

Democracy and Social Justice: Negative Effects of the Calculation of the Death Benefit on Welfare Orphans.

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ABSTRACT: The death pension is among one of the benefits provided by Social Security in Brazil. It happens that, since 2015, it has undergone changes that have made it difficult for those who have the right to access it. The most significant change came with the Pension Reform that occurred in November 2019, which altered its calculation base, economically harming the purchasing power of its beneficiaries. For this reason, this article aimed to address how a benefit whose basis is to help the citizen of an unexpected event, can be changed to diminish the economic power of this. To achieve the intended, some considerations on democracy and social justice were also woven, the analytical-descriptive research of exploratory nature was used, especially in books, scientific articles, and laws related to the theme, in addition to real examples of primordial for the foundation of the proposed objective.

KEYWORD: Democracy; Social Justice; Death Pension; Calculation

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I. INTRODUCTION

There is no single model of democracy, so much so that various theories try to describe and characterize democratic systems. Even with several existing models, a phrase by Rui Barbosa is still valid today: "the worst democracy is preferable to the best of dictatorships".

A democratic society of law brings to its legal system the guarantees of human rights, rights that are fully linked to democracy and social justice. Thus, it can be said that democracy is the environment where there is the development and promotion of human rights through social policies.

This work will understand, in its first topic, the relations between democracy and social justice. Thus, it understands democracy as a system that aims to ensure the citizen's participation in the politics of his society, either by direct or indirect means, as well as to limit state power to maintain individual and social freedoms. To this end, the Brazilian Federal Constitution was drafted so that everyone has the minimum conditions of a dignified life; that would be the ideal of justice.

In a second moment, this paper discusses how Social Security aims to ensure the rights related to health, social security, and social assistance. And in particular, how the death pension benefit protects the dependents of the insured from the death event, causing the family to maintain its economic power to provide for it.

In the last topic, this paper mentions 3 real cases of women who lost their husbands, pensioners and, as the change in the calculation of the death pension benefit, brought with the pension reform, harmed the sustenance power of these and many other families. Thus, such families, in addition to dealing with emotional loss, also had to deal with the loss of purchasing power.

To achieve the proposed objective, we used exploratory analytical-descriptive research, especially in books, scientific articles and laws related to the theme, in addition to primordial real examples for the foundation of the proposed objective.

II. METHODOLOGY

The methodology used to achieve the intended, were in the considerations on democracy and social justice, using the analytical-descriptive research of exploratory nature, especially in books, scientific articles and laws related to the theme, in addition to real examples of primordial for the foundation of the proposed objective. Figure 1 shows a diagram, with each step of the methodology represented by connections. The arrow indicates the sequence of steps, indicating that the bibliographic review comes after the definition of the problem, followed by the formulation of the hypothesis, data collection, data analysis, interpretation of the results and, finally, the elaboration of the report (DE OLIVEIRA, 2018).

