

*The Remodeling of the Continuous Cash Benefit Social Policy by the  
Judiciary*

*A Remodelação da Política Social do Benefício de Prestação Continuada pelo  
Judiciário*

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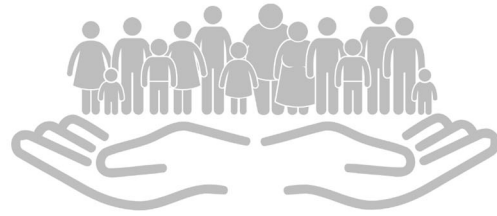
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**ABSTRACT:** Due to organized civil movements, the Brazilian Constitution of 1988 provided for a series of civil rights. Among them, the benefit of continuing provision of a minimum wage to the elderly and to the disabled that could not provide for themselves, or by their families, irrespective of any contribution from the State. The judiciary's participation in the growth of the number of beneficiaries goes far beyond the concessions resulting from stricto sensu decisions, as by casuistically reinterpreting the law in thousands of cases, it ultimately leads to an imbalance in politics, forcing the other two Branches to adapt. Thus, new laws emerge from that recent jurisprudence. Although the demand comes from the quest for equality, given the limits of the available public resources, it ends up harming the State's political and financial agenda. It also

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leads to the illegitimate usurpation of the right to rule of the Legislative and Executive Branches, as the real possibilities in policy implementation – especially the ones that are programmatic in nature – cannot be technically analyzed, despite they demand economic and social planning.

**Keywords:** social security; continued benefit; judicial activism; reserve of the possible; judicialization of policies.

**RESUMO:** Em decorrência dos movimentos organizados, a Constituição de 1988 previu uma série de direitos sociais em seu texto. Dentre eles, o Benefício de Prestação Continuada – BPC, no valor de um salário-mínimo aos idosos e deficientes que não tivessem condições de se manter ou serem mantidos por sua família, independentemente de qualquer contribuição ao Estado. A participação no aumento do número de beneficiários vai muito além das concessões decorrentes de decisão judicial *stricto sensu*, pois ao reinterpretar a norma casuisticamente em milhares de processos acaba por desbalancear a política nacional, forçando os demais poderes a se adaptarem. Dessa forma, surgem normas a reboque da jurisprudência, sempre no intuito de resgatar um modelo sistemático e operacional que possa atender os cidadãos de forma isonômica. Apesar da origem da demanda estar focada na busca pela igualdade, dado o limite dos recursos públicos disponíveis, o que se verifica é um prejuízo na agenda política e financeira do Estado e usurpação ilegítima do direito de escolha dos Poderes Legislativo e o Executivo, sem que sejam analisadas tecnicamente as possibilidades reais de execução das políticas de natureza programática, que exigem um planejamento econômico e social.

**Palavras-chave:** seguridade social; benefício de prestação continuada; ativismo judicial; reserva do possível; judicialização das políticas.

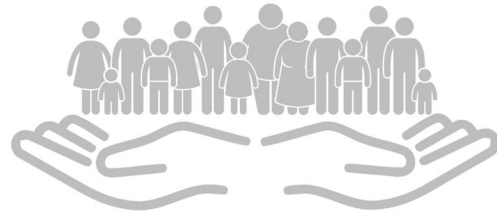
## 1 INTRODUCTION

Putting the Brazilian Judiciary's reasoning into historical perspective, it is clear that, when faced with a conflict between what the law prescribes and what they believe to be the fairest solution for the case, judges do not hesitate to rely on interpretative techniques to redefine legal provisions and make viable what they understand to be appropriate. In the case of Continuous Benefit Payment, BPC, this stance encouraged the search for judicial means to claim the welfare benefit by citizens who do not meet, partially or entirely, the eligibility criteria. In 2013, after almost two decades of judicialization of the BPC, the Supreme Federal Court, STF, ruled that, in

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order to grant the benefit, other hypotheses may be considered in addition to those legally provided for.

When regulating Social Welfare, the National Congress must, of course, respect constitutional principles. However, in addition to these, it must observe the objectives that govern the organization of Social Security. Among these, selectivity and distributivity are particularly relevant. Soon after the enactment of the LOAS,<sup>1</sup> the constitutionality of the eligibility criteria for the BPC was questioned by the Attorney General of the Republic, who alleged that the criteria might restrict social rights, in disagreement with constitutional principles. However, the Direct Action of Unconstitutionality was dismissed by the STF.

However, the rapporteur's dissenting vote recommended partially accepting the action. In line with the understanding that the eligibility criteria defined by the LOAS for the BPC do not exhaust the possibilities of proving insufficiency, the rapporteur considered: *“the question that remains is whether the hypothesis provided for by the rule is the only one capable of characterizing the situation of economic incapacity of the family of the disabled person or the elderly invalid.”* (Brazil, 1988, rapporteur's vote, p. 4). This interpretation can be considered the reason for the judicialization of the BPC.

In this paper, we use documentary and statistical evidence to demonstrate that the judiciary, when dealing with the BPC, acted as a positive legislator. Considering cases in isolation, disregarding the context of social policies, it employed interpretative maneuvers to create alternative hypotheses for concession despite maintaining the legal provision that gave effect to the constitutional command, obliging the legislator to adapt the rules in line with jurisprudence.

## 2 CONTINUOUS BENEFIT

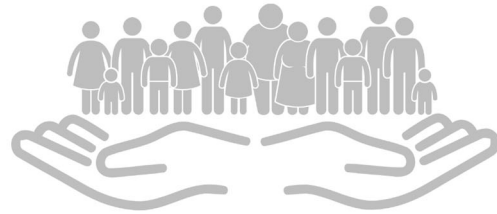
### 2.1 The Genesis of BPC in Social Assistance

According to Fagnani (2005), it was only at the end of the last century, after a progressive

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<sup>1</sup> Federal Law of Social Welfare.





crisis in the labor market that led to a shortage of opportunities and income associated with increased unemployment and informality, that organized social movements managed to include the fight against poverty on the national agenda. In the 1980s, numerous discussions and reflections emerged on the potential contours of social assistance conception and implementation (cf. Sposati et al., 1985).

From the new constitutional perspective, it was impossible to conceive of contemporary democracy without the full integration, in social protection, of the significant portion of the population that was marginalized, outside the market, or in informal work relationships.

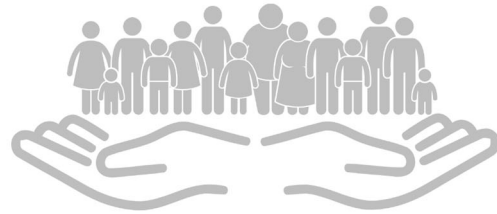
Today, Social Welfare, together with social security and health policies, constitutes a system formed by positive actions of the State aimed at consolidating a substantive democracy. It is part of the three pillars of Social Security, which is embodied in government actions developed jointly and through programs that provide, equitably and fairly, the guarantee of rights and dignified living conditions to citizens. However, it differs because Social Welfare is non-contributory and is also carried out through public initiatives and societal actions.

