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**1**  
VOLUME



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# EUROPE

## **The Right to Social Security in the Constitutions of the World**

Broadening the moral  
and legal space for social justice



**The Right to Social Security  
in the Constitutions of the World:  
Broadening the moral and legal space  
for social justice.**

ILO Global Study, Volume 1: Europe

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The Right to Social Security in the Constitutions of Belgium, Bulgaria, Czech Republic, Republic of Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Republic of Latvia, Republic of Lithuania, Netherlands, Republic of Poland, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Ukraine, United Kingdom

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Ellie Palmer is a Professor in the School of Law and Human Rights Centre at the University of Essex where she began her distinguished career as a commercial lawyer. However for the past fifteen years

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She has particular research interests in the development of judicial and extra-judicial mechanisms of accountability for the fair distribution of centrally allocated health and welfare resources; and in the use of international standards to protect socially marginalised and vulnerable adults and children living in poverty, especially in mainland Europe. Since 2009 when her acclaimed monograph *Judicial Review Socio Economic Rights and the Human Rights Act* (Hart 2007) was reprinted in paperback, the theme of austerity has brought new dimensions to her research and teaching; most recently as co-editor of an academic and practitioner text, *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016). She is also currently working on her latest monograph *Welfare Human Rights and States Protection*, based on undergraduate and post-graduate teaching which she led at Essex in the wake of the economic downturn.

Ellie Palmer's commitments to the ideals of social justice extend beyond her academic activities. From 2006-2010 she was a Trustee of the Children's Legal Centre based at Essex. Between 2004 and 2008, she was legal expert on the Commissioning Panel for the ESRC Public Services Program. In 2007, she participated in the Second UK High Level Dialogue on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) convened by Amnesty International-UK. In 2010, she was appointed to an EHRC Expert Advisory Group to review the protection of socio-economic rights in the United Kingdom. Since February 2011, she has been Director of the Essex ESRC funded Project, "Access to Justice in an Age of Austerity: Time for Proportionate Responses." She has also acted as legal consultant to leading UK human rights practitioners and NGO's, including the Democratic Audit, Amnesty UK, British Institute of Human Rights, Interights, Joseph Rowntree Foundation; most recently for the UK Charity Just Fair, in the preparation of a list of issues concerning Article 9 (CESCR) for submission to the UN Committee on Economic Social and Cultural Rights for consideration in October 2014.



## PREFACE

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The Constitution of the International Labour Organization, adopted in 1919, was the first international document to proclaim that lasting peace and social justice are impossible to establish without “the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision of old age and injury”. In the following hundred years, the majority of the national constitutions have followed suite, recognizing the principle of social justice among their foundational clauses and social security provisions – among the basic rights of their citizens. In the second half of the twentieth century, social security has grown into a cornerstone institution of a modern State and was consecrated as a fundamental human right.

In 2008, the Declaration on Social Justice for a Fair Globalization restated the ILO’s mandate and objectives with respect to the four strategic areas of employment promotion, social protection, social dialogue and rights at work viewed as “inseparable, interrelated and mutually supportive”. The objective of social protection has been broadened to include “the extension of social security to all, including measures to provide basic income to all in need of such protection and adapting its scope and coverage to meet the new needs and uncertainties generated by the rapidity of technological, societal, demographic and economic changes”. In response, the International Labour Conference has adopted the Recommendation concerning National Floors of Social Protection, 2012 (No. 202), which draws the blueprint for setting basic social security guarantee to all in need and building comprehensive social security systems from the floor upwards.

*ILO Global Study on the Right to Social Security in the Constitutions of the World: Broadening the moral and legal space for social justice*, covering 187 ILO member States, aims to take stock of these developments as reflected in the national constitutions across the continents and to assess the value added by the constitutional guarantees of social security to the advancement of social justice in the twenty-first century. The Global Study, composed of ten volumes, is dedicated to the ILO Future of Work Centenary Initiative and the worldwide celebration in 2019 of the 100th anniversary of the adoption of the ILO Constitution, which was the first to put labour and social rights under the protection of international law. The International Labour Standards Department, which is conducting the ILO Global Study, thanks the authors for their contributions and commitment to strengthening and extending social security worldwide.

CORINNE VARGHA

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## FOREWORD

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### MAKING SOCIAL SECURITY A CONSTITUTIONAL RIGHT<sup>1</sup>

From an embryonic institution limited to only a few countries in the wake of the twentieth century, social security developed into one of the main social institutions of today's societies, industrial as well as post-industrial societies. It played a key role in the human quest for greater protection from uncertainty, disease and deprivation shared by all nations and peoples of the world. Even in the most economically developed countries, social security can truly be considered as one of the great achievements of the twentieth century. In industrialized countries, social security systems have gradually covered all those in need of assistance whether through loss of health or income or the need to care for children or dependent persons. From an instrument of social control providing minimum standards of wellbeing to people in dire circumstances, social security has evolved into an instrument for promoting economic development, social cohesion and democracy. It was fused with the core functions of the State to form the "welfare state" as the distinct model of social development, which sustained a general belief in the ability of all countries to meet the pervasive challenge of putting in place a social security system accessible to all.

Social protection has come to be regarded as a productive factor preserving and enhancing the health, productivity and quality of the workforce and creating new employment in the social services sector. By providing replacement income it maintains domestic demand and helps stabilize the economy, particularly in the time of recessions. Where economic and social development are seen as mutually reinforcing processes, social protection systems are considered a societal investment in social and human capital necessary for stable long-term economic growth. The right to social protection was universally recognized as a fundamental human right guaranteeing a secure, healthy and decent standard of living necessary for the realization of a human being. ILO stood at the source of this process. The body of standards it has produced over the years brought into existence the international social security law, which not only gave the firm legal foundation for the human right to social security but filled it with guaranteed minimum standards of protection.

The post-Second World War history showed that human rights, democracy and the rule of law flourished in the societies characterized by high social cohesion and equity striving to eliminate want and deprivation by establishing universal social security systems. In 2001, the International Labour Conference recognized the effectiveness of this combination for growth and development of modern societies. It concluded that social security is an indispensable part of government policy to ensure social cohesion and social peace and prevention of poverty. By promoting solidarity between active and inactive members of society, between rich and poor and between present and future generations, social security

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<sup>1</sup> The first study on this subject, which has largely inspired the Global Study undertaken subsequently by the International Labour Organization (ILO), was carried out by the ILO Committee of Experts on the Application of Conventions and Recommendations in *Social Security and the Rule of Law*, Report III (Part 1B), International Labour Conference, 100th Session, 2011.



contributes to human dignity, equity and social justice. It is equally important for political inclusion, empowerment and the more stable development of democratic institutions under the rule of law.

Social rights were integrated into the world order instituted after the Second World War. Their inclusion in the Atlantic Charter of 1941, the Declaration of Philadelphia of 1944, the Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights of 1966 had such an impact that certain provisions on social security and social protection are to be found in practically all national constitutions adopted subsequently.

Constitutions define the way national legal systems are linked to international law and can import social security protections established in it. Constitutional provisions automatically introducing international treaties into the national legal system have the effect of creating duties for the State in relation to social security where such treaties contain social security provisions. As a result of such provisions, national laws denying corresponding social security rights could be declared unconstitutional on the grounds of inconsistency with an international treaty, such as ILO Convention or the International Covenant on Economic, Social and Cultural Rights. State obligations in relation to social security may also be derived indirectly from constitutional provisions attributing the force of law to international treaties, or an authority higher than national law, upon their publication or ratification.

The level of the constitutional commitment to social security and the binding force of the constitutional provisions differ considerably from one country to another. These commitments take the form of either very specific provisions on the functioning of social security schemes or, at the other extreme, general statements defining the approach to be adopted by the State to social welfare. Although several national constitutions do not refer specifically to “social security”, the great majority contain provisions that recognize the need for one or more forms of social protection. The means of social protection most commonly referred to in national constitutions throughout the world include social security, social insurance, social assistance and support, and social services. These means are often provided for in the context of protection against specific social risks or life situations, such as motherhood, fatherhood, childhood or old age, and with respect to specific categories of the population, such as children and young persons, families with children, the elderly and persons with disabilities. Health insurance and the provision of health care are often dealt with separately from protection against other social risks. Other means of protection may include the concepts of income security, minimum income, social pensions and the minimum subsistence level. The blend of these provisions and the level of detail vary greatly, often implying a redistribution of responsibilities between executive, legislative and judicial authorities.

Constitutional guarantees play a very important proactive role in introducing social rights into national legislation and in fostering their implementation. They can control the generation of norms, provide a justification for rules, mechanisms and institutions that already exist, provide guidance in the interpretation of other rules, and influence the organization of public services. They also provide a basis for the protection of rights through institutional mechanisms, primarily through constitutional and supreme courts, thereby holding out the promise of the fulfilment of such rights in future. Where there is an individual right of action before the supreme or constitutional court, individuals are able to participate actively in the realization of their social rights. The increasing role of the courts in giving substance to constitutional protections and preventing any deliberate retrogressive measures emerged as a noticeable trend during the post-crisis period of fiscal consolidation and social austerity in Europe accompanied by the general rollback of acquired social rights. Finally, the Constitution as a legal embodiment of human values attaches to social security rights a strong moral dimension – that of preventing the unjust denial of human dignity together with income.

Constitutions embody the right to social security in different ways: some include social security as a constitutional objective of state policy; some impose a duty on the State to realize social rights without establishing a corresponding individual right to claim social security; others confer an individual right to social security thus indirectly acknowledging the duty on the State to fulfil this right. In this continuum from soft to hard constitutional obligations to provide social security, there are States that both grant individual rights and impose duties but qualify the fulfilment of those rights or the imposition of those duties by only requiring the State to progressively realise the right or fulfil the duty. While the variety

of constitutional provisions ensuring social protection continues to increase, there is a noticeable pattern of their convergence around three main approaches: affirming social security as an individual right of a human being; defining the social responsibility of the State in social security provisions; and placing social security among the guiding principles of state policy.

Globally, the latest decades have seen a major trend towards making social security a constitutional right. This trend paved the way to the idea of underpinning the world economy by a global social protection floor made up from the mosaic of the national floors, which was embodied in the ILO Recommendation concerning National Floors of Social Protection, 2012 (No. 202). This instrument opened a new vision of what social justice could mean in a global era, broadening the moral, legal and fiscal space for social protection in the transition to a more sustainable global economy.

The articles included in this volume take stock of some of these developments in the constitutions of the 22 European countries in the context of the rights-based approach to social security. The first volume will soon be followed by the second covering the remaining European constitutions in the perspective of moving from a purely academic perception of constitutional law to using it as a practical instrument for defending the acquired rights. In the period 2017-2019, further collections of national articles on the social security provisions in the constitutions of Latin America and the Caribbean, Africa, Asia and the Pacific will reflect the development of social protection in the constitutional law across all the continents and complete the global picture outlook thus achieved.

*ILO Global Study on the Right to Social Security in the Constitutions of the World: Broadening the moral and legal space for social justice*, will be composed of ten volumes and dedicated to the worldwide celebration in 2019 of the centenary of the adoption of the ILO Constitution, the first international document placing social protection at the core of social justice.

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# INTRODUCTION

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## THE CONSTITUTIONALISATION OF SOCIAL SECURITY RIGHTS AS THE WAY TO A SOCIAL JUSTICE STATE

*Dr. MARCIN WUJCZYK*

The debate on social security rights has been arousing strong emotions for years. Opinions have been voiced negating the existence or the need to distinguish such rights, and others indicating the necessity to treat social security rights on an equal footing with other human rights. The economic crisis, which has affected numerous European countries in recent years, has made this debate even more topical. The purpose of this study is to re-examine the issue of social security rights and their significance.

It seems that during the assessment of particular social security rights, the most important role is played by the contents of international instruments and their significance in the system of international legal standards. It should be noted that, although many instruments of that sort exist at both a global level (the International Labour Organisation should be considered the most important organisation creating social security rights standards) and a European level (the most important international instruments seem to be the European Social Charter established within the legal system of the European Council, along with the European Charter of Fundamental Rights binding for member states of the European Union), social security rights have yet to obtain sufficient and effective protection in the system of international legislature. In consequence, the position of social security rights still depends on whether they are guaranteed in the internal legal systems of particular countries. And this is the perspective from which the issue of social security rights have been analysed in this study. The detailed presentation of all national legal systems from the perspective of social security rights is on the one hand impossible (due to, among other things, the specificity of many solutions comprising the content of social security rights), and on the other hand ineffective (excessive casuistics would not allow conclusions to be drawn). For that reason, the authors of this study have focused on the position of social security rights within the regulation of the most important instrument regulating the system of the state, i.e. the constitution. The adoption of the constitutional perspective has many advantages. Firstly, an analysis of the constitutional provisions allows the position of social security rights within the framework of human and civil rights to be assessed according to a particular country. Thus, it is possible to obtain an answer to the question about the significance of social security rights in the legal regulations of the national law. Secondly, the constitutional provisions, and in particular, interpretations made on their basis by constitutional courts of particular states, indicate the minimal contents of social security rights. Finally, the analysis of the contents of constitutional provisions presents an opportunity to look at social security rights cross-sectionally, i.e. to include the perspective of international instruments ratified by the state, and of instruments of lower rank than the constitution.

The studies included in this collection allow for numerous conclusions on the perception of social security rights in the system of the national law of European countries. Furthermore, it must be noted that the variety of outlooks on social security rights by particular legal traditions still raises a number of questions and doubts.



In reference to the debate, mentioned at the beginning, on the issue of social security rights, it should be indicated that the mere act of defining the meaning of this notion raises doubts. The starting point may be the definition developed by the International Labour Organisation. For this institution, “social security is the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner.” The core idea of social security rights is also well conveyed in the definition quoted by Grega Strban, who indicates that “social security is a public system of income protection in case of its loss or reduction (e.g. due to old age, invalidity, decease, accident at work or occupational disease, sickness, maternity or unemployment) or increased costs (e.g. for health care, raising of children or long-term care services), organised through a process of (broader or narrower) social solidarity” (Grega Strban, *Constitutional Protection of the Right to Social Security in Slovenia*).

It is worth mentioning that social security rights differ from civil and political rights, the position of which has been well-established. The latter ones are mainly based on the necessity to provide certain liberties and freedoms of actions, whereas the social security rights provide the individual with the entitlement to demand that the state undertakes actions to guarantee the individual the appropriate (minimal) living standards for that individual and his or her family members.

The majority of constitutions analysed in this collection has a reference to social security rights. In most cases, however, they lack a clear reference to the notion of social security rights. Yet, constitutional provisions mention the existence of specific qualifying entitlements as the social security right. Frequently, they also use notions that should be assumed to cover the term of social security rights. These are terms such as, for example, social justice (Estonia, Poland), or social state (Germany, Russia). Those notions frequently constitute the basis for distinguishing a series of social security rights or giving them specific wording. Some social security rights are regulated by instruments separated from the constitution that are, however, of a constitutional status (e.g. in the Czech Republic, numerous rights that have the character of social security rights are regulated by the Charter of Fundamental Rights and Freedoms). Yet, there are some constitutions in which social security rights have not been clearly regulated (in the case of Germany).

The rights regulated by constitutional provisions, most often considered to comprise the contents of social security rights, include the right to acquire the means of one’s livelihood by work, the right to adequate material security in old age, during periods of work incapacity, and in the case of the loss of their provider, the right to the protection of health and the right to free medical care and to medical aid on the basis of public insurance, social protection of family, the right of parents who are raising children to assistance from the state and the right of women for special care during pregnancy, the right to protection of health, voluntary and local government welfare services promotion, and assistance in finding employment.

With a view to the above remarks, an attempt may be made to define social security rights as a system of guarantees that is to provide help in spheres related to health, financial and accommodation needs, as well as related to the loss and search of work. The analyses to date have showed that this help is guaranteed by the state, yet there is nothing to prevent the duties concerning the execution of social entitlements from being imposed on private entities.

It often happens that the property right is included in the group of social security rights along with other typical social security rights (see the case of Hungary). It seems to be rather the entitlement securing the execution of social security rights. Sometimes, social security rights include the right to free choice of profession and training, or the right to work (the case of the Czech Republic and Estonia). The question arises whether such an understanding of social security rights is not too broad. Such rights should be rather rated among the employee rights than social security rights. On the other hand however, the typical social security rights are often inseparably linked with the right to work. It is therefore worth considering the adoption of the broad understanding of social security rights. It would contribute to the strengthening of the institution of social security rights and would support the implementation of regulations that guarantee other social entitlements.

In some Constitutions, social security is indicated, not as a notion, from which the rights for particular individuals arise, but only as the objective the state should strive to attain (this happens in Hungary). Such

an attitude should be considered disputable. Its definite advantage is the presentation of social security rights as entitlements of a dynamic character, i.e. such that should be continuously developed. On the other hand, this solution poses a serious threat that those rights will not be guaranteed at the minimal level. The lack of the possibility to derive a specific entitlement from the basic law carries the risk that state authorities, in the process of creating the law, will not endeavour to grant the real entitlements to citizens within the social guarantees. It is worth considering whether constitutional norms should not combine both of the above solutions, i.e. on the one hand include minimal securities of social security rights, and on the other hand, order that they be continually developed, taking into account the state's current economic situation.

A question should be posed – what should be considered in identifying the scope of generally accessible social security benefits. It seems that, above all, an appeal should be made to human dignity. Dignity may be considered to be a moral and spiritual value, inextricably linked to mankind, finding its expression in the conscious and responsible self-determination of one's life. The above constitutes a basis for demanding respect for that value from other entities. An unambiguous definition of the notion of dignity seems impossible to be formed. It is differently interpreted and explained. A great thinker of the Enlightenment era, I. Kant, posited that “humanity is itself the guarantee of dignity. In consequence a human being may not be used by anybody (...) as a means but should be always treated simultaneously as the aim and this is exactly the expression of dignity”. (I. Kant, *Critique of practical reason*, Warszawa 1953, p. 61). Human dignity plays a special role in determining the limits of rights and liberties to which an individual is entitled to. Thus, it constitutes the foundation on which the system of subjective rights of humans is constructed, or in broader sense, the legal system, the central element of which is the individual. As F.F. Segado observes, “dignity and rights do not exist at the same level. Dignity is the ultimate value. It means (...) that even a person who behaves dishonourably may not be deprived of the same dignity, equal to any other person. Therefore, dignity is the source of all the individual's rights, regardless of their nature – arising precisely from the dignity inherent in the human being.” (F.F. Segado, *Godność człowieka jako najwyższa wartość porządku prawnego w Hiszpanii (Human Dignity as the Highest Value of the Legal System in Spain)* [in:] *Godność człowieka jako kategoria prawna (Human Dignity as a Legal Category)*, eds. K. Complak, Wrocław 2001 pp. 180-181). The position that dignity constitutes the basis of social security rights allows one to say that social security rights should be granted at least to the extent that would prevent the violation of dignity in the understanding above. In my opinion such a violation is depriving a homeless person of the right to accommodation, or depriving the families without adequate livelihood of social welfare. Furthermore, it is unquestionable that somebody may be denied health care. The possibility to obtain help from the state in case of illness should be considered to be one of the most basic entitlements arising from the essence of human dignity.

In assessing the scope of acceptable restrictions of social security rights, one should be guided by the principle of proportionality. Due to this principle, all restrictions should be made only to the extent necessary to achieve legitimate purposes.

Finally, when determining the scope of social security rights, the interests of particular individuals and the public interest should be taken into consideration, and an appropriate balance between them should be kept.

Some concern may be raised by the fact that in many constitutions the right to use numerous social security rights has been guaranteed solely for citizens of that country (see the case of Slovakia). This solution is justified mainly by the fear of excessive financial burdening of the budget. It seems that this is just the range of entities entitled to use social security rights is one of the most crucial issues, which should be amended in national legal systems. This is such an important issue since nowadays there is an ever-greater flow of citizens between particular countries. This substantial migration results in the formation of big groups of immigrants deprived of the right to social security in the place where, in reality, they have their centre of vital interests. What is more, in the face of the ongoing economic crisis, it is possible to observe the tendency towards even greater activities aimed to restrict the entitlements of persons who are not citizens of a given country (such actions have been undertaken e.g. in Great Britain). No matter how one may understand the endeavours to restrict access to benefits, in particular to monetary

ones financed from the state budget, it should not lead to the migrants' deprivation of the right to access basic social security rights. The principle adopted in the constitution of Estonia seems to be a good solution. In accordance with that principle, everyone is entitled to the social security rights guaranteed in that act (thus, regardless of citizenship), and the restrictions apply solely to the rights which have been explicitly restricted in legal regulations. This solution leads to the assumption that there is a principle that newcomers from other countries are granted the right to use social security rights under the same terms as the citizens of that country (a similar solution has been adopted in the Russian constitution). One should further remember that all exceptions should be interpreted restrictively. Therefore, there should be no exceptions made from that principle in excess or in a way that may subvert the objective arising from the established principle.

One should notice that, despite the fact that most constitutions mention granting social security rights to their citizens, no specific entitlements derive from the contents of these constitutions. In many cases these rights are merely of a declaratory nature. It means that the entities that have been granted these rights may not pursue them on the basis of the constitutional provisions as such. They may be pursued solely within the limits stipulated by the regulations. In practice this means that the regulations of a statutory force may not thoroughly eliminate constitutional entitlements but the scope of these entitlements depends on the contents of the regulations of subconstitutional rank. This regulation raises many doubts. Since in reality, with this method of stipulating the contents of social security rights, they are deprived of strong constitutional protection. In effect, they may be changed by the legislator depending on immediate needs. It poses a threat to the significance of the constitutional guarantees of social security rights. Undoubtedly, the concept of minimum social security rights developed by some constitutional courts (such a principle has been developed by the Polish Constitutional Tribunal for example) constitutes important protection against such a threat. In accordance with this concept, the legislator may regulate the scope of entitlements for citizens, but may not, however, restrict those entitlements beyond the minimum arising from the constitution (the so called core of the law). Here a question arises as to whether the core of these social security rights should not obtain additional protection. This could be achieved by the implementation of an international instrument enacting the minimal standards of social security rights. It is an extremely difficult task, considering the diversity of social security rights in particular states. Yet, with the development of the level of social guarantees, it does not seem to be impossible to attain. In particular, considering the fact that in the European international law there are such instruments. In the first place, one may indicate the International Labour Organization Convention No. 102 or the Code of Social Security, which is based on it, existing within the framework of the system of standards of the Council of Europe. It is also worth noticing that a number of constitutions mention the validity of instruments of international law, including those that regulate social security rights in the national law of particular countries. Those remedies might undoubtedly constitute a significant factor reinforcing the protection of social security rights. However, as Professor Eberhard Eichenhofer rightly points out in his analysis of the situation in Germany, "there is a huge reluctance within the domestic judiciary to give an international law rule such an important impact that it will make a revision of internal law a legal imperative" (cf. Eberhard Eichenhofer, *The right to Social Security in the European Constitutions*). It seems then that the debate on the significance of international instruments in the national system of the state and the necessity of taking them into account in the judicial decisions of national courts should be encouraged.

The protection of social security rights is seldom restricted to their regulations in constitutional provisions. As it arises from the prepared studies, the protection of constitutional social security rights has been primarily entrusted to the constitutional courts and tribunals (the Czech Republic, Poland, Latvia, Lithuania, Italy and Slovenia). These bodies are to verify the consistency of statutory provisions with norms included in the constitution. Most frequently, constitutional courts are authorized to recognise certain instruments, the provisions of which violate constitutional standards as unenforceable. For that reason, constitutional courts are often referred to as "negative legislators". In the context of social security rights, the role of constitutional courts seems, however, much more important. The studies included in this book show that in numerous states these institutions have played a major role in providing often very general formulations included in the constitution with a very precise meaning, or in developing the rules

stipulating the principles by which the legislator should be guided while regulating social security rights. The case of Latvia is a good example. The Latvian constitutional court is the author of the principle of a socially responsible state, in accordance with which “The duty of the State to form a sustainable and balanced policy to ensure the welfare of the society follows from the principle of a socially responsible state. Therefore the legislator has to elaborate such a regulatory framework that would be aimed at the sustainable development of the State.” (cf. Merle Mude, *The constitutional Social Security Rights in Latvia*). The jurisdiction of constitutional courts often also defines the terms under which it is possible to interfere in social security rights in the times of economic crisis (an example of this can be the Lithuanian constitutional court, which has allowed for the possibility of limiting the state pension entitlements during the difficult economic situation, on the condition that it is necessary to ensure vitally important interests of society and protect other constitutional values, and it is of a temporary nature). At the same time, the example of Hungary, where the competence of the constitutional court regarding the fiscal laws was limited due to the economic crisis, indicates that even this form of protecting social security rights cannot be considered sufficient.

The above observations lead to the conclusion that the strengthening of social security rights requires complex protective measures. It is undoubtedly of crucial significance to extend and then propagate (both new and already existing) international standards, at global and regional levels. The existing international organizations (such as the International Labour Organisation, the Council of Europe or the European Union) have already developed procedures for formulating new standards, and have many years of experience in stipulating the contents of those regulations and extending those contents. It then seems that the emphasis should be put on increasing the awareness of particular states and their citizens regarding the significance of protecting social security rights by acceding to the international instruments that formulate the guarantees of particular social entitlements.

Apart from the protection at the level of international law, the strengthening of the significance of social security rights should be achieved through formulating the guarantees in the national law. I fully agree with the position that the constitutionalisation of social security rights supported the extension and strengthening of social security rights. Thus, even the general reference to social security rights in the constitution contributes to raising the rank of those rights.

Fabrizio Proietti rightly observes that “in the dynamic perspective of the rights-values, it can be said that a right, even if in the early stage of its grounding it is not accompanied by instruments of judicial defence (individual or collective), can still be fundamental in the ability to link to the core values spread throughout the legal system, and to stimulate a strong cultural and political pressure, which ends up in remodelling its formal and substantive quality (cf. Fabrizio Proietti, *The Right to Social Security in the Italian Constitutional System*). This statement should be wholly referred to social security rights. It is by all means desirable that social security rights be stipulated in the constitution in such a way as to enable the derivation of specific meaning, further specified in provisions of other acts. Here, we reach the third crucial element constituting the system of the guarantees of social security rights. It is the existence of an objective and independent body responsible for the consistency of the law legislated by the state authorities with the values and subjective rights included in the Constitution. The analyses presented in this study indicate that these very institutions have frequently prevented the restriction of social security rights due to the contradiction between proposed amendments and the Constitution.

The maintenance of the aforementioned elements of the protection of social security rights is of the greatest significance during the economic recession. It cannot be denied that the economic crisis has exerted enormous influence on the scope of entitlements arising from social security rights. In many cases one might even talk about the recession in this field (e.g. in the case of Greece).

It seems that in the era of crisis, facing the negative consequences for social security rights the citizens are entitled to is unavoidable. For it is not possible to maintain high social security benefits in the situation of significantly reduced income. Should there be, however, any limitations imposed on restricting social security benefits? And if so, then what criteria should be applied in that situation. The issue undoubtedly requires a detailed discussion. In my opinion, it is beyond any doubt that the limitation of social security rights should not be excessive. The introduced restrictions should not violate

the essence of a particular entitlement, in particular, when a given social right is rooted in the constitution. Furthermore, the restrictions should not be applied automatically to all entities who have availed of help from the state up to this moment in time. The poorest people or people in the most difficult situation should be least affected by the introduced changes. People in a better financial situation may, in turn, be deprived of existing entitlements to a greater degree. Such an approach ensures the realization of social justice and reduces the risk of negative results for people who are most vulnerable to economic exclusion.

Yet, it should be noted that there are also positive aspects of the economic crisis in the context of social security rights. Its effects have forced the implementation of new forms of help for the most affected persons. Some aid programmes and public works are being introduced. What is more, the crises make it necessary to re-examine the distribution of resources within the framework of social aid. It provides a great opportunity to eliminate all irregularities that frequently appear in this field and to direct the aid to the persons who really need it. Hence, it is worth considering whether the crisis should not be used as an occasion to develop more efficient methods or realizing the entitlements arising from social security rights. It seems that the economic crisis creates an ideal opportunity to introduce new forms of social aid to the most deprived persons. Finally, the difficult economic situation of particular countries should be used as a source of information on the functioning of social aid and the introduction of all necessary changes (e.g. to the bodies responsible for the distribution of resources within the framework of social aid).

The analyses presented in this collection of over 20 national systems in regard to social security rights indicate that it may be said that social security rights are at a crossroads. In most cases, it is not clear whether there will be a significant reduction of entitlements within social security rights, or whether the existing protection will be maintained, and gradually extended. Much will depend on the development of the economy and also on the expectations of citizens of particular states. It is beyond any doubt that lawyers and scholars working on the social security rights issue will also play a major role in setting trends. Therefore, one of the challenges they should be presented with is the initiation of the debate on the future of social security rights and the determination of the directions they should follow.

One may hope that social security rights will find a permanent place in both international and national law, and in the latter case, they will be permanently regulated in the constitution. It will allow for the development of the state which is well-balanced, beneficial for its citizens and guarantees social justice.

# BELGIUM

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## THE RIGHT TO SOCIAL SECURITY IN THE BELGIAN CONSTITUTION

*Prof. PAUL SCHOUKENS*

### 1. Introduction

*Article 23 Belgian Constitution:*

*Everyone has the right to live a life in conformity with human dignity. To this end, the laws, decrees and rulings alluded in Article 134 guarantee, taking into account corresponding obligations, economic, social and cultural rights, and determine the conditions for exercising them.*

*These rights include notably:*

1. *The right to employment and to the free choice of professional activity in the framework of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;*
2. *The right to social security, to health care and to social, medical and legal aid;*
3. *The right to have decent accommodation;*
4. *The right to enjoy the protection of a healthy environment;*
5. *The right to enjoy cultural and social fulfilment.*

In this contribution we will discuss the right to social security in the Belgian Constitution and its relation to the different social security reforms due to the recent economic crisis. The main research question is the following: “Can the right to social security in the Belgian Constitution be used as a real instrument to prevent social regress and as a stop for the roll-back of social expenses in times of crisis?”

In order to answer our main question, the contribution is divided into four chapters, in each of them we will discuss a different topic. The **first chapter** will look at the different constitutional guarantees that protect the social security system in Belgium, namely the right to social security (Article 23), the prohibition of discrimination (Articles 10 and 11) and the right to property (Article 16 of the Belgian Constitution and Article 1 Protocol no. 1 ECHR).

In the **second chapter**, we will examine the material and personal scope of the right to social security in Article 23 more in detail. Before doing so, we will briefly discuss its development in the Belgian legal order.

The **third chapter** will provide a short overview of the case law of the Belgian Constitutional Court and the doctrine with regard to the right to social security in Article 23. Due to the concise formulation of the Belgian constitutional legislator, the Court and the literature had to define the contents and scope of this article. Moreover, the case law of the Constitutional Court will allow us to sketch the possible impact of the right to social security on national legislation and the Belgian legal system as a whole.

The **fourth chapter** will further elaborate on possible threats to social security rights due to the recent economic crisis. This chapter will describe some of the recent and future changes in Belgian social security law succinctly. In addition, the possible impact of the European Semester of the European Union on the Belgian social security system will also be discussed. Finally, in the **conclusion** an answer will be formulated to the central research question.

## 2. Overview of the constitutional guarantees of social security rights

Despite the fact that the Belgian Constitution does not explicitly proclaim Belgium as a ‘social state’, it does contain several guarantees for the protection of social security claims. This chapter will briefly discuss each of them. Firstly, Article 23 will be examined, followed by a brief overview of the prohibition of discrimination in Articles 10 and 11 of the Constitution. Finally, we will look succinctly at the right to property in Article 16 of the Belgian Constitution and Article 1 Protocol no. 1 European Convention on Human Rights (ECHR).

### a. Right to social security

Article 23, which contains the right to social security, consists of three separate parts, each having its own specific function. The first paragraph sets out an overarching principle, namely “*the right to live a life in conformity with human dignity*” that serves as the foundation for the more specific social and economic rights set out in this provision. To this end, the second section of Article 23 points out that the Belgian legislator, both at the federal and the regional level, should take into account the different social, economic and cultural rights when exercising its competences.

Finally, Article 23 consists of a non-exhaustive list of economic, social and cultural rights that has to provide the contents of the overarching principle.<sup>1</sup> This list contains amongst others the right to employment and to the free choice of an occupation within the context of a general employment policy and the right to social security. However, no further information was given by the constitutional legislator on how to interpret this right to social security.<sup>2</sup> The case law of the Belgian Constitutional Court is therefore of utmost importance in determining and interpreting the concrete scope of Article 23 (cfr. Chapter three). In Chapter two we will discuss the material and personal scope of the right to social security further.

### b. Prohibition of discrimination

Articles 10 and 11 of the Belgian Constitution provide, like Article 23, some protection for social security claims. Article 10 formulates the principle of equality, while Article 11 contains a general prohibition of discrimination. The Belgian Constitutional Court often combines both articles to interpret the constitutionality of legal norms. In order to do so, the Court has established a specific test which is based upon the case law of European Court of Human Rights.<sup>3</sup> This specific test comprises the following criteria:

- 1) Prohibition of arbitrariness (distinction must have a legal or justified goal as objective)
- 2) Criterion of objectivity (distinction must have an objective character)

<sup>1</sup> D. PIETERS and P. SCHOUKENS, “Country Report on Belgium” in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 24.

<sup>2</sup> M. JAMOULLE, “L’article de la Constitution Belge dans ses relations avec les droits fondamentaux, le droit du travail et la sécurité sociale” in G. VAN LIMBERGHEN and K. SALOMEZ (eds.), *Sociale grondrechten als bakens voor een vernieuwd sociaal recht – liber amicorum Professor Maxime Stroobant*, Gent, Mys & Breesch, 2001, 128; G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 406-407.

<sup>3</sup> Const. Court (Belgium), no. 21/89, 13 July 1989, online access [www.juridat.be](http://www.juridat.be); Const. Court (Belgium), no. 23/89, 13 October 1989, online access [www.juridat.be](http://www.juridat.be); D. PIETERS and P. SCHOUKENS, “Country Report on Belgium” in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 32.

- 3) Criterion of adequacy (distinction must be able to reach the justified goal)
- 4) Criterion of proportionality (the legal measures must be in proportion with the justified goal)

The Belgian Constitutional Court has often used Articles 10 and 11 in social security claims in previous case law. It is important to note that before 2003 the Constitutional Court could only test the validity of Belgian legislation against Articles 10 and 11, but not against Article 23. As a result, Articles 10 and 11 of the Constitution have played an important role in social security cases. For example, in 2003 the Court had to interpret an article of the Belgian Social Aid Statute (OCMW-wet) that limited social aid of urgent medical care for illegal residents.<sup>4</sup> According to the Court, there was a double discrimination. First, illegally staying children and legally staying children were treated unequally. As the objective of the legislation was to encourage persons leaving the country, the criterion was not adequate because both categories were not capable of leaving the country by themselves. A second discrimination concerned the equal treatment of illegally staying adults and illegally staying children. The former have the choice to leave the country, whilst the latter do not. Consequently the Social Aid Statute had to be adapted: illegally staying children now have to right to receive the necessary assistance.

### c. *Right to property*

The right to property in Article 16 of the Belgian Constitution provides another guarantee for the protection of social security claims, next to the prohibition of discrimination and the right to social security. Article 16 protects citizens against the expropriation power of the state and it entails a duty for the state to find a balance between the public interest and the owner's private interests. However, it remains uncertain whether social security claims can be regarded as property and to what extent they are protected under Article 16.<sup>5</sup> As no social security claims have been brought before the national courts invoking Article 16 of the Constitution so far, the case law of the Constitutional Court does not give an answer in this regard. Furthermore, Article 16 itself does not give a definition of the right to property, nor does the case law of the Constitutional Court.<sup>6</sup> Although Article 16 could play a role in cases where social benefits are lowered or even abolished by law, the role and the extent of which this provision could provide protection is still uncertain at the moment.

It seems that national courts rather refer to Article 1 Protocol no. 1 ECHR (for now) when providing protection for social security claims under the right to property. There are various reasons that explain this. First, only the Constitutional Court can judge the validity of Belgian legislation with the Constitution, whilst all courts can decide not to apply a statute when not in conformity with the ECHR. Secondly, the concept of property in Article 1 Protocol no. 1 ECHR seems broader than the one in Article 16 of the Belgian Constitution.<sup>7</sup> It is clear from the case law of the ECHR that social security claims, regardless of them being financed by contributions, can enjoy the protection of Article 1 Protocol no. 1 ECHR.<sup>8</sup>

<sup>4</sup> Const. Court of Belgium, no. 106/2003, 22 July 2003, online access [www.juridat.be](http://www.juridat.be).

<sup>5</sup> D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 39.

<sup>6</sup> D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 38-39.

<sup>7</sup> D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 38-39.

<sup>8</sup> See for example following cases: ECtHR 16 September 1996, *Gaygusuz*, 17371/90, paragraphs 39-41; ECtHR 12 October 2004, *Asmundsson*, 60669/00; ECtHR 30 September 2003, *Poirrez*, 40892/98; ECtHR Grand Chamber, 6 July 2005 (decision on admissibility), *Stec and others*, 65731/01 and 65900/01, paragraphs 42-47; For more information: M. COUSINS, *The European Convention of Human Rights and Social Security Law*, Antwerp, Intersentia, 2008, 65; P. LEACH, *Taking a Case to the European Court of Human Rights*, Oxford, Oxford University Press, 2011, 399; A. GOMEZ HEREDERO, *Social security as a human right. The protection afforded by the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 2007, 20-22; K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 223.



Thirdly, it is not necessary that loss of property is definitive under Article 1 Protocol no. 1 ECHR, while the Belgian Supreme Court<sup>9</sup> (Hof van Cassatie / *Cour de Cassation*) does require this with regard to Article 16.<sup>10</sup>

### 3. *Personal and material scope of the right to social security in article 23 of the Belgian Constitution*

#### a. *Development*

The right to social security, as included in Article 23 of the Belgian Constitution, is the result of several years of political debate and deliberation that started in 1988 and ended in 1994 with the adoption of a catalogue on economic and social rights.<sup>11</sup> During the first years of this parliamentary debate, the Belgian government was hardily interested in supporting the original parliamentary proposal.<sup>12</sup> The government did not consider this proposal as urgent, and decided to prioritize other legislative acts in the same domain such as the approval of the revised European Social Charter.<sup>13</sup>

During the period between 1992 and 1994, the debate about economic and social rights came to the fore again. Both the federal Parliament and the Senate started working at two concrete proposals to adopt several social and economic rights in the Belgian Constitution. The Parliament formulated the different socio-economic rights negatively,<sup>14</sup> contrary to the Senate that formulated the rights in a positive way. Eventually, the Senate's proposal was adopted in 1994.<sup>15</sup>

#### b. *Material scope*

The text of Article 23, third section, 2° of the Belgian Constitution, entails “*the right to social security, to health care and to social, medical and legal aid*”. The distinction between social security, health care and social aid was based on the International Covenant on Economic and Social Rights which distinguishes between the right to social security (Article 9) and the right to an adequate standard of living and the right to the best possible physical and mental health (Articles 11 and 12).

The concept of social security is not defined in the Constitution, nor does the constitutional legislator explain in what direction social security should evolve or what standards should be used in order to determine whether there is a violation of Article 23. It seems that the preparatory works defined social security in a rather restricted sense, namely as an overall term for social insurance schemes against recognized social risks.<sup>16</sup>

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<sup>9</sup> Besides the Constitutional Court, the Belgian Supreme Court also has the competence to interpret the Constitution and Constitutional Rights but only the Constitutional Court can squash legislation when not in conformity with the Belgian constitution and constitutional rights; See for example: S. SOTTIAUX, “Grondwetsconforme interpretatie: garantie of aantasting van de scheiding der machten” in A. ALEN et al., *Leuvense Staatsrechtelijke Standpunten 2*, Brugge, Die Keure, 2010, 196.

<sup>10</sup> See e.g. Supreme Court (Belgium), 4 December 2008, *Amen*, 2009, 133.

<sup>11</sup> Constitutional amendment of 31 January 1994, B.S. 12 February 1994, 3660.

<sup>12</sup> G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 393.

<sup>13</sup> M. STROOBANT, “Sociale en economische grondrechten in de Belgische grondwet. Wordingsgeschiedenis van artikel 23: het Akkoord van ‘Le Ry d’Ave” in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 22.

<sup>14</sup> G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 408.

<sup>15</sup> G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 407; M. RIGAUX, “De schanierfunctie van art. 23 G.W.” in M. Stroobant (eds.), *Sociale grondrechten*, Antwerp, Maklu, 1995, 111.

<sup>16</sup> D. PIETERS and P. SCHOUKENS, “Country Report on Belgium” in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 26.

As Leclercq pointed out, even though there is no precise or commonly accepted definition of the concept of social security, the constitutional legislator has tried to make clear that the right to social security should be perceived as the right to be socially insured when having an occupation, e.g. the self-employed worker, the public servant or the employee. According to the author, this right is linked to the duty of paying social security contributions.<sup>17</sup>

### c. *Personal scope*

Article 23 of the Belgian Constitution states that “everyone” has the right to live in human dignity. Nationality is hence not a requirement to enjoy the right to social security. Nevertheless, the fact that different social security schemes, for example, exist for civil servants, self-employed and wage-earners, does not breach the right to social security in Article 23 of the Belgian Constitution.<sup>18</sup> Article 23 thus does not implicate that everyone has the right to enjoy the same rights under the national social security system.

Moreover, the Belgian Constitutional Court interprets the word “everyone” in a strict sense,<sup>19</sup> wherefore it is possible to limit the application scope of social and economic rights to certain categories of persons in order to achieve a goal of general interest.<sup>20</sup> The restriction of social assistance benefits to the extent of urgent medical care for adult illegal immigrants was, for instance, in conformity with Article 23 (case 131/2001).<sup>21</sup> According to the Court, the state should not assume the same responsibilities for illegal residents and individuals residing lawfully in Belgium. However, as stated above, the fact that social assistance benefits were restricted to urgent medical care for both illegal adults as minors was contrary to Articles 10 and 11 of the Belgian Constitution (case 106/2003).<sup>22</sup> This means that the national legislator will still need to respect the prohibition of discrimination in Articles 10 and 11 of the Belgian Constitution.

## 4. *The impact of the right to social security on the Belgian legal system*

The formulation of Article 23 was rather vague and needed further clarification by national courts and doctrine to define the concrete contents and the possible impact of this article on the domestic legal system. For that reason, this chapter will give an overview of the case law of the Belgian Constitutional Court and the relevant doctrine. Furthermore, by looking at the case law of the Court, we will get an impression of the possible impact of the right to social security on Belgian legislation as the Constitutional Court is able to test the validity of Belgian legislation in relation to Article 23 since 2003.<sup>23</sup>

The margin of discretion given by the Constitutional Court to the Belgian legislator and the corresponding obligations that can be imposed on individuals, will first be discussed. Secondly, the question whether the right to social security has direct effect will be dealt with as well as the principle of standstill. In a final part, an overview of some recent critiques and ambiguities concerning the right to social security will be given.

<sup>17</sup> See Review of Title II Constitution to add Article 24bis regarding economic and social rights, Toelichting *Parl. St. Senaat*, 1992-93, no. 100-2/3<sup>o</sup>, 18 J.F. LECLERCQ, “Sociale zekerheid: honderduizend of niets, stop je of ga je verder?”, RW 2007-08, 509-510.

<sup>18</sup> D. PIETERS and P. SCHOUKENS, “Country Report on Belgium” in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 25.

<sup>19</sup> M. BOSSUYT, “Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof” in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 61.

<sup>20</sup> G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 412 and 415.

<sup>21</sup> Const. Court. (Belgium), no. 131/2001, 30 January 2001, online access: [www.juridat.be](http://www.juridat.be); Const. Court (Belgium), no. 203/2004, 2 March 2004, online access: [www.juridat.be](http://www.juridat.be).

<sup>22</sup> Const. Court (Belgium), no. 106/2003, 22 July 2003, online access: [www.juridat.be](http://www.juridat.be).

<sup>23</sup> Special law changing the special law of 6 January 1989 on the Arbitragehof, BS 11 april 2003.

### a. *Margin of discretion*

A first question raised before the Constitutional Court concerned the margin of discretion of the different legislators in Belgium with regard to the development of the right to social security.<sup>24</sup> The Belgian Constitutional Court decided that the lack of clarity of the right to social security in the Constitution implies that the legislator himself had to define the specific content of this right.<sup>25</sup> This means that the legislator has a rather large margin of discretion in realizing the right to social security.

In addition, the legislator could delegate some of his powers to establish the content of Article 23, when he has indicated the specific subject and the limits to the delegation of powers. According to the Court, the highly technical and complex nature of social security legislation can be considered a justified delegation of power.<sup>26</sup> As social security legislation requires the possibility for a flexible and swift reform, it is sufficient that the legislator lays down the overall guidelines and objectives for the executive.<sup>27</sup>

### b. *Corresponding obligations in Article 23 of the Belgian Constitution*

Part two of Article 23 of the Belgian Constitution specifies that the different economic, social and cultural rights guaranteed under this article, can also contain “*obligations*” that individuals have to fulfil. As PIETERS and SCHOUKENS point out, the Belgian Constitution does not usually mention fundamental obligations, which makes the reference to the corresponding obligations – which individuals have to fulfil when they call upon Article 23 – all the more relevant.<sup>28</sup>

In principle, the Belgian government must ascertain that individuals can enjoy the right to live in human dignity, for example, by organizing a social security system that provides for an adequate safety net.<sup>29</sup> However, the basic rights under Article 23 can be limited on the basis of admissibility criteria.<sup>30</sup> For example, in order to receive social benefits, individuals should make efforts to receive an income, by, for instance, looking for a job.<sup>31</sup> In the context of social security law, this means that an individual could be refused social aid when he/she systematically fails to assume his/her responsibilities towards society.<sup>32</sup>

The assertion of the reference to corresponding duties shows that the social rights guaranteed in Article 23 are not absolute, but that they possess a relative character as not everyone can claim these

<sup>24</sup> Const. Court (Belgium), no. 99/2008, 3 July 2008, online access: [www.juridat.be](http://www.juridat.be).

<sup>25</sup> M. BOSSUYT, “Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof” in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 60.

<sup>26</sup> Const. Court (Belgium), no. 64/2008, 17 April 2008, online access: [juridat.be](http://juridat.be); A. ALEN and K. MUYLLE, *Compendium van het Belgisch Staatsrecht*, Mechelen, Kluwer, 2012, 38; M. BOSSUYT, “Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof”, Rochefort in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 61.

<sup>27</sup> G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 412 and 415-419.

<sup>28</sup> D. PIETERS and P. SCHOUKENS, “Country Report on Belgium” in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 29.

<sup>29</sup> A. VAN LOOVEREN, “Sociale rechten en minimarechten” in R. JANVIER (eds.), *Actuele problemen van het sociale zekerheidsrecht*, Bruges, die Keure, 1999, 263-264.

<sup>30</sup> Const. Court (Belgium), no. 28/2002, 30 January 2002, online access [www.juridat.be](http://www.juridat.be); Const. Court (Belgium), no. 101/2008, 10 June 2008, online access [www.juridat.be](http://www.juridat.be).

<sup>31</sup> D. PIETERS and P. SCHOUKENS, “Country Report on Belgium” in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 29.

<sup>32</sup> Const. Court (Belgium), no. 28/2002, 30 January 2002, online access: [www.juridat.be](http://www.juridat.be); D. PIETERS and P. SCHOUKENS, “Country Report on Belgium” in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 29; A. VAN LOOVEREN, “Sociale rechten en minimarechten” in R. JANVIER (eds.), *Actuele problemen van het sociale zekerheidsrecht*, Bruges, die Keure, 1999, 256-261.

rights unconditionally. However, the Court did point out that the corresponding obligations have to be proportionate in order to enable everyone's realization of their right to live in human dignity.<sup>33</sup>

### c. *Direct effect*

The question whether Article 23 has direct effect or not, has been debated since its introduction in the Belgian Constitution. The original intention of the constitutional legislator was that Article 23 would not have direct effect. In order to avoid that doctrine and jurisprudence would accord direct effect to Article 23, the constitutional legislator stated explicitly that secondary law should establish and regulate social rights. As a result, it is generally alleged that individuals cannot deduct subjective rights from the right to social security.

Subsequently, part of the doctrine and the judiciary followed the decision of the constitutional legislator.<sup>34</sup> However, an increasing number of (lower) courts, such as the Court of Appeal of Mons, did accord direct effect to a part of Article 23, more specifically to the overarching principle of it ("the right to live a life in conformity with human dignity"). This case concerned a subsistence level payment within the law on social service departments (OCMW-wet). Yet, the direct effect of Article 23 with regard to social aid is not unconditional, as it is linked to the willingness to work.

One could apply the same reasoning for the right to social security. As PIETERS and SCHOUKENS stated: if someone is socially insured and fulfils his/her duties in relation to the social security institution, but does not receive a social benefit, that person could claim his right to social security from the social security administration.<sup>35</sup> However, the courts have not granted direct effect to the right to social security at the moment. Nevertheless, it is important to note that even if the right to social security would have direct effect, this does not mean that its direct effect is unlimited, just as the right to social security is not unconditional.<sup>36</sup>

### d. *The principle of standstill*

In the preparatory works concerning the adoption of Article 23, the Belgian Senate had mentioned the existence of a "standstill-principle"<sup>37</sup> for the socio-economic rights under this article.<sup>38</sup> Yet, this principle was not mentioned in the final draft of the article which meant that the question whether Article 23 included a principle of standstill was left to the Constitutional Court.<sup>39</sup> In case 169/2002, the Court accepted the existence of a standstill-principle, which obliges the legislator to abstain from lowering the level of protection under the social assistance system.<sup>40</sup> In case 5/2004, the Court confirmed its previous case but

<sup>33</sup> Const. Court (Belgium), no. 28/2002, 30 January 2002, online access: [www.juridat.be](http://www.juridat.be).

<sup>34</sup> For an overview see D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 28 en G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 442 e.v.

<sup>35</sup> D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 28.

<sup>36</sup> D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 28.

<sup>37</sup> For some general works on the principle of standstill in the Belgian constitutional order: A. ALLEN, K. MUYLLE, *Compendium van het Belgisch Staatsrecht*, Mechelen, Kluwer, 2008, 38. J. THEUNIS, "Het recht op de bescherming van een gezond leefmilieu, even stilstaan bij de standstill" in K. DEKETELAERE (ed.), *Feestbundel Milieurecht*, Bruges, die Keure, 88.

<sup>38</sup> Preparatory Works Senate (Belgium), BZ 1991-92 nr 100-2/3, 4 and 9-11.

<sup>39</sup> Const. Court (Belgium), no. 169/2002, 27 November 2002, online access: [www.juridat.be](http://www.juridat.be), noot S. BOUCKAERT; Const. Court (Belgium), no. 4/2004, 14 January 2004, online access: [www.juridat.be](http://www.juridat.be).

<sup>40</sup> Const. Court (Belgium), no. 169/2002, 27 November 2002, online access: [www.juridat.be](http://www.juridat.be). See also M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof" in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 63; S. BOUCKAERT, "De verplichte materiele dienstverlening aan kandidaat-vluchtelingen en de toetst door het Arbitragehof aan het grondrechteninstrumentarium in het algemeen en aan het standstilbeginsel in het bijzonder", *RW* 2003-04, 93; J.F. LECLERCQ, "Sociale zekerheid: honderduizend of niets, stop je of ga je verder?", *RW* 2007-08, 510.

added that the standstill-principle prohibits the legislator to diminish the protection that existed at the moment Article 23 came into force in a considerable way.<sup>41</sup> In this way, the Court prohibits measures that would result in a significant deterioration of the rights ensured by the right to social security.<sup>42</sup> The Court now compares the changes with the previous legislation, and does not limit itself to the legislation that was already in force in 1994 (relative notion).

The standstill-principle in Article 23 does not guarantee that the social security system should be gradually extended in Belgium,<sup>43</sup> nor does it mean that the legislator cannot touch upon the modalities of certain social security benefits anymore.<sup>44</sup> Moreover, the Belgian doctrine considers this standstill-principle only as a relative duty for the Belgian legislator in the sense that it prohibits a substantial decline of the rights in Article 23. The legislator still has the freedom to decide on how to guarantee these rights in the most adequate way.<sup>45</sup> In certain cases a reduction of social security rights could be justified for the sake of public interest.<sup>46</sup> According to MAES, this still leaves ample space to withdraw social rights in the case of severe economic problems.<sup>47</sup> To conclude, the right to social security allows for some restrictions as long as they do not declare the constitutional right completely void and they are not unlimited in time.<sup>48</sup>

#### e. *Ambiguities and criticism*

As the Belgian Constitutional Court seems to have a rather reticent attitude when reviewing legislation's conformity with the right to social security, the Belgian legislator has a large margin of discretion for the realization of the right to social security in Article 23.<sup>49</sup> As BOSSUYT points out, the Court has been more reluctant with regard to the social and economic rights under Article 23, than with regard to classic rights and freedoms.<sup>50</sup> However, with the acceptance of the standstill-principle, the Court gradually makes a profound legal protection possible with respect to the right to social security. This brings about that the Constitutional Court still leaves the legislator a large margin of discretion.

Some ambiguities concerning the right to social security in Article 23 have to be solved in the future. Firstly, it is still uncertain whether the right to social security has direct effect in the Belgian legal order.

<sup>41</sup> Const. Court (Belgium), no. 4/2004, 14 January 2004, online access: [www.juridat.be](http://www.juridat.be).

<sup>42</sup> Const. Court (Belgium), no. 169/2002, 27 November 2002, online access: [www.juridat.be](http://www.juridat.be).

<sup>43</sup> Const. Court (Belgium), no. 64/2008, 17 April 2008, online access: [www.juridat.be](http://www.juridat.be).

<sup>44</sup> J.F. LECLERCQ, "Sociale zekerheid: honderduizend of niets, stop je of ga je verder?", RW 200708,511.

<sup>45</sup> D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 30.

<sup>46</sup> *De transversale bepalingen inzake recht en vrijheden*, Report Working Party on Title II Belgian Constitution, Belgische Kamer van Volksvertegenwoordigers, 20 february 2006, DOC 51 2304/001,17; M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof" in W. RAUWS and M. STROOBANT, *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 64; G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 125; D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 31.

<sup>47</sup> G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 125.

<sup>48</sup> D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 31.

<sup>49</sup> M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof", in W. RAUWS and M. STROOBANT, *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 67.

<sup>50</sup> M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof", in W. RAUWS and M. STROOBANT, *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 67. In its text the author refers to following cases: Const. Court (Belgium), no. 41/2002, 20 February 2002, online access: [www.juridat.be](http://www.juridat.be); Const. Court (Belgium), no. 66/2007, 26 April 2007, online access: [www.juridat.be](http://www.juridat.be); Const. Court (Belgium), no. 92/2008, 26 June 2008, online access: [www.juridat.be](http://www.juridat.be); See as well: M. DAMBRE, "Het verplicht schriftelijk woninghuurcontract doorstaat de grondwettelijke toets", noot onder Const. Court, no. 92/2008/, 26 June 2008, *NjW* 2008, 735/736.

Legal doctrine and jurisdiction both accepted the direct effect of several parts of Article 23 of the Belgian Constitution. However, this seems to conflict with the constitutional legislator's original intention.<sup>51</sup> Secondly, the contents of the right to social security is not entirely clear and will need further refinement by the Constitutional Court.

Thirdly, the case law of the Constitutional Court is criticized by legal scholars because Article 23 does not accord with Article 12 (3) of the (Revised) European Social Charter that establishes the states' obligation to gradually extend the protection's scope of the national social security system. Such gradual extension is not accepted by the Constitutional Court.<sup>52</sup>

At last, it is not clear in which way the standstill-principle of the Constitutional Court should be applied in practice at this moment. Although it has been extensively studied by the legal doctrine, the standstill principle still needs further elaboration and refinement.<sup>53</sup> Hence we can conclude that the right to social security in the Belgian constitution is still, twenty years after its enactment, in a transitional phase. Some additional flesh should be put on the bones of Article 23 by either the Constitutional Court or the competent Belgian authorities in order to provide a firm and legally secure guarantee for the protection of social security rights in Belgium.

## 5. Social security rights in times of economic crisis

This chapter will provide an overview of some important changes in the Belgian social security system during the recent economic crisis (from 2007 until now). As this is a legal contribution, we will focus upon a couple of important legislative changes in Belgian social security law, more specifically in the area of pensions and unemployment benefits. We will also take a closer look at some recommendations from the Council of the European Union under the European Semester<sup>54</sup> which may have an influence on the current social security reforms in Belgium.

### a. Recent social security changes in Belgium

At the end of 2011, the Belgian pension system was reformed by a statute in which the Belgian Government approved some final issues before the end of the year.<sup>55</sup> Aim of the different reforms was to render early retirement increasingly difficult. First, the early retirement age was raised for all citizens to 62 years.<sup>56</sup> This increase will be realized gradually, with a pension age-gain of half a year, starting in 2013. In this way, the actual pension age of 65 years will be reached in 2016. These reforms also altered the minimum career length, which was increased from 35 to 40 years.<sup>57</sup> Again, this increase will

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<sup>51</sup> J.F. LECLERCQ, "Sociale zekerheid: honderduizend of niets, stop je of ga je verder?", RW 200708, 509; G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 389393; M. STROOBANT, "Algemeen Besluit" in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 201; For an overview of some of the case law concerning the direct effect of Article 23: D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 27.

<sup>52</sup> M. STROOBANT, "Algemeen Besluit" in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 204.

<sup>53</sup> M. STROOBANT, "Algemeen Besluit" in W. RAUWS and M. STROOBANT, *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia*, Antwerp, Intersentia, 2010, 204.

<sup>54</sup> For additional information on the EU semester and EU economic governance: F. FABBRINI, "The Euro-crisis and the courts: judicial review and the political process in comparative perspective", *Berkeley J. Int'l L.* 2014, 1-79; A. HINAREJOS, "The Euro Area Crisis and Constitutional Limits to Fiscal Integration", *CYELS* 2012, 243; K. LENAERTS, "Economic Integration, Solidarity and Legitimacy", *KU Leuven Euroforum* 2013, 6.

<sup>55</sup> Wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

<sup>56</sup> Art. 85 wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

<sup>57</sup> Art. 85 wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

be realized gradually, starting in 2012 and ending at 42 years in 2015. Additional changes were made in 2015 to increase the retirement age from 66 years in 2025 and 67 in 2030.<sup>58</sup> Furthermore, the age for early retirement was also increased from 62.5 years in 2017 to 63 years in 2018.<sup>59</sup> The minimum career length will also be further increased from 41 years in 2017 to 47 years in 2019.<sup>60</sup>

Furthermore, the statute in 2011 repealed some special pension schemes for sailors and pilots.<sup>61</sup> The statute also introduced more stringent criteria for several periods of nonactivity which are equivalent to work for the determination of the career length.<sup>62</sup> Finally, the calculation of the pension for civil servants was made less favourably: their pension will now be calculated on the basis of the average income received the last ten years of their career instead of the last five years.<sup>63</sup>

Changes were moreover made in 2011 to the survivor's pension system in order to remove the existing unemployment traps. The survivor's pensions currently aim at compensating the financial losses regarding the spouse's death. However, as this pension can only be combined with a limited professional income, persons who were granted a survivor's pension reduced or in some cases even stopped their professional activities.<sup>64</sup> From 2015 onwards, the survivor's pension will be replaced by a transitional allowance for widowers or widows under 45 years old, allowing to cumulate this benefit with a professional income.<sup>65</sup> The age of 45 will be gradually increased, to 50 years in 2025. Finally, the survivor's pension shall also be limited in time: two years for a widow or widower with dependent children, one year otherwise.<sup>66</sup>

As of November 2012, a reform regarding the Belgian unemployment benefits entered into force.<sup>67</sup> While preserving the regime of receiving unemployment benefits unlimited in time, some changes were introduced to ensure that the unemployed will return quicker to the labour market. These changes concern, amongst others, the amount of the unemployment benefits, granting higher unemployment benefits in

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<sup>58</sup> Art. 12 Wet van 10 augustus 2015 tot verhoging van de wettelijke leeftijd voor het rustpensioen en tot wijziging van de voorwaarden voor de toegang tot het vervroegd pensioen en de minimumleeftijd van het overlevingspensioen, *BS* 21 augustus 2015, 2de editie. p. 54410.

<sup>59</sup> Art. 18 Wet van 10 augustus 2015 tot verhoging van de wettelijke leeftijd voor het rustpensioen en tot wijziging van de voorwaarden voor de toegang tot het vervroegd pensioen en de minimumleeftijd van het overlevingspensioen, *BS* 21 augustus 2015, 2de editie. p. 54410.

<sup>60</sup> Art. 18 Wet van 10 augustus 2015 tot verhoging van de wettelijke leeftijd voor het rustpensioen en tot wijziging van de voorwaarden voor de toegang tot het vervroegd pensioen en de minimumleeftijd van het overlevingspensioen, *BS* 21 augustus 2015, 2de editie. p. 54410.

<sup>61</sup> Art. 111-116 wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

<sup>62</sup> Art. 122 – 126 wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

<sup>63</sup> Art. 110 wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

<sup>64</sup> Wet tot wijziging van het rustpensioen en het overlevingspensioen en tot invoering van de overgangsuitkering in de pensioenregeling voor werknemers en houdende geleidelijke opheffing van de verschillen in behandeling die berusten op het onderscheid tussen werklieden en bedienden inzake aanvullende pensioenen, *BS* 9 mei 2014; Voorstel van wet 4 maart 2014 tot hervorming van het overlevingspensioen van de zelfstandigen, *Parl. St.* Kamer 2013-2014, nr. 3418/01.

<sup>65</sup> Art. 2 Wet tot wijziging van het rustpensioen en het overlevingspensioen en tot invoering van de overgangsuitkering in de pensioenregeling voor werknemers en houdende geleidelijke opheffing van de verschillen in behandeling die berusten op het onderscheid tussen werklieden en bedienden inzake aanvullende pensioenen, *BS* 9 mei 2014; See also: Voorstel van wet 4 maart 2014 tot hervorming van het overlevingspensioen van de zelfstandigen, *Parl. St.* Kamer 2013/2014, nr. 3418/01.

<sup>66</sup> Art. 8 Wet tot wijziging van het rustpensioen en het overlevingspensioen en tot invoering van de overgangsuitkering in de pensioenregeling voor werknemers en houdende geleidelijke opheffing van de verschillen in behandeling die berusten op het onderscheid tussen werklieden en bedienden inzake aanvullende pensioenen, *BS* 9 mei 2014; See also: Voorstel van wet 4 maart 2014 tot hervorming van het overlevingspensioen van de zelfstandigen, *Parl. St.* Kamer 2013/2014, nr. 3418/01.

