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CONTINUED PROVISION BENEFIT: THE ECONOMIC CRITERIA IN LIGHT OF THE JUDICIAL POWER'S UNDERSTANDING AND RECENT LEGISLATIVE INNOVATIONS *BENEFIT OF CONTINUED PROVISION: THE ECONOMIC CRITERION IN THE LIGHT OF THE UNDERSTANDING OF THE JUDICIARY AND RECENT LEGISLATIVE INNOVATIONS*

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SUMMARY
The objective of this work is to study the poverty requirement, that is, the economic criterion, which is one of the necessary requirements to obtain the right to the Continuous Payment Benefit, which brings the necessary parameters to obtain the right to support. financial aspect of said law. Doubts about the constitutionality of the aforementioned criterion, based on social changes and individual subsistence conditions, the need for flexibility in the economic aspect prove to be of great necessity, in view of the real current economic condition of those who find themselves in a situation of greater financial vulnerability. In view of this, a relative "confrontation" is analyzed between the evaluation methods used by the INSS, responsible for the evaluation, granting and maintenance of the benefit at the administrative level, which uses the criteria stipulated by the Organic Social Assistance Law, or that is, per capita income less than ¼ of the federal minimum wage and the flexibility formed by the jurisprudence of the Courts and Judges.

Key words: Social assistance. Benefit of continued provision. Economic criterion.

ABSTRACT
The object of the present work, aims to study the requirement of miserability, that is, the economic criterion, which is one of the necessary requirements to obtain the right to the Continuous Benefit Benefit, which brings the necessary parameters to obtain the right to protection . of the said law. Doubts about the constitutionality of the said criterion, based on social changes and the conditions of individual subsistence, the need for a more flexible economic aspect is of great need, in view of the real current economic condition of those who are in a greater situation. financial vulnerability. In view of this, a relative "confrontation" between the evaluation methods used by the INSS, responsible for the evaluation, concession and maintenance of the benefit in the administrative scope, which uses the strict criteria stipulated by the Organic Social Assistance Law, that is , per capita income below ¼ of the federal minimum wage and the flexibility formed by the jurisprudence of the Courts and Courts

Keywords: Social assistance. Benefit of the continued provision. Economic criterion.

1. INTRODUCTION

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The analysis of the socioeconomic condition established by the Organic Law of Social Assistance to obtain the benefit of continued provision has generated several controversies between the National Institute of Social Security, responsible for the evaluation and administrative granting, and the Judiciary, to which those eligible for the benefit resort to were not successful in the administrative screening, since the value of per capita income used as a parameter for the insured to be classified as socially miserable and fulfilling one of the requirements to obtain the benefit, that is, less than ¼ of the minimum wage, is considered outside of the current parameters, considering that it does not take into account the variation in the cost of living of each individual or family group, other social benefits include higher income, of up to ½ minimum wage, in addition to people who do not fit the per capita value , they are often really in need and end up not receiving the aforementioned assistance benefit.

Thus, based on a more specific analysis of the research object of the present work, that is, the methods of evaluating the economic criteria for obtaining the BPC, the parameters used by the entity responsible for granting the benefit through administrative means are presented, in addition to being judged which present the jurisprudential understanding of how economic evaluation should be carried out in the judicial sphere, with this aim to demonstrate the differences between the methods and criteria used by both, and the minimum value set by each, in addition to presenting the various legislative changes and jurisprudence that have taken place since the implementation of the benefit to the present day.

Based on what is currently being practiced in the judiciary, in order to analyze the condition of poverty, it is necessary to combine both requirements, both objective and subjective, which take into account what is established by law in line with the specific case.

It is important to highlight that such divergences between administrative and judicial criteria, and a possible change in value, would generate negative repercussions on the budget allocated to financing Social Security, which was the pivot on which discussions on the pension reform, approved in the year 2019. However, even with the possibility of budgetary losses, a more generous and comprehensive criterion must be created, which is consistent and closer to the social reality in which we currently live so that inequalities and social injustices can be reduced, where many are helpless and without the means for a satisfactory life as they do not fit into the value stipulated by the

legal system, and despite having an extremely minimal condition, they need assistance to meet their basic needs and at least lead a life with more dignity.

