

ESTUDIOS

Defining extreme hardship to determine eligibility to welfare aid: The shift from household income measurement to means testing

*Definición de dificultades extremas para determinar la elegibilidad a la ayuda de bienestar:
El cambio de la medición de la renta familiar per cápita a pruebas de medios*

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ABSTRACT This paper discusses extreme hardship as an economic eligibility requirement to the welfare aid set forth in Article 20, paragraph 3, of Law 8.742/1993. The analysis is based on criteria that go beyond the measurement of monthly per capita household income and adopts a deductive approach to scrutinize the literature, legislation, and case law on the subject. The paper maps out the development of the relevant cases and provides insight into the precedents laid down by the Federal Supreme Court. The problems posed by the subsidiary nature of the benefit are also considered. All in all, monthly per capita household income not being an accurate indicator of extreme hardship, the means test should be adopted.

KEYWORDS Social assistance, poverty, means test.

RESUMEN En este trabajo se discute la dificultad extrema como requisito de elegibilidad económica para la ayuda social prevista en el artículo 20, párrafo 3, de la Ley 8.742/1993. El análisis se basa en criterios que van más allá de la medición del ingreso familiar per cápita mensual y adopta un enfoque deductivo para escudriñar la literatura, la legislación y la jurisprudencia sobre el tema. El documento traza el desarrollo de los casos relevantes y brinda información sobre los precedentes establecidos por la Corte Suprema Federal. También se tienen en cuenta los problemas que plantea la naturaleza subsidiaria del beneficio. Con todo, como el ingreso familiar mensual per cápita no es un indicador preciso de las dificultades extremas, debería adoptarse la prueba de medios.

PALABRAS CLAVE Asistencia social, pobreza, prueba de medios.

Introduction

The text of the 1988 Federal Constitution is knowingly incongruous, the reason being that there was no ideological consensus among the members of the Constituent Assembly around fundamental issues (Bastos & Martins, 1988: 1). Nonetheless, it is clear that the assembled representatives were genuinely concerned with social issues. The very preamble of the Constitution states that the purpose of a democratic government is to “ensure the enjoyment of social rights”.

On the one hand, the Constitution guarantees free enterprise¹ and freedom to choose an occupation,² thus establishing the primacy of labor as the purpose of social order.³ On the other hand, the Constitution also enshrines human dignity⁴ and states that the Republic is founded upon values such as justice and solidarity, adopting the reduction of social inequality as one of its main goals.

According to Article 3, items I and II, the Federative Republic of Brazil aims to “build a free, just and solidary society” and “eradicate poverty and substandard living conditions and to reduce social and regional inequalities”. Moreover, Article 193 of the Constitution sets out that social justice is one of the purposes of social order, because “the social order is based on the primacy of work and aimed at social well-being and justice”.

1. Article 1º, item IV, of the 1988 Federal Constitution: Art. 1 The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities of the Federal District, is constituted as a Democratic State of Law and has as its foundations: [...] IV - the social values of work and free initiative.

Article 170, head paragraph, of the 1988 Federal Constitution: Art. 170. At the economic order, founded on the valorization of human labor and free initiative, we aim to ensure everyone a dignified existence, in accordance with the dictates of social justice, observing the following principles.

2. Article 5º, item XIII, of the 1988 Federal Constitution: Art. 5 Everyone is equal under the law, without distinction of any nature, guaranteeing Brazilians and foreigners residing in the Country the inviolability of right to life, freedom, equality, security and property, in the following terms: [...] XIII - is free or exercise of any job, office or profession, attending to the professional qualifications that have been established.

3. Art. 193 of the 1988 Federal Constitution: The social order is based on the primacy of work, and its objective is social well-being and justice. Single paragraph. The State will exercise the role of planning social policies, ensuring, in accordance with the law, the participation of society in the processes of formulating, monitoring, controlling and evaluating these policies (included by Constitutional Amendment 108 of 2020).

4. Article 1º, item III, of the 1988 Federal Constitution: Article 1, item IV, of the 1988 Federal Constitution: Art. 1 The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities of the Federal District, is constituted as a Democratic State of Law and has as its foundations: III - the dignity of the human person.

Although not expressly mentioned as a duty, labor is a means to create wealth, and for this reason it is safeguarded by various other rights the Constitution recognizes.⁵ There are, however, socially, and personally vulnerable people who face poverty because their physical or psychological impairments prevent them from obtaining and maintaining a job.

The Constitution provides specifically for these socially vulnerable people and enshrines their *right* to subsistence by ensuring payment of a nationally standardized minimum cash benefit, which is hypothetically sufficient to meet their individual basic needs. Social welfare, as part of the array of social security public policies, is the social protection scheme that most adequately meets the demands of such a project, especially because it sets forth goals that both society and the government must achieve.

The recipients of welfare aid, commonly referred to as BPC (Benefício Assistencial de Prestação Continuada), are those mentioned in Article 203, item V, of the 1988 Federal Constitution,⁶ namely disabled and elderly persons, in accordance with the statutory meaning of those terms.

The right to subsistence – which is contingent upon being an elderly or disabled person – entitles the beneficiary to receive a monthly payment equivalent to one minimum wage. People socially or personally vulnerable who do not meet the age or disability criteria are not entitled to the benefit, which is classified as non-contributory due to its gratuitous nature.

Thus, people who do not meet the legal definition of disability or aged below sixty-five years are obligated to make previous individual social security contributions in order to be entitled to receive payment of a monthly minimum-wage benefit, as per Article 201 of the 1988 Federal Constitution.

The purpose of this paper is to provide a framework for the definition of the poverty threshold below which individuals who meet the above-mentioned legal definitions become entitled to this fundamental right to social assistance (Article 6, head paragraph,⁷ and Article 203, item V of the 1988 Federal Constitution).⁸

5. Article 7° of the 1988 Federal Constitution: Art. 7 The rights of urban and rural workers, in addition to others aimed at improving their social condition.

6. Article 203. Social assistance shall be granted to whomever may need it, regardless of whether the beneficiary contributed toward social welfare, and shall have the following objectives: [...]; V – guaranteeing a monthly benefit of one minimum wage to disabled and elderly persons who demonstrably lack the means to support themselves and whose family is unable to support them, as set forth by statute.

7. Art. 6° of the 1988 Federal Constitution. Social rights are education, health, food, work, housing, transport, leisure, security, social security, protection of motherhood and childhood, assistance to the destitute, in the form of this Constitution.

8. Article 203 of the 1988 Federal Constitution. Social assistance shall be granted to whomever may need it, regardless of whether the beneficiary contributed toward social welfare, and shall have the fo-

The research methodology involved the analysis of doctrinal works and, mainly, of jurisprudence related to the theme. In the case of the assistance benefit (BPC), whose value is one minimum wage, legal matters are, commonly, decided by the Federal Special Courts, which take care of small claims.

In seeking to examine already consolidated jurisprudence, the research of decisions of the last instance of the Federal Special Courts was privileged, that is, the National Division for the Harmonization of Federal Small Claims Courts (Turma Nacional de Uniformização dos Juizados Especiais Federais – TNU). Although they are not mandatory to judges of first instance, according to Brazilian law, the understandings of TNU are usually invoked as precedents and vectors of interpretation in judgments of first instance.