It should not be forgotten that the guarantee of a minimum existential level must be adapted to the real needs of society at a given moment in history and its development: it is necessary to find a balance point to achieve social objectives. Boschetti (2006) states that Social Assistance must be treated with realism and common sense: universality must be approached soberly in order to define rationally which citizens fall into the condition of need.

In addition to identifying users, it was necessary to define how public protection would be provided in order to comply with the constitutional mandate. The chosen path focused on guaranteeing income, with the expansion of both coverage and the value of benefits, leading to the consequent gradual inclusion of new social segments through the structuring of a distributive system that, in addition to reducing poverty and social inequality, acts preventively in the face of other hypotheses of vulnerability (Mesquita et al., 2015).

The lack of income renders it impossible to achieve a decent level of well-being through consumption. It is accompanied by insecurity resulting from limited access to and poor working





conditions, especially in cases of illness, old age, or disability (Castro & Ribeiro, 2009).

It should not be forgotten that although Social Welfare offers monetary benefits aimed at those in poverty, it is not limited to this. Welfare also operates the part of Social Security that offers services aimed at guaranteeing rights and addressing situations of vulnerability that can affect any citizen, from the dissolution of family ties to drug addiction.

Since the Constitution, the welfare model has undergone a gradual transformation, culminating in the establishment of the Unified Social Assistance System (SUAS), which was approved by the National Social Assistance Council in 2005. According to Tavares (2009), SUAS reconciles its operational approach with its funding of Social Assistance. Basic and extraordinary social protection services are decentralized and offered primarily at the Social Assistance Reference Center (CRAS) and the Specialized Social Assistance Reference Center (CREAS). After a period of consolidation and changes to the LOAS (Brazil, 2011a), the system gained enormous capillarity. In 2015, SUAS had a network of 8,192 CRAS and 2,400 CREAS. Thus, SUAS is now more accessible to the low-income population than INSS agencies. Currently, the guidance for those who intend to apply for a BPC is to look for the nearest CRAS to start the process.

The practical design and implementation of social policies encounter a series of issues that must be addressed in order to make a reliable diagnosis and thus achieve the goal intended by the norm: social well-being. Regional socioeconomic inequalities cannot be ignored, and in a country with the continental dimension of Brazil, it is essential to understand the increasingly complex and problematic nature of the urban or rural environment in which the recipient is located (Jaccoud, 2009).

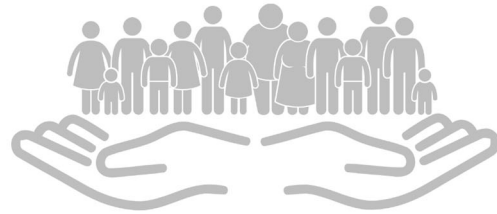
## 2.2 Criteria for eligibility for BPC

The LOAS regulated the eligibility criteria for BPC, following the Constitution, which defined its value as one minimum wage and restricted it to the elderly and people with disabilities. To operate the BPC, the LOAS should better specify some fundamental concepts, such as what

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defines someone as elderly or disabled, what "insufficient" means, and how to prove it, as well as who constitutes a family member. The judicialization of BPC, as we will see, revolves around the alignment or lack thereof of these specifications with other principles and provisions of the Constitution and other laws that address Social Assistance.

### 2.2.1 The criterion of insufficient means

In its various definitions, poverty is associated with the deprivation of necessities and lack of goods and services that prevent the guarantee of a minimum standard of well-being. However, this is the point that is difficult to characterize: How shall we define a minimum standard of well-being and comfort? Poverty assumes a relative character since the social and economic context is a key element in defining what is, in each era, socially unacceptable.

The field of poverty measurement itself offers a wide variety of approaches, not always with consistent results. Experts employ various methods to characterize and measure poverty. Options range from estimating the amount needed to purchase a minimum basket of products and services based on empirical research to the political definition of an income value (Soares, 2009; Osorio; Soares & Souza, 2011).

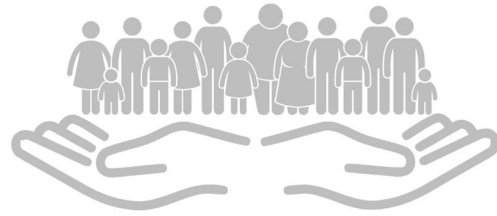
The income criterion adopted in the legislation facilitates the operationalization of programs based on a specific objective, enabling the identification of the target audience for government action. Furthermore, it is assumed that sufficient income guarantees the various dimensions of well-being, which concern the individual's choice of priorities, a value inherent to the dignity of the human being, who must have the right to define their way of life – since the Constitution values free initiative.

The minimum wage was introduced into Brazilian legislation in 1936. The 1988 constitution defined it as a right of urban and rural workers: "*minimum wage, fixed by law, nationally unified, capable of meeting the basic vital needs of the worker and his/her family with housing, food, education, health, leisure, clothing, hygiene, transportation, and social security, with periodic adjustments that preserve its purchasing power, and its allocation for any purpose is prohibited.*"

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(Brazil, 1988, art. 7, IV.

In theory, the Brazilian minimum wage should be enough to keep a family of four out of poverty under normal conditions. The average family size in 1988 was approximately four people; this is the size of a widespread ideal representation of the nuclear family, consisting of a heterosexual couple and two children. From this perspective, the minimum wage has an implicit poverty line equivalent to one-quarter of the minimum wage per capita, which was adopted to define eligibility for the BPC.

### 2.2.2 The concept of family

In the social protection systems that exist worldwide, there are varying levels of recognition of the roles of the State, families, and the market in achieving well-being. The 1988 Federal Constitution, in addition to its dimensions, focused on access to rights and strengthened the role of families as a pillar of this protection. The family serves as the foundation of socialization, capable of protecting its members by overcoming vulnerabilities and assuming the responsibility of ensuring autonomy, coexistence, and financial stability (Mioto, 2000).

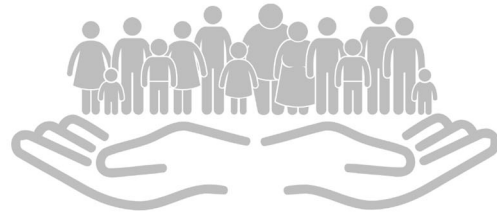
The definition of who is part of the applicant's family is one of the controversial aspects of the BPC and has direct implications for income distribution (Medeiros, 2009a, 2009b). Regarding the BPC, the Constitution views the family both as legally responsible for the elderly or disabled person due to family ties and as an economic unit that provides for the support of its members. Thus, one issue that must be addressed when analyzing the Continuous Benefit Payment is the concept of family, which, because it is used to calculate per capita income, determines whether the applicant is classified as being in poverty.