2 SOCIAL SECURITY

Social Assistance, together with Health and Social Security, are the pillars on which Social Security Law originates, which together form a social foundation of great importance to Brazilian individuals.

In part, Social Security can be conceptualized according to Martins (1997, p. 38) “as a set of principles, norms and institutions, integrated by actions initiated by Public Authorities and society, aiming to ensure rights relating to health, social security and social assistance”.

Thus, Social Security had its origins in the social need to establish means of protecting human dignity, aiming to resolve the risks of inequality and the effects of life's adversities, such as hunger, illness, old age, etc. (JARDIM, 2013).

In Brazil, social protection evolved in the same way compared to the international model, initially being private and voluntary, moving on to the formation of the first mutualist plans and, later, to increasingly greater State intervention (JARDIM, 2013).

In relation to social assistance, it is governed by its own law, that is, Law No. 8,742/93, and assistance services aim to promote improvements in the quality of life of the population that does not have the minimum conditions to maintain itself, also with the aim of promote ways for these people, who are part of the social assistance system, to be qualified and adapted to obtain income and enter the social security system, based on pecuniary benefits. (ZUBA, 2013, p. 60).

In summary, Social Assistance is a public policy, that is, a right of every citizen who needs it, therefore, the requirement for receiving assistance support is the need of the person assisted and not their prior contribution, as happens in social security, being In this case, the person endowed with resources for their maintenance, logically, will not be the recipient of state actions in the area of assistance, and it will not be possible to provide a monetary assistance benefit to this person. (MARTINS, 2014, p. 519-520). In Brazil, all innovation and definition of Social Assistance as it is currently known began with the Federal Constitution of 1988, which provided for the so-called “Social Security System”, including

in this concept both social security and health, as well as social assistance, being the first to bring in its body the express provision of this institute, since previous constitutions and legal norms mentioned access to social security or health, but without regulating or cite any rules on social assistance. (MARTINS, 2015, p. 344).

Social Assistance is initially set out in articles 203 and 204 of the 1988 Federal Constitution, integrating the Social Security system, together with Health and Social Security. (TSUTIYA, 2013, p. 509).

Social Assistance began to be regulated and organized from 1993 onwards by Law No. 8,742 and its introduction took place in view of the need to create a decentralized, participatory assistance system with guaranteed allocation of financial resources, with the introduction of control of the public sector on the resources transferred to private entities with evaluation and social control mechanisms, in addition to the need to reverse the social framework. (TSUTIYA, 2013, p. 511).

3 THE BENEFIT OF CONTINUED INSTALLMENT

Established by law no. 8,742/93, called the Organic Law of Social Assistance (LOAS), the Continuous Payment Benefit (BPC) is an assistance aid of a pecuniary and non-contributory nature, which aims to provide the minimum amount of assistance, through an integrated set of actions of both public and social initiative, to ensure that the basic needs of those who do not have the means to provide for them on their own are met. (CASTRO, 2020).

Due to the structure and its ability to serve all those assisted by this benefit, the INSS was responsible for granting the BPC, meaning that it would not be necessary to develop another structure and specific body to deal with the analysis of just one benefit which, although it does not have a contributory requirement, is similar in its structure to the social security benefits that remain INSS is responsible for its analysis. (IBRAHIM, 2015, p. 17). The BPC as it is currently known has its forecast from the 1988 Federal Constitution, but its structuring began decades earlier (MARTINS, 2015, p. 532).

After the promulgation of Law No. 8,213/91, "social security support" came to be known as "lifetime monthly income", this expression being contained in art. 139. Only with the entry into force of Law No. 8,742/93, in its article 20, the lifetime monthly income became

to be called "continuous benefit benefit", which is still used today. (MARTINS, 2015, p. 533).