<sup>67</sup> Koninklijk besluit tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *B.S.* 30 december 2011; Koninklijk besluit tot wijziging van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering in het kader van de versterkte degressiviteit van de werkloosheidsuitkeringen en tot wijziging van het koninklijk besluit van 28 december 2011 tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *B.S.* 30 juni 2012.

the first three months of unemployment and decreasing benefits quicker.<sup>68</sup> In calculating the benefits, the period during which an individual previously worked as an employee and the period of unemployment will play a more important role.<sup>69</sup>

#### *b. Country-Specific recommendations under the European Semester*

The Country-Specific recommendations under the European Semester are part of the budgetary supervision procedure at the level of the European Union. Due to the crisis this supervision mechanism was tightened, amongst others, through the creation of the European Semester. The European Semester is a yearly cycle of economic policy coordination where the Commission analyses the projected economic and structural reforms of the member states and provides recommendations for each of them.<sup>70</sup> When member states do not act upon these recommendations within the time frame given by the Commission and the Council, a warning can be issued. In case of excessive macroeconomic imbalances, the Council can issue a sanction against the member state in question.<sup>71</sup>

The Country-Specific recommendations under the European Semester lay down measures in order to strengthen the economic position of the member states, including the national social security systems as they are an important part of the national budgets.

In the Country Specific recommendations of 2014 and 2013, the Commission and the Council encouraged Belgium to close the gap between the effective and statutory retirement age and to pursue the ongoing reforms of reducing early-exit possibilities.<sup>72</sup> Furthermore, Belgium has to invest in active-aging programs and in increasing the statutory retirement age by aligning the retirement age with the life expectancy. Also, the cost-efficiency of public spending on long-term care has to be improved.<sup>73</sup> In 2015 the government was encouraged to complement the pension reform by linking the statutory retirement age to life expectancy.<sup>74</sup>

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<sup>68</sup> Koninklijk besluit tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *B.S.* 30 december 2011; Koninklijk besluit tot wijziging van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering in het kader van de versterkte degressiviteit van de werkloosheidsuitkeringen en tot wijziging van het koninklijk besluit van 28 december 2011 tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *B.S.* 30 juni 2012.

<sup>69</sup> Koninklijk besluit tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *B.S.* 30 december 2011; Koninklijk besluit tot wijziging van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering in het kader van de versterkte degressiviteit van de werkloosheidsuitkeringen en tot wijziging van het koninklijk besluit van 28 december 2011 tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *B.S.* 30 juli 2012.

<sup>70</sup> The Council and the European Council have to approve the draft country specific- recommendations of the Commission. For more information about the European Semester and Country Specific Recommendations see: P. SCHOUKENS and J. BEKE SMETS, "Fighting Social Exclusion under EU Horizon 2020. Enhancing the Legal Enforceability of the Social Inclusion Recommendations", *European Journal of Social Security* 2014, 51-73.

<sup>71</sup> For more information see: K. Lenaerts, "Economic Integration, Solidarity and Legitimacy", *KU Leuven Euroforum* 2013, 6; P. SCHOUKENS and J. BEKE SMETS, "Fighting Social Exclusion under EU Horizon 2020. Enhancing the Legal Enforceability of the Social Inclusion Recommendations", *European Journal of Social Security* 2014, 51-73.

<sup>72</sup> Council Recommendation, 8 July 2014, on Belgium's national reform program and delivering a Council opinion on Belgium's 2014 stability programme; Council Recommendation No. 10623/1/13, 19 June 2013, on Belgium's 2013 national reform program and delivering a Council opinion on Belgium's stability program for 2012-2016.

<sup>73</sup> Council Recommendation, 8 July 2014, on Belgium's national reform program and delivering a Council opinion on Belgium's 2014 stability programme; Council Recommendation No. 10623/1/13, 19 June 2013, on Belgium's 2013 national reform program and delivering a Council opinion on Belgium's stability program for 2012-2016.

<sup>74</sup> Council Recommendation, 14 July 2015 on the national reform programme of Belgium and delivering a council opinion the 2015 stability programme of Belgium



Furthermore, the Commission and the Council emphasized the importance of the longterm sustainability of public finances. Belgium can realize this by curbing age-related expenditure, which includes health care expenditure. In 2011 and 2012, Belgium received a similar remark from the Council and the Commission.<sup>75</sup>

Moreover, the Council and the Commission urged Belgium in 2011 and 2012 to pursue the initiated reform of the unemployment benefit system to reduce disincentives to work and to strengthen the focus of activation policies on vulnerable groups, in particular people with a migrant background.<sup>76</sup> Furthermore, the recommendation also stated that Belgium should reduce the high social security burden for low paid-jobs.

*c. Recent and future changes to the Belgian social security system and the right to social security*

During the crisis, the pension reforms, which increased the early retirement age to 62 years and adapted the social statute of civil workers, made early retirement increasingly difficult. The survivor's pensions and the unemployment benefits were also reformed in order to increase the labour force participation rate. These reforms were (at least to a certain extent) the result of the Country-Specific recommendations addressed to Belgium.

The question remains which reforms regarding the Belgian social security system will be established in the near future. During the Belgian elections of May 2014, social security reform was an important topic: several political parties suggested an increase of the retirement age, an abolition of unemployment benefits unlimited in time and some proposed the rationalization of the overall social security system together with the elimination of possible abuses. Some of these proposals have been translated into legislation, e.g. the further increase of the retirement age.

Besides political wishes to reform the social security system in Belgium, the European Union also has an increased impact on the Belgian social security legislation. In the yearly Country-Specific recommendations, Belgium is urged to reform its social security system in order to strengthen its competitiveness and to ensure the long-term sustainability of its public finances. As stated above, the recent reforms in Belgium with respect to the pension and unemployment system are examples of this increased impact.

However, we have to emphasize that the European Union does not have comprehensive legislative competences in the field of social security and that it cannot (or only limitedly) change the social security legislation of the member states by means of directives or regulations. In any case, the recommendations of the Commission and the Council will have to be implemented by national law. When altering national legislation, the legislator will have to respect the guarantees under Article 23, Articles 10 and 11, and the right to property under Article 1 Protocol no. 1 ECHR (and possibly Article 16 of the Belgian Constitution). As the Constitutional Court can test the validity of legislation with regard to these rights, they can be important guiding principles for the legislator when altering social security legislation. Especially the standstill-principle can play an important role in assessing the validity of detrimental changes in national social security legislation.

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<sup>75</sup> Council Recommendation No. 11244/12, 6 July 2012, on Belgium's national reform programme 2012 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 20122015; Council Recommendation No. 209/2011, 12 July 2011, on Belgium's national reform programme 2012 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 2012-2015.

<sup>76</sup> Council Recommendation No. 11244/12, 6 July 2012, on Belgium's national reform programme 2012 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 20122015; Council Recommendation No. 209/2011, 12 July 2011, on Belgium's national reform programme 2012 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 2012-2015.

## 6. Conclusion

As from 1994, Belgium has its own right to social security, which is included in Article 23 of the Belgian Constitution. Because of the lack of clarity by the constitutional legislator regarding the scope and contents of the right to social security, the Belgian Constitutional Court and the doctrine had to interpret this new-born right. As the Court seems to acknowledge a large discretion to the legislator in defining the specific content of the right to social security, the protection of this right appears rather limited. Secondly, the fact that the right to social security in Article 23 does not have direct effect, seems to restrict the application of this article even further. Nevertheless, the right to social security entails a standstill-principle which means that the legislator cannot diminish the level of protection in a considerable way.

The right to social security hence requires the legislator to motivate possible changes and to make sure that these changes respect the guarantees provided in the Constitution. Article 23 can thus be seen as a “*buffer*”, but it still allows the legislator to reform or alter the national social security system in case of economic problems. Furthermore, this article also allows the legislator to ensure the sustainability of the national system.

Not only Article 23 can protect social security claims, the prohibition of discrimination in Articles 10 and 11 too provide some protection by laying down a duty for the legislator not to discriminate, also with regard to social security rights. The right to property in Article 1 Protocol no. 1 ECHR provides a third judicial safeguard, however it remains unclear whether Article 16 of the Belgian Constitution can be invoked in social security claims.

From the previous chapters, it has become clear that the protection of social security is layered and guaranteed through different constitutional guarantees. Whilst still leaving ample leeway for reform, the different constitutional guarantees do seem to provide for some protection against social regress and the rollback of social expenses and benefits.

## BULGARIA

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### SOCIAL SECURITY AS A CONSTITUTIONAL RIGHT IN BULGARIA

*Assoc. Prof. PLAMENKA MARKOVA*

#### *Emergence of social security rights in the Bulgarian Constitutions*

Bulgaria is one of the European countries that have included the right to social security in its constitution in the middle of the 20th century. In the period 1945-2014 three constitutions have been adopted- in 1947; in 1971 and in 19991.

Art 75 of the 1947 Constitution provided the right to pensions, allowances and benefits in case of sickness, injury, disability, unemployment and old age. This right was implemented by general insurance and affordable medical care. The National Assembly was assigned the function of monitoring and solving issues related to the constitutionality of the laws and other legislative acts, i.e. the role of a constitutional court, which did not exist under its provisions.

The 1971 Constitution proclaimed an extensive catalogue of the social and political rights and freedoms of citizens. What is more, this catalogue did not differ considerably from that of the democratic constitutions of old democracies. Fundamental social rights played an important role in the socialist theory of constitutional law and were regarded as the main element of individual rights and freedoms.<sup>1</sup>

Article 43 envisaged the same risks as in art. 75 of the 1947 Constitution and had added pregnancy, maternity, raising a small child and death. Art 44 of the 1971 Constitution guaranteed special protection to some vulnerable groups as minors and adolescents, disabled and elderly people without immediate family who are unable to support themselves on the property thereof. Art 47 dealt with medical care. No doubt this influence goes back not only to the Constitution of the Soviet Union, but to the relevant international instruments at the time – the ILO social security conventions,<sup>2</sup> the Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights of 1966.

The Bulgarian Constitution, effective as from July 12, 1991 was the first democratic Constitution passed in Eastern Europe following the radical political and economic changes in the socialist system of

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<sup>1</sup> Drzewicki, K., Krause, K., and Rosas, A., *Social Rights as Human Rights, A European Challenge* (Institute for Human Rights, Abo Akademi University), Abo, 1994 pp.203 f.

<sup>2</sup> Bulgaria is a member state since 1920 and has ratified **C024** – Sickness Insurance (Industry) Convention, 1927 (No.24); **C025** – Sickness Insurance (Agriculture) Convention, 1927 (No.25); **C035** – Old-Age Insurance (Industry, etc.) Convention, 1933 (No.35); **C036** – Old-Age Insurance (Agriculture) Convention, 1933 (No.36); **C037** – Invalidity Insurance (Industry, etc.) Convention, 1933 (No.37); **C038** – Invalidity Insurance (Agriculture) Convention, 1933 (No.38); **C039** – Survivors' Insurance (Industry, etc.) Convention, 1933 (No.39); **C042** – Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934 (No.42). Bulgaria has ratified **C102** – Social Security (Minimum Standards) Convention, 1952 (No.102) in 2008.

1989. It provides a detailed catalogue of fundamental rights and obligations of citizens. Thus it affiliates Bulgaria to international law requirements on human rights. The present Constitution in Article 51 provides that citizens shall have the right to social security and social assistance and in Article 52 provides the right to health through health insurance.<sup>3</sup>

The constitutional right to social security is rich in content. It includes many different and specific social security rights—compensations, benefits, and pensions for temporary incapacity to work; maternity; temporary reduced ability to work (reassignment); unemployment; invalidity; old age; death. Actually, it includes the right to social insurance and social assistance although in Bulgarian legal theory these are two separate rights.<sup>4</sup> The social assistance, as defined in the national legislation, covers benefits in cash or in kind, which supplement or replaces income up to the basic living needs or satisfies an incidental need of the supported persons and families. The scope of social protection in Bulgaria includes both the classic contribution based social insurance, non-contributory social security schemes and social assistance, including the system of social services. It contains targeted programmes for social assistance and care, creating employment for disadvantaged groups, family allowances for children, etc. (The non-contributory social security schemes and the social assistance scheme are financed by the state budget. A set of criteria, including means tests, is applied to these schemes in order to assess entitlement. The social insurance schemes are financed through special budgets of the social insurance funds.)

The unemployment insurance in para 2 of art. 51 is part of the general right to social security. The special attention given to it is due to its relevance for the period when the 1991 Constitution was adopted. The right to social security is defined as individual, fundamental social right. This characterization means that it is inalienable<sup>5</sup> and may be restricted only in exceptional cases according to art. 57 para 2 and 3 of the Constitution.

The individual right to social security is based on the principle of the social/welfare state (indent 5 of the Preamble of the Constitution embrace the principle of the “social State”)<sup>6</sup> and on the two cited articles – 51 and 52 of the Constitution. Several decisions of the Constitutional court<sup>7</sup> must be considered and added to these articles and they all together form the constitutional block that expresses the trend of the constitutionalization of the right to social security.

The provision of Article 51, para 1 of the Constitution enshrines a fundamental right of citizens the right to social security and social assistance, without having specified the order, the principles and the system for its implementation and practical application. The state shall ensure the realization of this right as this stems from the declared “welfare state.” It must take and perform the necessary actions to

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<sup>3</sup> **Article 52.** (1) Citizens shall have the right to health insurance guaranteeing them affordable medical care, and to use at no charge of medical services under terms and according to a procedure established by statute.

(2) The health care of citizens shall be financed from the state budget, by employers, through personal and collective health insurance contributions, and from other sources under terms and according to a procedure established by statute.

(3) The State shall protect the health of citizens and shall promote the development of sports and tourism.

(4) No one may be forcibly subjected to medical treatment or to sanitary measures except in cases provided for by the law.

(5) The State shall exercise control over all health-care facilities, as well as over the manufacture of, and trade in, medicinal products, biologically active preparations, and medical equipment.

<sup>4</sup> V. Mrachkov, *Social Security Law*, Sofia, Sibi 2010, p.43-46.

<sup>5</sup> Article 57. (1) Citizens' fundamental rights shall be inalienable.

<sup>6</sup> “We, the National Representatives of the Seventh Grand National Assembly, aspiring to express the will of the Bulgarian people, Declaring our loyalty to the universal human values of liberty, peace, humanism, equality, justice and tolerance; Elevating to the rank of paramount principle the rights of the human person and the dignity and security thereof; Aware of our irrevocable duty to safeguard the national and state unity of Bulgaria, Hereby proclaim our determination to create a democratic, law-governed and social state”;

<sup>7</sup> Decision No. 11 dated 24 July 1992 under constitutional case No. 18/1992; Decision No. 12 dated 25 September 1997 under constitutional case No. 6/1997; Decision No. 21 dated 15 July 1998 under constitutional case No.18/ 1997; Decision No. 32 dated 16 November 1998 under constitutional case No. 29/1998; Decision No. 5 dated 29 June 2000 under constitutional case No. 4/2000; Decision No. 2 dated 4 April 2000 under constitutional case No. 9/2005; Decision No. 2 dated 22 February 2007 under constitutional case No. 12/2006; Decision No. 3 dated 13 March 2007 under constitutional case No. 2/2007; Decision No.7 dated 31 May 2011 under constitutional case No. 21/2010; Decision No. 2 dated 4 February 2014 under constitutional case No. 3/2013.

create a regulatory system for social security. When comparing para 1 and 2 of art 51 the lack of an express indication that the right to social security is regulated by law cannot be overlooked. The importance of the right to social security, the wealth of specific social security components, through which it is applied, and the traditions of its legal framework require an explicit indication of the relevant legislation. Since the legislative act must address major public relations concerning the application of the enshrined by the Constitution fundamental right of citizens, there can be no doubt that this enactment should be a law. Therefore, the legislature shall be competent to create the legal framework for social security system in order to provide a real opportunity for citizens to benefit from the right envisaged in art 51. Otherwise, this constitutional provision would remain an unenforceable declaration. The legislature shall consider appropriate, what social security system to accept, based on what principles it should be conducted in accordance with constitutional norms (to that effect Decision of the C Court No. 12 of September 25, 1997 on cc No. 6 / '97 . – SG, No. 89 of 7 October 1997 and Decision No. 21 of 15 July 1998 on cc No. 18/97 – SG, No. 83 of 21 July 1998). Thus the Constitution becomes not only a source, but also a firm foundation of national law on social security, implying a new distribution of responsibilities between the executive, the legislative and the judicial authorities.

Constitutional guarantees control the generation of new norms or amendments to the existing legislation (to that effect Interpretative Decision No 7 of May 31, 2011 of the Constitutional court on cc No. 21/2010)<sup>8</sup> and influence the organization of public services. An example could be given by Article 84 of the Constitution according to which the National Assembly shall...” 17. (new, SG No. 12/2007) hear and adopt reports on the operation of any bodies which are elected in whole or in part by the National Assembly, where this is provided for by statute.” The Social Security Code provides that the Governor of the National Social Security Institute is elected for four years term of office by the National Assembly.

What is new in the 1991 Constitution is the provided basis for the protection of rights through institutional mechanisms, and primarily through the Constitutional court, the Supreme courts and the Ombudsman, who advocates the rights and freedoms of citizens. The powers and activities of the Ombudsman are regulated by statute.<sup>9</sup>

Another characteristic feature of the Constitution is its “direct force” in revoking provisions of existing laws contravening the Constitution. This direct force (Article 5, para 1 and 2) of the constitutional provisions makes possible their direct implementation and supremacy over all other provisions with the respective legal consequences. Proceeding from this, any citizen or juridical person can efficiently defend his rights and interests. Such direct force is characteristic of constitutional provisions regulating the constitutional law status of Bulgarian citizens, their rights and obligations and the provisions regulating the structure, composition, mandate, prerogatives and interrelations of the state bodies. Within the framework of constitutional control the Constitution makes it possible for the Supreme Court of Cassation or the Supreme Administrative Court to stop the trial of cases upon establishing contradictions between the law and the Constitution by officially referring these cases to the Constitutional Court. The direct force of the Constitution also finds expression in explicit texts in the Constitution providing for the passage of new laws.

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<sup>8</sup> Interpretative Decision No 7 of May 31, 2011 by the Constitutional Court: “The Constitutional Court of the Republic of Bulgaria has adopted an interpretative decision on the following issue: “request for pronouncement of unconstitutionality of § 4a of the Transitional and final provisions (TFP) to the Social Security Code (SSC)”. Section 4a, para. 1 of the TFP to SSC provides that “funds of individual accounts available as to January 1, 2011, of the women born from January 1, 1955 to December 31, 1959 inclusive, and of the men born from January 1, 1952 to December 31, 1959 inclusive, who up to December 31, 2010 were insured in a professional pension fund shall be transferred to fund “Pensions” of the state social insurance”. The initiators point out that this infringes the inviolability of private property of the insured persons.

The Constitutional Court pronounced section 4a of the TFP to SSC unconstitutional, considering the following: Article 19, para. 2 of the Constitution requires the law to establish and guarantee equal legal conditions for business activity for all citizens and legal entities. In the case of the SSC section 4a funds of a group of individuals are transferred and the pension insurance companies continue to operate with regard to all other insured individuals. In this way the limits of permissible state regulation are exceeded and thus insecurity is created.

<sup>9</sup> See Article 91 of the Constitution.

The constitutional rights to social security and to health are defined as social right on the basis of its objective to protect the existence of the individual when falling into material difficulty and needs the support of the community. As a social right it falls into the category of the so called positive<sup>10</sup> or participation rights-*Teilhaberechte* or *Droits exigencies*.

The detailed regulation of the social security right is in the Social Security Code and in the Law on Health Insurance. The compulsory health insurance, as well as the healthcare financed by the budget, provide a basic package of healthcare activities, financed either by the budget of the National Health Insurance Fund or by the state budget depending on the scheme. Compulsory health insurance shall guarantee to the insured persons free access to medical care by means of a package of health-care activities of a specific type, scope and amount, as well as the free choice of a care provider, who or which has concluded a contract with a Regional Health Insurance Fund. The right of choice shall apply to the entire territory of Bulgaria and may not be restricted on geographic and/or administrative grounds.

### ***Scope of application of the constitutional guarantees***

The scope of application of constitutional guarantees relating to social security covers only Bulgarian citizens. Other EU nationals are not foreigners within the meaning of the Bulgarian legislation, EU nationals have the same rights and obligations as Bulgarian nationals on the basis of Treaty on the Functioning of the European Union.<sup>11</sup> Foreigners with permanent or long-term residence in Bulgaria have any and all rights and obligations under the laws of Bulgaria and all ratified international treaties to which the Republic of Bulgaria is a signatory, excepting those rights and obligations expressly requiring Bulgarian citizenship. The special protection that Bulgaria provides to aliens under the Asylum and Refugees Act includes asylum, refugee status, humanitarian status and temporary protection.

The following persons are subject to the compulsory health insurance system:

1. all Bulgarian citizens who are not also citizens of another country;
2. Bulgarian citizens who are also citizens of another country and permanently reside on the territory of the Republic of Bulgaria;
3. foreign citizens or persons without citizenship who have permission to stay permanently or long-term on the territory of the Republic of Bulgaria, unless otherwise stipulated by an international agreement to which the Republic of Bulgaria is a party;
4. persons with a status of refugee, humanitarian status or who have been granted the right to asylum;
5. foreign students and doctoral students admitted to universities or science organizations in the country by the order of the Decree of the Council of Ministers No. 103 of 1993 for the Implementation of Educational Activities Among the Bulgarians Abroad and Decree of the Council of Ministers No. 228 of 1997 for Admittance of citizens of the Republic of Macedonia in the state universities of the Republic of Bulgaria;
6. persons, who fall outside of the scope of the ones referred to in items 1 through 5, with regards to whom the legislation of the Republic of Bulgaria is applied in compliance with the rules for coordination of the social security schemes.

Persons who are subject to health insurance in another Member State shall not be obligatorily insured by the National Health Insurance Fund, according to the rules for coordination of the social security schemes.

<sup>10</sup> Charles Fried, *Right and Wrong* (Cambridge, Mass.: Harvard University Press, 1978), p. 110.

<sup>11</sup> **EU citizens and Families Entry Stay and Departure Act** Art. 3. During their residence in the Republic of Bulgaria the European Union citizens and the members of their families, who are not themselves citizens of the European Union, shall have all rights and obligations according to the Bulgarian legislation and the international agreements, to which Bulgaria is a party, except the ones for which Bulgarian citizenship is required

According to Bulgarian law, child benefit is available for:

- Pregnant women who are Bulgarian citizens and families of Bulgarian citizens that raise their child in Bulgaria
- Families in which one of the parents is a Bulgarian citizen for their children with Bulgarian citizenship, living in Bulgaria
- Pregnant women who are foreign citizens and families of foreign citizens who have permanent residence and raise their children in Bulgaria

In Bulgaria, social assistance is provided by the state. Eligibility for monthly child benefit depends on family income. The benefit is paid until the child finishes secondary education (maximum age 20).

### ***Provisions attributing international treaties authority equal or superior to national law***

The present Bulgarian Constitution is based on the modern principle of interrelation between national and international law. This is evidenced by its unique stipulation in Art.5 para 4 that “international instruments which have been ratified by the constitutionally established procedure, promulgated and come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country and supersede any domestic legislation stipulating otherwise.” These international instruments become domestic law norms, are incorporated in the Bulgarian legal system and are applied directly in the presence of the above-mentioned conditions. This is controlled by the Constitutional Court which is authorized to rule on the conformity of the laws with universally recognized norms of international law and with international instruments to which Bulgaria is a party.

The previous Bulgarian Constitution treated the interrelation between domestic and international law mainly on the basis of the so-called “realistic dualism”. This principle does not allow for supremacy of the one law over the other and the implementation of international law is guaranteed through its transformation into domestic norms.

### ***The role of the constitutional court in defining the right to social security***

The Constitutional Court is a public authority, a body of State power, whose basic function is to exercise review over the constitutionality of laws. According to Constitution it ensures its supremacy. Actually, the legal regulation of this institution in Bulgaria largely follows the model, which became current in Europe under the influence of H. Kelsen. The Constitutional Court is a part of the public institution’s system – its competence stems directly from the Constitution, which specifies its powers. More specifically, it is equal to the supreme bodies of the three Powers, but it does not interfere with their activity. As a public authority the Constitutional Court has its main functions – to review the constitutionality of laws and to give binding interpretation of Constitution.

It is, therefore, directly related to legislation, but it is not a legislator itself. According to the Constitution legislative power in the Republic of Bulgaria is exercised by the National Assembly. In other words, Parliament is sole legislator. In Bulgarian legal theory, some authors try to avoid the formula of the Constitution that the National Assembly is sole legislator and adopt the compromising stance that the activity of the Constitutional Court is not legislative, but identical to rule-creation. Apparently they are, likewise, not inclined to regard constitutional review as “negative legislation”, and give review and the concept of “legislator” a meaning different from the meanings which refer to the competence of the National Assembly.

The Constitutional Court accepted that, although it is called “court”, it is not a body which administers justice, nor is it part of the judiciary. The main argument is that the Constitution itself takes the Constitutional Court out of the system of the judiciary by means of regulating its functions in a separate chapter. That assumption has been criticized in legal literature on the grounds that the Court is a body of the judiciary, because it considers legal disputes and thus administers justice.

Indeed, when the Court reviews constitutionality of laws, its activity looks like a judicial administration of justice, but its very essence makes it different from ordinary justice – as far as constitutional review is concerned the Constitutional Court does not rule on a specific legal dispute, as ordinary courts do. But beyond constitutional review, the Constitution gives the Court other powers and these are related to the ruling of legal disputes.

According to the Constitution, the laws, which have been declared unconstitutional, are not to be applied as from the day on which the Court's decision comes into force. This phrasing gives rise to different reactions in Bulgarian legal doctrine. According to one set of opinions, the Constitution explicitly proclaims that an unconstitutional law is also non-applicable. Non-applicability has the meaning of postponement. The formulation has its logic in the role and status of the Constitutional Court – it does not share the legislative power of the National Assembly. In this sense, it would be unjustified to define the Constitutional Court as a “negative legislator”. The main problem of this argument, however, is that it leaves open the issue concerning the legal effect of the declaration of the unconstitutionality of a law.

According to the other set of views, the meaning of the Constitution is that the law, which has been declared unconstitutional, ceases to be a normative regulator, loses its effect and is therefore *practically repealed*. Decision No. 22/95 on c.c. No. 25/95 of the Constitutional Court accepted that the coming into force of the decision, declaring a law unconstitutional, annuls the law on the strength of the decision and its constitutive effect. Annulment of a law is equal to its abrogation by the National Assembly. With this decision, the Constitutional Court actually reinforced the argument about its being a “negative legislator”, i.e. the annulment of the law *ex nunc* due to its unconstitutionality functions as abrogation of a law by another law.

Decision No. 22/95 on c.c. No. 25/95 made another significant step forward. According to it, when the Constitutional Court declares a law unconstitutional, and this in turn abrogates or modifies an existing law, the latter restores its effect in the phrasing prior to the abrogation or modification from the moment the Court's decision comes into force. The Constitutional Court argument is that, unless such a “resurrection” of the abrogated law is allowed, an unacceptable legislative gap will emerge. In this par the Decision makes a substantial contribution with regard to the modification of the formulation about the Court's legal status. With its acceptance the Constitutional Court actually claims that, as long as it not only repeals the law, which has been declared unconstitutional, but also restores the preceding law, it is actually closer to the position of a “positive legislator”.

The Constitutional Court of Bulgaria has a power, which is rarely seen in the normative regulation of constitutional justice. It can give binding interpretations of the Constitution. This is a separate power and comes first among the prerogatives of the Constitutional Court. The interpretation of the Constitutional Court is official, i.e. binding and abstract. In Ruling No. 4/04 on c.c. No. 9/07 the Court rejects the possibility that the interpretation of the Constitution transforms it into a “positive legislator”; the power to interpret should not be used to seek and achieve circumvention of constitutionally established powers. This Ruling expresses a trend in the recent jurisprudence of the Court – its unwillingness, when interpreting the Constitution, to be a “positive legislator”. This position is justified through the argument that only the National Assembly can legislate and that the Constitutional Court should not “substitute” it in its function. As for the meaning of Constitutional Court power to interpret the Constitution, it aims at clarifying the sense of constitutional provisions, the connections between them and other provisions, as well as the principles of the Constitution. Of course, in a number of instances the Court's interpretation of a constitutional text did add much more to the normative sense of the Constitution than to its clarification. From this point of view, the Constitutional Court turns into a legislator and its interpretative decisions have the nature of sources of law, or, more specifically, subsidiary sources of law.

In Bulgarian legal theory opinions divide as to whether the decisions of the Constitutional Court concerning the interpretation of the Constitution, are sources of law and further on, whether the Constitutional Court becomes a “positive legislator” through such decision making. Still, scholars are unanimous that the power of the Court to interpret the Constitution is essential and that this power has important consequences, thus suggesting that it should be exercised cautiously and reasonably. Legal theory sustains that the interpretative power of the Constitutional Court includes the filling in of gaps in the constitutional regulation.



According to the Constitution of the Republic of Bulgaria, the Constitutional Court does not act *ex officio*, it cannot take the initiative to rule on the constitutionality of a law. The Constitutional Court can be seized a restrictively foreseen by the Constitution public institutions and certain number (group) of Members of Parliament: one fifth of the Members of Parliament, i.e. 48 of them, the President, the Council of Ministers, the Supreme Cassation Court, the Supreme Administrative Court, the Prosecutor General and the Ombudsman. Besides the Ombudsman can approach the Constitutional Court for declaring unconstitutionality only of a law which infringes human rights and freedoms.

The Constitutional Court accepted that it can be approached by the plenums of the Supreme Cassation and the Supreme Administrative Court, comprising all magistrates, as well as by the general assemblies of their colleges. When single panels of the Supreme Cassation or the Supreme Administrative Court find out, while hearing a dispute, inconsistency between a law and the Constitution, they suspend proceedings and submit the issue to the Constitutional Court. Their reason for approaching the Constitutional Court here is a concrete one, but the review the Court will exercise, is still abstract. The Constitution of the Republic of Bulgaria does not allow for individual constitutional complaints by persons before the Constitutional Court on an unconstitutional law. This can be done through one of the institutions, listed above, i.e. by proxy. In practice, the initiative will most often be taken by the Ombudsman or the single panels of Supreme Cassation Court or Supreme Administrative Court.

As in the other European states, the Bulgarian Constitutional Court is called to ensure the supremacy of the Constitution over the laws and bylaws that Parliament passes and over the presidential decrees. The Constitutional Court decisions are final (i.e. cannot be challenged) and binding on all, courts included. They are binding by the interpretation of the Constitution by the Constitutional Court's interpretative decisions and also by its other decisions. The Constitutional Court control covers not only the laws passed after the adoption of the Constitution but also the laws passed before the adoption of the Constitution (so-called existing legislation). The Constitutional Court cannot revoke decisions of the Supreme Court of Cassation and of the Supreme Administrative Court if they contravene the Constitution. It is not the fourth instance above them.

The Constitutional court did not attempt any activism in defining and protecting social security rights in transition to the market economy and against the austerity measures provoked by the economic crisis. In certain cases the Court hesitated between the principle of the social state and the protection of the private property, reflecting the abandonment of the socialist law doctrine.

Some of the decisions are controversial and dissenting opinions are stated by judges. A good example is the Decision No.5 29 June 2000 on cc 4/2000, a part of which deals with the issue of the complementary nature of compulsory supplementary pensions insurance. The decision accepted that the second pillar complies with art. 51, but several judges dissented and argued that it did not fit in the implementation of the social function of the state. They insisted that the social minimum is guaranteed by the state social insurance (the state is obliged to create conditions for its provision). Persons wishing to receive higher pensions than this minimum, have the opportunities provided by the voluntary pension insurance. Legislative imposition of a second, supplementary mandatory pension insurance cannot be justified either by the right under Art. 51, para.1 of the Constitution nor by the social character of the state. The regulation of the supplementary mandatory pension insurance creates a legal mutant that does not fit in the normal legal and language categories ("language is the natural environment of the law"). For example, all reference to compulsory insurance (arranged on the principle of mandatory participation – art. 125, para. 1, item 1 SSC) contradicts to the rule that it is based on a contract between the insured person and the licensed pension insurance company – art. 124 SSC. The basis of contractual freedom, however, is the freedom to enter or not to enter into a contract, but in this case, the insured persons are deprived of this freedom. The apparent contradiction is not only in the language but in the very essence of the institute. It recognizes the right of the state to impose on its citizens, additional social security obligations than the necessary social minimum, through which their duty can be justified. At the same time absurdly the state is authorized to decree the appearance of "private" relationship between the insured and private funds. Since there is no clear criterion for cases in which the state can do this a possibility appears of increasing the "care", e.g. by introducing of additional compulsory insurance for

other risks. The Court did not indicate a reasonable constitutional ground for introducing this additional duty for social insurance.

The Constitutional Court of Bulgaria in another case decided that the more restrictive rules on health insurance introduced by the National Health Insurance Fund Act were not in breach of the Constitution. According to the Court, unlike basic civil rights, social rights are neither universal nor directly justiciable and can therefore be restricted by the Government. “Far-reaching decisions on constitutional entitlements to social rights that are not implemented can easily damage the authority of the courts.”<sup>12</sup>

### ***Threats to social security rights in times of economic crisis***

In the course of the 1990s, it became clear that the old-age security system inherited from the socialist past was in dire need of reform, to secure its financial sustainability, to meet the demographic challenges ahead and to adapt some of the previous design features to the new economic order. When welfare and distribution issues started to attract greater attention after the major crisis in 1996-1997 in Bulgaria, it turned out that the scope and type of reforms needed in the field of social policy were highly disputed. This has been especially true in the area of old-age security. Pension reform seemed inevitable in Bulgaria, as the process of economic transformation was putting great strain on the existing retirement system. The discussions with some international donors (the World Bank and the USDOL) reflected the international controversy between the “new pension orthodoxy”<sup>13</sup> and its opponents, triggered by forecasts of population ageing and a wave of pension privatisations in Latin America. This debate focused on the question whether it is sufficient to adapt the existing public pay-as-you-go (PAYG) system, or whether private, individually fully funded (IFF) pension schemes, such as the one in Chile, are a more appropriate solution to short- and long-run problems facing old-age security.

A first change in the public private mix was brought about by introducing supplementary private IFF schemes. Since a major reform of the pension system in 2000, the reformed scheme is based on a three-pillar model. It combines an unfunded component (first pillar) managed by the National Social Security Institute, with an occupational funded scheme and universal pension scheme (second pillar) and voluntary retirement saving funds (third pillar).

Participation to the second pillar is compulsory for individuals born after 1959, while workers born before this date receive their pension only from the first pillar and (in a few cases) from the voluntary pillar.

The PAYG system is financed through budget transfers and social contributions. The latter are paid by workers and employers (respectively 45% and 55%). Contributions are collected, along with other revenues, by the National Revenue Agency. For incomes above the maximum wage ceiling, no contribution is due. The state budget transfers to the NSSI each year an additional 12% of the insurable wage bill to cover pension expenditures not related to social insurance and the gap between contributions and (social insurance) pensions.

First-pillar pensions are related to earnings. Old-age benefits are calculated according to a formula which reflects the length of service, lifetime income (for the share earned after 1996) and an accrual rate of 1.1 percent per year of service. Pensions paid to workers insured under the second pillar are adjusted in proportion to the lower contribution rate paid to the NSSI. Survival pensions and disability benefits are also provided to the insured population under the unfunded scheme.

The retirement age is set at 65 years for both men and women with at least 15 years of contributions. However, as a result of a generous system to assess the length of service that includes non-contributory years (e.g., military services, maternity leave, unemployment periods, pre-1989 gaps in contributions) only a small share of pensioners get their old-age benefit at this age and earlier retirement is common. Old-age benefits for these workers cannot be lower than a minimum pension of about BGN 130 (approximately

<sup>12</sup> Decision on 2 of 22 February 2007 on cc n 12/2006.

<sup>13</sup> The “new pension orthodoxy” (surged in the 1990s and advocates pension privatisation all over the world. Its main transmission mechanism in developing and transition countries has been World Bank advice.

65 Euro) per month. Since 2006, this is linked to the pension level that would have accrued on the basis of the point system. For pensioners with 15 years of contributions or less, the minimum benefit is 85 percent of the minimum pension above.

Selected categories are covered by special pension regimes. These include:

- *Type-I* workers: miners, pilots, steel workers, workers in chemical plants and other at-risk workers who benefit from an earlier retirement age (typically 52 years for men and 47 years for women) and a more generous system to assess the length of service for the benefit calculation (e.g., three years of contributions are accrued for each year of work for miners and five years of contributions for each three years of work for other special categories).
- *Type-II* workers and special categories: including military forces, police, and other special enforcement agency workers can retire with 25 years of service and no age limit.

Benefit indexation was based on the “golden Swiss” rule. Benefits were indexed to a combination of price and nominal wage growth (with equal weights for each component). In the past, ad hoc adjustments to benefits beyond this formula have been frequent. Minimum and social pensions are also adjusted in line with price inflation and nominal wage growth.

The second pillar is based on a defined-contribution scheme. Since 2003, workers born after 1959 pay a contribution rate (now 5 percent out of the 16 percent contribution rate for pensions) to the funded pension system. This is paid almost in equal parts by employers and employees and in full by self-employed. Contributions are accumulated into individual accounts managed by pension insurance companies, which are joint stock companies that are separate legal entities from the public pension funds supervised by the Financial Supervision Commission. The mandatory second pillar covers old age and survivor risks. It provides pensions at the statutory age of 63 years (for men) and 60 years (for women) and earlier retirement pensions five years before the statutory age. Benefits are expected to cover between 10 percent and 15 percent of wages for individuals with full working histories.

For at-risk workers and other special categories the mandatory funded pillar also covers early retirement costs. A separate funded scheme under the second pillar of the pension system covers workers in special occupations. The scheme is based on a defined contribution system and pays early retirement benefits (or the equivalent lump-sum payment for small pensions) up to the normal retirement age to workers in hazardous conditions. The PPF system is financed by social contributions ranging between 10 percent and 15 percent (of which 3 percentage points are paid to the NSSI) depending on the work category paid exclusively by the employer. After a delay in the implementation of this reform in 2009, PPFs were expected to provide early retirement pensions since January 2011, while the NSSI would stop paying new benefits. However, the implementation of this reform has been suspended and moved to 2012, pending discussions on a burden-sharing agreement between the NSSI and PPFs to cover the cost of these pensions.

The third pillar of the pension system comprises a voluntary defined-contribution scheme. This covers voluntary individual pension funds operating since 1994 and occupational funds for voluntary group policies operating since 2007. Tax incentives are provided to participants in these voluntary funds; voluntary contributions are exempt from income tax up to 10 percent of wage for employee and BGN 60 per month for the employer. Investment income and retirement benefits are also tax exempt. Benefits can be in the form of lump-sum payments or annuities and include survivor and disability pensions. The pension reform reflected the crisis in Bulgaria (1996-1997) that led to introducing a currency board arrangement still in force.

**The recent crisis, however, led to a sharp deterioration in public finances.** The sudden stop of the capital-inflow boom in 2008 led to a sharp economic downturn in Bulgaria. Notwithstanding decisive corrective actions to limit spending (including a wage and pension freeze in the second half of 2009 and in 2010-2013), the decline in domestic demand led to a revenue collapse in the budget.

**The pay-as-you-go pension system is a major source of fiscal pressure.** Social security revenue declined sharply during the crisis, reflecting the fall in income and rising unemployment. At the same time, significant cuts in social contribution rates (introduced under the pressure of the employers’ organizations) and ad hoc benefit increases created a large imbalance in pension accounts. Until 2008, budget transfers

to close the gap between pensions and contributions had averaged about 3 percent of GDP per year. However, measures adopted in recent years heightened financial pressures on the unfunded component of the social security system. This has led to a large imbalance that is financed through state budget transfers.

**Demographic trends are expected to complicate fiscal management.** Bulgaria is one of the fastest-aging economies in the EU according to the 2009 Ageing Report (European Union, 2009), owing to falling birth rate and rising life expectancy. The old-age dependency ratio will increase rapidly in the next decades reflecting the projected doubling in the share of elderly in the total population and an even more marked decline in the share of the working-age population. These trends would adversely affect the financial stability of the pension system and make budget transfers to cover deficits a risk to macroeconomic stability.

**Impact on the investment of private pension funds.** Privately managed pension funds have been adversely affected by the decline in the stock market and in some years have recorded negative rates of return.

**In the period 2010-2014, a gradual pension reform package was approved by Parliament and the amended several times due to change of government.** The reform envisaged that contribution rates would be increased by 1.8 percentage points from 2011 while a pension freeze will remain in next years' budgets. The reform would also gradually raise the minimum contribution period for a full pension from 37 years to 40 years for men (with 63 years of age) and from 34 years to 37 years for women (with 60 years of age) over a decade. The retirement age is planned to be gradually raised (by six months per year) to reach 65 years for men and 63 years for women over the next two decades.

The crisis affected different types of pension schemes in different ways. Furthermore, the effects of the crisis were felt differently by the different generations. The most affected are the workers who are close to retirement, those with long periods of membership in the funded pension schemes and in particular those whose investment portfolio is heavily exposed to riskier assets as stocks.

The gap in financing for the pension system is creating trade-offs with other policy targets of the Government, notably to lower the tax burden. Such budget priorities may affect other areas such as family benefits, healthcare, and education, and deepen the social exclusion of some groups of people.

The economic crisis increased the need for social assistance of low income Bulgarian households. The global crisis has also affected remittances from Bulgarians working abroad. In recent years, the government has tightened the eligibility conditions for the social assistance benefits in order to let the beneficiaries see a job more actively.

Unemployment has remained high – 13% for the first quarter of 2014. There was a substantial increase in the unemployment benefit which was meant to respond to the crisis as an automatic stabilizer of the Bulgarian economy. In addition to the high demand for benefits, the contribution income of the unemployment insurance was reduced due to the reduced number of insured persons and the reduction of the contribution rate. As a result of the combined effects of these measures the unemployment insurance fund is in deficit.

### ***Assessment of the future of social security rights in light of the Constitution***

The social security system has been constantly under pressure since the reform in 2000 and did not follow strictly the initial version due to political reasons. As already pointed the pension system will have to adjust to adverse demographic developments. Dependency rates are expected to increase significantly over the coming decades. According to the World Bank,<sup>14</sup> the old-age dependency rate, which is defined as the number of elderly (above the age of 65) per 100 working-age persons, is estimated to double from 25 percent in 2011 to 51 percent in 2075. Moreover, the system dependency rate, defined as the number of beneficiaries relative to the number of contributors, will increase from 75 elderly or disabled persons per 100 contributors to 109 beneficiaries per 100 contributors by 2050. Moreover, the pension system has

<sup>14</sup> World Bank, 2013, "Mitigating the Economic Impact of an Aging Population: Options for Bulgaria", Poverty Reduction and Economic Management Unit (Washington: The World Bank Group).

pledged gross replacement rates of roughly 47 percent of average wages, which are similar to replacement ratios in countries experiencing more favourable demographics and with significantly higher pension contribution rates.

**Recent changes, which reverse a number of recent pension reforms, worsen pension sustainability.** From July 2014, automatic indexation will be implemented again based on the “golden Swiss rule” that links pension increases to the average growth of insurable income and CPI inflation. This is an important change to previous plans, which implied an indexation to CPI only. In addition, the gradual increase in the retirement age, part of the 2011 pension reform and started in 2012 (to reach 65 years for men by 2017 and 63 years for women by 2020), has been halted. Thus, the pension deficit by 2040 is now projected to be near 6 percent of GDP instead of 4 percent of GDP. The deficit is financed by the budget and crowds out other spending, which is increasingly coming under pressure as the population ages. Compensatory measures are needed to limit budgetary pressures.

Further reform options in the pension system (besides returning to the 2011/2011 reform decisions) include limiting early retirement, enhancing control over the invalidity pensions and increasing the retirement age of women to that of men, which would help boost labour force participation and counter the drag from aging on growth.

All these negative factors require improving the possibilities for access to the Constitutional court by introducing individual claims by citizens; developing the capacity of human rights bodies and courts to deal with positive human rights and furthering the research on new developments in the practice of the international and supranational supervisory mechanisms and courts on issues related to social protection.

The work carried in some international organizations like the ILO on social protection floor should be broadly popularized and the new Recommendation concerning National Floors of Social Protection 202/2012 should be used in legislative activities and in argumentation of the judiciary.

## CZECH REPUBLIC

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### THE RIGHT TO SOCIAL SECURITY IN THE CONSTITUTION OF THE CZECH REPUBLIC

*Assoc. Prof. JAN PICHRT<sup>1</sup>, Assoc. Prof. KRISTINA KOLDINSKÁ<sup>2</sup>*

#### **1. The constitutional guarantees of social security rights**

##### *1.1. Introduction*

It is very usual and traditional to devote in the introduction of similar articles extensive interpretations related to the historical development of investigated institutes, more precisely to the analysis of potential influence of the genesis of the legal regulation in the investigated area in a given country in its recent form and that also with respect to the potential of historical interpretation when interpreting legislative texts. We are going to, intentionally, partially break this tradition for two reasons; the first, is the intention of the editor, by whom was defined the maximum extent of this contribution, the second and more fundamental reason, is the weakening of the importance of continuity of the historical development of legal regulation in the investigated area in the Czech Republic, due to its “deformation” at the time of a non-democratic system.<sup>3</sup>

For the aforementioned reasons, we will only deal with the “recent history”, more precisely, with the time in the Czech Republic after the Velvet Revolution (in 1989), laid within the overall democratization of society in the early 1990’s, the constitutional legal framework on which the existing legal regulation of social security law in the Czech Republic is based and steps to fundamental reforms of the social security system were taken.

##### *1.2. Briefly on the development of the social security law after 1989*

Economic reforms and the transition from a planned to a market economy after 1989, brought with it necessary reforms in the area of the social security law.

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<sup>3</sup> Those who are interested in this area and in a more comprehensive view on social security legislation may refer to the publication (in Czech language) Tröster, P. et al. ‘Právo sociálního zabezpečení’ /Social Security Law/, 6th edition, Prague: C.H. Beck, 2013 and further (in English) Koldinská, K., Lang, R. ‘Czech Republic’ in International Encyclopaedia of Laws: Social Security Law, edited by Willy van Eeckhoutte. Alphen aan den Rijn, suppl. 89 NL: Kluwer Law International, 2013.

Among several things the Czech Republic faced at the beginning of the 1990's was the need to deal with appearance of an entirely new phenomenon for the country as yet, the unknown social condition – e.g. unemployment. The economy before 1989, i.e. the economy during period of socialism, was deformed by focusing on saturation of needs within the “Eastern bloc” (and thus often unable to compete globally), and was characterized by a planned nature, controlled focus on heavy industry and extensive growth factors – leading to resulting conditions among others such as “full employment”, and more precisely to a demonstration of the lack of labour force, due to inefficient use, when in fact “over-employment” existed due to the absence of the corrective measures of functional market mechanisms. “Opening up of the market” after 1989 led, to (among other things) the destruction of a number of industrial enterprises, and the emergence of unemployment and thus to the need to adopt appropriate legislation in response.

The fact that unemployment was in the early 1990's in the Czech Republic a new phenomenon had probably to some extent impact on the fact that the legal regulation on employment (including securing unemployment benefits paid by the Employment Office) is still – despite the public nature of the legal regulation – considered rather as a specific area of labour law in the Czech Republic.<sup>4</sup> A somewhat similar situation applies to the issue of work accidents and occupational diseases, which is historically also regulated under labour legislation – specifically in the provisions of the Labour Code (Act No.262/2006 Coll., the Labour Code, as amended).<sup>5</sup> Despite this (to some extent historically conditioned) specific, it is evident that the range of social events in the Czech Republic are similar to that in other European countries.<sup>6</sup>

However, even in areas where social security was before 1989 quite functional from the views of the addressees of benefits, it was necessary to proceed to changes caused by differences in the new politico-economic environment. It was soon evident a long-term unsustainability of further funding of some systems – especially the ongoing financing of pension systems (this area has no complex solution so far – see below). It was also necessary to make changes that eliminated some factors of unjustified inequalities in the area of social security – such as the removal of the institute of the so called “personal pensions”.

It is therefore evident that in the 1990's the Czech legislator faced many challenges in the area of social security.

### *1.3. Briefly on the development of the constitutional framework of social security law after 1989*

#### *a) Creating of the independent Czech Republic to 1 January 1993*

After 1989, in Czechoslovakia there was gradually further development of the relationship between the Czech and Slovak Republics and growing emancipation tendencies (manifested externally among others by repeated modification of the name of the common state), which led to the extinction of Czechoslovakia. On 25 November 1992, the Federal Assembly of the Czech and Slovak Federative Republic decided its

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<sup>4</sup> Compare Employment Act, no. 435/2004 Coll.

<sup>5</sup> Accident Insurance Act No. 262/2006 Coll., which regulated on a new basis this issue already in 2006, in a separate act has not yet come into effect, more precisely its effectiveness has been repeatedly postponed (last until 1 January 2015) and the Government and the social partners are now discussing ways to adopt entirely new legal regulation of work accident insurance.

<sup>6</sup> Among social events (this means among legal events with a direct or vicarious negative impact on the social situation of an individual with which the social security legislation associates the creation, alteration or extinction of rights and duties in the frame of social security legal relationships) falling within the scope of social security law in the Czech Republic are above all:

- (a) illness or impairment of health – which can cause also incapacity to work or a state designation as a long-term unfavourable state of health or disability
- (b) pregnancy and maternity
- (c) lack of maintenance of a child
- (d) reaching a certain age
- (e) death
- (f) insufficient earnings
- (g) work accident and occupational disease

extinction by 31 December 1992, and that its successor states are the current Czech Republic and the Slovak Republic.

In the following month (16 December 1992), the Czech National Council (in the position of the Czech Parliament) for the purpose of legal and constitutional solution of the independence of the Czech Republic enacted a new Constitution of the Czech Republic (“Constitution”).<sup>7</sup>

*b) The constitutional order of the independent Czech Republic*

On 15 December 1992, was by the adoption of the Act no. 4/1993 Coll., on certain measures in relation to the extinction of the Czech and Slovak Federal Republic (this law is sometimes also referred to as the “take over law”), ensured the continuity of the legal system in the level of “ordinary” laws – i.e. even laws falling within the area of legal regulation of social security and labour law – in the territory of the new state (independent Czech Republic) with the legal order of the Czech and Slovak Federal Republic from the time before 31 December 1992.

However, the situation was different regarding the area of legal regulation of constitutional law. On 16 December 1992, the adopted Constitution in Article 112, paragraph 1 introduces a new concept “constitutional order” of the Czech Republic and characterizes it by a list stating that the constitutional order of the Czech Republic consists of the Constitution, the Charter of Fundamental Rights and Freedoms and the constitutional laws (the latter mentioned – constitutional laws – are then in the cited provisions further divided). Article 3 of the Constitution then expressly declares that the Charter of Fundamental Rights and Freedoms is part of the constitutional order of the Czech Republic.

It is not – with regard to the focus of this text – appropriate to further discuss the concept of “constitutional order” as well as discussions associated with this newly (by the Constitution itself) introduced concept and its definition contained in Article 112 of the Constitution (see above),<sup>8</sup> but it is appropriate with regard to the aims of this text to deal in more detail with two fundamental constitutional norms – the Constitution and especially the Charter of Fundamental Rights and Freedoms.

In connection with the latter mentioned norm, it is necessary to bring in brief specifics of constitutional development in the Czech Republic after 1989, and in order to help (though abbreviated) with a better understanding of the circumstances associated with the adoption, and wording of the Charter of Fundamental Rights and Freedoms, which is – from the view of the focus of this text – the most important part of the constitutional order of the Czech Republic, because it is – as will be clarified below – a key source of constitutional law of the Czech Republic in the area of fundamental rights and freedoms.

*c) To adoption of the Charter of Fundamental Rights and Freedoms*

The Charter of Fundamental Rights and Freedoms (hereinafter the “Charter”) was adopted in 1991, (i.e. at time, before the split of Czechoslovakia – see above) by the former Federal Assembly of the Czech and Slovak Federal Republic. The Charter was promulgated in the Collection of Laws on 8 February 1991, along with a constitutional law which introduced it, under no. 23/1991 Coll.; it came into effect on the same day (8 February 1991).

Further fate of the Charter was influenced by the subsequent disintegration of Czechoslovakia and by difficulties that accompanied the birth of a new “constitutional order” of the independent Czech Republic – see above.

E. Wagnerová<sup>9</sup> says to this: “When creating a new Czech constitution there were disputes about its incorporation (understand the Charter) into the text of the Constitution, which had ideological overtones. Part of the political scene was bothered particularly by the large social and cultural rights. It was finally

<sup>7</sup> The Constitution has been published in the Collection of Laws under no. 1/1993 Coll. and became effective on 1 January 1993.

<sup>8</sup> For more details it is possible to refer to the publication KLÍMA, Karel et al. *Komentář k Ústavě a Listině*. [Commentary on the Constitution and the Charter], 2nd edition, Plzeň: Aleš Čeněk, 2009, pp. 845 and following.

<sup>9</sup> The current senator – was for many years a judge and Vice-President of the Constitutional Court.



taken separately into the Czech legal order, but not expressly as a constitutional law, what is indeed a negative presentation of the then political scene, more precisely of the then dominant political forces. Yet, through Article 3 in conjunction with Article 112 paragraph 1 of the Constitution it became part of the Czech constitutional order...”<sup>10</sup>

In the text of the Charter, more precisely in its preamble, is to this day, seen the process of its adoption in the (then still) common state of “the Czechs and Slovaks”, when the Federal Assembly of the Czech and Slovak Federal Republic (federal parliament) approved the Charter on the basis of the proposals of the Czech National Council and the Slovak National Council.<sup>11</sup>

As has already been indicated above, the Charter has not been approved by the Federal Assembly as a separate document, but as part of the Constitutional Act no. 23/1991 Coll., which introduced it; during the split of Czechoslovakia the Charter was as part of the constitutional order of the independent Czech Republic published for information again in the Collection of Laws under no. 2/1993 Coll. on the basis of the Resolution of the Czech National Council of 16 December 1992 on promulgation of the CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS as part of the constitutional order of the Czech Republic.

To this, states V. Šimíček, the legal nature and force of the Charter is given unchanged since 1991, when it was approved, and the Constitution has only confirmed such position in Article 3 and Article 112, paragraph 1.<sup>12</sup>

Since its adoption in 1991, the text of the Charter was changed only once, and in very little – with regard to the focus of this text insignificantly.<sup>13</sup> As concerns the text of the preamble of the Charter, which still – for reasons mentioned above – talks about Czech and Slovak Federal Republic, it is necessary to interpret this provisions, in accordance with the Article 1 of the Act no. 4/1993 Coll., on measures related to the extinction of the Czech and Slovak Federal Republic, as a provision talking about the Czech Republic.

The Constitution and the Charter are designated as a constitutional foundation of the Czech Republic, which has “two material pillars” – the institutional part is contained in the Constitution and the human rights part in the Charter.<sup>14</sup>

*d) Decision-making activity of the Constitutional Court of the Czech Republic in matters of social rights*

The Constitutional Court of the Czech Republic is a judicial body which ensures compliance with the Constitution; status and competences of the Constitutional Court are included directly in the Constitution. The Constitutional Court is composed of 15 judges who are appointed by the President and with the consent of the Senate for a period of 10 years. Among the activities of the Constitutional Court are:

- abrogation of statutes and their individual provisions if they are in violation of the Constitution;
- decisions on constitutional complaints against final decisions infringing on guaranteed fundamental rights and freedoms;
- decisions on disputes related to the powers of state bodies and state self-governing bodies.

The role and importance of the decision of the Constitutional Court in the area of social security law ensues from some of its decisions, to which we will further devote. In relation to the decision-making

<sup>10</sup> E. Wagnerová in Wagnerová, E.; Šimíček, V.; Langášek, T.; Pospíšil, I. at al. *Listina základních práv a svobod. Komentář. [The Charter of Fundamental Rights and Freedoms. Commentary]*, Praha: Wolters Kluwer ČR, a.s., 2012, p. 9.

<sup>11</sup> The final form originated from originally own and different proposals of republican parliaments which were during discussion in the Federal Parliament “entwined”.

<sup>12</sup> V. Šimíček in Wagnerová, E.; Šimíček, V.; Langášek, T.; Pospíšil, I. at al. *Listina základních práv a svobod. Komentář. [The Charter of Fundamental Rights and Freedoms. Commentary]*, Praha: Wolters Kluwer ČR, a.s., 2012, p. 49.

<sup>13</sup> In 1998, by a constitutional law that has extended the deadline for the detention of the accused of a crime from 24 to 48 hours.

<sup>14</sup> Compare K. Klíma in Klíma, K. et al. *Komentář k Ústavě a Listině. [Commentary to the Constitution and the Charter]*, 2nd edition, Plzeň. Aleš Čeněk. 2009, p. 18.

activity of the Constitutional Court and the Charter, it is appropriate to cite K. Klíma, who states that the Constitutional Court gave the Charter gradually, due to its activities, more significant legal force and that because “the Constitutional Court has taken a distinctive legal stand to the Charter as a whole and took it as a basis for a principled procedural purity of activity of Czech courts in the use of intellectual doctrine of “fair trial” in the approach of the European Court of Human Rights.<sup>15</sup> M. Bobek then states: “The Charter is a benchmark for any acts or omissions of Czech authorities. Exceptions are situations where it is though the act of the Czech authority, but it only implements a binding regulation of EU law where it has no discretion.”<sup>16</sup>

#### *1.4. Constitutional framework of the right to social security and assistance in material need*

Economic, social and cultural rights are regulated in fourth head of the Charter, in articles 26. – 35.

We will now devote a brief mention to those of them that are associated with fundamental social events (see above), in the sequence given by the Charter:

##### *a) The right to acquire the means of ones livelihood by work*

In Art. 26 of the Charter are included several interrelated fundamental rights, classified into the group of economic rights – the right to the free choice of a profession, the right to engage in enterprise and to acquire the means of ones livelihood by work. The third paragraph of this article of the Charter states: “Everybody has the right to acquire the means of their livelihood by work. The State shall provide an adequate level of material security to those citizens who are unable, through no fault of their own, to exercise this right; conditions shall be provided for by law.” Legal regulation in the field of employment, including the relevant ‘services’ which are provided (mostly to unemployed persons) by the Labour Office (for example state unemployment benefit paid to unemployed persons during the time when they are unemployed, including the amount of the benefit, duration of the support period, conditions to be met by an unemployed person to have the right to the benefit) is incorporated into act no. 435/2004 Coll., the Employment Act (as amended). Security in case of unemployment is financed from state resources. The next important enactment in this field is Act no. 589/1992 Coll., on social security and state employment policy premiums (as amended), which regulates the social security premium which includes the pension insurance premium, the sickness insurance premium and the state employment policy premium. Pursuant to this Act employers and employees are bound to pay premiums and in this framework also a state employment policy premium. Premiums are income of the state budget from which unemployment benefits are financed.

##### *b) The right to adequate material security in old age, during periods of work incapacity, and in the case of the loss of their provider*

Art. 30 of the Charter<sup>17</sup> provides:

- (1) Citizens have the right to adequate material security in old age and during periods of work incapacity, as well as in the case of the loss of their provider.
- (2) Everyone who suffers from material need has the right to such assistance as is necessary to ensure their basic living standard.
- (3) Detailed provisions shall be set by law.

<sup>15</sup> Ibidem.

<sup>16</sup> M. Bobek in Wagnerová, E.; Šimíček, V.; Langášek, T.; Pospíšil, I. at al. *Listina základních práv a svobod. Komentář.* [The Charter of Fundamental Rights and Freedoms. Commentary], Praha: Wolters Kluwer ČR, a.s., 2012, p.37.

<sup>17</sup> For the complexity of interpretation it should be noted that the provisions of the Charter devote to this issue in Articles 27 to 30: – freedom of association and the right to strike (Article 27); – the right to fair remuneration for work and to satisfactory work conditions (Article 28); – the rights of women, adolescents and persons with health problems to a special protection in labor law relations (Article 29).

In this article of the Charter are thus included the following rights:

- the citizen’s right to adequate material security in old age,
- the citizen’s right to adequate material security during periods of work incapacity,
- the citizen’s right to adequate material security in the case of the loss of his provider,
- the right of everybody who suffers from material need to such assistance as is necessary to ensure a basic living standard.

Accumulation of several types of social events “covered” by this article of the Charter leads to the fact that it is often referred to as the principal provision of the Charter related to the social security law. The above rights are secured in Czech Republic by legal regulations which are discussed in more detail in Chapter 2 of this text; as well as the fact that the Charter in these issues distinguishes in case of certain rights between citizens and other natural persons. In chapter 3 will also be discussed some important decisions of the Constitutional Court of the Czech Republic for the conceptualization of these rights.

Already here it is appropriate to draw attention to the problematic nature of the adjective “adequate” (material security). The problem is evident from the below-mentioned decision of the Constitutional Court on Czech pensions. J. Wintr states regarding this issue that to the term “adequate” in the text of paragraph 1 “...can be attributed two different meanings: (a) security adequate to prior social conditions of a particular citizen, or (b) such security that eliminates poverty and ensures a dignified standard of living, whereas the constitutionally guaranteed standard is in principle the same for all citizens.”, and further J. Wintr considers the interpretation of Constitutional Court on this issue “as the middle between these two positions”.<sup>18</sup>

With regard to fact that the text of Art. 30 of the Charter has not been changed since 1991, it is appropriate, in relation to the right of citizens to adequate material security during periods of work incapacity, to highlight a fundamental conceptual change which – without any change to the text of the Charter – has been introduced in the new Labour Code (Act No. 262/2006 Coll.). The consequences of the “failure” of the public law system providing sickness benefit to “guard” against abuse of the system and the growth of temporary incapacity for work (which did not correspond to the trends of development in neighbouring countries), led the state, while adopting the new Labour Code, at first, to the delegation of security of employees temporary incapable for work (and in quarantine) in the first 14 calendar days of such incapacity (totally new) to the employer. This obligation was, due to the economic crisis, extended in 2011 – 2013 to 21 calendar days. The legislature then notionally “completed” the process by providing a tool to employers against employees (violating mode of temporary incapacity insured) leading even to the possibility to unilaterally terminate the employment relationship with the employee, if he/she breached the mode of temporary incapacity insured regarding the obligation to stay during temporary incapacity to work in the place of stay and observe the time and extent of allowed walks, and refers in this context to Section 56, paragraph 2 letter b), of the Act on Sickness insurance. This legal regulation is considered by many authors a completely conceptually incorrect mixing of labour law obligations and the obligations of a person temporarily incapable, more precisely, wrongly allowing sanction for non-compliance with the obligations laid down by public law legal regulations within a private law relationship; they have even doubts about compliance of this regulation with the constitutional order.<sup>19</sup>

<sup>18</sup> J. Wintr in Wagnerová, E.; Šimíček, V.; Langášek, T.; Pospíšil, I. at al. *Listina základních práv a svobod. Komentář. [The Charter of Fundamental Rights and Freedoms. Commentary]*, Praha: Wolters Kluwer ČR, a.s., 2012, p. 634.

<sup>19</sup> Compare Bělina, M., Pichrt, J. Nad návrhem novelizace zákoníku práce (včetně vazby na návrh nového občanského zákoníku) [Over the proposal of the amendment of the Labour Code (included relation to the proposal of the new Civil Code)], *Právní rozhledy*, no. 17, 2011, C.H.Beck, pp. 612-613.

c) *The right to the protection of health and the right to free medical care and to medical aid on the basis of public insurance*

Art. 31 of the Charter provides:

“Everyone has the right to the protection of their health. Citizens shall have the right, on the basis of public insurance, to free medical care and to medical aid under conditions provided for by law.”

