage foreseen in the Brazilian Constitution.<sup>17</sup>

## 3. Housing Support Programs

Provisional Presidential Decree 996 of 25 August 2020, which instituted the “Green and Yellow Home” Program, was converted into a law by Congress (see Act 14,118 of 12 January 2021). With the goal of implementing the right to housing, the program supports the funding of housing as well as the financing and regularization of rural properties. In the modality without co-payment from the state the monthly income limit for residents of urban areas is R\$

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<sup>12</sup> On this, see my previous report: SARLET, Ingo Wolfgang. Social Security in Brazil: Public Pension Reform and Responses to the COVID-19 Pandemic. *Social Law Report* No. 6/2021. Available at: <https://tinyurl.com/yc5r4vwm>. Access on: April 05, 2022, p. 21 et seq.

<sup>13</sup> In a decision by the Federal Supreme Court (FSC) the other federated entities were authorized to import and distribute vaccines approved by some foreign authorities if the Federal Administration does not fulfil the immunization plan and the National Agency of Sanitary Surveillance does not give its opinion in 72 hours. BRASIL. Supremo Tribunal Federal (Pleno). Acórdão. Referendo na MC na ACO 3.451 DF, 24.02.2021. *Diário da Justiça Eletrônico* 45, 10.03.2021; BRASIL. Supremo Tribunal Federal (Pleno). Acórdão. Referendo na MC na ADPF 770 DF, 24.02.2021. *Diário da Justiça Eletrônico* 45, 10.03.2021.

Moreover, the FSC decided that the states, municipalities and the Federal District have competence to decide on the vaccination of minors above 12 years of age under observance of scientific evidence and appropriate strategic analyses and priorities set out in a technical note of the Ministry of Health. BRASIL. Supremo Tribunal Federal (Pleno). Referendo na Oitava Tutela Provisória Incidental na Arguição de Descumprimento de Preceito Fundamental 756 Distrito Federal. 11.10.2021. *Diário da Justiça Eletrônico* 1, 10.01.2022.

<sup>14</sup> Until 2012, 15% of resources obtained from taxes revenues (Art. 77, III, ADCT, FC, combined with art. 198, § 2º, III, CF). Since 2012 the percentage continued to be 15%, see: art. 7º LC 141/2012. BRASIL. *Lei Complementar 141, de 13 de janeiro de 2012* (LC 141/2012). Brasília, DF: Presidência da República, 2021. Available at: <https://tinyurl.com/5dje2x4k>. Access on: April. 10, 2023. “Ato das disposições constitucionais transitórias - ADCT” (“Transitional Constitutional Provisions Act”); it is the last part of the Brazilian Federal Constitution and contains transition rules.

<sup>15</sup> LC 141/2012.

<sup>16</sup> This only can happen when these transfers are voluntary, i.e. when the transfer isn't expressly determined by law.

<sup>17</sup> BRASIL. Supremo Tribunal Federal (Pleno). Acórdão. Recurso Extraordinário 858.075 Rio de Janeiro. 17.05.2021. *Diário da Justiça Eletrônico* 169, 25.08.2021.

7,000.00 and for residents of rural areas R\$ 84,000.00.<sup>18</sup> In the modality with co-payment from the state<sup>19</sup> the limit is R\$ 4,000.00 and R\$ 48,000.00, respectively.<sup>20</sup>

This program replaced the “My Home My Life” Program. A comparative study of both programs sees a difference in the decrease of interest rates for the North and Northeast regions, which are the Brazilian regions with the greatest economic difficulties. The amounts for real estate and subsidies remained the same, but the possibilities for land property regularization and housing improvement were expanded. The study also identifies the differences in the approaches adopted by the previous and the present federal administration as a cause for the divergencies in the programs.<sup>21</sup>

#### 4. Selection of Monographies

ALMEIDA, Luiz Antônio Freitas de. *A tutela "ponderada" do direito à saúde: proporcionalidade e seu uso na defesa contra a insuficiência de proteção estatal*. Belo Horizonte: Fórum, 2021.

ALMEIDA, Verônica Scriptorre Freire; Akaoui, Fernando Reverendo Vidal; Lamy, Marcelo, (Eds). *O direito da saúde na era pós Covid-19*. São Paulo: Almedina, 2021.

ALVES, Hélio Gustavo. *Guia prático dos benefícios previdenciários: análise constitucional da reforma da previdência (EC 103/2019)*. 3. Ed. Rio de Janeiro: Forense, 2021.

AMADO, Frederico Augusto Di Trindade. *Curso de direito e processo previdenciário*. 14. Ed. Salvador: JusPODIVM, 2021.

AMUI, Alexandre. *A aposentadoria especial no regime geral de previdência social no Brasil: o meio ambiente de trabalho e a teoria da consequência à causa*. Belo Horizonte: Dialética, 2021.

BASSETTO, Marcelo Eduardo Rossitto. *Direito previdenciário e controle de convencionalidade: aplicação do direito internacional à prática previdenciária*. Curitiba: Juruá, 2021.