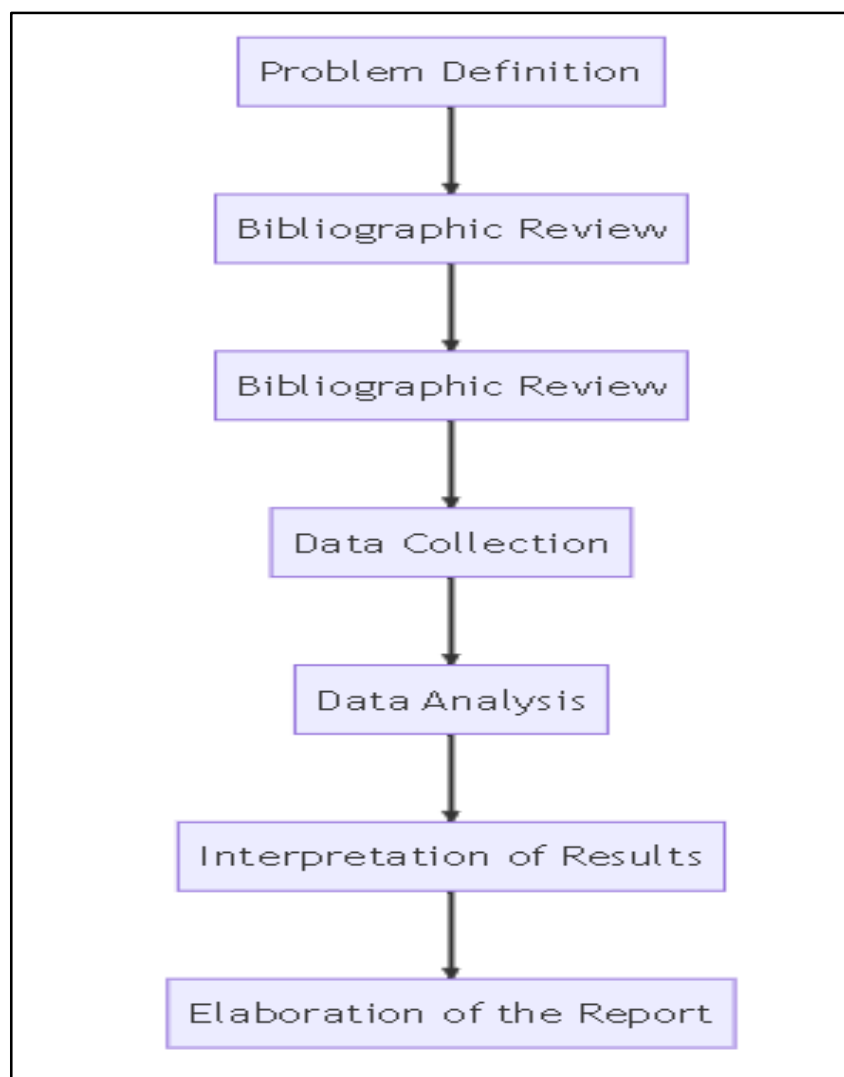


Figure 1: Elaborated by the authors based on (DE OLIVEIRA, 2018).

DEMOCRACY AND SOCIAL JUSTICE

In advance, it should be warned that there is not only a definition of democracy, what will be understood in this topic is how a democratic state of law is linked to the issues of social justice.

SOME CONCEPTIONS ABOUT DEMOCRACY

The contemporary theory of Democracy converges three traditions of political thought:

- a) classical theory, also disseminated as Aristotelian theory.
- b) medieval theory and

c) modern theory, also known as The Maquiavel theory (BOBBIO; MATEUCCI; PASQUINO, 1998).

In classical theory, Aristotle understood democracy as an unfair and corrupt way of governing itself and defined it as the "government of advantage for the poor" and set against the "Government of advantage for the monarch" (tyrant) and the "Government of advantage for the rich" (oligarchy) (BOBBIO; MATEUCCI; PASQUINO).

The doctrine of classical democracy received different readings, in one of them, Schumpeter (1961) brings that: "the democratic method is the institutional arrangement to reach certain political decisions that carry out the common good, and it is up to the people themselves to decide, through the election of individuals who gather to fulfill their will".

From the point of view of the author above, this type of democracy is named procedural, because it is defined only as "a system of rules for the choice of those leaders, who would make the political decisions that would guarantee or not the common good of the community that chose them" because the democratic method would be an institutional method to make political decisions (MONTEIRO; MOURA; LACERDA, 2015).

Medieval jurists elaborated the theory of popular sovereignty. About medieval theory, the work of Marsilius of Padua (Defensor *pacis*) demonstrates the principle that the power to make laws, on which the sovereign is supported, is exclusive of the people, or their most powerful part (*valentine pars*). In this theory elaborated by Marsio, the legislature and the executive are the two fundamental powers of the state — the first is the main power and belongs to the people, while the second is delegated by the people to others by a revocable mandate. It is possible to understand that the medieval author argues that the real power of establishing a government belongs to citizens or legislators, and, as a consequence, to undress a ruler if necessary (BOBBIO; MATEUCCI; PASQUINO, 1998).

Coming to the modern concept, democracy is considered a government of the people, as a government of the majority, where sovereignty is known as popular, being the responsibility of the people to legislate and, in this way, to found the normative order that will govern society, that is, the Constitution.