As concerns the first sentence of Art. 31 of the Charter, then the laws by which the right to the protection of health are implemented, are in particular in Act No. 258/2000 Coll., on the protection of public health and in Act No. 20/1996 Coll., on the people's health care.

The system of public insurance (second sentence of Art. 31 of the Charter), its financing, as well as plurality of health insurance companies are then implemented by several other laws.

Of these – from the perspective of constitutional conformity – worth attention is the recent decision of the Constitutional Court of the Czech Republic, which affected Act No. 48/1997 Coll., on public health insurance. The Constitutional Court by a judgment file no. Pl. ÚS 36/2011<sup>20</sup> decided on 20 June 2013, on the proposal to repeal parts of the above mentioned act so that repealed (among other things) was the provision on implementation of the so called “above-standards” (after many years of discussion). This provision divided health care, more precisely health services, with respect to payment from public health insurance, to a fundamental variant – fully-paid, and a variant economically more expensive, that beyond the payment for the fundamental care provided from public health insurance, funds should not be paid.

d) *Social protection of family, right of parents who are raising children to assistance from the state and right of women for special care during pregnancy*

Art. 32, paragraph 1, 2 and 5 of the Charter provides:

- (1) Parenthood and the family are under the protection of the law. Special protection is guaranteed to children and adolescents.
- (2) Pregnant women are guaranteed special care, protection in labour relations, and suitable labour conditions.
- ...
- (5) Parents who are raising children have the right to assistance from the state.”

Social protection of the family included in Art. 32 of the Charter is implemented by laws described in 2nd chapter of this contribution.

The second paragraph of this article (special labour conditions for pregnant women) has (among other things) an anti-discrimination aim and its provisions are specified especially by the Labour Code. The concept of this protection shows in its approach tendencies of development. The Constitutional Court in the past solved for example the question of absolute prohibition of night work for women and absolute prohibition of sending pregnant women on business travel (this prohibition was included in the “old” Labour Code until 31 May 1994); the Constitutional Court stated regarding this, that these prohibitions would for women “mean their discrimination from the view of employment opportunities and conditions for performance of employment”.<sup>21</sup>

## **2. *The scope of the material and personal social security rights guaranteed by the Constitution***

As it has been already said, the Czech Charter of Fundamental Rights and Freedoms guarantees quite a wide range of social rights, from which several social laws and acts derive. Material and personal scope more or less copies the general constitutional concept.

<sup>20</sup> Publisher in the Collection of laws under no. 238/2013 Coll. and available also on [http://www.usoud.cz/en/decisions/?tx\\_ttnews%5Btt\\_news%5D=2341&cHash=53682c589c39aaaaabfd8d1244cd47f](http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=2341&cHash=53682c589c39aaaaabfd8d1244cd47f).

<sup>21</sup> The judgement file no. Pl. ÚS 13/94 of 23 November 1994 available on <http://nalus.usoud.cz/Search/Results.aspx>.

The right to free choice of profession and training is mainly guaranteed by the Act No. 435/2004 Coll., on employment. The personal scope of protection under this law covers all citizens of the Czech Republic and also foreigners, who can be employed in the Czech Republic (have an appropriate authorisation). EU citizens have the same rights as the Czech citizens.<sup>22</sup> The right to employment is defined in the Art. 10 of the Act No. 435/2004 Coll., according to which it's a "right of the person who wishes to and is able to work and is applying for work, to work in a labour law relation, to the brokering of employment and to the provision of other services under the conditions set forth in this Act." Under this act, labour services and unemployment benefits are provided to entitled persons.

The Charter guarantees to citizens "the right to adequate material security in old age and during periods of work incapacity, as well as in the case of the loss of their provider." This article is actually the crucial one in defining social security in the Czech Republic and its personal and material scope. Already the Charter states, that most rights deriving from social security systems are provided to citizens (including also EU citizens – according to the EU law). On the other hand, there are rights of persons suffering from material need, which are guaranteed to everyone.

Adequate material security in old age is provided especially under the Act No. 155/1995 Coll., on pension insurance. Its personal scope is defined in quite a complicated way in art. 5-10 of the Act No. 155/1995 Coll. Insured under Czech pension system are in general employers and persons with similar gainful activity, as well as self-employed persons, if such a gainful activity is enacted on the territory of the Czech Republic or for a Czech employer. As regards material scope, insured persons are provided by old-age pension, disability pension or survivor's pensions (widow's and widower's pension and orphan's pension), if conditions are fulfilled. Invalidity pension is there to secure an income to a person, whose incapacity to work lasts for a longer time (in general for more than one year). Survivor's pensions shall provide an income to people, who lost their breadwinner.

In case of short-term incapacity to work, the system of sickness insurance, regulated by the Act No. 187/2006 Coll., on sickness insurance, shall be activated. Under this act, not only sickness benefits, but also maternity benefits, shall be provided. Sickness insurance is open to all employees and people enacting similar activity and, on a voluntary basis, also to self-employed persons, if they work on the territory of the Czech Republic, or their employer is based here. The same is applicable to EU citizens and to foreigners with long-term residence (subject to authorisation under certain conditions).<sup>23</sup>

People suffering from material need are provided with benefits regulated by the Act No. 111/2006 Coll., on assistance in material need. Under this act, three benefits can be provided to a person or family in material need: allowance for living, supplement for housing, extraordinary immediate assistance. Personal scope of this system reaches all citizens of the Czech Republic and also EU citizens, if they reside on the territory of the Czech Republic. Under certain conditions, this system is open also to foreigners (in general, if they legally reside in the Czech Republic). If certain conditions for extraordinary immediate assistance are met, no special requirements are put on clients of the system.<sup>24</sup>

The right of everyone to the protection of health and the right of citizens to free medical care and to medical aids, on the basis of public insurance, is further developed by acts on health insurance,<sup>25</sup> which regulate financing of public health care, and on health care services,<sup>26</sup> which regulate requirements on quality of the health care provided to patients. Public health insurance and therefore also the high quality

<sup>22</sup> Art. 3 of the Act No. 435/2004 Coll.

<sup>23</sup> Cfr. Art. 5-13 of the Act No. 187/2006 Coll.

<sup>24</sup> Cfr. Art. 5 of the Act No. 111/2006 Coll.

<sup>25</sup> Act No. 48/1997 Coll., on public health insurance, Act No. 592/1992 Coll., on premiums for general health insurance, Act No. 551/1991 Coll., on the General Health Insurance Company of the Czech Republic (VZP), Act No. 280/1992 Coll., on departmental, professional, business and other health insurance companies.

<sup>26</sup> Act No. 372/2011 Coll., on health services and the terms and conditions for the providing of such services (Health Services Act), Act No. 373/2011 Coll., on specific health services, Act No. 374/2011 Coll., on emergency medical (rescue) services.

of health care services is open to wide public, especially to Czech citizens and EU citizens, but under certain conditions also to legally resident foreigners.<sup>27</sup>

Social protection of family is guaranteed especially by the Act No. 117/1995 Coll., on state social support, which regulates main family benefits.<sup>28</sup> Personal scope covers again Czech and EU citizens with long-term residence in the Czech Republic and also foreigners, with long-term residence permit.<sup>29</sup>

The social security rights guaranteed by the Czech Constitution/Charter of Fundamental Rights and Freedoms are all transacted into laws and acts. The personal scope covers all Czech and EU citizens and often also third-country nationals. In some specific cases, social rights of third-country nationals, as provided by the Czech legislation, not always fully respect obligations of the Czech Republic deriving from the EU legislation.<sup>30</sup> In general it can be however argued, that the personal scope is defined in a standard way and allows to many to enjoy a very generous material coverage of social security guaranteed by the Czech legislation.

### ***3. The constitutional regulations' impact on the content of social security rights in the domestic legal system***

The Czech Constitutional Court provides a careful surveillance on the content of social security rights from the constitutional perspective. That is why some of its recent decisions can serve as a good answer to the question on impact of constitutional regulations on the content of social security rights in the domestic legal system. Let us start from some critique. For example, one of the constitutional judges in her dissenting opinion to one of recent Constitutional Court's judgements argued, the case-law of the Constitutional Court would not be stable and unified and this situation could cause some problems.<sup>31</sup> Still, the case-law of the Constitutional Court remains the most important source of interpretation of social rights and has a direct effect on further development of domestic legal system in the area of social security.

#### *3.1. Constitutional Court's definitions of social rights*

The Constitutional Court tries to provide a coherent interpretation of social rights, which does however not mean, that such an interpretation would be static.<sup>32</sup> The Constitutional Court declared already in 2003, that under some circumstances, it may depart from its own jurisprudence regarding

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<sup>27</sup> Art. 2 of the Act No. 48/1997 Coll.

<sup>28</sup> There are also e.g. foster care benefits regulated by the Act No. 349/1999 Coll., on social-legal protection of children. This act regulates also all the specific rights of children and minors, who are in socially difficult situation and provides for protection of their healthy development.

<sup>29</sup> Cfr. Art. 3 of the Act No. 117/1995 Coll.

<sup>30</sup> There are e.g. some doubts about limits for third-country nationals in access to health insurance after six months of legal residence in the Czech Republic, where the Czech legislation requires long-term residence permit, while the EU legislation (the single permit directive) guarantees participation in the social security system after six months of legal residence, without any further specification.

<sup>31</sup> She pointed out, that seeing the increasing number of quite fundamental and complex issues of social politics that the Constitutional Court is forced to address or does in fact address; the internal reason is the existing instability of the case law on economic and social rights. Therefore, the biggest task for the "third generation" of the Constitutional Court will be to create understandable, sustainable and internally consistent case law on the economic and social rights. The case law, according to her, in matters of economic and social rights is exceptionally important, regardless of the "lower category" of these rights, because it often affects complex social and health care systems and their functioning. By doing so, it often breaks down certain political ideas about the functioning of the basic functions of the state and changes the government's budget plans. "Dissenting Opinion of Ivana Janů to the reasoning of judgment file no. Pl. ÚS 36/11 of 20 June 2013 (available at [http://www.usoud.cz/en/decisions/?tx\\_ttnews\[tt\\_news\]=2341&cHash=53682c589c39aaaabfbd8d1244cd47f](http://www.usoud.cz/en/decisions/?tx_ttnews[tt_news]=2341&cHash=53682c589c39aaaabfbd8d1244cd47f), accessed 5.4.2014).

<sup>32</sup> In judgment file no. Pl. ÚS 1/08 that the Constitutional Court stated that it "...does not approach evaluation of questions related to social rights in a static manner, but with exceptional emphasis on what the situation is at the time of its decision."

social rights. Among these circumstances it nominated: a change of the social and economic relations in the country, a change in their structure, or a change in the society's cultural expectations, a change or shift in the legal environment formed by sub-statutory legal norms, which in their entirety influence the examination of constitutional principles, without, of course, deviating from them, but, above all, not restricting the principle of the democratic state governed by the rule of law. A further circumstance allowing for changes in the Constitutional Court's jurisprudence is a change in, or an addition to, those legal norms and principles which form for the Constitutional Court its binding frame of reference, that is, those which are contained in the Czech Republic's constitutional order.<sup>33</sup> The Constitutional Court at the same time declared, that social rights are not unconditional in nature, and can be exercised only within the bounds of the laws, while the statutes may not deny or annul constitutionally guaranteed social rights.<sup>34</sup> The Constitutional Court also stated that "the specific character of social rights is that they are dependent chiefly on the economic situation of the state. The level at which they are provided reflects not only the state's economic and social development, but also the relation between the state and the citizen, founded on mutual responsibility and on the recognition of the principle of solidarity. The degree to which the principle of responsibility and solidarity are expressed in the legal order of a given state also determines the character of that state (for ex., as a social state)."<sup>35</sup>

Having made the above general remarks, some concrete examples of constitutional regulation's impact on social security rights can be provided, taken again from the jurisprudence of the Constitutional Court.

### 3.2. *Constitutional Court and fees in health care*

Recently, the Constitutional Court had to review legal provisions, which increased the payment of a patient for "hotel services" connected with hospital care. According to the legislation in force, the patient was obliged to pay for such services 100 CZK (some 3 Euro) per day. It was seen as the equivalent of expenses that the patient would necessarily have anyway (even outside the medical facility). The Constitutional Court did not accept this view and argued, that it's hardly acceptable, that during hospitalization in an intensive care unit the patient is being provided "hotel services." In these cases the obligation to pay the fee conflicts with the principle of health care, which is provided free-of-charge, on the bases of health insurance. The Constitutional Court stated, that "hospitalization that is health care in the narrow sense, covered by public health insurance, must be provided free, because for the patient there is no other alternative to it." From the point of view of constitutionality of such provision, it was also pointed out, that there is a lack of limits for this payment, which must be paid also by non-earning persons, including socially at-risk groups, children, persons with health disabilities, etc. Likewise, the obligation to pay the fee is not limited in time; the patient is to pay it in full regardless of the length of hospitalization. The combination of these factors, according to the Constitutional Court, "can evoke a financially unbearable situation, not only for the abovementioned categories of patients. In any case, it denies the essence of solidarity in receiving health care."<sup>36</sup> These conclusions contrast in a way to a previous judgment of the Constitutional Court, where it discussed the constitutionality of health care fees as such, when they were introduced, though strong protest of that time social-democratic opposition. Originally, the Constitutional Court accepted the fees and among others stated, that "The Constitutional Court is aware of the multi-functionality of a regulatory fee, because, in addition to the regulatory element, there is a utilitarian viewpoint, consisting of the fact that regulatory fees help a health care facility, in

<sup>33</sup> Cfr. judgment file no. Pl. ÚS 11/02 (no. 198/2003 Coll.; N 87/30 SbNU 309).

<sup>34</sup> Cfr. judgment file no. Pl. ÚS 8/07 of 23 March 2010 (available at [http://www.usoud.cz/en/decisions/?tx\\_ttnews\[tt\\_news\]=460&cHash=e25394dd3b7a147e5e9e1ed98b62a490](http://www.usoud.cz/en/decisions/?tx_ttnews[tt_news]=460&cHash=e25394dd3b7a147e5e9e1ed98b62a490), accessed 10.4.2014).

<sup>35</sup> Cfr. judgment file no. Pl. ÚS 2/08 of 23. April 2008 (available at [http://www.usoud.cz/en/decisions/?tx\\_ttnews\[tt\\_news\]=488&cHash=f1a49b3af9a48356e646118193999e45](http://www.usoud.cz/en/decisions/?tx_ttnews[tt_news]=488&cHash=f1a49b3af9a48356e646118193999e45), accessed 10.4.2014).

<sup>36</sup> Judgment file no. Pl. ÚS 36/11 of 20 June 2013 (available at [http://www.usoud.cz/en/decisions/?tx\\_ttnews\[tt\\_news\]=2341&cHash=53682c589c39aaaaabfd8d1244cd47f](http://www.usoud.cz/en/decisions/?tx_ttnews[tt_news]=2341&cHash=53682c589c39aaaaabfd8d1244cd47f), accessed 5.4.2014).

addition to providing payment-free health care, to function better, provide related services, or improve personnel aspects and the level of the environment in which health care is provided, and so on.”<sup>37</sup>

For the above mentioned reasons, the Constitutional Court abolished the fee paid for the inpatient care, which is currently having a very important impact on the general financial situation of hospitals, as the fee was their income. The government promised to provide hospitals with additional money through increasing of contributions for so called “state insured persons” into health insurance system.

### 3.3. *Constitutional Court about forced labour in the Czech social legislation*

Another important intervention of the Czech Constitutional Court with an impact on the whole concept of one part of social security rights, was the recent abolishment of the so called “public service”. In 2011, an amendment to the Employment Act (Act no. 435/2004 Coll., on Employment), introduced as a reason for deleting a job seeker from the register of job seekers the refusal of an offer to perform public service of up to 20 hours per week if he is listed in the register of job seekers for more than 2 consecutive months, and has no serious reason for refusing. This meant that accepting this offer, was a condition for exercising the rights that the state accords citizens under the Charter of Fundamental Rights and Freedoms as appropriate material security in the event that they cannot, through no fault of their own, obtain the means for their living needs through work, and which citizens can exercise under the law only through the register of job seekers. Compulsory performance of public service was envisaged also within the system of social assistance (Assistance in Material Need). The original idea behind introducing this obligation to take public service was to introduce a measure against misuse of the position of a job seeker and the related benefits. It was however problematic, because the public service was offered only to certain job seekers, who were offered/obliged to perform the work of up to 20 hours a week over a period of several months. As a consequence, two groups of job seekers were created, with fundamentally different conditions for being maintained in the relevant register, and the determination of which group a particular job seekers belongs in depended to a great degree on the wide discretion of the regional branch of the Labor Office of the Czech Republic. The Constitutional Court declared the compulsory public service unconstitutional, as it was not found as a suitable or proportional means for achieving the related aims of preventing social exclusion, maintaining or reacquiring work habits, or preventing misuse of performance within the framework of material security in case of unemployment. The condition for maintaining a citizen in the register of job seekers affected, according to the Constitutional Court, the essential content of the constitutionally guaranteed social right to proportionate material security during unemployment.

The Constitutional Court, when abolishing relevant provisions of the Employment Act and Act on Aid in Material Need, went quite far, when it labled the public service to be forced labour, prohibited by international law. The Constitutional Court first reviewed whether public service, in the case of persons listed in the register of job seekers is work or service, then whether it is performed willingly, or whether it is not performed as a result of duress or under threat of penalty. The Court stated, that public service offers the unemployed only the possibility of unpaid performance of the assigned work activity, the obligation on a job seeker to perform it for up to 20 hours a week, with all limitations and it can be therefore considered a disproportionate burden for exercising individual statutorily defined rights that are accorded the job seeker for the purpose of material security during unemployment. The Constitutional Court concluded, that the compulsory public service, as legislated in the Czech legislation, can be indeed seen as forced labour, as defined by the Czech constitutional law, international law and also by the jurisdiction of the European Court of Human Rights.<sup>38</sup>

<sup>37</sup> Judgment file no. Pl. ÚS 1/08 of 23. September 2008 (available at [http://www.usoud.cz/en/decisions/?tx\\_ttnews\[tt\\_news\]=486&cHash=5f71b939f66bb64b10b5e57efa3d343f](http://www.usoud.cz/en/decisions/?tx_ttnews[tt_news]=486&cHash=5f71b939f66bb64b10b5e57efa3d343f), accessed 10.4.2014).

<sup>38</sup> Pl. ÚS 1/12 of 27 November 2012 (available at [http://www.usoud.cz/en/decisions/?tx\\_ttnews\[tt\\_news\]=2048&cHash=de691cb3d931c4a9d987ada3072280bc](http://www.usoud.cz/en/decisions/?tx_ttnews[tt_news]=2048&cHash=de691cb3d931c4a9d987ada3072280bc), accessed 10.4.2014), par. 20-41.



The above mentioned judgment is not without international relevance. Conclusions of the Constitutional Court go, to a certain extent, against a current Europe-wide tendency, which is in theory being discussed as “repressive welfare state”<sup>39</sup> or “conditional social benefits”.<sup>40</sup> This in a way justifies restrictions being put into European welfare legislations with the argument of efficiency and fight against social fraud and misuse. The Constitutional Court on the contrary put certain limits to this policy and said, that even in the system with the biggest level of discretions, like social assistance, there must be some limits put to the burden put on shoulders of a person, who is threaten or already affected by social exclusion.

### *3.4. Constitutional Court about some aspects of Czech pensions*

As a disputable response to the question of adequacy of the Czech pension system, a Constitutional Court’s judgment from 2010 may serve as a good example. A principle of adequate material security was put in question by a former judge, who felt discriminated, because his pension from the obligatory pension system (first pillar) represented only some 19% of his previous wage, even though his obligatory contributions to the system were quite high though his whole working life. Actually, the legislation in force created a situation where a participant in the pension system who contributed three times more than a participant who contributed an amount calculated from an average wage was allocated a pension of – relatively – less than half. The Constitutional Court recalled, that the Charter of Fundamental Rights and Freedoms guarantees all participants of pension insurance adequate material security. The proportionality of material security in relation to individual participants in pension insurance must be, according to the Constitutional Court, understood in relation to satisfying an individual’s living needs, in relation to the widest possible circle of persons, but also in relation to the insured person as a payer who co-creates the financial resources from which the material security will be provided.<sup>41</sup> In this judgment, the Constitutional Court discussed also principles of solidarity<sup>42</sup> and equivalence, including the system and functioning of social welfare systems.<sup>43</sup> The Court concluded, that the current system of ceiling of pensions amount, given the existence of a system of contributions to pension insurance without an effective “ceiling,” established marked disproportionality between the level of contributions to the insurance system, income levels, and the level of allocated pension benefits for some insured persons and it violated some fundamental principles of constitutional rights.

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<sup>39</sup> G. Vonk. Law and the Rise of the Repressive Welfare State, available at <http://louisvanoverbeek.blogspot.cz/2013/10/g-vonk-law-and-rise-of-repressive.html> (Accessed 10.5.2014). The author discusses also the above mentioned judgment of the Czech Constitutional Court.

<sup>40</sup> E. Eichenhofer. EU activation policy and its effects on the fundamental social right to work. *European Journal of Social Law*. No. 2/2013.

<sup>41</sup> Pl. ÚS 8/07 of 23 March 2010 (available at [http://www.usoud.cz/en/decisions/?tx\\_ttnews\[tt\\_news\]=460&cHash=e25394dd3b7a147e5e9e1ed98b62a490](http://www.usoud.cz/en/decisions/?tx_ttnews[tt_news]=460&cHash=e25394dd3b7a147e5e9e1ed98b62a490), accessed 10.4.2014).

<sup>42</sup> This principle has been discussed more extensively also in a judgment file no. 2/08, where the Constitutional Court among other stated that: “The degree to which the principle of solidarity is recognized depends on the level of the ethical appreciation of coexistence in society, on its cultural character, but also on the sense of the individual for justice and sense of unity with others and the sharing of their fate in a certain time and place. From the perspective of the individual, solidarity can be perceived either internally or externally. Internal solidarity reflects the emotional affinity of one’s relations to others, is spontaneous, and is exerted first and foremost in the family and in other partnership-type associations. Generally the state does not intervene into such relationships, or only to a very restricted degree (see family law relations regulated by the Act on the Family). External solidarity lacks this emotional affinity, thus the individual is more reluctant in consenting to its assertion. [...] In this area, the state very actively asserts its function as the supreme power. It is through the principle of solidarity that redistribution occurs, that is the movement of transferred funds from one to the other – to the needy. Solidarity has its limits [...] The state may, in the name of solidarity, only draw upon such a portion of the property of the capable so that, in so doing, it neither destroys their active efforts nor oversteps the constitutional boundaries of the protection of property.”

<sup>43</sup> Every system of social security carries advantages or disadvantages for certain social groups, depending on whether it gives preference to the viewpoint of solidarity or the equivalence principle. This regulation is reserved to the legislature, which cannot act arbitrarily. ... It is the obligation of the legislature to transparently express the ratio of the components of solidarity and equivalence in the social insurance system (including pension insurance) – cfr. Pl. ÚS 8/07.

This judgment caused a big debate among lawyers and social politicians, also because the legislator was given only one and half year to amend respective laws according to the judgment. It could be also said, that the judgment discussed a lot the relationship between the level of contributions and the level of pension awarded, without taking that much into account, that the Czech pension system has been historically determined by a very high level of solidarity,<sup>44</sup> which, among other resulted in quite a high level of pensions paid from the first pillar to current pensioners. The Constitutional Court, on the other hand, strongly encouraged the legislator to speed up the pension reform, in order to adopt also further parametrical reforms of the first pillar and especially to adopt some new legislative measures and introduce some other instruments of supplementary pensions.<sup>45</sup>

On the contrary to the above discussed judgment, where the Constitutional Court interfered into current concept of legislation in force, another, older, judgment can be cited, where the Court did not feel competent enough to abolish another provision of the Pension Act, even if this provision was apparently discriminatory. We have here in mind a judgment from 2007 on pensionable age, which is different for men and women – and it's o.k. so far – but which can be lowered to a woman, if she brought up more than one child. This right is in no way transferable to a man.

The Constitutional Court did not share the opinion that such a provision would be inconsistent with the principle of equality and right to adequate material security in case of old age, both guaranteed by the Charter of Fundamental Rights and Freedoms. The Court was not of the opinion, that annulling the provision, which lowered pensionable age only to women, who brought up children, would implement equality between the sexes in relation to the right to material security in old age. In this regard, the Constitutional Court stated that: “If the contested provision were annulled, a certain advantage for women/mothers would be removed, without, as part of the ‘equalization,’ men/fathers acquiring the same advantages as women/mothers have. The Constitutional Court functions only as a negative legislature, and its intervention regarding the contested provision would thus only violate the principle of protection citizens’ confidence in the law, or perhaps interfere in legal certainty, or legitimate expectation.”<sup>46</sup> The question of discrimination based on sex as such was actually not discussed in the judgment and the Court left it with the only reasoning, that if an advantage for mothers would be removed, fathers did not acquire any similar advantages and it's therefore better not to interfere.

Interestingly enough, the original petitioner in this case did not content himself with the Constitutional Court's conclusions and went to Strasbourg. The European Court of Human Rights was however similarly careful as the Constitutional Court and stated, that “the Court finds that the original aim of the differentiated pensionable ages based on the number of children women raised was to compensate for the factual inequality between men and women. In the light of the specific circumstances of the case, this approach continues to be reasonably and objectively justified on this ground until social and economic changes remove the need for special treatment for women. In view of the time-demanding pension reform which is still ongoing in the Czech Republic, the Court is not convinced that the timing and the extent of the measures undertaken by the Czech authorities to rectify the inequality in question have been so manifestly unreasonable as to exceed the wide margin of appreciation allowed in such a field.”<sup>47</sup>

Having said the above, there is no doubt, that the Czech Constitutional Court plays a decisive role in interpretation of social rights and that it contributes in an important way to the final shape of the social

<sup>44</sup> Recently recalled e.g. also in an CJEU judgment C-166/12 Radek Časta v Česká správa sociálního zabezpečení.

<sup>45</sup> In the meantime, the Act No. 426/2011 Coll., on pension savings, introducing a so-called second pillar, has been adopted, but it is currently being discussed how to abolish it, as the current political representation promised to its voters, that it would abolish the system, because it was not well accepted by the public and former opposition (current government) strongly protested against its introduction.

<sup>46</sup> Cfr. judgment file no. Pl. ÚS 53/04 of 16 October 2007 (available at [http://www.usoud.cz/en/decisions/?tx\\_ttnews\[tt\\_news\]=495&cHash=c37eba57d02e9c764a977284fbf64996](http://www.usoud.cz/en/decisions/?tx_ttnews[tt_news]=495&cHash=c37eba57d02e9c764a977284fbf64996), accessed 10.4.2014).

<sup>47</sup> ECHR Case of 17. February 2011 *Andrle v. the Czech Republic*, App. No. 6268/08. The case was commented and compared with the CJEU jurisprudence in Koldinská, K. *Should fathers not raise their children?* In European Gender Equality Law Review. 2/2011 (available at [http://ec.europa.eu/justice/gender-equality/files/egelr\\_2011-2\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/egelr_2011-2_en.pdf), accessed 15.5.2014).

security rights guaranteed by the Czech legislation. The above cited judgments, on the other hand, confirm to a certain extent the originally expressed criticism, that the Constitutional Court's jurisprudence is not always consistent and stable and that even in same areas, the Court sometimes issues different judgments on very similar questions. Still, its case law remains a very important source of interpretation and often also of understanding the logics and systematics of the Czech social security system.

#### **4. Threats to social security rights in times of economic crisis**

It could be stated, that the recent economic crisis brought some new elements, never seen before in the western history, also from the point of view of social security rights. Whereas during the 20. Century, economic crisis mainly brought to immediate reaction of welfare states and to increasing the guarantees of social rights, the last economic crises, on the contrary, brought to restrictions in public spending, especially in the area of social costs.

Recent developments in the Czech legislation confirm the above mentioned tendency, with however one specificity. The Czech economy was not that much affected by the crises, as other economies. That is also why during the crisis e.g. many Czech daughters in multinationals were supporting their mothers, especially in financial business. On the other hand, as the Czech economy is strongly export-oriented, it would be false to argue, that there was absolutely no impact of the global crisis on the Czech economy. The crisis was however not felt so much compared with other European countries, which can be seen e.g. on the level of unemployment rate, which never exceeded 10%.

Nevertheless, last right-wing governments pushed on cutting social expenditure as much as possible, especially in the field of social assistance (a system dedicated to the most vulnerable groups), without trying to really reform it (e.g. a very hot issue of social housing was not solved at all and works on relevant legislation are only starting).

At the same time, it should be mentioned, that the system of pension saving has been introduced, labelled as a second pillar.<sup>48</sup> The Act no. 426/2011 Coll., entered into force as of 1. January 2013 and it was expected, that during the first year, some 500 000 people will take a part in it. This expectation showed however as unrealistic and only a bit more than 80,000 people take currently part in the system. Because the pension saving system did not have large political consensus across the political spectre, the current government declared, it would abolish the whole system as soon as possible. Even if the system as such can be criticized,<sup>49</sup> it does not seem very wise to solve the problem by abolishing an already running system and so threatening the legal and economic certainty of people, especially of participants in the system.

#### **5. Assessment of the future of social security rights in light of the Constitution**

Trying to predict the future of social security in a concrete society is like crystal gaze, even if one knows well how the welfare state has evolved in last years and what are current proposals for still ongoing social reforms. Moreover, currently, social reforms are becoming more and more dependent on political situation, which is true not only for the Czech Republic.

As one of examples of the last said could serve the issue of pension reform in the Czech Republic. When the second pillar (which is actually not a second pillar, meaning occupational pensions, but a system of pension saving) was being prepared, the then opposition together with trade unions organized quite massive protests. The system of pension saving was nevertheless adopted and entered into force

<sup>48</sup> This term is however not correct. The World Bank means under second pillar the occupational pension system, but the Czech system of pension savings can in no way be labeled as a occupational pension system. It's more an alternative to the third pillar, not very different from it.

<sup>49</sup> Some criticisms can be found in Koldinská, K. *Voluntary pensions in the Czech Republic*. International Standard-Setting and Innovations in Social Security. 1. vyd. Alphen aan den Rijn: Kluwer Law International, 2013.

as of 1.1.2013. Not even one year later, in autumn 2013, parliamentary election changed distribution of political power and left-wing parties formed together a new government. As soon as the new Minister of Labour and Social Affairs has been installed, she declared, that she would immediately start working on abolishing the pension saving system. An expert group has been established in order to work further on some aspects of pension reform, including removal of pension saving system. This situation brought quite some hesitation regarding legal certainty of current clients of the system (some 80,000 people) and also just expectations of all citizens and inhabitants in the field of social rights as such.

In order not to finish with a negative judgement of possible future, it should be underlined, that currently, there are some good tendencies regarding social inclusion, with a special focus on Roma people.<sup>50</sup> In this regard, a new, still missing, act on social housing shall be prepared soon and it shall be also worked on some amendments of social assistance legislation and employment legislation.

Last, but not least, some steps towards better harmonising of family and working life shall be soon taken, including e.g. the new legislation on so called “child groups”, which should in a way compensate the dramatical lack on places for small children in kindergartens etc.

All in all, there are some good perspectives for future social security rights, while adopting changes which would be systematic, with positive general long-lasting effects on all fields of social law, remains a great challenge for the Czech legislator.

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<sup>50</sup> Not only the Minister of Labour and Social Affairs, but also the Minister for Human Rights both declared, they would pay special attention to social inclusion issues and on real and long-lasting integration of socially excluded Roma communities in some problematic regions of the Czech Republic.

# ESTONIA, REPUBLIC OF

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## THE RIGHT TO SOCIAL SECURITY IN ESTONIAN CONSTITUTION

*Assoc. Prof. GAABRIEL TAVITS*

### ***1. Historical development and concept of the protection of the social rights***

#### *1.1. The concept of social rights*

The concept of social rights is not uniquely developed in Estonian legal system. In the professional literature, social rights are classified in compliance with the broader and narrower terms. The right to an adequate standard of living is considered to be the core of the social rights, which requires as a minimum everyone to be provided with the opportunity to use the rights necessary for existence such as the right to adequate food, clothing, housing, and adequate care. Certain rights of a social nature are necessary to ensure these rights, such as the right to property, the right to work, and the right to public assistance.

When speaking of the social rights in the narrower terms, the following social rights are brought as example in Estonian professional literature: the universal right to public assistance (Constitution (hereinafter PS) Art. 28 (2)), special obligation to care for families with a large number of children and persons with disabilities (PS Art. 28 (4)), the right to protection of health (PS Art. 28 (1)), voluntary and local government welfare services promotion (PS Art. 28 (3)) and assistance in finding employment (PS Art. 29 (3)).<sup>1</sup>

However, other social rights have been recognized, as well, such as the right to freely choose employment (Art. 29), equal treatment of persons (Art. 12), the state's obligation to provide free legal aid.<sup>2</sup> This section reviews the fundamental social rights more broadly, not just the obligations for state assistance as of Art. 28. The rights concerning different field of social security is the main topic of the current chapter.

Fundamental social rights are based on the principle of human dignity, just like other fundamental rights. The Constitution requires the state to guarantee everyone a decent subsistence minimum. A social right is the right of everyone to receive state benefits. The state is also obliged to take action to ensure these benefits for everyone.

Standards adopted for social purposes in the Constitution may be of dual nature: to guarantee either general national objectives as well as individual subjective rights. It is generally accepted that the legislator is provided with considerable leeway to safeguard social rights, and the courts have no rights to make socio-political discretionary decisions when evaluating the substance of individual subjective rights.

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<sup>1</sup> See R. Alexy. *Fundamental Rights in the Constitution of Estonia*. *Juridica*, special edition, 2001, pp. 60, 44. T. Annus. *State Law (Riigiõigus)* 2006, p 442.

<sup>2</sup> T. Annus. *State Law (Riigiõigus)* Tallinn 2006, p 43.

## 1.2. Historical development<sup>3</sup>

The historical development of social rights in Estonia will be observed during the 1st period of Estonian statehood, i.e. 1918-1940, and since regaining of independence in 1991.

The Republic of Estonia was proclaimed on 24 February 1918 by the Salvation Committee, declaring in public the “Manifesto to the Peoples of Estonia (the Declaration of Independence)”. Until the adoption of the Constitution, the popularly elected Constituent Assembly decided to draft the so-called Provisional Constitution. On 4 June 1919 the Constituent Assembly adopted the law “The Principles of Temporary Procedure of Estonian Government Act”, which entered into force on 9 July 1919. The law stated that Estonia was an independent and democratic republic. This law, like the manifesto, contained a long list of fundamental rights and freedoms. Social rights were added as follows: The right to a free elementary education in a native language, the right to employment, the right to decent upkeep on statutory basis, the right to obtain land for cultivation and housing, the right to protection of motherhood and labour rights, the right to state aid for youth, old age, disability and accidents.

On 15 June 1920, the Constituent Assembly adopted the first Constitution of the Republic of Estonia, which entered into force on 21 December of the same year. The Constitution of 1920 was one of the most democratic constitutions in Europe at that time. The Constitution was an explicit demonstration of the idea of the rule of law. The Constitution of 1920 was influenced by both the French Declaration of the Rights of Man and the Citizen, and the Constitution of the Weimar Republic. We have to highlight the comprehensive catalogue of the fundamental rights of the citizen which contained more than twenty fundamental rights: equality of all citizens (Art. 6), inviolability of the home (Art. 10), freedom of conscience (Art. 11), freedom of speech (Art. 13), privacy of correspondence (Art. 14), freedom to move and find a place of residence (Art. 17), freedom to hold meetings, freedom of association and freedom to strike (Art. 18), freedom to choose a profession and freedom to be engaged in business (Art. 19), the right to private property (Art. 24). As for social rights, one of the key provisions was Art. 25, under which the organization of the economic life in Estonia had to meet the principles of fairness, with the aim of promoting decent upkeep pursuant to appropriate laws, which were intended to guarantee obtaining arable land, housing and access to employment, the protection of motherhood and labour rights, as well as state aid for youth, old age, disability and accidents.

The economic crisis of the early 1930s and the absence of any system of checks and balances in the Constitution of 1920 resulted in amending the Constitution in 1933. Since the changes were substantial and related primarily to the system of state authorities, it is also called the Constitution of 1933 in legal literature. The Constitution Amendment Act abolished parliamentarism and replaced it with a peculiar form of dualism. Despite important changes, the chapter of the Constitution of 1920, concerning the fundamental rights of the citizens, remained in force (Chapter 2). In 1937, a new Constitution was adopted. The main list of the fundamental rights was retained, including fundamental social rights. A number of social rights were elaborated and specified in the new Constitution. Separate provisions were added to protect the family: the family is under the protection of the state, protection of mothers and children shall be managed by law. Special care shall be taken for families with a large number of children (Art. 21). Assistance from the state in finding work (Art. 27) was provided, as well as organizing help to aged or disabled citizens or those living in deprivation; pursuant to statutory provisions of social security and social welfare (Art. 28). The so-called fundamental rights development clause was stipulated in Art. 33 of Fundamental Rights Chapter – the list of the citizens' rights and obligations in this section does not eliminate other rights and obligations arising from the spirit of the Constitution or in accordance with the Constitution.

The Constitution of 1937 sought to further develop the ideas of liberalism and individualism, while emphasizing the solidarity with the state. That is the reason why social aspects were less emphasized in the Constitution, and the primary attention was focused on the collective nature of fundamental rights,

<sup>3</sup> See H. Siimets-Gross. Social and Economic Fundamental Rights in Estonian Constitutions Between World Wars I and II: Avanguard or Rearguard of Europe. *Juridica International*, 10, 2005, pp 135-143.

including social rights, where an individual is laid on responsibilities towards the country and his/her fundamental rights shall be limited at that.

Finally, by 1940, the Constitutions had provided for establishment of quite a comprehensive system of social law in Estonia, which was divided into the law of social care, the law of healthcare, and the law of social insurance. Here are some examples of the laws: the Welfare Act, the Public Health Administration Act, the Livelihood Act, the Act on the Prevention and Control of Infectious Diseases, etc.

The first period of Estonian independence ended on 17 June 1940 when Estonia was occupied by the Soviet Union and was incorporated into the Soviet Union for more than fifty years.<sup>4</sup>

On 20 August 1991, the Republic of Estonia was restored de facto on the basis of legal consistency. The Constitutional Assembly was formed to draft a constitution; the draft constitution was approved by the Supreme Council of the Republic of Estonia on 20 April 1992 and was decided to put to a referendum. The referendum for the adoption of the Constitution took place on 28 June 1992. This Constitution entered into force on 3 July 1992.

The minimal model of fundamental social rights has been realized quite convincingly in the Constitution.<sup>5</sup> The Constitution provides for social rights such as:

- 1) the general right to state assistance (Art. 28 (2));
- 2) special care of families with a large number of children as well as people with disabilities (Art. 28 (4));
- 3) the right to protection of his or her health (Art. 28 (1));
- 4) promotion of the provision of voluntary welfare services and the provision of welfare services by local authorities (Art. 28 (3));
- 5) assistance for persons who seek employment in finding work (Art. 29 (3));

## 2. *Legal essence of social rights*

Social rights are rights under which an individual has the right to demand something from the state. Social rights force the state to take active steps and provide individuals with benefits. The protection of social rights is based on the idea of assistance to and care for those who are unable to adequately provide for themselves on their own.

Social rights constitute rights to something that an individual could also receive from private persons if he or she had sufficient funds and if the market had an abundant supply.<sup>6</sup>

In guaranteeing social rights, the legislature has particularly extensive power of decision over the extent of benefit allocation. The great freedom of the legislature in allocating social benefits arises from the issue that these benefits have a considerable impact on economic and social policy and the establishment of the budget. If social rights are interpreted too extensively, it could lead to an increase in the tax burden and, thereby, the reallocation of funds which may cause fundamental social rights to come into conflict with other fundamental rights.

Several social rights are subject to the principle that in order to guarantee the rights it is sufficient for the government to at least have an action plan to achieve social welfare. It can be provisionally argued that the protection of social rights also exists if the courts do not order the payment of a new or larger benefit, but the legislature has already failed to allocate the existing benefit and the courts eliminate such unequal treatment.<sup>7</sup>

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<sup>4</sup> The period while Estonia was incorporated into the Soviet Union is not observed in this section. It is not possible to identify the specifics of Estonia in comparison with the developments in the Soviet Union as a whole, and ensuring the fundamental social rights in the former socialist countries during this period.

<sup>5</sup> R. Alexy. *Fundamental Rights in the Constitution of Estonia*. Juridica special edition, 2001, page 76.

<sup>6</sup> R. Alexy. *Fundamental Rights in the Estonian Constitution*. Special Edition of Juridica, 2001, pp. 76-77.

<sup>7</sup> T. Annus. *State law (Riigiõigus)*. Tallinn 2008, pp. 442-443.

Upon talking about social rights, they are often contrasted with classic civil and political rights. If fundamental liberty rights are primarily liberty rights with respect to the state, social rights are social claim rights of an individual to the positive action of the state. Therefore, social rights are rights under which each individual has the right to demand something from the state. Social rights force the state to take active steps and provide individuals with benefits. In the case of classic fundamental liberty rights, there is usually no doubt that these are subjective rights that can be protected in court. Social rights cause more disputes. The question of the extent to which the social provisions included in the Constitution should be interpreted as everyone's subjective right to claim benefits via court proceedings is highly controversial.<sup>8</sup>

In the context of Estonia, it must be considered that the violation of section 28 of the Constitution or another constitutional rule can be established by the courts even if no one's subjective right has been directly violated. In light of constitutional values, laws can also be evaluated at the general level. The Chancellor of Justice, for example, can theoretically raise an issue about the scope of social security, arguing that the duty imposed on the government under the Constitution to create universal social security has not been complied with.

In addition, it must be taken into account that if any right to social protection does not form a constitutional right, it may be an ordinary subjective right granted to an individual by law. In such an event, the question concerning the extent to which the courts have the right to intervene in decisions made by the executive must be assessed. Can the courts provide an assessment of the assistance that is needed by a specific person in a specific case? According to Estonian case law, intervention by the courts is allowed and possible.<sup>9</sup>

Although social policy is a matter of political choice to a large extent, the Estonian Constitution does not tolerate an extremely liberal social policy. Whereas the granting or refusal to grant social assistance was earlier considered the discretionary decision of the state, today this is everyone's subjective right, at least to a certain extent. Under the Constitution, social assistance is the right of people without sufficient means and not a privilege that is allocated on the basis of the free discretion of powers.

States with a functioning democracy, respect for separation of powers and impartial administration of justice consider that the rights and freedoms that can be legally realised or that can be protected in courts which will provide a final judgment thereon are binding. Provisions concerning fundamental rights whose violation cannot be established by any court have a closed nature in terms of the administration of justice. Thus they are not legally binding – simply morally or politically binding. They represent programmatic objective-setting.

The binding nature and judicial realisability of rights and freedoms depends on their content and, to a lesser extent, on their form. Based on the general understanding and practice, political rights are legally binding and judicially realisable. Judicial realisability also means the justification of courts in basing the conclusion of a judgment directly on a relevant provision of the Constitution and/or international agreement.

However, social rights are mostly closed for the administration of justice, as they are too general and too objective-setting by nature and depend on the socio-economic and political possibilities and expediency of the state, which can be decided on by the political management of the state as democratically elected and not by a court. An individual can, in principle, exercise social rights via the private sector, if he or she has the corresponding desire, means and possibilities, and in this case the liability of the state is not direct, but indirect.

The legal validity of rights and freedoms also depends on the form of the constitutional provision or on how clear and specific its wording is. The clearer the provision, the greater the possibility to realise it in court. Decisions on the judicial realisability of one or another constitutional provision are made by the Supreme (Constitutional) Court in the final stage.<sup>10</sup>

<sup>8</sup> T. Annus, B. Aaviksoo. Social Welfare as a Fundamental Right: Duties of the State, Local Governments, Family and Other Persons in Guaranteeing Constitutional Rights in the Sphere of Social Welfare. Special Edition of *Juridica*, 2002, pp. 10–12.

<sup>9</sup> *Op. cit.*, pp. 10–12.

<sup>10</sup> R. Maruste, *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse*, Tallinn 2004, pp. 242–243.



In summary of the above, the following can be observed: just like other fundamental rights, social rights guaranteed by the Constitution bind state authorities, which are required to act in accordance with the meaning and content of objectives provided for in the Constitution; they are also applicable as a means of control when the constitutionality of laws is inspected, and they can also be used as a justification in restricting fundamental rights and the substantiation of deviations from the principle of equal treatment; social rights must also be considered upon the interpretation of provisions by the authority implementing the law.

### 3. Sources of social rights

#### 3.1. National law

The hierarchy of norms in the current legal system of the Republic of Estonia is based the Constitution. According to the first sentence of Art. 3 (1) of the Constitution, the governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith. Thus, the regulations and principles of the Constitution have the supreme legal force. The Constitution is followed by acts. The acts are followed by regulations of the Government of the Republic and the ministers, and orders of local governments and other administrative bodies. In defining social rights, collective agreements, case law and common law are of less importance.

##### 3.1.1. Constitution

The Constitution of the Republic of Estonia was adopted by referendum on 28.06.1992. The catalogue of fundamental social rights in the Constitution of the Republic of Estonia of 1992 is minimal. Article 10 of the Constitution should be noted for its importance to indirectly lay down the principle of a social justice (*Sozialstaat*). Although it is not said directly in Article 10 of the Constitution that Estonia is a *Sozialstaat*, it is established in Article 10 that the fundamental rights contained in the Constitution, do not preclude other rights which are in conformity with the principles of social justice and the rule of law. Social rights are explicitly provided by Art. 27 about the protection of the family. Art. 28 that provides the right to health protection and the right to government assistance in the case of old age, incapacity for work, loss of provider, or need; and Art.29 that provides the right to freely choose his or her profession and position of employment, and state help for unemployed.

The main source of fundamental rights in Estonia is the Constitution and in particular its second chapter. Pursuant to Article 10 of the Constitution, the rights, freedoms and duties listed in the second chapter do not preclude “other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and which are in conformity with the principles of human dignity, social justice and democratic government founded on the rule of law”. This provision includes a development clause and refers in particular to the fact that the Constitution cannot be interpreted not only in the literal meaning of the text of the Constitution, but the values accepted in the Constitution should be considered more widely. Furthermore, it allows the use of the principles of human dignity, social and democratic rule of law for interpreting the Constitution.

##### 3.1.2. Laws

The legislative body of the Republic of Estonia is the Riigikogu (the Parliament). The Constitution of the Republic of Estonia adheres to two types of laws: constitutional and ordinary laws. In order to pass a constitutional law, a majority vote of the membership of the Riigikogu is required.<sup>11</sup> In order to pass an ordinary law, positive result of the voting among the members of the Riigikogu is required.

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<sup>11</sup> There are 101 members in Estonian Riigikogu, the adoption of constitutional laws requires the vote of 51 members of the Riigikogu.

Constitutional laws are set out in Art. 104 (2) of the Constitution and the said laws do not affect the social rights provided by law. Legislation in the field of social rights is abundant. No comprehensive codification of the protection of social rights is not yet established in Estonia.<sup>12</sup>

### 3.1.3. *Other regulations*

Pursuant to Art. 87 (6) and 94 (2) of the Constitution, the Government of the Republic and the minister who presides over his or her ministry, have the right to issue regulations and directives on the basis of and for the implementation of laws. Regulations and directives may also be issued by local government councils, rural municipalities and city councils. The execution of the right to issue regulations usually requires an empowering provision by the legislator. The regulations specify and determine the implementation of the laws. On the basis of self-management, the local authorities, as public institutions, have the right to issue regulations without any special empowering provision. These regulations constitute statutes.

### 3.1.4. *Collective agreements*

In Estonian legal system, collective agreements can be perceived as legal sources in employment law, but they do not represent legal sources of social rights. Collective agreements are not mentioned as a source of social rights in the Constitution. In Estonian legal system, the importance of collective agreements is relatively unimportant. In Estonian legal system, collective agreements can be entered into by the trustee to employees and trade unions. The share of collective agreements in regulating labour relations is relatively unimportant and that is the reason why collective agreements do not have a significant role in the development of social rights, neither in ensuring working conditions. Today, collective agreements can be better considered as wage agreements.

### 3.1.5. *Law of the Judge*

In Estonian legal system, the task of the judges lays in implementation of the law, not acting as a legislative institution. Pursuant to Article 146 of the Constitution, the court administers justice in accordance with the Constitution and the laws. Thus, court decisions have no effect of case law. However, implementation of law cannot be understood only in a very narrow meaning and only as mere subsuming. In order to eliminate the deficiencies of legislative standardization the courts develop existing legal scales, using the techniques of interpretation and analogy. Thus, the essence of the law of the judge lays in interpretation, specifying and further development of the law. At that, interpretation and furnishing of the principles of the Constitution are important. Most important here is the role of the Supreme Court as the highest court of the country, which acts also as the constitutional review court. So, for example, the Supreme Court has noted about the furnishing of the principles of a social justice and human dignity as the principles of the Constitution that the social justice and the protection of social rights include the idea of assistance and care to those who are not able to secure their own lives and primary needs independently and sufficiently. Their human dignity would be lowered if they were deprived of the assistance they require to meet their priority needs.<sup>13</sup> As secondary source social justice, the judicial decisions constitute the development of social law, providing more specificity and interpretation.

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<sup>12</sup> Still, Estonia has the intention to codify the matters related to social security and social welfare in a single code in order to ensure a better overview of the rights provided in Article 28 of the Constitution. See M.-L. Aasamets. *Sotsiaalõiguse korra tamise vajadus ning lähtekohad*, *Juridica*, 2010, No. 8, pp. 589-596.

<sup>13</sup> The Decision of 21.01.2004 of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-7-03, p 14.

### 3.1.6. Common law

In Estonian legal system, based on the principle of the legal basis set out in first sentence of Article 3 of the Constitution (Governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith), the approval of the common law as the source of social law, is highly problematic. Thus, common law has no significance as an independent source of social law. Upon the Constitution, for example, different social guarantees must be regulated by law (e.g. Article 28). Common law may be introduced in the interpretation of laws by courts.

### 3.2. International law

Validity of international law in the country is dependent on the regulations and conditions arising under the Constitution. Pursuant to Article 3 (1) of the Constitution, the generally recognized principles and rules of international law are an inseparable part of Estonian legal system.

The regulations concerning the validity of international agreements are set out in Chapter IX of the Constitution. According to Article 121 of the Constitution, some international treaties are subjected to ratification in the Parliament. The provisions of such agreements have priority over formal law. If Estonian laws or other acts are inconsistent with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply according to Article 123 of the Constitution. Most of the international treaties concluded by the executive authority are not subject to ratification by the Riigikogu. What is the position and the legal force of such agreements in the hierarchy of the sources of law has not been reflected in the Constitution, as well as in the existing case law. Given that these agreements are not legitimized by the Parliament, they should not have priority before the law.

International agreements, containing provisions, being sufficiently clear and specific, and targeted to regulating domestic relations, are the source of social rights.

Estonia is a party to various relevant international conventions that have provided for social rights. For example, the European Convention on Human Rights and Fundamental Freedoms, which is directly applicable, and ratified by the Riigikogu.

In terms of the social rights, there are two more important sources, the European Code of Social Security and the revised version of the European Social Charter. These two documents ensure the compliance of the social rights of Estonian legal system with the norms and principles established by the European Council.

In addition to the above-mentioned international treaties, Estonia has joined a number of universal agreements: the International Covenant on Economic, Social and Cultural Rights and Civil and the International Covenant on Civil and Political Rights. Estonia has also ratified a number of ILO conventions, but among these conventions there is no convention that concerns the issues of social security.

## 4. Circle of protected individuals – bearers of social security rights<sup>14</sup>

The general abstract notion of a bearer of fundamental rights, freedoms and duties is everyone (section 9 of the Constitution). The notions “no one” and “any person” are also used as synonyms of “everyone” in the wording of the Constitution.

“Everyone” means, first of all, any persons, natural persons, children and adults, the ill and the healthy, persons with or without active legal capacity, and citizens and non-citizens. An unborn person (i.e. a foetus) is generally not considered a bearer of rights and freedoms. Certain rights of some natural

<sup>14</sup> For more information, see M. Ernits. Holders and Addressees of Basic Rights in the Constitution of the Republic of Estonia. *Juridica International*, IV, 1999, pp. 11-31.

persons – such as children, prisoners, persons without active legal capacity, public servants, servicemen, non-citizens and persons with multiple citizenship – may be restricted under the law.

Protected persons also include a group of natural persons and various associations without passive legal capacity and non-governmental organisations that may be bearers of both individual and collective rights.

The Estonian Constitution also distinguishes:

- a) the rights of all and everyone; and
- b) the rights of citizens of Estonia.

The first group of subjects is identified using the word “everyone” and the universal content of the right. The second group of subjects is designated using the expression “citizens of Estonia” and this subject is primarily related to single political rights.

The entitled subjects of fundamental rights (bearers of fundamental rights) are those who can directly refer to fundamental rights as provisions granting them rights. In addition, in certain events legal persons have fundamental passive legal capacity. On the other hand, traditionally the state does not have fundamental rights.

Most of the fundamental rights are “everyone’s” fundamental rights, meaning that any and all persons are bearers of these fundamental rights. Everyone’s rights apply to all persons, irrespective of their age, gender, citizenship, active legal capacity or other circumstances.

#### 4.1. Citizens

Under section 8 of the Constitution, every person for whom one parent is a citizen of Estonia is entitled to Estonian citizenship. Citizenship of the Republic of Estonia is acquired by birth or naturalisation.

Based on historical tradition, a distinction is made between human rights and civil rights. Citizenship or belonging to a state’s nation creates closer ties with the state along with the special rights and duties accompanied therewith. The Constitution grants certain fundamental rights to citizens, e.g. section 28 of the Constitution provides the right to assistance in the case of need and subsection 29 (1) the right to freely choose a position of employment and area of activity. This does not mean that aliens have no fundamental rights: many rights specified in the Constitution are human rights that extend to all persons and that the state must guarantee, irrespective of citizenship.

#### 4.2. Aliens

According to the Constitution, social rights are also guaranteed to aliens, unless the Constitution prescribes otherwise. The rights provided for in the Constitution as the rights of citizens extend to non-citizens in two ways. Firstly, the Constitution contains a reference to some of these rights saying that they also extend to aliens unless otherwise provided by law. Aliens can only be deprived of these rights under the law if this is necessary in a democratic society. The notation “*unless otherwise provided by law*” substantially indicates that Estonian citizenship may be an additional criterion under which the legislature may prescribe specifications.

As an important requirement in terms of qualifying as an alien, the Constitution provides that they must be in Estonia. In most cases it is sufficient if an alien is on Estonian territory.

The notion of an alien is not included in the Constitution. In accordance with the Aliens Act, an alien is a person who is not an Estonian citizen. Aliens are directly mentioned in respect of the fundamental rights included in the Constitution in the following instances: subsection 28 (1) of the Constitution expressly prescribes that every citizen of Estonia is entitled to state assistance in the case of old age, incapacity for work, loss of provider, or need. Unless otherwise provided by law, citizens of foreign states and stateless persons in Estonia enjoy this right equally with citizens of Estonia. Subsection 29 (1) of the Constitution reads that every citizen of Estonia is entitled to choose his or her area of activity, profession and position of employment. Unless otherwise provided by law, citizens of foreign states and stateless persons in Estonia enjoy this right equally with citizens of Estonia.

## 5. *Social security rights*<sup>15</sup>

### 5.1. *Principle of social justice*

According to § 10 of the Constitution of the Republic of Estonia, the basic principles of the constitution are human dignity and social justice (Sozialstaat). The basic social rights can be derived from these principles, including also the ones mentioned in Constitution § 28. The content of social rights is to prevent the damage proceeding from the realisation of social risks and to mitigate the consequences of the occurred damage, and by this ensure the dignity of human life. A dignified life has to ensure that the immediate needs of a human being (e.g. food, clothing, hygiene, health care, transport, and housing) are met and a person can actively and without being embarrassed take part in everyday life. When the everyday management of the human being is ensured, human dignity in general is guaranteed. When a human being can lead a dignified life, also the stability and unity of the society is ensured.

Based on the fact that the constitution proceeds from the autonomy and freedom, a human being himself/herself is responsible for ensuring dignified human life. Among other items of the Constitution, a variety of rights are ensured as follows e.g § 19 guarantees the right to free self-realisation, § 29 ensures the right to freely choose the area activity, profession and position of employment, § 32 the property of every person, § 34 the right to inviolability of family and private life. If a person is unable to cope with his/her management, according to Constitution § 27 subsections 3 and 5, it is the duty of the solitary family (the natural or horizontal solidarity of the family) to help and provide for them. If a family is unable to provide for the needs of a family member adequately, the society has to provide for the person's needs partly or at full. Hence, the state's duty to ensure dignified human life by providing for the basic social rights is considered only as the third option.

Briefly, the relevant content of the principles of a social justice declare that a human being should not be left alone in trouble. The state has to take care of those citizens, who are not able to provide livelihood and ensure their subsistence. When talking about the principles of the social justice, the objective and subjective dimensions have to be differentiated.

The objective obligations of the representatives of the state power proceed from the principles of the social justice. When making decisions based on social-political choices, the legislator has to act in compliance with the nature of the principles and basic rights of the Constitution. As the measures applied for social purposes include the inevitable re-distribution of benefits, the objective dimension of the social justice provides additional statements to justify for example the restrictions on the right of property (PS § 32) or taxation (PS § 113).

As far as the subjective dimension of the social justice is concerned, the first sentence of § 28 subsection 2 describes the state's duty in regard to a person in need "entitled to state assistance in the case of need, the prejudice of which gives the right to have recourse to the courts and the court has the right to check the compliance of the act providing social rights with the Constitution".<sup>16</sup>

According to the principles of human dignity, the minimum means of subsistence cover the immediate needs, including adequate food and clothing, which correspond to the prevailing weather conditions, bed for sleeping in a room heated during a cold season, basic toiletries and washing facilities, basic medical care and education, which enables to cope with life. The basic right to dignified subsistence proceeds from the combined impact of the principles of human dignity and the subjective dimension of the social state. The increase of general welfare may have an impact on the re-distribution of the level of minimal needs, from which we cannot exclude the possibility that due to the development of the society the social means the level of subsistence may also rise at some extent.

<sup>15</sup> About the Estonian social security system see also: L.Leppik. Estonia, in D.Pieters. The social security systems of the states applying for membership of the European Union, Intersentia 2003, pp44-58. T. Dijkhof. International social security standards in the European Union. The cases of Czech Republic and Estonia. Intersentia, 2011, pp 195-295.

<sup>16</sup> The Decision of 21.01.2004 of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-7-03, p 16.

## 5.2. Right to health protection

The state has to fulfil several obligations proceeding from the person's right to health protection and the international legislation.

According to Constitution § 28 subsection 1, the state is obliged to protect the mental and physical health of indefinite number of citizens by applying preventive measures. The state has to apply measures to ensure that people's living environment is healthy and safe (e.g. quality of the air, safe noise level, food safety; protection from radiation; protection from asbestos). Illnesses (e.g. contagious diseases, occupational diseases, depression) and injuries (e.g. caused due to a dangerous toy) and death (e.g. lethal traffic accidents) have to be avoided. Measures applied to ensure healthy and safe living environment (e.g. requirements established to, water quality, the safety of the passenger transport, waste management; prohibition provided in the legal act to handle narcotics and psychotropic substances and a corresponding punishment for the breach of it) have to be reflected in legal acts. As the established requirements are useful only when they are followed, the efficiency of state supervision has to be focussed on.

Besides the obligation to ensure a healthy living environment, the state has to apply various preventive measures in order to guarantee the possible highest level of citizens' mental and physical health (e.g. vaccination, health education). Focussing on the citizens' health and the application of preventive measures is considered important by the United Nations Organisation, the European Council and on the level of the European Union. In addition, the state has to create and operate a health care system via which a citizen as an access to a high quality health service in case of an illness or injury without an unreasonable long delay, and a substitute income in case of temporary inability to work. The state is obliged to create a collectively financed social welfare system, which ensures an access to the health service to the majority of the population, including economically non-active citizens (including children, unemployed drug addicts, people permanently incapacitated for work). The obligation of partial financing of the health service is not excluded; however, the size of the charged fee has to ensure a citizen the economic availability of the service. The state has to create a social welfare system to provide substitute income to people in case temporary inability to work is caused to an economically active person due to an illness or injury.

Constitution § 28 states the person's right to protection of health. Although according to the mentioned paragraph the right to health protection is established, it is not clear whether the right to health protection also includes the right to health insurance. In Estonia it has to be kept in mind that the right to health protection may be ensured in two different ways. On one hand and according to the Health Services Organisation Act,<sup>17</sup> every person has a right to assistance in case of emergency. The emergency aid is financed from the state budget. On the other hand, in order to receive full health insurance protection, the person must be insured or to be viewed equal to an insured person.<sup>18</sup> An insured person is a person who pays for or for whom a part of social tax (the health insurance part) is paid in the health insurance fund. A person equal to an insured person is covered by health insurance according to the law, for (children, pensioners, pregnant women).<sup>19</sup>

Health insurance protection is ensured to all Estonian citizens and foreigners, who stay in Estonia and have at least a temporary residence permit or a temporary right of residence. In case of the above-mentioned persons the same restriction is valid – either the employer pays the social tax for the health insurance or they enter into an insurance agreement with the Health Insurance Fund. Emergency care is guaranteed to all people, who happen to be on the territory of Estonia, and which provision does not depend on the basis that allows them to be of the territory of Estonia. Therefore, it may be stated on the basis of the Constitution that the right to health protection is ensured to a person, but the above-mentioned right does not automatically mean that the Constitution guarantees the right to health insurance to any person.

<sup>17</sup> § 5 and 6 Tervishoiuteenuste korraldamise seadus (Health Services Organisation Act, (english translation available: <http://www.riigiteataja.ee>), RT I 15.04.2014,5,

<sup>18</sup> §5 Ravikindlustuse seadus (Health Insurance Act, english translation available: <http://www.riigiteataja.ee>), RT I 2002,62,377

<sup>19</sup> According to the data of Estonian Health Insurance Fund, the number of people subject to health insurance as of 31.12.2013 was 1.23 million. Taking into account the fact that according to the last census carried out, the population in Estonia was 1.3 million people, the number of people not covered by health insurance is about 75000.

### 5.3. Pension insurance

A person's constitutional right to state pension insurance proceeds from Constitution § 28. According to Constitution § 28 subsection 1, everyone is entitled to state assistance in the case of old age, incapacity for work, loss of provider, or need. The categories and extent of the assistance, and the conditions and procedure for its allocation shall be provided by law.

