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Social security reform: An analysis of Constitutional Amendment No. 103/2019 from the perspective of its constitutionality

Ana Cristina Alves de Paula Barreto[1].

ABSTRACT
Social security is a social insurance system that guarantees financial support to workers when they can no longer work, known as retirement. However, the 1988 Constitution established social security rights without defining the means of financing, creating a gap. Over the years, due to this gap and other factors such as the increase in life expectancy, constitutional reforms through Constitutional Amendments were necessary. The process of approving a Constitutional Amendment is restricted and complex, requiring 3/5 of the favorable votes in two rounds in each legislative house. Despite formal approval, an Amendment can be considered unconstitutional in the material aspect, since the power of constitutional reform is not absolute and must respect the principles and rules established by the original constituent legislator so as not to violate the Democratic Rule of Law instituted since 1988.

Keywords: Social security, Retirement, 1988 Constitution.

INTRODUCTION

Social security is a kind of social insurance, which ensures that when the worker can no longer work, he has a financial support that is called retirement. Although the 1988 Constitution incorporated broad rights for citizens (including social security), constitutional mechanisms have created a gap in social security, since there is a right to social security, but there are no means by which it will be funded. Over the years, due to this gap, the growth in life expectancy and several other factors, there was a need to reform the constitutional text through Constitutional Amendments.

In brief summary, a Constitutional Amendment changes the constitution, the magna carta of the Brazilian legal regime. For this reason, the rules for the approval of an Amendment are very strict and its approval process complex, requiring 3/5 of the votes in favor, voted in two rounds in each legislative house. Although at first glance it may seem paradoxical, even if the formal requirements for its enactment are observed, in the material aspect an Amendment to the Constitution can be considered unconstitutional. The Federal Supreme Court has already established the understanding that the derived constituent legislator finds numerous limits and barriers to its reforming power, arising from the text of the major law itself.

[1] São Paulo State University "Júlio de Mesquita Filho" (Unesp – Franca/SP campus) – Faculty of Human and Social Sciences (FCHS)

The designated power to reform the Constitution, exercised by the National Congress, is neither absolute nor unlimited, and must be strictly subsumed to the terms, principles and rules that were adopted by the original constituent legislator, under penalty of tarnishing and even affronting the Democratic Rule of Law instituted in Brazil from its promulgation in 1988.

Constitutional changes, promoted by the central Executive, with the support of Parliament, may come up against the Judiciary. Some measures, pointed out as indispensable to the fiscal adjustment of the State, such as the modifications of the social security rules of the civil service, could be canceled by the Supreme Court, for reaching constitutional rules considered intangible. Based on the instruments of International Labor Law, the main objective of this article is to discuss the control of constitutionality in Brazil, in order to investigate an apparent paradox: is it possible for a constitutional rule to be unconstitutional? How has the Supreme Court of Justice of Brazil acted in the face of the changes that occurred in the Own Social Security Regime of federal public servants after the approval of Constitutional Amendment No. 103/19?

To this end, an adequate contextualization of the political process in which the decisions of the Supreme Court are inserted and the impacts – and the structural, legal, constitutional, institutional and conjunctural dimensions – of the legal decisions of unconstitutionality to be taken by the Court in the face of the Social Security Reform will be made.

Direct Unconstitutionality Actions No. 6254, 6255, 6256, 6258, 6289, 6271, 6279, 6361, 6367, 6384, 6385 and 6916 will be analyzed, in order to try to identify the relationships between the political process of reform and the Court's standard of action. The hypothesis to be tested is that the Court has been using, in cases of control of constitutionality, a range of informal decision-making strategies that guarantee it a room for maneuver in relation to the other branches, little triggering its constitutional veto power.

OBJECTIVE

The main role of the Federal Supreme Court comprises the safeguarding and defense of constitutional principles, of a markedly communitarian Charter – confirmed by the status given to the principle that privileges respect for the dignity of the human person – while subordinating private economic activities to the fundamental rights of the individual and to the social interest.

The exercise of constitutional jurisdiction in 1988 expands the Court's request for protection in relation to fundamental rights, with the creation of legal instruments, such as the collective writ of mandamus, the writ of injunction and the 'habeas data', the expansion of the radius of protection of popular action (now applicable to public property, the environment, to historical and cultural heritage and administrative morality).

A potential agent with veto power in the political system, the Court has used, in cases of control of constitutionality, a wide range of informal decision-making strategies that guarantee it a room for maneuver in relation to the other powers.

The main objective of this article is to analyze the control of constitutionality through the decisions rendered by the Court in the proposed historical period, as a function of a set of relations given within the political process, which incorporates the structural, legal-constitutional, institutional and conjunctural dimensions of its performance. A qualitative analysis of the Adins that involve themes of the 2019 pension reform will be carried out with regard to the federal civil service.

The specific objectives consist of:

- To verify the extent to which the Court uses its institutional veto power instituted through the control of constitutionality.
- Identify the situations in which the STF acted as an agent with veto power, who and what it vetoed;
- Explain the pattern of action of the STF in the period, based on the analysis of the political process, according to the dimensions mentioned above;
- And to identify how the Court reacted to the mobilization of the new agents authorized to join the Adin, after the expansion made by the CF-88, transformed into a veto point. These agents mobilized in order to 'supervise' the constitutionality of the norms beyond the Court itself.

In line with what has been exposed throughout this proposed article, it also aims to analyze the Social Security Reforms that occurred in Brazil through Constitutional Amendments, from the 1988 Constitution to the year 2019, in order to observe the impact that such reforms caused, especially for public servants.

Finally, the objective of this article is to confirm the hypotheses initially formulated, testing them throughout the research and the elaboration of the work.

METHODOLOGY

This article will work with a broad hypothesis, which involves one of the biggest legal issues that arise in the current stage of Social Security Law: the enormous impact on social security legislation caused by the approval of the most recent reforms in Brazil.

This article is about transdisciplinary research. This work begins with such a warning because it is imperative to immerse Law in the complex world of knowledge in which knowledge cannot be seen separately. It has social security law in its spine and, therefore, it reaches constitutional law in an

unquestionable way, embarking on 12 direct actions of unconstitutionality, in order to achieve a useful scientific result. It is on constitutional law that all the rest of the knowledge produced is based.

International law is the guiding thread of the work, because it is through it that the research defines its purpose: how States behave to comply with international regulations. To this end, ILO Conventions No. 102 and 157 are used as international instruments that provide minimum standards and, based on them, follow the Brazilian legal systems in order to identify if and how such State meets the minimum requirements extracted.

All this theoretical framework is extremely necessary to understand one of the thorniest issues of Law for developing economies in the world: the possible unconstitutionality of a constitutional amendment in the social security field.

In view of the number of Reforms that Social Security has undergone since our current Federal Constitution, especially the changes caused by the last one, which drastically changed the social security system, it is necessary to make a more detailed analysis of the Social Security Reforms that have already occurred and the change they have caused in the political and social arrangement of our society.