The new law also brought new criteria for granting the benefit, which became less rigid than those stipulated by Law 6,179/74, but the granting of the benefit under the new parameters only took place after the publication of Decree nº 1,744/95, valid thus the old rule of lifetime monthly income until 12/8/95, the effective date of the new decree. (MARTINS, 2015, p. 533)

The initial requirements for the BPC concession are set out in Decree 8,805/2016, which stipulates as a criterion the beneficiary's registration in the Individual Taxpayer Registry (CPF) and in the Single Registry for Government Social Programs, with the latter being required to be periodically updated. of their information, and those who do not do so may have their benefits suspended. (AMADO, 2017, p. 53).

Defined by LOAS, the Elderly Statute and its regulatory decree, the elderly person must cumulatively prove that they are 65 years of age or older, are part of a family whose monthly per capita income is less than 1/4 (one quarter) of the minimum wage, and not have any other benefit under Social Security or another scheme, including unemployment insurance, except for medical assistance and a special compensatory pension. (CASTRO, 2020, p. 1,283).

In the case of a person with a disability (PwD), they must cumulatively prove the existence of long-term impediments of a physical, mental, sensorial or intellectual nature, and such impediments, associated with other conditions, hinder the full and effective participation of this person in society on equal terms with other individuals; in addition to a per capita income of less than 1/4 of the minimum wage and not having any other benefits under Social Security or any other regime, with the exception of medical assistance and a special compensatory pension. (CASTRO, 2020, p. 1,284).

For the purpose of granting the benefit, a long-term impediment will be considered as a result of the disability that will incapacitate the person for normal activities and work for a minimum of two years. (CASTRO, 2020, p. 1,285).

Thus, although both benefits present some divergences in their granting criteria and the requirements for qualifying the beneficiary, the analysis of the requirements makes it clear that the biggest obstacle between the benefit and those who find themselves in need of its provision is the economic criterion. , which, as will be seen later, should not be applied to

risks what the rules that regulate it bring, but rather make its relevance based on each situation or each case.

4 THE ECONOMIC CRITERIA FOR GRANTING THE CONTINUED INSTALLMENT BENEFIT

As discussed previously, Law 8,742/93, also known as the Organic Social Assistance Law (LOAS), regulated in its article 20 the necessary requirements for the granting of the Continuous Payment Benefit, such as the age criteria for the elderly and incapacity for the disabled. Furthermore, the same article established in its 3rd paragraph, an objective criterion to identify the individual's state of vulnerability, evaluating income*per capita*of the family group.

Thus, based on what was brought by §3, only those who found themselves in a state of complete misery and socioeconomic hardship could benefit from the financial assistance granted by the BPC, that is, the economic parameter of 1/4 of the minimum wage that was defined, would restrict social assistance to only those who were unable to obtain a dignified life or guarantee their subsistence through their own efforts or that of their family group. (SERAU JUNIOR, 2014, p. 276).

The granting of the benefit depended, until then, on proving the requirements: being an elderly person or having a disability and being in a situation of poverty, as legislated by art. 20 of Law No. 8,742/93.

With the wording given by Law No. 12,435/2011, the device underwent a subtle change regarding the delimitation of the restrictive concept of family, considering for the purposes of granting the benefit the family group composed of the applicant, the spouse or partner, the parents and, in absence of one of them, the stepmother or stepfather, single siblings, single children and stepchildren and wards, as long as they live under the same roof (BRASIL, 2011).

Article 20, §4, in its wording given by Law no. 12,435/11, although it prohibited the accumulation of BPC with any other social security benefit or other benefit, it allowed when resulting from medical assistance and special pensions of an indemnity nature. (BRAZIL, 2011). In the judicial sphere, the biggest cause of controversy concerns the objective criteria for measuring poverty brought by § 3 of the art. 20 of Law No. 8,743/93, which deals with per capita family income of less than ¼ (one quarter) of the minimum wage.