Estonian pension insurance consists of three different pension systems. Firstly, there is the general state pension insurance, which provides aid to a person in four cases as follows: due to age (old age pension), incapacity to work (pension for incapacity to work), the loss of provider (survivor's pension) and the minimal pension insurance, which is the national pension.<sup>20</sup> The conditions for receiving the state pension are provided in the State Pension Insurance Act. To ensure the better protection of the population at the retirement age, the Estonian parliament established an additional pension scheme – mandatory funded pension already in 2002. The mandatory funded pension is not ensured by the state, but is managed by different private pension funds. The mandatory funded pension is received on condition that the person has reached the old-age for receiving old-age pension, established by the state.<sup>21</sup> The third type of the pension constitutes special pensions. Special pensions are financed from the state budget and are paid to certain people for having worked in specified areas. Special pensions are established to some groups of employees who have worked in various public sectors (police, prosecuting authority, defence army, rescue service), and some people working in the private sector (hard work performed in especially hard working conditions, superannuated pension). Based on the above-described information, Estonia guarantees the constitutional right to state assistance in the case of old age, incapacity for work, loss of provider.

According to Constitution § 28, the mentioned assistance is guaranteed to Estonian citizens, however, according to Constitution § 28 subsection 2, the assistance may be extended to foreign citizens. According to different legal acts dealing with the pension insurance, the payment of the state pension is guaranteed to permanent residents of Estonia and to persons and individuals living on the territory of Estonia with a temporary right of residence or residence permit. Hereby, the problematic issue of the accession in the mandatory pension fund has to be solved. According to the Funded Pensions Act,<sup>22</sup> it is not stated whether the foreign citizens coming to work in Estonia can join the described system or not. Concurrently, as the state pension system is ensured, the described situation does not violate the foreigners' rights either. As far as the foreign citizen stays legally on the territory of Estonia, he/she is granted the benefits received via the state pension insurance in the case of old age, incapability for work and the loss of provider.

### 5.4. Social protection of the unemployed

As far as the social protection of the unemployed is concerned, the Constitution of Estonia provides no certain standards. The Constitution only establishes that the state deals only with the retraining of the unemployed. However, the Constitution does not specify what is meant under it. According to the Constitution, the state has to create a system, which guarantees the unemployed effective training and retraining courses. The Constitution does not establish which kind of benefits have to be granted to the unemployed by the state. Hence, according to the Constitution, the state has to guarantee the unemployed only the necessary training and retraining courses and services.

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<sup>20</sup> National pension is a kind of pension, which ensures minimal pension insurance to all people in Estonia. National pension is paid in case material conditions for receiving a pension (age, loss of ability to work, loss of provider) are met but qualification requirements (qualification period) are not met. In addition to the above-said, the payment of national pension is guaranteed in case when a person has reached the age of 65 and has lived in Estonia before applying for the pension at least five years.

<sup>21</sup> According to the State Pension Insurance Act, the age of retirement for men and women is 63 years, starting with the year 2016 the retirement age starts rising until the year 2022, when both – men and women may retire at the age of 65., see § 7 (2), Riikliku pensionikindlustuse seadus (State Pension Insurance Act, available: <http://www.riigiteataja.ee>), RT I 2001,100, 648.

<sup>22</sup> Kogumispensionide seadus (Funded Pensions Act), RT I 2004, 37, 252.

At the same time, it may be stated based on the Constitution that the unemployed have a right to two types of assistance: firstly, the substitute income during the period of unemployment; and secondly, the assistance for returning to the labour market via a variety of labour market services. The state has to guarantee an unemployed person a substitute income from the collectively funded social insurance scheme, which in case of unemployment guarantees the majority of economically active population the right to receive adequate social insurance compensation during a reasonable period. If a person has not joined the social insurance scheme and gets no substitute income or the period of paying the compensation has ended, and the person has no money for living, social assistance has to be allocated to the person. The state may exclude social assistance in monetary form if the family is able to provide for the person.

Constitution § 29 subsection 3 part two establishes the state's obligation to provide assistance to a person seeking for work. This provision together with Constitution § 28 subsection 1 and 2, gives a person the right to claim assistance from the state for a professional counselling service for re-entering the labour market. It is primarily the state's duty to create labour market services, and ensure their quality and purposefulness. It does not exclude the option that private persons may provide labour market services, but means that the state is obliged to ensure the existence and availability of these services (economic, physical, temporal) and their compliance with the needs of the labour market.

### 5.5. Protection of family

The constitutional protection of family is endured by Constitution § 27. According to this section families with children are under state protection. The Constitution itself does not specify what the state protection actually includes. In case of families with children, the state may provide direct assistance (state family allowance) or indirect assistance (e.g. deduction of expenses related to bringing up children from the person's tax return). In addition to the above-mentioned services provided by state, the assistance of state to families with many children holds an important place. State benefits are established in the State Family Benefits Act.<sup>23</sup> In addition, also the parental benefit provided by the state has to be pointed out.<sup>24</sup> The aim of the parental benefit is to give a parent an opportunity to stay at home with the child until the child is 18 months old. The size of the benefit is calculated from the employee's salary of the previous year. In other words – a parent has a right to be at home with the child and receive a benefit, which size equals to her/his salary. For those people who have no salary the state has fixed a minimum benefit, which equals to the minimum monthly salary in the country.

Family obligations include the responsibility to take care of the child and to bring him/her up until he/she is 18 years old, and taking care of adults who are incapable of taking care of themselves. The role of the state in the family management is mainly stated in the fact that the state ensures services, which support family life and, provides family income supplement. Proceeding from the international law, the state has to pay family or child benefits, ensure certain services (e.g. baby-sitting service), take care of a child without parental care, arrange care of an adult family member, etc. When paying compensations, the state may consider the family's need for assistance, but also pay them universally without evaluating the need for assistance. The only important fact is that the payable benefits should form a significant addition to the income of numerous families. When a family is not able to cope, social assistance, including the payment for social services, has to be provided.

According to Constitution § 28 subsection 4, families with a large number of children as well as people with disabilities enjoy special care of the national government and of local authorities. It means that both – the state and the local authorities have to pay special attention to families with a large number of children and people with disabilities. This has to be considered upon the creation of legislation and its application.

The mentioned standard is based on the fact that having a family with a large number of children and people with disability may face significant obstacles and their realisation of human dignity and other basic

<sup>23</sup> Riiklike peretoetuste seadus (State Family Benefits Act), RT I, 22.12.2013, 2.

<sup>24</sup> Vanemahüvitise seadus (Parental Benefit Act), RT I, 10.01.2014, 14.



rights and freedoms may be hindered. Firstly, the social risks depending on a certain situation may cause expenses, which a person may not be able to bear unless becoming subject to extreme poverty. Secondly, the mentioned social risks may cause factual obstacles to the realisation of other basic rights, freedoms and obligations (e.g. mobility disability may hinder the right to choose a profession or a working position as provided in Constitution § 29 subsection 1).

Having many children and taking care of them causes major expenses and may hinder earning livelihood, because parents have to give up working partially or at full extent in order to care for the family. Therefore, the families with numerous children are subject to the probable realisation of the possible risk of becoming poor. According to European Social Charter (Revised) article 12 and 16, among other things, to avoid families with numerous children becoming extremely poor, the state has to provide them with appropriate child benefits.

## **6. Protection of social security rights**

### *6.1. Content of protection*

#### *6.1.1. Public authority with competency to restrict social freedoms*

As mentioned under sources of social rights, the legislature is primarily competent to exercise the legal regulation of social freedoms under the corresponding provision delegating authority. The Constitution also prescribes competency for adopting such legislative acts. Article 10 of the Constitution includes a clause on the restriction of fundamental rights.

#### *6.1.2. Principle of proportionality and other restrictions*

The Supreme Court has embraced the principle of proportionality as a general principle applicable in a state governed by the rule of law. The principle of proportionality requires that the means applied must correspond to the desired outcome. The principle of proportionality is a significant criterion in restricting fundamental rights.<sup>25</sup>

The principle of proportionality is closely linked with discretionary power – the duty to take into consideration both private and public interests and other circumstances in a specific case. It is clear that if the executive or courts receive discretionary power upon the application of a provision, they are required to consider the specific circumstances. However, disputes have emerged due to an issue as to whether the principle of proportionality requires that the authority (the court or the executive) applying the law upon restricting personal rights must receive discretionary power or whether the law serves as a basis for establishing the rules requiring the application of definite legal consequences in the case of certain factual circumstances irrespective of the conditions of a specific case.

### *6.2. Abuse of fundamental social rights*

The Constitution of the Republic of Estonia does not contain a direct prohibition on the abuse of social rights. Section 19 of the Constitution provides that everyone has the right to “free self-realisation”. The Supreme Court has not attempted to define the notion of free self-realisation. The case law of the Supreme Court, according to which the right to free self-realisation includes very different rights, refers to the broad scope of protection of this right. If subsection 19 (1) means a general liberty and personality right, this also means that all other fundamental rights can be restricted to protect this right. Under subsection 19 (2), everyone must observe the freedoms of others and the law provides the possibility to restrict everyone’s rights to protect subsection 19 (1). Nevertheless, restrictions must be prescribed by

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<sup>25</sup> T. Annus. *Riigiõigus*, Tallinn 2006, p. 106.

law and the law must be necessary in a democratic society. Subsection 19 (1) of the Constitution does not considerably diminish the meaning of other fundamental rights.<sup>26</sup>

Subsection 19 (2) of the Constitution includes the general duty to respect and observe the rights and duties of others. Secondly, subsection 19 (2) of the Constitution also contains a general duty to obey the law. This duty entails all provisions that are in accordance with the Constitution. Subsection 19 (2) of the Constitution finally stipulates the triple impact or validity of fundamental rights in mutual relations between private individuals.<sup>27</sup>

At the same time, the Constitution contains the government's duties to protect and assist and possibilities to restrict fundamental social rights. If a fundamental right imposes an active duty on the state, the general principles of the protection of fundamental rights are analogous to liberty rights. The scope of protection of fundamental rights must be determined and thereafter it must be assessed whether the violation of the scope of protection is justified.

As in the case of liberty rights, the violation of social rights does not necessarily constitute a violation of fundamental rights. A fundamental right may be restricted if this is necessary in a democratic society. The economic possibilities of the state, for example, establish important restrictions on the government's duty to protect and support. For instance, Article G of the amended and revised European Social Charter prescribes that restrictions can be established on the rights protected under the Charter for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals.

In establishing substantial restrictions, the Riigikogu (i.e. the Estonian parliament) must take into account the principle according to which the restriction on fundamental rights must be necessary in a democratic society. In assessing the scope of duties to protect and support or fundamental social rights, the legislature has quite extensive freedom of discretion. Courts may not make social and political discretionary decisions in assessing the correctness of restrictions on subjective rights.

### *6.3. Possibility to exercise fundamental social rights guaranteed under the Constitution without the intervention of the legislature*

Since fundamental freedoms can also be realised without the intervention of the legislature, the realisation of fundamental social rights without the intervention of the legislature is associated with fundamental social rights in the narrower meaning and also with the principle of equality. Although special literature is based on the fact that, in principle, active intervention by the legislature is necessary, the idea that the realisation of social rights is also possible without the intervention of the legislature is supported.

### *6.4. Legal bases of, prerequisites for and limits of social benefits*

Pursuant to subsection 28 (4) of the Constitution, everyone is entitled to government assistance in the case of old age, incapacity for work, loss of provider, or need. The law provides for the conditions of receiving benefits. Thus, the Constitution stipulates the requirement under which social benefits can only be established and changed under the law. Section 113 of the Constitution reads that national taxes and compulsory insurance payments are established by law. The funds prescribed for financing social benefits arising from said principle must be set out by law.

Taking into account the budgetary prerequisites and restrictions referred to above, it arises from the foregoing that the courts cannot guarantee social benefits, at least in cases that entail a decrease in public revenue or excessive expenses.

<sup>26</sup> *Op. cit.*, pp. 256-257.

<sup>27</sup> Comments to the Constitution, p. 201.

### 6.5. Sanctions applied in the case of omissions of the legislature and administration

The realisation of the majority of social rights still presumes that active steps will be taken by the government and, above all, by the legislature. As in other Member States of the European Union, the Constitution of the Republic of Estonia does not recognise legal measures that provide the possibility of forcing the legislature to take active steps. At the same time, it is possible to contest a situation in court where the government or local authority has failed to issue a certain legal act.

If legislation of general application is not issued, a person can claim compensation for damage caused due to the failure to issue the legislation. Under section 14 of the State Liability Act, a person may claim compensation for damage caused by legislation of general application or by failure to issue legislation of general application only if the damage was caused through a significant violation of the obligations of a public authority, the legal provision forming the basis for the violated obligation is directly applicable and the person belongs to a group of persons who have been specially injured due to the legislation of general application or by failure to issue the legislation of general application.

The court can sanction the failure of the administration to take positive measures to establish fundamental social rights regulated by the Constitution and laws indicating that the omissions of the executive are considered unlawful. These omissions of the administration may also lead to the liability of the administration.

### 6.6. Principle of equality and extension of social benefits

Neither special literature nor case law express answer the question as to whether, relying on the principle of equality, the courts can extend benefits prescribed to a certain group of persons to individuals to whom the benefits are not prescribed under the provision of equal treatment. Current case law has had to engage in the application of the principle of equal treatment on the basis of age in disputes related to health insurance, but no common opinion has been formed as to whether the circle of recipients of social benefits can be extended upon the application of the general principle of equality.

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# FRANCE

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## THE FRENCH SOCIAL SECURITY SYSTEM

*Ms ELIANE CHEMLA*

### ***1. The history of a pragmatic system***

Before outlining the French social security system, the difference between two complementary principles that together form social protection as a whole must be introduced: the principle of insurance and the principle of solidarity.

Throughout its history, the social security system has melded these two principles together unequally, due to both the circumstances under which it was founded and the changes that have taken place within the society that it is meant to protect. To summarize in broad terms how it came about, it may be said that it was founded with a view to achieving universal solidarity, leading to the creation of today's two-sided social protection system: insurance for those who are able to afford it and assistance for those who cannot. While this simplified presentation above all helps understand the structure of the system, in reality it is not as straightforward.

Generally speaking, the principle of insurance is based on professional solidarity among workers of the same category, for the most part financed by contributions from insured persons, covering risks and providing benefits when an insured risk occurs. Due to its nature of solidarity, this insurance is compulsory.

The principle of assistance is based on national solidarity and is aimed at providing coverage for everyone by relying on public financing. Assistance benefits are offered to those in need of them, regardless of whether they have contributed financially, and therefore are secondary in nature.

At the beginning of the nineteenth century, the economy developed in such a way that charities, mostly run by churches, became ineffective. Up to that point, they had provided aid to poor people and those in situations of need. Gradually, specific protection systems took root, believed to be the forerunners to today's social security, which combined elements of assistance and welfare. These professional associations, which were referred to as "mutual benefit societies", insured their members in exchange for modest contributions to cover sickness benefits, funeral costs and pay out a retirement pension if they had sufficient financial reserves. They did not have a regulatory framework until 1852 when they were recognized by a decree enacted by Louis Napoleon Bonaparte. In 1898, risk coverage was extended to maternity and children. Following the birth of social security, these schemes became "mutual insurance companies", forming part of insurance economics.

At the same time, national solidarity became established in society. Since 1893, a law had been in force that provided free medical assistance to all citizens who were sick but did not have sufficient resources. At the dawn of the twentieth century, a national social aid system for children and assistance measures for disabled and ill, elderly people were implemented.

Gradually, these mutual benefit societies were absorbed into the public domain, having before been private, independent and voluntary: subjective and individual social aid measures, enacted by law, supported the principle of national solidarity. The Act of 5 April 1910 therefore established compulsory insurance for trade and industry workers; the Acts of 5 April 1928 and 30 April 1930 established an insurance scheme against the risk of sickness, maternity, disability, old age and death for employees with work contracts. The Act of 30 April 1928 created a special scheme for agricultural workers and the Act of 11 March 1932 established benefits covering family dependants that were financed by employers.

However, it was not until the end of the Second World War that social security, which was universally popular, became a government social protection project.<sup>1</sup> The National Resistance Council incorporated in its programme “a comprehensive social security programme aimed at ensuring the livelihoods of all citizens, whenever they are not able to do so through work, managed by the representatives of the interested parties and of the State”. Pierre Laroque, the father of social security, attempted to implement this project, however it did not take off because of the will of the mutualistes in certain professions and his choice of financing. The difficulties he encountered because of this choice subsequently limited his ambitions.

The two-fold nature of the project may be attributed to the combined influence of the 1942 Beveridge Report and the Bismarckian system. Beveridge, whose aim was to expand welfare to all citizens and increase social justice, proposed the three-U rule which would guarantee total national solidarity: universality of social protection by covering all citizens and risks; uniform benefits based on individual needs and not risk occurrence; unity of state management of all social protection schemes financed by taxes. The Bismarckian system, which is mainly concerned with preventing trade union and socialist rebellions by improving working conditions, is based on the concept of insurance (compulsory coverage for eligible workers that is financed by social contributions from workers and employers and managed by the workers and employers).

### *The French social security system and the Beveridge report*

Despite declarations made by the National Resistance Council, the French system moved away from the model that it had wanted to adopt, not only for political reasons but also due to existing professional companies.

1. Unity was not achieved. While the division into branches was not made official until 1967, social coverage was divided from its inception, with each branch corresponding to a risk, meaning that the concept of insurance was given more importance than “insuring the livelihoods of all citizens”. It was managed by several specialized funds, each covering a risk (for example old age, illness, maternity).

The organization of social security into schemes based on professional affiliation reinforced this approach. The special schemes that existed before the war (including mining, the railway company SNCF and civil servant schemes) were retained. An agricultural scheme was added, along with other independent schemes (including for traders, craft trade workers and liberal professions) based on profession, because of their resistance to the widespread introduction of the scheme set up in 1946.

2. The universality called for by the National Resistance Council differed from its original intention, moving away from the Beveridge model. The concept based on professional affiliation prevailed over one based on citizenship. However, the instigators of the scheme believed in its universality, and considered that the professional schemes would in time provide the entire population with insurance, since they were convinced that economic development would gradually create jobs for everyone.

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<sup>1</sup> The Ordinance of 4 October 1945 provided for a coordinated network of funds instead of multiple organizations, however it has never become an administrative entity.

The Ordinance of 15 October 1945 related to sickness, maternity, disability, old-age and death risks.

The Act of 22 August 1946 extended family benefits to the majority of the population.

The Act of 30 October 1946 incorporated compensation for occupational accidents with social security.

The Act of May 22 1946 suggested the principle of universal coverage for the entire population but self-employed and non-agricultural professions were against it.

This particular form of universality remains only partially true, however:

- Parts of the schemes based on professional affiliation still exist. The result is that employees have different benefits because they are not affiliated with the same scheme (the debate on the differences between pension schemes continues today).
- Risk coverage for the unemployed is identical, provided by an assistance scheme (either at the local or national level) that is financed by taxes. The economic crisis that took place at the end of the 1970s caused the assistance scheme to expand. Nowadays it forms an integral part of social protection along with the minimum income benefit established in 1988, the income of active solidarity established in 1999, and universal health coverage implemented in 2000, all much more in line with the Beveridge concept of covering needs.
- Not all risks are covered. The risk of unemployment, which was not an issue when the system was created as there was a workforce shortage, was not incorporated in social security. Unemployment insurance was established later in 1958 and to this day, its financing and management remain independent of social security.

All in all, there is universal coverage, from the perspective of both the population and social risks, but this came to be via several successive stages based on different concepts. These are the elements of this universal approach with French characteristics.

3. The principle of uniformity was abandoned by the founders of the French social security programme because they wanted the benefits, referred to as “replacement income”, to ensure the same standard of living as that prior to the risk occurring, which is why they remain separate, like individual resources. Social contributions and benefits are therefore dependent on prior earnings, which is why they are referred to as “replacement income”. Inequality is, however, reduced by the wide range of contributions and benefits.

While none of the three U-rules have been fully embodied, the French model has retained parts of all Beveridge’s main principles.

### *The French system and the Bismarckian model*

As we have just seen, where the system diverges from Beveridge’s recommendations, it moves closer to the Bismarckian model:

- Social contributions from both employees and employers represent the point of entry, whereas taxes finance the solidarity and minimum social benefits. During the course of history, salary contributions have dropped below what is required to cover expenses during periods of increased unemployment, which in turn increases the proportion of taxes needed to finance social protection. Despite this, social contributions still cover more than 60 per cent of revenues: social security continues to be more insurance-oriented than assistance-related and is still based more on mutualizing risks than national solidarity.
- The various social security schemes are not directly managed by the State but by social partners, highlighting their professional and statutory nature.
- The concept of replacement income remains, despite solidarity income still existing due to the creation of minimum social benefits. Furthermore, the statutory and professional concept maintains social hierarchy more than it offsets it, even if compensation is partly included in it. In this way, the desire for a welfare state is apparent in the choice of benefits themselves in proportion with the risk, not the salary.

### *The uniqueness of the French system*

The resulting French social security system mirrors more closely the Bismarck model than the Beveridge model, despite the fact that the latter’s principles remain. The Bismarckian insurance concept has, however, been adapted in order to retain the general principles of solidarity:

- by extending coverage to people who are not contributing, such as students (considered to be pre-working age), retired people, and members of the workforce who are unemployed, and by passing laws that grant rights to people who are outside of the traditional family circle (partners, common-law spouses);
- by maintaining the principle that social aid should be for all those who do not have sufficient resources in order to enjoy an adequate livelihood;
- by extending (in 1975) the advantages of certain social security benefits based on place of residence through public financing, achieved in 1999 through the implementation of universal health coverage which depended on resource conditions, irrespective of professional activity and contributions.

The basic founding principle of social security was mentioned above, as defined by the National Resistance Council. Quotes from the Ordinance of 1945 provide a clearer picture of how these principles were meant to be implemented: “Social security is the promise made to each person that no matter the circumstances, he will have the necessary means so that he and his family can live with decency. Justified by a fundamental lack of social justice, social security is in response to the concern of eliminating the uncertainty that workers face in relation to their future, a constant uncertainty that creates in them a feeling of inferiority and which is the real and profound basis of class distinction between those who are sure of themselves and their future and those workers who are constantly tormented by the threat of poverty.”

“Seen in this light, social security calls for an extensive national organization of compulsory mutual assistance to be established that can only reach its full potential if it is very general in terms of the people and risks it covers. The overall objective is to provide coverage for the entire population of the country against all elements of uncertainty; this goal will only be achieved after many long years of persistent effort. What is possible today is to organize the framework within which this plan will be gradually implemented.”

The unique and pragmatic approach of the French social security system can be characterized by its attempt to attain Beveridge’s principles through essentially Bismarckian means, all the while adapting to social change.

## **2. The organization of social protection**

The Ordinance of 4 October 1945 provides for a coordinated network of funds instead of the existing multiple organizations. Still today they are not unified, however.

The result is that agricultural occupations have retained their “agricultural social mutual insurance” which is managed by various organizations. Employees covered by special schemes (those that existed before the creation of the general scheme) refused to join in the new scheme, and by doing so preserved, for what was supposed to be a transitional period but still exists today, special schemes (such as for civil servants, seafarers and railway and mine workers) with different benefits. Even today regulations are trying to harmonize these benefits, particularly as regards pensions.

The Ordinance of 19 October 1945 addressed illness, maternity, disability, old-age and death risks, and the Acts of 22 August and 30 October 1946 provided for occupational accident compensation and family allowances which extended to the majority of the population, without affecting existing principles. The Law of 22 May 1946 established the principle of extending social security to the population as a whole. However, self-employed, non-agricultural employees were opposed to it, and therefore a specific compulsory scheme was developed under the name “*no-no scheme*”, which has become the social scheme for self-employed workers.

Similarly, while administrative unity for social security has yet to be attained, demographic and economic changes have worked towards this goal by forcing a number of small insurance funds to close

and by introducing a compensation mechanism between schemes in order to balance the demographic relationship between contributors and pensioners, causing smaller schemes to lose their assets to the general scheme.

The successive reforms of the social security system have always stayed true to the main principles put forth when it was established, as well as enabling it to survive by keeping it balanced. Over time, the objective of justice was complemented by an objective of fairness, resulting especially in the differences in benefits and contributions among the various schemes being slated for elimination.

This is how over time, and not without a number of difficult updates, the French social security system attempted to move towards achieving its principles and preserve, despite financial difficulties, the essence of the concept of generosity that had led to its creation.<sup>2</sup>

### *The composite structure of the French social protection system*

France's traditional approach to social security means that it only deals with social protection that is covered by the contributions that members are obliged to make, and offers core benefits when one of the risks it covers occurs.

Since this core social protection does not guarantee that all expenses resulting from a risk (such as sickness) or from the situation of the insured person (such as old-age pension) will be reimbursed, complementary social protection is needed. In practice, this tends to come from personal savings, a mutual insurance system or complementary social insurance.

General guidelines are provided by the State through acts or regulations, based on the position that the standard to be adopted holds by virtue of the constitutional principles that determine the division between act and regulation. While the overall scheme is in theory managed by the social partners, the State decides the level of resources and content of the benefits offered by the general scheme. Certain special schemes continue to enjoy more independence, but this is being phased out.

A number of changes, both in sickness and old-age pension coverage, have brought the parameters of different schemes closer together in an attempt at harmonization, but also due to the financial difficulties faced by these schemes.

Regarding sickness, following the 1996 constitutional reform, the Act on financing social security (LFSS) was established. This new financial law category was aimed at keeping social and health expenditure under control by determining, on a yearly basis, the conditions needed for the social security system to remain financially stable, which was achieved by setting expenditure objectives based on the revenue forecast. Parliament votes on this Act every autumn, in conjunction with the budget law which determines the State's budget. In this way, Parliament not only supervises the financial stability of social

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<sup>2</sup> Interprofessional collective agreement of 14 March 1947 establishing the supplementary retirement scheme for managers.

Act of 9 April 1947 extending social security to civil servants.

Act of 17 January 1948 establishing three retirement pension insurance schemes for self-employed, non-agricultural occupations (craft trade workers, industrial and trade occupations, licensed professions).

Act of 12 April 1949 : creation of a mandatory health insurance scheme for farmers, managed by the Agricultural Social Mutual Insurance Company (MSA).

Act of 25 January 1961: creation of a mandatory health insurance scheme for farmers, with free choice of insurer.

Act of 12 July 1966: creation of an independent maternity health insurance scheme for people who are self-employed and not agricultural workers, managed by the National Health Insurance Fund for the Self-Employed (CANAM).

Act of 22 December 1966: creation of a compulsory complementary scheme for farmers covering accidents at work, occupational diseases and accidents that occur outside of work, with free choice of insurer.

Act of 25 October 1972: institutionalization of social protection of farmers against accidents at work.

Act of 4 July 1975: extension of compulsory old age pension insurance to entire workforce.

Act of 28 July 1999: implementation of universal health insurance: basic protection solely based on place of residence and complementary protection for the most disadvantaged.

Act of 2008: implementation of principles intended to align remaining special schemes with the general scheme in relation to old age pension insurance parameters.



security but also has a say in the guidelines of health and social security policies, and the way in which they are financed.

This control is, however, limited. The LFSS does not provide for revenue to be collected, it only forecasts it. In addition, the expenditure objectives, which are voted on by Parliament, determine expenditure based on a level which is deemed to be sustainable, but do not limit it.

It has only been since the 1993 Act was passed that the Government has acted upon the different parameters of old-age pensions in order to improve the financial status of the general scheme related to pension insurance (mainly the duration of contributions, pension calculations and age of pension eligibility). A number of reforms followed that once again consolidated the conditions for calculating pensions in an attempt not only to adapt the scheme, as and when necessary, to economic difficulties which reduced resources, but also to the adjustment in life expectancy which significantly increased the duration of pension contributions as well as the costs of the scheme.

Initial reforms applied only to the general scheme, but were followed by reforms to the civil servant scheme. In 2008, a number of decrees aimed at aligning more rigidly the conditions imposed on members of special schemes with those in other schemes. While certain schemes retained a number of comparative advantages, it must be noted that the on-going controversy surrounding these “injustices” is mostly unsubstantiated, made up of the same empty claims used over and over again.

It has already been specified that these schemes retained their professional organizations, which manage contributions and benefits like the general scheme national funds, but the description of the conditions prevailing within the general scheme should include the conditions of all the other schemes, or at least of their near future.

### *The general social security scheme*

The general French social security system divides risks into three branches: Sickness/Accidents at work and occupational diseases, Family, Old Age.

Each branch is managed by a group of private local funds specialized in one of the risks, that share the national territory, and abide by the directives set out by a public national body:

- The *Caisse nationale d’assurance maladie des travailleurs salariés* (CNAMTS) – the National Health Insurance Fund for Salaried Employees) is a public institution made up of local funds (private entities) that dictates the direction of those funds. The local funds (CPAM), governed by the principle of equality (trade unions that represent employers and workers) but subject to a large extent to the policies decided at the national level, are in fact responsible for implementing this policy.
- The *Caisse Nationale d’Assurance Vieillesse des Travailleurs salariés* (CNAVTS) – National Old-Age Insurance Fund for Salaried Employees) centralizes all the resources of old-age insurance and manages old-age and survivors’ insurance through core organizations.

Since the 2010 reform, the core organizations that are responsible for managing pension schemes are also responsible for managing occupational accident prevention schemes. The CARSAT falls under the supervision of both the CNAV and the CNAM.

- Similarly, the *Caisse Nationale d’Allocation Familiale* (CNAF) – National Fund for Family Allowances finances all the family benefit schemes through its network of core funds (the CAF).

Acting in connection with all branches, the *Agence Centrale des Organismes de Sécurité Sociale* (ACOSS) – Central Agency of Social Security Organizations is tasked with managing the funds for the various risks related to the three national funds. These local organizations, known as the URSSAF, collect social security benefits and hold employers accountable for their social obligations.

### *Unemployment insurance*

While in theory unemployment insurance is based on the same principles as other branches, the risk of unemployment appeared after the other risks and was therefore not part of the social security organization that was defined in administrative terms. It was not until 1958 that the social partners,

strongly encouraged by the Government, created an established unemployment insurance scheme. As a result of how it was initiated, this scheme benefits from more independence at the political level.

Operation of the public employment service was organized by the social partners, which finance the scheme, in two different bodies: the *Union Nationale interprofessionnelle pour l'Emploi Dans l'Industrie et le Commerce* (UNEDIC) – National Interprofessional Union for Employment in Industry and Trade managed by the social partners and tasked with administering the unemployment insurance scheme and setting up compensation through the *Association pour l'emploi dans l'industrie et le commerce* (ASSEDIC) – Association for Employment in Industry and Trade network which paid the compensation owed to the beneficiaries, and the Agence Nationale pour l'Emploi (ANPE) – National Employment Agency which is dependent on the State and is responsible for finding work for the unemployed. In 2008, the ANPE and the ASSEDIC network were administratively regrouped into a new body called “*Pôle-emploi*” – Employment Centre, which has the same responsibilities as the institutions it was created from, without, however, modifying the principles of equal management of the UNEDIC.

The aim, amount and duration of unemployment insurance benefits depend on the duration of contributions to the scheme and the amount paid in.

### *Supplementary coverage*

There are two categories of supplementary coverage: optional and traditional schemes (that apply to health insurance) and compulsory schemes (that apply to old-age employee schemes).

*Regarding sickness*, getting expenses reimbursed has become more and more restrictive since the first Act on social security funding was passed, in order to adjust spending to the available revenue which is decreasing due to increased unemployment. To compensate for this increase in the “excess”, insured persons can sign up for supplementary insurance, usually with a mutual insurance company, that belongs to them and is managed as a non-profit, covering all or part of the difference between expenses and the amount reimbursed under the general scheme. In many large enterprises, the employer signs up to supplementary group insurance. For both types of contracts, the *Union nationale des organismes complémentaires à l'assurance maladie* (UNOCAM) – National Union of Complementary Health Insurance Organizations – consolidates the various mutual health insurance companies. This body enables the mutual insurance companies to play a fully-fledged role in the health system by negotiating with health insurance companies and health professionals.

Supplementary health insurance is not monopolized by mutual insurance companies; private insurance companies also offer coverage.

*Regarding old age*, while supplementary insurance is voluntary, it is compulsory for employees. The mutual and other insurance companies that manage the compulsory supplementary old age scheme are grouped in two federations: the AGIRC – ARRCO for private sector employees and IRCANTEC for public sector employees. Given the typically low pension payments made under the general scheme, supplementary pensions are essential within the employee pension system, except for civil servants and members of certain special schemes. It is up to them whether they sign up for supplementary pension insurance which in some cases may result in tax incentives.

### *Assistance and solidarity: social aid and action*

As has been shown, social security benefits are based on contributions which are linked to employees' status. People who have not worked are therefore excluded because they have not contributed, or have not contributed enough, to the scheme, despite having the greatest need for social security benefits.

On the basis of national solidarity, assistance mechanisms were created to respond to this need. Tax contributions are made to the system and benefits or care are provided to those who are not affiliated with a social security scheme, regardless of prior contributions. The aim is to provide minimal resources for survival and sufficient care to enable all persons to remain in good health.

There are usually two types of assistance:

- “social aid”, whereby the public institution helps meet a need. This is in answer to an obligation that society has decided to implement, and a subjective right of the individual who has found himself in this situation of need. In theory, society is meant to find accommodation for those who are not able to secure it through the private market; minimum income (either referred to as “insertion” or “active solidarity”) is provided to all those who do not have sufficient resources; universal health insurance ensures that the medical care of the uninsured is covered by the State.
- “social action” may be required by a company or individual in order to make up for any shortcomings of social aid. For this reason, social security organizations put aside part of their budget to cover more than just the statutory benefits for members who find themselves in a difficult situation. Similarly, local communities subsidize associations that provide support for those in need.

By filling in the gaps left by the social security system, or compensating for its shortcomings, these other branches of social protection, social aid and action, strive not to leave some of their citizens “by the wayside”. Due to the difficult situation that the country is currently experiencing, these additional types of protection have proven to be essential, so much so that more radical ideas of social assistance have been discussed, such as “subsistence income” which would be paid out to everyone, regardless of their situation, and would go hand in hand with the extension of social security to all. While of course not perfect, today’s coverage continues to be effective and is similar to other European systems.

### *The principles of social security and the justice system*

The legal principles of the social security system are contained in the Constitution and its Preamble, and have been enforced by constitutional and benefits courts: labour courts for labour matters, social security courts for members of the various schemes, and administrative courts for state official schemes.

### *Main documents:*

#### Article 1 of the Ordinance of 10 October 1945

A social security system that insures workers and their families against all kinds of risks that may impair or take away their earning capacity and covers maternity costs or family costs is hereby established.

#### Articles 10 and 11 of the Preamble to the Constitution of 1946

The Nation shall provide individuals and families with the conditions necessary for their development. It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working shall have the right to receive suitable means of existence from society.

#### Article L111-1 of the social security code as amended by the Act of 21 December 2001

Social security is organized based on the principle of national solidarity.

It guarantees workers and their families against risks of all kinds that may reduce or suspend their earning potential. It also covers maternity, paternity and family costs.

It provides, for all people and for all family members residing on French territory, coverage for sickness, maternity and paternity costs as well as family costs.

This coverage applies through membership of the concerned parties and their dependants to one (or more) compulsory scheme(s).

It guarantees benefits covering social insurance, occupational accidents and diseases, old-age allowances and family benefits within the framework of the provisions set out in this code.

#### Article 1 of the Act of 13 August 2004 on Health Insurance

The Nation affirms its commitment to the universal, compulsory and comprehensive nature of health insurance. Regardless of age and physical or mental condition, each insured person benefits from protection that he finances according to his resources against the risk and consequences of sickness.

Article 34 of the Constitution of 1958

Statutes shall also lay down the basic principles of:

[...]

- employment law, trade union law and social security.

[...] Social security financing laws shall lay down the general conditions for the financial stability thereof and, taking into account forecast revenue, shall determine expenditure targets on the conditions and with the reservations provided for by an institutional act.

### *The Constitutional Court*

Drawing on these provisions, the Constitutional Court recognized the constitutional status of the right for every individual to obtain a job,<sup>3</sup> of the principle of workers' participation,<sup>4</sup> and of the right to social protection<sup>5</sup> or health protection.<sup>6</sup>

Pursuant to these principles, and the main constitutional principles of *equality before the law* and *equality in terms of public burdens*, the Constitutional Council implemented a rule related to social security that states that “the principle of equality shall neither conflict with what the legislator rules in different situations, nor with the fact that he derogates from equality for general interest reasons, as long as, in another case, the difference in the resulting treatment is in relation to the intention of the law that establishes it”, in line with the European Court of Justice and the European Court of Human Rights. As stated in a 1997 decision:

Considering that, through this provision which has been criticized, the legislator, who is responsible for evaluating the conditions under which family rights must be reconciled with other general interest imperatives, attempted to restore financial stability within the family branch of the general social security scheme by suspending payment of family benefits to families that had a higher level of resources; by stating that family allowances and age restrictions “are allocated to a household or individual whose resources do not exceed the ceiling which varies according to the number of dependent children”; by avoiding certain threshold effects linked to the establishment of the ceiling by granting different family allowances when resources exceed the ceiling of an amount lower than the determined sum, which further highlights the transitional character of the measure, which applies “until all the family benefits and financial aid have been reformed”, the legislator has established the difference between cases based on objective and logical criteria in relation to the goals of the Act;

[...]

Considering that, even with the same income and number of children, the cost associated with having children at home is markedly different if there is only one person in the couple pursuing a gainful activity, or only one caretaker, or if both pursue a gainful activity, due to the specific constraints caused by the two previous situations. It is the duty of the regulatory authority to set the minimum occupational income that grants the right to an increase in a way that does not create unjustified discrimination.

In this way, the principle of equality does not conflict with granting different benefits depending on needs, responding to a concern for equality that the Constitutional Council, while not explicitly stating it as a principle, still introduces it into its reasoning on social issues.

<sup>3</sup> Constitutional Council, Decision No. 98-401 of 10 June 1998, framework and incentive Act related to the reduction of working hours.

<sup>4</sup> Constitutional Council, Decision No. 77-83 of 20 July 1977, Act amending Article 4 of the Amending Finance Act of 1961 (service obligation of civil servants).

<sup>5</sup> Constitutional Council, Decision No. 86-225 of 23 January 1987, Act establishing various social order measures.

<sup>6</sup> Constitutional Council, Decision No. 80-117 of 22 July 1980, Act on the protection and control of nuclear materials.

### *The Administrative Court*

Even though contentious social security issues fall within the competence of the Judicial Court, specifically the Social Security Court, and as a last resort the Court of Cassation, the Administrative Court can be called upon to rule either on conformity with the law and the principles set out in the regulations addressing this topic, or the disagreements on social benefits between an employer and his employees.

#### *– Family benefits*

In accordance with regulations, the State Council has had the opportunity to confirm that the principle contained in Article 11 of the Preamble to the Constitution constitutes a “general principle of law” through which families, and particularly mothers and children, must be guaranteed material security. A minimum level of income must be guaranteed through family benefits.

#### *– Equality between men and women regarding old-age pensions*

Taking the principle into account, which is particularly applicable to the right to social security in both the Administrative Court and the Constitutional Council, of prohibiting discrimination, particularly in relation to gender, the State Council also ruled, at the same time as a decision taken by the Court of Cassation, and eliminated the difference in retirement age between male and female flight attendants established by Air France’s internal rules.

As regards the amount paid out in old-age pension, the State Council’s ruling of 29 July 2002, based on the Griesmar judgment of the Court of Justice of the European Communities of 29 November 2001, which was in response to a preliminary question raised by the State Council, confirms that “the principle of equality of compensation precludes that a bonus, used for calculating old-age pension, granted to those who have provided their children with an education, applies only to women, while men who provided their children with an education are exempt from this bonus”.

#### *– Right to health*

Regarding health, in its Charente-Maritime Departmental Assembly decision of 14 December 2007, the State Council interpreted, in view of paragraph 11 of the Preamble on the right to health, the legislative provisions that determine the funds that must be left, after payment, to elderly people who are living in a home financed by social aid. The State Council deemed that this was not in conformity with the principle of reducing funds below what is needed in order to acquire supplementary health insurance.

### *The Judicial Court*

The Court of Cassation sets out the rules regarding social security, where disputes involve employees fighting their employer or their social security organization. The Court of Cassation’s case law and that of the Administrative Court coincide even more than in related fields, particularly concerning labour rights and old-age pension rights. Regular meetings ensure that they follow the same reasoning and avoid interruptions to case law.

#### *– Equality between men and women*

In its 15 June 1999 judgment, the labour chamber of the Court of Cassation ruled that it was illegal to have an age difference, which dated back to the time of Louis XIV, between male dancers (45 years) and female dancers (40 years) at the Paris Opera Ballet. Following this ruling, the Paris Opera set the age of retirement at 42 years for all.

However, the Constitutional Council and the Court of Cassation at first disagreed on this highly disputed issue.

In 2003, the Constitutional Council ratified a legislative provision giving women, and not men, an increase of one year in old-age pension per child. It ruled:

[...] that it was the responsibility of the legislator to take into account the inequality of treatment suffered to date by women; that in particular, they interrupted their professional activity much more than men in order to provide their children with an education; therefore, in 2001, the average duration of insurance was 11 years less than that of men; that women's pensions were on average over a third less than that of men; that due to the general interest surrounding this situation and to avoid the consequences resulting from abolishing the provisions of Article L. 351-4 of the social security code regarding pensions paid to future retirees, the legislator could implement provisions to compensate for the inequalities that in theory should disappear.<sup>7</sup>

But in 2006, the Court of Cassation, ruling on the case of an insured man who had raised his child on his own, granted him an increase in the duration of his insurance, estimating that in his case, the discrimination was not in conflict with the French Constitution but with Article 14 of the Convention on Human Rights and Fundamental Freedoms, which prohibits any discrimination based on gender without objective and reasonable justification. Following this judgment, a legislative reform was established to align the benefits granted to fathers and mothers, as long as they can prove their professional activity was interrupted in order to raise a child.

As guardians of the principles, ultimately reaching a consensus in order to protect the rights of all in relation to social security, acknowledging the needs that the desire to restore various schemes in difficulty can impose, national courts, in line with European courts, built a solid framework that should enable the French social security system, which is often struggling financially, to adapt to the conditions, including during times of crisis, without losing sight of the strong desire for national solidarity expressed in the Preambles to the Constitution and nurtured by case law.

The fragility of the French social security system is sometimes referred to, a system that is expensive, meaning that it sometimes struggles financially. However, it would be unfair to forget that the difficulties it encounters are the downside of having an ambitious programme that expresses not only national solidarity but also a concern not only to preserve the health and wellbeing of its citizens but also to bring the aid of the strongest to the weakest. While acknowledging that reform is needed, this system refuses to sacrifice the principles that it was built on. It should continue to follow this course despite the crises that it will undoubtedly encounter along the way.

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<sup>7</sup> Decision No. 2003-483 of 14 August 2003.

## GERMANY

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### THE RIGHT TO SOCIAL SECURITY IN THE GERMAN CONSTITUTION

*Prof. EBERHARD EICHENHOFER*

#### **1. The constitutional guarantees of social rights**

In the Basic Law (“Grundgesetz”) – the German Constitution – a special and coherent catalogue of social human rights is not foreseen. Only a few social rights’ guarantees primarily as to women, mothers, children and handicapped persons are explicitly stipulated. Therefore, in the current German legal thought social human rights are regarded as neither fundamental, nor integral parts of human rights. As the full spectrum of human rights acknowledged in international law, among them above all the basic social human rights to work, education, health, accommodation, social security or social assistance (Articles 22-26 UDHR), does not correspond to the far more restricted catalogue of human rights explicitly figured out in the Basic Law as fundamental rights (“Grundrechte”), the doctrine argues even more that due to their very legal nature social human rights could not and never exist.

In this understanding human rights are supposed as negative freedoms<sup>1</sup> – *a status negativus*<sup>2</sup> – which should open to each individual a sphere for choice and action free from any state intervention. Social rights, however, intend to create the positive freedom of the individual – *a status positivus*. Such a freedom is based on entitlements against public institutions like employment services, schools, city councils, social insurance administrations or health services. As social rights imposes to them commitments to bring about and make practically feasible specific social rights, public institutions are obliged to become active, both on the legislative and the administrative field. Big government is the outcome of social rights. Can, however, human rights concur with the idea of big government?

All the rights of delivery, which are addressed to public institutions, depend on preliminarily given public institutions, taken actions, political choices made and financial capabilities sufficiently available those rights are supposed to be inappropriate as human rights guarantees, as the individual entitlements stemming from them are not directly given by the Constitution, but are to be identified and verified and, finally, made effective by acts of state legislation themselves. Those rights are therefore conceived as being enshrined in law, but not to be found in the guarantees of the Constitution.<sup>3</sup>

Hence, in the current German legal thinking the fundamental rights, explicitly enacted in the Constitution, are taken as a *pars pro toto* for the human rights in general. Among the main scholars in

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<sup>1</sup> Isaiah Berlin, *Four Essays on Liberty*, Oxford University Press, 1969.

<sup>2</sup> This doctrine stems from Georg Jellinek, *Allgemeine Staatslehre*, 1960 (3. Aufl.), 419 ff.; *ibid.*, *System der subjektiven öffentlichen Rechte*, Tübingen 1905 (2. Aufl.), reprinted 2011, 94 ff., 114 ff., 136 ff.

<sup>3</sup> Isensee, *Der Staat* 1980, 367; Scholz, *RdA* 1993, 249; Murswiek, in Isensee/Kirchhof, *Handbuch des Staatsrechts*, Band 9 (2011), § 192.

German law there is a wide-spread consensus, that social human rights are a legal category of minor importance. Therefore, those rights do not matter or materialize in the conceptual framework within the German Constitution.<sup>4</sup>

## 2. *The scope of the martial and personal social security rights guaranteed by the Constitution*

### a) *The lack of social rights in the Constitution*

The Basic Law lacks a fully elaborated catalogue of social human rights.<sup>5</sup> Only a few of the provisions can be interpreted as giving rights due to social need or with social intentions. These are above all the equal treatment clauses for men and women or with respect to handicapped persons (article 3 para. 2, 3 of the Basic Law). They do not only provide for equal rights, but also for equal living conditions to all addressed persons. So, they matter in the context of fundamental freedoms. Further examples are the commitment to assist families, to protect mothers and their children, to guarantee equal treatment between marital and non-marital children and to respect the rights of collective bargaining and action for both employees and employers (article 6 para.1, 2, 5; article 9 para.3 of the Basic Law).

This constitutional arrangement can be explained by the history. The framers of the Constitution *intentionally abstained* from providing a comprehensive catalogue of social human rights. This decision was taken against the constitutional traditions of the Weimar Republic and the international developments in human rights legislation in the formative era of the German Constitution. It was taken, because the Basic Law intended originally to establish an interim regime for the western part of Germany. In the period of the constitution's formation the assumption prevailed, that after a very short period of time the German unification – the east-west unity – will come true. The framers of the Constitutions were convinced to assume that this incident could be brought about in the very next years after the constitutional formation of West Germany and, hence, within the foreseeable future. So, the Constitution was explicitly sketched as a preliminary and transitional legislation, to be replaced in the very next future.

This reluctance can also be explained by the constitutional history of Germany. In the Constitution of the *Weimar* Republic of 1919 the social human rights played a pivotal role as an integral part of a broad and comprehensive catalogue of human rights, which had a similar profile than the one, enacted on the international level after World War II. As to the Weimar Republic Constitution of August 11th, 1919, the *economic life* should coincide with the principles of *social justice* and follow the aim to guarantee a life in *human dignity* to each human being (article 151). Human labour has to be protected by a unified labour law (article 157). The freedom of association and collective bargaining is guaranteed to both employees and employers (article 159). The right to social insurance (article 161) was guaranteed. In general, it was stated, that irrespective of the individual freedom each citizen is exposed to the moral commitment, to utilize her/his physical or intellectual capability for the common good. Under there auspices each citizen should have a right to work in order to acquire his or her personal maintenance (article 163). Employees are entitled to take part in the gestion of enterprises. For this purpose works councils shall be established on the level of a factory, the enterprise, or on regional or national level (article 165).

The Weimar Constitution served even more as a *model* for the international enactment of social human rights, as it was – apart from the Mexico Constitution of 1917 and the Constitution of Finland of 1919 – one of the first constitutions of the World which did provide for fundamental social human rights. But

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<sup>4</sup> Isensee, *Verfassung ohne soziale Grundrechte*, in *Der Staat* 1980, 367; Murswiek, *Grundrechte als Teilhaberechte, soziale Grundrechte*, in: Josef Isensee/Paul Kirchhof, *Handbuch des Staatsrechts*, Band 9, 2011, 3. Aufl., § 192; Brunner, *Die Problematik der sozialen Grundrechte*, 1971; an opposite position can be found in Eberhard Eichenhofer, *Soziale Menschenrechte im Völker-, europäischen und deutschen Recht*, Tübingen 2012.

<sup>5</sup> Klee, *Die progressive Verwirklichung wirtschaftlicher, sozialer und kultureller Menschenrechte*, 2000; Lohmann, *Soziale Menschenrechte und die Grenzen des Sozialstaats*, in Kersting (Hg.), *Politische Philosophie des Sozialstaats*, 2000, 351; Eichenhofer, *Soziale Menschenrechte im Völker-, europäischen und deutschen Recht*, Tübingen 2012.



in the Weimar Republic the courts interpreted these human rights as provisions of a mere programmatic character, which did *not* have *any binding effect* – neither to the courts, nor the administration, nor finally the legislator.<sup>6</sup>

The framers of the Basic Law intended to avoid this arguing for the future definitely. It was the overall intention of them to make the Constitution a strictly and unconditionally mandatory piece of legislation, which as the supreme law of the land, should be acknowledged and regarded as being paramount to all other legal provisions and to abide without any reservation. As to the strictness of constitution, there was the assumption made, that this imperative could not cope with a social rights' guarantee, which leaves not only a wide room for interpretation, but depends also on legislative implementation.

Furthermore, the Basic Law as the Constitution of the Federal Republic of Germany did not intend to create a comprehensive Constitution, but to give shape to a provisional and interim status for the former West Germany to regain its sovereignty and at the same time to leave open the door for a reunification of the then divided Germany. As to *Carlo Schmid*, a leading intellectual and Member of the Parliamentarian Assembly, the Basic Law shall *not constitute, but organise the state*.<sup>7</sup> So, the reluctance to implement social rights into the framework of the fundamental rights can also be explained by the concern not to anticipate a social order for a unified Germany, which should be established later on the basis of a new constitution.

When 1990 the east-west divide of Germany had been overcome, the Constitution of West Germany was kept and not revised despite of its fragmentarian character, as it was regarded at that time as the best Constitution Germany ever had before, and, therefore the opinion prevailed, that the unification did not give any ground for its revision. So, under the constitutional law of Germany after the unification the previous incompleteness of the Constitution as to the social sphere was kept.

#### *b) The “social state” – clause (articles 20, 28 of the Basic Law)*

The Basic Law established a substitute for its lacking social human rights; this is the principle of the “social state” (Sozialstaat). In articles 20, 28 of the Basic Law Germany defines itself as a democratic, federal, republican and social state, which is based on the rule of Law. These five characteristics of the German state cannot be altered, nor abolished even not by a change of the Constitution itself (article 79 para.3 of the Basic Law). These five characteristics assume with other words the character of “eternal”, i.e. unchangeable principles of the Constitution.

As to the social state clause the state has to control, on whether from the freedoms guaranteed under the constitution follow detrimental social effects, above all unacceptable disequalities, unjustifiable differences as to incomes, pensions or social status. Whenever those impacts are about to happen, the state is obliged to react and fight against poverty and exclusion, reduce inequalities in income and fortune and to overcome social dependencies. Under the social state clause the state is supposed to make a social order becoming to exist, which is based on “social justice”<sup>8</sup> and strives to overcome “social contracts”.<sup>9</sup>

From this characteristic of Germany as a “social state”<sup>10</sup> does not stem any individual rights' guarantee, but it obliges the state to create a whole range of social legislation, which has to create individual social rights. So, under the social state clause the state becomes mandatory to create social rights, which have to assume a legal, but not a constitutional rank.

<sup>6</sup> RGZ 113, 33, 37; 116, 268, 273.

<sup>7</sup> Speech of October 20th, 1948.

<sup>8</sup> BVerfGE 22, 180, 204; 59, 231, 263; 69, 272, 314; 94, 241, 263; 110, 412, 445.

<sup>9</sup> BVerfGE 1, 97, 105; 43, 213, 226.

<sup>10</sup> Forsthoff, Begriff und Wesen des sozialen Rechtsstaates, in: ders. (Hg.), Rechtsstaatlichkeit und Sozialstaatlichkeit, 1968, 165, 180: “A Constitution can never be a social law.” “Eine Verfassung kann nicht Sozialgesetz sein”; Hartwich, Sozialstaatspostulat und gesellschaftlicher status quo, 1978 (3. Aufl.); Zacher, Das soziale Staatsziel, in Isensee/Kirchhof (Hg.), Handbuch Staatsrecht, Bd. 2, 2004 (3. Aufl.), § 28, 428; Spieker (Hg.), Der Sozialstaat, 2012; Heinig, Der Sozialstaat im Dienst der Freiheit, 2008; Wallrabenstein, Versicherung im Sozialstaat, 2009.

c) *Protection of social rights under other constitutional principles and rules*

The lack of genuine social human rights in the German Constitution brought about a debate under the legal perspective on whether those social rights could find any constitutional attention at all. In the course of the developing case law of the German *Constitutional Court* (Bundesverfassungsgericht) various contexts became relevant as to the question on whether those rights could be get any protection under another angle of constitutional law. As the German Constitution strives to give a full-fledged protection of the individual as to all circumstances, which stem from acts of the state, the freedom of action (article 2 para. 1 of the Basic Law), the equality (article 3 para. 1 of the Basic Law) and the property clauses (article 14 of the Basic Law) had been addressed as instruments to protect social rights.

As to the universal guarantee of the freedom of action the Constitutional Court did examine on whether a legal provision on a mandatory inclusion in a special scheme of old age protection for self-employed medical doctors can cope with the freedom of action.<sup>11</sup> The Court held that this is possible, as the obligatory inclusion into social security schemes is to be assessed as an appropriate means to a legitimate end, necessary and proportionate to achieve its end. As to the social legislation a series of very distinct questions had been examined by the Constitutional Court, on whether they comply with the principle of equality of each person before the law. As to the case law of the Constitutional Court social legislation has to be enacted in accordance with the principle of equal treatment of each person.<sup>12</sup>

This provision does not require that differences are not allowed, nor does it hinder the legislator to make distinctions if there is a good cause for doing this, nor does it embarrass that social legislation is built upon typical cases,<sup>13</sup> which does not appropriately fit to atypical situations. The equality of treatment is, however, not granted, if distinctions are made which lack a convincing ground. So, the equal treatment clause is hurt, if a social legislation is based upon irrational and unjustifiable distinctions.

Since the first years of the Constitutional Court case law there was a broad debate about whether under the German Constitution a social right can be conceived as a *property right*.<sup>14</sup> Whereas the Federal Social Security Court<sup>15</sup> already very early qualified social insurance rights as property under the Basic Law, the Constitutional Court held in the formative era till 1980, that social insurance does not correspond with the requirements to property, which are peculiar to an entitlement under private law. Social insurance rights are, however, rights under public law; so they could fall into the substantial scope of the property clause of the Basic Law. But in 1980 the Constitutional Court<sup>16</sup> changed its position and accepted, that also social insurance rights are to be conceived as property under the Basic Law.

This case law coincides with the one of the *ECHR*. But the meaning and the substantial scope of application of the property clause differs as to the case law of both courts. Under the latter all social benefits based on a legal entitlement can be taken as property in the meaning of the 1<sup>st</sup> Additional Protocol to *ECHR*.<sup>17</sup> Under the German constitutional law, however, only those social rights can be

<sup>11</sup> BVerfGE 10, 354; 12, 319; 75, 108; further BVerwGE 87, 324.

<sup>12</sup> BVerfGE 54, 11; 59, 287; 66, 234; 72, 141; 89, 365; 92, 53; 97, 103; 99, 165; 100, 195; 102, 68; 103, 242; 105, 73; 111, 176; 125, 75.

<sup>13</sup> BVerfGE 63, 119; 66, 66; 67, 231.

<sup>14</sup> BVerfGE 32, 111; vgl. zur Problematik: Adam, Eigentumsschutz in der gesetzlichen Rentenversicherung, 2009; Axer, in Epping/Hillgruber, BeckOK GG, 2012, Art. 14 Rn. 56 ff.; Boecken, Der verfassungsrechtliche Schutz von Altersrentenansprüchen und -anwartschaften in Italien und in der Bundesrepublik Deutschland sowie deren Schutz im Rahmen der Europäischen Menschenrechtskonvention, 1987; Jährling-Rahnefeld, Verfassungsmäßigkeit der Grundrente, 2002; Krause, Eigentum an subjektiven öffentlichen Rechten, 1982; Lenze, Staatsbürgerversicherung und Verfassung, 2005; Papier, in von Maydel/Ruland/Becker (Hg.) Sozialrechtshandbuch, 2012 (5. Aufl.), § 3 Rn. 41 ff.; Pohl, Rechtsprechungsänderung und Rückanknüpfung, 2005; Preis/Kellermann, SGB 1999, 329; Reiter, SGB 1996, 246 ff.; Stober (Hg.), Eigentumsschutz sozialrechtlicher Positionen, 1986.

<sup>15</sup> BSGE 9, 127.

<sup>16</sup> BVerfGE 53, 257.

<sup>17</sup> ECHR 16.9.1996 (Gaygusuz ./ Austria) 17371/90; 7.5.2002 (Burdov ./ Russia) 59498/00; 25.10.2005 (Romanov ./ Russia); 30.9.2003 (Koua Poirrez ./ France) 40892/98; 12.4.2006 (Stec ./ United Kingdom) 65731/01; 65900/01.

regarded as property, which are based and stem from own contributions made by payments to the social security administration or own work.<sup>18</sup>

Under the property clause the legislator is not only committed, but acts also in a legitimate manner, if it both defines the social insurance rights and at the same time or reduces social insurance rights, because both acts are accepted or provided for under the property clause.<sup>19</sup> As to article 14 para. 1 of the Basic Law, the legislator has to give shape to the content of property and it has to establish the limits of property. The Basic Law establishes property only within social limits; the use of property shall also serve to the public benefit (“Eigentum verpflichtet, sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen”, article 14 para.2 of the Basic Law). From this follows clearly, that also restrictions of social insurance rights are permitted under the Constitution, unless they are appropriate to make the social insurance burden bearable to the active population and proportionate and, finally, the amount of benefits keeps on to be substantial and adequate to the beneficiary.

In the context of the right to social assistance quite early in the legal history of post-war West Germany the question emerged on whether such a right has a sound constitutional fundament. The Federal Administrative Court<sup>20</sup> held already 1951 in one of its first judgments, that under the Constitution a social assistance beneficiary has not only a legal entitlement to *social help*, but that this right is embedded in and stem from the constitutional guarantee of *human dignity* and that it will find in this principle its conceptual fundament. In its sequent case law the Constitutional Court<sup>21</sup> joined this perspective and held, that human dignity in combination with the social state clause bring about a fundamental right to protection of a minimum level existence. This should be in the absence of other preliminary sources be guaranteed by the public administration, which should become active as a lender of the last resort. On this basis the Constitutional Court hold, that the individual’s right to a minimum level of existence encompasses the socio-cultural minimum. This means, with other words, that not only the physical existence has to be guaranteed, but that, additionally to this, by means of social assistance the social and cultural participation of the beneficiary is to be made feasible. The Court also held that the level of social assistance benefits is to be determined in a transparent manner and on the basis of a rational method to identify and assess the specific needs to be covered by means of social assistance.

#### d) *Impact of the international protection of social rights*

In the German legal system the international social rights, enacted in many provisions of international law – among them above all the UN, ILO, Council of Europe and EU legislation is relevant in the sense, that the leading provisions on social rights are *transformed* into the German legislation. By this act of transformation of international into national law the international law rules assume the characteristic of a provision under German law. Therefore it has the same rank as provisions under the legislation of Germany. If the international provision has the same content as the corresponding provision under German law, the latter will prevail to the first. So, under these circumstances the provision under German law is regarded as paramount to the international one. If there is a provision under international law, whereas a corresponding provision in German law is lacking, the international law demands for a complementary provision to be enacted in German law.

But there is a huge reluctance within the German judiciary to give an international law rule such an important impact that it will make a revision of internal law a legal imperative.<sup>22</sup> There is a widespread reservation to international law, which is challenged predominantly as an act of intrusion and violation of national sovereignty. For those, who are not familiar with international law, but practise on the basis of the domestic law cultivate a widely diffused resentment against international law, which is not

<sup>18</sup> BVerfGE 69, 272, 301; 100, 1; 59, 104.

<sup>19</sup> BVerfGE 97, 271; 122, 151.

<sup>20</sup> BVerwGE 1, 159.

<sup>21</sup> BVerfGE 132, 134; 125, 175.

<sup>22</sup> BVerfGE 111, 307.

regarded as a fundament of or a frame of reference for domestic law, but which is seen as alien and so non-genuine component of domestic law and, hence, of law at all. So, there is up to now a widely shared tendency to *minimize* or even *annihilate* the *impact* of *international law* on *national legislation*. This tendency is also driven by the case law of the Constitutional Court, which is keen, with varying degrees of intensity and rigor to minimise the influence of international law on German law. The main argument in this context is that the national Constitution is the supreme law of the land and that therefore also the international law, when incorporated into national legislation, has to comply with national Constitutional law and because of this assume a lower rank as to the Constitution. This reasoning, however, does not. So, the role of international social rights to the German social legislation is still rather incremental and rarely to be fully observed.

But this argument cannot uphold under the Basic Law itself. As to article 1 para 2 of the Basic Law the German people confesses to respect the unalienable human rights as fundaments of each human society and imperative as indispensable basis of peace in the world. This provision makes the international human rights in their entirety an integral part of the German human rights legislation and, hence, it imposes to it to regard them completely.

### 3. *The constitutional regulations' impact on the content of social security rights*

#### a) *Social rights in ordinary legislation*

Within the social legislation of Germany the Social Code plays an important role, as it contains all the relevant provisions on social legislation in Germany. In integral part of this legislation is to be found in the *basic social rights*.<sup>23</sup> They are enacted in the introductory and most general part of the *Social Code*. It plays a key role to outline the purpose, function, structure and content of the German system of social security.

Despite this, a strong civilicism is to be noticed as to the binding effect of social rights. In the legal literature they are assessed as lacking any “normative substance”,<sup>24</sup> they are conceived as irrelevant.<sup>25</sup> But this characteristic is not justified. As to the official justification<sup>26</sup> the social rights in the context of the Social Code shall describe the targets of social benefits; it shall keep pace with the international development, where a rights-based approach to social legislation becomes more and more common and gained ground. Social rights shall emphasize, that the individual in a modern welfare state is supposed to be not an object for social policy but that social policy intends to establish the beneficiary as a subject of rights.

Seen from a systematic point of view, social rights in the Social Code help to translate the goal of social justice into the *structure* of the various *social branches of protection*. They are not made in order to create specific social rights, but to outline the normative basis on which social entitlements are built upon.

#### b) *Justiciability of social rights*

As to the low awareness for social rights their justiciability is not a key issue. On the contrary under the arguments put forward against social right their alleged injusticiability, plays a leading role. So, due to the meagre role social rights play in the current legal debate in Germany, the problem of the *justiciability* of social rights did *not* attract a *broader interest* among the legal scholars in Germany so far.