On the other hand, also in small claims, the final control of decisions is made by the Federal Supreme Court, which is the Brazilian constitutional court. Thus, the understandings of our constitutional court about the BPC are analyzed. Decisions rendered in the context of concentrated control of constitutionality, as well as in the context of the so-called repetitive appeals, representing controversy, were selected for consideration. Such decisions compel all the other courts of the Brazilian Judiciary, which therefore justifies their examination in this paper.

Defining levels of poverty is an admittedly difficult task, mostly because the criteria used to differentiate between various degrees of poverty are based on multiple social and individual factors. In view of this, the first step is to determine what poverty is.

Defining poverty

Poverty has existed since the beginning of civilization and attempts to minimize its toll have met with little success. This has often been the case in Brazil, where inequality is rampant. According to Venturi, poverty is a state in which an individual and his or her family experience deprivation and suffering because of being in need, which includes the temporary lack of means to provide one's own basic needs (Venturi, 1994: 21).

Poverty may be attributed to either individual or social causes. The former is related to physical or intellectual limitations inherent to a particular individual, whether temporary (such as injury or disease) or permanent (such as idleness or extravagance) in nature. The latter come because of an imbalance in the organization of a given

llowing objectives: [...]; V – guaranteeing a monthly benefit of one minimum wage to disabled and elderly persons who demonstrably lack the means to support themselves and whose family is unable to support them, as set forth by statute.

society, such as destruction caused by war, economic depression, racial, sexual or religious discrimination, low wages, and the like (Venturi, 1994: 21-23).

Whatever the cause of poverty and the attending social needs, governments have moved beyond merely providing education, health and public security and have come to ensure *poverty relief* to people in extreme poverty, in view of the fact that individual poverty has social consequences that affect everyone. According to the Constitution, poverty relief is provided in the form of social assistance.

Article 23, item II, of the 1988 Federal Constitution grants powers in common to all entities of the Federation (the Union, the States, the Federal District and the Municipalities) to provide *public assistance*. However, the federal government has the power to enact general legislation and grant welfare aid equivalent to one minimum wage to people with disabilities and the elderly, as per Article 203, item V, of the 1988 Federal Constitution.

BPC aid is regulated by Law 8.742/1993, commonly referred to as the Social Assistance Organic Act – LOAS (Lei Orgânica da Assistência Social), which lays out its organizational and operational aspects. Assistance may be given in the form of benefits (Articles 20 through 22),⁹ social assistance services (Article 23),¹⁰ programs (Article 24)¹¹ and projects to alleviate poverty (Article 25 and 26).¹²

Under Articles 20 and 21 of Law 8.742/1993, persons with disabilities and the elderly are entitled to receive payment of a benefit equivalent to one minimum wage, provided they qualify as disadvantaged or extremely poor according to objective cri-

9. Art. 20. The benefit of continued provision is the guarantee of a monthly minimum wage to the disabled person and the elderly person aged 65 (sixty-five) years or older who prove that they do not have the means to provide for their own maintenance or to have it provided by your family.

Art. 21. The benefit of continued provision must be reviewed every 2 (two) years to assess the continuity of the conditions that gave rise to it.

Art. 22. Occasional benefits are understood to mean supplementary and provisional provisions that organically integrate the guarantees of the SUAS and are provided to citizens and families due to birth, death, situations of temporary vulnerability and public calamity.

10. Art. 23. Social assistance services are understood to be continuous activities aimed at improving the population's life and whose actions, aimed at basic needs, observe the objectives, principles and guidelines established in this Law.

11. Art. 24. Social assistance programs comprise integrated and complementary actions with defined objectives, time and scope to qualify, encourage and improve benefits and assistance services.

12. Art. 25. Projects to combat poverty comprise the institution of economic and social investment in popular groups, seeking to subsidize, financially and technically, initiatives that guarantee them the means, productive and management capacity to improve general subsistence conditions, raise the standard of quality of life, the preservation of the environment and its social organization.

Art. 26. The incentive for projects to fight poverty will be based on mechanisms of articulation and participation of different governmental areas and on a system of cooperation between governmental, non-governmental and civil society bodies.

teria. Because we are dealing with a non-contributory benefit for a specific group of people, a few explanations regarding the cost of social rights is in order.

The cost of social rights

The government guarantees the right to subsistence for people under certain circumstances. However, the protection offered is not necessarily commensurate with the level of need. In the words of Wladimir Novaes Martinez, this protection “is the least amount of assistance a government can provide within the constraints of the resources available” (Martinez, 1995: 217). The reasoning behind this truism is that human needs are infinite, but government resources are limited.

Urgency of need is directly proportional to the level of disadvantage. Social assistance, however, only provides subsidiary means of protection. This is clear from the text of Article 1 of Law 8.742/1993, which states that the purpose of social assistance is to provide for basic needs, that is, for basic needs *exclusively*, and is further reinforced by Article 2, sole paragraph, of Law 8.742/1993, which clarifies that social assistance aims, among other things, to ensure a social minimum.

On the other hand, Article 195 of the 1988 Federal Constitution mandates that social welfare be financed by all of society, either directly or indirectly, while Article 204 determines that social assistance be funded out of the social welfare budget, in view of the fact that recipients of the benefit are people who are unable to contribute.

Similarly, the tax immunity granted to social assistance charitable entities that meet the legal requirements must be considered indirect funding, pursuant to Article 195, paragraph 7, of the 1988 Federal Constitution.

Finally, the 1988 Federal Constitution enshrines the principle of financial solidarity, by which those who can afford to contribute fund the assistance given to those who cannot, in keeping with the spirit of solidarity and social justice mentioned above.

Indeed, the consequences of poverty are felt by all the members of society, including the wealthy. Celso Barroso Leite was keen to notice this aspect of social assistance in his writings:

Social assistance may range from philanthropy-like individual support to more impersonal and indirect collective aid aimed at specific groups or the community at large. It may also be undertaken by all of society through dedicated public bodies. Clearly, however, social assistance is not the result of altruistic, humanitarian or charitable motives exclusively. The basic needs of the disadvantaged affect the rest of the members of society and ultimately have an impact on the community as a whole. In view of this, the community rationally anticipates those needs and prepares to meet them ahead of time. Today, such measures are a socioeconomic imperative and form the subject matter of an up-and-coming Welfare Law (Leite, 1997: 533).

The cost of social rights is also analyzed by Stephen Holmes and Cass R. Sunstein, who point out that all rights are claims, because they require the government to make considerable financial expenditures (Holmes & Sunstein, 2019: 23, 61, 109, 173).

Governments incur significant expense to ensure first-generation rights that ensure liberty and civil rights. For instance, realizing individual rights implies installing and maintaining the infrastructure necessary to allow people to vote (buildings, servers, furniture). Even the enforcement of ownership rights requires governments to train, equip and maintain a police force capable of effectively guaranteeing public security.