Thus, democracy can be conceptualized as a system that aims both to ensure the citizen's participation in the politics of his society, either by direct or indirect means, as well as to limit state power to maintain individual and social freedoms (HARO; DAYS; FERRER, 2020).

In general, the development path of representative democracy can be divided basically into two directions: a) in the gradual expansion of the right to vote; and (b) in the increase of representative agencies (agencies composed of elected representatives). In both directions, the democratization process, which includes the full, increasingly full compliance with the limit principle of popular sovereignty, was inserted into the liberal structure, where the liberal state is understood as the State of Guarantees (BOBBIO; MATEUCCI; PASQUINO, 1998).

In the case of a state of guarantees, the idea of justice is essential for them to be met, a subject that will be addressed below.

THE ISSUE OF SOCIAL JUSTICE

The postulate in the Constitution is that everyone has the minimum conditions of a dignified life, this is the ideal of justice. Some types of development are outlined by the Supreme Law: "it is a development that, reducing inequalities, will provide social well-being and justice." This time, it is perceived that Brazil "is attached to combining economic progress with social progress" (CARVALHO, 2010).

It is important to emphasize that the issue of social justice, in a democratic society of rights, is closely linked to the basics of freedom and equality. And one of the thinkers who best outlined the main elements for achieving the principle of social justice was John Rawls.

The democratic equality brought by Rawls "requires a strictly equal distribution of basic freedoms and rights, as well as equitable opportunities." And since citizenship is the basis of the economic and political system, public policies and essential constitutional issues must be built by the citizens themselves (DANNER, 2006).

At the last moment, Rawls bases society on human dignity, so that it is oriented to realize the well-being of every citizen who belongs to it. It is for this reason that society is understood as a "fair system of social cooperation between free and equal citizens" based on dialogue and mutual respect (DANNER, 2006).

Rawls (1997) outlined the following consideration of the term justice:

Justice is the first virtue of social institutions, as truth is the system of thought. Although elegant and economical, a theory should be rejected or revised if it is not true; similarly, laws and institutions, however efficient and well-organized they may be, must be reformed or abolished if they are unfair.

If Rawls' view of the idea of justice were followed to the letter, the basis of calculation applied in the granting of death pensions in Brazil, which will be later, should be reviewed immediately, because its injustice to surviving dependents is clear.

It is important to consider that the formulations of Rawls' principles of justice give a cooperative and "well-ordered" society and demonstrate its concern to meet the basic needs of citizens to exercise their rights and freedoms. Therefore, in the process of exercising fundamental rights, some conditions must be fulfilled in advance because they consider these "basic needs" (WEBER, 2013).

Although Rawls' theory of justice is questioned and even contradicted by several authors, Sen (2011) makes it clear that this theory played an important role in demonstrating the various aspects of the idea of justice and, although this theory is abandoned, Rawls clarifications will continue to contribute to political philosophy.

Moreover, it remains clear that justice seeks elements aimed at compensating people living at an economic, social, and political disadvantage. In this sense, it is up to the State, represented by its elected rulers, to develop policies to compensate this portion of the population, because social justice is essential for economic and social development.

The next topic will address the death pension benefit, a benefit that is part of Social Security, a constitutional system of protection and social justice.

SOCIAL SECURITY IS A FORM OF PROTECTION AND SOCIAL JUSTICE.

Title VIII of the Federal Constitution of 1988 provides for Social Security and, article 194, includes a set of actions aimed at "ensuring rights related to health, social security and social assistance".

This topic will seek to address how social security protects Brazilian citizens, especially through the social security benefit of a death pension.

SOCIAL SECURITY IN THE FEDERAL CONSTITUTION OF 1988.

Before the Brazilian Federal Constitution, the Universal Declaration of Human Rights of 1948, to protect the Dignity of the Human Person, predefined in article XXV that every human being should be entitled to a standard of living that can ensure, not only for himself but for his entire family: "the right to security in the event of unemployment, illness, disability, widowhood, old age or other cases of loss of livelihoods outside its control."