<sup>23</sup> Eichenhofer, in Eichenhofer/Wenner (Hg.), Wannagat SGB I, IV, X, 2012, § 2 SGB I Rn. 2 ff.

<sup>24</sup> Von Maydell, Die “sozialen Rechte” im Allgemeinen Teil des SGB, DVBl 1976, 1, 6.

<sup>25</sup> Karlheinz Rode, Zum Wesen der sogenannten “sozialen Rechte” im Sozialgesetzbuch – Allgemeiner Teil, SGB 1977, 268, 272; Hauck/Noftz, SGB I, § 2 I 2; Schnapp/Meyer, Zur Entwicklung von sozialen Rechten in der Sozialgesetzgebung, DRV 1973, 66 ff.; Manfred W. Wienand, Bedeutungsgehalt und Funktionen der sozialen Rechte im Allgemeinen Teil des Sozialgesetzbuches, 1980.

<sup>26</sup> Bundestags-Drucksache VI/3746, S. 16.

### *c) Growing awareness of social rights*

Despite of the profound reservations as to social rights as such and to the constitutional guarantee of these rights especially, the constitutional dimensions of the legislation on social protection substantially gained ground and got a growing attention. In the context of the constitutional provisions on human dignity, equality of rights, protection of freedom, property rights, protection against all sorts of discrimination and respect of the rule of law a series of social policy measures attracted a broad attention in Constitutional law, in the case law of the Constitutional Court and, finally, in the doctrine.

## **4. Threats to social security rights intimes of economic crisis**

In the context of social rights as human rights the idea of rights coincides with the idea of social obligations. Under the Constitution the parental right to care for and educate the children coincides the assumption, that the parents are obliged to make use of their rights, otherwise the parental rights are to be withdrawn (article 6 para 2 of the Basic Law).

This principle that social rights and social commitments concur is a general feature of all social rights. As to article 14 para 2 of the Basic Law the property rights are also limited by social aims. If the constitutional property clause also applies to social rights, also the social limitation clause matters for social rights. As to these two restrictions – the committing strand of social rights and the social limitation of property rights – a theoretical justification can be found for adjusting social rights in times of economic crisis. So, social rights are not to be regarded as absolute rights in the sense that their content is to be protected irrespective of the conditions under which the contributions live and work. If there are recession and unemployment, wage cutbacks or a shrinking number of contributing insured persons the legislator is not embarrassed to reduce benefits in order to keep the balance between the beneficiaries' rights and the contributor's commitments. As the latter depend directly on the first, the Constitution provides for compromising the conflicting portions in a proportionate manner.<sup>27</sup> If such compromise is to be found out, the most vulnerable beneficiaries should be protected and the less vulnerable beneficiaries should bear the higher share.<sup>28</sup>

## **5. Assessment of the future of social security rights in the light of the Constitution**

There is an indication on the increasing awareness of international social rights as to their impact on the domestic legislation. This tendency is not to be restricted to a single part of legislation but it represents an overall and all-embracing trend. In this context of an increasing international impact on national constitutional law the human rights' guarantees for social rights become more and more important. So, there is some reason to assume a growing influence of international law to the further development of domestic law. As social human rights play a key role in international law they will also become more important for domestic law in the years to come.

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<sup>27</sup> BVerfGE 36, 73; 54, 11; 58, 81; 64, 87; 100, 59.

<sup>28</sup> BVerfGE 87, 1.

## GREECE

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### THE RIGHT TO SOCIAL SECURITY IN THE GREEK CONSTITUTION

*Prof. PETROS STANGOS*

#### *Introduction*

The right to social security is readily presented in legal theory as an emblematic social right. It is proclaimed as a right in the International Covenant on Economic, Social and Cultural Rights and the revised European Social Charter as well as a considerable number of national constitutions, both in and outside Europe. It exemplifies the specific nature of rights which require, in order for them to be exercised, a positive act by the public authorities, and which are more likely to form part of public policy than of actions brought before the courts on subjective rights. However, a different picture emerges if we examine the interpretation of the provisions of the International Covenant and the European Social Charter by the bodies originally interpreting them – the United Nations Committee on Economic, Social and Cultural Rights and the European Committee of Social Rights (ECSR) – and the abundant international, European and national jurisprudence resulting from actions seeking to enforce these rights. The number and range of judgments on the right to social security lead to the need to re-examine the dogma of inadmissibility, which lies more within the realm of labour theory for legal professionals than reality.

The Greek Constitution first focussed on social security when it was enacted in 1975 after the fall of the military dictatorship. It remains in force although it has been amended on a number of occasions. Article 22, paragraph 5 (originally paragraph 4 before the constitutional review of 2001) establishes that the State shall provide social security for all working people, as specified by law. The Greek legal doctrine presents it as either a “social right” based on this provision or an “institutional guarantee” prescribed by the Constitution in order to effectively guarantee social security for the population. This difference in terminology does not entail a substantive difference. Greek legal professionals unanimously recognize that the provision of article 22(5) of the Constitution does not lay down a justiciable right for individuals enforceable against the State for the purposes of obtaining a particular type of allowance for a particular length of time.<sup>1</sup> However, Greek jurisprudence does recognize that the constitutional provision imposes an obligation on the legislature to make law on social security matters in order to protect insurance funds and guarantee the development of the social security system.<sup>2</sup> A claim by an individual to obtain social security benefits is “moderately” justiciable: it is receivable only if the State’s refusal to grant such

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<sup>1</sup> J. Iliopoulos-Strangas & G. Leventis, “La protection des droits sociaux fondamentaux dans l’ordre juridique de la Grèce”, in J. Iliopoulos-Strangas, *La protection des droits sociaux fondamentaux dans les Etats membres de l’Union européenne*, Nomos Verlag, 2000, p. 431.

<sup>2</sup> Council of State No. 2802/1991, Council of State No. 2677/1992.

benefits leads to unjustifiable discrimination or treatment that is manifestly arbitrary or unfair towards the individual.<sup>3</sup>

The Greek legislature did not wait for constitutional recognition of the State's obligation regarding social security in order to set up a social security system. The foundations of this system were laid down even before the Second World War. Nevertheless, it was only after the war and, in particular, its aftermath (i.e. the civil war from 1946-1949) that the State decided to create a national social security system based on the precepts of separation from the State and self-financing. The initial system was based on the fact that the insured parties were, at the time, young and larger in number than pensioners, which should have meant that contributions would accumulate to create significant resources and that pensions could easily be paid out of the system in the near- to medium-term. However, in the rather bleak economic situation of the 1960s and 1970s, the system was deprived of its potential to be independent and self-financed. Very high pensions granted to specific groups in society, workers registered in the system who were not paying contributions, and retirement at an early age, as well as factors such as falling birth rates, increased life expectancy and an ageing population resulted in all the contributions being used to pay for benefits and, over time, the contributions could no longer cover such benefits. Thus, the State was forced, in practical terms, to commit to guaranteeing the payment of pensions using public funds. Since the mid-1970s, financing the Greek social security system has essentially been entrusted to the State and has become a cog in the machinery of the State. Public policy administrators "traditionally" committed to clientelism and an underdeveloped bureaucracy were incapable of managing the capital of the insured parties in a financially profitable way for them.<sup>4</sup>

The State's positive obligation in the field of social security was enshrined in the Constitution in 1975, which coincided with the start of a lasting and deep crisis in the social security system (II). The overt failure of all attempts effectively and credibly to reform the system from the 1990s up to when the current financial and socio-economic crisis hit<sup>5</sup> has legitimized the reform adjusted to the Greek bail-out under the leadership of the Troika (IV). This has, in turn, created new constraints relating to the sustainability of the system (V). Over the last 40 years, the legislature's work regarding the implementation of obligations flowing from the Constitution was complemented by the work performed by the national courts, shaped – within the limits permitted by "moderate" justiciability concerning the right to social security as a social right – by the interpretation of statutory law in the light of the Constitution (I) and the impact of constitutional guarantees of social security on the national legal system (III).

## ***1. Constitutional guarantees of the right to social security***

Article 22(5) of the Constitution is not the only provision in the Constitution which is of interest in order to understand how the State came to guarantee the right to social security. Certain people, such as the elderly and people with disabilities, are at an objective disadvantage due to their situation. Social security acts as a protective measure for people in those types of situation, which are described in article 21(2), (3) and (6) of the Constitution as an area in which specific measures must be taken by the State.<sup>6</sup>

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<sup>3</sup> Three-member Administrative Court of first instance of Athens no. 3330/2007.

<sup>4</sup> For a brief analysis of the evolution of the Greek social security system, see D.A. Sotiropoulos, *The social situation of Greece under the crisis. Basic socio-economic data*, 2011, Berlin: Friedrich-Ebert-Stiftung.

<sup>5</sup> The repeated attempts to reform the Greek social security system are examined by K. Featherstone & D. Papadimitriou, *The Limits of Europeanization. Reform Capacity and Policy Conflict in Greece*, 2008, London: Palgrave Macmillan, pp. 121-170.

<sup>6</sup> Under article 21(2) of the Constitution, persons suffering from incurable bodily or mental ailments are entitled, among other categories of suffering people, to special care from the State. In accordance with article 21(3), the State shall care for the health of its citizens and shall adopt special measures for the protection of the elderly and people with disabilities; paragraph 6 of the same article stipulates that people with disabilities have the right to benefit from measures ensuring their self-sufficiency, professional integration and participation in the social, economic and political life of the country.

It is possible to infer by reading all these provisions in conjunction with article 22(5) that the State has an obligation not only to implement a social security system for working people but also to contribute to financing it by allocating part of its budgetary revenue to it. It is precisely the latter obligation which was formalized in Act No. 2084/1992, which establishes that the State is to finance one third of the expenditure of social security bodies.<sup>7</sup>

If the provisions of article 21(2), (3) and (6) are read together with article 22(5) of the Constitution, it is legitimate to think that, pursuant to the latter provision, *compulsory social insurance* must be exclusively entrusted to *public bodies*. Under the jurisprudence of the Greek supreme courts, whenever the law establishes *primary* and *compulsory* social insurance which is based on contributions from employers and employees, the State or a public corporation must be entrusted with the organization of the allocation of the benefits provided for.<sup>8</sup> This does not mean that the Constitution prohibits social insurance payments from benefit societies or private for-profit companies. These two types of undertakings offer optional pensions or other benefits, namely *supplementary* pensions from benefit societies (also referred to as the *second pillar* of the social security system, which is additional to the *first pillar* which covers compulsory and primary retirement pensions as discussed above) and *complementary* benefits from private for-profit companies by means of contracts concluded with groups of individuals or the members of a particular branch of industry (this is the *third pillar* of the social security system). The establishment and activities of both types of social security entity are covered by article 12(1) of the Constitution, which guarantees the right of Greek citizens to form non-profit associations and unions with regard to benefit societies, and article 5(1), which enshrines the freedom to choose with regard to private companies. Nevertheless, the Greek Supreme Court of Appeal has held that article 22(5) of the Constitution allows the legislature to make law on social security in its entirety, without making a distinction as to whether it concerns the first, second or third pillar and even allow it to intervene in terms of establishing, amending or annulling the conditions originally agreed on in supplementary social insurance contracts or contracts that come under the third pillar.<sup>9</sup>

The distinctive features of the Greek social security system, in the light of guiding principles of its organization, straddle a “Bismarckian” social insurance system and a “Beveridge” social protection system. The “Bismarckian” model is characterized by the range of its social security bodies, which are related to the various branches of industry and are financed by contributions. Notwithstanding the central role of the State with regard to financing these bodies, this was the prevalent social security model in Greece until fairly recently. It is clear that this type of structure, which covers all insured parties, was likely to entail significant inequalities concerning the treatment they received depending on which branch of industry they belonged to. This susceptibility might be deemed difficult to reconcile with the requirement in article 21(3) of the Constitution, whereby the State is responsible for taking special measures for the elderly and people with disabilities, among others.<sup>10</sup> However, the Council of State’s jurisprudence holds that entrusting social security to the multitude of bodies is justified by the different types of working conditions of the insured parties and is not incompatible with the principle of formal equality laid down in article 4(1) of the Constitution (“All Greeks are equal before the law”) or with article 22(5) of the Constitution.<sup>11</sup> Bearing this in mind, the principle of equality is breached if similar groups of insured parties that are covered by the same social security body are treated unequally. In contrast, unequal treatment of parties insured by different social security bodies will only be subject to penalties if the treatment guaranteed is not at least equivalent to that under social protection.<sup>12</sup>

<sup>7</sup> Act No. 2084 on the reform of the social security system, in Official Gazette (O.G.) No. 165/1992.

<sup>8</sup> Council of State No. 5024/1987, Special Supreme Court No. 87/1997.

<sup>9</sup> Supreme Court of Appeal No. 1638/1991.

<sup>10</sup> See in extenso K. Chrysogonos, *Civil and social rights* [in Greek], 2nd edition, 2002, Athens-Thessaloniki: Sakkoulas Publications, pp. 527-528.

<sup>11</sup> Council of State No. 2805/1991.

<sup>12</sup> Council of State No. 1461/1995.



Even before the current crisis hit, upsetting public finances and the entire Greek economy, a public policy had been drafted aimed at a “shift” in the Greek social security system from the “Bismarckian” model to the “Beveridge” model. The latter (which owes its name to Lord William Henry Beveridge, the British economist and politician who instigated the establishment of a welfare system under the post-war Labour Government) is based on the fundamental principle of the State’s central management of the social security system, as well as the principles of financing the system using taxes, it being a single system and the uniformity and universality of benefits, which are intended to meet basic subsistence needs (hence the reason they are very low).

This Greek public policy, outlined since the early 2000s, sought to merge the social security bodies whose resources had been badly managed with other bodies which were relatively stable and healthy.<sup>13</sup> However, the Greek legislature did not consider it an obligation, in pursuing this policy, to strictly adhere to the constitutional commitment to the principle of equality (article 4(1) of the Constitution) read in conjunction with article 22(5) of the Constitution. In the light of this, it was up to the Greek supreme courts to attach limitations to this policy. Thus, the Supreme Court of Appeal had already decided by the end of the 1980s that the need perceived by the State to maintain the financial stability of social security bodies was not a compelling reason to derogate from the application of the principle of equality.<sup>14</sup> The jurisprudence of the Greek supreme courts gave rise to a principle, whereby the legislature is only allowed to merge “homogenous” social security bodies, i.e. bodies that have the same organizational structure and whose financial sustainability is in fact similar. This principle was expressly formulated in a dissenting opinion on a Council of State judgment and has since been confirmed in Supreme Court judgments. It was held in this legal opinion that “a social security body, which is sustainable owing to the low level of benefits it offers its members, shall not be permitted to make its members bear the financial cost of it merging with another body that has become insolvent due to it offering pensions that did not match its actual financial capacity. As a general rule, national regulations concerning the unified treatment of insured parties, which does not take into account the financial health of each of the bodies to be merged, are incompatible with articles 4(1) and 22(5) of the Constitution”.<sup>15</sup> To conclude the analysis, where social security bodies are merged, it is up to the legislature to decide to make up the deficit of certain bodies using public funds; it is not for the parties insured by the financially healthy entities.<sup>16</sup> It is the legislature’s responsibility to raise, by means of public funds, the level of benefits guaranteed by a body that falls below the level of benefits offered by the other body, or to bridge the gap in terms of sustainability between the merging bodies.<sup>17</sup>

## 2. *The main features of the Greek social security system*

In addition to the “Bismarckian” and “Beveridge” classifications of the Greek welfare system, it shared, at least until the eve of the crisis at the end of the 2000s, the characteristics of the welfare model developed in southern Europe, pairing serious gaps in the social security net and remarkably generous benefits reserved for a protected core of the labour market.<sup>18</sup>

Pensions are the backbone of the Greek welfare system, providing households with 24.1 per cent of their disposable income on average.<sup>19</sup> Other social allowances (such as family support, healthcare benefits, housing benefits, unemployment benefits and social assistance) are minor and account, on

<sup>13</sup> See the detailed analysis of A. Stergiou, *Social Security Law* [in Greek], 2013, Thessaloniki: Zygos, pp. 138-143.

<sup>14</sup> Supreme Court of Appeal (Plenary session) No. 567/1986.

<sup>15</sup> Council of State (Plenary session) No. 668/2012.

<sup>16</sup> Court of Auditors, IV Section, Minutes of the Meeting No. 16/1.6.1999.

<sup>17</sup> Council of State (Plenary session) No. 92/2001.

<sup>18</sup> M. Ferrera, “The Southern model of welfare in social Europe”, in *Journal of European Social Policy* 6 (1), 1996, pp. 17-37.

<sup>19</sup> See *Survey of Income and Living Conditions 2008*, Pressrelease, 9.3.2010, Pireaus: Greek Statistical Service [in Greek].

average, for 3.2 per cent of the disposable income of households.<sup>20</sup> Employees in the public sector (e.g. the civil service, judiciary and public corporations) and in liberal professions (e.g. lawyers, doctors, civil engineers and architects) were the policyholders who benefited most from the entitlements relating to social security. Employees in the private sector (excluding the banking sector) never benefitted from the same preferential treatment. On the whole, the parameters defining the actual content of social security entitlements varied considerably from case to case. For example, the statutory retirement age for men ranged from 45 to 65 years for a full pension. The range was equally broad in terms of contribution levels, the minimum contribution period, reference earnings and replacement rates. The general picture was fairly complex and systematic differences between the entitlements of different groups of pensioners have been identified. In general, the rules governing pensions favoured self-employed workers more than salaried employees, employees in the public sector more than those in the private sector, middle-aged taxpayers more than young people, skilled workers more than unskilled workers, and men more than the majority of women.<sup>21</sup>

Unequal access to benefits was also the main characteristic of supplementary pensions. The relevant social insurance schemes concerned around 62 per cent of all insured workers. Although coverage was practically universal in the civil service (and public corporations) and widespread among employees in the private sector (95 per cent), it was much more limited in the liberal professions (48 per cent), extremely low among self-employed workers (two per cent), and almost non-existent among farmers. As the majority of supplementary pension schemes were set up in the 1970s and had, therefore, not yet reached maturity, only 38 per cent of pensioners were, in practice, receiving a supplementary pension in addition to their primary pension. The benefit levels have been strictly set and almost at random within each supplementary insurance body; they correspond to between 20 and 45 per cent of the final salary. In the last few years before the crisis hit, bearing in mind the number of people insured under supplementary pension schemes and of potential policyholders, all these funds were showing a deficit.<sup>22</sup>

The shortcomings in the social security net were also significant in terms of social benefits other than pensions. The contributory unemployment allowance instrument paid meagre benefits with a low replacement rate, for a short period of time and provided incomplete coverage. Non-contributory unemployment benefit aimed at the long-term unemployed over the age of 45 has not managed to play the significant role it was expected to when it was first introduced in 2001, mainly due to the strict eligibility rules.

In addition, family allowances were only relevant to large families and unskilled workers. However, most families with one or two children received only a small allowance if any, even if they were living in poverty. Public assistance for housing was limited. The public rental housing sector is underdeveloped and rent subsidies, subject to the resources statutorily provided for, available on a contributory basis, were not accessible for the poorest families. Short-term sickness or maternity benefits ranged from moderately generous (for skilled workers) to non-existent (for unskilled workers). Disability benefits were extremely fragmented with no less than ten different categories and 22 sub-categories often unjustifiably treating the people concerned differently. Moreover, Greece is the only remaining Member State of the European Union which does not have a guaranteed minimum wage system, not even at the local or regional level (as is the case in Italy, Spain and Hungary), which could have acted as a social security safety net in the last resort.

On the whole, because social benefits are heavily dependent on contributions, unskilled workers and their families, in particular, are denied their rights. The inherent risks of this situation have been fully exposed by the crisis when hundreds of thousands of workers lost their jobs and, consequently, access to social benefits for themselves and their dependants.

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<sup>20</sup> *Ibid.*

<sup>21</sup> M. Matsaganis, "Union structures and pension out comes in Greece", *British Journal of Industrial Relations*, 45 (3), 2007, pp. 537–555.

<sup>22</sup> See C. Leventi & M. Matsaganis, *Distributional implications of the crisis in Greece in 2009–2012*, Working Paper 14/13, Microsimulation Unit, University of Essex, available at <https://www.iser.essex.ac.uk/publications/working-papers/euromod/em14-13.pdf>.

### 3. *The impact of the constitutional guarantees of social security on the domestic legal order*

In the fragmented and unequal social security system operating in Greece until the crisis hit, it was not to be expected that the national courts, and more specifically the higher courts, take the same route as the high courts of other Member States of the European Union. That is to say, imposing on the States concerned the obligation to give effect to social security rights of individuals by means of positive measures, with a focus on ensuring that social security is adequate and accessible to all. In Greece, the State's deep commitment to financing various social security bodies connected to different socio-professional categories and integrating the social security system in the State's clientelistic and paternalistic machinery,<sup>23</sup> have been vectors of change in the system amid partisan antagonism, where competing groups sought to gain better treatment based on their lobbying and bargaining power.<sup>24</sup> In these conditions, the basic constitutional rule, enshrined in article 22(5) of the Constitution, was the tool used by the national courts to lay down *casuistically* the principles which should have guided the legislature's action in this area. Aside from the principle of equality which has already been discussed in the introduction and in the first section of this study, the matter concerns the principles governing the relationship between the level of contributions and the level of benefits, the participation of the insured parties in the administration of social security bodies and the insurance coverage for social risk and contingencies.

Based on the jurisprudence of the national and high courts, the abovementioned constitutional provision does not, either literally or purposively, give rise to an obligation on the legislature to impose a contributory approach, at any cost, to social security contributions. In other words, the Constitution does not guarantee a fixed ratio between contributions and insurance benefits.<sup>25</sup> Consequently, the Constitution does not require that the level of contributions be calculated on the same basis as that of benefits.<sup>26</sup> However, it is compatible with the Constitution for the law to establish that beneficiaries insured for a longer period than those for a shorter period pay higher contributions in order to consolidate the resources needed for the social security body to meet its objectives.<sup>27</sup> Moreover, the legislature is not prevented from reducing future pensions of certain categories of insured parties with an increased income (and, as a result, who have paid higher contributions than other parties), thereby making the economic burden to ensure the feasibility of the entire system heavier for them.<sup>28</sup>

This jurisprudence, which monopolized the national courts' concerns in the field of social security throughout the 1990s and 2000s, has been hailed in parts of the Greek social security doctrine as proof of the domestic legal system's attachment to the role of redistributing national resources, which was traditionally the role of the social security branch; and even as proof of attachment to the principle of solidarity, which is at the other end of the spectrum to the contributory nature of contributions and helps to uphold and strengthen social cohesion.<sup>29</sup> However the national courts have set limits as to the resulting, non-contributory nature of social insurance contributions. According to the Council of State, "although the legislature has complied with its obligations pursuant to article 22(5) of the Constitution and the principle of equality (enshrined in article 4(1) of the Constitution), when establishing, for reasons of social solidarity, more favourable treatment of financially disadvantaged insured parties as compared

<sup>23</sup> See above, in the Introduction.

<sup>24</sup> For example, from the 1950s to 1980s, when the Greek government wanted to develop electrification and attract skilled labour, it preferred to grant benefits payable in kind either immediately, e.g. free electricity, or in the future, e.g. early retirement, rather than pay high wages it could not afford. However, it ends up paying these at some point, as well as the wages that increased over time.

<sup>25</sup> Council of State No. 3251/1996.

<sup>26</sup> Three-member Administrative Court of First Instance of Athens No. 7348/1998.

<sup>27</sup> See the comments regarding the court decisions mentioned in the two previous footnotes of A. Stergiou, "The right to social security" [in Greek], *Law Review of Social Security*, No. 3/555, 2005, pp. 172-173.

<sup>28</sup> Three-member Administrative Court of First Instance of Athens No. 7348/1998, Council of State No. 1807/2001.

<sup>29</sup> See, for instance, G. Katrougalos, *The Welfare State of the post-industrial era* [in Greek], 1998, Athens: Savvalas Publications; A. Stergiou, "The constitutional protection of social security" [in Greek], *The Constitution*, 1994, pp. 66-100.

to financially powerful insured parties by imposing on the latter higher contribution rates or capping the benefits they will receive in the future, it is incompatible with the abovementioned constitutional provisions for a regulation to lay down that higher benefits be paid to the insured parties who have paid reduced contributions compared to those who have paid higher contributions for coverage of exactly the same risk.”<sup>30</sup>

This jurisprudence of the Greek high courts seems to have started stabilizing in the late 1990s. However, this has not prevented the Greek Supreme Courts from establishing and promoting the principle whereby a legal cap on the social insurance benefits offered by a social security body is compatible under the Constitution provided that these benefits, pursuant to the law which introduced them, do not have the distinct advantages of “pure contributory benefits”. According to jurisprudence, social benefits are not “purely” contributory if they have not been exclusively financed using beneficiaries’ contributions, and they have been supplemented by contributions from employers that are double the amount paid in by employees or have been financed using budget revenue or “essential contributions” made by third parties. In contrast, if the benefits are paid from the social security body’s capital, accumulated purely on the basis of withheld payroll and not of “social resources”, imposing a cap on such benefits would be incompatible with articles 22(5) and 4(1) of the Constitution. This jurisprudence was introduced in a Special Supreme Court judgment of 1980; its approach was confirmed by the Court of Appeal and the Council of State in the 1990s.<sup>31</sup>

In addition, according to Greek constitutional doctrine, the participation of insured parties in the administration of social security bodies constitutes another principle that extends the effect, throughout the domestic legal system, of the relevant fundamental rule as contained in article 22(5) of the Constitution.<sup>32</sup> However, the Council of State, in a decision handed down in the early 1990s, held that the government was not required, under article 22(5) of the Constitution, to establish a majority representation of the insured parties in the administrative councils of social security bodies because the constitutional provision does not contain any indication as to the way in which these bodies, in their capacity as public legal persons, should be organized and managed.<sup>33</sup> This judgment from the Greek Supreme Administrative Court seems rather unfortunate: in trying to define the principles which should govern the State’s involvement in the field of social security, the Court focused solely on article 25(5) of the Constitution, when in fact the State’s prerogatives under article 22(5) of the Constitution should also be exercised in the light of other equally relevant constitutional principles and provisions. This includes article 5(1) of the Constitution which stipulates that “all persons shall have the right to participate in the social, economic and political life of the country”. This provision, when applied to the area of social security, would shed light on the requirement for the parties directly concerned (the insured parties) to participate in the administration of social security bodies. Nevertheless, their participation would not be able to prevent the Government, whose political responsibility comes from Parliament, from managing the operations of these bodies. Consequently, a legal basis for a simple, rather than majority, representation in the administration of social security bodies of the parties concerned could have been article 22(5) read together with article 5(1) of the Constitution.

Lastly, another predominant principle concerning social security in the national legal system is that the coverage provided by the competent bodies should at least cover the main social security risks and contingencies; as for the jurisprudence, it emphasized that the “interest of the State and society” required “insofar as possible” universal, full insurance coverage of the world of work.<sup>34</sup>

<sup>30</sup> Council of State No. 4837/1997.

<sup>31</sup> See Special Supreme Court No. 9/1980, Supreme Court of Appeal (Plenary session) No. 32/1995, Council of State (Plenary session) No. 540/1999.

<sup>32</sup> See, for instance, G. Leventis, “The social rights of the citizen” [in Greek], *The Constitution*, 1976, pp. 174-175; K. Chrysogonos, see above fn. 10, pp. 533-534.

<sup>33</sup> Council of State (Plenary session) No. 2692/1993.

<sup>34</sup> Council of State (Plenary session) No. 832/1985.

#### 4. *Threats to social security rights and judicial responses in times of economic crisis*

In the Member States of the European Union which have been affected by the financial and economic crisis, the measures adopted to deal with the crisis have significantly affected the welfare institutions. Changes have been made on two fronts. The first is budget consolidation, in other words reduced public deficits have deprived the welfare state of precious resources. The second is that the crisis has acted as a catalyst bringing about far-reaching and large-scale reforms.

The social cost of the crisis has been particularly high in Greece. National revenue fell by almost a quarter. The gap between the standard of living in Greece and the rest of the European Union has returned to what it was 50 years ago. More than a quarter of the labour force is unemployed. The actual, average benefits for those in work are below the levels reached at the end of the 1990s. On the whole, the political response to the social consequences of the crisis has been misguided or inadequate. The reform of social welfare has brought with it some welcome improvements, but most of the budget cuts were discriminatory and have caused significant problems and disruption to the health and social security systems. Despite the discourse of national politicians and international organizations on the need to strengthen the net of social protection, action to date can only be described as extremely disappointing. In the first three months of 2013, only one out of five unemployed workers was receiving unemployment benefits.<sup>35</sup>

Although no cases have been brought, at least to date, before the Greek courts and tribunals by individuals concerning the compatibility of the “anti-crisis” measures affecting the national social security system with the Constitution, the legality of these measures has been questioned in the light of the agreed European social security system, which was established in the European Social Charter of the Council of Europe and is monitored, to ensure compliance of States Parties to the Charter with the commitments to which they have subscribed, by the European Committee of Social Rights (ECSR).

In January 2012, five Greek pension federations submitted to the Committee under its *quasi-judicial* procedure of collective complaints,<sup>36</sup> five complaints against Greece.<sup>37</sup> The complaints concerned the package of measures passed by the Greek Government in 2010 on pension rights: the variable reduction in proportion, but nevertheless significant, of the benefits from primary, supplementary and additional pensions; suspended pension payments or reduced payments where work was undertaken beyond a certain age; increased contributions to solidarity funds of pensioners; reduced “social solidarity” allowance paid to the lowest income pensioners in the private sector. The complainant organizations argued that the package of measures was contrary to article 12 of the European Social Charter in respect of social security.<sup>38</sup>

<sup>35</sup> For a comprehensive analysis of the effects of the crisis on the social protection system, see M. Matsaganis, *The Greek Crisis: Social Impact and Policy Responses*, 2013, Berlin: Friedrich-Ebert-Stiftung, pp. 20-27.

<sup>36</sup> The collective complaints procedure of the European Committee of Social Rights (ECSR), is regarded unanimously by the European doctrine of human rights as a *quasi judicial* process, the first in international law specifically for economic and social rights; the practice of the ECSR in deciding collective complaints, reveals that the ECSR has developed considerable economic and social rights jurisprudence; it has articulated and elaborated on the values underlying the Charter; it has also employed techniques of reasoning drawn in part from the European Court of Human Rights. For a comprehensive analysis of the collective complaints procedure, see H. Cullen, “The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights”, *Human Rights Law Review* 9:1(2009), pp. 61-93.

<sup>37</sup> See Federation of employed pensioners of Greece ((IKA –ETAM) v. Greece, collective complaint No. 76/2012, decision on the merits of 7 December 2012; Panhellenic Federation of Public Service Pensioners v. Greece, collective complaint No. 77/2012, decision on the merits of 7 December 2012; Pensioners’ Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece, collective complaint No. 78/2012, decision on the merits of 7 December 2012; Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v. Greece, collective complaint No. 79/2012, decision on the merits of 7 December 2012; Pensioner’s Union of the Agricultural Bank of Greece (ATE) v. Greece, collective complaint No. 80/2012, decision on the merits of 7 December 2012.

<sup>38</sup> Article 12 of the European Social Charter: “With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake: (1) to establish or maintain a system of social security; (2) to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention No. 102 Concerning Minimum Standards of Social Security; (3) to endeavour to raise progressively the system of social security to a higher level; (4) to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by

*Note 38 continued on page 86*

Neither the complainant organizations nor the Greek Government have, in fact, developed very convincing arguments likely to be used as grounds for the finding of a breach or otherwise. The claimants have, in essence, stated that the measures – the implementation of which was described by the government as being necessary to restore the balance of public accounts – were neither necessary nor suited to doing so. They argued that other, probably more effective, measures could have been proposed such as the development of public buildings; tax on capital, and on exchange and brokerage transactions; and the fight against tax fraud. The complainant organizations also relied on the European Court of Human Rights' consistent jurisprudence, according to which the restrictions of rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the first Protocol thereto should not have been passed before checking that a proper balance was struck between the public interest and the protection of the rights of individuals, which was not the case in Greece, where no specific actuarial studies were carried out.

Irrespective of the substantive debate, the complainant organizations also held that while article 31 of the Charter provides for restrictions and limitations to the rights set forth therein in certain cases (namely, with a view to protecting public order, national security, public health, or morals) and for restrictions and limitations which are not set forth in the body of the text, such restrictions and limitations must be prescribed by law, whereas the measures adopted by the Greek Government were not based on actual legislation but on ambiguous legislative powers in the form of memoranda, conventions and agreements with the European Union. The fact is that the measures under review have been largely imposed on Greece by the Troika (i.e. the European Commission, the European Central Bank and the International Monetary Fund). It is not all that far-fetched to think that, as a result, the ECSR held that there was no breach of the Charter.

The high level mission of the International Labour Office did in fact, in its report of September 2011 on Greece, state that the level to which Greek pensions had fallen after the 2010 “laws” did not seem to be below that set by Convention No. 102 insofar as it is possible to assess this based on the first results of the actuarial studies available. However, it also reported that around 20 per cent of the Greek population was facing the risk of poverty, which it had not had the opportunity to discuss with the Troika. It also noted that under the circumstances there was scope to raise questions concerning the validity of maintaining the social security system. The reform package lead, moreover, to a significant extension of the minimum contributory period in order to obtain a retirement pension, including for women, without any other type of measure being introduced as compensation for women, children and young people.

In this context, the ECSR was not able to examine the issue to find out whether the acts described as national “laws” were worthy of such a label, as it deemed that doing so was beyond the scope of its powers. Nevertheless, it generally concluded that the criticized measures did breach article 12 of the Charter when read in conjunction with article 31. It was not that the measures under review were not worthy of the label “laws” but rather that, contrary to the provisions of article 12 of the Charter aimed at ensuring States Parties endeavour to raise progressively the system of social security to a higher level or at the very least maintain the social security system at a satisfactory level, they were not necessary in a democratic society for the preservation of public order, national security, public health, or morals and therefore were not covered by article 31 of the Charter.

The ECSR also stated that, regardless of the States' margin of appreciation with respect to balancing social security accounts, choices had to be made between various measures which either increased income or reduced the expenditure earmarked in those accounts. Every effort should be made for the choices to comply with the requirement to reconcile the public interest with the rights of individuals, including the

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*Note 38 continued from page 85*

other means, and subject to the conditions laid down in such agreements, in order to ensure: (a) equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties; (b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties”.

legitimate expectations that may have arisen concerning the certainty of the applicable rules relating to social benefits, in particular pension rights, on the basis of which individuals have made contributions over the course of their career. This means that the choices made should not, contrary to both the principle that every natural or legal person is entitled to the peaceful enjoyment of his possessions set forth in the first Protocol to the European Convention on Human Rights and the principle of legal certainty, result in depriving any person of such a substantial share of their means of subsistence as to seriously affect his or her living conditions, which instead of contributing to the protection of public order only represents a threat to him or her.

### 5. *Assessment of the future of social security rights*

On the domestic political scene, which has lost all credit because of the country's compromised position in the hierarchy of developed countries as a result essentially of its economic and financial collapse, a debate is raging on the future of the Greek social security system and its reform, which is crucial like never before. This debate is taking place in academic circles and civil society rather than in the national political system.<sup>39</sup> It focuses on the following main points:

- (a) A total end to contributions from employees and employers.
- (b) The same pensions in terms of value and amount for men and women who work, granted by the State as soon as the individual has reached the fixed retirement age. No individual will be excluded from this benefit. Given the universal nature of the benefit, the State's obligation to take steps regarding social security, as required by the Constitution, will have been duly satisfied.
- (c) The pension granted by the State could be complemented by benefits which will be agreed on following collective bargaining between employees and employers. It could, optionally, be complemented by benefits contracted for with private insurance companies.
- (d) Socio-professional groups will be free to organize pension funds, which may allocate supplementary pensions. The sustainability of these funds will not be guaranteed by the State. Existing supplementary pension funds could either continue while gradually becoming independent from the State or be dissolved.

While the withdrawal of state funding to finance various social security bodies could easily be deemed incompatible with the principles of the welfare State, there is no denying that if it were to occur by means of a global reform of the system, it would be met with a certain degree of relief from the general public. The general public has been very disappointed with the chronic shortcomings of the system, as well as the injustices and the unequal treatment it has embodied for decades. Clearly such a reform cannot be made from one day to the next without transitional measures and deadlines. The real obstacle to this reform does not lie in the inability to create such measures and deadlines. It lies, by contrast, in the blatant lack of will on the part of Greek politicians to even consider such a reform, or even to engage in the dialogue and debate which is currently unfolding on the topic in civil society. Political responsibility concerning Greek governance policy on the impasse, in terms of the current social security system's ability to meet its specific obligations, is the result of the irrational and disorganized management of the system pursued for so many years. For the Greek system of government, it seems to be enough to simply proclaim the growth of the country's economy as the only way out of the endemic crisis. However, as has been rightly noted, domestic economic growth could be boosted by a reform of the pensions system, which would *inter alia* boost the private social insurance market. It is highly likely that Greek politicians are waiting for the social security system to collapse in order to decide to rebuild it on a new foundation. However, if that happens it will lead to the collapse of the entire Greek economy and even of the political system itself.

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<sup>39</sup> For an overview of this debate, see P. Vourloumis, "For a new system of social security", *The Athens Review of Books*, December 2013, pp. 20-22; M. Xafa & P. Tinios, "What we choose for the social insurance system? One way to the depreciation or a new beginning?" *The Athens Review of Books*, May 2014, pp. 11-14.

# HUNGARY

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## THE RIGHT TO SOCIAL SECURITY IN THE HUNGARIAN FUNDAMENTAL LAW (CONSTITUTION)

*Prof. JÓZSEF HAJDÚ<sup>1</sup>*

### **1. The constitutional guarantees of social security rights.**

#### *1.1. Transition from Constitution to Fundamental Law*

The Hungarian Parliament passed Hungary's Fundamental Law<sup>2</sup> on 18 April 2011.<sup>3</sup> The Fundamental Law, which entered into force on 1 January 2012, supersedes the previous constitution (hereinafter: 1989 Constitution), which, in keeping with the requirements of democratic constitutionalism during the 1989-90 regime change, comprehensively amended the first written Constitution of Hungary (Act XX of 1949).<sup>4</sup>

The document – according to the declaration set forth in Article B) – seeks to maintain that Hungary is an independent, democratic state governed by the rule of law, and furthermore – according to Article E) – that Hungary contributes to the creation of European unity, however, in some respects it does not comply with standards of democratic constitutionalism and the basic principles set forth in Article 2 of the Treaty on the European Union (hereinafter: TEU):<sup>5</sup>

- a) An important criterion for a democratic constitution is that everybody living under it can regard it as his/her own. The Fundamental Law basically breaches this requirement. Its lengthy preamble, entitled National Avowal, defines the subjects of the constitution not as the totality of people living under the Hungarian laws, but as the Hungarian ethnic nation. The Fundamental Law defines it as a community, the binding fabric of which is “intellectual and spiritual”, not political, but cultural. The elevation of the “single Hungarian nation” to the status of constitutional subject suggests that the scope of the Fundamental Law somehow extends to the whole of historical Hungary, and certainly to those places where Hungarians are still living today.<sup>6</sup>

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<sup>2</sup> The drafting of the Fundamental Law took place without following any of the elementary political, professional, scientific and social debates. The Council of Europe's Venice Commission also expressed its concerns related to the document.

<sup>3</sup> For the “official” English translation of the Fundamental Law, see: <http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf> (10. 03. 2014).

<sup>4</sup> For the official English translation of the Opinion, see: [http://tasz.hu/files/tasz/imce/2011/opinion\\_on\\_hungarian\\_constitutional\\_questions\\_enhu.pdf](http://tasz.hu/files/tasz/imce/2011/opinion_on_hungarian_constitutional_questions_enhu.pdf).

<sup>5</sup> Balogh Zsolt, Hajas Barnabás: Rights and Freedoms. In: Schanda Balázs, Varga Zs András, Csink Lóránt (szerk.): The basic law of Hungary: A First Commentary (Dublin: Clarus Press, 2012).

<sup>6</sup> Zoltán Fleck, Gábor Gadó, Gábor Halmai, Szabolcs Hegyi, Gábor Juhász, János Kis, Zsolt Körtvélyesi, Balázs Majtényi, Gábor Attila Tóth: Opinion on the Fundamental Law of Hungary, June 2011.



- b) The decline in the level of protection for fundamental rights is influenced not only by the substantive provisions of the Fundamental Law pertaining to fundamental rights, but also by the weakening of institutional and procedural guarantees that would otherwise be capable of upholding those rights that remain under the Fundamental Law. The most important of these is a change to the review power of the Constitutional Court, making it far less capable than before of performing its tasks related to the protection of fundamental rights (see details later).<sup>7</sup>
- c) The new Fundamental Law regulates some issues which would have to be decided by the governing majority, while it assigns others to laws requiring a two-third majority. This makes it possible for the government (2010-2014 and 2014-2018) enjoying a two-third majority support to write in stone its views on economic and social policy. A subsequent government possessing only a simple majority will not be able to alter these even if it receives a clear mandate from the electorate to do so. In addition, the prescriptions of the Fundamental Law render fiscal policy especially rigid since significant shares of state revenues and expenditures will be impossible to modify in the absence of pertaining two-third statutes. This hinders good governance since it will make it more difficult for subsequent governments to respond to changes in the economy and in the society. The very possibility created by the Fundamental Law to regulate such issues of economic and social policies by means of two-third statutes is incompatible with parliamentarism and the principle of the temporal division of powers.<sup>8</sup>

### *1.2. The international compatibility of the Fundamental Law*

Based on Point f) of Paragraph (2) of Article 24, the Constitutional Court will continue to investigate whether laws breach international agreements. However, the Fundamental Law does not mention who shall initiate procedures of this nature, and also makes no reference to the opportunity for an ex officio review. No mention is made of how harmony should be created if a Hungarian law breaches a generally accepted rule of international law. Where an international agreement is breached by a piece of legislation or constituent provision, the annulment of the latter two is only an option (Point c) of Paragraph (3) of Article 24). This weakens the requirement set out in Paragraph (2) of Article Q, under which Hungarian laws must be in harmony with international law: it would have been more opportune to prescribe categorical annulment of such legislation, naming it as an exception due to a conflict with the EU's founding treaties.<sup>9</sup>

Furthermore, Article E contains only one new rule in comparison to Article 2/A and Paragraph (4) of Article 6 of the 1989 Constitution, namely that the law of the EU may stipulate a generally binding rule of conduct. This requirement, incidentally, also follows from the EU's founding treaties. The rule, however, still says nothing about requesting priority of application.<sup>10</sup>

<sup>7</sup> <http://www.vg.hu/kozelet/tarsadalom/solyom-eddigi-lesulyosabb-kritikaja-jon-a-lex-polt-346427> (12. 04. 2014).

<sup>8</sup> For example, pensions: the Fundamental Law itself excludes the possibility that a subsequent governing majority create a compulsory funded pension scheme based on capital investment. It is not compatible with the functions of the constitution that the governing majority excludes the application of one of the available public policy solutions in the Fundamental Law without having been empowered by the electorate to do so. In addition, Article 40 of the Fundamental Law assigns the basic rules of the pension system to a cardinal act, which, as mentioned above, requires a two-third majority. In any case, the Fundamental Law makes it possible that the retirement age and other conditions of eligibility as well as the basis for calculating pensions will be modifiable only by a two-third majority.

In addition, Article L of the Fundamental Law specifies that the regulation of family welfare support is also to be subject to two-third statutory regulation. It is clear, however, that the pertaining prescriptions of the Fundamental Law create the possibility that every detailed issue of the family welfare support will only be modifiable subsequently by a two-third majority.

<sup>9</sup> Jakab András: *Az új Alaptörvény keletkezése és gyakorlati következményei*, HVG Orac, Budapest, 2011.

<sup>10</sup> Zoltán Fleck, Gábor Gadó, Gábor Halmai, Szabolcs Hegyi, Gábor Juhász, János Kis, Zsolt Körtvélyesi, Balázs Majtényi, Gábor Attila Tóth: *Opinion on the Fundamental Law of Hungary*, June 2011. <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf> (18. 03. 2014).

### 1.3. The relationship between rights and obligations

The Fundamental Law reshapes the relationship between rights and duties in contrast with the 1989 Constitution. This change will impact on the substantive rules of most of the Hungarian legal system<sup>11</sup> and the practice of political institutions, as well. Although fundamental rights and duties (Articles I-XXXI) were included in one chapter, the chapters called “National Avowal”<sup>12</sup> and “Foundation” also contain principles concerning the enjoyment and exercise of rights as well as the fulfillment of duties.<sup>13</sup>

The relationship of rights and duties stated by the Fundamental Law is marked by a peculiar ambiguity. According to certain provisions of the Fundamental Law, and the general picture which they outline, the exercise of certain rights depends on the discharging of duties. As a result, they can no longer be regarded as inalienable individual rights. This ambiguity can be detected in the passage of the National Avowal according to which “individual freedom can only unfold in cooperation with others”. The article cataloguing fundamental rights also bears the title “Freedom and Responsibility”.<sup>14</sup>

According to the modern conception, which the 1989 Constitution shares with conceptions of the world’s constitutional democracies, and which has been shaped by Hungarian constitutional review as well, everyone enjoys fundamental rights equally and the state is to protect everyone’s rights equally. According to this conception, inalienable constitutional rights are entitlements which lay the groundwork for the duties of the state (and those of all other agents, as well). “It is the primary duty of the state to protect the inviolable and inalienable rights of human beings”.<sup>15</sup> That is, it is not for the state to decide what it will protect and what it will not. A conception running counter to this manifests itself, however, in a number of passages in which the Fundamental Law makes the exercise of rights expressly dependent on the discharging of duties.<sup>16</sup>

Although the subject of rights is the human being, even if their rights are communal (Article I), the new Fundamental Law is in some of its passages anti-individualist. Rights do not necessarily serve to protect the autonomous interests of persons, but rather collective interests (which remain unspecified). In these passages, the new Fundamental Law does not regard entitlements as the limits of collective (state) agency, but rather treats the interests of the collective as the source and at the same time limitation of rights. Thus the new Fundamental Law identifies the foundations of the economy as the freedom of enterprise and value-creating work (see Article M), the pursuit of individual welfare is coupled with duties owed to the collective (see Article O), the article on the freedom of property and inheritance admonishes to the “social responsibilities” of the owner (see Article XIII).<sup>17</sup>

<sup>11</sup> For example, the chapter on fundamental rights itself contains 18 passages pertaining to the legislation of new acts of Parliament.

<sup>12</sup> The relevance of the “National Avowal” is based on Article R, which prescribes with mandatory force that the interpretation of the provisions of the Fundamental Law is to be in harmony with the National Avowal’s declarations.

<sup>13</sup> Fleck Zoltán – Gadó Gábor – Halmai Gábor – Hegyi Szabolcs – Juhász Gábor – Kis János – Körtvélyesi Zsolt – Majtényi Balázs – Tóth Gábor Attila: *Vélemény Magyarország Alaptörvényéről*. <http://www.fundamentum.hu/magyarorszag-alaptorvenye-i/cikk/velemenymagyarorszag-alaptorvenyerol> (13. 03. 2014).

<sup>14</sup> Fleck Zoltán – Gadó Gábor – Halmai Gábor – Hegyi Szabolcs – Juhász Gábor – Kis János – Körtvélyesi Zsolt – Majtényi Balázs – Tóth Gábor Attila: *Vélemény Magyarország Alaptörvényéről*. <http://www.fundamentum.hu/magyarorszag-alaptorvenye-i/cikk/velemenymagyarorszag-alaptorvenyerol> (13. 03. 2014).

<sup>15</sup> Az Alkotmány kommentárja, Századvég Kiadó, Budapest, 2009 I-III. kötet.

<sup>16</sup> For example, Article XII declares in one and the same passage everyone’s right to choose one’s employment and profession freely, and their duty to contribute to the welfare of the community by doing work in accordance with one’s abilities and opportunities. This is unacceptable in a liberal democracy. The bearer of an inalienable right is free not only to choose among available opportunities for work, but also to refrain from work. The obligation to work is contrary to freedom. Moreover, since this passage includes a duty, it also empowers an entity (local government, authority) to oversee whether this duty is discharged.

<sup>17</sup> <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf>.

#### *1.4. Right to social security: state goals instead of social rights*

The previous Constitution set forth that citizens have the right to social security<sup>18</sup> and they are entitled to the support required to live.<sup>19</sup> The new Fundamental Law, however, identifies social security as a state goal: Hungary shall (only) strive to provide social security to all of its citizens, and the level of assistance is determined not as the extent necessary for subsistence but “statutory subsidies” are provided for (See Article XIX).

At the same time, in connection with the new Fundamental Law it must be noted that it adds to the state goals within the scope of social rights. The state aims to provide every person with decent housing<sup>20</sup> and access to public services, which were not included in the previous Constitution (Article XXII).<sup>21</sup>

Here the institutional guarantees of social security must be mentioned by all means. The 1989 Constitution mentioned the social insurance system and the system of social institutions in relation to implementing social security, while the new Fundamental Law talks about a general state pension system and a system of social institutions. Besides the state pension system, the Fundamental Law allows for the “operation of voluntarily established social institutions”<sup>22</sup> – which also promotes the livelihood of the elderly. Thus the two-pillar pension system (1st pillar: statutory state pension and 2nd pillar: voluntary pension funds) is stabilized by the Fundamental Law,<sup>23</sup> however the text of the Fundamental Law rules out the reinstatement of the previously eliminated compulsory private pension fund (which was originally the second pillar under the World Bank concept) and there is absolutely no mention of social insurance.<sup>24</sup>

In summary, pursuant to the provisions of the Fundamental Law, the state has increased freedom in providing social rights. One might venture to say that the prohibition set up by Constitutional Court Decision 43/1995 (VI. 30), according to which the abrupt change of a social insurance service or its downgrading from insurance to assistance qualifies as interference into a fundamental right, no longer exists in this form. The provisions of the Fundamental Law on social rights clearly show that it is possible to interfere into existing rights, to rearrange them and ultimately to transform the social security system. According to the Fundamental Law, the state enjoys a great degree of freedom in the field of social rights, and this may result in social and economic policies which are more flexible and better suited to the requirements. Accordingly, the provisions of the Fundamental Law do not constrain the state in a worse economic situation, and the rules on social security alone will not bankrupt the state merely because they shall be observed under all circumstances. However, the ultimate limit lies not in the regulations on social rights but in realizing human dignity.<sup>25</sup>

<sup>18</sup> Trócsányi László szerk.: *A mi alkotmányunk*, Complex Kiadó, Budapest, 2006 p. pp. 483-484.

<sup>19</sup> However, for the sake of accuracy it must be mentioned that the provisions of the 1989 Constitution relating to social rights were the subject of debate in the practice of the Constitutional Court, too. [See Constitutional Court Order No. 24/1991 (V. 18.)] The issue under debate was whether these were rights or were formulated only as a state objective. Finally, the practice of the Constitutional Court reinforced the latter position, i.e. that the Constitution’s rules on social rights served only as guidance for the state and no right derived from the Constitution (in spite of being worded as a right), and at best they can be secondary, subjective rights created by legislation. The consideration underlying this opinion was that they shall not be fundamental rights because they depend on the economic performance of the state. If the economic performance declines, there are two options to choose from: 1. either the state does not observe the provisions of the Constitution and thus the Constitution will be devalued, or 2. it observes them and impending state bankruptcy will follow.

<sup>20</sup> The Constitutional Court examined the issue within the framework of constitutional interpretation whether the right to housing can be deduced from the Constitution and reached a negative answer, at the same time maintaining that in the case of imminent danger to life the state shall provide dwelling (Constitutional Court Decision No. 42/2000 (XI. 8.).

<sup>21</sup> Juhász Gábor: *A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben*, *Fundamentum* 2012. évi 1. szám.

<sup>22</sup> These are the voluntary and supplementary pension funds.

<sup>23</sup> However, the two-pillar pension system implied by the Fundamental Law is not the same as the two-pillar – statutory social insurance pension and compulsory private pension – model proposed earlier by the World Bank.

<sup>24</sup> Juhász Gábor: *A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben*, *Fundamentum* 2012. évi 1. szám. <http://www.fundamentum.hu/sites/default/files/12-1-02.pdf> (14. 03. 2014).

<sup>25</sup> [http://ejegyzet.hu/obh/Alaptorveny\\_szabadsag\\_felelosseg/lecke11\\_lap2.html](http://ejegyzet.hu/obh/Alaptorveny_szabadsag_felelosseg/lecke11_lap2.html).

## 2. *The scope of the material and personal social security rights guaranteed by the Fundamental Law (Constitution)*

### 2.1. *Right to work*

The Fundamental Law gives a specific value content to work. In the National Avowal of the Fundamental Law it is expressed that the strength of community and the honour of each person are based on labour, an achievement of the human mind. The fundamental principles include that the economy of Hungary shall be based on work which creates value and freedom of enterprise. Then in the chapter on Freedom and Responsibility, where the right to work is regulated, the task of the state to take measures for creating jobs (so that “every person who is able and willing to work has the opportunity to do so”) appears as a state objective on the one hand, while on the other hand the Fundamental Law states that every person shall be obliged to contribute to the community’s enrichment with his or her work to the best of his or her abilities and potential (Article XII). Thus physical and intellectual work, the possibility of enterprise is of paramount importance in the Fundamental Law.<sup>26</sup>

However, unlike the 1989 Constitution,<sup>27, 28</sup> the new Fundamental Law does not proclaim the right to work (which the Constitutional Court has also interpreted as no more than the state’s obligation, not specified in any more detail, to pursue an employment policy), and, thus, the new provisions make it clear that the provision relating to creating work opportunities is only a state goal. A new element, however, is the prescription of an obligation to perform work to the best of the individual’s ability and potential which is rather hard to be defined by a court of law.<sup>29</sup>

### 2.2. *Social rights, right to social security*

The Fundamental Law, in keeping with the spirit of the Constitutional Court precedents, treats the creation of social security not as a right, but as a state goal. The wording of Article 70/E of the 1989 Constitution and some of the relevant Constitutional Court decisions, in principle, left open the opportunity for the right to social security to be interpreted as a fundamental right at some time in the future. Constitutional Court Decision 32/1998. (VI. 25.) even went as far as to outline, in abstract terms, the constitutional extent of the right to social security. The new text of the Fundamental Law eliminates the opportunity for interpretations of this kind. The second sentence is virtually a word-for-word repetition of the second half of the first sentence of Article 70/E of 1989 Constitution, but while this clearly only lists examples of those entitled to receive assistance, the new text can be interpreted as an exhaustive list of the entitled groups, from which it can be concluded, for example, that the state only needs to concern itself with creating social security for the groups included in the list (and not people unemployed through “their own fault”, for example). Another change is reflected in the fact that the assistance to be provided is no longer of the extent “necessary for subsistence”, but just the extent “determined by law”.

The 1989 Constitution mentioned the social insurance system and the system of social institutions in relation to implementing social security,<sup>30</sup> while the new Fundamental Law talks about a general (statutory) state pension system and a system of social institutions.

Therefore, social insurance itself has been completely removed from among the means of creating social security, and only the system of social institutions and measures remains in the text. These provisions aim to ensure that there are no constitutional barriers to introducing measures to make benefits dependent

<sup>26</sup> Jakab András: *Az új Alaptörvény keletkezése és gyakorlati következményei* (Budapest: HVG-Orac, 2011). Schanda Balázs, Balogh Zsolt (szerk.): *Alkotmányjog – Alapjogok*, (PPKE JÁK: Budapest, 2011).

<sup>27</sup> József Hajdú: *Labour Law in Hungary*, Wolters Kluwer, 2011. pp. 58-59.

<sup>28</sup> Trócsányi László szerk.: *A mi alkotmányunk*, Complex Kiadó, Budapest, 2006 p. pp. 461-464.

<sup>29</sup> Balogh Zsolt, Hajas Barnabás: *Rights and Freedoms*. In: Schanda Balázs, Varga Zs András, Csink Lóránt (szerk.): *The basic law of Hungary: A First Commentary* (Dublin: Clarus Press, 2012).

<sup>30</sup> Trócsányi László szerk.: *A mi alkotmányunk*, Complex Kiadó, Budapest, 2006 p. pp. 483-484.

on the performance of work or other activity regarded as socially beneficial, in keeping with the new social-policy approach.<sup>31</sup>

The text rules out the reinstatement of the compulsory private pension funds regime, with the aim of this being to make it impossible, due to a conflict with the Fundamental Law, to re-introduce this previously tried social-policy solution, which is rejected by the present government.<sup>32</sup>

The Article XIX of the Fundamental Law deals with the protection of elderly. It states that Hungary shall contribute to ensuring the livelihood for the elderly by maintaining a general state pension system based on social solidarity and by allowing for the operation of voluntarily established social institutions. In addition to the general provisions there is a special rule which states that the conditions of entitlement to state pension may be laid down in an Act with regard to the requirement for stronger protection for women.

The theoretical starting point is that pensions prior to retirement age cannot be claimed as of 2012 onwards. The only permanently existing, systematic exception has been the award of old-age pension regardless of any age criteria for women with an eligibility period of at least 40 years, which was introduced in 2011. Eligibility period refers to a narrower category than the generally applied term of service time in the pension insurance system, as only the enabling period of performing gainful activity and the disbursement period of child raising benefits are accepted under this term. As a further criterion, the exact time of enabling period of performing gainful activity within the at least 40 years of eligibility period may not be less than 32 years. The new retirement alternative is a reward for women who had worked all their active lives and had mostly raised children as well. This provision is against the Paragraph (3) of Article XV of the Fundamental Law, which states that “women and men shall have equal rights”. It seems that the special old-age pension for women with 40 years of eligibility period is discriminatory, but the Paragraph (5) of the same Article – which was inserted into the Fundamental Law as an amendment in 2013<sup>33</sup> –, underlines that by means of separate measures, Hungary shall protect families, children, women, the elderly and persons living with disabilities. This can be regarded as an affirmative action to protect working women.

In addition to the state pension system, the Fundamental Law mentions the system of social institutions. As regards pensions, this surely means elderly annuity<sup>34</sup> for those who have no entitlements, and in a wider sense also the operation of a system of social institutions on the basis of the “principle of need” included in the text of the Fundamental Law.

During the analysis of the provisions of the Fundamental Law relating to social rights, the question arose whether Paragraph (4) of Article XVI, that is the command that adult children shall be obliged to look after their parents if they are in need, also belongs to this circle. However, looking after elderly parents is a moral command. It shall definitely be observed as a moral obligation, but it is not directly related to the task of the state to establish and to operate a system of social institutions.<sup>35</sup>

### 2.3. *Right to health and to a healthy environment*

According to the Fundamental Law, the right to health means the right to physical and mental health. The 1989 Constitution – using the terminology of the UN International Covenant on Economic, Social and Cultural Rights – talked about “the right to the highest possible level of physical and mental health”.<sup>36,37</sup> According to the Fundamental Law, every person shall have the right to health. The 1989 Constitution identified the institutions of labour safety and health care, the organization of medical care and the

<sup>31</sup> Juhász Gábor: A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben, *Fundamentum* 2012. évi 1. szám.

<sup>32</sup> Schanda Balázs, Balogh Zsolt (szerk.): *Alkotmányjog – Alapjogok*, PPKE JÁK, Budapest, 2011.

<sup>33</sup> Amended by Article 21(1)f) of the Fourth Amendment to the Fundamental Law (25 March 2013).

<sup>34</sup> This is a social assistance type benefit regulated by Act III of 1993 on Social Assistance.

<sup>35</sup> Jakab András: *Az új Alaptörvény keletkezése és gyakorlati következményei*, HVG-Orac, Budapest, 2011.

<sup>36</sup> Kardos Gábor: *Az egészséghez való jog dilemmái*, <http://egk.tatk.elte.hu> (05. 03. 2014).

<sup>37</sup> <http://mentropia.2722.hu/uj3/cikkolvas.php?menu=1&cikk=59&tipus=1> (18. 14. 2014).

opportunities for regular physical activity, as well as the protection of the urban and natural environment as the institutional guarantees for implementing this right. The Fundamental Law, besides retaining these, promotes the exercise of this right by ensuring that agriculture remains free from any genetically modified organism, by providing access to healthy food and drinking water and by supporting sports. This means that the Fundamental Law has expanded the institutional guarantees in line with modern challenges”.<sup>38</sup>

In the practice of the Constitutional Court the right to health did not qualify as a fundamental right but – similarly to the right to social security – as a constitutional right from which several legislative obligations arose for the implementation of this right. With regard to the right to health, the Fundamental Law does not change this “dogmatic classification”.<sup>39</sup>

Environmental protection is mentioned in relation to the right to health, but the Fundamental Law also contains a specific clause on environmental protection. The right to a healthy environment appears as a fundamental right in the practice of the Constitutional Court. Its specific feature is that no subjective rights are provided (as its subject is “everybody”, “mankind”) but it is basically the institutional obligation of the state to implement this right.<sup>40</sup>

#### 2.4. Property right

Under certain conditions, specific public law entitlements also come under the protection of property. The extension of the fundamental right protection of property to social insurance services and their entitlements fits in with the conception which the Constitutional Court holds on the function of property. The constitutional protection of public law entitlements is reasoned in the following way: “The protection of property is related to one’s own assets or value-creating work in the field of social insurance, too. Therefore, the greater protection of insurance services paid for through one’s own contributions is distinguished from the smaller protection of assistance-type benefits. The protection of property may extend as long as the service has the same function as the material assets would have, from which it also follows that this attribute cannot be ceased. However, exact correlation between one’s own contributions and the service is excluded by the manner of operation of social insurance (non-capitalized assets) and by the element of solidarity incorporated in it, as well as by the risk borne by the contribution payer in the long run.” To put it simply, if the state interferes in questions of property through compulsory withdrawal, claim protected by property protection arises against the state on the other side. This simplified formula holds in the field of social insurance – apart from pensions – for certain services of health insurance. This means property protection in social insurance. Although the insurance element has a role in these cases, this role is not exclusive as certain survivors’ benefits (e.g. widow(er)’s pension) are also included in the protection. In these cases the property protection of social insurance claims is related to the general function of property, to ensuring the material (financial) bases of individual autonomy.<sup>41</sup>

In sum, the provisions of the Fundamental Law pertaining to social rights result in no dramatic change with respect to the protection of these rights, mainly because under the 1989 Constitution the Constitutional Court did not recognise the fundamental-right status of social provisions. Some of the provisions of the Fundamental Law (Articles XII, XIX and XX), reflecting the spirit of the Constitutional Court’s judicial practice to date, make this even clearer than the previous text.<sup>42</sup>

<sup>38</sup> Balogh Zsolt, Hajas Barnabás: Rights and Freedoms. In: Schanda Balázs, Varga Zs András, Csink Lóránt (szerk.): The basic law of Hungary: A First Commentary, Dublin: Clarus Press, 2012.

<sup>39</sup> Juhász Gábor: A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben, *Fundamentum* 2012. évi 1. szám. <http://www.fundamentum.hu/sites/default/files/12-1-02.pdf> (14. 03. 2014).