The central approach developed in this work seeks to establish an intersection between the structural, legal-constitutional, institutional and conjunctural dimensions of the judicial decisions against the 2019 Social Security Reform analyzed here, taking into account issues that involve both these dimensions and more specific issues, which can only be identified through quantitative analysis. The methodological orientation is explicit content analysis of judicial decisions, based on Laurence Bardin.

Bardin (2011) indicates that content analysis was already used since humanity's first attempts to interpret the sacred books, having been systematized as a method only in the 1920s, by Leavell. The definition of content analysis appears in the late 1940s and 1950s, with Berelson, assisted by Lazarsfeld, but it was only in 1977 that Bardin's work, "Analyse de Contenu", was published, in which the method was configured in the details that serve as a guideline today. For Bardin (2011), the term content analysis designates: a set of communication analysis techniques aimed at obtaining, through systematic and objective procedures for describing the content of messages, indicators (quantitative or not) that allow the inference of knowledge related to the conditions of production/reception (inferred variables) of these messages (BARDIN, 2011, p. 47).

Godoy (1995b) states that content analysis, according to Bardin's perspective, consists of a methodological technique that can be applied in different discourses and to all forms of communication, regardless of the nature of its support. In this analysis, the researcher seeks to understand the characteristics, structures or models that are behind the fragments of messages taken into consideration. The analyst's effort is, therefore, twofold: to understand the meaning of communication, as if it were the normal receiver, and, above all, to look away, looking for another meaning, another message, which can

be seen through or next to the first. Bardin (2011) indicates that the use of content analysis foresees three fundamental phases: pre-analysis, exploration of the material and treatment of the results - inference and interpretation.

In addition to the presentation of the strategy for analyzing the content of judicial decisions, new forms of quantitative treatment of judicial decisions are also adopted, namely:

a) The generality and territorial impact of the alleged unconstitutional law:

The approach elaborated by Ricci (2002) for the analysis of the impact of legislative production will be used to classify the laws alleged to be unconstitutional. What is intended is to establish a relationship between the decision rendered and the rule questioned, based on these two criteria. The laws will be classified in order to identify a decision-making pattern of the Court.

The question is: Is it possible to identify the effects of the Court's decisions based on the determination of the generality and territorial impact of the legislation submitted to its examination? If so, what is the impact of decisions in which the Court actually decides the merits and what is the relationship between its standard of decision and the impact of the laws judged?

b) Decisions based on form:

Although ignored by many studies on the STF, they make up the majority of the Court's decisions. The analysis of these decisions, together with the decisions based on the request, allows us to identify a political strategy of the Court that, by using formal criteria, seeks to avoid political conflicts, avoiding attributing them a permanent character, by not incorporating them into the agenda and content of the Court's decisions. Decisions based on form point to other elements of the Court's political strategy, such as the formation of the Court's agenda, the establishment of rules for the access of authorized political actors, and the establishment of formal and informal rules that determine the relations between the Court and the other political powers. As the study is inserted within a specific historical cut, the selection and analysis of exemplary cases are made from elements extracted from the political conjuncture itself.

A database was created with 12 Adins in progress during the referred period. The investigation had as its starting point this database and the crossing of the information extracted from it, seeking to identify possible decision-making paths built by the Court within a historical conjuncture in which the conflicts of interest established between various groups, formal or informal, as well as between sectors of society, are directed to the Judiciary, aiming to, first, the definitive solution to the conflict and, second, the protection of the rights and guarantees established in the Charter, a function constitutionally assigned to the Supreme Court, as seen above.

All data were extracted from the official website of the Supreme Court (www.stf.gov.br), with the help of internal tools of the site itself, which allow access to almost complete information on each of the actions analyzed, such as the initial petition, the steps taken within the Court and even the vote of each of the justices. The database informs the number of the lawsuit, the reporting minister, the applicant, the defendant, the legal provision questioned, the origin of this provision, the decision rendered in the injunction, the decision rendered on the merits, the vote of the justices, and the date of the judgment of the action, in the injunction or on the merits. The action number is the necessary requirement to access it in full on the website. The annexes at the end of this research were prepared from the crossing of the information entered in the Database and provided by the website.

The factors that influence decision-making (an analysis that would yield a specific work) will not be analyzed, nor will the subjective criteria for the adoption of one or another position by the Court be analyzed. Furthermore, the "Decision Theory" in its material aspect will not be addressed, nor the linguistic-discursive issue, which will be addressed only in a punctual way to support a position on certain points.

With an emphasis on exploratory and dogmatic research, an extensive bibliography on the subject will also be raised, as well as research will be carried out in the primary sources of legal-dogmatic research. The preparation of the research will have specialized bibliography, with works of national and foreign doctrine, international standards, scientific articles, legislation, as well as national and foreign jurisprudence in addition to the main documents that make up the ADINs mentioned, and whatever else arises, if useful and pertinent to the theme of this article.

In summary, it uses a qualitative approach, through bibliographic research, using content analysis techniques, and also has an exploratory aspect.

DEVELOPMENT

International Labor Law, contrary to what it may seem, is not part of the legal branch of Labor Law, constituting – according to Barthélemy Raynaud (1977, p. 22) – an arm of Public International Law, basically based on three well-defined motives, according to Arnaldo Süssekind (1986, p. 1468) – those of an economic nature, those of a social nature and those of a technical nature.

Both the Treaty of Versailles, which established the International Labor Organization (ILO) in 1919, in its Part XIII, as well as the other international instruments for the protection of workers, as well as the Universal Declaration of Human Rights of 1948, establish legal and social principles for the promotion and protection of labor and social security rights for the dignity of workers. In this sense is the wording of article 22 of the aforementioned Declaration, which provides that "every person, as a member of society, has the right to social security and to the realization, through national effort, through

international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable to his dignity and to the free development of his personality".

This purpose is felt in the preamble to the ILO Constitution (1948), according to which "there are working conditions which entail, for a large number of individuals, misery and deprivation, and that the resulting discontent endangers universal peace and harmony, and considering that it is urgent to improve these conditions with regard to, for example, [...] the protection of workers against serious or occupational diseases and accidents at work, the protection of children, adolescents and women, old-age and disability pensions [...]".

The ILO remains firm in its purposes, and can be considered the most promising and successful organization within the current scenario of people's rights. The organization can be considered a world reference center in matters of employment, labor and social security. From this perspective, ILO Conventions No. 102 (approved at the 35th meeting of the International Labour Conference in Geneva (1952), containing several propositions relating to minimum standards for Social Security), No. 157 (adopted at the 68th session of the Conference in Geneva (1982) on the preservation of rights in the field of Social Security stand out.