The Federal Supreme Court, in judgment of Direct Unconstitutionality Action No. 1,232, ended up deciding to reject the request, which provides for the need to prove that the family's per capita income is less than 1/4 of the minimum wage as one of the legal and objective requirements for meeting the conditions for granting the benefit, verifying, then, that the fulfillment of this requirement entails the presumption of necessity required by law. (STF, 1998).

There were many favorable decisions at the judicial level regarding the granting of the benefit of continued payment in cases where the per capita family income of the author was higher than ¼ of the minimum wage, with the economic condition being proven by other means, being based on the dissenting vote. by Minister Ilmar Galvão in ADI nº 1,232 in which he recognized the constitutionality of the legal provision, however, raising questions about the capacity of the rule imposed by the norm would be the only one capable of defining the situation of economic incapacity, and such a limitation would alienate a large part of the proponents of the benefit, deeming the action partially valid. (STF, 1998).

At a later time, the Federal Supreme Court, aiming to adapt the rule to the principles on which social security is based, established an understanding that the inflexible and absolute hermeneutics given to the device limited access to the fundamental right, in addition to not being able to assess the real state of poverty and social vulnerability in which families with elderly or disabled loved ones found themselves, taking into account the income obtained by them, without considering the factual context in which they found themselves (XIMENES, 2016, p. 613).

Thus, after years, the Federal Supreme Court ended up establishing an understanding similar to that given by Minister Ilmar Galvão in ADI 1,232, which already provided for the possibility of proving economic conditions by means other than per capita income and the parameter stipulated by the legal norm. . (STF, 2013).

Finally, with the aim of extending access to the benefit to those who needed it, but were “excluded” due to the income earned, the income of ¼ of the minimum wage was listed as a guide for the incidence of the absolute presumption of misery of the needy, which is why all individuals with income lower than that described in art. 20, § 3, of Law 8,742/93 would be entitled to the Continuous Payment Benefit. (GRAU, 2018, p. 86).

However, despite the objective of reducing the incidence of administrative denials of benefits by the INSS, judicialization in certain cases is inevitable. This is due to the fact that

that the divergence present in §3 of article 20 of the LOAS, was not limited to the value established by it to define the individual's state of poverty, but rather in the definition of per capita income as the only parameter for assessing economic hyposufficiency and social vulnerability of the benefit candidate. (SERAU JUNIOR, 2014, p. 278). After the relative unification of the jurisprudential understanding regarding the BPC's economic criteria, Law 13,981 was published on March 23, 2020, and the legal text of the continued provision benefit underwent some significant changes, giving a new wording to §3 of the article 20 of the LOAS, in which a family whose monthly per capita income is less than 1/2 (half) minimum wage was considered incapable of providing for the maintenance of a disabled or elderly person". (BRAZIL, 2020).

The President of the Republic, who had vetoed the change promoted above, but ended up being promulgated after overturning the veto, filed ADPF (Argument of Non-Compliance with Fundamental Precept) No. 662, stating that the criteria for the perception of the Benefit Benefit Continuing (BPC) worth 1/2 minimum wage, violated the rules of art. 113 of the ADCT, as well as arts. 16 and 17 of the Fiscal Responsibility Law and also art. 116 of the Budgetary Guidelines Law for 2020. (PREVIDENCIARISTA, 2020).

Minister Rapporteur Gilmar Mendes, on the merits of ADPF nº 662, which was received as a Direct Action of Unconstitutionality, considered that Law nº 13,981/20 would have increased the number of people eligible for the continued provision benefit without indicating the corresponding source of funding, determining on a preliminary basis, the suspension of the effectiveness of the rule in question, that is, of art. 20, §3 as amended by Federal Law no. 13,981/20 until the foreseen conditions are implemented. (STF, 2020).