According to Stephen Holmes and Cass R. Sunstein, the benefits from those significant investments make no difference to the poor who do not own any property. Even the resources allocated to the budget of the Judicial Branch, which are essential to resolve conflicts over material goods, are meaningless to disadvantaged people without any possessions. The destitute are effectively excluded from any benefit derived from such investments.

The costs attached to the realization of social rights must be seen as a governmental investment in the welfare not only of the individual recipients, but of society as a whole.

Lastly, one must take into account that social assistance policies are funded by all the members society, including the beneficiaries themselves through consumption taxes.¹³

Recipients

According to Article 203, item V, of the 1988 Federal Constitution, individuals must concurrently meet a personal and an economic requirement in order to qualify for BPC aid. First, the applicant must be a disabled person or an elderly person aged sixty-five years or older. Second, the applicant must be in a situation of extreme hardship or in a state of need.

Article 20, head paragraph, of Law 8.742/1993 reinforces that successful applicants must be sixty-five years or older or qualify as a disabled person, as laid out in Article 20, paragraph 2, of Law 8.742/1993.¹⁴

Thus, applicants must be at least sixty-five years of age or qualify as a disabled person in order to meet the personal requirement.

13. It is common knowledge that the Brazilian tax system is significantly regressive because a large portion of the revenue comes from taxes levied on consumption, such as the tax on the circulation of goods and services (Imposto sobre Circulação de Mercadorias e Serviços – ICMS), which places a greater tax burden on poorer the households, which spend a greater share of their income on consumption.

14. Article 2, head paragraph, of Law 13.146/2015 defines a disabled person as “a person who has a long-term physical, mental, intellectual or sensory impairment which in interaction with one or more barriers may hinder his or her full and effective participation in society on an equal basis with others”.

When allocating social assistance benefits, statutory law may not set any personal or economic requirements in a way that would result in the exclusion of a significant portion of the population in need, as any such requirements would violate the rule enshrined in Article 194, paragraph 3, of the 1988 Federal Constitution.

Only criteria that are compatible with the guidelines set forth in the 1988 Federal Constitution may be validly adopted to define personal and economic requirements for BPC applicants. Therefore, allocation of the benefit must follow the tenets of social justice. In this context, the beneficiaries are the “destitute” referred to in Article 6 of the 1988 Federal Constitution.

The commonly used term to refer to people in such circumstances is “disadvantaged” (“*hipossuficiente*”), which was coined by Cesarino Júnior to designate people who are needy, underprivileged, or poor (Cesarino Júnior, 1970: 417).

Both the relevant literature and case law have adopted the term “disadvantaged” when referring to recipients in a state of poverty. In the context of the Consumer Protection Code (Law 8.078/1990), however, the term carries a different meaning. For this reason, we prefer the term “recipient”.

Although both persons with disabilities and the elderly can be grouped under the term “beneficiary”, the word “recipient” is technically preferable because it excludes the notion of “benefit”, which could convey the erroneous idea that social assistance is a mere favor and not a legitimate right.

Household

Statutory law adopts the monthly per capita income of the household as the basis for the official measure of extreme hardship. It is therefore essential to understand the meaning of the term “household” in this context.

Article 226 of the 1988 Federal Constitution provides that the family is the foundation of society and shall enjoy special protection from the State. For the specific purposes of Article 203, item V, of the 1988 Federal Constitution, the family may be constituted by both marriage and civil union (*união estável*).¹⁵

However, a family may be constituted by people other than spouses or civil partners and their children. Article 226, paragraph 4, of the 1988 Federal Constitution provides that, in the context of social assistance, “the community formed by either parent and his or her descendants is also considered a family entity”.

This description qualifying the individuals that form a household is very important, because only those deprived of means to support themselves through labor, or

15. In 2011, the Federal Supreme Court delivered judgment in Direct Action of Unconstitutionality (ADI) 4277 and Claim of Non-Compliance with a Fundamental Precept (ADPF) 132 recognized same-sex civil unions.

those whose family is unable to provide for them, are entitled to enjoy BPC aid. Evidently, the number of people that make up the household directly affects whether the applicant meets the official requirements for extreme hardship.

In that context, the original text of Article 20, paragraph 1, of Law 8.742/1993 defined the household as the group of people listed in Article 16 of Law 8.213/1991,¹⁶ provided they cohabitate in the same house. The definition was exclusively designed for the purposes of social assistance.

For some time, the courts grappled with the possibility of including the income earned by other cohabiting members of the same house, despite not being listed in Article 16 of Law 8.213/1991.

The National Division for the Harmonization of Federal Small Claims Courts (Turma Nacional de Uniformização dos Juizados Especiais Federais – TNU) submitted the following question in Topic 73: “What is the composition of the family unit for the purpose of defining eligibility requirements to receive the BPC before the enactment of Law 12.453/2011?”. The following doctrine was settled in a judgment delivered on August 31, 2012: “The definition of family unit must be based on a restrictive interpretation of Article 16 of Law 8.213/1991 and the original text of Article 20 of Law 8.742/1993”.

Thus, the TNU held the opinion that income from any person not expressly listed in Article 16 of Law 8.213/1991 and in Article 20, paragraph 1, of Law 8.742/1993 must be disregarded. More recently, however, the TNU has held a somewhat different opinion in several occasions.

Law 12.435/2011 amended Article 20, paragraph 1, of Law 8.742/1993 to define the household as the group composed of the applicant and his or her spouse or partner, parents and stepparents, single siblings, single children, single stepchildren, and underage wards, provided they all cohabitate in the same household.

It has already been established that the legal definition of household causes significant distortions when evaluating the ability of a family to support itself (Zacharias, 2021: 288).

16. Article 16 of Law 8.213/1991: “The following are considered dependents of Standard Social Security Benefit recipients: I – the spouse or civil partner and any unemancipated children under 21 years of age or disabled, regardless of status (text inserted by Law 9.032/1995); II – the parents; III – any unemancipated siblings under 21 years of age or disabled, regardless of status (text inserted by Law 9.032/1995); IV – (text repealed by Law 9.032/1995). Paragraph 1. Any living dependents from each class exclude dependents from the following classes. Paragraph 2. Stepchildren and underage wards shall be considered children of the recipient provided the same recipient makes a declaration to that effect and the minors are economically dependent on the recipient, in accordance with the corresponding regulatory provisions (text inserted by Law 9.528/1997). Paragraph 3. Any person that constitutes a civil union with the recipient shall be considered a civil partner, pursuant to Article 226, paragraph 3, of the 1988 Federal Constitution. Paragraph 4. The persons listed in item I are presumed economically dependent on the recipient, but the economic dependence of the persons listed in the remaining items must be proven by evidence”.

In fact, countless cases heard in federal courts involve households whose members live in separate houses on single or adjacent plots of land, and these circumstances must be considered when evaluating whether an applicant meets the requirements for extreme hardship. Conversely, there are cases in which the applicant receives support from an economically able non-cohabiting family member.

The subsidiary nature of welfare aid

Household size is directly related to the principle of subsidiarity (Baracho, 2000: 28, 45; Zacharias, 2021: 284-288) which posits that the government should only interfere in social and economic relations when individuals are unable to cope with their challenges and problems themselves.