Social rights are disciplined in the title intended for the social order. The only article of Chapter I — General Provisions of Title VIII — of the Social Order, of the Federal Constitution, Art. 193, states that the "Social Order is based on the primacy of work and for the objectives of providing social well-being and justice".

In this sense, to affect the foundations of the Brazilian State, especially the Dignity of the Human Person and also to make concrete the provisions of article 3, which provides for the construction of a free, just, and solidary society, the Federal Constitution of 1988 instituted an instrument of social protection: Social Security (CARVALHO, 2010).

In Balera conception (1989), social security represents an evolution in the concept of the role of the State and society. When necessary, almost all the protection of individuals depends on public power and the initiative of society. The Brazilian constitutional order offers social security three tools to achieve the proposed objectives: the health system, the social security system and the social assistance system.

Also, the constitutional text lists social security objectives as objectives: universality and services to urban and rural populations; selectivity and distributivity in the provision of benefits and services; irreducibility in the value of benefits (our griffin); equity, among others (COVO; DAYS, 2019).

The principle of irreducibility of the value of benefits, mentioned above, limits the modification of the monetary value (quantitative expression) and the real value (qualitative expression) thus avoiding reductions that limit the purchasing power of the beneficiary or that do not preserve the original value of the benefit (TELES, 2007). Under this principle, Article 201, paragraph 4 of the CF/88 provides that " the readjustment of benefits is ensured to preserve, permanently, the real value, according to criteria defined by law".

Nevertheless, the normative force of the principles, the reductions in benefits continue to be imposed, or with the election of calculation criteria that use reducing factors; now with the application of new calculation indices as happened with the death pension benefit that will be seen later.

Before entering the main subject of this work, it is worth mentioning, as already seen above, that as a set of social security initiatives, health, social security and social assistance are part. The death pension benefit is part of social security, it is of a contributory nature and compulsory membership. Moreover, the benefits provided to the insured and their dependents of the Social Security according to article 18 of law 8.213/91: disability retirement, retirement by age, retirement by contribution time, special retirement, sickness benefit, maternity salary, accident benefit, death pension, incarceration, social service and professional rehabilitation.

Despite the various benefits offered, what will be seen in the next topic will be, specifically, the death pension benefit, due to dependents of social security policyholders.

THE DEATH PENSION BENEFIT

It is important to clarify that the death event, despite being the only certainty of any person, is undesirable and irreversible. Thus, the State, as guarantor of social protection, instituted the death pension benefit, to support

its dependents, which, with the occurrence of this event, had as a consequence the loss of the resources that guaranteed their subsistence.

Based on Article 74 and following Law No. 8,213/91 (Social Security Plans and Benefits Act), the death pension is the social security benefit due to the dependents of the insurance who died, retired or not. It is a benefit that replaces the remuneration that the deceased insured received in life.

Article 16 of Law No. 8,213/91 brings the list of dependents of the insured:

I) the spouse, partner, partner, and unemancipated child, of any condition, under 21 (twenty-one) years old or invalid or who has an intellectual or mental disability or severe disability.

II) parents; and

III) the unemancipated brother, of any condition, under 21 (twenty-one) years old or disabled or who has an intellectual or mental disability or severe disability.

It is noteworthy that the same law, in paragraph 1 of Article 16, is clear by saying that the existence of any of the classes mentioned above excludes the right to a pension of the following classes. It is understood in this way that the above list is excluded, due to be understood in the said order that was brought into law. Thus, the existence of dependents of class I excludes the right of dependents of classes II and III.

To be entitled to the benefit there are three requirements:

- a) the presumed death or death of the insured;
- b) the insured quality of the deceased at the time of death;
- c) and the existence of dependents, according to the law.

Regarding the quality of insured of the deceased, it is important to highlight that, even if the person, at the time of death, lost this quality, but still implemented the legal requirements for obtaining some type of retirement by the date of death, the pension will be due to his dependents¹.

3“Summary 416 of the STJ - It is due to the death pension to dependents of the insured who, despite having lost this quality, met the legal requirements for obtaining retirement until the date of his death. (Súmula 416, THIRD SECTION, judged on 09/12/2009)”.