<sup>40</sup> [http://ejegyzet.hu/obh/Alaptorveny\\_szabadsag\\_felelosseg/lecke10\\_lap1.html](http://ejegyzet.hu/obh/Alaptorveny_szabadsag_felelosseg/lecke10_lap1.html) (12. 04. 2014).

<sup>41</sup> Jakab András: Az új Alaptörvény keletkezése és gyakorlati következményei (Budapest: HVG-Orac, 2011). Schanda Balázs, Balogh Zsolt (szerk.): Alkotmányjog – Alapjogok (PPKE JÁK: Budapest, 2011).

<sup>42</sup> <http://www.fundamentum.hu/tarsadalmi-igazsagossag/cikk/gazdasagi-es-szocialis-jogok-vedelme-az-alkotmanyban-es-az-alaptorvenyben> (27. 04. 2014).

At the same time, in certain places (e.g. Article XIX, Paragraphs 3 and 4), the wording contains new mandates and restrictions in line with current policies with which the constitution-maker attempts to prevent the new direction taken by social-policy measures from being declared unconstitutional and seeks to classify the solutions brushed aside by the current government as unconstitutional in the future.<sup>43</sup>

### **3. The constitutional regulations' impact on the content of social security rights in the domestic legal system**

#### *3.1. Characteristics of the Hungariansocial security system*

According to the practice, there are five main branches of social security system<sup>44</sup> in Hungary. Pensions and health services are still classified as social insurance, even though the term social insurance wasn't mentioned in the Fundamental Law. The other three statutory branches are the unemployment insurance, the family support system and the social assistance system which are out of the scope of social insurance.

In Hungary all persons who are gainfully employed and those of equivalent status are insured against all social insurance risks. These persons include those in paid employment (including those in public administration), the self-employed (including members of co-operative societies), numerous groups of persons of equivalent status, persons receiving income subsidy, jobseeker benefit and job-seeker aid.

Everyone is automatically affiliated to a social insurance scheme as soon as he/she begins to work in Hungary and is not exempted from being compulsorily insured. Employers pay social tax (not contribution<sup>45</sup>) and employees pay social insurance (health and pension) contributions.<sup>46</sup> Economically inactive uninsured persons residing in Hungary may voluntarily pay a lump-sum amount in order to be covered against healthcare risks.

As a main rule, employers register their employees and self-employed persons register themselves with the competent local office of the taxation and finance office and/or the competent social insurance organisations, as necessary.

Anyone who voluntarily subscribes to the social security system can sign an agreement with the competent social security institution.<sup>47</sup>

Foreign EU and EEA nationals who are employed by Hungarian companies are required to contribute to the scheme and are eligible to receive benefits on the same basis as Hungarian nationals.

Social security status of third country citizens: the Hungarian activity of third country citizens will continue to be exempt from social security contribution (employee part) and social tax liabilities (employer part) if their Hungarian activity does not exceed two years. In case of Hungarian assignments, the legislation provides the two-year exemption period so that social security insurance liability (employee and employer part) should only arise from 1 January 2015. Furthermore, the individual can continue to be exempt from social security contributions (employee part) even if his/her Hungarian activity exceeds two years if the following conditions are met:

- the extension of the Hungarian activity is a result of an unforeseen reason at the time of the beginning of the activity, and
- the reason for the extension of the Hungarian activity arises after one year of the start date of the Hungarian activity, and

<sup>43</sup> Zoltán Fleck, Gábor Gadó, Gábor Halmai, Szabolcs Hegyi, Gábor Juhász, János Kis, Zsolt Körtvélyesi, Balázs Majtényi, Gábor Attila Tóth: Opinion on the Fundamental Law of Hungary, June 2011. <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf> (18. 03. 2014)

<sup>44</sup> The Hungarian social security system offers protection against sickness, maternity, old-age, changed working capacity, survivorship, children's education and unemployment.

<sup>45</sup> Since 01. January. 2012.

<sup>46</sup> The current (2014) individual contributions for the basic benefits package are set at 18.5% (10% for pension and 8.5% for health care) of gross earnings, and employer social tax is 27% of the insured person's gross earnings.

<sup>47</sup> Hajdú József – Homicskó Árpád: Bevezetés a társadalombiztosítási jogba, Patrocinium Kiadó, Budapest pp. 60-61.

- the individual notifies the National Tax and Customs Administration within eight days after the extension of the Hungarian activities.

This possible exemption does not affect the social tax liability (employers' obligation), i.e. if the Hungarian activity of the third country citizen exceeds two years, social tax liability should arise from the first day of the Hungarian activity (retrospectively).

Foreign nationals working in Hungary for wholly foreign-owned companies, and the representatives and staff of diplomatic missions are not eligible for the scheme and need to make their own private insurance arrangements.

The management, organisation and administration of the Hungarian social insurance system are centralised, whereas services concerning social benefits are decentralised.<sup>48</sup>

### 3.2. Material scope

#### a) Pension insurance (old-age pension and survivors' pension)

Mandatory pension insurance was comprehensively reformed in 1997. The act on the social insurance pension entered into force on 1 January 1998. Originally, the system consisted of two pillars. The reformed first pillar has remained mandatory state pension scheme that is publicly managed and financed on a pay-as-you-go basis. Until November 2010, the compulsory private pension scheme was regarded as the second pillar of the system. The vast majority of insured persons' contribution was paid in the form of membership fee into the compulsory private (old-age) pension funds that agreed to award either lump-sum payment or monthly pension-type allowance under certain terms of the membership agreement.

The statutory pension insurance (1st pillar) covers the following benefits: a) old-age pension; b) advanced pension for women with at least 40 years of employment; c) survivors' pensions; and d) accident related survivors' pensions.

The major change in the Hungarian (old-age) pension insurance system affecting nearly 3 million insured people was that according to the relevant Act, as from 3 November 2010, membership in the second pillar pension (compulsory private pension) has no longer been compulsory. Until 1 March 2011 the Act offered free choice for those compulsorily insured in the 1st and 2nd pillar of the pension system either to remain in the 1st pillar or to stay exclusively in the 2nd pillar on a voluntary basis. In this latter case, the persons remaining only in the 2nd pillar will not acquire any further rights under the 1st pillar after taking the decision, but the rights that they have acquired before will not be lost.<sup>49</sup> As a consequence, the mandatory pension system remained dominantly public.<sup>50</sup> The Hungarian Fundamental Law established a new two-pillar pension system, based on compulsory social insurance system (governed by PAYG principle) on the one hand and voluntary private savings (funded system) on the other hand.<sup>51</sup>

The other significant change has been taken related to disability pension. Originally, disability pension was incorporated in the social insurance pension act. The first reform of disability pension was introduced in 2008. As a second phase of the changes, the disability benefits' system was reformed with Act CXCI of 2011 on the 'Benefits for persons with changed working capacity and amendments of certain acts', which entered into force on 1st January 2012. As from 1 January 2012 the invalidity pension scheme has been completely closed and consequently from this date new invalidity pensions and accident-related invalidity pensions (pensions for accident at work or occupational diseases), rehabilitation annuities, regular social

<sup>48</sup> [https://www.inps.it/docallegati/Mig/Doc/social\\_security\\_on\\_the\\_move/eng/project\\_deliverables/country\\_report\\_hungary.pdf](https://www.inps.it/docallegati/Mig/Doc/social_security_on_the_move/eng/project_deliverables/country_report_hungary.pdf) (21. 03. 2014).

<sup>49</sup> The rest of the second pillar became voluntary from 3 November 2010, fully funded and run by several authorised and independent private pension funds which are supervised by the Hungarian Financial Supervisory Authority (recently by the Hungarian National Bank).

<sup>50</sup> The Hungarian 1st pillar pension system is a mandatory, uniform, defined-benefit pay-as-you-go system with an earnings-related public pension combined with a minimum pension. The minimum pension, which is worth HUF 28 500 per month (around 12% of average earnings). The amount has remained unchanged since 2009.

<sup>51</sup> József Hajdú: Hungarian pension system in transition, *Studia Iuridica Caroliensia*, Budapest, 2011 pp. 34-52.



annuities for persons with ill-health, temporary invalidity annuities and health damage annuities for miners cannot be awarded. The new benefits substituting the invalidity pensions aim at the reintegration of persons with changed working capacity to the labour market and are focused on rehabilitation.<sup>52</sup> The new system of invalidity insurance offers two types of benefits by virtue of the health status and the remaining working capacity of the person claiming the benefit.<sup>53</sup> The complex rehabilitation procedure aims at the revision of entitlements based on the working capacity of those persons who were in receipt of any benefit on the basis of damaged health until 31 December 2011.<sup>54</sup>

*b) Health insurance (benefits in cash and in kind)*

There is only one type of compulsory health insurance system in Hungary. The law on compulsory health insurance provides for the wide range of benefits in kind and cash which are covered by the Health Insurance Fund. The Ministry of Human Resources is responsible for health insurance and the health sector. The Ministry monitors the activities of all insurance providers, the privately managed health insurance funds as well as of the providers of healthcare services in respect of healthcare benefit. The Ministry also investigates complaints relating to the procedures the health insurance agencies follow. The National Health Insurance Fund (NHIF) operates via its Budapest headquarters and the devolved NHIF offices in the country's 19 counties.

The law determines the legal status guaranteeing ipso facto compulsory insurance coverage. Employers are obliged to declare their employees and pay social tax for them to the competent tax authority, which transmits the data relating to their insurance rights to the competent county-level health insurance funds. Healthcare services can be received from specified healthcare providers, including private providers contracted with the National Health Insurance Fund. The main services of health insurance are as follows:

- a) *Medical treatment.* Everyone who is covered for healthcare is entitled to receive all the care their state of health requires. As a main rule, medical care is free of charge in Hungary. If the treatment is not prescribed by a physician or is not provided through the normal hospital system or if he/she chooses a doctor other than the one allocated by the healthcare system, fees imposed by the care provider will be paid by the patient. The individual might also pay only a certain part of the costs of medicines and medical appliances.
- b) *Medicine.* Medicines administered in hospital are free of charge. Otherwise, the NHIF covers part or all of the cost when the medicine prescribed is on the social insurance assistance scheme list.<sup>55</sup>
- c) *Dental treatment.*
- d) *Medical appliances.*<sup>56</sup>

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<sup>52</sup> The basic aim of the new disability benefits from one part is to guarantee incomes for those persons who are not able to work because of their state of health. From the other part the aim of the rehabilitation is to reintegrate persons with changed working capacity to the labour market, to prepare them for employment in a suitable work place and to ensure such employments concerning their working capacity.

<sup>53</sup> 1. the person is entitled to rehabilitation benefit if he/she can be rehabilitated. Rehabilitation benefit may be provided for the period required for rehabilitation, within the limit of 3 years from the start of the benefit.

2. a person with changed working capacity is entitled to disability benefit if rehabilitation is not recommended; or he/she cannot be rehabilitated, or the person reaches the retirement age within five years.

<sup>54</sup> <http://www.onyf.hu/hu/> (12. 04. 2014).

<sup>55</sup> The rules relating to drug approval are fixed by ministerial decree:

a) standard aid: 80%, 55%, 25%;

b) increased and maximum aid is dependent upon a NHIF decision.

Some medicines in the maximum aid category have been taken off the list for full reimbursement.

<sup>56</sup> <http://www.oep.hu> (14. 03. 2014).

c) *Unemployment insurance*

The Hungarian unemployment scheme is compulsory and insurance-based. Both employers (in form of social tax) and employees (in form of special contribution) are paying to the system. There are both active and passive labour market measures to promote employment and to provide for the job seekers.<sup>57</sup> Placement services are open to every resident including EEA nationals irrespective of the insurance relationship. The Ministry for National Economy is responsible for the unemployment insurance system. The institutional structure of the Hungarian employment policy system can be divided into two main types: 1. self-governing bodies<sup>58</sup> on the one hand, and 2. administrative bodies<sup>59</sup> on the other.<sup>60</sup>

d) *Family support system*

The Ministry of Human Resources is responsible for family benefits. The family support system is a universal system, meaning that every citizen who meets the entitlement criteria is entitled. Every citizen who has a child up to a certain age may be entitled to various family support benefits. The family support benefits are operated and administered partly by the Hungarian State Treasury and partly the National Health Insurance Fund.<sup>61</sup>

e) *Social assistance system (means tested benefits)*

The local governments are the main actors of the management of the social assistance system. Various social assistance benefits are granted by the local governments. The Ministry of Human Resources is responsible for the supervision. The wide range of social assistance benefits covers various contingencies and plays a crucial role for those who do not have enough resources to live on.<sup>62</sup>

## **4. Threats to social security rights in times of economic crisis**

### **4.1. Political, financial and economic situation**

When the global financial crisis hit in 2008, Hungary was already in a precarious economic situation in spite of the previous socialist Government having introduced major austerity measures between 2006 and 2008. The restrictions and cuts, however, resulted in stagnating economic growth, which dropped further because of the spiralling global financial crisis. Already 80% at the end of 2010, the debt ratio increased by 15 percentage points between 2006 and 2011, primarily due to the economic downturn and the weakening of the Hungarian currency, the forint.<sup>63</sup> The Ministry of Economy announced that the debt was 77,035.4 million euros at the end of the second quarter of 2012, equivalent to 77.7% of GDP and 79.2% of GDP in 2013.<sup>64</sup>

<sup>57</sup> József Hajdú: Social protection of the unemployed, Pólay Elemér Alapítvány, Szeged, 2013. pp. 215-234.

<sup>58</sup> The self-governing bodies are the National Conciliation Council, the Governing Body of the Labour Market Fund, and the Regional Labour Councils.

<sup>59</sup> The Public Employment Service is the administrative body responsible for the supervision of the employment system. It consists of the National Labour Office, the Regional Labour Centres, the local offices of the Regional Labour Centres and the Regional Labour Force Development and Training Centres.

<sup>60</sup> <http://www.afsz.hu/> (24. 04. 2014).

<sup>61</sup> <http://www.allamkinestar.gov.hu/> (14. 03. 2014).

<sup>62</sup> <http://www.nefmi.gov.hu/main.php> (14. 03. 2014).

<sup>63</sup> Ibid., "Fiscal consolidation measures already in parliament." Available at: <http://www.kormany.hu/en/ministry-for-national-economy/news/fiscal-consolidation-measures-already-in-parliament> (23. 04. 2014).

<sup>64</sup> Ministry for National Economy, "Hungary excels in general government debt reduction," 7 November 2012. Available at: <http://www.kormany.hu/en/ministry-for-national-economy/news/hungary-excels-in-general-government-debt-reduction> (23. 04. 2014).

However, these measures did not prevent a flood of international speculation which threatened to collapse the country's economic and financial system. Immediate support from the International Monetary Fund<sup>65</sup> and the European Central Bank allowed Hungary to avert the worst economic scenarios. Nevertheless, the crisis underscored several weak points in the Hungarian system which could no longer be ignored, which include:

- an extremely high exposure to foreign currency debt (mainly in the private sector);
- high levels of external debt financing;
- low level of employment combined with a high rate of long-term unemployment and activity rate;
- low average monthly wages compared to the productivity level;
- premature consumerism generated by the banks offering low interest rate credits denominated mainly in Swiss francs, which led to very high level of the households' indebtedness.<sup>66</sup>

Unemployment in Hungary rose very rapidly after the political change in 1989, but reduced to 7.8% by 2008 (with a very low activity rate of 56.7%). As a result of the recent economic crisis, the unemployment rate rose to 10% by 2009, 11.2% by 2010, 11.6 by 2011, 11.7 by 2012, 11.8 by first quarter of 2013 and continuously decreased since the 2nd quarter of 2013 and reached 8.3 by the first quarter of 2014.<sup>67</sup> Hungary's GDP dropped by 13% from 2008 to 2009, but rose again in 2010 and 2011 and slightly dropped again in 2012. Since 1st quarter of 2013 the GDP is continuously increased again. In the 1st quarter of 2014 the GDP is 3.5%.<sup>68</sup> More than 50,000 jobs were lost from 2008 to 2011, and an additional 90,000 jobs were transferred from full time to part time jobs. Most of the jobs were lost in the for-profit sector and most of the job creation occurred in the NGO sector.<sup>69</sup>

As an effect of the crisis, the number of registered unemployed persons with elementary education rose by 18% and the number of those who have no secondary level education rose by 41%. The crisis also affected those groups who have fixed term contracts. Long-term unemployment rose<sup>70</sup> steadily, and approached 3.6% by 2008. This rate rose also during the crisis to 4.2% in 2009 and to 5.5% in 2010.<sup>71</sup>

As a precondition for a new IMF loan and to avoid the EU's excessive deficit procedure in October 2012, the Fidesz Government (2010-2014) approved new austerity measures, which hit the majority of enterprises (banks, public service providers, and telecom companies in particular). The Hungarian population is also directly affected by increased taxes on financial transfers and fringe benefits, since these measures worsen the situation of the domestic economy, which was already in recession. The package aimed at cutting next year's budget deficit represents 1.2% of the GDP.<sup>72</sup>

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<sup>65</sup> IMF, "Dealing with households debt," *World Economic Outlook*, April 2012, Ch. 3. Available at: <http://www.imf.org/external/pubs/ft/weo/2012/01/pdf/c3.pdf> (24. 04. 2014).

<sup>66</sup> OECD Economic Surveys: HUNGARY, March 2012. Available at: <http://www.oecd.org/eco/49852285.pdf> (24. 04. 2014).

<sup>67</sup> <http://www.ksh.hu> (12. 04. 2014).

<sup>68</sup> <http://www.ksh.hu> (13. 04. 2014).

<sup>69</sup> NB.: In the first quarter of 2014, Hungary jobless rate fell to 8.3 percent from 8.6 percent in the previous period and 11.8 percent a year earlier. In the first three months of 2014, the number of unemployed people was 370 thousand, 139 thousand fewer than in the same period of 2013. Each of the seven statistical regions was characterized by decreasing unemployment.

<sup>70</sup> The increase of long-term unemployment has several underlying reasons: the economic structure inherited from the socialist era, the regime change, global recession, demographic processes and the government's policies all had a role in it.

<sup>71</sup> Luca Koltai: 'Work instead of social benefit? Public works in Hungary' Peer Review on "Activation measures in times of crisis: the role of public works" 2014 [ec.europa.eu/social/BlobServlet?docId=10515...en](http://ec.europa.eu/social/BlobServlet?docId=10515...en) (25. 04. 2014).

<sup>72</sup> The GDP share of social expenditure in Hungary was below the European average and it is more than it was in 2011.

#### 4.2. National Social Inclusion Strategy (NSIS)

As an antecedent, on 30 November 2011 the Hungarian Government adopted a 10-year National Social Inclusion Strategy (NSIS) accompanied by a short-term action plan<sup>73</sup> for the period 2012–2014.<sup>74</sup>

The comprehensive targets of the NSIS are as follows in harmony with the poverty reduction goals of the Europe 2020 Strategy:

- Reduction of the rate of individuals living in poverty and social exclusion, with special regard to the Roma population.
- Prevention of regeneration of poverty and social exclusion.
- Improvement of equal access to social and economic welfare, reinforcement of social cohesion.

One of the main priorities of this Strategy was a fierce fight for employment. In this strategy poverty is considered mainly as the individual's own responsibility, even by those who would otherwise subscribe to the idea of helping the poor.

Despite the praiseworthy goals of the adopted NSIS, a moderated result has been accomplished up to now. According to the figures from the Hungarian Central Statistical Office (HCSO), 42.2% of the Hungarian society is characterized by material deprivation and 23.1% by severe material deprivation.<sup>75</sup> This means that almost two-thirds of the society cannot go on vacation, 24.7% struggle with arrears, 2,860,000 cannot eat meat dishes every other day, and 1,154,000 cannot afford heating.<sup>76</sup>

It is also clear from the HCSO analysis<sup>77</sup> that young adults face above average risk of poverty and that poverty risk decreases with age. Those aged 17 years are the most vulnerable. In 2010 only 20.3% of this group were poor, one year later already 23% were poor. The relative position of the elderly is better because pension benefits are regular and predictable. Many pensioners, however, do feel poverty as the average monthly net pension in 2012 is HUF 93,615 (about EURO 312).<sup>78</sup>

One of the main problems of integrating NSIS into the society is that the Hungarian civil society, including trade unions, NGOs are very weak today. Regrettably, solidarity among the most vulnerable groups of Hungarian society has not strengthened.

#### 4.3. Public works program: a new-old workfare model

Public works have been used as a remedy for long-term unemployment since 1991 in Hungary. However, their role remained limited until 2000, when – as part of a workfare reform – the task of organising such projects was handed over to local municipalities, with around 90% of wage costs covered by a central government subsidy. Eligibility rules for unemployment assistance were tightened and recipients were obliged to participate in public works for at least 30 days a year. However, public workers

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<sup>73</sup> Short-term funding for the implementation of the Strategy up to 2014 will be supplied from the operational programmes concerned of the New Széchenyi Plan.

<sup>74</sup> Government of Hungary, *Hungarian National Social Inclusion Strategy*, Budapest, 30 November 2011. Available at: <http://romagov.kormany.hu/hungarian-national-social-inclusion-strategy-document> (24. 04. 2014).

<sup>75</sup> In Hungary nearly 30% of the population, i.e. 3 million people live in poverty or social exclusion according to the EU indicators. Among them around 500,000 to 600,000 are Roma. Poverty rate is approximately 70% among the Roma [...] Their employment rate is under 30% [...] As regards education, primary school completion is above 80% among the Roma, but secondary school completion is only 20%. Significant territorial disparities and housing segregation also hit the Roma disproportionately.

<sup>76</sup> HCSO, First Release, # 174, 15 November 2012. Available at: <http://www.ksh.hu/docs/eng/xftp/gyor/gde/egde21209.pdf> (24. 04. 2014). HCSO, First Release, #119, 31 July 2012. Available at: <http://www.ksh.hu/docs/eng/xftp/gyor/mun/emun21206.pdf> (25. 04. 2014).

<sup>77</sup> HCSO, Statisztikai Tükör: A társadalmi kirekesztődés nemzetközi összehasonlítására szolgáló indikátorok 2011 (Statistical Reflection: Laeken indicators, vol.6. no.72 (21 September 2012). Available at: <http://www.ksh.hu/docs/hun/xftp/idoszaki/laekindikator/laekindikator11.pdf> (26. 04. 2014).

<sup>78</sup> Ibid., Average provision of recipients of pensions, benefits, annuities and other provisions, January 2000–. Available at: [http://www.ksh.hu/docs/eng/xstadat/xstadat\\_annual/i\\_fsp008.html](http://www.ksh.hu/docs/eng/xstadat/xstadat_annual/i_fsp008.html) (05. 05. 2014).

have a worse labour market profile than job seekers in general. Elderly people and undereducated groups are over-represented among them.<sup>79</sup>

The income sources of poor people already reflect public work programs started under the previous Socialist government (2006-2010). The “Road to Work” program was based on the motto that the minimum living standards of the poor should not be maintained from public assistance, but from work.

A first public work program of the Fidesz government was introduced in 2009 and reformed in 2011. It has risen to the level of ideology: “we are building a society of work.” Accurate data, however, is very difficult to obtain, as though it was being concealed. It is a fact that the public work program which started with a budget of HUF 30 billion (EURO 100 million) now stands at HUF 180 billion (EURO 600 million).<sup>80</sup>

In some regions of Hungary, indeed in many countries of Central and Eastern Europe, there are cases of unemployment that are multi-generational. It has become a serious social problem over the last 20 years of the welfare approach. Therefore, since taking office in 2010, the Fidesz Government has aimed to get Hungary’s unemployed back to work. A central part of the Government’s program of “Renewal” has been about reducing the huge welfare roles, reaching those who have been out of work for so long time.

The idea behind the program is to counter unemployment by offering local, public work opportunities and a wage to the unemployed instead of welfare checks. The program pays more than welfare, so there is some incentive in the system to choose public work over welfare. But the key is to guide the long-term unemployed back to some kind of productive work – and work habits, like getting up at a certain time, showing up at a workplace, talking to others during the day, but most importantly, feeling responsible and needed again.

One key measure is the system of incentives established by the Széll Kálmán Plan (in March 2011), the support of investments by micro-, small and medium-sized enterprises aimed at job creation as well as the start of the public work programme. Thereby from 2012 a new type of public employment system was introduced by which the state organizes temporary employment schemes for people who cannot profit from their physical and mental skills but are eager and able to work. Therefore – instead of welfare benefits – via the public employment system they can receive much higher wages.

The new public work programme (since 2012) basically aims to introduce a principle which focuses on the work – centered attitude of the economy, society and the state, and which can help boost employment rate, which is currently considered low compared to the EU. The system, which complements the social welfare system based on welfare considerations, better motivates people to seek a job and it will utilize existing support schemes.<sup>81</sup> Via communal work projects large numbers of people can be offered employment in order to achieve goals which provide added value. The programme supports personalized communal work, by which public work employees create added value – in individual work phases, as part of a supply chain – for which demand from the central administration can be secured.<sup>82</sup>

In fact, Hungary’s level of employment statistically climbed back at pre-crisis level<sup>83</sup> but this state was achieved via public work programs and an ever higher number of Hungarians working abroad.<sup>84</sup>

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<sup>79</sup> Luca Koltai: ‘Work instead of social benefit? Public works in Hungary’ Peer Review on “Activation measures in times of crisis: the role of public works” 2014 ec.europa.eu/social/BlobServlet?docId=10515...en.

<sup>80</sup> <http://budapestbeacon.com/public-policy/on-poverty-in-hungary-and-the-formation-of-a-penalistic-state/>.

<sup>81</sup> One example is the channelling of EU funds to public employment programmes (including communal work) and investing available resources in self-sustaining projects.

<sup>82</sup> <http://www.kormany.hu/download/6/67/90000/Employment%20and%20labour%20market%20conditions%20are%20favourable%20in%20Hungary.pdf> (27. 04. 2014).

<sup>83</sup> There were 4.053 million people employed in Hungary in the December 2013-February 2014 period, the Central Statistical Office (KSH) has reported on Friday. The employment rate in the 1574 age group rose to a new ten-year high (53.2%), whereas the unemployment rate dropped further to 8.6%. The favourable set of figures is no surprise in light of the fact that as a result of the winter public work scheme there were 165,000 more fostered workers in January than in the same month of 2013.

<sup>84</sup> The numbers of those working abroad are also rising. There are about 100,000 of them currently.

Employment remains under pre-crisis levels in the private sector,<sup>85</sup> although corporates have not just cut their headcount, but also reduced working hours in order to avoid layoffs.<sup>86</sup>

The spectacular improvement of labour market readings, unfortunately, does not reflect a rapid amelioration of Hungary's economic health, rather the impact of the winter public works. Season jobs, public work schemes generally wind down in the winter season, pushing employment figures lower and the rate of unemployment higher. In the previous years the unemployment rate usually jumped to 11-12% towards year-end. The government, however, had no intention to see a similar leap, therefore introduced the winter season in public work schemes for the Nov13 2013-Apr14 2014 period, with the goal of hiring 200,000 unemployed. As a result, instead of the 20,000-30,000 fostered workers hired in the previous years in 2013 there are 200,000 of them. As a result, in January 2014 alone, there were 165,000 more of them than in the same month of 2013.<sup>87</sup>

The public work program has its critics, of course. It has been maligned as some kind of forced labour or "harsh" workfare. It is true that the jobs do not pay high wages and the work is often menial labour. But the point of the program is to break the cycle of long-term welfare dependency and restore some sense of self-esteem. The basic stake is which is better: collecting a welfare check or getting paid for doing work.<sup>88</sup>

## 5. *Assessment of the future of social security rights in light of the Fundamental Law (Constitution)*

Pursuant to the Constitution of the Republic, "citizens of the Republic of Hungary have the right to social security". The new Fundamental Law states that "Hungary shall strive to provide social security to all of its citizens". This notion derives from the "liberal concept of minimal state".

The Constitution of the Republic insisted on fundamental rights – among them social rights – being unconditional and unrestrictable; whereas the new Fundamental Law creates a new order: the exercise (the possibility of the exercise) of fundamental rights must be deserved.<sup>89</sup>

The new Fundamental Law parallels human rights with the – unspecified – obligations, and in some cases (particularly in the field of the so-called social rights) makes the assurance of constitutional rights the duty of the state only if the citizens fulfil certain obligations to be designated by the law or by the authorities in return. This contradicts the customary definition of human rights, making it relative what the state had to do – or should have done – so far unconditionally and without reservations. This is a significant change because in this way the new Fundamental Law differs not only from the fundamental rights, human rights dogmatics of most "democratic" states but is also against the international norms which – in principle – constitute part of the effective law in Hungary today.<sup>90</sup>

The Fundamental Law contains a new, previously unknown element, too. As concerns the social system, the following provision is included in the Fundamental Law: The nature and extent of social measures may be determined by law in accordance with the usefulness to the community of the beneficiary's activity. Thus merit as a condition is included besides need, which represents a significant difference from the previously known principle of solidarity, and which at the same time provides a constitutional basis for the introduction of public work.

<sup>85</sup> The National Bank of Hungary (MNB) sees the rate of unemployment around 10% both in 2013 and 2014, because the rising labour supply cannot be taken up by the market.

<sup>86</sup> [http://www.bbj.hu/economy/public-work-programs-jobs-abroad-drive-down-unemployment\\_69816](http://www.bbj.hu/economy/public-work-programs-jobs-abroad-drive-down-unemployment_69816).

<sup>87</sup> [http://www.portfolio.hu/en/economy/public\\_works\\_shore\\_up\\_hungarys\\_employment\\_figures.27568.html](http://www.portfolio.hu/en/economy/public_works_shore_up_hungarys_employment_figures.27568.html).

<sup>88</sup> On poverty in Hungary and the formation of a penalistic state by Éva Nagy. <http://budapestbeacon.com/public-policy/on-poverty-in-hungary-and-the-formation-of-a-penalistic-state/> (March 27, 2014).

<sup>89</sup> Tamás Gáspár Miklós: Az új alkotmány történelmi jelentősége. [http://nol.hu/belfold/20110329-az\\_uj\\_alkotmany\\_tortenelmi\\_jelentosege-1024881](http://nol.hu/belfold/20110329-az_uj_alkotmany_tortenelmi_jelentosege-1024881) (20. 03. 2014).

<sup>90</sup> It is important to point out that in the past years there was no textual difference between the Constitution of the Republic and the international, and within this the European, "legal texts" on fundamental rights.

Thus the new Fundamental Law makes all the social benefits conditional on the criterion of “usefulness to the community”. This is problematic because in accordance with the Fundamental Law employment is no longer the obligation of the state, whereas working is the citizens’ obligation rather than their right. Based on this, the Fundamental Law makes a moral and legal distinction between persons who produce exchange value (capital holders and employees) and “unproductive” persons who are excluded from production (unemployed persons, pensioners, students, members of the precariat – that is persons who work irregularly, need assistance from time to time and live from one day to the other (sick persons, disabled persons, seasonal workers, persons doing domestic work, etc.). This approach may foreshadow a new form of discrimination.<sup>91</sup>

This is what the preamble says about the social system: “We hold that we have a general duty to help the vulnerable and the poor”. Earlier the 1989 Constitution of the Republic established social rights and state obligations: “Citizens of the Republic of Hungary have the right to social security;<sup>92</sup> they are entitled to the support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own.” The Fundamental Law, however, states a state aim only: “Hungary shall strive to provide social security to all of its citizens. Every Hungarian citizen shall be entitled to statutory subsidies for maternity, illness, disability, widowhood, orphanage and unemployment not caused by his or her own actions.” From the Fundamental Law itself no state obligation ensues, the state is free to decide whether it will undertake statutory obligations for certain disadvantaged situations, and if so, what kind. While the 1989 Constitution stated: “The Republic of Hungary shall implement the right to social support through the social insurance system and the system of social institutions”,<sup>93</sup> according to the Fundamental Law: “Hungary shall implement social security for the persons listed in Paragraph (1) and other people in need through a system of social institutions and measures.” Thus social insurance, that is the system built on the institutional relationship between contributions and benefits, which gives rise to enforceable rights in return for contributions, has been removed from the Fundamental Law.

The outcome of this change could cause a fundamental modification in the Hungarian social security system. Basically, social insurance is the state guarantee for receiving healthcare services and pension in return for the contributions paid. The basic principle of the system is proportionality: who earns more, pays more – for example – into the pension fund and will receive a higher pension.<sup>94</sup> However, the system can operate only if politics does not interfere basically into the use and distribution of the contributions paid. Moreover, social insurance is the compulsory common risk of the insured, which was based on the principle of solidarity and not on the principle of equivalence or merit.<sup>95</sup>

In the new system the state can decide freely what to use the contributions for (it is absolutely true for the social tax which is paid by employers). Earlier the employers paid the social insurance contributions into separate social insurance funds (pension and health insurance funds) for each of their employees. In the central budget this money – in principle – could not be used for any other purposes. The current government changed the employers’ contribution into social tax, which has to be paid into the central budget.<sup>96</sup> It is important to note that it is not only the name which has changed. The government is free to dispose over the collected tax, it is not obliged to spend it on employees’ social benefits. Naturally, it can be used for that purpose, too.

<sup>91</sup> Juhász Gábor: A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben, *Fundamentum* 2012. évi 1. szám. <http://www.fundamentum.hu/sites/default/files/12-1-02.pdf> (14. 03. 2014).

<sup>92</sup> A great achievement of 20th-century Europe was the establishment of the social system, which provided security and, based on this, dignity to those persons – the elderly, children, sick people, the disabled and the unemployed – who were unable to provide for their own living. In this way they were not dependent on their wage-earning family members.

<sup>93</sup> Trócsányi László szerk.: *A mi alkotmányunk*, Complex Kiadó, Budapest, 2006 p. pp. 483-484.

<sup>94</sup> Czucz Ottó – Hajdú József – Pogány Magdolna: *Szociális Jog II*. Unio Kiadó, Budapest, 2005 pp. 152-165.

<sup>95</sup> <http://nyugdijonline.hu> (15. 04. 2014).

<sup>96</sup> Dr. Török Györgyi: Társadalombiztosítási járulék helyett szociális hozzájárulási adó. <http://www.munkajog.hu/szaklap/hr-munkajog/2012-9/tarsadalombiztositasi-jarulek-helyett-szocialis-hozzajarulasi-ado> (17. 04. 2014).

In addition, the Fundamental Law states: “Every person shall be responsible for him or herself, and shall be obliged to contribute to the performance of state and community tasks to the best of his or her abilities and potential.” This provision encourage the supplementary private pension savings.<sup>97</sup> The problem is that the majority of Hungarian population has no private savings because the extent of deductions to be used for social expenditure did not decrease.

Furthermore, the 1989 Constitution stated: “Everyone has the right to equal compensation for equal work, without any discrimination whatsoever”, and also that “all persons who work have the right to an income that corresponds to the amount and quality of work they carry out”.<sup>98</sup> The new Fundamental Law makes no mention of compensation whatsoever, it only states that: “every employee shall have the right to working conditions which respect his or her health, safety and dignity.”

Finally, I would like to deal with the institutional guarantees of the Fundamental law. Regarding the institutional guarantees, the most spectacular change in the field of state organisation seems to be that the examination of individual complaints became the characteristic of the Constitutional Court instead of the posterior law review. According to the Fundamental Law, not only unconstitutional laws but also unconstitutional jurisdiction can be reviewed in the competence of constitutional complaint. Necessarily, the importance of abstract posterior law review decreases and *actio popularis* terminates.<sup>99</sup>

The Fundamental Law has created a clear hierarchy in the interpretation of the content of human rights. Consequently, the requirements of human rights will emerge in ordinary judiciary. As the Constitutional Court reviews the constitutionality of the particular decisions, judges, if they do not want their decisions annulled, will consider the aspects of human rights. Furthermore, these requirements will also turn up in the administration, as administrative decisions are reviewed by courts. Accordingly, the mechanism of constitutional protection seems to strengthen. However, there are some shades making lawyers less optimistic. Namely, in 2010 the Parliament, referring to a “state of economic crisis”, amended the Fundamental Law and the Act on the Constitutional Court in order to restrict the constitutional review of financial laws.<sup>100</sup> This is a key issue for protecting social rights, because they are significantly dependent on financial circumstances. In a theoretical aspect, this regulation is controversial; it infringes formal constitutionality: without judicial review there is no guarantee that the regulations of the Constitution on financial issues prevail in practice.<sup>101, 102</sup>

### ***Brief summary***

The new Hungarian Fundamental Law, in keeping with the spirit of the Constitutional Court decisions, treats social security not as a right, but as a state goal. The second sentence of the Paragraph (1) of Article XIX is virtually a word-by-word repetition of the second phrase of Article 70/E of 1989 Constitution, but while this clearly only lists examples of those entitled to receive assistance, the new text can be interpreted as an exhaustive list of the entitled persons, from which it can be concluded, for example, that the state only needs to concern itself with creating social security protection for the persons included in the list<sup>103</sup> (and not people unemployed through their own fault, for example). Another

<sup>97</sup> <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf>.

<sup>98</sup> Trócsányi László szerk.: *A mi alkotmányunk*, Complex Kiadó, Budapest, 2006 p. pp. 483-484.

<sup>99</sup> Lóránt Csink– Balázs Schanda: *The Constitutional Court*. In: *The Basic Law of Hungary – A First Commentary*. Clarus, Dublin, 2012. p. 162.

<sup>100</sup> <http://www.ugyvedvilag.hu/rovatok/publikaciok/tarsadalmi-felelosseg-es-a-tulajdonhoz-valo-jog> (25. 04. 2014).

<sup>101</sup> Although Paragraph (4) of Article 37 of the Fundamental Law states that the restriction terminates when the state debt goes under the 50% of the GDP, regarding the state of the finances, it is unlikely to happen in the near future.

<sup>102</sup> Lóránt Csink: *Human rights in the sense of the new basic law* p. 5-6. [http://www.ajk.elte.hu/file/annales\\_2012\\_06\\_Csink.pdf](http://www.ajk.elte.hu/file/annales_2012_06_Csink.pdf) (26. 04. 2014).

<sup>103</sup> Every Hungarian citizen shall be entitled to assistance in the case of maternity, illness, disability, handicap, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act.



change is reflected in the fact that the assistance to be provided is no longer of the extent “necessary for subsistence”, but just the extent “determined by law”.

Furthermore, the word of social insurance has been completely removed from among the means of social security, and only the system of social institutions and measures remained in the text. The Fundamental Law contains regulations which aim to restore balance by reducing social security, public welfare and public services. These provisions aim to ensure that there are no constitutional barriers to introduction measures to make benefits dependent on the performance of work or other activity regarded as socially beneficial, in keeping with the new social-policy approach.

The text rules out the reinstatement of the compulsory private pension funds pillar, with the aim of this being to make it impossible, due to a conflict with the Fundamental Law. According to the new provision of the Fundamental Law the livelihood for the elderly persons will be provided by a two-pillars pension system: 1) a general state pension system based on social solidarity and 2) by allowing for the operation of voluntarily established social institutions.

## IRELAND

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### THE RIGHT TO SOCIAL SECURITY AND THE IRISH CONSTITUTION: TRACING THE RIGHTS-FREE WAY OUT OF THE CRISIS

Dr. THOMAS MURRAY<sup>1</sup>

#### *Introduction*

Ireland's experience of the global economic recession has been pronounced, and greatly exacerbated because of past policies that facilitated major credit and property market bubbles. The consequences have been a major financial crisis, a severe contraction in economic output, and a rapid emergence of high rates of unemployment and emigration. Ireland entered recession in 2009, with its unemployment rate rising to 14.8 per cent. (Unemployment is expected to remain in double digits until at least the second half of this decade).<sup>2</sup> A total of 46,500 Irish people, predominantly young, emigrated in the year to April, 2012, a rise of 16 per cent on the previous 12 months. In 2010, the Irish government, faced with bankruptcy, appealed for an €85 billion 'bailout' from the European Union Commission, European Central Bank, and International Monetary Fund and agreed to continue and extend its existing austerity programme. Successive Irish governments have prioritised resolving the immediate fiscal crisis faced by the state through a series of austerity budgets, often at the expense of concomitant, resultant and long-term social crises.

International financial institutions do not incorporate human rights impact assessments when negotiating structural adjustment lending programmes. The social costs have been predictable and, for some, catastrophic. Risk of poverty has increased from 23.1 per cent in 2007 to 29.4 per cent in 2011, compared to EU-27 averages of 24.4 and 24.2 per cent respectively.<sup>3</sup> In 2012, some 1,230,000 people, more than one-in-four of all people in the state, suffered two or more deprivation experiences. At 26.9 per cent in 2012, the level of enforced deprivation has more than doubled since 2007, when it was 11.8 per cent.<sup>4</sup> Some 10 per cent of the Irish population is now in food poverty.<sup>5</sup> There has also been a pronounced rise in

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<sup>1</sup> I thank Dr. Graham Finlay for comments on an earlier draft. The usual disclaimer applies.

<sup>2</sup> TASC, 2014, *Budget 2014: Choosing an equitable route to recovery*, Dublin: TASC. p. 6.

<sup>3</sup> TASC, 2014, *Budget 2014: Choosing an equitable route to recovery*, p. 6.

<sup>4</sup> The Central Statistics Office sets out eleven enforced deprivation experiences: (a) Without heating at some stage in the last year (b) Unable to afford a morning, afternoon or evening out in the last fortnight (c) Unable to afford two pairs of strong shoes (d) Unable to afford a roast once a week (e) Unable to afford a meal with meat, chicken or fish every second day (f) Unable to afford new (not second-hand) clothes (g) Unable to afford a warm waterproof coat (h) Unable to afford to keep the home adequately warm (i) Unable to afford to replace any worn out furniture (j) Unable to afford to have family or friends for a drink or meal once a month (k) Unable to afford to buy presents for family or friends at least once a year. Those who suffer two or more of these experiences are officially categorised as deprived. See CSO (2012) *Survey on Income and Living Conditions*. Dublin: CSO.

<sup>5</sup> Caroline Carney and Bertrand Maître, (2012) 'Constructing a Food Poverty Indicator for Ireland using the Survey on Income and Living Conditions', Social Inclusion Technical Paper No. 3, Dublin: Department of Social Protection.

inequality: in 2011, 10 per cent of the Irish population received almost 14 times more disposable income than the poorest 10 per cent.<sup>6</sup> The question of whether constitutional law may be an instrument of social protection in Ireland is therefore timely.

If we define the right to social security as the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or the loss of a breadwinner, then the present constitutional basis for the right to social security is very weak at present in Ireland. The Irish state conceives of economic rights primarily in terms of benefits or cash payments rather than social services, emphasising managerial ‘performance’ targets to the detriment of responding to the concerns of those who work in or depend on the state’s welfare infrastructure.<sup>7</sup> In the Irish model, social security provision has proven highly susceptible to retrenchment in times of crisis.<sup>8</sup>

Ireland has not witnessed a constitutional challenge to austerity measures threatening or undermining existing levels of welfare provision. Perhaps the most interesting point of comparison here is Portugal, where recent constitutional cases appear to have been quite important to preventing a roll-back of social security rights.<sup>9</sup> Both Ireland and Portugal have experienced severe austerity as ‘peripheries’ in the Eurozone and both state’s constitutions and models of welfare provision share comparable, though not identical, Catholic voluntarist influences.<sup>10</sup> However, and primarily owing to the nature of past and present constellations of power in Irish society, the former’s model of social security provision is not subject to a robust constitutional framework or model of overarching accountability.

In these circumstances, a range of human rights monitoring institutions, opposition political parties and civil society organisations have responded to austerity, retrenchment and privatisation by advocating a more egalitarian, rights-based way out of the crisis. As Des Hogan, Acting Chief Executive of the Irish Human Rights Commission has observed, while customers of privatized water or health services may have access to the law of contract or tort for restitution, where one has no relationship with the private entity delivering State services, recourse to domestic remedies for a socio-economic right will be limited. Constitutionalising socio-economic rights, it is hoped, may address this deficit.<sup>11</sup> Moreover, there is widespread popular support for a rights-based way out of the crisis. Recent polls suggest that over 70% of the Irish public believe that the Irish Constitution should be amended to protect additional human rights like the right to health and social security.<sup>12</sup> In line with public opinion, the recent Convention on the Irish Constitution voted overwhelmingly in favour of constitutionalising a range of social and economic rights. The government is currently due to respond formally to its proposals and to consider putting them to referendum.

In light of these past experiences and contemporary developments, I assess whether the Irish Constitution may in fact be useful in stopping the roll-back of the European social model in Ireland and promoting a rights-based path out of the current crisis. The article falls into four parts. Part one outlines the Irish model of social security provision, placing it in a comparative perspective and demonstrating

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<sup>6</sup> TASC, 2010, *The Solidarity Factor: Public Responses to Economic Inequality in Ireland* available at [http://www.tascnet.ie/upload/file/Solidarity%20Factor\\_upload.pdf](http://www.tascnet.ie/upload/file/Solidarity%20Factor_upload.pdf); accessed 20.07.2012.

<sup>7</sup> Irish Human Rights Commission, 2005, *Making Economic, Social and Cultural Rights Effective*. Dublin: IHRC Publications.

<sup>8</sup> Amnesty International Ireland, 2014, *Bringing ESC Rights Home*, p. 7.

<sup>9</sup> Lucas Pires, M., 2013, ‘Private versus Public or State Versus Europe? A Portuguese Constitutional Tale’ *Mich. J. International Law*. Emerging Scholarship Project. Available at: <http://www.mjionline.org/wordpress/wp-content/uploads/2013/07/Pires.pdf>; accessed 10/06/2014.

<sup>10</sup> See Pedro Magalhaes, ‘Explaining the Constitutionalisation of Social Rights: Portuguese Hypotheses and a Cross-National Test’ in Denis Galligan and Mila Versteeg, 2013, *Social and Political Foundations of Constitutions*. Cambridge: Cambridge University Press, pp. 432-468.

<sup>11</sup> Des Hogan (IHRC), 2013, ‘Human Rights and Austerity in Ireland: Address to the European Group of National Human Rights Institutions Berlin/ Brussels’. Available at: [http://www.ihrc.ie/download/pdf/address\\_by\\_des\\_hogan\\_at\\_nhri\\_austerity\\_seminar13\\_june\\_2013\\_brussels.pdf](http://www.ihrc.ie/download/pdf/address_by_des_hogan_at_nhri_austerity_seminar13_june_2013_brussels.pdf); accessed 12.06.2014.

<sup>12</sup> Amnesty International Ireland, 2014, *Bringing ESC Rights Home*. Dublin: Amnesty Publications, p. 7.

its vulnerability to retrenchment in the course of the current crisis. Part two examines the relationship between the Irish Constitution and social security provision, highlighting what limited provision is made for material rights. Part three examines recent education and disability rights cases in the Irish Supreme Court as well as governmental and civil society responses to such cases before and after the crisis. In the absence of a body of social security rights case-law, these cases provide us with a close approximation of the challenges facing those who would constitutionalise and make effective social security rights.

Based on these findings, part four provides an overall assessment of the specific merits of a rights-based way out of crisis in the Irish context. In the absence of wider political transformation, and notwithstanding recent developments at the Constitutional Convention, the Irish state is unlikely to guarantee social security rights at present. That said, the increased emergence of a rights-based discourse concerning social provision in Irish civil society suggests that there are ethico-political limits to welfare state retrenchment and that constitutional change on this issue in the long-run cannot be discounted. While their advocates recognise that social security rights are not a panacea, a number of important yet often unrecognised limitations attach to their constitutionalisation and effective realisation in the Irish context.

These limits include the past practice of the Irish judiciary which is predominantly oriented towards the common law's strong defence of property rights, as well as the financial barriers to entry to the Irish legal system. Potential support structures, including the lawyers, organisations and money necessary for claimants to access the courts, are also increasingly limited by austerity and by other political constraints.<sup>13</sup> Moreover, given the highly segmented, targeted nature of Irish social security provision, individual victories on a case-by-case basis would not appear to offer a firm basis for developing universal or 'solidaristic' models of social security provision. In short, the Irish case-study does not suggest that constitutionalising social security rights will provide any greater or more effective realisation of socio-economic rights than has been achieved, albeit quite limitedly, in other jurisdictions.

## ***1. Ireland's social security in crisis***

Ireland's social security provision is comparatively low. Among the worlds of welfare capitalism, Ireland's welfare state has been broadly characterised as 'Anglo-Saxon' or 'liberal', together with Australia, the United States, New Zealand, Canada and the United Kingdom.<sup>14</sup> Welfare provision in this model tends to be targeted or means-tested rather than universal and predominantly based on cash transfers rather than public service provision. Both Ireland and the UK have historically built their systems around insurance (alternatively described as 'national' or 'social' insurance) and, to a lesser degree, general taxation.<sup>15</sup> One further distinguishing feature of Ireland and the UK is the separation of income maintenance from health care.<sup>16</sup> The Irish state commits a comparatively small proportion of aggregate wealth to support social services or income transfers. Not unlike the US, it offers tax incentives as a form of state subsidisation to avail of market provision in areas such as housing, health and pensions.<sup>17</sup> The limitations of the Irish

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<sup>13</sup> See Charles Epp, 1998, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.

<sup>14</sup> Gosta Epsing-Andersen, 1990, *Three Worlds of Welfare Capitalism*. Oxford: Polity Press. Though the standard work of reference, this typology overlooks systemic divergences between European cores and peripheries as well as political and economic variables that may be of more explanatory value in peripheries such as Ireland. See Mel Cousins, 2005, *Explaining the Irish Welfare State: An Historical, Comparative and Political Analysis*. Edwin Mellon: New York, pp. 9-11.

<sup>15</sup> Anthony McCashin, 2004, *Social Security in Ireland*. Dublin: Gill and MacMillan, p. 56.

<sup>16</sup> There are minor exceptions to this in Ireland: social insurance contributions cover entitlement to Treatment Benefits (Dental, Aural, and Optical benefits) for some categories of contributor. See McCashin, *Social Security in Ireland*, p. 56, n. 1.

<sup>17</sup> Niamh Hardiman (ed.), 2012, *Irish Governance in Crisis*. Manchester: Manchester University Press, p. 3.

state's welfare effort in this regard tend to be ameliorated somewhat by highly gendered, voluntary and family networks of care.<sup>18</sup>

Social security in Ireland is the responsibility of the Minister for Social Protection. The Department for Social Protection consists of a central policy section and a separate Social Welfare Services office headed by a Director-General, responsible for the operational activities of the department.<sup>19</sup> There are three key forms of payment scheme: social insurance, social assistance and universal. Under social insurance schemes, eligibility for benefit is determined by the level of social insurance contribution paid. Social insurance schemes are mainly financed from compulsory contributions made by employers, employees and the self-employed. PRSI (pay-related social insurance) contributions are normally deducted from an employee's wages or salary, with a maximum of 52 contributions per annum. In certain instances, the Government may also contribute to the Social Insurance Fund. Social assistance or means-tested payment schemes are aimed at those who have not paid sufficient social insurance contributions and are based on an assessment of individual or family income. Finally, under universal schemes, payments are made to citizens without respect to income or social insurance contributions. The primary example here is child benefit. Non-contributory schemes are financed from general taxation.

The Irish health care system consists of a two-tier mix of public and private service provision. About 80 per cent of total spending on healthcare provision in Ireland comes from public sources, primarily, as in the UK, from general taxation.<sup>20</sup> However, with both forms of health care often provided in the same institution, and by the same personnel, successive Irish governments have increasingly subsidised private care at the expense of public provision. Ireland is the only EU health system that does not offer universal coverage of primary care.<sup>21</sup> Entitlement to a medical card, ensuring entitlement to general practitioner and hospital services free of charge, is based on a means test. In 2001, eligibility for medical cards was extended to all persons aged 70 and over irrespective of income. In 2005, a GP visit-only medical card was introduced, setting higher qualifying income limits and entitling the holder to free GP services but not free prescribed medicines. Those without medical cards are liable to GP fees but are entitled to a subsidised hospital service in a public bed in a public hospital.<sup>22</sup>

There are a number of distinguishing features to note about Irish provision for old age. In contrast to the more unified arrangements of Scandinavian or Continental countries, Irish social security pensions are built largely around private sector employees and the self-employed while public sector employees' pensions are financed and structured differently. (A number of low-income self-employed and part-time employees are therefore excluded). Social security recipients' pensions tend to be a flat rate while the latter's pensions are predominantly income-related.<sup>23</sup> The Irish system has additional flat-rate payments in respect of spouses and children. Also, Ireland has no provisions for deferred or earlier pensions; the only age differentiation is between the Retirement Pension payable at age 65 for a greater contribution record and the Contributory Pension payable at age 66.

Turning to unemployment payments, Ireland's provision is again less comprehensive than Scandinavian or Continental systems. Unemployment Benefit is payable to insured persons except self-

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<sup>18</sup> See Kathleen Lynch (2013) 'Why Love, Care and Solidarity are Political Matters: Affective Equality and Fraser's Model of Social Justice' In: Anna Jónadóttir and Ann Ferguson (eds). *Love: A Question of Feminism in the Twenty-first Century*. New York: Routledge, pp.173-189.

<sup>19</sup> The Department of Social Welfare (1947–1997) was renamed the Department of Social, Community and Family Affairs (1997–2002), the Department of Social and Family Affairs (2002–2010) and, most recently, the Department of Social Protection (2010–present). When an application for payment is refused, a right of appeal exists to the legally independent Appeals Office.

<sup>20</sup> Claire Finn and Niamh Hardiman, 'Creating two levels of healthcare' in Hardiman, Niamh (ed.), 2012, *Irish Governance in Crisis*. Manchester: Manchester University Press, pp. 110-131, p. 113.

<sup>21</sup> Social Justice Ireland, *Analysis and Critique of Budget 2014*, p. 18. Available at: <http://www.socialjustice.ie/sites/default/files/file/Budget/2013-10-16%20-%20Budget%20Analysis%202014%20FINALFINAL.pdf>.

<sup>22</sup> At the end of 2008 there were 1,352,120 medical card holders and 85,546 GP visit card holders. Together they represent about 30% of the total population.

<sup>23</sup> Anthony McCashin, *Social Security in Ireland*, 56-7.

employed and public servants, with eligibility based on social insurance. Benefits are included in annual taxable income. Partial Benefit is payable for short-time working and part-time working. Unemployed aged 55-66 were entitled to a Pre-retirement Allowance after 15 months unemployment. Unemployment Assistance is payable to those with insufficient contributions or after Unemployment Benefit is ended, subject to a means-test. There are two rates of Unemployment Assistance, short-term and long-term. Ireland has flat-rate benefit and assistance payments plus adult and child dependent payments depending on spouse's income.

In terms of 'last-resort' provision for those without specific coverage under insurance or assistance categories, Ireland has a national statutory framework for 'safety net' provisions in its Supplementary Welfare Allowances provisions. This gives a legal right, subject to a means test, to a statutorily-determined payment, and permits additional payments for exceptional needs and emergencies. Such frameworks occur in Scandinavian and Continental systems; in contrast, Southern European systems tend to have more regional arrangements, with considerable discretion and variation. Finally, Ireland is unusual in its use of non-cash benefits (or 'free schemes') as supplements to cash payments. These comprise of provisions such as universal free (public transport) travel for pensioners, seasonal fuel allowances for welfare-dependent households and for pensioners living alone, or a free television license.<sup>24</sup>

Over the 1990s and 2000s, in the context of unprecedented levels of economic growth, social security provision in Ireland increased significantly in real terms. However, social security functioned in a wider context of higher overall levels of prosperity and rising employment, as well as profound changes in social and family structures. A number of long-standing challenges to sustaining welfare effort became apparent throughout this period, including the shift from industrial to services employment, the country's ageing demographics as well as the introduction of budgetary limits in the course of European Monetary Union. The crisis of 2007-08 has accentuated political pressures towards less welfare effort, greater means-testing and increased marketization of social services.

Since the beginning of Ireland's economic crisis, austerity measures totalling just over €30 billion have been introduced. Budget 2014 marked the ninth fiscal adjustment. Taken together, the total scale of these adjustments has been equivalent to the removal of 17.8% of GDP from the economy.<sup>25</sup> In terms of the nature of these adjustments, social expenditure cuts have outweighed tax increases by two-to-one. The IMF and European Commission have accepted the reverse ratio (one-to-two) as the means to address fiscal adjustments in other countries such as Italy. Successive Irish governments, however, have persisted with reducing expenditure rather than bringing Ireland's total tax take closer to the European average. Public spending in recent years has approximated 42.6% of GDP, compared to 49.3% of the EU-28. Whereas health and education expenditure tend to match the EU-28 average, social protection spending tends to be lower; 16.4% to 19.9%. IMF forecasts suggest that by 2018, under current budgetary policy, primary public spending (i.e. not including debt interest repayments) will have fallen to the second lowest level in the EU as a proportion of GDP.<sup>26</sup>

The expenditure and taxation changes from Budget 2009 to Budget 2013 have had a significant cumulative impact on households in Ireland, particularly the old, the young, those with children and those on low incomes. In terms of health care, an international review of the Irish healthcare system in 2012 concluded that continuing budget cuts could lead to a reduction in access to necessary services for certain groups as it is not possible to have a sustainable health system with 3% reduction in expenditure year on year. Access to free GP care to all over 70 was rescinded in 2008 with a return of a means test. On return to work, unemployed people now lose their full medical card status for a GP visit only card. The Government, however, has provided for Free GP Care for children aged 5 and under. Government has also withdrawn subsidies for care and medical expenses, increasing the Drug Payment Scheme threshold by 37% (€54) per month and trebling prescription charges for medical

<sup>24</sup> Anthony McCashin, *Social Security in Ireland*, 63.

<sup>25</sup> Social Justice Ireland, *Analysis and Critique of Budget 2014*, pp. 1-2.

<sup>26</sup> International Monetary Fund (2013) *World Economic Outlook*, April, p. 33.

cardholders to €1.50 per item.<sup>27</sup> The weekly Disability Allowance and weekly Carers Allowance has been reduced by almost 8% (€16.30) each, while the Respite Care Grant has been reduced by 19% (from €1780 to €1375 p.a.).

In terms of old age provision, the age of eligibility for the State pension has increased to 66, the first in a series of changes which will raise the qualification age for the pension by a further two years over the next decade and a half. It will increase to 67 years in 2021 and to 68 years in 2028. Various changes have further restricted eligibility to the contributory State pension, including a requirement for ten years PRSI contributions to qualify, up from just five previously. A new ‘total contributions’ approach is due to come into force in 2020, with the level of pension paid to be directly proportionate to the number of social insurance contributions made by a person over their working life. A total contributions requirement of 30 years contributions for a maximum pension will be introduced.<sup>28</sup>

Regarding unemployment assistance, the personal rate of social welfare has been reduced by 8% (€16.30 per week) to €188 per week. Austerity has disproportionately affected the young, with the personal rate of Jobseekers allowance for those under 24 reduced to €100 per week and to €144 a week for those aged 25. The government has increased the number of paid contributions to qualify for Jobseekers Benefit from 52 to 104 paid contributions. Ireland’s duration of entitlement to benefit was 390 days in comparison with Finland’s 500 days and Germany’s sliding scale with a maximum of 64 months.<sup>29</sup> The maximum length of time for claiming Jobseekers Benefit has been cut to 9 months for those with 260 contributions and to 6 months for those with less than 260 contributions.<sup>30</sup>

In terms of universal payments, successive government have reduced Child Benefit by 21% (€36) per month for the 1st and 2nd child, and by 26% (€54) per month for the 3rd child. Child Benefit is no longer payable to children aged 18 in fulltime second level education.<sup>31</sup> Finally, in terms of ‘last resort’ provision, fuel allowance payments have been reduced by 18.7% (€120) per annum. Since 2008, there have also been reductions in the Household Benefits Package, including the abolition of the Telephone Allowance.

The European Social Model of public services and supports are only attainable if Irish society is willing to maintain European levels of public spending. Ireland’s overall tax-take, however, remains peculiarly low. In 2011, Ireland’s total revenue, including social security contributions, was 28.9 per cent of GDP compared to the EU-27 weighted average of 38.8 per cent – less than three-quarters of the average level of European taxation.<sup>32</sup> The primary factor involved in this ‘low tax’ regime is the very low level of social security contributions. In Ireland, social contributions were only 5 per cent of GDP compared to 12.7 per cent of the EU-27; they made up 16.4 per cent of all tax revenue, less than half the EU-27 average (37.3 per cent). Other important factors include the relatively low levels of local government revenue-raising, and the above average levels of tax expenditures or tax breaks, the latter greatly undermining equity in the income tax system. Social justice and human rights organisations have called for much greater transparency in the budgetary process and suggest that the constitutionalisation of social security rights may aid this process.<sup>33</sup>

## 2. *Social security and the Irish Constitution*

The nature of Ireland’s welfare state and social security provision owes to a variety of historical, structural factors, including its colonial and post-colonial development, its comparatively later and slower levels of industrialization and economic growth, its ‘weak’ state capacity, as well as the manner of trade

<sup>27</sup> Social Justice Ireland, *Analysis and Critique of Budget 2014*, p. 11.

<sup>28</sup> Social Welfare and Pensions Act (2011). National Pensions Framework (2010).

<sup>29</sup> Anthony McCashin, *Social Security in Ireland*, 59.

<sup>30</sup> Social Justice Ireland, *Analysis and Critique of Budget 2014*, p. 11.

<sup>31</sup> Social Justice Ireland, *Analysis and Critique of Budget 2014*, p. 11.

<sup>32</sup> TASC, 2014, *Budget 2014: Choosing an equitable route to recovery*. P.14.

<sup>33</sup> Social Justice Ireland, *Analysis and Critique of Budget 2014*, p. 24.

union, social democratic and left mobilization.<sup>34</sup> Over the 19th century, successive British governments introduced a heavily centralised model of welfare, prioritising the top-down role of the state's central planning institution, later the Department of Finance. Meanwhile, the day-to-day running of health, education and charitable services was left to the Catholic Church, a measure cost-effective, pious and ultimately, as recent reports into clerical abuse have demonstrated, detrimental to the well-being of many thousands of men, women and children.<sup>35</sup>

Crucially, secular and left political mobilisation in the independent Irish state, particularly as measured by the performance of the Labour party, has been comparatively weak in European terms. Each government in the history of the state has been led by nationalist political parties, Fianna Fáil and Fine Gael, broadly of the centre and centre-right respectively.<sup>36</sup> In the post-World War Two era then, organised labour was not in a position in Ireland as elsewhere to generate a cross-class coalition of support for universal social security provision. Instead, such provision as emerged from predominantly Catholic nationalist political forces developed along 'non-solidaristic' lines, resulting in the highly segmented system of provision outlined above.<sup>37</sup>

The same constellation of political forces is further evidenced in the specific relationship between the Irish Constitution and the Irish model of social security provision. Adopted by popular vote in 1937, *Bunreacht na hÉireann* (the Irish Constitution) marked a significant declaration of nationhood based on the principle of popular sovereignty, while simultaneously provided for a conservative entrenchment of existing institutions.<sup>38</sup> These included the inherited state apparatus, a Westminster model of centralised government and administration, as well as the 'special position' of the Catholic Church and its interests in education, health and social policy. The Constitution's fundamental rights provisions (articles 40-44) reflected both liberal democratic thought and Roman Catholic social teaching, combining 'negative' rights of tolerance and non-interference with 'positive' duties expressing social justice concerns. Ireland was the first amongst the common law countries to explicitly recognise social and economic rights in its constitution.