In 1998, it was decided to import the concept of family from social security legislation: the spouse, the partner, the partner and the non-emancipated child, of any condition, under 21 years of age or disabled, the parents and the non-emancipated sibling, of any condition, under 21 years of age or disabled. Although this decision may have simplified the operation of the BPC, integrated into the Social Security system, it causes distributional problems by using a definition of poverty

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that differs from that used in studies on the subject (Medeiros, 2009b).

In 2011, the law was amended again to define the family as being composed of the applicant, the spouse or partner, the parents and, in the absence of one of them, the stepmother or stepfather, unmarried siblings, unmarried children and stepchildren and minors under guardianship, provided that they live under the same roof (Brazil, 2011a). It brought the concept of family used in the BPC closer to that used in poverty studies, but substantive differences persist. One of these is the fact that siblings, children, and stepchildren are only counted if they are unmarried, thus allowing for the possibility of cohabiting families, that is, extended families composed of more than one nuclear family. Another is that co-residents in kinship relationships with the applicant other than those established by law are not part of the BPC family. Thus, depending on the applicant, the same family for poverty studies may have several BPC families, and it is even possible for two beneficiaries to belong to the same domestic group. However, their BPC families may be completely different.

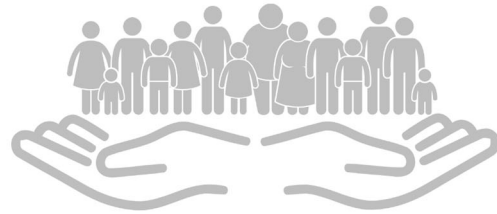
### 2.2.3 The age criterion

The Elderly Statute is the legal instrument that aims to specifically protect the elderly, establishing rights and protection measures for this category of people. The chronological criterion was chosen by the legislator, who, in the first article of the law, defines an older person as someone aged 60 or over (Brazil, 2003). However, not all rights are guaranteed to this age group. The same legal document stipulates that the BPC will only be granted to individuals aged 65 or older. It remains the prevailing criterion today, despite initiatives in doctrine, case law, and the legislature aimed at extending the benefit to all older people, specifically those aged 60 and above.

It is important to emphasize that the age to receive the BPC was higher. In the original wording of the LOAS, to receive the BPC – like the RMV that preceded it – it was necessary to be 70 years old or over. In 1998, the age for BPC was reduced to 67 years. It was the Elderly Statute in 2003 that redefined it to 65 years.







#### 2.2.4 The disability criterion

In the Constituent Assembly, the preliminary draft of the Social Order Commission did not provide any guarantee of income for people with disabilities in its initial draft. This omission was reversed by Popular Amendment 77, which called for the inclusion of Assistance in the amount of one minimum wage for people with disabilities who were unable to support themselves. Signed by more than 48,000 citizens, it was the result of an important social mobilization that successfully included people with disabilities in the BPC, initially designed for the elderly.

In 2007, the definition was updated to follow the United Nations Convention on the Rights of Persons with Disabilities. A new decree defined a person with a disability as one “whose impairment prevents them from independent living and working.” The CRPD recognizes in its preamble that *“disability is an evolving concept and that disability results from the interaction between persons with disabilities and the barriers due to attitudes and the environment that prevent the full and effective participation of these persons on an equal basis with others”* (UN, 2007).

Thus, today, it is considered that disability does not only result from physical limitations/injuries, as it is correlated with the difficulty encountered in the relationship between people who have some hardship and the physical and institutional environment built for an exclusionary majority. Human dignity applies to everyone and cannot be excluded from those who require some form of adaptation. It is necessary to seek mechanisms that serve the diversity of people who make up the community, respecting the special needs of some, which may be due to the insufficiency or absence of an organ or a psychic function (Coutinho, 2009).

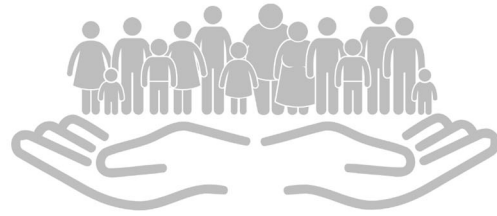
Based on this ideal brought by the CRPD, the LOAS was amended in 2015 to provide that “a person with a disability is considered to be someone who has a long-term impediment of a physical, mental, intellectual or sensory nature, which, in interaction with one or more barriers, may obstruct their full and effective participation in society on an equal basis with other people” (art. 20, § 2, LOAS).

The inclusion of people with disabilities in the job market can be analyzed from two

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perspectives. On the one hand, under the premise that the lack of Education in this group results in their exclusion from the market due to a lack of qualifications, which could, in theory, be overcome by the program. On the other hand, one cannot fail to analyze the issue from the perspective of the demand for work in a national context marked by informality and the presence of low-income people in precarious jobs.

In this way, the intention is not to encourage any occupation under the pretext of strengthening citizenship and a sense of belonging but rather to avoid the opposite effect of intensifying vulnerability. The objective is to guarantee inclusion in the formal labor market, with guarantees of all labor and social rights, without disregarding that the employer must also have incentives to adapt the company not only to the new employee profile but also to the new needs associated with mobility.

Furthermore, care must be taken to ensure that this policy of integrating social actions does not lead to a reductionist interpretation of income guarantee policies and their real purpose and impact on social protection. Even worse is to pejoratively associate services with beneficiaries as a condition, sometimes even a punitive one, for receiving the monetary benefit instead of an opportunity to improve the level of well-being of the populations involved.

### 3 THE JUDICIALIZATION OF BPC

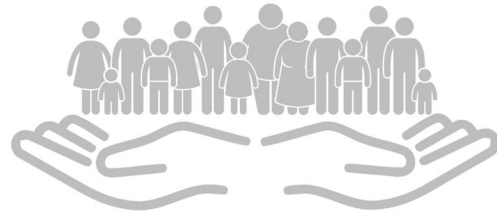
Assistance public policies in Brazil are still under development and, therefore, require improvements and effective consolidation, in addition to addressing the immaturity in the process of structuring participatory institutions and establishing a national and integrated system of social control. A series of factors, including the right to individual choices and the diversity of cultures experienced across the vast national territory, make it challenging to provide uniform treatment and an objectively applied prescription for beneficiaries.

As already discussed, the consolidation of the social protection system around rights and family must guarantee autonomy to individuals to pursue their goals and values without manipulation and oppression so that the identification of the vulnerability and specific risks of

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those who need an assistance policy in order to provide means and products to guarantee the overcoming of poverty, without acting in a disciplinary manner towards these people, presents a significant challenge.