The first major changes in this benefit came with Law No. 13.135/15. This law established a period of termination for the benefit according to age and also required a minimum of two years of marriage or stable union for the dependent to live up to the benefit, with only two exceptions:

- a) when the cause of death is an accident or,
- b) when it is an invalid spouse or partner who is unsusceptible to rehabilitation.

The change brought by the above law is as follows: the dependent who proves to be two years at least married or stable union will receive the pension for a certain time according to his age: for 3 years if he is under 21 years; for 6 years, if he is between 21 and 26 years old; for 10 years, if you are between 27 and 29 years old; for 15 years, if you are between 30 and 40 years old; for 20 years, if you are between 41 and 43 years old; and for life for those aged 44 or over (in January 2021 it was increased by one year for each group).

For those who do not have two years of marriage or a stable union, the law determined that they will only be entitled to 4 months of pension. This same rule comes with dependents who do not have at least 18 monthly contributions until the date of death.

It is emphasized that before this law, it was only necessary to prove a stable union or marriage for the dependent to receive the benefit for a lifetime, regardless of the age at which he became a widower.

Moreover, the most drastic change came with that of the Pension Reform (EC 103/19), which entered into force on November 13, 2019, and significantly altered the calculation of benefits, thus reducing its value.

Previously, the monthly income corresponded to one hundred percent (100%) of the benefit amount that the insured received on the date of death or would be entitled to receive if he retired due to disability. In the new rules, the coefficient became 50% of the amount of retirement that the deceased insured received or the one he would be entitled to if he had to retire due to disability on the date of death. If there are dependents, it adds up to 50% plus 10% per dependent up to the limit of 100%.

The loss is even greater if the deceased insured person is not retired. In this case, to reach the value of the benefit is calculated the average of all contribution salaries since July 1994, a fact that leads to a significant reduction since there is no longer way to discard the 20% lower salaries as was done previously.

O próximo tópico buscará demonstrar, com exemplos concretos, como essa base de cálculo afetou a vida dos dependentes.

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CONCRETE CASES

According to statistical data from Social Security, a total of 113,320 death pension benefits were granted between January and May 2020, while between the same months of 2021, this total jumped to 226,858 benefits (BRASIL, 2021).

The impact of the calculations of the death pension for dependents is a cruel fact to be faced, in addition to effective loss it is also necessary to deal with the loss of economic power and, statistical data show that this economic loss will also be felt by society in general, as it significantly loses its purchasing power. In addition, to demonstrate such a loss, 3 real examples will be cited below.

The first case refers to a dependent woman, from the home, aged 48 years. The husband, insured by the General Regime, was an airplane pilot since 2011 and, only in the last 5 years, contributed to the social security ceiling, which in 2021 corresponds to R\$ 6,433.57. The insured died in April 2021, aged 44, due to complications of COVID-19.

In this case above, when the death pension was deferred to the widow, the calculation conducted was the average of all remunerations since July 1994. From this calculated average is that the value of 50% is removed, then 10% more per dependent is added. As can be seen in the image below, taken from the letter of the grant of the death pension, the benefit amount was calculated at R\$ 1,911.22.

Table 1: Calculation of benefit according to EC 103, DE 13/11/2019.

CALCULATION OF BENEFIT ACCORDING TO EC 103, DE 13/11/2019	
CONTRIBUTION SALARIES AVERAGE	R\$ 5.308,95
CONTRIBUTION TIME CONSIDERED	12 ANOS
PERCENTAGE OF THE CALCULATION BASE VALUE	60%
CALCULATION BASE VALUE	R\$ 3.185,37
PERCENTAGE OF MONTHLY INCOME (DEPENDENT)	60%
BENEFIT AMOUNT (INITIAL MONTHLY INCOME)	R\$ 1.911,22

It is impossible not to notice the significant loss that this dependent had since she did not have paid activity and will have as the sole source of subsistence the pension left by her deceased husband.

