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The Provisional Measure 871 and the Programme of Incapacity Benefit Investigation: General Considerations and Perspectives

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Abstract: This article aims to analyse Provisional Measure 871 and the INSS Disability Benefit Review Program of the Brazilian current government, unveiling the directions of austerity sought, if in the dimension of efficient and effective application of public resources to reach those benefits eligible and exclude those who make inadequate use, or in the neoliberal orthodox direction of the lean State, and which open up many opportunities for capital to intervene by offering services and leaving excluded margins that do not access the market by restricting resources and are not covered by restrictive public policies and selective.

Key words: austerity; public; resources; public policy

JEL codes: H

1. Introduction

Published on 18 January 2019, and effective until December 2020 with the possibility of extension until December 2022, Provisional Measure 871 (MP 871) establishes within the area of the Brazilian Social Security System (Instituto Nacional do Seguro Social — INSS in Portuguese), a special programme for the detection of irregularities within the unable-to-work benefits system, plus a review of Incapacity Benefits.

Similarly scheduled until 31 December 2020, as part of the Benefit Monitoring Scheme, is the Institutional Performance Bonus (Bônus de Desempenho Institucional por Análise de Benefícios com Indícios de Irregularidade do Monitoramento Operacional de Benefícios — BMOB in Portuguese), awarded for detection of irregularities in benefit claims, to the value of R$ 57.50 per case, supplemented by the Institutional Performance Bonus for medical examinations relating to incapacity claims (Bônus de Desempenho Institucional por Perícia Médica em Benefícios por Incapacidade — BPMBI in Portuguese), at a value of R$ 61.72 per case.

Defined therein are the instances where a claim may be considered to contain evidence of irregularity, and shifts the role of healthcare professional responsible for unable-to-work benefits to the Federal domain. This role, as well as that of other medical workers in National Insurance are now administered by the Ministry of Finance.

Also subject to change is Law nº 8.009, 29 March 1990, which guards against the confiscation of family property, but now using the caveat that recoverability may not be opposed when used as reparation for benefit claims made through misconduct fraud or coercion.

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Law nº 8.112 of 11 December 1990, which covers the legal status of public servants, autarkies and public federal foundations, is now adjusted to deal with the pension rights inherent in life Insurance.

Law nº 8.212, 24 July 1991, which concerned itself with Social Security, its budgetary plans and other issues, is now required to maintain a permanent supervision of the benefits it concedes in order to prevent irregularities or material error.

The MP alters Law nº 8.213 of 24 July 1991, which deals with National Insurance benefit plans and other schemes, to require a burden of proof of a stable family union and dependants financial need when claiming prisoner-dependant status.

It establishes that credits unduly gained upon the death of a civil employee must be repaid.

Amongst other amendments MP 871, establishes a system of review for all and any suspicious benefit claim.

A closer reading of the text, however, constructs a "mini-reform of National Insurance", so to speak, since it lays down previously inexistent demands on continuing benefit provision, capable of causing major hardship and legal instability amongst claimants.

With the introduction of the Benefit Claims Irregularity Analysis, all manner of claims already agreed are to be re-evaluated. Whereas before, incapacity benefits were given the fine-tooth comb, today retirement pensions, special or old-age pensions, pensions linked to life assurance, may be revised and curtailed.

However concerted the methodology of MP 871 in detecting irregularity and fraud, it is now applying the logic of the penal law enemy to benefit claimants.

The underpinning logic of the enemy in penal law (in German Feindstrafrechtt coined by Gunther Jakobs German Lawyer and Professor of Penal Law and Philosophy at the University of Bonn), posits that certain individuals who are enemies of society (or of the State) do not possess the legal and procedural protections available to others (Muñuz Conde, 2012).

The aim of this article is to examine MP 871 and the INSS Programme of Incapacity Benefit Investigation initiated by the current Government. We highlight the plot lines of austerity, either at the level of application of public resources, serving the needs of legitimate claimants, and excluding those who are not, or alternatively at the level of neoliberal orthodoxy, where the trimmed down State can offer numerous chances for capital to intervene, leaving margins of exclusion with insufficient means to access the market and unprotected by restrictive or selective public policy.

This article is the result of theoretical research based on literature review and documentary research using qualitative approach and discourse analysis.

2. From the Notion of Citizenship to the Enemy in Criminal Law: Exclusion Without the Right to Defence?

Jakobs distinguishes between a penal code for the citizen (Bürgerstrafrecht), which is characterised by a law-abiding norm, and another for the enemy, formulated against danger and permitting any available means of retribution (Muñuz Conde, 2012).