### 3.1 Expanding the population eligible for the Judiciary

The BPC was designed to serve the elderly and disabled by expanding the coverage of the Lifetime Monthly Income to individuals who had never contributed to Social Security. Initially, the target audience was restricted by the criteria of the 1993 LOAS: income below  $\frac{1}{4}$  of the minimum wage per capita of the applicant's nuclear family, at least 70 years of age, or a disability that caused permanent incapacity (irreversible injury). However, institutions – administrative, legal, and political – have revised the original BPC guidelines, always to cover more recipients than those originally authorized, thereby expanding the possibilities for granting the benefit.

#### 3.1.1 Expansion by changing the criterion for insufficient means

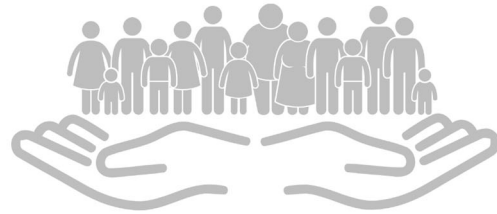
In 1998, following the proposal of a Direct Action of Unconstitutionality, the Federal Supreme Court (STF) was able to analyze the objective criterion of family income, up to  $\frac{1}{4}$  of the minimum wage per capita, to characterize it as insufficient means. At the time, the STF considered the law constitutional and established the understanding that it is up to the political sphere to establish the eligibility criteria for the granting of the BPC/LOAS (Brazil, 1998). However, there was still no Binding Precedent, and the issue continued to be discussed in the lower courts. Numerous decisions were handed down by judges of the first and second instances, contradicting the position of the Federal Supreme Court in the sense that the income criterion was not exclusive and that it was possible to verify the condition of need through other socioeconomic elements.

Given this situation and the fact that the STF decision after ruling on the constitutionality of the law in a Direct Action of Unconstitutionality had erga omnes effect, the National Institute of Social Security, INSS, filed a series of complaints with the STF aiming to guarantee the authority of its decision. When addressing the issue again in 2004, the STF reaffirmed the validity of the

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family income criterion, which was up to a quarter of the minimum wage per capita, that had been ruled constitutional in 1998.

The scenario was consolidated in favor of LOAS, to the point that the National Uniformization Panel, which operates alongside the Federal Justice Council and is the highest adjudicating body in the Federal Special Courts system, in 2006, canceled summary 11 which provided that *"the monthly per capita family income above ¼ of the minimum wage does not prevent the granting of the welfare benefit provided for in art. 20, § 3, of Law No. 8,742, of 1993, provided that the applicant's poverty is proven by other means"*.

However, this extreme measure was not enough to pacify the understanding in the Federal Special Courts that a per capita family income of less than ¼ of the minimum wage is a mandatory requirement for granting the benefit. There was no restraint on new judicial concessions based on other poverty-related criteria. In addition, the argument arose that subsequent legislation introduced the criterion of half the minimum wage per capita as a reference for granting welfare benefits, which began to be used by judges as a new reference for granting the BPC under the argument of equality (Diniz; Medeiros; Penalva, 2010).

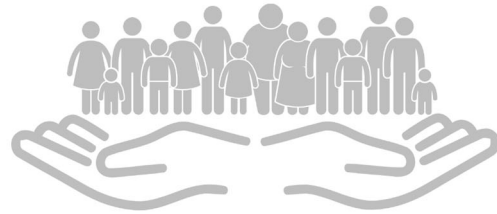
The discussion was once again taken to the STF, which in 2013 revised its position, recognized the non-exclusivity of the objective income criterion of the LOAS, and authorized the possibility of considering other elements to assess the social condition of the elderly or disabled person, without, however, declaring the unconstitutionality of the Law that provided for the criterion of ¼ of the minimum wage, which remains in force. Thus, at least, the STF did not declare the nullity of the value provided for in the Law but allowed other parameters to be considered in the concrete assessment of the applicant's poverty condition.

A common point in the arguments that questioned the criterion for characterizing insufficient means was that the poverty line was, in fact, half the minimum wage. It is a value used in many studies on poverty in Brazil, although it has never been proposed as the official poverty line in Brazil. One of the arguments supporting the review of the Supreme Court's understanding was precisely the existence of new benefits created after the LOAS, which referenced a value

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equivalent to half the minimum wage (at the time) for their concession.

Thus, despite being created with a higher line, from 2012 onwards, the access line to the BPC became higher than that of the other benefits used to meet its criteria, supporting the ruling of the Supreme Federal Court, issued in 2013, which contradicts the very argumentative logic of the decision. It should be noted that when the PBF became a reality in 2004, its eligibility lines were already lower than half and a quarter of the minimum wage in real terms.

By allowing the admission of other elements, in addition to income, to assess the poverty status of applicants, the Supreme Federal Court has disrupted the operation of the BPC. The eligibility criterion – poverty – has become subjective, thereby compromising the program's administration. Following a poorly founded tradition, the judiciary has granted the BPC to applicants with a family income of up to half the minimum wage per capita, as long as they demonstrate their poverty, deducting all types of expenses, thereby creating a concept of fictitious net income per capita for the family group. It has practically become the rule following the Supreme Federal Court's decision, leading to the expansion of the population potentially eligible for benefits.

This subjectivity was introduced by the legislator in 2015, through the insertion of § 11 in Article 20, to determine what other evidence of the family group's condition of poverty and vulnerability can be used. However, this provision lacks regulation, which is why it has not been applied administratively to date.

However, this provision inserted in the LOAS, together with the arguments established by the STF, gave the judiciary even greater discretion, with each judge having a different parameter and rule to determine the condition of poverty and the situation of vulnerability in the specific case.

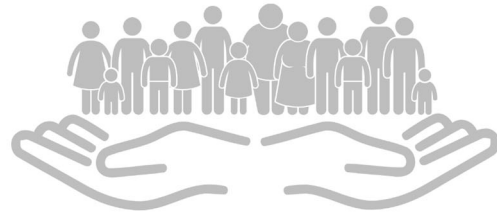
The consequence was an exponential increase in judicial concessions by BPC, accompanied by a rise in public spending for a portion of the population that had been expressly excluded from public policy.

In an attempt to control concessions by establishing limits, § 11-A was inserted in Article

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20, and Article 20-B was inserted in the LOAS in 2021. The first provision allows for the possibility of increasing the monthly per capita income limit to a maximum of half the minimum wage, and the second provision provides the objective evidence to be analyzed for the concession of BPC when the monthly per capita family income exceeds one-quarter of the minimum wage. However, these articles are not yet applied judicially.

A new legislative attempt to regulate the judicial concessions of BPC outside the established public policy was introduced at the end of 2024, with the inclusion of § 3º-A in Article 20 of the LOAS. This article proposes to prohibit, when calculating per capita family income, the deduction of amounts or expenses not specified by law.