In contemporary society, the Constitutions of the States enshrine numerous fundamental rights.[2] Fundamental rights are the result of the clash of forces between the dominated class and the dominant class, in a certain historical period, in which the dominated class, although subjugated by the dominant class (because the dominant class uses the instruments of coercion of the State), manages to guarantee an existential minimum in the face of this class, in this case, represented by the State. The doctrine, in turn, classifies fundamental rights into generations.[3]

The difference between the generations of fundamental rights lies in the fact that the fundamental rights of the first generation were established to protect the individual against the State; on the other hand, the fundamental rights of the second and third generations need, in order to be implemented, a provision

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[2] According to José Afonso da Silva (2006, p. 178), "Fundamental rights of man is the most appropriate expression for this study, because, in addition to referring to principles that summarize the conception of the world and inform the political ideology of each legal system, it is reserved to designate, *at the level of positive law*, those prerogatives and institutions that it concretizes in guarantees of a dignified, free and equal coexistence of all people. In the qualifier *fundamental is* the indication that we are dealing with juridical situations without which the human person cannot be fulfilled, does not live together and, sometimes, does not even survive; fundamental *of man* in the sense that everyone, equally, must be not only formally recognized, but concretely and materially put into effect. Of *man*, not as the male of the species, but in the sense of a *human person.*"

[3] According to Paulo Bonavides (1999, p. 517), "[...] Fundamental rights began to manifest themselves in the institutional order in three successive generations, which undoubtedly reflect a cumulative and qualitative process, which, according to everything predicts, has as its compass a new universality: material and concrete universality, replacing the abstract and, in a certain way, metaphysical universality of those rights, contained in natural lawFinally, we are faced with first, second and third generation rights, namely, rights of liberty, equality and fraternity, as has been widely pointed out, with complete propriety, by authoritative jurists."

by the State. In this case, the State must act in order to guarantee the individual the possibility of enjoying the rights listed in the Federal Constitution, promulgated on October 5, 1988.

Second-generation social rights aim to ensure the good and equality in favor of the population, and are related to work, social security, the dignified subsistence of man and the protection of disease, disability and old age. Its purpose is to benefit and protect the underprivileged and workers who need it, so that the principle of equality or isonomy is truly respected.

For these rights to be effective, it is necessary to carry out public policies and services. In other words, it is necessary for the State to be active in serving the population. When it is not, there is the possibility of requesting judicial protection, so that social rights are fulfilled.

In this sense, the Constitution of the Federative Republic of Brazil of 1988 presents itself as a social Constitution, materialized in Title VIII, which deals with Social Order. Article 193 is based on the preeminence of work and, as a guideline, on social well-being and justice, in harmony with the economic order, which is also based, under the terms of article 170, *caput*, on the valorization of human work and free enterprise, aiming at the dignity of the citizen.

Under the terms of article 6 of the Federal Constitution, the citizen presents himself as the recipient of social rights, composing the social order, together with the title of fundamental rights, "substantial nucleus of the democratic regime", in the lesson of José Afonso da Silva (2006, p. 828). From this emerges Social Security, which, under the terms of article 194, *caput*, of the Federal Constitution, comprises an integrated set of actions initiated by the Public Authorities and society, aiming to ensure the rights related to health, social security and social assistance (BRASIL, 1988).

In this context of the social order, Social Security stands out, which, in the words of Wagner Balera (2006, p. 38), "[...] in our legal system, justice is the end of the social order, and Social Security is the protective model that is intended to institutionalize its precepts." At this point, it was developed to strengthen and structure the support to the citizen, due to the emergence of the most varied contingencies or social risks.

The constitutional text gave more precise contours to Social Security (a branch of social security, of an eminently contributory nature, whose purpose is to protect the insured and their dependents against social contingencies that prevent or reduce the ability to provide for themselves and their families) in its arts. 201 and 202 (BRASIL, 1988), so that the benefits and services are intended to cover events of temporary or permanent incapacity for the work and advanced age; maternity protection, especially for pregnant women; protection of workers in situations of involuntary unemployment; and granting of family allowance and imprisonment allowance for the dependents of low-income insured persons and pension for the death of the insured, man or woman, to the spouse or partner and dependents.

The Brazilian Social Security is formed by two basic regimes, of mandatory affiliation, which are the General Social Security Regime (RGPS) and the Own Social Security Regimes of public servants and military, the first being compulsory for people who perform paid work activity, which is why it has the legal nature of legal mandatory insurance, unlike the second, which aims only to offer complementary benefits to maintain the standard of living of the insured and their dependents.

In addition to these two mandatory regimes, there is also the Supplementary Pension System, of a private nature, whose adhesion is optional.[4]

The Specific Social Security Regimes of public servants (holders of effective positions) of the Union, the States, the Federal District and the Municipalities, as well as the military of the states and the Federal District, constitute a microsystem within the Social Security Law, with its own rules, and with a principled discipline a little different from the general regime, although we find every day a greater proximity between the general regime and the specific regimes.

As for the military of the Armed Forces, consisting of the Navy, the Army and the Air Force, more precisely, they are part of specific Social Protection Systems, according to article 142, § 3, item X, of the CF/88.

Article 24, item VII, of the CF/88 provides that it is up to the Union, the States and the Federal District to legislate concurrently on Social Security Law. In the context of concurrent legislation, the competence of the Union is limited to establishing general rules (art. 24, § 2, of the FC/88). This competence of the Union to legislate on general rules, however, does not exclude the supplementary competence of the States (art. 24, § § 2, of the FC/88).

The fundamental normative basis of these regimes is found in article 40 of the Federal Constitution, with the changes and additions promoted by Constitutional Amendments 03/93, 20/98, 41/03 and 47/05. This article guarantees to civil servants holding effective positions in the Union, the States, the Federal District and the Municipalities, including their autarchies and foundations, a Social Security system of a contributory and solidary nature, through the contribution of the respective federative entity, active civil servants, retirees and pensioners, observing criteria that preserve the financial and actuarial balance.

The social security rules of article 40 are also applicable to magistrates and members of the Public Prosecutor's Office, by express constitutional provision (articles 93, VI, and 129, § 4, of the Federal Constitution).

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[4] CF/88. Article 202. The private pension system, of a complementary nature and organized autonomously in relation to the general social security system, will be optional, based on the constitution of reserves that guarantee the contracted benefit, and regulated by complementary law.

The public agent occupying, exclusively, a position in commission declared in a law of free appointment and dismissal, of another temporary position, including elective mandate, or of public employment, the General Social Security Regime (art. 40, § 13, CF/88).

In addition to the provisions of article 40, the requirements and criteria established for the General Social Security System shall be observed in its own social security system, as applicable, (article 40, § 12, CF/88). Thus, the constitutional rules of the RGPS apply subsidiarily to the RPPS.

The Social Security of public servants has been undergoing constant regulatory changes, aiming to correct old distortions of the system. In the past, the Social Security of public servants was much more like a prize for civil servants who behaved in the standards required by the Public Administration than a Social Security plan based on a protective logic that uses actuarial rules.

Prior to EC No. 20/98, the first major constitutional reform on social security, the civil servant's Social Security was not even mandatorily contributory, since article 40 only brought contributory as a requirement of this Regime after the change promoted by the aforementioned Constitutional Amendment.