Thus, the suspension of certain laws is required to protect an imperilled society or State. Most of the studies on penal law and philosophy oppose the concepts of Feindstrafrecht. Jakobs in turn claims that he merely describes reality, while his critics allege an affirmative standpoint (Muñuz Conde, 2012).

Jakobs suggests that anyone who does not submit to a State's laws and legal foundation — or who seeks its destruction — should lose all citizen or human rights. Furthermore, the State should allow the subject's persecution by any means available (Muñuz Conde, 2012). For instance, a terrorist who wishes to subvert society, a criminal who ignores the law, a mafioso who follows only the norms of the brotherhood, should be termed as *unpersons*, to be treated not as citizens, rather as enemies.

The notion of enemy is in opposition to that of citizen. The latter justifies, amongst other things, restrictive penalties, or guarantees of penalty completion. The former, however, implies an unrecoverable loss of personhood. Retribution for the enemy in the legal world requires a writing-off of certain groups of human beings.

And who is this enemy? Certainly he or she will be on the opposite side to whoever is in power, since the enemy concept is markedly fluid and vague, defined by the ruling orders, to serve their interests. In Western society, the enemy is to be found on the margins, amongst drunks, prostitutes and the like whom the majority prefer to view as an inconvenience.

Legal doctrine severely criticises the theory propounded by Jakobs (Muñuz Conde, 2012). To classify crimes and punishment so vaguely kills legality stone dead. It punishes people, ideas and lifestyles to the detriment of concrete facts.

In extreme cases, punishment of the enemy is used as a political manoeuvre to reduce social anxiety whilst greater crimes are committed elsewhere, to becalm the sense of fear and helplessness and to strengthen the rule of law. They take advantage of an extreme situation through serious violations of the law and employ the resulting sensationalism for self promotion and a stricter punishment for the offender. Emergency criminal law, the policy of fear made its major appearance in the aftermath of 11 September 2001, where military measures suppressed various rights of those immigrants selected as enemies.

Constitutionally doubtful, the penal law relating to the enemy gradually ceased to centre exclusively on terrorists, criminal gangs, traffickers of arms or people, becoming the rule, leaving behind the subsidiarity and fragmentation of a penal code, fundamental for a democratic constitutional state.

It deviates from its retributive purpose, to favour punishment of preparatory action as a means of predicting and preventing further transgression. It loosens the legal doctrine of inter criminis, penalising formal crimes as well as mere behaviour, destroying the principle of injury.

Eugênio Raúl Zaffaroni (2011, p. 123) in his work *The Enemy in Penal Law* wisely asserts that: "The judicial admission of the notion of enemy (if it is not used strictly in the context of war) was logical and historically the primary symptom of the authoritarian destruction of the rule of law".

There is no sense, then, in repeating the mistakes of the past by using penal law as a means for one group to gain dominion over another.

In principle, the democratic rule of law is the converse of formulaic penalties, and opposes the use of the juridical to legitimise a penal process aimed at making invisible certain social groups. Although it may, however, be expressed in this way, it does not dismiss repressive methods to maintain and impose ordered legitimacy, while nevertheless seeking political means for conflict resolution.

This logic, both perverse and antidemocratic, reveals the legal weakness in MP 871, since the democratic rule of law established by the Constitution of 1988 abhors such reasoning, and our Magna Carta guarantees the right of all citizens in all judicial and administrative procedures to a full and contradictory defence.

The principle of contradictory defence is enshrined in article 5 (item LV): "a contradictory and full defence will be guaranteed to litigants in juridical or administrative process, and to the accused with all inherent means

and resources".

The principle of a full defence in the legal process belongs fundamentally to modern judicial practice. It guarantees that no one will be subject to sentencing without an effective participation in the legal procedure, and derives from the Latin *Audi alteram partem*, which means "to hear the other side", or "to let the other side also be heard".

It is vital for both sides to present opposing positions, so the presiding court when sentencing may not take any other than an impartial stance towards what has been presented.

Another pressure point in MP 871 causing much legal confusion is how an irregular benefit from INSS may be defined. The rules need to specify exactly as such, for, if not, figures become generalised and arbitrary, placing benefit maintenance at the discretion of the INSS.

Another clear example of perverse and arbitrary logic within Criminal Law of the Enemy, is that the INSS has set up an electronic link to receive denunciations of benefit abuse. Thus, any benefit holder could face the consequences of an unfounded accusation.

Added to this is that many benefits are legally granted but the interpretation of benefit legislation by the INSS and the judiciary diverges greatly.