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<sup>18</sup> We have not found one clear answer to the question of why the difference between the income limit for urban and rural residents is so large. The remarks to the Act are silent in this respect. See: BRASIL. EMI nº 00029/2020 MDR ME, Brasília, 20 de agosto de 2020. Exposição de Motivos da Medida Provisória 996, de 25 de agosto de 2020. Available at: <https://tinyurl.com/2p972pjx>. Access on: April 10, 2023.

One possible explanation could be that the Bolsonaro government tried to benefit farmers. There is one salient social polarization in Brazil: supporters versus opponents of agriculture. See for example in the news: RODRIGUES, Sabrina. “Esse governo é de vocês”, diz Bolsonaro a Ruralistas. (O)eco, July 4, 2019. Available at: <https://tinyurl.com/2n2wx4d5>. Access on: April 10, 2023.

<sup>19</sup> In purchasing a new home, for example, the state’s co-payment could reach R\$ 110,000.00 for urban areas and R\$ 130,000.00 for rural areas. BRASIL. [Decreto 10.600, de 14 de janeiro de 2021](#). Brasília, DF: Presidência da República, 2021.

<sup>20</sup> BRASIL. *Lei 14.118, de 12.01.2021*. Brasília, DF: Presidência da República, 2021. Available at: <https://tinyurl.com/4zmkhu94>. Access on: March 28, 2022.

<sup>21</sup> MELO, Sarah Silva de. *Análise Comparativa entre Programas Governamentais de Habitação*. Programa Minha Casa Minha Vida e Programa Casa Verde e Amarela. Goiânia: Pontifícia Universidade Católica de Goiás, 2021.

- BORBA, Sylvio. *Acesso à saúde no Brasil: a desigualdade na distribuição e o mínimo razoável*. Florianópolis: Habitus, 2021.
- BRAGA, Paulo Cesar da Silva. *Responsabilidade civil do Estado pela insuficiência da saúde pública*. Curitiba: Juruá, 2021.
- CARDOSO, Alessandro Mendes. *Novos estudos de custeio previdenciário*. Belo Horizonte: D'Plácido, 2021.
- CARDOSO, Phelipe. *Manual de direito previdenciário: volume único*. 2. Ed. Salvador: JusPODIVM, 2021.
- CASTRO, Carlos Alberto Pereira de.; Lazzari, João Batista. *Manual de direito previdenciário*. 4. Ed. Rio de Janeiro: Forense, 2021.
- CAVALCANTE, Rodrigo Arantes. *Direito médico e da saúde*. São Paulo: Editora Mizuno, 2021.
- COHN, Amélia; ELIAS, Paulo E. *Saúde no Brasil: políticas e organização de serviços*. 6ª ed. São Paulo: 2005.
- FERNANDES, Jorge Ulisses Jacoby. *Direito provisório e a emergência do coronavírus: ESPIN - COVID-19: critérios e fundamentos: direito administrativo, financeiro (responsabilidade fiscal), trabalhista e tributário*. 2. ed. Belo Horizonte: Fórum, 2021.
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- FREITAS FILHO, Roberto (Ed.). *Direito à saúde: questões teóricas e prática dos tribunais*. São Paulo: Saraiva, 2021.
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- LA BRADBURY, Leonardo Cacau Santos. *Curso prático de direito e processo previdenciário*. 4. Ed. São Paulo: Atlas, 2021.
- LAZZARI, João Batista; CASTRO, Carlos Alberto Pereira de. *Direito previdenciário*. 2. Ed. São Paulo: Método, 2021.

- LIMA, Gilvânklm Marques de. *A agricultura familiar e a previdência social: avaliação sob a ótica da análise econômica do direito*. Rio de Janeiro: Lumen Juris, 2021.
- MARTINEZ, Wladimir Novaes. *Regulamento da previdência social: breves notas ao Decreto 3.048/1999 e respectivas atualizações*. Curitiba: Juruá, 2021.
- MARTINO JÚNIOR, Randolpho. *Gestão da saúde e eficiência dos gastos públicos: uma abordagem à luz do princípio da máxima efetividade da norma constitucional*. Belo Horizonte: Dialética, 2021.
- MARTINS, Bruno Sá Freire. *A nova previdência dos servidores públicos*. Curitiba: Alteridade, 2021.
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- MORAIS, Océlio de Jesus C. *Valores e princípios da previdência social*. São Paulo: LTr, 2021.
- NÓBREGA, Tatiana de Lima; Benedito, Maurício Roberto de Souza. *O Regime previdenciário do servidor público*. Indaiatuba, SP: Foco, 2021.
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VALE, Sheyla Suruagy Amaral Galvão do. *A adequada construção dos precedentes judiciais e o problema da responsabilidade solidária dos entes federativos em matéria de saúde*. Rio de Janeiro: GZ, 2021.

WURSTER, Tani Mara; ALVES, Clara da Mota Santos Pimenta. *Julgamento com perspectiva de gênero: um guia para o direito previdenciário*. Ribeirão Preto: Migalhas, 2021.

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