Article 127, IV, of Law No. 8,212/90 also provides for the penalty of revocation of retirement as one of the possible disciplinary penalties applicable to public servants. In our view, this penalty is not consistent with a contributory Social Security, having been tacitly revoked by EC 20/98.

There is even a Direct Action of Unconstitutionality (ADI 4882) in the Federal Supreme Court, filed by ANFIP, against legal provisions that authorize the revocation of the retirement of public servants. Such provisions would be unconstitutional because retirement is currently a state consideration resulting from the effective contribution of the public servant. It should be noted that there are some old judgments in the STF that validate the penalty of revocation of retirement (MS 21.948/RJ and RMS 24.557-DF, for example), but none of them faces the argument of changing the nature of the civil servant's Social Security, with the obligation to contribute. Let us wait, then, for the outcome of the ADI...

The Social Security of public servants was changed by several constitutional amendments. Amendments 20/98, 41/03, 47/05 and 103/19 significantly modified the system.

Before EC 20/98, for example, public servants could retire for length of service, regardless of age. This legal diploma now requires cumulative compliance with the requirements of age and contribution time for retirement in the RPPS.

It was also possible in the system prior to EC 20/98 that civil servants had fictitious periods of service time. The unused premium leave, for example, counted twice for retirement purposes. This benefit consisted of a period of three months of leave for every five years worked. If the civil servant chose not to take the three months of leave from service, he would be entitled to have this time counted twice for retirement purposes. Currently, article 40, paragraph 10, of the Federal Constitution expressly prohibits any fictitious calculation of contribution time.

Before the enactment of EC 20/98, it was possible to accumulate public pensions indiscriminately. It was also possible to accumulate public office with retirement earnings. Thus, a retired Tax Auditor could take a public exam for the same or another position, cumulating his retirement with the remuneration of the position.

EC No. 41/03 also brought a series of changes, ending integrality and parity. Integrality is the right of the civil servant to receive retirement in the amount of his last remuneration as an asset, and parity is the guarantee that retirement earnings will be readjusted every time the remuneration of active civil servants is increased. This Amendment also created the controversial contribution of the inactive, retired and pensioners and changed the way of calculating the value of the retirements and pensions granted by the RGPS, in addition to providing for the possibility of instituting a Supplementary Pension Scheme for Public Servants, imposing strong changes in the system after the creation of the aforementioned Institutes.

EC No. 47/05 also brought some changes, undoubtedly less representative than the other two mentioned. It changed transition and contribution rules for inactive civil servants. EC No. 103/19, on the other hand, changed the age required for the retirement of civil servants and all the rules for calculating the amount of social security benefits.

All these Constitutional Amendments were accompanied by transition rules that differentiate public servants in relation to the moment when they entered the public service. The transition rules differentiate the civil servants according to the date of entry into the public service: if prior to the date of publication of EC 20, on 12.16.1998; EC 41, on 12.19.2003; or the date of EC 103/19. We also have the differentiation between those who entered the public service before the creation of the Official Supplementary Pension System and those who entered after it. We know that for federal employees of the three spheres of power, FUNPRESPs have already been created.

All this tangle of constitutional rules and Law No. 9717/98, which provides for general rules for the organization and operation of the social security regimes of the public servants of the Union, the States, the Federal District and the Municipalities, the military of the States and the Federal District and provides other provisions, must be studied.

Changes in the design of any public pension system redefine the scope of benefits and their impacts in terms of redistribution from the present to the future, reduction of inequalities and poverty among the elderly, as well as protection against certain risks still in activity. This understanding is enshrined and the reaction of support or criticism to each new reform of social security reflects a dispute over which of these dimensions should prevail, if all of them, combined, or only one of them.

There are rules of the aforementioned Amendment No. 103/19 that apply to civil servants at all levels of government. On the other hand, there are rules that will only be applicable to employees of the states, the Federal District and municipalities if the local legislation is subsequently modified, such as the

requirements/income for pensions and the amount of the death pension. A true breach of equality between permanent civil servants, who now have social security regimes with different rules. Only paragraphs §1, item II; § 8°; § 10; § 11; § 16; § 17; and § 18, all of article 40 of the CF/88.

According to the new caput of article 40 of the CF/88, "the social security system of civil servants holding effective positions will have a contributory and solidary character, through the contribution of the respective federative entity, active civil servants, retirees and pensioners, observing criteria that preserve the financial and actuarial balance". Not all political entities are mentioned, so that there is no longer a constitutional imposition for all political entities to constitute RPPS, with the main focus being Brazilian municipalities. The new § 22 of article 40 states that "The institution of new social security regimes is prohibited". Thus, municipalities that do not have RPPS will no longer be able to create them as of November 13, 2019.

The Federal Constitution, in article 40, § 20, prohibits the existence of more than one social security system and more than one body or entity managing this system in each federative entity, covering all powers, bodies and autarchic and foundational entities, which will be responsible for its financing, observing the criteria, parameters and legal nature defined in the complementary law.

Some benefits of the RPPS already enjoy a constitutional provision, although the respective Benefit Plans may institute new benefits, which is the case with retirements and death pensions. However, according to article 5 of Law No. 9717/98, "the social security systems of the public servants of the Union, the States, the Federal District and the Municipalities, the military of the States and the Federal District may not grant benefits other than those provided for in the General Social Security System, which is dealt with by Law No. 8,213, of July 24, 1991, except as otherwise provided for in the Federal Constitution".

This is another provision that aims to approximate (or equalize) the RPPS to the RGPS, disregarding that public relations has peculiarities that may, in some cases, generate differentiated benefits.

In this sense, the Own Regimes may only offer the following benefits (art. 51 of the Internal Guidance MPS/SPS 02/2009):

I. As for the server:

a) disability retirement;

b) compulsory retirement;

c) voluntary retirement by age and contribution time;

d) voluntary retirement due to age;

e) special retirement;

f) sickness benefit;

g) family allowance; and

h) maternity pay.

II. As for the dependent:

a) death pension; and

b) imprisonment allowance.

However, this was modified by article 9 of EC No. 103/19, which has immediate application to all political entities. The list of benefits of the RPPS was limited to retirements and death pensions, as well as leaves due to temporary incapacity for work and maternity pay will be paid directly by the federative entity and will not run into the account of the RPPS to which the civil servant is linked.

In the event of extinction of its own Social Security system, the federative entity will assume full responsibility for the payment of the benefits granted during its term, as well as those benefits whose necessary requirements for its granting were implemented prior to its extinction.

A Federal Constitution is always edited with the intention of lasting over time, however, the political-social dynamics may require adjustments in the will of the original constituent power. To allow the constitutional text to be changed and to accommodate the social reality, the original constituent power itself creates the power of reform and establishes the procedure to be followed and the limitations to be observed. As it is an instituted, conditioned and not initial power, the power to amend the Constitution is subject to formal and material limitations, established in article 60 of the Major Law.