This is due to self-direction within INSS administration, where rules and ordinances are not always in line with current legislation.

Even within the INSS, benefit concession suffers from diverging interpretation; the body for Social Security itself has varying views on legislation depending on the regions, its management, resource control, all leading to a disunity of function.

MP 871 even limited what could be considered an irregularity leading to welfare benefit withdrawal and set a short period for such recipients to defend themselves to the Department.

A period of ten days is to be counted for the claimant to be notified of any payment irregularity via a bank, electronically, simple letter or other means such as WhatsApp, e-mail, text message and so on. No fixed method for notification is employed.

And here we face yet another problem. Amongst the vast numbers of benefit claimants, how many have the means to read and understand an official message? There is no exaggeration in saying that a great number of claimants will only be aware of the details when they go to collect their benefits and realise that there is nothing to be collected. Such examples are currently occurring during close analyses of unfit-to-work claims, and permanent benefits.

Moreover, there is a chance that the benefit will be suspended should any explanation be considered insufficient by the INSS. In other words, the procedure is in itself a hindrance to a proper defence, be it through the means of notifying the claimant, or through the reduced timescale. Consequently. the assistance is temporarily discontinued, and a new claim period installed, now for 30 days, in which to lodge an appeal.

It so happens that the appeal has no suspensive effect, which means that the claimant is not liable to receive any interim amount from National Insurance. If the benefits centre judges the appeal admissible, benefit will be restored and paid up. If not, the claimant loses his/her income.

3. Neoliberal Austerity: Beyond Efficiency and Efficacy, to the Reduction, at All Costs, of Public Spending

In a recent interview, the Finance Minister Paulo Guedes, stated that reform of Social Security could generate savings of up to 1,3 trillion reals within ten years. According to him, the minimum amount to be saved will be 700 billion of reals, capable of reaching two-thirds more than the efforts of the previous government.

In the interview of 20 February 2019, he stated: "We are looking at the numbers and they vary between 700 and 800 billion to 1.3 trillion of reais, which is a significant reform, and provides an important fiscal restructuring. This will have a powerful effect for 15, 20 or 30 years. It's either this or we end up I like Greece".

Proposals from the previous administration led by Michel Temer, originally predicted savings of R$ 800 billion, but adjustments passed by Congress reduced that to R$ 480 billion. On corporation tax, Guedes states that the government will consider reducing the rate from 34% to 15%. Counterintuitive if the aim was merely to reduce public spending and increase resources of the State. It is clear that austerity is a neoliberal orthodoxy, hard or authoritarian, bent on reducing the State workforce. while maintaining and financing the general conditions for capital, especially bankrolling this stage of capitalism.

From the Minister's words, it is clear that the idea behind the reforms is to make the welfare system more efficient from the accounting standpoint, for it later to be placed it into private hands. This may not be explicit in the declarations of its supporters, although their intentions, as yet undeclared, are plain to see.

The explicit, advocated aims of National Insurance reform in Brazil stem from the democratic management of public policy, changes in the funding mechanisms, the need for reduction in public spending, administrative improvement in the distribution of benefits, fighting fraud and the reduction of judicialization within welfare systems, presenting such change as vital and urgent.

Included within MP 871, which was submitted to be voted upon by the Congress, was the following justification; adoption of the measures hereby proposed will permit greater efficiency and efficacy in actions of the State for benefits management, duly enabling control of public spending arising there from and reducing undue increases for public deficit. Apart from providing clear gains, implementation does not imply greater costs, since the predicted outcomes depend upon the removal of undue payments. This plays a central role in the current restrictions brought about by the country's financial crisis, as well as honouring spending limits imposed by the controls imposed by Constitutional Amendment nº 95 of 2016. All such features underline the urgency and relevance of the measure hereby presented.

Meanwhile, it can be clearly seen that all such attempts to reform the Brazilian National Insurance System are no more than mere fiscal arrangements aimed at reducing public spending, avoiding any costs and increase in the public debt, while favouring the market. Ready to obey the dictates of the International Monetary Fund (IMF) and the World Bank (WB), who work to spread the doctrines of neoliberalism, such as free markets and the creation of conditions for such, areas previously in the public domain, now need to be readied for market, leaving the State leaner and fitter. No matter if this leaves vast tracts of the populace unprotected, or under-protected, by minimum assistance. Such bodies are the outriders for the new bourgeoisie, descended from the Chicago School, the home of ultra-liberalism.

IMF influence is clear. Reform of the welfare system is a priority to ensure the Brazilian government's fiscal sustainability in the long run.