### 3.1.2 Expansion through the flexibility of the concept of family

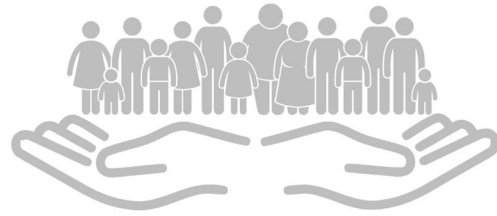
As previously discussed, the BPC concept of family has undergone successive changes. It differs from that used in poverty studies, which considers all those living under the same roof, the household group, as the unit of analysis for defining insufficient means. In many cases, the BPC family works to exclude from the calculation of per capita family income the participation of individuals who, in theory, would have better conditions to enter the labor market and who could afford to provide dignified maintenance for elderly and disabled family members. For example, if a disabled person lives with a married sibling, no matter how high the latter's income, it will not be counted in the income of the former's BPC family. It can also work in the opposite direction, artificially increasing the per capita income of an older adult who has dependent grandchildren who are not included in the count.

In practice, the interpretation given by the judges is in *dubio pro misero*. Minor grandchildren who live with their grandparents and are supported by them, a common situation in low-income families, are often included in the calculation of per capita income. On the other hand, given the restrictive interpretation of the definition of a family group and the duty of reciprocal support, older grandchildren who live on the same property as their grandparents are usually not considered, even if they have economic potential that is being directed towards the joint support

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of the family. This position leads to an apparent contradiction in the logic used and represents yet another hypothesis for broadening the characterization of poverty.

### 3.1.3 Expansion due to changes in the calculation of older people's income

The STF ruled that the legislator committed an unconstitutional partial omission when determining that only the elderly should be excluded from the calculation characterizing poverty, the welfare benefit of up to one minimum wage received by another elderly person, extending the hypothesis to people with disabilities, due to: *"the lack of plausible justification for discrimination against the disabled about the elderly, as well as against elderly beneficiaries of social assistance about elderly holders of social security benefits in the amount of up to one minimum wage"* (Brazil, 2013). And it went. Further, the STF analogously applied the exception provided for the elderly - and now people with disabilities - who receive BPC and extended the scope to those who receive any social security benefit in the amount of one minimum wage on the grounds of equality and that such a distinction would help to discourage contributions to social security, reinforcing informality.

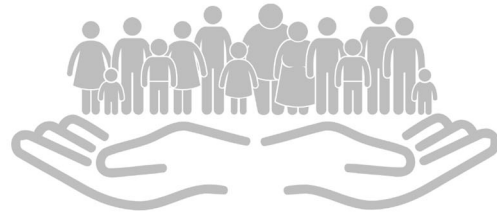
However, the STF did not declare the legal provision that excluded the BPC from the calculation of the older adult's family income null and void; it merely expanded the possibilities for excluding the benefits from the calculation. Thus, today, the prevailing understanding is that there is no plausible justification for discriminating against people with disabilities, the elderly, and older people who are beneficiaries of Social Assistance. About older people who are entitled to social security benefits in the amount of up to one minimum wage, concerning the calculation of income for granting the welfare benefit. Following this logic, the judiciary extended the exclusion of the receipt of other benefits – whether welfare or social security – from the calculation of the monthly family income of individuals with disabilities.

This reasoning was transposed to the LOAS in 2020, with the inclusion of § 14 in Art. 20, providing that "the benefit of continued provision or the social security benefit in the amount of up to 1 (one) minimum wage granted to an elderly person over 65 (sixty-five) years of age or a

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person with a disability will not be computed, to grant the benefit of continued provision to another elderly person or person with a disability in the same family, in the calculation of the monthly per capita family income”.

### 3.1.4 Expansion due to changes in the concept of disability

The concept of disability has evolved, for example, from being associated with irreversible anomalies or injuries of a hereditary, congenital, or acquired nature, which prevent the performance of activities of daily living and work, to any impediment lasting at least two years that may obstruct full and effective participation in society on an equal basis with other people. Considering the environment from its physical to its cultural aspects, verifying the presence of barriers in Brazil often implies increasing the number of people with disabilities – think of the transportation difficulties faced by caregivers and disabled people who live in the outskirts or rural areas.

Although there are several actions, treaties, and programs aimed at integrating people with disabilities, the judiciary understands that the necessary modifications and adjustments are not being carried out satisfactorily and that the guarantee of income in the amount of a minimum wage must be preserved for those who prove that they do not have the means to provide for their maintenance, given the presumption of incapacity for independent living and work in the current national context, which does not guarantee access to the special needs of those who present some differentiation. In this sense, case law has consolidated the understanding that the purpose of the rule that provides for the granting of Continuous Benefit to people with disabilities is based on the constitutional principle of human dignity and social responsibility towards those who find themselves faced with restrictions on their working life due to their physical or mental condition and not necessarily based on total incapacity for daily life activities.

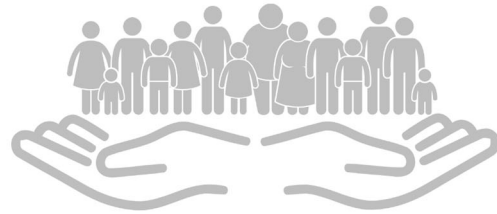
In order to adapt to the numerous court decisions in this regard, in 2008, the Attorney General's Office issued a Statement that is mandatory for all legal bodies representing the Union, according to which the inability to provide for one's subsistence through work is sufficient to

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characterize the inability to live independently, as provided for in Art—203, V, of the Federal Constitution.

In 2011, the Executive settled the issue by determining that, to recognize the right to BPC, a person with a disability is considered to have long-term impediments – at least two years – "*of a physical, mental, intellectual or sensory nature, which, in interaction with various barriers, may obstruct their full and effective participation in society on an equal basis with other people*" (Brazil, 2011b, art. 1).

Thus, it is possible to grant the BPC in cases of partial incapacity, provided that the impediments, the disabling restrictions, of a physical, mental, intellectual, or sensory nature, are combined with the "various barriers" that can "obstruct their full and effective participation in society on an equal basis with other people." Thus, in practice today, there is no longer a distinction between individuals with incapacity resulting from illnesses and those with disabilities: both have the right to welfare benefits, provided that the temporal requirements – long-term incapacity – and poverty are met. The BPC also becomes, to some extent, a sickness benefit for informal workers.