The 1988 Constitution significantly expanded the list of material limits to the power of amendment, the so-called stony clauses, which are not restricted to the limits expressed in paragraph 4 of article 60 of the Constitution. As is known, in the body of the constitutional text, there are implicit stony clauses, which are also part of the broad list of material limitations to the power of reform. These limitations would not produce effects if judicial control of compliance with the requirements established by the original constituent power were not admitted. Thus, any constitutional amendment enacted with disregard for the established procedure or the limitations imposed will suffer from the vice of unconstitutionality and will be subject to control of constitutionality by the Judiciary.

It should be emphasized from the outset that article 60, paragraph 4, of the Federal Constitution established substantial prohibitions in the face of the reforming power (stony clauses), expressly providing that:

> Article 60. The Constitution may be amended by proposing:
> ...
> Paragraph 4 - The proposal for an amendment aimed at abolishing:
> I - a federative form of State;

II - direct, secret, universal and periodic voting;
III - the separation of powers;
IV - individual rights and guarantees

According to the best doctrine, the prohibitions instituted in relation to the modification of the constitutional text are not restricted to the provision transcribed above, and are also diffuse in several other of its articles, which enshrine perennial and immutable principles and norms, fundamental to the very subsistence of the current constitutional system.

As guardian of the Federal Constitution, it is incumbent on the Federal Supreme Court to declare the unconstitutionality of any constitutional amendment that violates or affronts the original Constitution.

It is up to the federative entities to "ensure the safeguarding of the Constitution, laws and democratic institutions". The original constituent power – the National Constituent Assembly – makes the Constitution. It is the power in fact. Derived constituent power is constituted power. It is the legal power, subject to circumstantial limits (article 60, § 1, of the Federal Constitution), procedural (article 60, §§ 2, 3 and 5) and material, the so-called stony clauses (article 60, § 4), in addition to being subject to the implicit limits arising from constitutional principles. The constitutional amendment, coming from the derived constituent power, which disrespects such limitations, expressed and implicit in the text of the Major Law, will be subject to the control of constitutionality by the Federal Supreme Court. There are jurisprudential precedents, already in force under the 1988 Constitution, in which the STF declares the unconstitutionality of a constitutional amendment provision. The constitutional amendment that undermines the federative principle, against the autonomy of the federated entities, can, therefore, be declared unconstitutional, as it violates the unalterable core of the Constitution (art. 60, § 4, I).

In this chapter, we will study the Direct Actions of Unconstitutionality filed by the following entities against Constitutional Amendment 103/2019: National Association of Public Defenders (ADI 6254); Association of Brazilian Magistrates, National Association of Members of the Public Prosecutor's Office, National Association of Labor Prosecutors, National Association of Labor Justice Magistrates and National Association of Prosecutors of the Republic (ADIs 6255 and 6256); Association of Federal Judges of Brazil (ADIs 6258 and 6289); National Association of Tax Auditors of the Federal Revenue of Brazil (ADI 6271); Workers' Party (ADI 6279); National Union of Federal Auditors and Technicians of Finance and Control (ADI 6361); National Association of Tax Auditors of the Federal Revenue of Brazil (ADI 6367); National Association of Federal Police Delegates (ADIs 6384 and 6385); and Association of Police Chiefs of Brazil (ADI 6916).

These associations question provisions that institute extraordinary social security contributions and progressive rates, that revoke previous transition rules, that annul pensions already granted with special

time counting and that give different treatment to women under the own regime and the general Social Security regime with regard to the increase in the retirement benefit.

According to the entities, the changes are an affront to the Federal Constitution and the bases of the social security system.

In ADI 6254, the National Association of Public Defenders (Anadep) questions provisions that institute extraordinary social security contributions and progressive rates, that revoke previous transition rules, that annul pensions already granted with special time counting and that give different treatment to women under the own regime and the general Social Security regime with regard to the increase in the retirement benefit.

ADIs 6255 and 6256 were filed by five class entities – Association of Brazilian Magistrates (AMB), National Association of Members of the Public Prosecutor's Office (Conamp), National Association of Labor Prosecutors (ANPT), National Association of Labor Justice Magistrates (Anamatra) and National Association of Prosecutors of the Republic (ANPR). In the first lawsuit, they argue that the progressivity of the social security contribution rates to which they are subject (between 14% and 19%) has a disproportionate impact on their subsidies without the creation of benefits corresponding to the "abusive increase". The entities are asking for an injunction to suspend the progressive rates and the possibility of instituting an extraordinary tax or expanding the contribution base of retirements and pensions.

In ADI 6256, the five entities question the provision that considers null and void the retirement that has been or will be granted by the Own Social Security Regime with reciprocal counting of the General Social Security Regime. For associations, it is necessary to make an exception for cases of registration of length of service provided for in specific laws or prior to Constitutional Amendment 19/1998, which, by express constitutional provision, is equivalent to contribution time.

In ADI 6258, the Association of Federal Judges of Brazil (Ajufe) also questions the progressive rates, the collection of social security contributions from retirees and pensioners on the value of earnings that exceed the minimum wage when there is an actuarial deficit and the provision for the institution of an extraordinary contribution for federal public servants in case of deficit. For Ajufe, the changes are an affront to the Federal Constitution and the bases of the Social Security system.

ADI 6271, presented by the National Association of Tax Auditors of the Federal Revenue of Brazil (ANFIP), also discusses the provisions that instituted the progressive rates of the social security contribution for civil servants. In all actions, the entities immediately ask for the suspension of the provisions that promote the harmful changes mentioned.

Among the lawsuits numbers 6254, 6258 and 6271, Fenajufe was admitted as *amicus curiae.* In them, the increase in rates, extraordinary contribution, repeal of transition rules, nullities in the calculation

of the length of service without corresponding contribution prior to constitutional amendment 20/1998, immunity from disability retirements, reduction of pensions, among other points of the reform of the Public Servant's Own Pension System, are discussed.

In addition, Sisejufe also filed a set of collective actions for its affiliates, which question specific points of EC 103/2019, in what harm the public servant. The challenge was divided by thematic groups, including: the right of civil servants to the transition rules of amendments 41 and 47; the prohibition of abusive increases in the rates and calculation basis of the contribution for active workers, retirees and pensioners; the impossibility of annulment of retirements with reciprocal counting between RGPS and RPPS. In all cases, it is demonstrated that the reform violated stony clauses, considering the history of judicial pronouncements on previous changes and the limits imposed on the Derived Constituent Power.

It should be added that in 2022 Sintrajufe/RS filed a public civil action seeking to declare, incidentally, in diffuse control, the unconstitutionality of article 35, items III and IV, of constitutional amendment 103/2019, in the part in which it revoked the previous transition rules provided for in articles 2, 6 and 6-A, all of constitutional amendment 41/2003, and in article 3 of constitutional amendment 47/2005. The lawsuit highlights that constitutional amendment (EC) 103/2019 revoked the constitutional transitional rules provided for in constitutional amendment 41/2003 and constitutional amendment 47/2005. It argues, then, that these rules were replaced "by transition rules with new, much more burdensome requirements, present in articles 4 and 20, frustrating the fair expectation of the Union's civil servants to obtain the retirement benefit based on the requirements previously established".