The Programme of Benefit Review proposed by MP 871 replicates a previous and successful model, previewed in MP 767, 6 January 2017, becoming Law nº 13.457 on 26 June 2017, in which a special performance bonus was granted to health-care professionals, within the INSS. Where no check had been carried out for the two years following introduction of the law, this fee was payable depending on the number of supplementary health-checks made to confirm or discontinue benefit payment.

Until October 2018, 412,274 claimants had their benefits removed, having been judged fit for work, thus demonstrating the great potential afforded by the bonus in the combat of irregularities. Therefore, austerity becomes vital to the wise management of public resources. Yet, in neoliberal government this does not simply represent the sound application of public policy, but more the need to reduce spending whatever the cost.

Based on these results, MP 871 proposes a Review Programme with effect until 31 December 2020, which aims to deliver one-off medical checks on claims invalidated for six months, and which bear no expiry date, nor indication of professional rehabilitation. Other support benefits, will be similarly subject thus increasing the scope of measures introduced by MP 767, of 2017 becoming Law nº 13.457 of 2017.

Today we can count 2.5 million claimants with continuing deficiencies, added to 2 million elder recipients of regular benefits, adding up to a monthly bill of R$ 4.3 billion. In 2017, the total outlay of such a benefit exceeded R$ 50 billion, and although ongoing bi-annual checks on continuing qualifications for benefit receipt were to be carried out, this was never done. However, the re-instating of checks on eligible claims is inspired from a neoliberal position, and has more to do with cutting public spending than probing for fraud and inappropriate payment, while those in need suffer through lack of information.

Berenice Rojas Couto (2006) in her book *Social Rights and Social Assistance in Brazilian Society: A Possible Equation* alerts us to the fact that social welfare is increasingly absent from the duties of the State, as neoliberalism takes hold over the manner in which the Executive governs.

The current administration reduced by around 50% budgetary resources earmarked for the area, affecting the capacity regularly to deliver social services already impacted by lack of investment.

The Brazilian State is resistant to public and popular control over its actions; there exists within social welfare a certain type of reverse citizenship (Fleury, 1994). What characterises the relationship between the State and the population is this lack of citizenship, so providing dependence on Social Assistance (Couto, 2006).

Nowadays, such a feature is evident in the elimination of official bodies and associations, thus closing the dialogue with civil society and cutting its participation in social power. The inability of the Welfare system to meet new situations of vulnerability and risk just when its public is set to increase once Reform National Insurance is approved, suggests that many will no longer be able to retire, but will be subject to policies ever more selective, and that many will go unassisted.

The reform of National Insurance taken up by the present government, must necessarily take into consideration the acquired rights and basic conceits of Social Security, when it was integral to welfare, health and social assistance. Nevertheless, there are attempts in Proposed Amendment to the Constitution (Proposta de Emenda à Constituição — PEC in Portuguese) nº 06 of 2019 to remove National Insurance from this role and restrict it to the level of contributions, for it later to be capitalised. Dismantling the component parts of Social Security created by the Magna Carta of 1988 and one of its major achievements to be preserved, will not escape.

4. Conclusion

Reform of social welfare is one of the basic elements in the transition of Brazilian society. Achieving monetary stability at any price – the removal of social rights, forces us to reshape our model of development for the country.

Before rushing to any decisions about the conceit of legal enemies, or charging headlong into austerity by cutting public spending whatever the outcome, now is the time for reasoned, democratic debate. We should create a context stressing the plurality of cultural and social concerns before taking any decision, especially when the subject is social protection.

Any collective deliberation upon the reform of National Insurance must call upon its integrants (State, Society and insured citizens) since it is only through collective and democratic consideration, that varied and plural viewpoints can be developed, thus arriving at a reform both democratic and well thought-out.

Unfortunately, at the current stage of deliberation, be it the Government-led reduction of public/popular participation, for example the weakening in the role of Rural Workers' Unions, the dissolution of advisory Councils, we are witnessing a gradual reduction in popular forums which were historically conceived to increase participation, with the shrinking of public and democratic debate, leaving unconsidered opinions other than those of the State.

As a guiding principle of National Insurance reform, it is now necessary to widen democratic participation. A public debate is both healthy and necessary, while the information locked within government bureaucracy must be available to the people; robust counter-argument and open comparison of interests are desirable. Thus, only through the reconstruction of consultative means of public deliberation in which diver-gent views, (both majority and minority) can be aired, will we be able to re-think National Insurance reform. Democratic debate will better equip us to deal with change.

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