

LEGAL ADVICE

Entities representing political amnesties request an opinion regarding the constitutionality of the changes intended by Proposal for Amendment to the Constitution No. 6/2019 (Welfare Reform PEC). The proposal brings four changes to article 8 of the Transitional Constitutional Provisions Act (ADCT) that concern political amnesties. Below, each of these four changes will be analyzed.

- 1st Amendment: Article 8, § 6 of ADCT. PEC wording: "Amnesty recipients in the manner provided for in this article and their dependents shall contribute to social security by applying a rate on the value of the monthly economic reparation to which they are entitled, in the manner established for the contribution of retirees and pensioners of the federal social security system".

Opinion: The amounts due to political amnesties consist of a type of constitutional reparation, that is, its legal nature is indemnification and not social security. In other words, those who were harmed by politically motivated acts receive compensation for damages suffered during the dictatorship, while a state of exception was in force.

This recomposition does not bear any relation with social security. As the indemnifying legal nature of political amnesty cannot be confused with the social security nature of the proper regime of the Union's public servants, the constitutional amendment cannot subject an indemnifying allowance to a social security subtraction. If the aforementioned amendment is approved, legal actions may be filed to ensure that the monthly amnesty payments, due to their indemnification nature, continue to be exempt from contribution to the Federal Government's Special Social Security System (RPPS).

It is worth adding that article 7 of the Consolidated Normative Instruction of the Federal Revenue of Brazil (IN RFB no. 1500/2014 with last updated by IN RFB

No. 1869/2019) clarifies that indemnifications are not subject to tax levy. This rule establishes the exemption of any indemnification value intended to repair patrimonial damages. In the case of the dictatorship victims, the constitutional indemnity consists precisely of a type of indemnity aimed at repairing the damages caused by the State during the military dictatorship. To remove any doubt, this rule also clarifies that compensation of any nature due to political amnesties, as well as reparations to political disappeared persons, are tax exempt.

In the field of jurisprudence, the Superior Court of Justice has already established the impossibility of discounting social security contribution on indemnity amounts due to political amnesties. In this regard, it is worth noting the following decision, reported by the late Justice Teori Zavascki:

"MILITARY PENSION. POLITICAL AMNESTY. IR. SOCIAL SECURITY CONTRIBUTION. EXEMPTION. RESTITUTION. STATUTE OF LIMITATIONS. MS.

The deduction of income tax and social security contributions on retirement payments to political amnesties (Dec. No. 4.897/2003 and arts. 1 and 19 of Law

n. 10.599/2002)". (Superior Court of Justice, MS 9.543-DF, Reporting Justice Teori Albino Zavascki, Case Report No. 0219, August 2004. The underlines have been added).

Along the same line, the other judgments demonstrate the pacific jurisprudence of the Superior Court of Justice on the matter:

"TAX AND CIVIL PROCEDURE. DENIAL OF JURISDICTIONAL PROVISION. NON-OCCURRENCE. POLITICAL AMNESTY. INCOME TAX AND SOCIAL SECURITY CONTRIBUTION. EXEMPTION. LAW 10.559/2002.

[...]

2. Pursuant to the case law of this Court, income tax and social security contribution are not levied on the retirement and pension of political amnesties, pursuant to Law 10559/2002, even before its effectiveness. Precedents: EDcl in MS 16.201/DF, Reporting Justice Benedito Gonçalves, First Section, DJe 07/11/2011; AgRg in AREsp 119.651/DF, Reporting Justice Castro Meira, Second Panel, DJe 23/04/2012.

3. Interlocutory appeal which is denied. 3. Interlocutory appeal not provided" (Superior Court of Justice. AgRg in REsp 1099027 / RS. Reporting Justice Sérgio Kukina. DJe 03/12/2013).

["..."] EXEMPTION FROM THE DEDUCTION OF INCOME TAX AND SOCIAL SECURITY CONTRIBUTION, BASED ON LAW NO. 10559/2002, DUE TO THE COMPENSATORY NATURE OF THE AMOUNTS PAID TO THE AMNESTIES. RIGHT WHOSE RECOGNITION, EVEN IN THE ABSENCE OF REQUEST OF THE AMNESTY, DOES NOT CONFIGURE EXTRA PETITA JUDGMENT. PRECEDENT. CASE IN WHICH THERE WAS AN EXPRESS REQUEST OF THE AMNESTY. ALLEGED UNCONSTITUTIONALITY OF THE SOLE PARAGRAPH OF ART. 9 OF LAW Nº 10.559/2002. IMPROCEDENCE. PRECEDENT OF THE FIRST SECTION. [...]

2. The case law of the Superior Court of Justice is well-established in the sense that, due to the nature of compensation of the amounts paid as a result of the granting of amnesty, the social security contribution and income tax are not levied on them, as in fact expressly provided for in Law no. 10,559/2002. Therefore, granting the exemption, even in the absence of a request from the interested party, does not constitute an extra petita judgment. Precedent.