This principle of jurisprudence is not to be interpreted exclusively from a liberal standpoint. Thus, it should not be invoked to advocate a minimal state. José Alfredo de Oliveira Baracho holds that the principle of subsidiarity embodies a compromise between a liberal¹⁷ and a welfare state model (Baracho, 2000: 95).

By the same token, it would not be reasonable to pay welfare aid to socially disadvantaged individuals who receive support from their families or local communities. In such cases, the burden of social assistance is to be shared between society and the government.¹⁸

In the same vein, Court Resolution 23, enacted by the Regional Division for the Harmonization of 3rd Circuit Federal Small Claims Courts, states that “welfare aid (LOAS) is of a subsidiary nature and applications must be evaluated taking into account any entitlement to financial support grounded on Civil Code provisions”.¹⁹

The TNU reasoned that an adequate interpretation of the rule that defines extreme hardship as an eligibility requirement for BPC applicants:

Must be carried out in such a way that it does exempt relatives from providing financial support legally owed to a person undergoing extreme socioeconomic hardship (Articles 1.694 and 1.697 of the 2002 Civil Code), in accordance with the principle of subsidiarity (Harmonization Request 0511978-42.2015.4.05.8300. Date of judgment: February 22, 2018. Date of publication: February 28, 2018).

17. A considerable part of the literature holds that the principle of subsidiarity does not apply to social assistance benefits, because it would only serve to aggravate the distress of socially vulnerable people. Cf. Wailla & Costa (2018). Similarly, Passos (2018).

18. Cf. Ajouz (2012). Nesse mesmo sentido, Marques (2009).

19. Source cases: 0000147-18.2015.4.03.9300, 0000148-03.2015.4.03.9300, 0000149-85.2015.4.03.9300, 0000150-70.2015.4.03.93000000151-55.2015.4.03.9300, 0000152-40.2015.4.03.9300; 0000920-19.2014.4.03.6319, 0001666-45.2014.4.03.6331, 0006066-92.2014.4.03.6302, 0010812-03.2014.4.03.6302, 0063790-91.2013.4.03.6301, 0092610-33.2007.4.03.6301.

In this context, other factors must be included in the analysis, such as any assets or savings held by the applicant, as well as the financial situation of his or her children and parents, as they are reciprocally bound by a duty to provide financial support to each other in case of need, pursuant to Article 229 of the 1988 Federal Constitution.

Eros Roberto Grau reinforces this view. In his opinion, the law cannot be interpreted in separate “strands” (Grau, 2021: 86). Thus, the fundamental right to social assistance should be interpreted jointly with the rule laid out in Article 229 of the 1988 Federal Constitution.

In a more recent judgment, the TNU decided that a monthly per capita income of less than one quarter of the minimum wage does not constitute a conclusive presumption of extreme hardship. For this reason:

The courts have granted the benefit in situations where the monthly per capita income exceeds one quarter of the minimum wage, and it seems to be equally reasonable to deny it in cases where the monthly per capita income falls short of this threshold, provided there is evidence demonstrating the absence of urgent need of assistance.²⁰

According to the doctrine settled by the TNU in Topic 122, fulfilment of the economic requirement of a monthly per capita income of less than one quarter of a minimum wage constitutes a rebuttable presumption of extreme hardship, which is valid unless proven otherwise. In our estimation, the principle of subsidiarity is compatible with the programmatic and social character of the 1988 Federal Constitution because social assistance is an instrument of social protection reserved for the “destitute” (Article 6). There is no danger of violating the Constitution if the principle is used sparingly when deciding cases, namely by denying the benefit only when the ability of the household to provide for itself is sufficiently proven.

Levels of extreme hardship

This topic of our paper discusses the challenges involved in measuring extreme hardship to identify potential BPC recipients. It involves defining eligibility to BPC aid based on a statutorily required level of poverty. Thus, in order to qualify for the BPC applicants must prove that they “lack the means to support themselves and whose family is unable to support them”, pursuant to Article 203, item V, of the 1988 Federal Constitution.

Article 20, paragraph 3, of Law 8.742/1993 provides a statutory definition of poverty (*rectius*: extreme hardship) for social assistance purposes: “Households whose monthly per capita income is less than one quarter of the minimum wage are considered unable to provide support to their elderly and disabled members”.

20. Pedilef 50004939220144047002. Reporting Federal Judge: Daniel Machado da Rocha. Date of judgment: April 14, 2016. Date of publication: April 15, 2016.

Statutory law defines extreme hardship by reference to the minimum wage enshrined in Article 7, item IV, of the 1988 Federal Constitution.

The literature has debated the potential unconstitutionality of the criterion adopted in Article 20, paragraph 3, of Law 8.742/1993 since its enactment. Part of the scholarship argues that the legal definition of extreme hardship contained in Article 20, paragraph 3, of Law 8.742/1993 excessively restricts a constitutionally protected social right and is therefore incompatible with Article 7, item IV, of the 1988 Federal Constitution.

Based on the premise that only individuals whose monthly income is not less than one minimum wage are able to provide for their basic needs, Luiz Alberto David Araújo holds that not even a constitutional provision could validly adopt a more restrictive criterion to define a poor individual (Araujo, 2011: 88).

The restriction to the scope of Article 203, item V, of the 1988 Federal Constitution is in fact unconstitutional. Although poverty may be categorized in different levels and various criteria may be adopted to classify a person as poor, restricting the scope of Article 203 of the 1988 Federal Constitution would prevent a significant number of disadvantaged people from qualifying for BPC aid. For this reason, the Federal Supreme Court has changed its opinion on the issue over the years, as we shall see in detail.

Article 20 of Law 8.742/1993 was amended by Law 13.146/2015, which inserted paragraph 11, substantially altering the method for evaluating the socioeconomic status of applicants: “In order to determine whether the applicant is eligible to the benefit described in the head paragraph of this Article, other evidence that the household is vulnerable and suffering extreme hardship may be taken into consideration, in accordance with the corresponding regulatory provisions”.

In other words, the poverty requirement for social assistance is not assessed using a purely arithmetical method, notwithstanding the criterion established in Article 20, paragraph 3, of Law 8.742/1993.

Paragraph 11 effectively supersedes paragraph 3 of Article 20. Lawmakers realized that a purely arithmetical measurement of income was not enough to accurately determine whether an applicant meets the poverty requirement for BPC aid. Thus, paragraph 11 transforms a strictly mathematical analysis into a means test (Zacharias, 2021: 302). In the words of Maurício Mota Saboya Pinheiro:

Means testing is a method used to determine eligibility to social assistance programs that takes into account multiple variables (indicators) concerning the resources (means) available to the applicant, such as access to goods and services, housing, medical care and education. This multidimensional method of assessment stands in contrast to the one that takes income as the sole criterion (Pinheiro, 2012: 41).

The courts did not fail to notice this transformation, which we will explain in the following pages.