The direct actions of unconstitutionality (ADIs) that question articles of the Social Security reform (constitutional amendment 103/2019) were on the virtual agenda of the Supreme Court for a virtual session and had their judgments suspended in September 2022, at the request of Ricardo Lewandowski. With the resumption of the trial, it was interrupted again, in June 2023, this time by Fux's prominence.

So far, Justice Luís Roberto Barroso, rapporteur, has voted to declare the constitutionality of contested rules and has only partially met one of the requests presented in the lawsuits.

Barroso presented his vote in 12 direct actions of unconstitutionality (ADIs) that question several points of the new Constitutional Amendment 103/2019. He declared the constitutionality of contested rules and only partially met one of the requests presented in the lawsuits.

For the minister, the rules of the reform should be maintained. Only article 149, paragraph 1-A, inserted into the Constitution by the amendment, should be interpreted as meaning that the basis for calculating the social security contribution of inactive and pensioners can only be increased if a social security deficit persists even after the adoption of the progressivity of rates.

DEFICIT

When analyzing the context of the new Social Security Reform, Barroso noted that the deficit in the sector is undeniable and has worsened significantly in recent years. According to him, the payment of retirements and pensions consumes a relevant slice of the Gross Domestic Product (GDP) and the state budget, leaving few resources for sectors such as health and education. In his view, changes that reduce public debt can have positive macroeconomic impacts, such as stimulating consumption and production (STF, 2023).

One of the points highlighted by the rapporteur is that the Brazilian population is living longer. According to projections by the United Nations (UN), in 2100, Brazil will be the 10th largest country in the world in proportion of elderly people. At the same time, the working-age population has been decreasing, due to the drop in the birth rate. As a result, there are fewer young people to finance the benefits of older people (STF, 2023).

JUDICIAL SELF-RESTRAINT

Regarding the questions about the processing of the amendment in the National Congress, the rapporteur stressed the need for judicial self-restraint, especially because the pension reform is difficult to reach consensus. In addition, the proposal was approved by a three-fifths majority of each House of the National Congress (STF, 2023).

On the other hand, in his understanding, the interpretation of the Presidency of the Senate to the rules of procedure applicable to the procedure was reasonable, and this understanding must be respected by the Judiciary (STF, 2023).

FACTUAL PREMISES OF LEGISLATIVE DELIBERATION

The minister also rebutted the allegation that the National Congress would have been based on mistaken premises to approve the amendment. According to Barroso, the technical opinion presented in one of the lawsuits is not able to remove the presumption of veracity of the information provided annually in the Union's budget execution report, which is even inspected by the Court of Auditors. In December 2019, the National Treasury projected a growing imbalance, estimated at R$52 billion for 2020 and R$201.7 billion for 2050 (STF, 2023).

SOLIDARITY CHARACTER

Regarding the argument that the reform would have ended the solidarity character of the Own Social Security Regime (RPPS), the minister explained that the principle of solidarity means that, in general, people do not contribute to the cost of their own retirement, but to the viability of the system as a

whole. This situation was not changed by the amendment, and the proposal to establish the capitalization system was rejected in the Chamber of Deputies (STF, 2023).

PROGRESSIVITY OF THE RATES

Regarding the progressivity of the rates of public servants, Barroso understood that the measure does not characterize confiscation, since it seeks to put into effect the principle of ability to pay, including establishing deductions at the base rate of 14% for the lowest salary ranges. On the other hand, if the civil servant has an increase in the social security contribution, he also benefits from a reduction in Income Tax (STF, 2023).

EXTRAORDINARY CONTRIBUTION

The rapporteur also stated that the mere constitutional provision of the possibility of creating the extraordinary contribution does not offend a stony clause. If it is instituted, the law to be approved will be subject to a rigorous examination of possible violations of constitutional norms, including those pointed out in the lawsuits, such as the principles of prohibition of confiscation and proportionality (STF, 2023).

TRANSITION RULES

For the rapporteur, the repeal of the transition rules of the 2003 and 2005 reforms does not violate the principles of legal certainty and trust, since the rules generated an acquired right only for civil servants who met the requirements provided for by the date of repeal. On the other hand, civil servants who had a mere expectation of rights were only entitled to a reasonable transition, and not to the perpetual maintenance of a certain rule (STF, 2023).

Regarding the transition rules of the 2019 reform, the minister stressed that the comparative analysis between the old and the current scenario allows us to say that the impact of the changes was small for those who were closer to completing the requirements for retirement (STF, 2023).

DEATH PENSION

Regarding the new criteria for calculating the death pension, he maintained that the level is close to the reality of other countries and is compatible with the amounts of alimony commonly set by the Judiciary (STF, 2023).

In his view, the prohibition on receiving more than one death pension, within the scope of the same social security system, is reasonable, as there are already rules prohibiting accumulation by the civil servant himself (STF, 2023).

CONTRIBUTION OF INACTIVE AND PENSIONERS

Article 149, paragraph 1-A, of the Constitution, as amended by the amendment, provides that, when there is an actuarial deficit, the ordinary contribution of retirees and pensioners may be levied on the amount of retirement and pension earnings that exceeds the minimum wage (STF, 2023).

In his vote, Barroso interpreted the provision in the sense that the calculation basis can only be increased in case of proven persistence of a social security deficit after the adoption of the progressivity of rates. For the rapporteur, this interpretation is more appropriate to the special protection granted to the elderly and to the principle of proportionality, which requires the adoption of the least onerous measure to the constitutional right or principle at stake (STF, 2023).

He pointed out that the expansion of the contribution calculation basis falls only on retirees and pensioners, who, in general, are in a situation of greater vulnerability than active civil servants. In addition, they contribute exclusively by virtue of solidarity, since they will not be entitled to any other benefit or to the recalculation of those they already receive. Therefore, the progressivity of rates must necessarily come before the increase in the calculation basis of inactive and pensioners, as a way to remedy the system's deficit (STF, 2023).

The reporting Justice voted for the dismissal of all the lawsuits, although he attributed an interpretation in accordance with article 149, paragraph 1-A, of the Federal Constitution so that the increase in the calculation basis of the inactive is necessarily preceded by the attempt to contain the deficit by the priority adoption of the progressive rate regime, considering the constitutional protection of the elderly and the principle of proportionality. Then, Edson Fachin presented a dissenting vote accepting some points of the actions, to declare the unconstitutionality of certain rules (STF, 2023).

The justice pointed out that the Court has already established the inexistence of an acquired right to a certain functional, insurance or tax legal regime, in order to allow changes in the social protection that must be conferred on public servants and also on the tax burden to be imposed for the funding of its own social security system (STF, 2023).