### 3.1.5 The Executive Branch capitulates

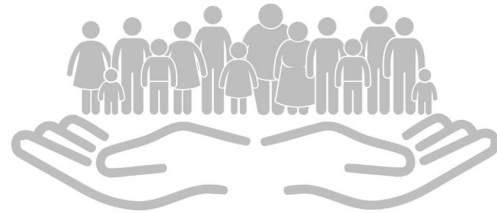
The expansion of the possibilities for receiving BPC, caused by court decisions that multiply and create criteria not provided for in the law, disorganizes the policy and motivates, in a transversal way, the legislator and the manager to adapt in order to seek uniformity of treatment. The other branches of government are compelled to regulate themselves according to the new criteria, as the outcome can be diametrically opposite, given the disservice of excessive individual subjectivism, which ultimately leads to regression from the model of personalized recipients. We return to a culture marked by clientelism and patrimonialism, aid and voluntary donations, now in the hands of the judges.

In this context, for the Executive Branch, capitulating remains the only option. The Attorney General of the Union issued Normative Instruction No. 2 of July 9, 2014, to authorize public attorneys, in the legal representation of the INSS, to withdraw and not to file appeals against court

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decisions that do not consider in the per capita income of the elderly another benefit – welfare or social security – received by someone from the same family unit and in the case of people with disabilities who do not consider in the per capita income another welfare benefit received by someone from the same family unit.

### 3.2 Analysis and Criticism

The concept of incapacity has advanced substantially, leading to the replacement of the sole medical assessment of disability and the degree of incapacity with a combined medical and social assessment. This assessment also considers the analysis of physical and social limitations within a given environment to facilitate the performance of activities.

However, in 2024, according to open data from the INSS, around 77% of the administrative requests submitted were rejected by the National Institute of Social Security (INSS), which does not identify in these cases the existence of the legal requirements capable of substantiating recognition of the right.

In the case of the elderly, poverty analysis is often used to determine eligibility for benefits, as age itself is easily verifiable and does not allow for delays. In 2024, according to open data from the INSS, per capita income higher than that provided for by law was responsible for 52% of the causes of administrative denial of the benefit.

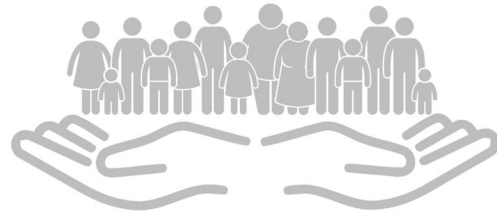
The granting rate for people with disabilities is lower than that for the elderly. In 2024, income higher than that provided for by law was responsible for only 14.8% of denials, with the prevailing causal factor being the manifestation of the INSS medical expert report due to the non-characterization of the applicant's incapacity for independent living and work, which accounted for 55.7% of the causes of denial. When analyzing these percentages, it can be inferred that more than 70% of the denials are due to the analysis of poverty conditions and the medical expert report.

Although the INSS denial of benefits is based on reports from social welfare technicians, the rate of judicial granting is very high. It has increased over time, reaching almost 33% of the total disability benefits granted in 2024, resulting in a total of 167,521 benefits.

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By removing the objectivity of the criteria observed by the administration in granting BPC, the Judiciary encourages all applicants who had their request denied to challenge the administrative decision through the judicial route. The Federal Special Courts, bodies where this type of claim is typically processed, often become substitutes for the INSS Agencies.

To resolve the discrepancy in criteria for assessing poverty between the administrative and judicial channels, the President of the National Council of Justice established, through Presidential Ordinance No. 90 of 2025, a working group (WG) to develop a unified instrument for assessing disability to grant BPC.

The creation of the WG originated from a request from the Federal Attorney General, as per official letter No. 00008/2025/PGF/AGU, due to the increase in the percentage of BPC grants by court order compared to the total number of grants.

The WG concluded its work on June 11, 2025, agreeing on some conclusions, including the recommendation that the Judiciary adopt the instrument used to analyze administrative requests for the BPC since it allows for a multidisciplinary analysis that is appropriate to the constitutional concept of disability, suggesting that the CNJ issue a resolution to make this adoption mandatory.

The judicial granting rate for people with disabilities is significantly higher. It is directly related to the lower granting rate for this group, for which expert evaluation proving the inability to work and live independently, as well as insufficient income, is very important.

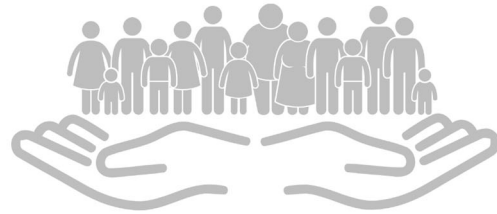
Regardless of the type of benefit requested, judges have been deciding based on socioeconomic reports, with a particular focus on the issue of income verification. In the case of disabled people, the analysis of the conditions that make the applicant incapable of independent living and work carried out by the Judiciary is extremely paternalistic. It enables the classification of most hypotheses, with a focus on analyzing the conditions of poverty.

What is most striking is that the analysis disregards the fact that most families own their property in good condition – which leads one to believe that someone is helping to support the supposedly underprivileged families. The grounds for the decisions are usually standard and general, justifying the granting of the benefit by citing the decision of the Supreme Federal Court

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as the primary argument and making express reference to the income cut of half the minimum wage.

As a result, the reciprocal duty of support between parents and children, which is the responsibility of families and society, has been disregarded, placing the State as the primary entity responsible for providing well-being and a dignified life to citizens, disregarding the exceptional nature that Assistance should have, given its non-contributory nature.

## **4 REFLECTIONS UNDER THE LIGHT OF THE LAW**

### **4.1 The reservation of the possible**

Canotilho (1998) asserts that one thing is to guarantee human rights, associated with human nature itself, of a universal and intertemporal nature; another thing, which, despite being close, are not confused, are fundamental rights, institutionally provided for in a concrete legal order, limited in time, in space and that in this way must be analyzed in the context in which they are inserted.

Thus, the legislative Branch must draft and approve bills, and the Executive Branch must establish public policies that guarantee citizens access to fundamental rights. However, among the diversity of objectives to be achieved, it is essential to establish goals, with priority given to meeting the most urgent and critical guarantees and scheduling their fulfillment in reasonable stages that can be deferred over time.

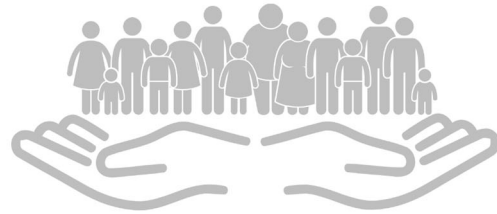
After all, given the scarcity of resources to fund public policies to reduce inequalities, it is better to accept a process of gradual implementation than to remain stuck in a situation of injustice and social abyss or to seek to formulate legally what should be frustrating the entire set of good actions due to the economic-financial incapacity of the state entity.