Topic 185 – High Court Of Justice

In view of the significant number of lawsuits challenging the method used to determine extreme hardship, the High Court of Justice submitted the following Topic 185 for the uniform settlement of repetitive claims:

Welfare benefit. The applicant may prove extreme hardship by all available means in cases where the monthly per capita household income exceeds one quarter of the minimum wage.

Judgment was delivered on August 20, 2009, settling the following doctrine:

The monthly per capita household income should not be the only evidence considered when determining whether an applicant is incapable of self-support or unable to receive support from his or her family. The level of income allows for an objective determination of whether the applicant is in need; in other words, a monthly per capita household income of less than one quarter of the minimum wage gives rise to a conclusive presumption of extreme hardship.

Thus, the High Court of Justice abandoned the purely arithmetical measurement of income, which greatly facilitated access to social assistance by vulnerable people. The same subject, however, was later discussed by the Federal Supreme Court.

Opinions held by the Federal Supreme Court

The Federal Supreme Court has held different opinions regarding the extreme hardship requirement established in Article 20, paragraph 3, of Law 8.742/1993. The relevant judgments will be analyzed in chronological order.²¹

ADIN 1.232-2

In Direct Action of Unconstitutionality (*Ação Direta de Inconstitucionalidade – ADIn*) 1.232-2, in a judgment rendered on August 27, 1998, and reported in the Official Gazette of the Federal Judicial Branch on the June 1, 2001 edition, the Federal Supreme Court held that the restriction contained in Article 20, paragraph 3, of Law 8.742/1993 was not unconstitutional.

The position is clear in the corresponding abstract of judgment:

Constitutional. The plaintiff challenges the federal statutory provision that establishes the eligibility criterion for the welfare aid defined in Article 203, item V, of the 1988 Federal Constitution. The alleged restriction to the relevant provision of the Constitution does not occur, in view of the fact that the very same Constitution

21. For an analysis of Federal Supreme Court case law on the subject, see Figueiredo (2018).

relegates to statutory law the task of specifying the eligibility requirements disabled and elderly persons must meet in order to receive the minimum-wage benefit. The statute in question objectively describes an entitlement to a welfare benefit granted by the State. Claim dismissed.

Apparently, the Court's reasoning was based on the premise that the rule contained in Article 203, item V, of the 1988 Federal Constitution was not immediately applicable and required statutory regulation. For this reason, declaring the unconstitutionality of the statute would have rendered the constitutional provision ineffective. This reasoning can be inferred from the abstract of the interlocutory judgment (ADIn 1.232-1/DF. Date of judgment: March 22, 1995. Date of publication: May 26, 1995, p. 15.154. Reporting Justice: Nelson Jobim. Date of publication: June 25, 2001):

Interlocutory injunction sought in direct action of unconstitutionality. Petitioner challenges the legal definition of household unable to provide for its disabled and elderly members contained in Article 20, paragraph 3, of Law 8.742/1993 (LOAS), which regulates Article 203, item V, of the 1988 Federal Constitution.

1 – Petitioner argues the unconstitutionality of Article 20, paragraph 3, of Law 8.742/1993, which sets the monthly per capita income threshold at one quarter of the minimum wage for a household to be considered unable to provide for its disabled and elderly members. Petitioner claims the legal definition effectively prevents rightful access to the minimum-wage benefit enshrined in Article 203, item V, of the 1988 Federal Constitution.

2 – Issuing an interlocutory injunction to stay the enforcement of the statutory rule under scrutiny would cause the constitutional provision to reacquire contingent effectiveness and render its applicability dependent upon the enactment of new statutory regulations, which would prevent the Administration from granting the benefit until final judgment is rendered.

3 – The losses that would come as a result of staying the enforcement of the statutory rule would be greater than any inconveniences derived from upholding it.

4 – Interlocutory motion denied.

By upholding the statutory provision, the judgment ensured that only extremely poor applicants, whose monthly per capita household income was less than one quarter of the minimum wage, met the economic requirement for BPC aid.

It is noteworthy, however, that the Federal Supreme Court did not declare that Article 20, paragraph 3, of Law 8.742/1993 was constitutional (Moro, 2001: 27).

Moreover, at the time it was rendered the judgment in ADIn 1.232-2 lacked binding force, which was reserved for judgments given in direct constitutionality actions, pursuant to Article 102, paragraph 3, of the 1988 Federal Constitution.

Interestingly, the Federal Supreme Court upheld this view in several cases of judicial review (see RE 213.736-SP, reported by Justice Marco Aurélio, Federal Supreme

Court Bulletin 179; RE 256.594-6, reported by Justice Ilmar Galvão, judgment rendered on April 28, 2000, Federal Supreme Court Bulletin 186; RE 280.663-3, Sao Paulo, judgment given on September 6, 2001, reported by Justice Maurício Corrêa).

Topic 312 – Federal Supreme Court

The enactment of Law 10.741/2003 (Elderly Persons Act) significantly changed the eligibility requirements for BPC applicants. Article 34, sole paragraph, of Law 10.741/2003 mandated that any BPC aid granted to a member of the same household be disregarded when assessing the extreme hardship of elderly persons:

Article 34. Elderly persons aged sixty-five years or older who lack the means to support themselves and whose family is unable to support them are entitled to a monthly benefit equivalent to one minimum wage, pursuant to the Social Assistance Organic Act (LOAS).

Sole paragraph. Any benefit previously granted to another member of the same household pursuant to the head paragraph shall be disregarded when calculating the monthly per capita household income within the scope of the Social Assistance Organic Act (LOAS).

The provisions of Law 10.741/2003 made it considerably easier for applicants to qualify for BPC aid. In that regard, the new statutory provision was commendable²².

On the other hand, lawmakers failed to ensure equal treatment for disabled persons, who would not be able to disregard BPC aid previously granted to another member of the same household when calculating the monthly *per capita* household income. They also failed to guarantee equal treatment for applicants from households where another member already received the minimum retirement benefit.

In any case, the Federal Supreme Court decided the matter of Topic 312 in *en banc* proceedings related to RE 580.963 (judgment rendered on April 18, 2013 and published on November 14, 2013, in the Official Digital Gazette of the Judicial Branch 225). The Court settled the following doctrine:

BPC aid for disabled and elderly persons. Article 203, item V, of the 1988 Federal Constitution.

The Social Assistance Organic Act (LOAS) regulated Article 203, item V, of the 1988 Federal Constitution by specifying the eligibility criteria for disabled and elderly persons who lack the means to support themselves and whose family is unable

22. On the other hand, some hold the opinion that the sole paragraph of Article 34 of the Elderly Persons Act compromises the *rationality* of the extreme hardship requirement, because the source of the income is irrelevant when assessing the purchasing power and effective social inclusion of poor households. It is unreasonable to see a social need where there clearly is none. Cf. Zacharias (2021).

to support them to qualify for a monthly benefit equivalent to one minimum wage.

2. Article 20, paragraph 3, of Law 8.742/1993 and the declaration of constitutionality given by the Federal Supreme Court in ADI 1.232.

Article 20, paragraph 3, of Law 8.742/1993 stipulates that “households whose monthly per capita income is less than one quarter of the minimum wage are considered unable to provide support to their elderly and disabled members”.