According to the minister, the economic argument of "deficit" alone does not authorize any and all changes in the legal regime. For Fachin, "the civil servant's pension is a public policy that can be associated with other purposes of stability and recruitment of these professionals, and can be compensated by the State through other sources" (STF, 2023).

In addition, Fachin understands that there is no reason for the collection of contributions from the inactive RPPS - Own Social Security Regime to be made on an increased basis in relation to workers in general and for the open and diffuse institution of extraordinary contributions, under the mere allegation of a "deficit" (STF, 2023).

In this sense, it voted to declare the unconstitutionality of article 1 of EC 103/19, which provides:

> Article 149.
> Paragraph 1-A - When there is an actuarial deficit, the ordinary contribution of retirees and pensioners may be levied on the amount of retirement and pension earnings that exceeds the minimum wage.
> Paragraph 1-B - Once the insufficiency of the measure provided for in paragraph 1-A to equate the actuarial deficit is demonstrated, the institution of an extraordinary contribution, within the scope of the Union, of active public servants, retirees and pensioners is allowed.
> Paragraph 1-C. The extraordinary contribution referred to in Paragraph 1-B shall be instituted simultaneously with other measures to equate the deficit and shall be in force for a determined period, counted from the date of its institution.

Finally, the minister asserted that the increase on the calculation of benefits, instituted in favor of female workers affiliated to the RGPS - General Social Security Regime, should be applied in the same way and without distinction to women civil servants linked to the RPPS - Own Social Security Regime (STF, 2023).

Then, Justice Luiz Fux asked for prominence and interrupted the virtual trial in September 2023. Now, the case will be restarted in a physical plenary, on a date to be defined (STF, 2023).

In the Executive, there is an arm wrestling over changes in the rules of social security. In January 2023, the Chief of Staff, Rui Costa (PT), said that the Planalto is not yet studying any proposal to update the pension reform. Costa contradicted what Carlos Lupi (PDT) said when he took office at the Ministry of Social Security, which has plans to work against the reform approved by the government of former President Jair Bolsonaro PL, which he called, during his speech, "anti-reform" (STF, 2023).

In view of the above situation, the current economic and political system of social security has undergone several reforms that have resulted in the restriction of social rights and guarantees, including with regard to social security protection. The principle of the prohibition of social regression corresponds to an instrument of limitation of the Reforming Power in the creation of norms contrary to the original Constituent Power, that is, the norms of fundamental social rights, such as social security law, cannot be restricted.

In this way, all social achievements in the social security sector must be guaranteed and recognized. If there is no such recognition, we have the configuration of social regression.

Therefore, the report of the reforms in social security after 1988 shows that these reforms were not guided by the principle of the prohibition of social regression. In this way, the Constitutional Amendments do not act as a guarantee that the degrees of implementation of the acquired social rights will not be reduced, in order to preserve the human existential minimum, since several social security rights conquered have been reduced over time.

FINAL CONSIDERATIONS

The current moment of constitutional jurisdiction demands that there be a systemic analysis of the performance of the body responsible for carrying out the control of constitutionality. In the Brazilian case, the Federal Supreme Court (STF) is the body assigned to the analysis of the constitutionality of the norms, in the sole or last degree. The most recent social security reform in the Constitution may confer binding effect and erga omnes effectiveness on the Court's decisions in certain situations.

With a little more than twenty years since its promulgation, the 1988 Constitution already has 128 constitutional amendments, which shows the existence of a desire for reform that has guided successive governments. As a result, the cases of constitutional amendments declared unconstitutional by the Supreme Court have increased significantly. It is inevitable to suppose the tendency that, with each constitutional amendment, there will be a direct action of unconstitutionality proposed by the political forces defeated in the process of drafting the amendment. Along with this reality, the importance of studying the control of the constitutionality of constitutional amendments by the Federal Supreme Court arises. Although there are no divergences as to the possibility of assessing the constitutionality of a provision of the reforming power, the issue is not simply theoretical, it is a current reality amply exemplified by several judgments of direct actions of unconstitutionality in the Supreme Court.

The aim of this article was to study the constitutional limits to the power of reform and, based on this study, to analyze the repressive control of constitutionality and the possibility of preventive control of constitutional amendments and the role of the current jurisprudence of the Federal Supreme Court in relation to the subject.

The debate is not unprecedented, having arisen at the end of the 1950s, when Germany differed over the legitimacy of a fundamental law drafted and promulgated by a constituent assembly whose protagonism fell not to the German people, but to the Allied government of occupation (SARLET, 2009). For more than 60 years of its validity, the Bonn Basic Law is today a reference in contemporary constitutional law, being responsible for the consolidation of a constitutional patriotism committed to the inviolability of fundamental rights. However, when it was drafted, the lack of legitimacy of the process gave rise to controversy due to the absence of a representative assembly or a popular consultation.

In this context, Professor Otto Bachof, from the University of Tubingen, would make history by asking such a question: would it be possible for constitutional norms to be unconstitutional because they violate an absolute legal principle or the internal system of the text itself, thus promoting a substantial modification of its content? His concern was to rid the constitutional text of provisions that contradicted fundamental precepts of justice, whose foundation would be in Natural Law. Since the people hold the Constituent Power, the text should reflect the feeling of justice rooted in each member of the collectivity (ESTRELLA, 2004).

In an open criticism of the theorists who adhere to the formal concept of the Constitution, Bachof states that the Constitution will be valid – understood as legitimate – only if the legislator considers "the 'constitutive principles' of any and all legal order and (...) to comply with the cardinal commandments of the moral law, possibly different according to time and place, recognized by the juridical community, or at least not to consciously deny them" (BACHOF, 1994). Therefore, the original norm of the text that was incompatible with a higher constitutional norm, with the "change of nature" of constitutional norms or with the Supralegal Law received in the Constitution, would be removed. If it violates unwritten principles that conform the meaning of the text, customary Constitutional Law and non-positive Supralegal Law, it may also be so.

This article proposed to analyze the Court's legal performance with regard to the changes promoted in the Own Social Security Regime of federal public servants by Constitutional Amendment No. 103/2019, in a period marked by great political-institutional instability and limited capacity to produce policies, both stabilization and reforms.

In the molds of society in the modern world, Social Security is an unquestionable human right, because contingencies that make it impossible for the individual to self-sufficiency are a situation, if not possible, probable. In addition, since the first social security systems were instituted, countries have tended to improve them and not exclude them from their legal systems.

Due to this significance, several international organizations have already inserted the right to social security as a good that must be protected by the State. With the International Labor Organization, the conception would be no different. Shortly after its foundation, largely as a result of the provision that provided for social security in the Universal Declaration of Human Rights, the ILO issued Conventions No. 102 and 157, which establish minimum standards of social security and a series of parameters that member states should commit to complying with, in order to provide a minimum of security to workers.

This minimum established by the ILO, although it determines parameters, does not create specific models that the legal systems must follow. Such a measure is appropriate because it respects the different realities experienced by each society. And as Law is built on social relations, it must be understood that in the face of different social relations, different legal mechanisms are developed.