Taking into account the entire argumentative context favorable to the expansion of the economic parameter, on April 2, 2020, Law No. 13,982 was published, which again amended § 3 of art. 20 of LOAS, stating that until December 31st of the 2020 financial year, the per capita family income parameter would be maintained at ¼ of the minimum wage. However, the approved legislative forecast provided for an increase to ½ minimum wage from 2021, and it is certain that this part of the approved project was vetoed by President Jair Bolsonaro, who even instituted the creation of emergency aid. (PREVIDENTIALISTA, 2020).

Despite the veto, Law No. 13,982/20 contained in its text, included in the Organic Social Assistance Law, art. 20-A, which due to the state of public calamity resulting from the

Covid-19, the criteria for measuring per capita income could be gradually expanded to up to ½ minimum wage.

Due to the fact that the presidential veto under Law No. 13,982 of 2020 was restricted to only the part of the text in which it dealt with the expansion of the criterion to ½ minimum wage, maintaining what it meant in terms of the validity of the ¼ parameter until December 31, 2020, the rule that regulates the granting of the benefit proved uncertain as to what would be valid after that date. Furthermore, the validity of the aforementioned Legislative Decree ended on December 31, 2020, which made the wording of art. 20- The dead letter. (BRAZIL, 2020).

To resolve the issue, through Provisional Measure No. 1,023 of December 31, 2020, President Jair Bolsonaro put an end to any speculation, provisionally, again attributing to art. 20 of LOAS the income parameter of less than ¼ of the minimum wage for granting the BPC. (BRAZIL, 2020).

It should be noted that at the time of this research, MP 1,023/2020 was awaiting evaluation by the National Congress. In the current context, to acquire the right to grant the BPC, two requirements are common among those eligible for the benefit (elderly people and people with disabilities), whether they do not have the means to provide for themselves or have it provided for by their family members, in addition to the requirement of a monthly per capita income of less than 1/4 of the minimum wage, taking into account the income of the entire family group, in addition to not having any other benefit under social security or any other regime. (BRAZIL, 2007).

It was defined that to calculate per capita family income, the applicant (recipient of the benefit), spouse, partner, parents, unmarried siblings, unmarried children and stepchildren and minor wards are considered for its composition. as long as they live under the same roof. (BRAZIL, 2007).

According to item VI of article 4 of the same decree, the monthly family income will be composed of the sum of the gross income earned monthly by the members of the family group, in the composition mentioned above, and may include salaries, earnings, pensions, alimony, benefits social security benefits, among other income received from the assets. (BRAZIL, 2007).

It is also worth highlighting, as defined by the sole paragraph of article 34 of the Statute of the Elderly, that for the measurement of per capita income, the benefit already granted to any family member in the terms of the caput. (BRAZIL, 2003).

In relation to people with disabilities, the Superior Court of Justice (STJ) in**repetitive feature,** theme**640,**extended to people with disabilities the same condition provided for the elderly, thus defining the understanding that for the purposes of receiving the benefit of continued provision, the benefit of a minimum wage that has been granted to another person must be excluded from the calculation of family income. disabled family member. (STJ, 2015).

The issue ended up being regulated by Law No. 13,982/20, included in § 14 of art. 20 of the LOAS, establishing that the benefit worth up to 1 (one) minimum wage is continuous provision or another social security benefit granted to an elderly person over sixty-five years of age or to a person with a disability will not be computed, for the purposes granting the continued benefit to another elderly person or person with a disability in the same family. (BRAZIL, 2020). Thus establishing the criteria for measuring per capita family income for granting the assistance benefit, which, although it remains unchanged in its delimitation of ¼ of the minimum wage, has undergone certain changes in terms of the parameters to reach the required value, as demonstrated in this topic .

CONCLUSION

With the implementation of the social security plan in the national system and the imposition on the State of the duty to guarantee the search for risk protection, also having the principles relating to security as the basis of social actions, the fight against inequalities, not limited only to social struggles, but also to projects and assistance programs granted by the government entity, prioritizing the guarantee of the subsistence of those most harmed or in a state of poverty.