The constitutionality of the economic requirement established by the statute was challenged on the grounds that it would allow certain applicants effectively undergoing extreme hardship to fall outside the scope of this constitutionally enshrined welfare benefit.

The Federal Supreme Court declared the constitutionality of Article 20, paragraph 3, of Law 8.742/1993 in the judgment delivered in Direct Action of Unconstitutionality 1.232-1/DF.

3. Various judgments by Justices of this Court have struck down the statutory economic requirements to offset the acquired unconstitutionality of the criteria specified in Law 8.742/1993.

The judgment rendered by the Federal Supreme Court, however, did not settle the controversy regarding the effective application of the monthly per capita household income requirement specified in the Social Assistance Organic Act (LOAS).

In the absence of amendment to the statutory requirement, various methods to bypass the sole economic criterion stipulated in the Social Assistance Organic Act (LOAS) were devised, with a view to accurately identifying households with disabled and elderly persons undergoing extreme hardship.

Concomitantly, various later statutes established more flexible eligibility criteria for access to other social assistance benefits, such as Law 10.836/2004, which implemented the Family Aid Program; Law 10.689/2003, which instituted the National Food Access Program; Law 10.219/2001, which created the School Aid Program; Law 9.533/1997, which authorizes the Executive Branch to grant financial aid to municipalities that create programs that promote education by guaranteeing a minimum income.

Several judgments delivered by individual Federal Supreme Court justices have challenged the established doctrine on the conclusiveness of the economic requirements BPC applicants must meet.

These requirements have become unconstitutional due to well-known political, economic, and social transformations, as well as changes in the legislation that have altered the eligibility criteria for access to other social assistance benefits provided by the government.

4. The unconstitutional omission of Article 34, sole paragraph, of Law 10.741/2003.

Article 34, sole paragraph, of the Elderly Persons Act stipulates that BPC aid previously granted to another member of the same household shall be disregarded when calculating the monthly per capita household income within the scope of the Social Assistance Organic Act (LOAS).

The statute does not determine that BPC aid enjoyed by disabled persons and re-

retirement pensions equivalent to no more than one minimum wage paid to elderly persons in the same household be disregarded when calculating the monthly per capita household income.

There is no plausible justification for failing to ensure equal treatment between disabled persons and the elderly, as well as between elderly persons entitled to social assistance and elderly persons entitled to a retirement pension equivalent to one minimum wage.

Unconstitutional omission.

5. The Court declares that Article 34, sole paragraph, of Law 10.741/2003 is partially unconstitutional, but it does not decree its annulment.

6. Extraordinary appeal denied.

The enjoyment of a benefit equivalent to one minimum wage by another member of the household significantly improves the quality of life of an applicant. Moreover, the minimum wage is the constitutional benchmark for the maintenance not of one single individual but of a household (Article 7, item IV, of the 1988 Federal Constitution).

In view of this, we posit that the Federal Supreme Court judgment opens the possibility for social assistance benefits to be granted in violation of the Constitution, because it allows applicants that are not destitute under the terms of Article 6 of the 1988 Federal Constitution to qualify for BPC aid.

For the same reason, the social assistance framework lost at least some of its consistency. In fact, further investigation is to determine whether granting BPC aid in certain contexts promotes idleness (Bastos & Martins, 2000: 429) and reduces incentives to look for new employment.

Topic 27 – Federal Supreme Court

The Federal Supreme Court decided the matter of Topic 27 in the judgment of Extraordinary Appeal 567-985 (RE 567-985). Following a similar reasoning to the one adopted in the matter of Topic 312, the Court held that BPC aid enjoyed by disabled persons and retirement pensions equivalent to one minimum wage paid to elderly persons in the same household must be disregarded when calculating the monthly per capita household income to assess extreme hardship.

Below is the abstract of the judgment delivered on April 18, 2013:

BPC aid for disabled and elderly persons. Article 203, item V, of the 1988 Federal Constitution.

The Social Assistance Organic Act (LOAS) regulated Article 203, item V, of the 1988 Federal Constitution by specifying the eligibility criteria for disabled and elderly persons who lack the means to support themselves and whose family is unable to support them to qualify for a monthly benefit equivalent to one minimum wage.

2. Article 20, paragraph 3, of Law 8.742/1993 and the declaration of constitutionality given by the Federal Supreme Court in ADI 1.232.

Article 20, paragraph 3, of Law 8.742/1993 stipulates that “households whose monthly per capita income is less than one quarter of the minimum wage are considered unable to provide support to their elderly and disabled members”.

The constitutionality of the economic requirement established by the statute was challenged on the grounds that it would allow certain applicants effectively undergoing extreme hardship to fall outside the scope of this constitutionally enshrined welfare benefit.

The Federal Supreme Court declared the constitutionality of Article 20, paragraph 3, of Law 8.742/1993 in the judgment delivered in Direct Action of Unconstitutionality 1.232-1/DF.

3. Various judgments by Justices of this Court have struck down the statutory economic requirements to offset the acquired unconstitutionality of the criteria specified in Law 8.742/1993.

The judgment rendered by the Federal Supreme Court, however, did not settle the controversy regarding the effective application of the monthly per capita household income requirement specified in the Social Assistance Organic Act (LOAS).

In the absence of amendment to the statutory requirement, various methods to bypass the sole economic criterion stipulated in the Social Assistance Organic Act (LOAS) were devised, with a view to accurately identifying households with disabled and elderly persons undergoing extreme hardship.

Concomitantly, various later statutes established more flexible eligibility criteria for access to other social assistance benefits, such as Law 10.836/2004, which implemented the Family Aid Program; Law 10.689/2003, which instituted the National Food Access Program; Law 10.219/2001, which created the School Aid Program; Law 9.533/1997, which authorizes the Executive Branch to grant financial aid to municipalities that create programs that promote education by guaranteeing a minimum income.

Several judgments delivered by individual Federal Supreme Court justices have challenged the established doctrine on the conclusiveness of the economic requirements BPC applicants must meet.

These requirements have become unconstitutional due to well-known political, economic and social transformations, as well as changes in the legislation that have altered the eligibility criteria for access to other social assistance benefits provided by the government.

4. The Court declares that Article 34, sole paragraph, of Law 10.741/2003 is partially unconstitutional, but it does not decree its annulment.

5. Extraordinary appeal denied.

The abstract is self-explanatory. The judgment clearly determines that the criterion contained in Article 20, paragraph 3, of Law 8.742/1993 is not the only one to be considered when assessing extreme hardship. The personal circumstances of the applicant may be considered as well.

In other words, the Federal Supreme Court holds that the rule contained in Article 20, paragraph 3, of Law 8.742/1993 does not prevent a judge from assessing other circumstances that may evidence extreme hardship. The purely mathematical eligibility criterion has thus been set aside.

On the one hand, the judgments cited above have facilitated access to BPC aid. On the other, however, they have increased the risk of legal uncertainty because they delegate to judges with potentially different views on the threshold of extreme hardship the task of examining the personal circumstances of individual applicants.