It is in line with the thinking of Borges (2019, p. 31), for whom one of the main characteristics of the 1988 constitutional text is the special attention given to the protection of fundamental social rights. Such attention is not only reflected in the extensive list of fundamental social rights provided, but also in the degree of detail of the content of these rights itself.

The hypothesis tested here is that the Court has been using, in cases of control of the constitutionality of the 2019 pension reform, a range of informal decision-making strategies that guarantee it a room for maneuver in relation to the other powers, little triggering its constitutional veto power.

The Federal Constitution of 1988 has as one of its characteristics its rigidity, which results from the greater difficulty for its modification than for the alteration of the other infra-constitutional norms of the legal system. This rigidity has as its main consequence the principle of the supremacy of the Constitution, which means that the Major Law is at the apex of the legal system. The Constitution does not derive its basis of validity from any higher legal diploma, it is simply established by the will of the determining forces of society. This magnitude that underlies the validity of the Constitution is known as the original constituent power. The constitutional text, although rigid, is not immutable, because immutability is an absurd thesis that collides with the reality of dynamic life, which undergoes changes, renewals and progress. It is accepted, therefore, that the Constitution be amended by the so-called derived constituent power, or reform, using the means provided for by the original constituent power itself, which establishes the procedure to be followed and the limitations to be observed. The term power of reform includes both the power to edit amendments to the Constitution and the power to revise the text.

Constitutional amendments are provided for in the body of the Constitution as a formal means of manifesting the power of reform and aim to enable the updating of the constitutional order whenever necessary. Due to the nature of constituted power, it is unquestionable that the power of reform is limited, since it is governed by norms of the Constitution itself that dictate its procedure and way of acting, and cannot distance itself from them under penalty of defect, and the constitutional reform is subject to the system of control of constitutionality. The power of reform is contained in a framework of limitations of form, which include procedural, temporal and circumstantial limits; or content, which restrict the matters that can be subject to reform, are the so-called stony clauses.

The power to amend the Constitution finds its basis of validity in the original constituent power and, therefore, is subject to the control of constitutionality, aimed at conferring the conformity of its manifestations with the parameters of adequacy to the system. The power of reform is subject to formal and material limits, which cannot be violated, under penalty of the amendment being declared unconstitutional. It is important to emphasize that such limitations established by the original constituent power cannot be subject to deliberation and modification by the power of reform, as they are also part of the intangible core of the Constitution.

Constitutionality control is a correction mechanism aimed at reestablishing the harmony of the legal system and consists of verifying the compatibility between any normative act and the Constitution. The declaration of unconstitutionality is the recognition of the invalidity of a norm and aims to interrupt its effectiveness. The control of constitutionality can be classified according to the nature of the control body, which can be political or judicial control; as to the moment of exercise of control, which can be preventive or repressive control; as to the judicial body that exercises control, which can be a diffuse or

concentrated system; and, finally, as to the form or mode of judicial control, which may be incidental or abstract.

In Brazil, since the 1925/1926 reform of the 1891 Constitution, the Federal Supreme Court has admitted the judicial control of the observances of the limits imposed on the power of amendment, an opportunity in which for the first time it was called upon to discuss the validity of constitutional reform. On that occasion, the STF understood itself to be competent to evaluate the constitutionality of constitutional amendments and, since then, it has remained firm in the same understanding. Thus, the Judiciary can declare the unconstitutionality of constitutional amendments. This competence of the Federal Supreme Court does not extend to the original constitutional norms, since the thesis that there is hierarchy among them is incompatible with the system of rigid Constitutions, and it is impossible to declare the unconstitutionality of original constitutional norms.

Therefore, it is only possible to control the constitutionality of derived constitutional norms. Thus, if the control is carried out after the amendment has been enacted, it will be repressive and jurisdictional. It can be done incidentally, in the analysis of a concrete case, by any judge or court, or abstract control can be carried out through a direct action of unconstitutionality to be judged by the STF. In addition, the STF also already admits that the control occurs even before the constitutional amendment comes into force. In MS 20.257/DF, written by Justice Moreira Alves, the Supreme Court understood that a writ of mandamus filed by a parliamentarian for the purpose of attacking a proposal for a constitutional amendment whose content violates any of the stony clauses of paragraph 4 of article 60 of the Constitution is applicable. The legitimacy to file the writ of mandamus is only of the federal parliamentarian, as it is his subjective right not to be summoned to participate in an unconstitutional vote.

It should be noted that this is the only hypothesis of jurisdictional and preventive control of constitutionality admitted in Brazilian law. The STF, therefore, recognizes the possibility of review, in court, of the constitutionality of amendment proposals that exceed the limits imposed on the reforming power. Therefore, in relation to the control of constitutionality, it can be seen that the Federal Supreme Court appreciates the discussion about the constitutionality of constitutional amendments, finding no problems in declaring, when necessary, the unconstitutionality of norms issued by the reforming power.

Social security rules are constantly changing, in view of the change in life expectancy, economic and social needs, and as for federal civil servants, mainly because of deficits and budget surplus, and there is no doubt that over the years new changes will need to be inserted in the social security system.

Amendment No. 103/2019, which was processed in the National Congress as PEC 06/2019, was enacted on November 12, during a joint session of the National Congress. The text changes retirement and pension rules for more than 72 million people, including private sector workers who are active and public servants.

During the processing of the PEC, several entities representing typical State careers worked intensively in the National Congress to assist in the production of a more balanced text that would not offend vital points of the Federal Constitution. However, with the approval without due debate, the entities proposed ADIs with the objective of promoting the judicial reanalysis, in the STF, of the points that they understand to be unconstitutional.

Among the proposed and approved changes are the unjustifiable difference in criteria for women's retirement in the RGPS and RPPS; a system of progressive and extraordinary rates, which in the enacted form a confiscation of public servants' salaries; revocation of pensions granted under the aegis of another constitutional text, in violation of the perfect legal act and legal certainty; as well as the tacit revocation of transition rules approved in constitutional amendments 41/2003 and 47/2005, which again removes legal certainty and the legitimate expectation of those who have been in transition to retirement for more than 15 years.

From the first opportunity in which the STF was called upon to analyze the constitutionality of constitutional reform, there was no doubt that the reforming power, subject to the limitations imposed by the original constituent power, is subject to constitutional jurisdiction. Currently, with the great eagerness for constitutional reforms, several amendments are issued in disagreement with the restrictions imposed by the original constituent power and, consequently, are submitted to judicial control.

The judicialization of the Social Security reform is carried out as a last measure, after approximately nine months of work carried out in the National Congress to prevent unconstitutional points from being enacted. The Federal Supreme Court has been exercising its function as guardian of the Federal Constitution on a daily basis and it is expected, as a precautionary measure, to suspend the effectiveness of specific articles that are not aligned with the current constitutional order, as a form of important protection of social security.

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