Thus, social rights must be implemented within a logic of reasonableness, which is the so-called reserve of the possible. This theory emerged in the 1970s in Germany, where a discussion arose about limiting the number of places in medical schools, despite the legal provision that Germans have the right to choose their profession, training center, and place of work freely. The German court recognized that, despite having the resources to create hundreds of places in medical

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courses, it would not be reasonable to meet the requested proportion, as the State was only obliged to create a sufficient number of places to meet society's demand for doctors (Scaff, 2005).

In the case under study, when formulating a public policy for income transfer to guarantee a social minimum, it is essential to analyze the average income of the population to determine, within the limits of what is feasible, what is effectively reasonable within the national economy. According to data from the National Household Sample Survey (Pnad), in 2005, approximately 57% of the population had a monthly per capita family income below one minimum wage. Therefore, one must consider the national context and the actual possibilities of consumption to define internally what the possible levels of well-being and the consequent poverty lines are.

A minimum starting point must be established, and the level of inequality that is ethically and socially acceptable in a given society must be defined. The question must be asked: What resources are available, and what opportunities can be leveraged to combat this inequality? Is it possible to build a political pact that can guarantee the same opportunities for participation in collective life, both about the paths chosen and concerning the enjoyment of its products?

#### **4.2 The relationship between powers**

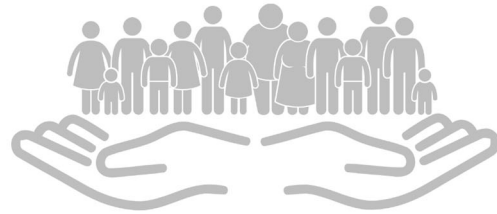
In a democratic state governed by the rule of law, the formulation of public policies should, in theory, originate in the legislative and executive branches. The former is responsible for budget allocation (creation of the law in the abstract), and the latter is responsible for the practical and concrete decision on its implementation, deciding how and where to spend public money. However, new classifications of the State's functions have been presented, and the judiciary has increasingly assumed the power to control all public acts, whether binding or discretionary.

The system was designed so that the government, faced with an overload of demands, can analyze the convenience and opportunity of allocating resources to a given action and establish preferences in the cost-benefit analysis of a given option compared to the alternatives presented. There is also the difficulty arising from the necessary increase in public spending and the growth of the State's active role – second-generation rights – in the implementation of social rights. On

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the other hand, there is also resistance regarding transparency related to tax and fiscal exemptions that are operated.

In this context, the difficulty arises in operationalizing state demands. What to do when faced with contradictory causes (energy and environment)? Since failure to meet or partially meet a new or repressed demand can threaten the stability of the system and, in extreme cases, lead to institutional rupture, the question arises as to which path to follow when actors clash to make their choices prevail.

The complexity of life forms and the limited resources require that decision-making consider the power of choices and their consequences without being naive about the idea that information is perfect and that solutions are exact. A technically flawless solution may become politically unfeasible and vice versa. Thus, peaceful solutions must be sought, seeking to harmonize the interests of the numerous actors and aspects involved in the consolidation of these policies. Antagonistic interests and divergent positions must be addressed in a suitable environment for these discussions, where there is an adequate context for the effective development of the controversy.

#### 4.3 Strengthening the Judiciary

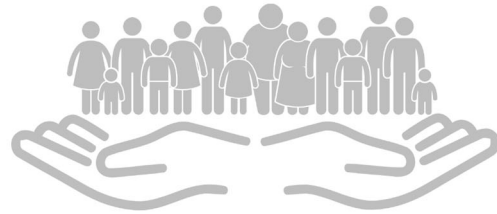
As Leonardo Avritzer (2013) rightly demonstrates, the phenomenon of strengthening the judiciary is recent, as the Brazilian political tradition has traditionally favored the Executive Branch, which has acted without a process of balancing its powers. This concentration of power in the figure of the President, in particular, began to take hold with Vargas, who took advantage of the crisis of the federative model, which saw the states' powers being weakened.

In democratic constitutionalism, the manifestation of the will resulting from the majority principle cannot prevail over the general will present in constitutional principles. In this context, the separation of powers requires mutual respect for the constitutional functions of each of them, and the 1988 Constitution, in order to materialize this principle, conferred on the Supreme Federal Court the role of ultimate arbiter of the extension of social and civil rights, given its power to

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interpret laws and the Constitution. The strengthening of the Judiciary and the search for an effective balance between powers resulted, among other reasons, from the social and political movements that confronted autocratic regimes in the seventies in the Iberian countries and Latin America in the following decade.

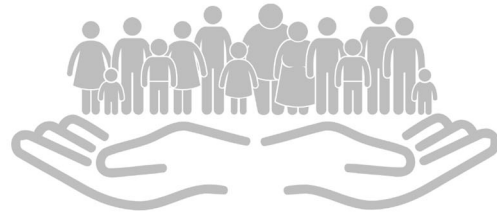
#### 4.3.1. The judicialization of politics

It is worth noting that, regardless of this modern process of strengthening the judiciary, there are some older and more isolated hypotheses where the extreme has been reached of removing politics from the political world and handing it over to the judiciary, with authorization and constitutional provision: this is what is called the judicialization of politics. It occurs when, with authorization and legislative provision, the execution of a public policy is handed over to the judiciary, which, given certain specificities, ceases to be a government program and assumes the role of State policy, as occurred with the Electoral and Labor Processes (Vianna, 2013).

This tension demystifies the existence of totally independent powers and began to be identified with the overcoming of Weber's theory of bureaucracy in administration at the end of the 1920s, when it was realized that the complexity of real social life tends to clash with formal law, based on predictability and legal certainty, making it impossible to regulate all situations with impersonal and rationally defined norms. If the guarantees of freedoms did not require active state action, whether from the Executive or the judiciary, social guarantees began to require the reformulation of the relations between law, politics, and economy, given their programmatic nature that demands economic and social planning focused on the future.

The solution found at the time was the judicialization of politics, which has labor law as a paradigm and allows the Judiciary to complete the legal concept in the face of the specific case and determine the extent of the application of the Law, given the impossibility of the legislator to anticipate all the variables in progress.





#### 4.3.2. Judicial activism

The judicialization of politics, a much older phenomenon, should not be confused with judicial activism. Modern constitutions included a substantive agenda of social rights, inviolable even by ordinary legislators, and also guaranteed judicial review, that is, the possibility of questioning the constitutionality of acts of the Executive and legislative branches before a Constitutional Court.

In this context, judicial activism emerges, where the judge, by his own choice, decides to interpret constitutional norms in a way that gives them the most significant possible scope. Under the pretext of representing a vanguard jurisprudence regarding fundamental rights, the judiciary participates intensely in the practical realization of social well-being by imposing conduct or abstaining from action on public power in a context of shrinking legislative power, resulting from the distancing of the political class and civil society (Barroso, 2009).