Statutory amendments enacted during the Covid-19 Pandemic

The mass unemployment triggered the Covid-19 pandemic caused millions of Brazilians to lose their sources of income. In order to alleviate the ensuing hardship, the government created the Emergency Aid social assistance program.

The statute that specifies the eligibility criteria for BPC aid was also amended. Article 1 of Law 13.982/2020 amended the wording of Article 20, paragraph 3, of Law 8.742/1993 and inserted new paragraphs into the text, as follows:

Article 20 [...]

Paragraph 3. Households shall be considered unable to provide support to their elderly and disabled members if the monthly per capita household income:

I – was up to one quarter of the minimum wage before and including December 31, 2020;

II – (VETOED)

Paragraph 14. BPC aid or retirement pensions equivalent to no more than one minimum wage, whenever paid to a disabled person or an elderly person aged sixty-five years or older, shall be disregarded when calculating the monthly per capita household income mentioned in paragraph 3 of Article 20 for the purpose of determining eligibility to BPC aid of another elderly disabled or person member of the same household.

Paragraph 15. More than one member of the same household may be entitled to BPC aid, provided the statutory requirements herein provided are met.

It is noteworthy that paragraphs 14 and 15 replicate the terms of the judgment delivered by the Federal Supreme Court in RE 580.963 (Topic 312) by ensuring retirement pensions equivalent to no more than one minimum are equally disregarded when calculating the monthly per capita income of the household and extending the rule to disabled persons.

Also due to the hardship caused by the Covid-19 pandemic, Law 13.982/2020 inserted Article 20-A into the text of Law 8.742/1993, which further regulated the extreme hardship requirement for BPC applicants.²³

23. Source: <https://bit.ly/3yNcSAX>.

Article 20-A. Due to the state of public distress officially declared by Legislative Decree 6, issued March 20, 2020, and the global public health emergency caused by the novel coronavirus (Covid-19), the maximum monthly per capita household income specified in Article 20, paragraph 3, item I, may be raised to one-half of the minimum wage.

Paragraph 1. The maximum monthly per capita household income mentioned in the head paragraph shall be raised gradually pursuant to the corresponding regulatory provisions and shall be based on the following circumstances, to be assessed jointly or separately:

I – degree of disability;

II – reliance on others to carry out basic daily activities;

III – personal and environmental circumstances, including familial and socioeconomic factors that may reduce the functional capacity and hinder the full integration of the disabled or elderly applicant;

IV – the share of the budget that the household mentioned in Article 20, paragraph 3, exclusively allocates to healthcare expenses, including medical appointments, diapers, special dietary needs and medication for the elderly or disabled person that is not available free of charge through the Unified Healthcare System (SUS), as well as any expenses with healthcare services not provided by the Unified Social Assistance Service (SUAS), provided such healthcare is demonstrably indispensable for the applicant to remain alive and in good health.

Paragraph 2. The degree of disability and loss of autonomy, as evidenced by the disabled person's dependence on others to carry out basic daily activities, as specified in paragraph 1, items I and II of this Article, shall be assessed through the use of indicators and functional capacity evaluation instruments designed for and specifically adapted to the Brazilian context, in compliance with Article 2, paragraphs 1 and 2, of Law 13.146/2015.

Paragraph 3. The assessment of the personal and environmental circumstances and the socioeconomic factors mentioned in paragraph 1, item II of this Article, shall comply with Article 2, paragraphs 1 and 2, of Law 13.146/2015 and take into account the following aspects:

I – the level of educational attainment and the stage of educational and cultural development of the applicant;

II – the accessibility and functionality of the place of residence, the living conditions, the sanitation infrastructure and the surrounding neighbors and family;

III – the availability of public transportation, public healthcare and social assistance services near the applicant's place of residence;

IV – the reliance of the applicant on assistive technology;

V – the number of cohabitants and whether the applicant cohabits with another disabled or elderly person that relies on others to carry out basic daily activities.

Paragraph 4. The share of the budget that the household allocates to healthcare expenses, including medical appointments, diapers, special dietary needs and medication for the elderly or disabled person within the meaning of paragraph 1, item IV of

this Article, shall be quantified by the National Institute for Social Security based on the average expenditures made by households exclusively for such purposes in accordance with the corresponding regulatory provisions, but applicants may submit evidence that their individual healthcare expenses effectively exceed the household average, pursuant to the same corresponding regulatory provisions.

Clearly, the purpose of the statutory amendment is to facilitate access to BPC aid. Paragraphs 14 and 15, which were inserted into the text of Article 3 of the Social Assistance Organic Act (LOAS), make it mandatory for the National Institute for Social Security (INSS) to follow the new statutory provisions. The courts already followed the same rule on the authority of the two above-mentioned Federal Supreme Court judgments.

However, the regulatory provisions necessary to raise the maximum monthly per capita household income requirement for extreme hardship to one-half of the minimum wage were never issued.

Law 14.176, signed into law on June 22, 2021, further amended the extreme hardship requirement. The new statutory provisions repealed paragraph 3, item I, of Law 8.742/1993 and inserted paragraph 11-A into the text of Article 20, making it possible for a regulatory provision to raise the maximum monthly per capita household income requirement for extreme hardship to one-half of the minimum wage, provided it complies with Article 20-B of Law 8.742/1993 below:

Article 20. When assessing other factors that may evidence the extreme hardship and vulnerability mentioned in Article 20, paragraph 11, of this statute, the following aspects shall be taken into account to determine whether to raise the maximum monthly per capita household income requirement pursuant to Article 20, paragraph 11-A, of this statute:

I – degree of disability;

II – reliance on others to carry out basic daily activities;

III - the share of the budget that the household mentioned in Article 20, paragraph 3, exclusively allocates to medical and healthcare expenses, including diapers, special dietary needs and medication for the elderly or disabled person that is not available free of charge through the Unified Healthcare System (SUS), as well as any expenses with healthcare services not provided by the Unified Social Assistance Service (SUAS), provided such healthcare is demonstrably indispensable for the applicant to remain alive and in good health.

Paragraph 1. The maximum monthly per capita household income mentioned in the head paragraph shall be raised gradually pursuant to the corresponding regulatory provisions.

Paragraph 2. The aspects mentioned in items I and III of the head paragraph of this Article shall be used to assess disabled persons, while the aspects mentioned in items II and III of the head paragraph of this Article shall be used to assess elderly persons.

Paragraph 3. A biopsychosocial assessment shall be administered to the applicant in order to determine the degree of disability mentioned in item I of the head paragraph of this Article, in compliance with Article 2, paragraphs 1 and 2, of Law 13.146/2015 (Disabled Persons Act) and Article 20, paragraph 6, together with Article 40-B, of this statute.

Paragraph 4. The share of the budget that the household allocates to healthcare expenses within the meaning of item III of the head paragraph of this Article shall be quantified by a joint resolution issued by the Ministry of Citizenship, the Special Secretariat of Retirement and Labor for the Ministry of the Economy and the National Institute for Social Security (INSS) based on the average expenditures made by households exclusively for such purposes, but applicants may submit evidence that their individual healthcare expenses effectively exceed the household average, pursuant to criteria specified in the corresponding regulatory provisions.