3. Case, moreover, in which the request for exemption was expressly made by the creditor, which reveals the unfoundedness of the extra petita judgment allegation.

4. According to the understanding of the First Section, which is responsible for ruling on tax matters, 'there is no unconstitutionality in Law 10559/2002, which, recognizing the nature of indemnity payments made to amnesty recipients, ruled out the assessment of Income Tax and Social Security Contribution' (MS No. 11.022/DF, Reporting Justice Herman Benjamin, DJe Feb. 1, 2010).

5. Interlocutory appeal dismissed".

(Superior Court of Justice. AgRg in EmbExeMS 11921 / DF. Reporting Justice Marco Aurélio Bellizze. DJe 05/09/2012).

- 2nd Amendment: Article 8, § 7º of ADCT. wording of the PEC: "The social contribution referred to in § 6 does not eliminate the collection of the other social contributions required from the compulsory social security insured".

Opinion: The contributions of the insured are due to the respective social security systems, whether it is the Special Social Security System of public servants (RPPS-Union), the General Social Security System (RGPS-INSS), a private or supplementary social security system. However, it is unconstitutional to attempt to treat a political amnesty reparatory/indemnity allowance as a contributory/security allowance.

For this reason, social security contributions should be required for installments that concern the relationship between work (activity) and retirement (inactivity). The situation is different with respect to the relationship between the damages caused by the State during the dictatorship (damages) and the constitutional duty of reparation to the victims (indemnification).

Precisely due to this differentiation, the Judiciary has a uniform understanding in the sense that the amounts paid on account of political amnesty cannot be object of contribution to welfare funds or social security funds. The judgment below exemplifies the position of the higher courts on the matter:

"ADMINISTRATIVE. POLITICAL AMNESTY. MORAL AND MATERIAL DAMAGES RESULTING FROM POLITICAL PERSECUTION. FUSEX. NON-INCIDENCE.

In accordance with the provisions of article 9 of Law 10,599/2002, the amounts paid for amnesty cannot be object of contribution to assistance funds, as occurs with FUSEX. MS 10.519/DF, Reporting Justice LUIZ FUX, FIRST SECTION, judged on 12/12/2005, DJ 13/2/2006, p. 647. Interlocutory appeal denied". (Superior Court of Justice. AgRg in REsp 1571175 / RS. Reporting Justice Humberto Martins. DJe 22/03/2016).

- 3rd Amendment: Article 8, § 8 of ADCT. PEC wording: "The simultaneous monthly perception of monthly reparation with retirement proceeds is prohibited, in which case the amnestied person may, under the terms provided for by law, opt for the more advantageous social security benefit or monthly reparation of economic nature, respecting the cases of acquired right until the beginning of the effectiveness of such prohibition".

Opinion: The proposed wording removes cases of vested right, i.e., those who already have the condition of political amnesty. Thus, those amnestied who receive monthly benefits until the edition of the PEC would not be affected by the change in the constitutional amendment. For new political amnesties, the PEC establishes that the beneficiary must choose between one of two benefits: the indemnity (monthly benefit) or the social security benefit (retirement or pension).

Again, the text presents a mistaken understanding of the legal nature of political amnesty reparation by confusing it with a social security benefit. Amnesty recipients receive monthly political amnesty payments because they suffered losses during the Brazilian dictatorship. Retirees, on the other hand, receive retirement benefits because, while they were working, they contributed to some social security regime (RPPS or RGPS, for example).

It is manifestly unconstitutional to withdraw an allowance from a citizen because he already receives a pension. Similarly, it is unconstitutional to withdraw a social security allowance from a citizen because he has already received an indemnity. These are different concepts that cannot be subject to compensation among themselves. If this amendment is approved, actions will be filed so that the Judiciary Power guarantees the constitutional and legal right that citizens have to accumulate indemnity with retirement, since they are different institutes with different foundations.

On this matter, the Federal Supreme Court has already established that retirement and amnesty have different origins and foundations. For this reason, there is no illegality in accumulating retirement of a social security nature with a monthly compensation of an indemnity nature. It is worth noting the following decision of the Brazilian Constitutional Court:

"PENSIONS. ACUMULATION. DIVERSE ORIGINS. ANISM. The pension resulting of amnesty, present institutional act, gains indemnity contours, and may be received with other fruit of legal bond maintained by the deceased with the State. [...] In view of the above, I grant the request to annul the contested administrative act and determine the maintenance of the pensions received by the plaintiff. The examination of the interlocutory appeal filed by the Union is prejudiced" (Federal Supreme Court. Reporting Justice Marco Aurélio. Writ of Mandamus No. 28,700. DJe 22/02/2013. Excerpt extracted from the vote of the Summary and the operative part of the vote of the Reporting Justice. Underlining added).

- 4th Amendment: Article 8, § 9th of ADCT. PEC wording: "The granting and adjustment of the monthly benefit due to amnestied persons may not exceed the

maximum limit established for the benefits of the General Social Security System, guaranteed the irreducibility of benefits already granted".