The Irish Constitution explicitly protects the right to free primary education (article 42.4), the State's duty to provide for children in need (article 42.5) and the right to private property (article 43). Moreover, Article 45, titled the 'Directive Principles of Social Policy', focuses on a communitarian vision of society and outlines a number of principles directed at achieving the common good. These include the right to earn a livelihood; the distribution of the ownership and control of material resources to subserve the common good; public control of essential industries, including the credit system; economic security; safeguarding the economic interests of the weaker sections of the community, including "support of the infirm, the widow, the orphan, and the aged", protection of health, and protection against entering into unsuitable work due to economic necessity. Importantly, however, the constitution expressly declares

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<sup>34</sup> Thomas Murray, 2016, 'Contesting a World-Constitution? Anti-systemic movements and constitutional forms in Ireland, 1848-2008' in *Journal of World-Systems Research*, Vol. 22, 1, pp. 77-107; see also Mel Cousins, 2005, *Explaining the Irish Welfare State*. pp. 12-15.

<sup>35</sup> CICA, 2009, *Report of the Commission to Inquire into Child Abuse*. Available at <http://www.childabusecommission.ie/index.html>; accessed 01.05.2014. See also Bruce Arnold, 2009, *The Irish Gulag*. Dublin: Gill & Macmillan.

<sup>36</sup> Fianna Fáil emerged as the dominant, nationalist ruling party, Fine Gael formed the largest party of opposition while the Labour party functioned as a potential junior coalition partner for either party. Notwithstanding dramatic socio-economic and cultural transformation over the intervening decades, this party system alignment persevered until the recent crisis. From the 1980s onwards, all three major parties have coalesced on conceding powers to international governance networks, notably uniting in successive referendums to campaign successfully for E.U. integration. Seán McGraw, 'Adaptive Governance: The Art of Party Politics', in Niamh Hardiman, ed., 2012, *Irish Governance in Crisis*, Manchester: Manchester University Press.

<sup>37</sup> In particular, the opposition of the Catholic hierarchy and medical profession to proposals to extend universal health care to mothers and children in the 1950s proved essential to preserving a duplicate, public-private health care system. See Mel Cousins, 2005, *Explaining the Irish Welfare State*. p. 28.

<sup>38</sup> Bill Kissane, 2011, *New Beginnings: Constitutionalism and Democracy in Modern Ireland*. Dublin: University College Dublin Press, pp. 88-9; Ruth Fletcher, 2001, 'Post-Colonial Fragments: Representations of Abortion in Irish Law and Politics' in *Journal of Law and Society*, Vol. 28, 4, pp. 568-589.



that Article 45 would not be cognisable by any court and would serve merely to guide government policy.<sup>39</sup> While the subsequent development of legislation and policies in Ireland reflected certain aspects of these socio-economic principles and rights, human rights standards are not routinely incorporated in policy or legislation.<sup>40</sup>

Over the intervening decades, Irish citizens have periodically sought to have social and economic rights, including social security rights, recognised or further protected in the Irish Constitution. There are two mechanisms for changing the Irish Constitution: amendment via referendum and re-interpretation via judicial review. In terms of the former, the government is responsible for choosing to word an amendment and to submit it to the electorate. Between 1937 and 2014, thirty-six referendums to change the Irish Constitution have occurred. No Irish government has yet decided to offer a referendum on the constitutional recognition of socio-economic or social security rights. In 1989, Ireland ratified the International Covenant on Economic, Social and Cultural Rights, which protects fundamental human rights like the right to health, the right to social security, and the right to an adequate standard of living, but that there has simply never been sufficient political will to give domestic legal effect to the range of rights Ireland has committed to under international law.

Somewhat exceptionally, the Fine Gael-Labour coalition government of 1995-97 considered the issue as part of a wider constitutional review process.<sup>41</sup> Two members of the Constitutional Review Group argued that the constitution should have an article ‘committing us to a democracy based on principles of social solidarity with the aim of eliminating poverty and promoting economic equality through a system of taxation based on principles of equality and progressiveness’.<sup>42</sup> The government concurred with the majority of the expert group who opposed the constitutionalisation of socio-economic rights on the grounds that it would represent a ‘distortion of democracy’.<sup>43</sup>

Most recently, in February, 2014, the government-appointed Convention on the Irish Constitution considered whether economic, social and cultural rights ought to be placed in the Irish Constitution. The one hundred-member Convention, composed of a chairman, twenty-nine parliamentary members of the Oireachtas, four representatives of Northern Ireland political parties, and sixty-six randomly selected citizens, decided that the current limited protection of economic, social and cultural rights is inadequate and voted by an overwhelming majority of 85 per cent to strengthen their constitutional protection.<sup>44</sup> 80 per cent voted in favour of giving constitutional protection to the full range of rights within the ICESCR. A majority also favoured including a provision in the Constitution “that the State shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts”. The Irish government is not obliged to proceed with any amendment proposal,

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<sup>39</sup> During the drafting process, the government reformulated these ‘positive’ rights to welfare as non-binding ‘directive principles’ in order to satisfy the Department of Finance’s preferences for minimal state spending, thereby preserving established financial, currency and trading links with the United Kingdom. Thomas Murray, 2015, ‘Socio-Economic Rights and the Making of the 1937 Irish Constitution’, *Irish Political Studies*, DOI: <http://dx.doi.org/10.1080/07907184.2015.1095738>.

<sup>40</sup> Amnesty International Ireland, *Bringing ESC Rights Home*, p. 110. Gerard Hogan, 2001, ‘Directive Principles, Socio-Economic Rights and the Constitution’ in *Irish Jurist*, 36 (2), pp. 293-320.

<sup>41</sup> An earlier all-party constitutional review committee had met in 1967 but were ‘not aware of any public demand for a change in the basic structure of the Constitution’ and did not consider the constitutional recognition of socio-economic rights. See *The Report of the Committee on the Constitution* (1967), Dublin: Stationary Office, p. 8.

<sup>42</sup> Alpha Connelly and Kathleen Lynch, 1996, ‘Equality before the Law’ in *Report of the Constitution Review Group*. Dublin: Stationary Office, pp. 586-91, p. 590.

<sup>43</sup> CRG Report, pp. 234-6; p.235. The Constitution Review Group have been accused of invoking double standards when assessing property and socio-economic rights: “It seems to us incompatible to assert that socio-economic right should not be constitutionalised because they raise issues of policy and practicality which should remain in the hands of the government and parliament ‘elected to represent the people and do their will’ unlike the ‘unelected judiciary’, yet to maintain that it is no ‘distortion of democracy’ to allow judicial supervisions of the decisions of those same representatives in the allied fields of property rights”. Rory O’Connell and Andrew Butler, 1998, ‘Ireland’s Constitutional Review Group Report’ in *Irish Jurist*, 33, pp. 237-65, p 254.

<sup>44</sup> Irish Constitution Convention: <https://www.constitution.ie/Convention.aspx>; accessed 01.06.2014.

but has committed to respond formally to each recommendation and debate it in the Oireachtas by the end of July.<sup>45</sup>

In addition to direct amendment, Irish citizens have also sought to broaden the Irish Constitution's recognition of socio-economic rights through judicial review. Ireland broadly follows the U.S. model of concrete judicial review, in which a legal case activates review once one of the parties invokes the constitution's provisions.<sup>46</sup> Given the highly centralised, party-dominated nature of Irish government and administration, the Constitution and the courts have emerged as among the more robust constraints on executive power. In Ireland as in Europe and North America, the rapid emergence of public interest litigation owed primarily to civil society attempts to by-pass existing, 'blocked' systems of representative politics and trade union organising.<sup>47</sup> Particularly from the 1970s onwards, all manner of high-profile constitutional cases have sought to defend 'minoritarian' rights for women, children, prisoners, homosexuals, Travellers, the disabled, the transgendered and asylum seekers.<sup>48</sup>

Concomitantly, mirroring wider global trends in the latter half of the twentieth century, an empowered judiciary emerged in Ireland. Notably, Chief Justice Cearbhall Ó'Dálaigh's court of the 1960s newly interpreted the constitution so as to acknowledge the existence of rights not explicitly listed in the constitution.<sup>49</sup> In the course of these developments, the Supreme Court proved particularly 'activist' regarding the preservation and enlargement of civil liberties, emphasising limits to police powers and rights of due process as well as expanding the private sphere, most notably with regard to the liberalisation of Catholic social or family law.<sup>50</sup> In contrast to the experience of the Indian Supreme Court, however, the Irish judges stopped short of re-interpreting the constitution's 'Directive Principles' so as to recognise their fundamental rights status.<sup>51</sup> Constitutional scholars have created a variety of plausible justifications for reading socio-economic rights into the Irish constitution, posited primarily in terms of existing liberal democratic, and communitarian constitutional norms.<sup>52</sup> In light of the history of actually-existing constitutionalism in Ireland, however, most scholars and practitioners accept that such interpretations are extremely unlikely to succeed before the present bench.<sup>53</sup>

In fact, the Court, ostensibly distinguishing between 'distributive' and 'commutative' justice as well as claiming a commitment to the principle of the separation of powers, has characteristically refrained from challenging duly enacted legislation or issuing compulsory injunctions to the government in the realm of

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<sup>45</sup> The Convention on the Constitution (An Coinbhinsiún ar an mBunreacht) was established in December 2012 to discuss eight specified constitutional issues and, time permitting, to initiate additional constitutional amendments. A Constitution Day, in which all proposals accepted by government will be put to a popular vote, is envisaged for 2015.

<sup>46</sup> The Constitution also provides for abstract review by way of presidential referral of bills of parliament to the Supreme Court. Michael Gallagher, 'The Changing Constitution' in John Coakley and Michael Gallagher, 2010, *Politics in the Republic of Ireland*. Routledge: London, pp. 72-108, p. 84.

<sup>47</sup> Mauro Cappelletti (ed.), 1981, *Access to Justice and the Welfare State*, Florence: European University Institute. See also G. McCormack, 1979, 'Review: Stevens's Cappelletti's *Access to Justice*' in *Irish Jurist*, 14 (1), pp.195-198, p. 195.

<sup>48</sup> Basil Chubb, 1991, *The Politics of the Irish Constitution*. Dublin: Institute of Public Administration. Brian Farrell, 1988, *De Valera's Constitution and Ours*. Dublin: Gill and Macmillan. See also Pádraig O'Morain, 2003, *Access to Justice For All*. Dublin: FLAC.

<sup>49</sup> *Ryan v. Attorney General* [1965] IR 294.

<sup>50</sup> Judges have interpreted into the constitution a hitherto un-enumerated right to 'marital privacy', thereby striking down a long-standing statutory prohibition on the importation of contraceptives (*McGee v. Attorney General* [1974] I.R. 284). In the early 1990s, the Supreme Court acknowledged a constitutional right to abortion in certain, strictly limited circumstances (*X v. Attorney General* [1993]). See also Garry Sturgess and Philip Chubb, 1988, *Judging the World: Law and Politics in the World's Leading Courts*. Sydney: Butterworths, p. 44.

<sup>51</sup> *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 Supreme Court 18. See also John O'Dowd, 2011, 'Remembering the Constitution: The Easter Proclamation and Constitutionalism in Independent Ireland', *IBIS Working Paper Series*, No. 104, p. 9.

<sup>52</sup> Gerry Whyte, 2002, *Social Inclusion and the Legal System: Public Interest Law in Ireland*. Dublin: Institute of Public Administration.

<sup>53</sup> See Gerry Whyte, 'The Efficacy of Public Interest Litigation in Ireland' in Maluwa, Tiyanjana (ed), 2014, *Law, Politics and Human Rights: Essays in Memory of Kader Asmal*. Koninklijke Brill: Leiden, pp. 252-86, p.259.

social security.<sup>54</sup> Seminal cases concerning court-ordered public expenditure, notably the introduction of free legal aid<sup>55</sup> and the payment of welfare arrears,<sup>56</sup> have had to be fought and won at the European Court of Human Rights. In those few constitutional cases where the Irish Court has struck down social legislation, it has been broadly in defence of negative liberties or property rights. Special interest groups, including employers, landlords and farming associations, have successfully used the constitution to challenge state regulation of the market place. Most notably, these took the form of successful constitutional challenges to rent restrictions,<sup>57</sup> taxation measures<sup>58</sup> and trade union protections.<sup>59</sup>

Traditionally then, the Irish judiciary has adopted a narrow conception of rights, emphasising liberal individualism, anti-statism and ‘negative liberties’ at the expense of ‘positive’ rights to welfare and social security or the interests of the ‘common good’.<sup>60</sup> This position is not atypical and owes to a combination of factors, including the strong defence of individual and property rights in the common law, the sociological conditions shaping judges’ formation and ideological preferences as well as the party-dominated judicial appointments process.<sup>61</sup> In the absence of a body of social security rights case-law then, recent education and disability rights cases in the Irish Supreme Court provide us with the closest possible approximation of the challenges facing those who would both constitutionalise and make effective social security rights.

### 3. *Expanding the Irish Constitution’s guarantee of socio-economic rights?*

The Irish Constitution, as noted in Fig. 1, explicitly recognises the right to free primary education (article 42.4), and the State’s duty to ‘supply the place’ of parents who cannot or will not provide for their children (article 42.5). That these provisions do not fall under the non-enforceable provisions of Article 45 signals that citizens may have recourse to the courts to vindicate these rights. The Irish Courts have interpreted both provisions as conferring corresponding rights on children to receive the services that the State is obliged to provide.<sup>62</sup> Between 1993 and 2001, a number of seminal constitutional cases were taken seeking to use Article 42 so as to compel state provision of resources to children with special educational needs and severe behavioural disorders. These cases illustrated a number of key features of the Irish state’s minimal welfare effort: centralised decision-making, segmented welfare provision,

<sup>54</sup> *O’Reilly v. Limerick Corporation* [1989] ILRM 181.

<sup>55</sup> *Airey v. Ireland* (1979-80) 2 EHRR 305, [1979] ECHR 3, (1980) 2 EHRR 305. The European Court of Human Rights found Ireland to be in breach of the European Convention on Human Rights because it had failed to provide legal assistance to Mrs Josie Airey in her attempt to obtain a judicial separation. The state introduced a Scheme of Civil Legal Aid and Advice in 1980 but it has been criticized for lack of funding and an almost exclusive focus on family matters. See Pádraig O’Morain, 2003, *Access to Justice For All*, Dublin: FLAC, pp. 10, 21-6.

<sup>56</sup> *McDermott and Cotter v. Minister for Social Welfare and Attorney General* [1987] ECR 1453. Ms. McDermott and Ms. Cotter had been unemployed since 1983, receiving unemployment benefit from January 1984 until January 1985. The Department of Social Welfare stopped payment on the grounds that a married woman was entitled to receive unemployment benefit only for a period of 312 days and at a lower rate than a married man. The High Court and European Court of Justice ruled against the state on the principle of sex equality. Some 70,000 women received back payments of more than €350m. See Ingeborg Heide, 2004, *Gender Roles and Sex Equality: European Solutions to Social Security Disputes*. International Labour Organisation: Geneva, pp. 43-56, p. 48.

<sup>57</sup> *Blake v. Attorney General* [1982] IR 117

<sup>58</sup> *Brennan v. Attorney General* [1984] ILRM 355 See also Keane, Ronan, 1983, ‘Land Use, Compensation and the Community’ in *Irish Jurist*, 18 (1), pp.23-33.

<sup>59</sup> *Educational Company of Ireland v Fitzpatrick* [1961] IR 345. See also Wilkinson, Brian, 1989, ‘Workers, Constitutions and the Irish Judiciary: A Jurisprudence of Labour Liberty?’ in *Irish Jurist*, 24 (2), pp. 198-226, p. 199.

<sup>60</sup> David Gwynn Morgan, 2001, *A Judgment Too Far? Judicial Activism and the Constitution*. Cork: Cork University Press. P. 106

<sup>61</sup> See Ran Hirschl’s comparative study of the new constitutionalism and distributive justice in Canada, Israel, New Zealand and South Africa. 2007, *Towards Juristocracy: the origins and consequences of the new constitutionalism*, London: Harvard University Press, pp. 146-7.

<sup>62</sup> See *Crowley v Ireland* [1980] I.R. 102 and *FN v Minister for Education* [1995] 1 I.R. 409. Conor O’Mahony, 2006, *Educational Rights in Irish Law*, Dublin: Thomson Round Hall.

underfunding, continued state reliance on the institutionalisation of children as well as the crucial role of voluntary and family networks of care. They further tested the ability and willingness of the Irish Courts to enforce a socio-economic right explicitly stated in the Irish Constitution.

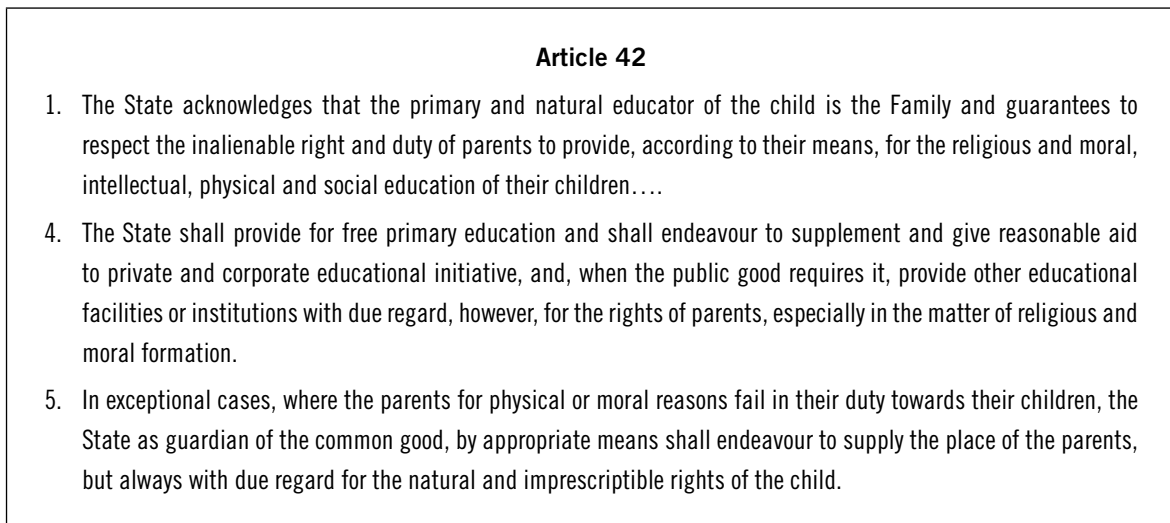


Fig. 1. Irish Constitution: Education Rights Provision

Throughout the 1980s and 1990s, autistic children in Ireland continued to receive ‘baby-sitting’ rather than fully resourced educational facilities. In 1993, Paul O’Donoghue, a profoundly autistic child, brought a constitutional action against the State, claiming he was not being provided with any educational services.<sup>63</sup> While the State argued that he was incapable of being educated and that the services required by him did not fall within the constitution’s definition of ‘primary education’, the Court rejected both of these arguments. Expert evidence indicated that the applicant was capable of educational development. Crucially, and drawing on the UN Convention on the Rights of the Child, Judge O’Hanlon concluded that ‘primary education’ involved ‘giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be’.<sup>64</sup> In this case, the Court issued a declaratory order, stating that the applicant’s right to free primary education had not been vindicated. Responsibility shifted to government to change its actions to vindicate its newly clarified constitutional obligations.

The most high profile of subsequent socio-economic rights cases centred on the state’s informal provision of treatment and education to Jamie Sinnott, a twenty-three year old autistic adult, and Kathryn Sinnott, his mother and primary care-giver. Up to the hearing of the Sinnotts’ court action in 1999, when Jamie was 23 years old, the State had provided him with no more than two years of primary education. (His classes at the Education and Development Centre at Lota, Co. Cork were discontinued following budget cuts). In the High Court, Judge Barr found that, while the applicant was over eighteen, he was still entitled to free primary education appropriate to his needs for as long as he was capable of benefiting from such education. The Court granted a mandatory injunction enforcing this entitlement. On appeal, however, the Supreme Court overturned this decision, deciding that the State’s duty to provide primary education did not extend to adults.<sup>65</sup> In a society where some 25% of adults have literacy difficulties, such a constitutional obligation, Chief Justice Keane recognised, would have ‘more far-

<sup>63</sup> *O’Donoghue v Minister for Health* [1996] 2 I.R. 20.

<sup>64</sup> *O’Donoghue v Minister for Health* [1996] 2 I.R. 20. P. 65.

<sup>65</sup> Chief Justice Keane’s dissented to declare that Jamie Sinnott was entitled to education as long as he was capable of benefitting from it; Judge Murphy also dissented but held that the state’s obligation to educate ceased at 12 years.

reaching implications'.<sup>66</sup> The Supreme Court also took a more restrictive view of the role of the courts in the enforcement of the right to education, and in particular in relation to the types of relief the courts are entitled to grant.<sup>67</sup>

Over the same period, a series of constitutional cases were also taken seeking to direct the State to make adequate provision in relation to both the accommodation and educational needs of children with behavioural problems. On a number of occasions, the Departments of Health and Education assured the High Court that such children would be provided with 'high support units'.<sup>68</sup> Notwithstanding the courts' issuing of several declaratory orders to this effect, the State did not implement the policy in a timely manner. As a result, applicants for institutional care were being placed in detention centres intended for children convicted of criminal charges. Subsequently, in *T.D. v. Minister for Education*, Judge Kelly granted a mandatory injunction requiring the Minister for Education to complete the development of suitable accommodation within a specified time scale.<sup>69</sup>

On appeal, the Supreme Court reversed this decision and indicated that, in accordance with the separation of powers doctrine, mandatory injunctions can only be obtained in the rarest of circumstances. The Court defined such circumstances as being restricted to where an organ of the State had shown a 'clear disregard' for its constitutional obligations, described by Judge Murray as 'a conscious and deliberate decision by the State to act in breach of its constitutional obligations to other parties accompanied by bad faith or recklessness'. The courts, Judge Hardiman claimed could not 'fill the vacuum' in policy-making because it would transfer power to 'an unelected judiciary at the expense of the politically accountable branches of government'.<sup>70</sup> The European Court of Human Rights has since offered a sharply contrasting opinion on the Irish State's provision for detained minors, finding it to be in breach of obligations under the European Convention on Human Rights.<sup>71</sup>

#### 4. *The future of social security rights and the Irish Constitution*

The experience of educational rights contestation outlined in the previous section illustrates a number of key challenges facing those in Ireland who would both constitutionalise and make effective in practice social security rights. Taken together, these challenges suggest that the constitutionalisation of social

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<sup>66</sup> *Sinnott v. Minister for Education* [2001] 2 IR 545, 633. Judge Geoghegan also envisaged an 'adult immigrant' being entitled to invoke Article 42. *Sinnott v. Minister for Education* [2001] 2 IR 545, 720. See also National Adult Literacy Agency Survey, <http://www.nala.ie/literacy/literacy-in-ireland>; accessed 10.10.2011.

<sup>67</sup> *Sinnott v. Minister for Education* [2001] 2 IR 545. See also IHRC (2005) Making ESCR Effective, p 101.

<sup>68</sup> *FN v. Minister for Education* [1995] involved a twelve year old orphan for whom the Eastern Health Board, under the Children's Act (1908), failed to provide accommodation. Judge Geoghegan ruled that the State had a constitutional obligation to establish 'suitable arrangements of containment with treatment' and, once assured that the provision of high support units was forthcoming, adjourned the case. Two years later, however, in *D.B. v. Minister for Justice* [1999], Judge Peter Kelly discovered these arrangements had been 'substantially departed from without that fact ever having been made known to the court'. He described as a 'scandal' the government's frequent policy changes and interdepartmental wrangles which delayed the needed legislation and claimed jurisdiction for the court 'to intervene in what has been called policy' in certain, urgent circumstances.

<sup>69</sup> *TD v. Minister for Education*, [2001] 4 IR 259.

<sup>70</sup> *TD v. Minister for Education*, [2001] 4 IR 259, 339. In a dissenting opinion, Judge Denham claimed that the checks and balances between these branches were as important as the institutions' separation and independence. TD's claims, Denham continued, were 'exceptional' (see article 42.5) and thus generated the courts' duty to intervene as 'the guardians of the Constitution'. *TD v. Minister for Education*, [2001] 4 IR 259, 301.

<sup>71</sup> *D.G. v Eastern Health Board* [1997] 3 IR 511; *D.G. v. Ireland* (2002) 35 E.H.R.R. 1153. D.G., a homeless teenager, was considered to have a personality disorder and to be a danger to himself and others. In the absence of a high-support therapeutic unit, the High Court ruled that DG be detained in St. Patrick's Institution, a prison, even though he was not facing any criminal charges. DG filed a complaint to the European Court of Human Rights. The Court found the State to be in breach of the European Convention on Human Rights because of its failure to make provision for the education of the teenager during his temporary detention. Gerry Whyte, 'The Efficacy of Public Interest Litigation in Ireland' in Maluwa, Tiyanjana (ed), 2014, *Law, Politics and Human Rights: Essays in Memory of Kader Asmal*. Koninklijke Brill: Leiden, pp. 252-86, p.261.

security rights may even be overrated.<sup>72</sup> Firstly, in terms of the Supreme Court, the TD and Sinnott decisions, in particular, clearly signal its restrictive view on the role of the courts in relation to public expenditure and socio-economic rights in general. It is possible that this view may change over time as new judges are appointed and alternative interpretations of the constitution pursued. However, these cases demonstrate that even an explicit constitutionalisation of a right may not ultimately translate into that right's substantive realisation in practice.

A second factor, and an important influence on judges' conservatism, that these cases reveal is institutional capacity to process case-loads, a capacity subject to politically determined resource constraints. Judges would appear to have responded to the rapidly escalating tide of litigation before the Superior Courts by raising the bar for judicial intervention higher.<sup>73</sup> There are grounds for thinking that the Irish courts did not recognise socio-economic rights, at least in part, for fear of creating insurmountable case-loads that might overwhelm the existing legal system. Judge Hardiman explicitly stated that if the courts acknowledged socio-economic rights they 'would certainly be appealed to again and again...' and cited media coverage of the 'hundreds of cases' recently taken by parents of children with special needs.<sup>74</sup> Beyond the courts, legal practitioners further suggested that the 'huge increase in litigation in this area' demonstrated how recognising socio-economic rights would result in the courts being 'overwhelmed'.<sup>75</sup>

Thirdly, these cases suggest the importance of legal aid and organisation underpinning access to the courts and the concomitant development of rights protections. The constitutional cases to secure special needs education and resources for autistic adults, children and carers, unlike those taken on behalf of detained minors, were accompanied by civil society campaigning, notably featuring the Irish Autism Alliance of which Kathy Sinnott was patron.<sup>76</sup> This dual approach yielded immediate concessions. On the day of the Sinnott verdict, the Minister for Education stated that he had a 'virtually open cheque book' to ensure 'full and appropriate provision' for both the education and care of people with disabilities.<sup>77</sup> New legislation followed soon after.<sup>78</sup> Since the crisis, however, disability service users, service providers and statutory bodies have reported a cumulative 14% cut to their core organisational funding between 2009 and 2012.<sup>79</sup> Moreover, elements of legislation specifying commitments to inclusion are currently postponed or suspended due to austerity.<sup>80</sup>

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<sup>72</sup> Hirschl argues that constitutionalisation is 'often overrated' and that judicial interpretations of constitutional rights appear to possess a very limited capacity to advance progressive notions of distributive justice in areas such as education. 2007, *Towards Juristocracy*, p. 148.

<sup>73</sup> In this regard, the judicial review of planning decisions (*O'Keefe v. An Bord Pleanála* [1993] 1 IR 39; *P&F Sharpe v. Dublin City and County Manager* [1989] IR 701) has been criticised as overly deferential and based on fears that the courts would become a 'last-chance saloon' for objectors to planning decisions. Similarly, the judicial review of ministerial deportation orders (*Lobe and Osayende v. Minister for Justice* [2003] 1 IR 1) prioritised the 'rather abstract objective of preserving the integrity of the asylum system' ahead of the unambiguously protected constitutional family rights enjoyed by Irish-born children of asylum-seekers. Niall Buckley, 2004, 'Merging Principles of Public Law: Towards Proportionality in an Irish Context', *Irish Jurist*, 39, pp. 161-214, pp. 199, 211-2.

<sup>74</sup> *TD v. Minister for Education* [2001] 4 IR 259.

<sup>75</sup> Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution', p. 184.

<sup>76</sup> Anna Kingston, 2007, *Mothering Special Needs*, London: Kingsley Publishers. p. 38

<sup>77</sup> Gerry Whyte, 2002, *Social Inclusion and the Legal System*. p. 357

<sup>78</sup> Within the following months, the Irish government announced the creation of a National Council for Special Education to improve services for adults with autism and to provide adequate special needs education for children. Government commitments to inclusion also followed, underpinned by legislation such as the Disability Act (2005), the Education of Persons with Special Education Needs Act (2004) and the Equal Status Acts (2000, 2004).

<sup>79</sup> Trish McKeogh, 2012, 'Assessing the impact of European governments' austerity plans on the rights of people with disabilities: Ireland'. European Foundation Centre, p. 27. Available at [http://www.efc.be/programmes\\_services/resources/Documents/Ireland%20Country%20Report\\_FINAL.pdf](http://www.efc.be/programmes_services/resources/Documents/Ireland%20Country%20Report_FINAL.pdf); accessed 01.07.2014.

<sup>80</sup> In particular, sections conferring statutory rights to assessment, education plans and appeals processes have been deferred. Significantly, since the State was unwilling to include a role for the legal system in the Disability Act 2005, such postponements cannot be contested in the courts. See McKeogh, 2012, 'Assessing the impact of European governments' austerity plans on the rights of people with disabilities: Ireland', pp. 16, 20.

The more general points for the effective realisation of social security rights, however, are that the uneven distribution of capacities to access justice has been a long-standing issue in Ireland and that corresponding ‘support structures’ for realising constitutional rights are limited in important respects. The Irish state’s free legal aid scheme imposes a strict means-test on applicants, excludes the taking of class actions or test cases and is severely under-resourced.<sup>81</sup> Post-2008, the Irish state has drastically shrunk key human rights monitoring organisations, merging the Equality Authority and the Irish Human Rights Commission and reducing their budgets. The bill for the new ‘Irish Human Rights and Equality Commission’ has attracted criticism that the director will not be independent of government and, moreover, that the body’s mandate with respect to socio-economic rights will be weakened.<sup>82</sup> State and philanthropic support for non-governmental organisations has also declined significantly, while those sources of funding that remain are often tied to ngos’ remaining uncritical of either government or pro-market policies.<sup>83</sup>

Even if social security rights were constitutionalised and successful cases taken, victories on an individual, case-by-case basis in other jurisdictions suggest their capacity to advance progressive notions of social solidarity or distributive justice is strictly limited.<sup>84</sup> This might be particularly true of Ireland given the highly segmented nature of its social security provision, the unavailability of a class action system on US lines and the correspondingly narrow focus of representative action. Judicial review functions such that ‘the courts are required to focus on the operation of the law as it affects the individual plaintiff and do not, generally speaking, have the capacity to examine how such a law impacts on the public at large’.<sup>85</sup>

Elsewhere, trade unions have been the crucial support structure for advancing more solidaristic or universal systems of social security rights, notably through corporatist negotiating in Scandinavian and Bismarckian welfare states. In Ireland’s pluralist model of interest group articulation, however, trade unions have traditionally played a weaker consultative role in tripartite decision-making with government and employers.<sup>86</sup> Moreover, the inherited segmentation of provision draws sustenance from the present division of labour in Irish society. Public sector employees and multinational private sector employees receive relatively high benefits through public occupational pensions and private occupational benefits respectively; the largest group, indigenous private sector employees are covered only by flat rate public welfare benefits. The fact that substantially non-unionised parts of the labour force and the highly unionised public sector are covered by private and occupational welfare may undermine the formation of cross-class coalitions in favour of welfare state expansion, as well as ‘solidaristic’ or universal social security rights.<sup>87</sup>

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<sup>81</sup> *Airey v. Ireland* (application No. 6289/73), 1979, ECHR. O’Morain, 2003, *Access to Justice For All*, p.10.

<sup>82</sup> Amnesty International Ireland, 2014, *Bringing ESC Rights Home*, p. 92. See also ‘Alan Shatter defends plan to appoint Human Rights and Equality Commission director’, 09.07.2012. Available at <http://www.rte.ie/news/2012/0709/328456-alan-shatter-human-rights-equality-commission/>; accessed 01.07.2014.

<sup>83</sup> See Mary Murphy, 2011, ‘Civil society in the shadow of the Irish state’ in *Irish Journal of Sociology*, 19, pp.170 – 187.

<sup>84</sup> Hirschl, 2007, *Towards Juristocracy*, p. 148.

<sup>85</sup> Gerard Hogan, 1997, ‘The Constitution, Property Rights and Proportionality’ in *Irish Jurist*, 32, pp. 373-397, p. 396.

<sup>86</sup> W. Korpi, 1983, *The Democratic Class Struggle*. London: Routledge and Kegan Paul. See also Rory O’Donnell, 2008, ‘The partnership state: building the ship at sea’, in Maura Adshead, Peadar Kirby and Michelle Millar (eds), *Contesting the State: Lessons from the Irish Case*. Manchester: Manchester University Press, pp. 73-99.

<sup>87</sup> Mel Cousins, 2005, *Explaining the Irish Welfare State*. p. 330. W. Korpi and Palme, 1998, ‘The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in Western Countries’ in *American Sociological Review*, 63 (5), pp. 661-87.

## Conclusion

Given wider constellations of power in Irish society, Irish governments past and present have consistently pursued a ‘rights-free’ way out of economic recession, often with predictable and devastating social consequences. The effects of the crisis of 2007-08 will be long-lasting. The ‘tough decisions’ successive Irish governments have made and continue to make are dismantling a social model that has underpinned development for more than half a century, producing a more deeply divided, two-tier society. Not only are the legacy banking costs and debt repayments being passed on to younger generations but austerity cuts to public services and social security are likely to deepen inequality in society and put Ireland’s economy onto a lower developmental trajectory for years to come.<sup>88</sup>

Among proponents of economic, social and cultural rights then, there is a critical awareness that better protecting such rights in the Constitution will not solve all problems.<sup>89</sup> Minimally, however, the provision of access to an effective remedy for the violation of a human right is an obligation under international law. Constitutional rights litigation, when combined with accompanying civil society mobilisation and advocacy, can function as a corrective for minoritarian groups, requiring the political system to address issues of social exclusion that might otherwise be ignored.<sup>90</sup> Without disability rights activists pursuing such a dual track campaign, it is unlikely that the state would have introduced legislation and increased expenditure for disabled children and adults. Maximally, proponents draw on international experience to show that socio-economic rights entrenchment would require government to promote meaningful engagement between state authorities, service providers and citizens, thereby facilitating better planning processes and outcomes, as well as greater accountability and transparency.

This article has sought to provide a holistic, critical assessment of the challenges facing the constitutionalisation and effective realisation of social security rights in practice. Ireland’s ‘Anglo-Saxon’ model of welfare state development is characterised by a comparatively low tax-take and welfare effort, with its limitations offset by a network of family and voluntary networks of care. The constellation of political forces shaping its development (as well as the development of the Irish Constitution) has ensured that such provision has remained highly segmented and targeted rather than solidaristic and universal. The education rights cases examined here demonstrate in sharp relief the implications of laissez-faire orthodoxies for autistic children and adults as well as associated care-givers. Similar experiences of hardship and inequality could be replicated across Irish society, notably the experiences of welfare-recipients, homeless people, asylum-seekers or Travellers.<sup>91</sup>

Moreover, these experiences involve more complex, intersectional systems of class, race and gender oppression than the present article has been able to explore.

Based on the foregoing assessment of these particular cases and of the history of wider constitutional development, the constitutionalisation and effective realisation of social security rights in Ireland appears unlikely in the near future. Notwithstanding remarkably high levels of public support, the efforts of non-governmental organisations or recent developments at the Constitution Convention, the orientations of those political parties and judges with formal decision-making authority over the amendment or interpretation of the Irish Constitution remain opposed to constitutionalising such rights. In fact, in the particular area of disability rights, the Irish state responded to the disability rights campaigns of the 1990s and 2000s by curtailing opportunities for further public interest litigation in the future. The Disability Rights Act (2005), for example, prohibits access to an independent arbiter until internal review procedures

<sup>88</sup> See TASC, Report on Budget 2014. p.2.

<sup>89</sup> See Amnesty International Ireland, 2014, *Bringing ESC Rights Home*. p.5.

<sup>90</sup> Gerry Whyte, 2002, *Social Inclusion and the Legal System*, pp. 176, 210, 244.

<sup>91</sup> There are some 25,000 Travellers in Ireland. They form an ethnic and indigenous minority with a distinctive culture, of which nomadism is an important part, and who, as individuals and as a community, experience high levels of prejudice and exclusion. See Joint Committee on Justice, Defence and Equality, 2014, *The Report on the Recognition of Traveller Ethnicity*, Dublin: Official Publications Office.



are exhausted.<sup>92</sup> The logic is clear: recent austerity cuts and postponements of disability services cannot be contested in the courts.<sup>93</sup>

Finally, even if successfully constitutionalised, there are strong grounds for thinking that social security rights may not function as effectively in Ireland as in other jurisdictions.<sup>94</sup> The past practice and common law orientation of the Irish judiciary as well as the legal system's institutional incapacity to process cases constitute important barriers to substantive constitutional protection, particularly regarding any constitutional rights involving public expenditure. Moreover, important limitations in terms of funding, power and internal democracy attach to the support structures necessary to ensure the taking of social security rights cases. Ultimately, even winning on an individual, case-by-case basis may not be sufficient to secure a more solidaristic, universal form of social security rights provision. It is precisely these forms of provision, dependent on mobilising cross-class coalitions of support, that appear to be more robust in providing a rights-based way out of the crisis.

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<sup>92</sup> Jurgen De Wispelaere and Judy Walsh. "Disability Rights in Ireland: Chronicle of a Missed Opportunity" *Irish Political Studies* 22.4 (2007): 517-543.

<sup>93</sup> Trish McKeogh, 2012, 'Assessing the impact of European governments' austerity plans on the rights of people with disabilities: Ireland', p. 20.

<sup>94</sup> For further development of this analysis, see Thomas Murray, 2016, *Contesting Economic and Social Rights in Ireland: Constitution, State and Society 1848-2016*. Cambridge: Cambridge University Press.

# ITALY

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## THE RIGHT TO SOCIAL SECURITY IN THE ITALIAN CONSTITUTIONAL SYSTEM

Assoc. Prof. FABRIZIO PROIETTI

### *Introduction*

The Constitution of the Italian Democratic Republic (1948) (henceforth: CORI) is commonly described as a ‘rigid constitution’. This means that it is very difficult to make changes to its formal text, as any update or modification requires a complex revision procedure with a very high majority vote (2/3) in each of the two branches of Parliament (Chamber of Deputies and Senate of the Republic).

At the foundation of the entire democratic structure lies regard for work ‘in all its forms’ as means of both economic and social elevation of a person and expression of social solidarity obligations incumbent on it.

Consequently, evolution of the protection system and conditions for access to social security measures for an ordinary legislator has been focused on the status of the ‘worker’; that is, at least in the first phase of constitutional principles implementation.

### **1. The italian constitutional framework**

#### *1.1. Constitutional principles ruling the right to social security in the ‘living law’*

In the basic principles of the CORI (Part I, Art. 1-12) contain some elements that allow us to interpret correctly each formula contained in the articles included in other parts of the Constitution.

In particular, it should be noted that Italy is a “*Democratic Republic founded on work*” (Art. 1, paragraph 1, CORI).

Also, emphasising the close link between rights and duties, it states that: “*The Republic recognises and guarantees the inviolable rights of man, both as an individual and in the social groups where his personality is expressed. The Republic expects that the intransgressible duties of political, economical and social solidarity be fulfilled*” (Art. 2 CORI).

The principle of equality is expressed in a broad and unreserved manner: “*All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions,*” and, indeed, the State assumes a very ambitious task: “*It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country*” (Art. 3 CORI).

The adopted social model has open and inclusive dimensions: “*The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective. Every citizen has*

*the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society”* (Art. 4 CORI).

The Italian Republic does not seem to guard its legal space particularly jealously, and in fact: *“The Italian legal system conforms to the generally recognised rules of international law. The legal status of foreigners is regulated by law in conformity with international provisions and treaties”* (Art. 10 CORI); as well as: *“Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations having such ends”* (Art. 11 CORI).

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The structure of the CORI distinguishes ethico-social relationships (Part II – Title II, Arts. 29-34) from economic relations (or better: socio-economic, as well as the literal wording of Title III of Part II) (Arts. 35-47).

The aforementioned Title II lays down specific formulas for the protection of the family: *“The Republic recognises the rights of the family as a natural society founded on matrimony. Matrimony is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family.”* (Art. 29 CORI); *“It is the duty and right of parents to support, raise and educate their children, even if born out of wedlock. In the case of incapacity of the parents, the law provides for the fulfilment of their duties. The law ensures to children born out of wedlock every form of legal and social protection that is compatible with the rights of members of the legitimate family. The law lays down the rules and limitations for the determination of paternity.”* (Art. 30 CORI); *“The Republic assists the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits. The Republic protects mothers, children and the young by adopting the necessary provisions.”* (Art. 31 CORI); of health: *“The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo any given health treatment except under the provisions of the law. The law cannot under any circumstances violate the limits imposed by respect for the human person.”* (Art. 32 CORI); of education: *“The Republic guarantees the freedom of the arts and sciences, which may be freely taught. The Republic lays down general rules for education and establishes state schools for all branches and grades. Entities and private persons have the right to establish schools and institutions of education, at no cost to the State. The law, when setting out the rights and obligations for the non-state schools which request parity, shall ensure that these schools enjoy full liberty and offer their pupils an education and qualifications of the same standards as those afforded to pupils in state schools. State examinations are prescribed for admission to and graduation from the various branches and grades of schools and for qualification to exercise a profession. Institutions of higher learning, universities and academies, have the right to establish their own regulations within the limits laid down by the laws of the State.”* (Art. 33 CORI); *“Schools are open to everyone. Primary education, which is imparted for at least eight years, is compulsory and free. Capable and deserving pupils, including those without adequate finances, have the right to attain the highest levels of education. The Republic renders this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations”* (Art. 34 CORI).

Title III of Part II confirms the centrality of work in the constitutional vision: *“The Republic protects work in all its forms and practices. It provides for the training and professional advancement of workers. It promotes and encourages international agreements and organisations that have the aim of establishing and regulating labour rights. It recognises the freedom to emigrate, subject to the obligations set out by law in the general interest, and protects Italian workers abroad.”* (Art. 35 CORI); also, contractual obligations regarding remuneration (compensation for work done) are functionalised to the development of the human person and fulfilment of the solidarity duties, and in the first place in the family: *“Workers have the right to a remuneration commensurate to the quantity and quality of their work and in all cases to an adequate remuneration ensuring them and their families a free and dignified existence. Maximum*

*daily working hours are established by law. Workers have the right to a weekly rest day and paid annual holidays. They cannot waive this right*” (Art. 36 CORI).

The principle of equality between men and women (in this particular article in terms of employment relationships, although the field of social security is derived from this) is also clearly stated: *“Working women have the same rights and are entitled to equal pay for equal work. Working conditions must allow women to fulfil their essential role in the family and ensure special appropriate protection for the mother and child. The law establishes the minimum age for paid work. The Republic protects the work of minors by means of special provisions and guarantees them the right to equal pay for equal work”* (Art. 37 CORI).

As mentioned above, the right to social protection is strongly linked, primarily, to the condition of the worker: *“Every citizen unable to work and without the necessary means of subsistence has a right to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment. Disabled and handicapped persons have the right to education and vocational training. The duties laid down in this article are provided for by entities and institutions established by or supported by the State. Private-sector assistance may be freely provided”* (Art. 38 CORI).

The Italian constitutional system demonstrates a choice of perspective in defining the tasks of the *social welfare state*: the conceptual and legal distinction between “social welfare support” and “social security”.<sup>1</sup>

These two lines of action are instrumental in the creation of a system of government programs and actions that aim to guarantee citizens the means to a free and dignified existence. This guarantee covers the fundamental principles of the Italian Republic (**personalist principle**<sup>2</sup> – protection of human dignity, life and health, education and vocational training; **equality principle** – equal rights and duties (other things being equal) between citizens and workers; **labourist principle** – protection of the right to work and livelihood; **solidarist principle** – actions of the State and private parties to the benefit of social groups/individuals in need).

This distinction, which is fundamental for our analysis because it is deeply rooted in the Italian constitutional tradition, is based on the same formulas as the main provision of the CORI devoted to these issues (Art. 38 CORI).

In the first paragraph, in fact, the right to “welfare support” (literally: *‘right to maintenance’*) is (formally) reserved for those with the *status* of a “citizen” (later in the text we will follow the evolution and expansion of this limit) and is tied (appropriately) to the condition of being *“unable to work”* and the absence of the *“necessary means of subsistence”*.

In the following paragraphs, however, the right to “social security” is reserved for “workers” and concretized in the right to receive *“adequate means for their needs and necessities”* at the occurrence of events that create a situation of need; below we will analyse the evolving application of this fundamental provision, leading to certain ‘openness’ in the form of complementary social security managed by private companies under the supervision of the State.

The decision to include specific recognition of a large number of ‘social rights’ raised an extensive (and still unresolved) legal and political debate about the meaning of the commitments made by the Italian Republic in respect of various categories of persons as beneficiaries of protection.

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<sup>1</sup> For more on the apparent dilemma, see: CATINI (2010), Il difficile rapporto tra previdenza e assistenza in Italia, in *Rivista del Diritto della sicurezza sociale*, 643 ff.

<sup>2</sup> Further on the subject: BALDASSARRE (1997), *Diritti Della persona e valori costituzionali*, Giappichelli.

I will try to give as concise and complete as possible a review of the various aspects related to the basic question: the ‘right to social security’ in the Italian constitutional experience.<sup>3</sup>

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The guarantees achieved by the Italian system have been a subject of careful analysis that also highlight certain contradictions in its evolution, largely a result of the ‘clientelist’ and demagogic approach of Italian *policy makers* over a long period of economic and social expansion in the wake of the Italian post-war reconstruction (1945-1969).

In fact, during this period there has been a proliferation of bodies created by the legislature to achieve the objectives of social protection provided for by the CORI, with a contextual (overly) generous formalisation of the promise of financial benefits adequacy to the income dynamics of protected persons (enactment of Law no. 153/1969 introduced a mechanism for calculating pensions based on pay, trusting in the miracles of the so-called PAYG system, and established retirement contribution upon attainment of the required 35 years; other rules (obviously dedicated to increase employees loyalty to the public authorities for political electoral support) granted the right to receive pension upon completing a rather small contribution period (in some cases: 15 years) regardless of actual age (so-called *baby-pensioners*).

Trend in the Italian economy (at the first symptoms of broader dynamics of globalisation) have profoundly changed the frame of reference: the number of employees with standard contracts (permanent full-time) is in steady decline; the birth rate in the demographic structure of the population is also declining; and there is massive growth in the immigration of foreign workers. These and other structural factors led the legislature to enact, in 1992, a series of laws that have reshaped the regulatory framework of the social security system in Italy.

This strenuous route (certainly unpopular during political elections, but constantly on the agenda of several governments of different political orientation that have occupied the seat in the past twenty years) focused on a giant *spending review* of the social security system. Yet, one can easily observe that reduction of public spending capacity in this area brings out an even stronger ‘new perspective’ of social rights in the Italian experience: on the one hand, an increasing role of the private sector (including *non-profit*) in setting up protective arrangements on top of those conferred on the State and public bodies; on the other, a shift of the legislative centre of gravity from the basic levels of protection to a supranational level (European Council and derived bodies;<sup>4</sup> European Union and its institutional bodies).

## 1.2. Constitutional Guarantees

As already mentioned, the provisions of the CORI dedicated to social security rights generally have a ‘programmatic’ character.

This means that the legislature’s task in giving effect to the constitutional provisions on the subject is constantly monitored, also because it is a result of an incessant political compromise.

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<sup>3</sup> I wish to honestly highlight that the chosen line of inquiry is deliberately free from the common ‘vice’ of self-reference; I do not wish to bore the reader with exhausting accounts of endless debates with a distinctly nominalistic flavour that risk, in the views professed by the Curators of this collective work, to distract us from the heart of the issue: what are the prospects of social rights protection in a global context of economic and financial crisis?

This paper is not addressed to the national specialist scientific community (it would be presumptuous for a professor who does not teach constitutional Italian and comparative law, but rather a related subject called Legal Foundations of Social security...) – it is aimed at scholars and operators (including *policy makers*) in other European countries, as well as supranational institutions, who wish to understand what might be called the ‘Italian anomaly’.

<sup>4</sup> I refer to the recent report (Conclusions 2013) of the European Committee of Social Rights (ECSR) on Italy, defined in January 2014, which states: “The Committee concludes that the situation in Italy is not in conformity with Article 12§1 of the Charter on the grounds that it has not been established that the minimum level of sickness benefit is adequate; the minimum level of pension benefit is inadequate”.

Nevertheless, it is necessary to point out that the analysis of constitutional formulas must be accompanied by an examination of the tools that ensure their effectiveness.

These tools must ensure their concrete enforcement, as the nature of social rights is closely related to their implementation.

The constitutional status given to social security rights consequently entails their constitutional protection, like that of all other rights guaranteed by the CORI.

Violation of social security rights does, in fact, result in the unconstitutionality of laws in conflict with those rights.

This defect can be detected by the Constitutional Court of the Italian Republic (henceforth: CCRI) in a legality review. This is also true in the case of purposeful violation of regulations whose implementation is entrusted to the legislature, which, despite being modest in relation to the legislature's failure to act, can however repeal the laws that are contrary to those ends.

The largest contribution to further definition and recognition of social security rights<sup>5</sup> came from the constant guarantees and promotion efforts of the CCRI that, in accompanying the evolution of these legal rights, has come to affirm them as 'perfect rights', even before the doctrine has adjusted its positions and its guidelines to ensure their immediate protection.

The CCRI has often intervened to give effective recognition to social security rights well before the legislature, with awards and decisions containing solutions that gave rise to heated debates.

The CCRI's tool of choice has been manipulative judgements, especially of the 'additive' type, in which the Court declared the unconstitutionality of laws that indiscriminately and unjustifiably precluded certain categories of citizens/subjects from some benefits, especially in the field of social security and welfare.

For all social rights included in the constitutional catalogue, according to the constant direction of the CCRI, the Court's guarantee is not merely a legal or legislative guarantee but that of constitutional rights (often the inviolable rights) and of constitutional values (often primary or supreme values).

In fact, the basis of their claim lies not in the law which makes it gradually and eventually possible in practice, but in the Constitution.

Therefore, the views of those who, in the new conception of the constitutional State, contrast social rights (mere entitlement to benefits) to the rights of freedom (which, on the other hand, don't require any positive performance) are no longer tenable because the latter also depend on the organization of the State.

Ultimately, the CCRI has offered social security rights full protection at the constitutional level, equating them to fundamental rights, both in terms of effectiveness (constitutional jurisprudence having recognised fundamental social security rights with as much efficacy with which classic constitutional freedoms are recognized), and with respect to legal status, for which they are indispensable, inalienable, non-renounceable and non-transferable, and have a primary legal status that, in many cases, is inviolable.

Therefore, the CCRI has recognized the immediate effectiveness in relation to third parties and not only in relation to the State, confirming that the effects of guaranteeing social rights is an immediate product of mere recognition, without requiring therefore preventive implementation on the part of the legislature.<sup>6</sup>

It seems appropriate to point out that the CCRI jurisprudence also comprises, increasingly and especially since the mid-eighties, the reasons for the stability of public finances with respect to social spending in an ongoing and difficult balance between social rights and equilibrium of the expanded State

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<sup>5</sup> On the genesis of social rights in the Italian experience, see: BENVENUTI (2102), *Diritti sociali* (digesto discipline pubblicistiche- Aggiornamento, Vol V, 219 ff.

<sup>6</sup> For a complete reconstruction of the dynamics: COLAPIETRO (1996), *La giurisprudenza costituzionale nella crisi dello stato sociale*, Cedam.

budget.<sup>7</sup> In this regard, in fact, a reversal of interpretation has been observed regarding the equality principle ‘at the highest level’.<sup>8</sup>

In parallel, the same constitutional doctrine has not failed to recognize this evolution and to attribute it to the crisis of the welfare state. It was noted, for example, that rulings of unconstitutionality qualifying as ‘*benefit additives*’,<sup>9</sup> have given way to so-called judgements of ‘*guarantee additives*’.<sup>10</sup> Indeed, while the former involve acquisition by certain categories of persons of a right to funds or services previously unlawfully excluded or limited, the latter are limited, more sparingly, to determining the acquisition of a passive legal situation by the State, consisting of a *non facere* or a constraint.

It’s the growing importance of economic and financial reasons that push the doctrine and the constitutional jurisprudence<sup>11</sup> to develop the concept of the *minimum essential content* of social rights, which then merged with *essential levels of performance concerning civil and social rights*.<sup>12</sup>

It is certainly a relative notion, since in the assessment made by the judge, as is commonly recognized, the greatest weight is attributed to the economic and social context,<sup>13</sup> as well as cultural content, referenced at the historical moment.<sup>14</sup> The CCRI itself (in particular, judgement no. 134/1982) had already left the legislature wide discretion in determining this *minimum*.<sup>15</sup>

In sum, in any decision relating to social rights, the CCRI has a very delicate task: in analysis of the laws (state or regional) brought to its attention it must strike a subtle balance between the expansive principles (trends to universality, adequacy/sufficiency, equality) and limiting principles (sustainability, general financial stability, constraints arising from supranational treaties), especially in a scenario that has become the norm since the constitutional requirement of a balanced budget (Constitution Act 1 of 2012).<sup>16</sup>

To date, the CCRI still has not handled the real theme of the near future: that of solidarity between generations.<sup>17</sup> Youth unemployment statistics cause serious concerns regarding the fitness of the system and its current funding mechanism.

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<sup>7</sup> For general outlines of the issue, see: GROPPI (1996), La quantificazione degli oneri finanziari derivanti dalle decisioni della Corte costituzionale. Profili organizzativi e conseguenze sul processo costituzionale, in L’organizzazione ed il funzionamento della Corte costituzionale, a cura di COSTANZO, Giappichelli, 269 ff; POLITI (2004), Il costo delle sentenze della Corte costituzionale nella recente riflessione dottrinale, in Scritti in memoria di Livio Paladin, Vol. IV, Jovene, 1753-1797.

<sup>8</sup> See: ONIDA (1993), Giudizio di ammissibilità delle leggi e responsabilità finanziaria del Parlamento, in AA.VV., Sentenze della Corte costituzionale e art. 81 Cost, Giuffrè, 40.

<sup>9</sup> See the CCRI judgements: 105/1980, 189/1980, 34/1981, 102/1982, 155/1982, 149/1983, 308/1983, 136/1984, 291/1984, 108/1985, 314/1985, 370/1985, 8/1986, 13/1986, 178/1986, 249/1986.; see also the judgements of 1987: 1, 43, 72, 154, 169, 226, 400, 431, 518, 561, 613, 614.

<sup>10</sup> In this respect are specified the judgements of so-called ‘temporary constitutionality’ (see, for ex.: 142/1982, 349/1985, 72/1987, 431/1987) from the so-called ‘judgements in warning to the legislature’ which, in case of inaction, were followed by decisions of unconstitutionality.

<sup>11</sup> See the judgements: 992/1988, 307/1990, 119/1991, 184/1993, 226/1993, 243/1993, 475/1998, 180/2001, 342/2002, 30/2004, 432/2005.

<sup>12</sup> See: CARAVITA (1984), Oltre l’uguaglianza formale, Cedam; BALDASSARRE (1989), Diritti sociali, in Enciclopedia giuridica, vol. XI. To check the success of the concept: TRUCCO (2012) Livelli essenziali delle prestazioni e sostenibilità finanziaria dei diritti sociali, relazione al Convegno del Gruppo di Pisa su I diritti sociali: dal riconoscimento alla garanzia, Trapani 8-9 giugno 2012, at [www.gruppodipisa.it/wp-content/uploads/2012/06/trapanitrucco.pdf](http://www.gruppodipisa.it/wp-content/uploads/2012/06/trapanitrucco.pdf).

<sup>13</sup> According to CERRI (1994), ragionevolezza delle leggi, in Enciclopedia giuridica, vol. XXV.

<sup>14</sup> The notation is by GIORGIS (1994), sentenza no. 134 del 1994: una conferma dell’esistenza di limiti costituzionali alla riduzione dello stato sociale, in Giurisprudenza costituzionale, 3153.

<sup>15</sup> For a comparison with the evolution of German constitutional law on the minimum subsistence see ANTONINI (2005), Il principio di sussidiarietà fiscale, Giuffrè, 100 ff.

<sup>16</sup> For a complete reconstruction of this issue’s profile: PUPO (2014) Principi relativi ai diritti sociali, at [https://www.forumcostituzionale.it/documenti\\_forum/paper/0471\\_pupo.pdf](https://www.forumcostituzionale.it/documenti_forum/paper/0471_pupo.pdf).

<sup>17</sup> See, in the evolutionary sense: PERSIANI (2007), Conflitto industriale e conflitto generazionale (cinquant’anni di giurisprudenza costituzionale), at [www.cortecostituzionale.it](http://www.cortecostituzionale.it); più di recente: VALENTI (2013) Diritto alla pensione e questione intergenerazionale: Modello costituzionale e decisioni politiche, Giappichelli.

## 2. *The impact of constitutional social security provisions in establishing the domestic legal system*

### 2.1. *Incorporation of international standards*

It should be noted that the Italian Republic has, in general, always wanted to demonstrate its readiness to recognise (implementing Arts. 10 and 11 of the CORI), including from a formal point of view, the various provisions in the field of social rights contained in the supranational legal sources.

It has, in fact, signed and ratified:

- the International Covenant (ONU-1966) on Economic, Social and Cultural Rights, ratified by Law no. 881 of 25 October 1977, entered into force on 15 December 1978;
- accepted (but not yet ratified) the Optional Protocol (2008) to the International Covenant on Economic, Social and Cultural Rights of 1996, which establishes a procedure for individual communications;
- accepted (but not yet ratified) the UN Convention (1990) on the Rights of All Migrant Workers and Members of Their Families;

Regarding the ILO sources ILO, Italy has not ratified the following Conventions:

- 159 – Vocational rehabilitation and employment (disabled persons), 1983;
- 164 – Health Protection and Medical Care (Seafarers), 1987;
- 167 – Health and Safety in Construction, 1988;
- 170 – Chemicals, 1990;
- 175 – Part-Time Work, 1994;
- 183 – Maternity Protection, 2000;
- 189 – Domestic Workers, 2011.

It should be noted that Italy was one of the first countries to ratify ILO Convention no. 102 – Social Security (Minimum Standards), 1952, with Law no. 741 of 1956.

In the European legal space, with reference to the Council of Europe, it should be noted that Italy has ratified, in their entirety, both the ECHR and the European Social Charter (the latter in its updated 1996 version; it has also ratified the Additional Protocol of 1995 providing for a system of collective complaints, with the only limitation that national NGOs are excluded), subject to ratification (restricted to parts V, VI, VII and VIII) of the European Code of Social Security (1964) by Law no. 1977, which came into force in 1978.

In the periodic reporting activity of the European Committee of Social Rights in the Council of Europe, Italy has often been spurred on to improve the level of social protection, with particular reference to the protection of disabled people and the amount of minimum pension; economic protection against unemployment is also the object of Committee's attention.

With regard to decisions on collective complaints, we note the claim on the right to housing of Sinti and Roma populations (58/2009 COHRE vs. Italy).

It must be said that from the small number of collective complaints presented against Italy, much still has to be processed to spread good practice.<sup>18</sup>

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<sup>18</sup> It may be helpful to take into account the collective complaints presented against the Italian Republic:

**No. 105/2014** Union Association "La Voce dei Giusti" vs. Italy

The complaint registered on 22 April 2014, relates to Article 10 (right to vocational training) of the Revised European Social Charter, read alone or in conjunction with the non-discrimination clause set forth in Article E. The complainant organisation alleges that teaching staff in a certain category is prevented from undertaking or continuing specialised studies in view of the increasing burden of workload imposed on it, in violation of the above-mentioned provisions. The complaint is still pending.

**No. 102/2013** National Association of Justices of the Peace vs. Italy

The complaint, registered on 2 August 2013, relates to Article 12 (right to social security) of the European Social Charter. The complainant organisation, the Associazione Nazionale Giudici di Pace (the National Association of Justices of the Peace), alleges that Italian law does not provide any social security and welfare protection for this category of honorary Judges, in violation of the Charter provision relied on. The complaint is still pending.

*Note 18 continued on page 130*



It foreshadows activation of the remedy through the collective complaints procedure, with reference to certain abnormal situations resulting from enactment of regulations that entail considerable restriction of social rights as a result of reforms that aren't always well thought out by the legislature, which is in turn pressed by the public finance crisis.

Within the ECHR,<sup>19</sup> we note (as emblematic of heated debates among the Courts) an ECHR judgement of 31 May 2011 regarding Swiss pensions paid to Italian workers, from which a clearly restrictive decision (for obvious reasons of public finance) of the CORI originated (judgement no. 264 of 2012).<sup>20</sup> Although more limited in scope, also very interesting is the ECHR judgement of 14 February 2012 on the Arras case, in terms of the enactment of a law of authentic interpretation, which removed the right to automatic equalization of pension. We should also mention the judgement of 4 December 2012 by the ECHR on Hamidovic case, which condemned Italy for the expulsion of a Bosnian-Roma woman, mother of five children.

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*Note 18 continued from page 129*

**No. 94/2013** Association for the Protection of All Children (APPROACH) Ltd vs. Italy.

The complaint was registered on 4 February 2013. The complainant organisation alleges that many children in Italy are still suffering corporal punishment, and violent punishment of children is still culturally and socially accepted. APPROACH complains of the failure of Italy to adopt the necessary legislation and its lack of diligence to eliminate violent punishment of children in practice in violation of Article 17 (the right of mothers and children to social and economic protection) of the European Social Charter. The complaint is still pending.

**No. 91/2013** Italian General Confederation of Labour (CGIL) vs. Italy

The complaint was registered on 17 January 2013. The complainant trade union, Confederazione Generale italiana del Lavoro (CGIL), alleges that the formulation of Article 9 of Law No. 194 of 1978, which governs the conscientious objection of medical practitioners in relation to the termination of pregnancy, is in violation of Article 11 (the right to health) of the European Social Charter, read alone or in conjunction with the non-discrimination clause in Article E, in that it does not does not protect the right guaranteed to women with respect to the access to termination of pregnancy procedures. It alleges also a violation of Article 1 (the right to work), 2 (the right to just conditions of work), 3 (the right to safe and healthy working conditions), 26 (the right of dignity at work) of the European Social Charter, the latter articles read alone or in conjunction with the non-discrimination clause in Article E, in that it not does not protect the rights of the workers involved in the above-mentioned procedures. Moreover, the complainant organisation asks the Committee to recognise, with respect to the subject matter of the complaint, the relevance of Articles 21 (the right to information and consultation) and 22 (the right to take part in the determination and improvement of the working conditions and working environment) of the European Social Charter. The complaint is still pending.