The new statutory provisions consolidate the perception that a purely mathematical method is not enough to accurately determine whether an applicant meets the extreme hardship requirement and favor the implementation of a means test.

More recently, the sole paragraph of Article 6 of Law 14.176, which was signed into law on June 22, 2021, stipulates that in order to raise the maximum monthly per capita household income requirement from one quarter to one-half of the minimum wage, pursuant to Article 20, paragraph 11-A of Law 8.742/1993, based on other evidence that the household is vulnerable and suffering extreme hardship in accordance with the specific provisions laid out in Article 20-B of Law 8.742/1993, the Executive Branch must first issue a regulatory decree which must also confirm that the relevant fiscal requirements have been met.

Lastly, Article 6, item I, of Law 14.176/2021 stipulates that the sections of Article 1 that insert paragraph 11-A into the text of Article 20 and Article 20-B into the text of Law 8.742/1993 shall only come into force on January 1, 2022.

The Unified Registry

The Unified Registry for Social Programs (Cadastro Único para Programas Sociais – CadÚnico) was created by Decree 3.877, issued July 24, 2001. Its purpose is to identify low-income households in Brazil and provide information regarding their socioeconomic status. The database is used by the federal government to select beneficiaries and integrate its various social assistance programs for low-income households, pursuant to Article 2 of Decree 6.135/2007, which contains the corresponding regulatory provisions.

Article 6 of Decree 6.135/2007 determines that municipal authorities register the households. The CadÚnico database can then be accessed by federal, state and municipal governments to assess the socioeconomic status of the registered households.

According to the original text of Article 2, paragraph 2, of Decree 6.135/2007, utilization of the CadÚnico database to implement the BPC aid program was optional. This provision, however, was repealed by Decree 9.462/2018.

Law 13.846/2019 inserted paragraph 12 into the text of Article 20 of the Social Assistance Organic Act (LOAS), making it mandatory for recipients to be registered both in the Natural Persons Registry (Cadastró de Pessoas Físicas – CPF) and the CadÚnico database for BPC aid to be granted, maintained, or modified.

The National Institute for Social Security (INSS) will therefore deny BPC aid to applicants who are not registered in the CadÚnico database.

In our opinion, the registration requirement is not unconstitutional because it is within the purview of statutory law to establish eligibility criteria requirements for BPC aid, provided the provisions of Article 203, item V, of the C1988 Federal Constitution are complied with.

Nevertheless, one cannot ignore the fact that low-income households face significant challenges to access the internet, and many potential applicants are unable to meet the requirement without help from third parties.

According to Carlos Alberto Pereira de Castro and João Batista Lazzari, the provisions that regulate the CadÚnico database require amendments to eliminate the communication gaps between the various social assistance programs registries and other public databases, among other issues. They propose creating an effectively unified registry that would gather all the data contained in public databases, namely those belonging to the revenue services at the federal, state, local and Federal District levels, the electoral courts, the various social assistance programs, the Central Bank and the National Institute for Social Security (INSS). Such a database would also deter tax evasion, facilitate tax collection, and provide “Social Security with an accurate picture of the status of each beneficiary” (Castro & Lazzari, 2021: 1174).

Unregistered applicants who are denied BPC aid by the National Institute for Social Security (INSS) face the unappealing prospect of litigation.

José Antônio Savaris holds that claimants in retirement lawsuits should be considered legally disadvantaged:

Claimants in retirement litigation are presumed to be legally disadvantaged. They are economically and informationally disadvantaged because they have insufficient knowledge regarding their legal situation and attending rights and duties. The veil of complexity that shrouds legal remedies and the legislation that regulates them prevents individuals from making informed and responsible decisions that take possible outcomes into account (Savaris, 2019: 63).

We do not necessarily share the opinion that all claimants who litigate over retirement benefits should be considered legally disadvantaged. In fact, at least some of

the claimants in retirement lawsuits are wealthy. On the other hand, petitioners that claim social assistance benefits certainly are not.

We do believe, however, that a lawsuit should be dismissed if the only ground for denying BPC aid was the failure of the applicant to register in the CadÚnico database. To substantiate the claim, the applicant must first complete the required registration in the CadÚnico database, as this allows the National Institute for Social Security (INSS) to analyze the application and assess whether the applicant meets the personal and economic requirements for BPC aid.

In any case, the TNU seems to hold a rather different view on the matter. In the judgment of Topic 217, the TNU settled the following doctrine:

Regarding BPC aid and other disability benefits, the court may adjudicate as to one or the other, regardless of whether the claimant filed a previous application before the Administration, provided the legal requirements are met and that the opposing party is given opportunity for defense, pursuant to Articles 9 and 10 of the Civil Procedure Code.

We do not share this view. The effective implementation of a means test by the Administration is an integral part of the application procedure to obtain BPC aid. Therefore, it cannot be delegated to the courts where there was no previous litigation.

In our opinion, the absence of any previous application, as well as its submission with the express purpose of having the application rejected, violates the purpose of the judgment rendered under the general repercussion rule by the Federal Supreme Court in Extraordinary Appeal 631240 (RE 631240) when deciding the matter in Topic 350.

Conclusions

BPC aid is a very relevant policy within the structural design of constitutional rights and guarantees because it ensures the right to subsistence in cases of social and individual vulnerability.

According to information available in the Transparency Portal, almost five million people received BPC aid in August 2021 alone.²⁴

Despite the statutory provisions establishing an arithmetical criterion based on the monthly per capita household income, the case law regarding the extreme hardship eligibility requirement enshrined in the 1988 Federal Constitution and in Article 20, paragraph 3, of Law 8.742/1993 has wavered over the years.

The most recent case law on the subject is practically unanimous in accepting that the statutory criterion established in Article 20, paragraph 3, of the Social Assistance Organic Act (LOAS) is insufficient to assess the extreme hardship eligibility require-

24. See <https://bit.ly/3Tqt4Qk>.

ment because despite the rebuttable presumption of extreme hardship established in the judgment of Topic 122 by the TNU there are vulnerable people whose monthly per capita income exceeds one quarter of a minimum wage.

A possible interpretation of the Federal Supreme Court precedents cited in this paper is that a maximum monthly per capita household income of one-half of the minimum wage may be a reasonable requirement to determine extreme hardship, and that this requirement may be established by presidential decree, pursuant to Law 14.176/2021.

Notwithstanding these considerations, there are instances in which any criterion based on the per capita household income is inadequate to assess the financial situation of the household, in which case performing a means test would be a more reasonable solution, as it involves assessing other relevant circumstances to determine whether the applicant meets the eligibility requirement for BPC aid, pursuant to the statutory provisions of Article 20-B, inserted into the text of Law 8.742/1993 by Law 14.176/2021.

Only by assessing the financial situation of every individual household would it be possible to effectively identify the applicants that genuinely need BPC aid.

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REVISTA CHILENA DE DERECHO DEL TRABAJO Y LA SEGURIDAD SOCIAL

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