Opinion: In this paragraph, the text also removed the cases of benefits already granted. Thus, those who receive monthly, permanent and continuous benefits until the date of edition of the PEC would not be affected by the proposed amendment. For new political amnesties, i.e., those who have not yet had this condition declared until the enactment of the constitutional amendment, the maximum value of the monthly benefit would correspond to the ceiling of the INSS and annual adjustments would follow the same indices of the RGPS.

However, the constitutional reparation of indemnifying nature seeks to recompose the damages caused by the State during the regime of exception. This is the reason why amnesty recipients receive a monthly payment as if they had been working. The limitation to the ceiling of the General Regime of Social Security would not be able to adequately compensate the victims of the dictatorship. These beneficiaries could sue in court to have the constitutional amnesty reparation correctly applied by the Judiciary.

In fact, the Judiciary has already established that the political amnesty should be interpreted in such a way as to give the institution the greatest breadth. In this vein, the Federal Supreme Court highlights this special aspect of full reparation for victims of the dictatorship:

"At first, the cause of action appears relevant for the solution of the controversy, since one of the pensions refers to retirement that has as background a true indemnity, present the Institutional Act no. 5 and article 8 of the Transitory Constitutional Provisions Act. All and any reasoning must be developed in order to give amnesty greater amplitude. This results from the legal nature of the institute, which aims to minimize harmful acts of the past, implying reparation, if not adequate, at least possible. One must despise literal, grammatical interpretation, which, although seductive, ends up emptying the benefit and prevents the due reparation for the arbitrary acts committed" (Federal Supreme Court. Reporting Justice Marco Aurélio. Writ of Mandamus No. 28,700. DJe 22/02/2013. Excerpt extracted from the vote of the Reporting Justice. Underlining added).

When judging the right to reparation in a general repercussion, the Plenary of the Federal Supreme Court recalled the differentiated treatment of reparations due to political amnesties. Along these lines, the Constitutional Court noted that the authoritarian past left individual and collective marks, which require due reparation. Constitutional reparations, therefore, should be treated under a special prism, in order to restore the dignity of the human person precisely for those who had this condition violated. It is worth noting the votes of Justices Dias Toffoli and Edson Fachin, who masterfully analyzed this matter in terms of general repercussion:

"The compensation due to the political amnesty integrates specific group that deserves differentiated treatment by constitutional provision (ADCT, art. 8). However, in the case of amnesty, the government is not ordered to pay a certain amount as a result of a court decision, as occurs with precatórios. The punishment occurs by virtue of an administrative determination, so that payment must be immediate.

[...]

Despite the doctrine itself recognizing the difficulty of delimiting the scope of protection of dignity and fundamental rights, there is no doubt that the legislator's choice, when regulating and guaranteeing the rights of these amnestied persons, was to provide those who had their dignity destroyed by the anti-democratic regime once installed in our country with a minimum restoration of that dignity. It is the mission of this Supreme Court, therefore, as already noted by Ingo Wolfgang Sarlet, to transform the dignity of the human person 'into a lived reality and, who knows, perhaps less and less violated' (Notes on the dignity of the human person in the jurisprudence of the STF. In: SARMENTO, Daniel & SARLET, Ingo Wolfgang (Coordinators). Fundamental Rights in the Supreme Court: Balance and Criticism. Rio de Janeiro: Lumen Juris, 2011. p. 73)" (Federal Supreme Court. Vote of the Rapporteur Minister Dias Toffoli. RE no. 553.710. DJe 23/08/2018. Theme 394 of the General Repercussion of the STF Plenary. Emphasis added).

"Furthermore, in the dimension of its relevance, one cannot neglect to be before a much larger issue, not to be circumscribed only to a merely economic dimension, but equally political and legal. It touches here the core of our current republican Constitution, amalgamated in a constitutional narrative that cannot be harmonized with the forgetfulness of the past, without which, as is well known, one cannot, in the community condition, fully live the present and project the future. Our political community, gathered together in the National Constituent Assembly, did not agree with any attempt to obliterate in the collective memory the acts of

exception prior to the Constitution. Acts that, remember, not only broke with democratic regularity, but fractured the free development of a countless number of life stories. It is in light of this understanding - of a past that bore individual and community scars and, therefore, deserves both memory and reparation - that art. 8, ADCT is inserted" (Federal Supreme Court. Vote of the Vogal Minister Edson Fachin. RE no. 553.710. DJe 23/08/2018. Theme 394 of the General Repercussion of the STF Plenary. Emphasis added).

Conclusion: In general, the four changes contained in the PEC start from a wrong premise, which consists of confusing constitutional indemnity sum with other issues of social security nature. In fact, compensation is not to be confused with social security. Case law demonstrates that the Judiciary has guaranteed special treatment to the constitutional indemnity owed to victims of the dictatorship. Therefore, judicial measures will be appropriate to rule out each of the four proposed modifications, as described above.

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