Under the argument that the law is insufficient to meet the constitutional purpose, the judge deliberately, through an expansive hermeneutics, chooses to participate in the process of creating law, reviewing decisions of other branches of government to promote public policies without necessarily observing some principles of coherence as limits to his activity. Advocates of activism seek to justify this power in the Constitution itself, which would have granted the judiciary, especially the Supreme Federal Court, through constitutional review, the power to directly interfere in political decisions made by the legislative and Executive branches.

From a philosophical point of view, they argue that the Constitution ceases to be merely a normative instrument with formal superiority to represent the material values that all must observe. Thus, the role of the magistrate in adapting the fact to the norm in a deductive manner through subsumption is added to the function of, based on principles and values, using logic to, in an inductive and axiological manner, determine the actions of the State (Bonavides, 2002).

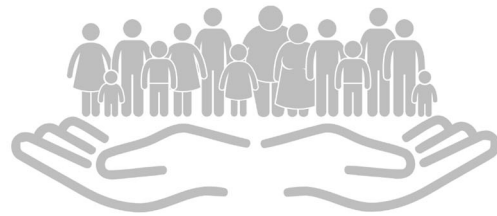
However, the law must be seen in its universality as a system of balance between the powers and their respective functions. The activist judge cannot ignore the primary functions of the powers, claim to be the protagonist of the state function, and, under the pretext of interpreting and

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applying the Constitution, grant the final word on what is fair in the material-valuative sense.

The distortion arises because activism gains ground precisely when weight is given to conflicting principles and will thus depend on the subjectivism and will of those who interpret them, who claim the power to impose their point of view and concept of justice.

These are rights intended for different groups: on the one hand, the protection of old age rights or other cases of loss of livelihood, which is precisely the purpose pursued by the continuous benefit, and on the other, the guarantee of special care and Assistance for children, which has been sought in the Bolsa Família Program - PBF.

By changing the requirement for granting the Continuous Benefit - BPC intended for the disabled and elderly; the Supreme Federal Court altered the entire system of implementing public social assistance policies. The Social Security budget has a mandatory part related to health and social security, and the remainder is allocated for Social Assistance.

The impact of the judicial action was clear because when determining the allocation of social security resources where the majority of the population has money – those over 65 years old – and the need is not proven, it can be understood that the Judiciary ignored the Public Policy aimed at breaking the pernicious arrangement between generations, which focuses on Assistance to those in school. More mandatory money for Assistance aimed at the disabled and elderly, less discretionary budget for Assistance aimed at the school phase, or in Education itself.

## 5 CONCLUSION

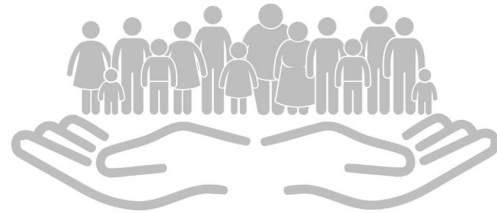
Despite having moved away from a social protection model based on philanthropy and monetary benefits resulting from compulsory contributions to compensate for moments of inability to provide for oneself only three decades ago, it can already be said that there has been significant progress in the materialization of social rights, truly breaking away from the trajectory developed previously.

This process of national democratization, stimulated by organized social movements, has required specific legislation to guarantee rights that were previously unrecognized and has

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expanded the power of the judiciary through political delegations in a process that has expanded rapidly.

The formulation and implementation of welfare policies aim to eliminate poverty and extreme poverty in the country, and ensuring a stable income for families is the chosen path to make this purpose viable. Thus, although the family is the primary focus of the National Social Welfare Policy, the structuring of social rights is centered on the transfer of financial resources. In this context, the Constitution expressly guarantees an income in the amount of a minimum wage to the elderly and disabled who lack the means to provide for their maintenance, either directly or through their family: the Continuous Benefit Payment – BPC.

The history of the BPC and its successive regulations demonstrates this. Over the past three decades, the criteria for receiving benefits have undergone several changes in their fundamental aspects, including the minimum age for identifying the elderly, the concept of family for determining per capita income, and the assessment of disability.

The hypotheses for expanding the granting of the benefit were informed by administrative, legal, and political decisions that led to the redesign of the BPC guidelines. However, the role of the judiciary as the driving force behind this movement stands out, having been observed that judges interpret according to the principle of *dubio pro reo* and thus anticipate possibilities that ultimately become the norm.

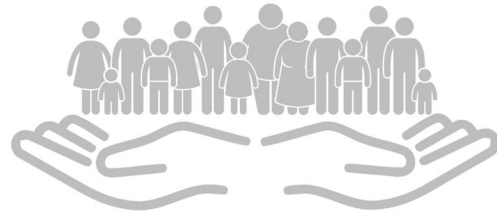
However, the practice of seeking judicial access to the BPC threatens the very democratization of Social Welfare—the other branches of government act in the wake of case law. In addition to legally established universal rights, the universalization of the benefit necessitates the provision of resources to guarantee it, inevitably confronting the well-known budgetary limitation. By assuming the leading role in implementing the policy, the judiciary not only causes budgetary problems but also management problems, as other non-mandatory programs, without constitutional support, are directly affected in their access to fundamental rights and are harmed by the indispensable complement of pure and simple income transfer.

Although the origin of this demand is based on the search for equality rather than the explicit

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desire for judicial activism, the judiciary has made alarming progress in its actions, given the weakening of the legitimacy of the Executive and legislative branches. It creates an imbalance that is detrimental to the functioning of the State, as it disregards the systemic effect of decisions and ignores the growth in the number of continuous benefits granted by the Brazilian State at the same time as the progressive and significant appreciation of the real value of the minimum wage.

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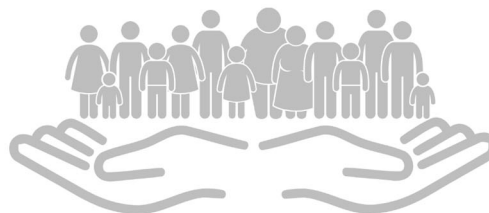
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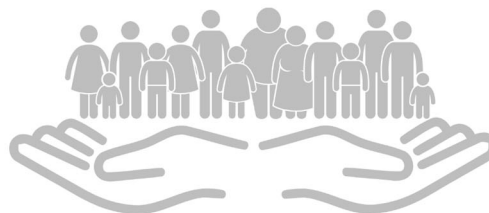
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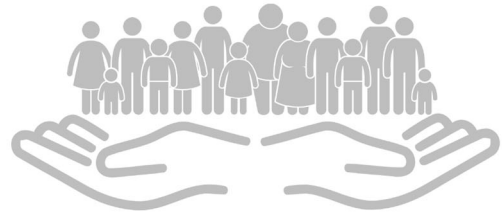
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