The Continuous Payment Benefit emerged as one of the public policies, in which the State grants a minimum necessary to promote the basic needs of its recipients, which covers the elderly and disabled people associated with situations of extreme need. Although the benefit provided for in LOAS aims to protect the elderly and people with disabilities, by bringing limitations to access to the benefit, several people found themselves blocked for not being entitled to the resource, as it required proof of income which should be less than 1/4 of the minimum wage, in addition to expressly prohibiting the cumulation of other security benefits with the BPC, which ended up resulting in the ineligibility of several people who considered themselves in need of this support.

The assistance benefit has proven to be a very effective aid in the search for improving the conditions of the poorest sections of the country, reducing the poverty rate and, despite the limiting requirements for access to it provided for by law, the BPC has fulfilled the objective of providing basic assistance to its beneficiaries, however the criteria currently applied for the purpose of determining per capita family income, which is less than a quarter of the current minimum wage, proved to be technically limited to support the measurement using such a parameter.

Its justification is not based on the constitutional principles that emerged to guide social assistance actions in Brazil, as its objective is to protect the most vulnerable groups who are considered incapable of providing for themselves and their families, based on the value of less than a quarter of the minimum wage as income is incoherent, considering that all other parameters for determining poverty in other benefits guaranteed by Brazilian legislation are higher than this amount.

Thus, after observing the inconsistency and deficiency in the application of the aforementioned criterion, many of those who found themselves helpless in their requests through the administrative process, seek to obtain the benefit from the understanding of the magistrates, who usually adopt a humanitarian vision and apply an assessment of the economic conditions of the applicants, with regard to the granting of the BPC through judicial means.

After several decisions arguing for the granting of the benefit, despite the legal criteria, as well as reflections on the contexts of poverty in which they were inserted in the specific case, the objective income criterion began to prove incapable of measuring the real state of need, deciding- This is to maintain the constitutionality of the legal provision, but making the measurement of poverty more flexible, including in the assessment several other parameters to arrive at the stipulated value, analyzing the specific case and not limiting itself to just the sum of the values received by the family group, in addition to covering the maximum income level is up to half the minimum wage per person in the family group, taking into account the fact that other benefits granted by the government are more flexible in terms of the minimum income value, such as the family allowance.

The recent changes aimed at making the per capita income measurement parameter more flexible, such as that contained in Law No. 13,981/20, which expanded the minimum income criterion to ½ minimum wage, which was later vetoed, ending up not having its effects , or included in Law No. 13,982 of the same year, which, like its predecessor, increased the

economic criterion for the same ½ minimum wage, but limiting this concession only to the duration of the COVID-19 pandemic, show the tendency of the legislative power to regulate this expansion, but still suffering resistance from some government entities, which justify the lack of a funding source since granting more benefits would result in more expenses and go beyond budgetary regulations.

FINAL CONSIDERATIONS

In view of the above, it can be concluded that the criterion imposed by the legal system, for the purposes of calculating income and consequent granting of the Continuous Payment Benefit, goes against all precepts for protecting the dignity of the human person and the guidelines established by the Democratic State of Law of provide the reach and accessibility of social rights to everyone, even more so those who are extremely vulnerable and economically insufficient, since the unfounded limitation to obtaining the benefit based on their economic criteria proves to be a beautiful example of social regression, in addition to consider the fact that this does not observe the reality of society, having as a comparison the judicial measures, which are offered for access to assistance benefits.

In conclusion, the importance of safeguarding the right to assistance benefits is observed, since in various situations the well-being and guarantee of a dignified life for people with disabilities and the elderly depend directly on this support, including that of their families, the which makes it essential to reevaluate legal precepts, thus positive questions that reflect the current reality of society, considering that the criteria used by LOAS do not match the situation and cases of the majority of the population today.

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