The second example brought is a 73-year-old female dependent woman whose 82-year-old husband, a retired social security pensioner, also died as a result of COVID-19. He was retired and received a benefit in the amount of R\$ 5,059.35. The calculation of the value of the benefit generated was, as observed in the image below, in the amount of R\$ 3,035.61.

Table 2: Calculation of benefit according to EC 103, DE 13/11/2019.

CALCULATION OF BENEFIT ACCORDING TO EC 103, DE 13/11/2019	
CALCULATION BASE VALUE	R\$ 5.059,35
PERCENTAGE OF MONTHLY INCOME (DEPENDENT)	60%
BENEFIT AMOUNT (INITIAL MONTHLY INCOME)	R\$ 3.035,61

In this second example, the fact that the benefit institute is already retired guarantees the dependent half of the value of the benefit that he already received, at this value, they add up to 10% per dependent. This calculation can be considered a little more advantageous than the calculation of the first example, but if you consider the age of the dependent, the loss is also significant, because as age advances, it can hardly be inserted in the labor market to supplement their income.

A third and final example brought, also refers to a dependent woman, with 54 years, her husband, insured and retired by social security, received a benefit in the amount of R \$ 3,632.73. After his death, the death pension benefit, as noted in the image below, was generated in the amount of R\$ 2,179.63.

Table 3: Calculation of benefit according to EC 103, DE 13/11/2019.

CALCULATION OF BENEFIT ACCORDING TO EC 103, DE 13/11/2019	
CALCULATION BASE VALUE	R\$ 3.632,73
PERCENTAGE OF MONTHLY INCOME (DEPENDENT)	60%
BENEFIT AMOUNT (INITIAL MONTHLY INCOME)	R\$ 2.179,63

It is possible to observe that the loss of economic power generated by the new calculation of the value of this benefit is clearly and unequivocally left. And, given the above, it is necessary to review these calculations to maintain a society with a dignified and egalitarian life, so that there is balance and a sense of justice in decisions, thus ensuring a better quality of life for dependents of social security policyholders.

Finally, it is relevant to mention the recent understanding of the Recursal Class of The Federal Special Courts of the Federal Court of Sergipe that ruled that EC 103/19 (Pension Reform) is unconstitutional in cases of Death Pension.

According to the vote, Constitutional Amendment 103/19 suppressed social security rights built for decades to protect those who find themselves without their primary source of subsistence, due to an unexpected event. This Amendment reinstated the death pension rules that were in the Organic Social Security Law (LOPS, Law No. 3,807/60) and the rules on the initial monthly income were more burdensome than that, even after it was repealed by the Federal Constitution and Law No. 8,213/91.

Also, according to the vote of the Recursal Class, the fact that EC No. 103/2019 drastically reduces the value of the monthly income of the benefit, without taking as a basis any other economic parameter, was the same as "emptying the content of the constitutional guarantee in practice". Thus, it was established that, in the case of the trial, the initial monthly income should be 100% of the amount of retirement received by the deceased insured, exactly as provided for in the rules before the Amendment.

It is noteworthy that such a decision will set precedents for new actions like this to arise in the courts, thus bringing hope of justice for those who received the benefit after the entry into force of the Pension Reform.

III. CONCLUSION

This work, in its first moment, seeks to demonstrate how a democratic society, where it presupposes the existence of citizens who have rights and duties, is responsible for ensuring social justice for the population.

It aims to demonstrate how Social Security, through its benefits, especially the death pension, offered by Social Security, represents a form of social protection for all its beneficiaries.

As seen, the reduction in the value of the Death Pension, together with the greater bureaucracy in acquiring it and, mainly, the change in the way the benefit is calculated, caused a great loss to society, given that the quality of life of the dependents suffered a considerable decrease, generating great economic and social impacts.

At the last moment, through the actual examples brought, it was possible to observe the setback caused by Constitutional Amendment No. 103/2019. And if, the main objective of the death pension was to guarantee the quality of life of the dependents of the "*of cuius*", the same loss, because such reduction significantly and unfairly impacted the economic life of these dependents, especially those who had no other source of income, leaving no alternative but to resort to the judiciary with the hope of considering the unconstitutional such calculation of benefit.

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