**No. 87/2012** International Planned Parenthood Federation European Network (IPPF EN) vs. Italy

The complaint was registered on 9 August 2012. The complainant organisation alleges that the formulation of Article 9 of Law No. 194 of 1978, which governs the conscientious objection of medical practitioners in relation to the termination of pregnancy, is in violation of Article 11 (the right to health) of the European Social Charter, read alone or in conjunction with the non-discrimination clause in Article E, in that it does not does not protect the right to access termination of pregnancy procedures.

The European Committee of Social Rights concluded that there was a violation of Article 11§1 and of Article E read in conjunction with Article 11 of the Charter and transmitted its report containing its decision on the merits of the complaint to the Parties and to the Committee of Ministers on 7 November 2013.

The Committee of Ministers adopted Resolution Res/CM ChS (2014) 6 on 30 April 2014.

<sup>19</sup> A critical review is found CINELLI (2006), *La tutela dei diritti sociali nella giurisprudenza della CEDU* ("Protection of social rights in the jurisprudence of the ECtHR"), *Rivista italiana di Diritto della sicurezza sociale* (Italian Journal of the Law of Social Security), 731 ff.

<sup>20</sup> To reconstruct the *controversy*, see: DE MICHELE (2014) *Il dialogo tra Corte di giustizia, Corte europea dei diritti dell'uomo, Corte costituzionale e Corte di Cassazione sulla tutela effettiva dei diritti fondamentali dei lavoratori a termine: la sentenza Carratù-Papalia della Corte del Lussemburgo*, at [http://www.cde.unict.it/quadernieuropei/giuridiche/60\\_2014](http://www.cde.unict.it/quadernieuropei/giuridiche/60_2014). For the general outlines of the dialogue between the Courts, see: RUGGERI (2011) *La Corte costituzionale "equilibrata", tra continuità e innovazione, sul filo dei rapporti con la Corte EDU*, in *Diritto pubblico comparato ed europeo*, 1757 ff; RUGGERI (2012) *La Consulta rimette abilmente a punto la strategia dei suoi rapporti con la Corte EDU e, indossando la maschera della consonanza, cela il volto di un sostanziale, perdurante dissenso nei riguardi della giurisprudenza convenzionale* ("a prima lettura" di Corte cost. n. 264 del 2012), at <http://www.giurcost.org/studi/Ruggeri23.pdf>; RUGGERI (2012) *La Corte di giustizia marca la distanza tra il diritto dell'Unione e la CEDU e offre un puntello alla giurisprudenza costituzionale in tema di (non) applicazione diretta della Convenzione* (a margine di Corte giust., Grande Sez., 24 aprile 2012), at <http://www.giurcost.org/studi/Ruggeri15.pdf>; RUGGERI (2012) *Costituzione e CEDU, alla sofferta ricerca dei modi con cui comporsi in "sistema"*, at <http://www.giurcost.org/studi/ruggeri14.pdf>.

Often, issues regarding protection of social rights are – with the procedural restrictions in the well-known domestic scope – conveyed by reference to violations of the instrumental provisions of the ECHR Convention,<sup>21</sup> almost always on the right to a fair trial and the prohibition of discrimination.

For an interesting combination of different (but converging) sources from the European legal area, note a CORI decision (judgement no. 40/2013), which removed an irrational obstacle to the release of long-term residence permits for non-EU citizens with reference to a social security benefit (disability pension).<sup>22</sup>

the contribution that can be offered by the primary legal basis (Charter of Fundamental Rights of the European Union – CFREU)<sup>23</sup> is genetically restricted<sup>24</sup> (in the current attitude of the Court of Justice of the European Union – CJEU) both due to a formal referral limited to the laws (secondary level) of the Union, and due to the assignment of assessment of the scope of application in each case to the CJEU.

It should be stressed that the ongoing workings of the operators in the European legal space (hoping for an awakening of the conscience of Italian jurists) will harness more and more paths of integrated protection of social rights, based on the principle of indivisibility – a clever combination of instruments activated in parallel: before the ECHR, before the European Commission, before the CJEU, before the ECSR. The result of this effort for the emergence of the legal substance of social rights must then

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<sup>21</sup> SERINO (2014) La tutela dei diritti sociali in Europa tra Corte di Giustizia e Corte Europea dei Diritti dell'uomo, at <https://www.duitbase.it/articoli/la-tutela-dei-diritti-sociali-in-europa-tra-corte-di-giustizia-e-corte-europea-dei-diritti-dell-uomo>; SICLARI D. (2013), La legge sotto condizione sospensiva di efficacia nel costituzionalismo europeo multilivello, at [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/paper/0401\\_siclari.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0401_siclari.pdf).

<sup>22</sup> Article 80, paragraph 19 of Law no. 388 of 2000 was declared unconstitutional, in so far as it sets the requirement for holders of residence permits granted to foreigners legally residing in the territory of the State an attendance allowance as per Art. 1 of Law no. 18 of 1980, no. 18 and disability pension as per Art. 12 of Law no. 118 of 1971. The Court stated that the contested provision – heavily restricting the scope of Art. 41 of Legislative Decree no. 286 of 1998, relating to social security benefits and welfare in favour of non-EU nationals – subordinated concession of the benefits constituting individual rights under the law in force in the field of social services to the ownership of the residence card, later replaced, with effect from 2007, with a long-term EC residence permit. It has been repeatedly scrutinised by the Court in reference to the institutions of disability pension (judgement no. 11 of 2009 and judgement no. 324 of 2006) and attendance allowance (judgement no. 306 of 2008), that is to say, the same benefits covered by the current referral orders. In the above judgements, it was reported how it was manifestly unreasonable to subordinate allocation of assistance benefits (which require a state of invalidity and disability) to the possession of a leave to remain in the territory of the State that for its issue demands, among other things, a certain income, while not taking into account the requirement – on which the Court was asked to rule in the present case – of possession, for at least five years, of a valid residence permit (also required for the attainment of the above residence status). The Court then noted that the provision of this latter requirement was, however, scrutinized with reference to other benefits, that is, for the monthly disability allowance as per Art. 13 of Law no. 118 of 1971 (in judgement no. 187 of 2010) and for the attendance allowance as per Art. 1 of Law no. 289 of 11 October 1990 (in judgement no. 329 of 2011). In both of these latter times, in declaring the unconstitutionality of the legislation complained of, it has been, in particular, stressed that – in those cases, as is the cases under present consideration, the benefits intended for the support of individuals and the maintenance of acceptable living conditions in the family context in which the disabled person is placed – any distinction between citizens and foreigners legally residing in the territory of the State, based on requirements other than those provided for the general population of subjects, results in a contradiction to the principle of non-discrimination of Art. 14 of the Convention, having regard to the strict interpretation of this provision that was offered in the case law of the European Court. And identical order for relief is also considered applicable by the Court – albeit *mutatis mutandis* – in the current judgement, having regard to the nature and the *ratio* of benefits under consideration here. In fact, this case is also dealing with the benefits targeting subjects in serious health conditions, with highly debilitating handicaps (in one of the two judgements it was also a minor), whose attribution implies the involvement of a series of values of essential prominence, all of them of constitutional significance and covered by the principles invoked, and among them Art. 2 of the Constitution. These values – also in light of the various international conventions that regulate them – render unjustified the application of a restrictive regime (*ratione temporis*, as well as *ratione census*) in respect of non-EU citizens legally residing in the territory of the State already for an appreciable and non-episodic period, as in the present cases.

<sup>23</sup> On the role of national constitutional traditions, see: GAMBINO (2012), identità costituzionali e *primauté* eurounitaria, in Quaderni costituzionali, 533 ff.

<sup>24</sup> STERN (2005) Dalla Convenzione europea dei diritti dell'uomo alla Carta europea dei diritti fondamentali. Prospettive di tutela dei diritti fondamentali in Europa, in The European Charter of Fundamental Rights in the Constitution, comparison evaluation (ed.: STERN, TETTINGER), Berliner Wissenschafts-Verlag, Berlin, 13 ff; STERN (2006) Costituzione europea e la Carta dei diritti fondamentali dopo il No francese e olandese, in Costituzione europea in divenire (eds.: STERN, TETTINGER), Berliner Wissenschafts-Verlag, Berlin, 25 ff; also in: Teoria del Diritto e dello Stato – Rivista europea di cultura e scienza giuridica 2005, 97 ff.

be carefully evaluated by national Judges who will be the ones to apply these in accordance with the principles to the specific facts placed before them.

Another essential aspect is cultural diffusion through the ANESC (Academic Network on the European Social Charter and Social Rights), which has an established presence in Italy and in other countries in the European legal space.

The greatest impact the EU law has in terms of implementation of the right to social security is caused by the Council Regulation (EEC) no. 1408/71, later amended by Regulation (EC) no. 883/2004, through which thousands of Italian and non-Italian workers were able to accrue the requirements to access social benefits, thanks to the *pro rata* mechanism. The Regulation (EC) no. 859/2003 dedicated to equal treatment in access to social security benefits for citizens of non-EU states (and their families), provided that they are ordinarily resident in the territory of the Union, is finding progressive application in relation to the development of demographic dynamics of immigration for employment purposes. Regarding the matters of family reunification for non-EU workers, Directive no. 86/2003 has been implemented; similarly with Legislative Decree no. 30/2007, Directive no. 2004/38 was implemented (free movement of EU workers and their families).

Directives concerning the protection of health and safety at work gave rise to a legislative *corpus* (Legislative Decree no. 81/2008) that is very complex and strongly implemented, thanks to a system of incentives (reduction of contribution), controls (by the State) and monitoring (by the workers' representatives) that over the past twenty years helped achieve some important results in terms of the progressive reduction of workplace fatalities, even though injuries and deaths affecting undocumented workers are still a great concern, especially regarding workers from outside the EU who work in agriculture in some areas of Italy.

The principle of equal treatment between men and women in matters of social security has found significant application in public employment.

The award of 13 November 2008 in Case C – 46/07, the CJEU has condemned Italy (in infringement proceedings) for unlawful age differentiation (more favourable to women) in terms of access to old age pension. Consequently, the Italian government had to issue regulations on equality between the sexes (most recently, Law no. 214/2011).

Also, note that the integrity of tax status of employees of insolvent employers (imposed by Directive no. 987/1980 and Directive no. 2002/74) is protected by law (Legislative Decree no. 80/1982; Legislative Decree no. 186/2005), and that this is valid both for the forms of compulsory social security and welfare managed by the State, and for private pension funds.

Legislative Decree no. 28/2007 of 6 February 2007 implemented Directive 2003/41/EC regarding the activities and supervision of institutions for occupational retirement; however, this sector also has a separate supervisory authority (COVIP).

## 2.2. *The main legal institutions to Implement the Principles of constitutional protection of the rights of social security*

The principles of adequacy, sufficiency and essential social benefits (Art. 38, CORI) are the foundation of a number of important legal institutions.

First of all, since 1942 (Art. 2116, Italian Civil Code) has been in place a mechanism that automatically recognizes entitlement to social benefits, even if the relative contribution has not been paid by the employer; however, it must be said that this principle works only to a limited extent (until expiration of the limitation period of five years) for benefits other than those due to accidents and occupational diseases (in which it operates fully automatically).

Secondly, in many cases of non-performance of work (illness, accident, maternity, recourse to subsidies for full or partial unemployment, etc.) the periods concerned are considered relevant and covered by contributions (the so-called figurative contribution), which are charged to the State. It is a tool intended to implement the principle of effectiveness.

Another significant institution, although relating to the use of pensions and dedicated to the application of the principle of adequacy, for a long time has been the so-called automatic equalization, based on the

constant indexation of pensions to the cost of living. In a radical move, starting from 2012 and for higher pensions such mechanism has been abolished, for obvious reasons of saving in pension expenditure.

Moreover, another mechanism for adjusting the amount of social benefits was delimited some time ago, for cases where they are awarded on the basis of Court judgement. In such cases, the amount will be increased by only one of the components set in Art. 429 of the Italian Code of Civil Procedure (legal interest; index of currency appreciation) and never cumulatively by these (Law no. 724/1994).

An important (and unfailing) type of institution, inspired by the principles of universality and solidarity, is represented by measures to ensure a minimum amount of pension, either with a contribution base (so-called integration to a minimum) or where access is not tied to a defined contribution (for situations of serious socio-economic hardship) (so-called welfare benefits for the elderly over 65 years). A similar measure is true for all economic treatments provided to protect the disabled, whether they are former workers or not.

The Italian social model has given importance to the principles of subsidiarity between the State and local communities (Arts. 117 and 118 CORI).<sup>25</sup> In particular, the matter of social security is left to the exclusive legislative competence of the State (except for the autonomous provinces of Trento and Bolzano, as well as for regions with special status), while the concurrent legislative competence is applied in relation to: workplace safety, health, complementary social security (pension funds, etc.), social assistance – in these matters it is the government's responsibility to establish minimum performance levels. In the above matters local communities are allowed to participate in decisions that form legal acts of the EU, as well as implementation and enforcement of international treaties and EU acts (Art. 117, paragraph 5, CORI).

It should be noted that the organization of health services in general (Servizio Sanitario, the Italian Health Service) is the responsibility of local governments; while the funding system is still largely controlled by the State.

It is easy to imagine that significant problems will arise from the implementation of Directive 2011/24 on the application of patients' rights in cross-border healthcare, precisely due to the mechanism for reimbursement of costs.<sup>26</sup>

A new line of the legislature's action regards the groups under the strongest risk of social exclusion (usually elderly people who live alone, with incomes close to the poverty line). Among the various measures introduced at the national level under the concurrent jurisdiction with local authorities (reduction of tariffs for water supply, electricity and gas, shopping vouchers, etc.), and at the local level (Solidarity Fund for the contribution to the cost of rent) the subject of two CORI decisions<sup>27</sup> (judgements no. 62/2013

<sup>25</sup> See: CIOCCA, (2003), Il sistema previdenziale nel federalismo, in: <http://www2.econ.univpm.it/servizi/hpp/distasi/Ciocca.htm>.

<sup>26</sup> On the topic, see: GRIGLIO (2013) La difficile costruzione di uno spazio di tutela dei diritti sociali a livello europeo: il caso della direttiva sull'assistenza sanitaria transfrontaliera, at <http://dx.doi.org/10.12775/TSP-W.2013.012>; DI FEDERICO (2012), La direttiva 2011/24/UE e l'accesso alle prestazioni mediche nell'Unione Europea, in Rivista di diritto della sicurezza sociale, 683 ff. The CJEU ruled on the Case C-211/08 on the infringement procedure. For more in-depth profiles, see PIOGGIA (2011), Diritti umani e organizzazione sanitaria, in Rivista di diritto della sicurezza sociale, 21 ff.

<sup>27</sup> In the context of severe economic and financial crisis, the state legislature is empowered by Art. 117, second paragraph, letter m) of the Constitution to introduce measures to “ensure the essential services to relieve situations of extreme need, in particular regarding food”, similar to judgement no. 62/2013, which also stated that the purpose of “ensuring the irreducible core” of the fundamental rights “justifies State intervention that also includes the provisions for appropriate and prompt delivery of a particular benefit in favour of individuals” (judgement no. 10 of 2010). Already in the decision back in 2010, it has been significantly observed that “regulations for the protection of situations of extreme weakness of the human person”, such as the one established by the shopping voucher, “although it affects the matter of social services and assistance reserved to regional competences, has to be reconstructed in the light of the basic principles of Arts. 2 and 3, second paragraph, Const., Art. 38, Const. and Art. 117, second paragraph, letter m, Const. An aggregate of these constitutional rules allows, first of all, to transfer between the social rights (the responsibility for which must be assumed by the national legislature) the right to obtain the essential benefits to relieve situations of extreme need – especially those related to food – and to affirm the duty of the State to establish the quantitative and qualitative characteristics, in the case where the lack of such provision can prejudice. In addition, this supports the view that the purpose of ensuring the irreducible core of this fundamental right renders legitimate intervention by the State, which also includes appropriate and prompt allocation of a particular benefit in favour of the individual”. The intervention of the State, therefore, “is

Note 27 continued on page 134

and no. 0/2010) has been the most sensitive (the shopping voucher).<sup>28</sup> For these actions, it was deemed lawful to pass the competence from local authorities on to the State.

In general, the real issue will be the impact of constitutional regulations on the content of social security rights in the domestic legal system.

The justiciability of social rights has traditionally been doubly problematic: a) on a technical level – the ability to set them up as an object of judicial protection;<sup>29</sup> and b) institutional legitimacy and/or jurisdiction of the courts (i.e. municipal judge – in the Italian judiciary system he is or should be specialized in accordance with Law no. 533/1973 – in *primis*). It must be emphasized that the ordinary forms of judicial protection of social rights (e.g. the right to health, welfare, equitable remuneration for work) are not only technically feasible, but they do exist and are numerous, with a decent incentiviveness which is too often almost nullified by the long processing times. In the context of constitutional,<sup>30</sup> the possibilities of intervention – as illustrated – are varied, ranging from institutional censorship of illegitimacy of the acts in conflict with the constitutional provisions that enshrine social rights, to the setting of terms within which the institutions are required to intervene and satisfy these rights, and to the explicit formulation of coordinated legal proceedings which the institutions are required to adopt and intervene.<sup>31</sup>

This, therefore, give the possibility of a negative intervention – to censor laws or regulatory actions that mark a setback in the protection of social rights, in the regulations where they are already prepared; as well as positive – to give impetus to inert political institutions (the emblematic case decided in the CCRI judgement no. 240/1994 concerning the so-called integration to a minimum of separate pension benefits).

In summary, it is possible to highlight some critical issues: development of an interpretative/argumentative strategy that allows to focus on the aspects of justiciable social rights and work on them; framework of obligations arising from those rights; assessment of the costs of their conservation.<sup>32</sup>

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*Note 27 continued from page 133*

*considered acceptable when, in addition to responding to the principles of equality and solidarity, we see present the aspects of extraordinary, exceptionality and urgency, as those following the situation of the international financial and economic crisis that has hit our country”.*

<sup>28</sup> Further on this issue, see: PIZZOLATO (2010), *La social card all’esame della Corte costituzionale*, in *Rivista di Diritto della sicurezza sociale*, 349 ff.

<sup>29</sup> The research was carried out with reference to fundamental rights, by MAZZARESE (2006), *Ragionamento giudiziale e diritti fondamentali. Logical and epistemological research in COMANDUCCI. GUASTINI (eds), Analisi e diritto. Ricerche di giurisprudenza analitica, Giappichelli – Torino, 2007*; also at [www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi.../10MAZZAR.PDF](http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi.../10MAZZAR.PDF).

<sup>30</sup> Really valuable work of skilful synthesis made periodically by MIANI CANEVARI; review of constitutional law published in *Rivista di Diritto della sicurezza sociale* (2013, 405 ff; 2012, 361 ff; 2011, 151 ff.) is a constant point of reference for all Italian judges.

<sup>31</sup> Please refer to VALENTINI (2012), *Il futuro dei diritti sociali tra garanzie essenziali e garanzie ragionevoli*, at <https://www.juragentium.org/topics/rights/valentini.pdf>, according to which: “The extent to which these judicial interventions can find an effective response in the operation and diligence of political institutions depends on the balance between jurisdiction and legislation and, more generally, between constitutional law and democratic government in the regulations; this balance also determines the efficiency of the judicial negative, even for the protection of civil or political rights.

The latter, in fact, places limits to which the political work has to adapt, retracing completed steps. It is true, however, that in the field of social rights the instruments available to constitutional justice and balance in the relationship between it and political institutions are still uncertain and under development. In this sense, today, the crucial factor is the way in which the judicial action will know from its ability to develop from its technical capacities and institutional reasons that justify it, to give a concrete thickness to guarantees the social rights.”

<sup>32</sup> CCRI has often been called upon to assess the boundaries of subtle balance between the guarantee of conditional social rights (social security rights to benefits) and the economic and financial needs, and the State budget.

On such occasions, CCRI analyzed, with awareness, the specific characteristics of conditional social rights, in relation to the principle (this also has a constitutional status, recently strengthened by with a formal reference to the elements of the so-called Fiscal compact) of financial balance, already present in the previous wording of Article 81 CORI.

CCRI’s approach (not just recent) was to implement a distinction between recognition of the individual right to social security and the attention and concrete guarantee of that.

*Note 32 continued on page 135*

It should be noted that CCRI has always been aware that an exponential growth of social spending reliably corresponds to the crisis of social security rights.

The aforementioned trends for the use of social security rights (by the political power) to ensure continuous electoral support gave impetus to the ongoing crisis of the Italian welfare system (and the protected social rights) that is taking progressively wider and more worrying dimensions, to the point of outlining in the scientific debate the idea of the inevitable disappearance of this form of state intervention.

The legislature necessarily has to deal with this phenomenon, and, in an effort to strengthen and renew the traditional methods and procedures for satisfying the social security rights, overcome the inefficiencies and contradictions of the system.

Since the 1990s, the Italian legislature, both at the ordinary and the constitutional levels, has changed the institutional structure and organization of the welfare system, through a process of decentralization of institutional powers from the central State to the regions and to local authorities.

Based on the principle of subsidiarity, the management and financial responsibilities regarding social benefits have thus been transferred to the government levels closest to the protected person, for their (alleged) ability to better interpret the social needs and the gaps in the services networks.

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*Note 32 continued from page 134*

The effect of this distinction has led the Court to bring these conditional social rights within the scope of the possible and the reasonable (in imitation of the Constitutional Court of the Federal Republic of Germany), but this only in legislative determination *quomodo* and *as of* the actual guarantee, and, in any way, not so as to compress the minimum necessary content to not render illusory the satisfaction of the protected.

The criteria by which the CCRI exercised control of the constitutionality of laws giving effect to conditional social rights are:

- The principle of progressive implementation of the legislative reforms (judgements no. 173/1986 and no. 205/1995);
- The principle of provisional constitutionality of a particular discipline, which requires development or reform (judgement no. 826/1988);
- The principle of ‘partial-unconstitutional implementation’ of a social right, where, which simplifies its enjoyment without securing it in practice (judgement no. 215/1987).

It is the Constitutional Court’s right to censor the legislative activity where the legislature has not used due reasonableness in weighing up the implementation of these rights in balance with other primary interests guaranteed by the Constitution and with the essential requirements of the budget.

Since late 1970s, CCRI has made it clear that the implementation of derivative social rights is conditioned (as already mentioned) by the required graduality, the reasonable weighing against other interests protected by CORI, the not unreasonable inertia or delays in the adoption of a satisfactory arrangement of the implementing legislation, the necessity to match the *ratio* of the specific social right.

It has made it very clear, without, however, calling into question the nature, status and the key role of social security rights, which are and remain inviolable.

Especially since the 1980s, CORI’s intervention in the process of streamlining the legal rights to social security was developed in the sense of recognition of immediate protection even to the conditional social rights that require a positive intervention of the legislature.

The instrument chosen by CORI was the so-called “remedial interpretation”, often used to enrich and elevate the level of protection of workers and disadvantaged social groups.

The Court thus has claimed the ability to censor the legislature’s discretionary power in implementing conditional social rights and financing of the protection measures, relying, on the one hand, on the concept of a minimum content of essential social rights, and on the other on the principle of gradual economic resources so as to address the changeability, instability and fairness in the protection of these rights, and at the same time safeguard the protection in the face of scarcity of resources.

These guidelines have inspired CCRI in operating the judgement of the balance between assets and constitutional values, which helped identify the limits and content of social rights and resolve any conflicts between constitutionally protected property (emblematic on this topic: judgements no. 495/1993 and no. 240/1994, followed by a fundamental applicative contribution of the Supreme Court via judgement no. 16079/2003).

Thus, CORI has repeatedly found itself, especially in recent decades, addressing the problem of balancing social policies with economic resources, in this regard pointing out that the ‘cost’ of social security rights must not transform the social structure or affect their operation/effectiveness. On occasion the Court has gone further and, in considering progressive and numerous social issues, has developed the ‘new rights’ and granted them constitutional protection. This was the case, for example, for the right to environment, that judgement no. 641 of 1987 has recognized as a primary and absolute value of the individual, the protection of which is required by constitutional principles, in particular Articles 2, 9 and 32 of the Constitution.

The systems for protection of social security rights have thus been opened also to local authorities.

The fundamental steps along this path were the Law no. 328/2000 on the integrated system of services and social interventions, which has provided a comprehensive reform of the social services sector, and, later, the constitutional reform of Title V of the CORI, implemented by the Constitution Act no. 3/2001: it has introduced a new criterion for the division of legislative powers between the State and the regions destined to have a major effect on the protection of fundamental rights, both social and civil.

Thus has been amended Article 117, CORI, which identifies the areas of exclusive competence of the State and the areas of shared competence of the State/regions, where the former is responsible for determining the fundamental principles and the latter for the discipline in the specific sectors and areas of exclusive competence of the regions.

The constitutional legislature allocates to the exclusive jurisdiction of the State “determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory” (Art. 117, paragraph II, letter. m).

This means that the exercise of powers conferred to the regions, both shared and exclusive, is still subject to the negative limit of compliance with the minimum levels of performance in the field of civil and social rights, and must adapt to the (‘external’) limit consisting of the fundamental principles whose determination is reserved to the State legislation in relation to competences shared with the regions.

The scientific debate<sup>33</sup> regarding this innovation in the field of social security rights has often demonstrated conflicting positions, especially with regard to the identification of essential character of the levels of performance in terms of social rights; the legislature has often been criticized for the reform as having caused a real erosion of the principle of equality.

In fact, this limitation of national legislature’s involvement in determining the basic level of benefits relating to social rights is in some respects an undeniable regression in relation to the principle of equality of the individual, as set out in Art. 3, CORI, now considered worthy of protection only in its minimum.

It must be observed that the new Art. 117, CORI attributes to the concurrent regional legislation the matters of protection and safety, education and health; these are all areas characterised by a particularly urgent problem of ‘retraction’ of the principle of equal treatment resulting from the imbalance in the enjoyment of the benefits.

The risk is to create an asymmetry in the provision of social benefits and a serious risk of weakening the constitutional guarantees of equality and solidarity.

Such situation could be remedied only by the necessary respect for the basic performance levels set by the State, pursuant to Art. 117 letter m), or intervention of the State Government in exercise of replacement powers under Article 120, CORI, to guarantee the basic level of social security benefits.

Even in Italy, as in the evolution of other national regulations (strongly characterized by the phenomena of globalization and European integration), we see a relocation of the social protection tasks from the national to the local level.

Thus is born – also in the political-institutional experience of Italy – a phenomenon of multi-level protection of social rights.

The State has lost (wanted to lose) a monopoly on the protection of social rights and shifted the guarantee thereof to supranational and international levels on the one hand, and regional and local levels on the other.

A new scenario is emerging through the various assessments that will be carried out by supranational subjects, both in the scope of European Union law (Commission, Court of Justice, especially in the light of the Charter of Fundamental Rights of the European Union), and in the conventional international law in the legal area of the Council of Europe (European Committee of Social Rights, in the light of the provisions of the European Social Charter that are binding States to respect the commitments made, either through regular reporting or through decisions made on collective complaints).

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<sup>33</sup> Fully reported by RAZZANO, Lo “statuto” costituzionale dei diritti sociali, at <http://www.gruppodipisa.it/wp-content/uploads/2012/05/trapanirazzano.pdf>.

### 3. *Personal and material scope of social security rights guaranteed by the Italian constitution*

As already stated, the body of the Italian system of social security revolves around Art. 38, CORI, in which the essential figure is that of the worker (for the purpose of constructing a pension model, for a long time – until 1995, but with effects still relevant to the workers of a more advanced age – on a contributory base, whereas the final calculation is based on remuneration for the purposes of financial benefits).

The figure of the ‘worker’ has been focused on a salaried employee; until 1996, most of atypical workers (about two million, used under autonomous coordinated collaboration agreements) were not enrolled in any pension system base and therefore could not claim any useful years of contributions.<sup>34</sup>

Therefore, over time has been constructed a basic pension protection that will ensure, however, only rather modest benefits.

For a long time, the Italian pension system was characterized by a large number of pension protection management bodies, both for public sector employees and for private sector workers, and the self-employed. Only recently, the reform imposed by the crisis (Law no. 214/2012) united both sectors under the management of a single body: the National Institute of Social Security (INPS); some exceptions still remain (sales agents, professionals,<sup>35</sup> etc.).

Over the past twenty years, the legislature, through a broad interpretation of Art. 38, CORI, has created a body of legislation (Legislative Decree no. 124/11994), which led to a (moderate) development<sup>36</sup> of complementary social security (pension funds, often born out of forecasts of collective bargaining at a category level and not at a corporate level) under the supervision of a public authority (COVIP) in order to avoid or reduce the risk of *default*.

As part of the constitutional prerogatives (Arts. 117 and 118, CORI), some local communities with statutory autonomy have established pension funds of limited discretionary scope.

At the same time, with a certain degree of homogeneity has been regulated the development of the so-called ‘third pillar’, i.e. forms of private savings for retirement purposes (mainly based on insurance policies). Both forms have (more and more modest) tax incentives at the individual level.

The above-mentioned social security protection model obviously does not exclude workers who are non-EU nationals; of course, if they leave the Italian territory (and as long as they do not move to work in another EU country), to obtain the pension benefit (i.e., the financial capital corresponding to taxes paid in Italy) they have to achieve the retirement age (subject to constant adjustment, based on the demographic indicators of life expectancy).

As for the Italian workers hired to work abroad, in non-EU countries with which Italy does not have bilateral social security treaties, the ruling principle is that of extraterritoriality of the Italian system (considered the most protective), implementing the provision of Art. 35, CORI (Law no. 398/1987, issued after the CCRI ruling no. 369/1985).

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The coexistence of these two approaches in the Art. 38, CORI (principle of expansive solidarity, from a professional category to a larger number of subjects, and principle – trend – of universality, typical for social security models) has led to the development of a model focused on the situation of need upon the occurrence of certain events that limit the person in the enjoyment of a free and dignified life.

<sup>34</sup> RENGA (2006) La tutela sociale dei lavori, Giappichelli.

<sup>35</sup> RENZI (2013), Sulla funzione pubblicistica delle casse professionali private, in *Rivista di Diritto della sicurezza sociale*, 391 ff; CALZOLAIO (2013), Le casse previdenziali sono amministrazioni pubbliche (anche se non ce lo chiede l’Europa), nota a Consiglio di Stato, Sez. IV, sentenza n. 6014/2012, in *Diritto della sicurezza sociale*, 221 ff.

<sup>36</sup> See: GAMBACCIANI (2012), La previdenza complementare nell’evoluzione dei principi costituzionali, in *Rivista di Diritto della sicurezza sociale*, 610 ff; ALTIMARI (2013), Orientamenti giurisprudenziali in materia di previdenza complementare, in *Rivista di Diritto della sicurezza sociale*, 194 ff.



This strong emphasis on personalistic element has marked – and still marks – the rationale for each intervention of the legislature (and consequently of the CCRI, if called upon to make the assessment of legality of the legislature’s decisions).

Here lie the foundations of a series of remarkable protective measures:

- cash benefits in the event of partial or total unemployment (with an attempt at standardization of the discipline – Law no. 92/2012 – which introduced the ASPI measure (which can not be universal in character, as it is still tied to a minimum contribution requirement);
- measures for disability/incapacity, both for the workers and for the non-workers;
- measures of economic support for the elderly in poor economic conditions (social allowance, social card, tariff reductions);
- cash benefits in case of ordinary sickness, occupational disease or injury (managed by the National Institute for Occupational Accidents – INAIL);
- protection of the survivors, both in case of natural death and that for work-related reasons (INAIL), albeit with some difficulties for undocumented workers and their families);
- measures to support the family burden: household allowance; allowance for the third child (the Government announced the introduction of a special allowance for birth, from the first child born into families with low and middle income).

In general, the subjective scope of the protections provided by the Italian social security system may be judged as somewhat stabilized in its expansive force; however, in the background remains the large latent phenomenon: lack of access to the system by the younger generations (Italy’s youth unemployment rate is over 50%) and demographic prospects that see a steady decline in new births (now chronically overtaken by deaths), with the variable (perhaps not unexpected) component of non-EU origin of a considerable part of the new born (although with strong critical issues relating to the difficult access to the citizen status, with *jus sanguinis* prevailing in the Italian system).

Separate discussion (created pursuant to Art. 32, CORI) must be dedicated to the national health system (SSN) that sees an increasing involvement of the local communities (regions) in the choices (and related liability).

The universal nature of the protection (not related to insurance records, but based on a mix of funding from general and special taxation and participation – with a significant objective and subjective scopes of exemption – of individual health services provided in the costs) is a major crisis (representing about 90% of the costs of the regions, including explosion of spending on medical drugs in the last twenty years).<sup>37</sup>

The government has imposed austerity measures, but it is very difficult to implement efficient monitoring that could lead to swift changes in the deeply rooted behaviour. Instead, aside from some patchy situations of excellence, there are ‘endemic’ problems of long waiting time and functional and organizational inefficiency.

The scenario could definitely change (probably for the worse for the economic and financial balance of the system) once the mechanism of the European cross-border patient mobility becomes fully operational (Directive 2011/24).<sup>38</sup>

Of course, access to the health care system is open even to non-EU citizens, without sensitive discrimination (especially with regard to essential services and emergencies).

Thanks to the social partners’ initiative, collective bargaining has long since introduced some form of collective insurance cover dedicated to the workers and their families, in order to ensure timely and efficient healthcare services offered by the private healthcare sector.

As regards the scope of the so-called ‘social welfare support’ (protections not based on years of contributions and/or dedicated to situations of need or social problems), we must note that the measures

<sup>37</sup> See: SICLARI M. (2011), L’art. 32, primo comma della Costituzione italiana nell’interpretazione della Corte costituzionale, in *Lex social* no. 2/2012, 79 ff.

<sup>38</sup> See: GRIGLIO (2013) La difficile costruzione di uno spazio di tutela dei diritti sociali a livello europeo: il caso della direttiva sull’assistenza sanitaria transfrontaliera, at <http://dx.doi.org/10.12775/TSP-W.2013.012>.

in this regard, while focusing on the principle of freedom/subsidiarity (horizontal), as per Articles. 38, 117 and 118, CORI, see a coexistence of public (primarily INPS, but we also see a strong impetus from local communities) and private subjects (belonging to the so-called third sector: associations, foundations, etc.). In this regard, we'll point out that Italy has more than twenty years ago adopted a framework law on volunteer activities (Law no. 266/1991), involving a huge number of people; Such solidarity network (which often intercepts and captures the new individual and social needs, and pushes for the recognition (even legal) of new rights is a really valuable asset to the Italian society, inspired by several (but not conflicting) religious, cultural and ideological directions.

In Italy, as in the rest of Europe, there is an open debate on the need/opportunity to introduce a measure of integrated financial support (with measures of active employment policy), a universal measure (so-called basic income \*\*\*\* BRONZINI et al)<sup>39</sup> which limits the risk of social exclusion.

Recently (2013) the Government has introduced a measure devoted to the so-called NEET (under the European Youth Guarantee program): the data currently available do not show any significant progress in a strategy that – it must be said – is just at its beginnings (and with a considerable delay).

Ultimately (and without getting into the known classification of distinctive social rights as 'conditional rights' or 'unconditional rights')<sup>40</sup> one could argue that talking of "material and personal social security rights" might seem like a stretch, as such term is borrowed from the international law (in particular, the immigration law).

Perhaps it is possible, under the social security law, to grasp the dual aspect: their strong correlation to the essential characteristics of the person, and their basilar nature for a free and dignified existence (which does not mean that they are necessarily measured by a simple ruler of minimum standards).

It is clear that, in times of economic crisis such as those which trouble the people of Europe today, the policies of progressive reduction of social spending bring out the question of identifying the 'red lines', overstepping which will push the social security rights to lose their full features.

#### **4. Constitutional guarantees of social security rights**

##### *4.1. The important role played by the Italian Constitutional Court*

In the first (expansion) phase, CCRI, inspired by the strong guarantee of the privileged status of social security rights (Art. 32 and Art. 38, CORI), played its role in achieving the objectives of social justice, giving great dynamism to the Italian social security system. Especially in the decisions referencing the principle of equality (Article 3, CORI), through 'additive' judgements, it has often extended the discretionary nature of protections (CCRI judgements nos. 103/1968, 108/1977, 369/1985, 880/1988, with regard to the protection of health and measures of social security and assistance, judgements nos. 137/1989, 476/1987, 332/1992, 171/2002, as regards the protection against accidents and occupational diseases).

With regard to the principle of equal treatment between men and women in the access to social security rights, CCRI has expressed adherence to the socio-economic patterns even in conflict with the evolutionary lines of the European Union law (on difference in retirement age for men and women, see judgement no. 123/1969, based on a vision of the role of women rooted in outdated prejudices; judgement no. 201/1972, based on the probability of women's widowhood being higher than that of men, a position, however, surpassed by the judgements nos. 587/1988, 189/1991, 450/1991 and 1/1992 which abolished preclusion of survivors from access to pensions conditioned to the retirement age requirements in the marriage relationship, in the light of the evolution of social custom and relevance of the protection itself). Similarly, a broad evolution has been seen in protecting the surviving children, using the concept of

<sup>39</sup> See: GIUBILEO (2013), Qualche ragionamento sul reddito minimo tra teoria, sperimentazione e problemi dello strumento, in *Rivista di Diritto della sicurezza sociale*, 337 ff.

<sup>40</sup> Especially illuminating on this matter are the reflections of EICHENHOFER (2013), in *Rivista di Diritto della sicurezza sociale*, 525 ff, whose conclusions evoke sanctions inspired by the moderation for the subjects found guilty of 'misconduct' along the path of social reintegration.

‘family burden’ (judgement nos. 42/1999 and 180/1999, which give significant attention to the known instability of employment opportunities for Italian young people under the age of twenty; no. 164/1975, which gave access to the survivors protection to married children at the date of death of the *deceased*; no. 140/1979, which protected daughters in case of marriage after the death of the deceased. Both decisions are influenced by contemporary Italian reform of family law, moving it further and further away from the patriarchal modes.

Significantly, CCRI has never had to specifically address the problem of acquisition (*jure proprio* and *non in jure successionis*, renunciation of inheritance by a family member being irrelevant) of the right to survivors protection, as such solution is the result of interpretation of the common law of legitimacy, which has drawn a constitutionally oriented line without the need to cross-reference to the CCRI.

Another significant application of the principle of equality in terms of assessing the unjustified inequality of the disciplines related to differing protection schemes managed by different entities (generally not amenable to comparison, for constant orientation of CCRI) (e.g. judgement no. 202/2008), or in terms of the extension or reinforcement of some protection for pensions (judgements no. 822/1988 and no. 61/1999), or to ensure the most favourable treatment (in particular for calculation of pensions: judgements nos. 307/1989; 428/1992; 264/1994, 388/1995, 160/1971, 230/1974). Under the latter profile, because of the obvious implications for public finance, the legislature often has been forced to intervene with rebalancing rules of great technical complexity.

More recently, in the face of attempts by the legislature, driven by the urgency of the containment of public spending, to introduce drastic restrictive measures (obviously contrary to the principle of equality or recessive with respect to the already recognised guarantees), CCRI has interpreted – dynamically, through a continuous monitoring of regulatory changes made by ordinary judges as a common remitting – its role as guarantor of the principles, especially when the legislature has attempted to evade or paralyse the effects of previous decisions of the same Court (no. 283/1989, no. 418/1991, no. 240/1994, all containing rulings to stop and demolish the regulations elusive in terms of integration to the minimum pension; no. 134/1994, no. 246/1992, no. 20/1994, all relating to the aspects of the judicial process on the matter of social benefits clearly foreordained to severely limit the recognition of these rights by foreclosures, forfeitures and court costs regimes).

In the same vein, the Court also struck the abuse of the rules of authentic interpretation (judgements no. 246/1992 and no. 421/1995) or retroactive regulations (judgements no. 191/2005, no. 1/2006), all taken with a clear intention to evade the principles of protection.

A distinct interpretative line of CCRI’s has proven more benevolent towards the need to limit spending on social services, enhancing the two-way character of the principle of equal treatment (judgement no. 429/2000, which has not assimilated rules on the accumulation of legal interest and the monetary revaluation index – instead effective for labour claims – for welfare benefits; no. 400/1999, which for the purposes of social allowance has ruled out the possibility of considering other situations of need, considering the prevailing needs those to contain public spending).

In particular, the two-way nature of the equality principle has, at times, permitted the Court to remove the unjustified privilege of a more favourable discipline over that given for comparison (judgements no. 62/1994, no. 219/1995, no. 421/1995).

A latent principle in the Italian constitutional system on the right to social security is the protection of legitimate expectations (this principle obviously has general value, but it assumes a fundamental importance for the gradually developing cases, among which those on legal relationship of the social security are perhaps the most important, having on their horizon the entire span of life – and not just work – of a person). According to CCRI, compliance with this standard did not have as a necessary consequence the inviolability of expectations (e.g. of maturation of requirements for access to a certain type of protection) and even social benefits in the course of their application: the legislature can intervene with pejorative laws on the pensions currently paid, provided this complies with the principle of reasonableness (judgements no. 349/1985, no. 822/1988, no. 211/1997, no. 416/1999, no. 446/2002).

Fewer decisions of CCRI are based on the principle of adequacy of social security benefits. In a first stage, the Court emphasized the corresponding nature of the social insurance; later (judgements

no. 160/1974, no. 26/1980, no. 173/1986, no. 501/1988) it established the dynamic direction: proportionality and adequacy of welfare should exist not only at the time of the first payment, but must be guaranteed in future periods with respect to the change in the purchasing power of the currency, the so-called equalization, adopted by the legislature with various automatic or semi-automatic mechanisms, with heavy restrictions introduced by the Reform Act of 2011; recognition of the need for a mechanism for re-evaluation of the monetary value of social benefits has become an established element in the constitutional jurisprudence (judgements no. 497/1988, no. 141/1989, no. 156/1991, no. 78/1993, No. 196/1993).stage

With reference to the problem of determining the minimum level of benefits ('adequacy' and 'sufficiency'), the Court has always shown respect for the discretion of the legislature, declaring the absolute immunity of the matter, with the only constraints being the balance with other rights guaranteed by the Constitution and the limits of financial compatibility (emblematic in this sense are the judgements no. 157/1980, no. 34/1981, no. 506/2002, no. 822/1988, no. 240/1194, no. 99/1995, no. 361/1996, no. 417/1996, no. 287/2004).

A new perspective for evaluating mechanisms for determining the minimum levels of social security benefits entered in play following the reform of Title V of the CORI; in particular, CCRI has been facing the problem of having to define the essential service levels concerning civil and social rights (judgements no. 283/2002, no. 88/2003, no. 423/2004, no. 50/2005, no. 120/2005).

With regard to the distinction between social security and social welfare support, the Court in its guidance grants the legislature a greater freedom of choice in the identification of combinations of disciplines and implementation of protection models, which can also be changed over time (judgement n. 31/1986); aware of the open nature of the protections provided for in Article 38, CORI, the Court has also played a role in the push to active the legislature in the new legal institutions in order to offer an expansion of the overall protection of the social security rights. In particular, we note the decisions on the recognition of the constitutional basis of the supplementary pension (judgement no. 427/1990, followed by later ones) and one on the preservation of the integrity of individual positions in the social security system, especially in retirement (called the aggregation mechanism, judgement no. 61/1999).

Albeit with some initial mistrust, the Court acknowledged that integration of the EU law into Italian state regulations (as long as directly applicable) is a natural consequence of the principles enshrined in Article 10, CORI (judgements no. 232/1989 and n. 160/1991); this approach was strengthened by the new text of Article 117, CORI, requiring the ordinary legislature, as well as local governments of the regions, to comply with the provisions of international conventions.

#### 4.2. *The opening to social security international standards*

We have already made some references to the impact<sup>41</sup> of international provisions on the development of Italy's legal system of social security rights.

The evolution of the CCRI jurisprudence in terms of verifying the implementation of the provisions contained in this type of rules has not been linear.

In a nutshell, and without any pretence to a systematic and complete analysis, we can give some examples of the ongoing dialogue – with regard to social rights – between CCRI and supranational control organs.

– *with the Strasbourg Court (ECHR):*

CCRI (in the first phase and up to 2007) has consistently held a restrictive position: ECHR decisions are not binding on the Italian Constitutional Court which is responsible for the assessment (independent and originating) of compatibility of internal rules considered by the ECHR differing with respect to international standards with the CORI. Those internal rules, however, as assessed by the ECHR, could not be automatically waived by the Italian court. A detection of differences could represent, at most, a reliable basis for an interpretation consistent with compliance with those obligations. However, through

<sup>41</sup> BALBONI (2008) *La tutela multilivello dei diritti sociali*, Jovene.

two fundamental judgements (no. 348 and no. 349 of 2007),<sup>42</sup> as a result of the new wording of Article 117, CORI (2001) CCRI imposed an obligation on any legislator of the Italian Republic (both national and local) to comply with the standards contained in international conventions (and therefore also in the ECHR); consequently, a domestic provision incompatible with the international obligations is automatically contrary to the constitutional principle (Art. 117, CORI). The current legal mechanism, therefore, sees international standards as an interposed standard that must be referred to by CCRI to assess the degree of compatibility with the CORI. Further consequence is that the court is required to interpret the national domestic rules in conformity with the said constitutional principle (i.e. constitutional interpretation); where this is not possible, the ordinary judge is obliged to refer the conflicting matter to the CCRI, with a reference to the parameter of Art. 117, CORI.<sup>43</sup>

A further enrichment of the framework (in constant evolution, for the natural attitude of the ECHR regulation-standard to provide a vehicle for the legal issues of great depth in terms of social rights) will be offered when Protocol 16 ECHR will become operational, which will allow national courts of the last instance to ask for an opinion (non-binding but authoritative and certainly such as to promote – in advance – the harmonization of the dialogue between the courts) of the ECHR; it is hoped that the Strasbourg Court will enact guidelines similar to those adopted by the CJEU in Luxembourg.

– *with the Court of Luxembourg (CJEU):*

the importance of the issue is in the obligation to disapply the national legislation contrary to the directly applicable EU law (Treaties and Regulations, with so-called direct horizontal effect).

On this point, the CCRI has sometimes been found to disagree with the Court of Justice of the European Union (CJEU).

In a first stage, the CCRI, while recognizing the primacy of EU law, considered that this assessment was restricted (Art. 11, CORI) only to the Court and not to the ordinary courts (see judgements no. 187/1973 and no. 232/1975).

In a second stage it has changed this approach and granted the ordinary courts a prerogative to determine what is the prevailing norm, always subject to the possibility of returning to the CCRI (for violation of Article 138, CORI), even against the EU regulation if it violates the fundamental principles of the CORI.

An acceptable degree of arrangement on the matter was reached by two judgements in 1989 (no. 232 and no. 389), which recognized that the inclusion of directly applicable EU provisions in the Italian regulations is the natural consequence of their origin in an external source, whose constitutional principle is laid down in Article 10, CORI. In case of a conflict between an internal standard and an EU provision, the only remedy is non-application by the national common court. This solution is also applicable to interpretative decisions of the CJEU and unconditional provisions of directives (CCRI judgements no. 113/1985 and no. 168/1991). In any case, CCRI reserves, by assessment, the internal implementation discipline if the interpretation and application of EU law does not result in a conflict with the fundamental principles of the CORI or non inalienable rights of the human person are violated (see CCRI judgement no. 509/1995).

With regard to the provisions contained in directives (even if they contain unconditional and sufficiently precise provisions), there is an established position (CCRI judgements no. 113/1985 and no. 389/1989) under which they are provided only with an effective vertical (i.e. in respect of the Member State and not between private persons). This approach has the following consequence: ordinary courts, when a dispute between private parties finds a contrast between an internal regulation and a provision of a directive, will have to raise the question before the CJEU; if it recognizes this contrast, the effects of its judgement will be

<sup>42</sup> TEGA (2007) Le sentenze della Corte costituzionale nos. 348 and 349 of 2007: la Cedu da fonte ordinaria a fonte “subcostituzionale” del diritto, at [http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti\\_forum/giurisprudenza/2007/0013\\_tega\\_nota\\_348\\_349\\_2007.pdf](http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2007/0013_tega_nota_348_349_2007.pdf).

<sup>43</sup> BONOMI (2012) Brevi note sul rapporto tra l’obbligo di conformarsi alla giurisprudenza della Corte di Strasburgo e l’art. 101, c.2 Cost., at <http://www.giurcost.org/studi/Bonomi.pdf>.

limited to a single case, although it can take the interpretation offered by the CJEU as an interpretative parameter of the national standard. The private party will ask the state for damages resulting from the infringement of the obligation to implement the Directive.

– *with the European Committee of Social Rights (ESRC) under the legal system of the European Social Charter:*

as already commented, a growing importance is played by<sup>44</sup> the dual role of the ESRC in the evolution of the<sup>45</sup> European legal space.

In the Italian experience, beyond the formal ratification of both the European Social Charter (ESC) that the revised Protocol on collective complaints, except for an occasional reminder of their style in some of CCRI's decisions, one cannot say that enough of the mechanisms provided in the ESC system has been implemented.

It is hoped that, just in the wake of the new issues raised by the effects of the economic crisis, we will see a beginning of a constructive dialogue between the Committee and the CCRI.

Particular attention is drawn by bilateral international agreements<sup>46</sup> in the field; it should be noted that only in the last thirty years, Italy has become a country of immigration and is no longer (for now ...) merely a country of emigrants.

## **5. *The future of social security rights under the italian constitutional standards in times of economic crisis***

Answering this question, one must be realistic: the future of the right to social security in Italy will follow a line of progressive containment, essentially objective in scope (size of pensions paid by public entities); it's not a secret thought that the discretionary nature will also be influenced by the legislature's choices (Law no. 214/2011):<sup>47</sup> the retirement age will continue to grow (based on demographic indexes)<sup>48</sup> and therefore fewer and fewer people will enjoy the old-age pension (retirement based solely on years of contributions is formally abolished).

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<sup>44</sup> See: MOLA (2012), *La prassi del Comitato europeo dei diritti sociali relativa alla garanzia degli standard di tutela sociale in tempi di crisi economica*, at NAPOLETANO, SACCUCCI (ed.), *Gestione internazionale delle emergenze globali regole e valori*, Editoriale Scientifica, 195; RUSSO (2013), *I vincoli internazionali in materia di tutela dei diritti sociali: alcuni spunti dalla giurisprudenza recente sulle "misure di austerità"*, at [http://www.osservatoriosullefonti.it/component/docman/doc\\_download/618-d-russo](http://www.osservatoriosullefonti.it/component/docman/doc_download/618-d-russo); OLIVERI (2012) *La Carta Sociale Europea come "strumento vivente". Riflessioni sulla prassi interpretativi del Comitato Europeo dei Diritti sociali*, at <https://www.juragentium.org/topics/rights/oliveri.pdf>; PANZERA (2011) *Per i cinquant'anni della Carta Sociale Europea*, at <https://www.gruppodipisa.it/content/uploads/2012/panzera.pdf>; STRAZIUSO (2012) *La Carta sociale del Consiglio d'Europa e l'organo di controllo: il Comitato europeo dei diritti sociali. nuovi sviluppi e prospettive di tutela*, at <http://www.gruppodipisa.it/wp-content/uploads/2012/06/trapanistraziuso.pdf>.

<sup>45</sup> Please refer to the exhaustive analysis of POLI (2014) *Diritti sociali ed eguaglianza nello spazio giuridico europeo*, at [https://www.amministrazioneincammino.luiss.it/wp-content/uploads/2014/01/Poli\\_Diritti-sociali-spazio-giuridico-europeo.pdf](https://www.amministrazioneincammino.luiss.it/wp-content/uploads/2014/01/Poli_Diritti-sociali-spazio-giuridico-europeo.pdf).

<sup>46</sup> The list of countries with which Italy has concluded agreements of type betrays the original matrix of the strategy to extend the protection for Italian citizens working for extended periods in non-EU countries: Argentina, the Republic of Cape Verde, Australia, the Republic of Korea, Bosnia and Herzegovina, Republic of Croatia (from 1 July 2013 Croatia is an EU member state), Brazil, Republic of San Marino, Canada and Quebec, the Holy See, former Yugoslavia, Tunisia, Israel, Turkey, Jersey, Isle of Man and the Channel Islands, United States (USA), Republic of Macedonia, Uruguay, Mexico, Venezuela, Monaco.

<sup>47</sup> See: SANDULLI (2012) *Il sistema pensionistico tra una manovra e l'altra: prime riflessioni sulla legge no. 214/2011*, in *Rivista del diritto della sicurezza sociale*, 1 ff; CINELLI(2012), *La riforma delle pensioni del Governo tecnico: appunti sull'art. 24 della legge n. 214 del 2011*, in *Rivista italiana di diritto del lavoro*, 385-414; FEDELE e MORRONE (2012), *La legislazione sociale del 2011 tra crisi della finanza pubblica e riforma delle pensioni*, in *Rivista del diritto della sicurezza sociale*, 105 ff.

<sup>48</sup> For multifactorial analysis on the topic: VESHI (2013), *Le sfide del futuro: i costi della vecchiaia e il long term care*, in *Rivista di Diritto della sicurezza sociale*, 369 ff.

A special mention must be given to the painful story of hundreds of thousands of people (the so-called ‘income-deprived’, or rather: ‘unprotected’, regarding the innovations brought by the reform of 2011) who, on the basis of collective agreements, quit their jobs, trusting to be eligible for access to pensions, and now find themselves without any income (neither work, being too elderly to be attractive on the labour market, nor pension, as their situation ‘froze’, in some cases also for the next ten years). The Government and Parliament have attempted to provide a solution (yet incomplete, for obvious reasons related to the austerity policies) to this difficult problem; the phenomenon is of such a size (also because caused by a mix of careless analysis of the social impact of the reform and fear of the Sword of Damocles placed over Italy by the well-known protagonists of the new form of supranational governing) that it deserves a compatibility check by a neutral assessor, such as the ESCR. It foreshadows a collective complaint on the heels of those who have affected the reform adopted in Greece.

It should also be noted that the law on pension reform (Law no. 214/2011) is actually the result of a conversion (in just three weeks and without any real parliamentary debate...) of an emergency decree (Decree-Law no. 201 / 2011, with the emblematic title: ‘Salva Italia’, save Italy...) suddenly issued by the current government (the experience was borrowed from the Decree-Law no. 384/1992, with which was denied the access to only contributory old-age pensions, due to the risk of default related to the first episode of speculative attack on the Italian public debt).

It should not be concealed that CCRI (on another occasion, to be precise) did not forget to criticize the use of “relaxed recourse to emergency decrees in such delicate matters (judgm. no. 220/2013 and no. 20/2012),<sup>49</sup> but it is to be assumed that, if the question is raised (if only after three years...), the Court would find an excuse to the work of today’s Government (and Parliament) (as it already has in judgement no. 127 / 2014, concerning infringement of Articles 117 and 118, CORI on the questions raised – from a different angle – primarily from local communities with statutory autonomy)

### *5.1. Threats to social security rights in times of economic crisis*

As mentioned above, the search for the delicate balance between the guarantee of social security rights and needs of restriction (containment) of public social expenditures may be affected by the recent constitutional reform of Art. 81, CORI.

The changes to the formula introduced not only the principle of a balanced budget, but also the prohibition of borrowing (except for the reasons set out in an exhaustive list).

This reform is undoubtedly likely to compress the effective protection of social rights both at the state and local levels: it will assess the impact that the new wording of Art. 81 will have on the jurisprudence of CCRI in its review of the reasonableness of the balance between “the principle of a balanced budget” and protection of social rights operated by the legislature, in conceiving and enacting individual acts.<sup>50</sup>

<sup>49</sup> See: DICKMANN (2013), La Corte costituzionale si pronuncia sul modo d’uso del decreto-legge, at [www.consultaonline.it](http://www.consultaonline.it).

<sup>50</sup> LUCIANI (2012) Costituzione, bilancio, diritti e doveri dei cittadini, at [https://astrid-online/rassegna/Rassegna-214/06-02-2013/Luciani\\_Varenna2012.pdf](https://astrid-online/rassegna/Rassegna-214/06-02-2013/Luciani_Varenna2012.pdf); LUCIANI (2013) L’equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità, at [https://www.cortecostituzionale.it/documenti/convegni\\_seminari/Seminario2013\\_Luciani.pdf](https://www.cortecostituzionale.it/documenti/convegni_seminari/Seminario2013_Luciani.pdf); MORRONE (2013), Pareggio di bilancio e Stato costituzionale, *Lavoro e Diritto*, 357 ff; PIROZZOLI (2011) Il vincolo costituzionale del pareggio di bilancio, at <http://www.rivistaaic.it/il-vincolo-costituzionale-del-pareggio-di-bilancio.html>; PITRUZZELLA (2014) Crisi di governo e decisioni di governo, *Quaderni costituzionali*, 29 ff; RUGGERI (2012) Crisi economica e crisi della Costituzione, in <http://www.giurcost.org/studi/Ruggeri19.pdf>; TEGA (2014) Welfare e crisi davanti alla Corte costituzionale, in *Giornale di Diritto del lavoro e delle relazioni industriali*, 303 ff; TOSATO (2013) La riforma costituzionale del 2012 alla luce della normativa dell’Unione: l’interazione fra i livelli europeo e interno, at [https://www.cortecostituzionale.it/documenti/convegni\\_seminari/Seminario2013\\_Tosato.pdf](https://www.cortecostituzionale.it/documenti/convegni_seminari/Seminario2013_Tosato.pdf); CIOLLI (2012) I diritti sociali alla prova della crisi economica, in ANGELINI, BENVENUTI (a cura di), *Il diritto costituzionale alla prova della crisi economica*, Jovene; SALAZAR (2013) Crisi economica e diritti fondamentali – Relazione al XXVIII Congresso dell’AIC, at <http://www.associazionedeicostituzionalisti.it/articolorivista/relazione-al-xxviii-convegno-annuale-dell-aic-crisi-economica-e-diritti-fondamentali>.

Following a realistic approach, it seems unreasonable to argue that in the future CCRI ought to deviate from its tradition, briefly described above.

It should however be noted that CCRI has (many years ago, actually, but the financial crisis of welfare system was the talk even then...) stated that *“In particular, we can not allow a statutory amendment which, occurring either at an advanced stage of the employment relationship or already in the state of quiescence, without any mandatory requirement significantly and permanently pejorates a previously payable pension, thus resulting in irreparable frustration of legitimate expectations nourished by the work for the time after the termination of their employment”* (judgement no. 822/1988).

In addition, in the same judgement, CCRI has specified that *“other reasonings are of secondary importance, such as generation of tax revenue [...] as well as the successful raising of the retirement age, adjustment of pension and increase in minimum benefits, together with the need to contain pension costs: reasons such as these do not justify the curtailment of pension to the detriment of those workers who have contributed their efforts, for the whole or in part, in the legitimate expectation to achieve an adequate pension”. In fact, “shall apply the principle of guaranteeing social security, which is also embedded in the Constitution (Art. 38), as well as the undeniable reasons of social justice and equity, for which reasons the reforms or actions may not be permitted that result in damage to categories of workers in general and, more particularly, those who are close to retirement or are already retired”*.

Therefore, in the opinion of the Italian Constitutional Court of the generation prior to the current one, although it is possible that the legislature intervenes with legislative changes that provide new requirements for access to pension, surely the same rules should adopt measures necessary to define the position of who has in the meantime ceased to work, because he or she has met the requirements prior to the reform.

As stated by CCRI, the legislature can not intervene in an advanced stage of the employment relationship or even when, as has happened in several cases under consideration, the person was already retired, undermining and decidedly worsening the retirement position in respect of pension previously payable.

We are not sure that today CCRI would respond to the same question with quite the same words.<sup>51</sup>

In the case law of the CCRI other significant statements can be found on this matter.

With the sentence quoted above, which, in fact, is considered as the leading case of constitutional jurisprudence, the Court stated that *“in our constitutional system, the legislature may enact regulations that adversely alter the regulation of long-term relationships, even if their object is made up of perfect individual rights [...]. These provisions, however, like any legal precept, can not translate in an irrational regulation and arbitrarily affect substantial cases brought by the previous laws, thus also worsening citizens’ trust in public security, which is a fundamental and indispensable element of the rule of law (see judgements no. 36 of 1985, no. 210 of 1971)”*.

Therefore, the Court concludes that *“Although legislative actions that change public regulations on pensions must be considered permissible, we can not, however, admit that such actions are absolutely discretionary”*.

It is not however, in the very serious present day, guaranteed that CCRI recognizes among its parameters that, in truth, has been identified very clearly in judgement no. 822 of 1988: the protection of the principle of trust, even if only in the right of access to social security benefits (pension); in essence, we

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<sup>51</sup> See: VALERIANI (2014) I limiti costituzionali alla revisione delle pensioni: le prospettive per il futuro – Working Paper no. 152/2014, ADAPT; ABBIAE (2014) Ancora in materia di misure anti-crisi. Il distinguendo della Corte, at <http://www.federalismi.it/> [www.federalismi.it/ ApplMostraDoc.cfm?Artid=24704](http://www.federalismi.it/ ApplMostraDoc.cfm?Artid=24704); ABBIAE (2014) Le Corti costituzionali di fronte alla crisi finanziaria: un soluzione di compromesso del Tribunale costituzionale portoghese, in Quaderni costituzionali, 146 ff; AA.VV. (edited by: FIERRO, NEVOLA, DIACO, FULGENZI, NORELLI) (2013), La tutela dei diritti e i vincoli finanziari, Quaderno di giurisprudenza costituzionale, at [https://www.cortecostituzionale.it/documenti/convegni\\_seminari/tuteladiritti.pdf](https://www.cortecostituzionale.it/documenti/convegni_seminari/tuteladiritti.pdf); BIFULCO (2011) Il custode della democrazia parlamentare. Nota a prima lettura alla sentenza del Tribunale costituzionale federale tedesco del 7 settembre 2011 sui meccanismi europei di stabilità finanziaria, at <http://www.rivistaaic.it/il-custode-della-democrazia-parlamentare-nota-a-prima-lettura-alla-sentenza-del-tribunale-costituzionale-federale-tedesco-del-7settembre-2011-sui-meccanismi-europei-di-stabilit-finanziaria.html>.



are confident that CCRI reaffirms that the impassable limit of the legislature is to not annul the recourse requirements which the protected person was convinced to have met and to have secured for his/herself the right to a certain social benefit. This parameter will have vital importance in all situations in which the legislature's attempt to save on social spending will (as has already been brought by Law no. 214 of 2011) put a number of obstacles so detailed and complex as to make it virtually impossible for many people to have access to a retirement pension.

It should however be noted that recently, on the subject of solidarity contribution from higher pensions (in particular those of managers, senior public managers and judges), CCRI, in its judgement no. 116/2013, declared the unconstitutionality of the levy.<sup>52</sup>

Even more delicate issues are contemplated in all cases in which the economic value of the reduction or the amount of pension casts a doubt upon compliance with the constitutional principle of 'means appropriate' to the needs of life, as established in Art. 38, CORI.

For example, the Court of Palermo, Section Labor Disputes, by order dated 6 November 2013 has raised the issue of the constitutionality of Article 24, paragraph 25, of the Legislative Decree no. 201 of 6 December 2011, converted into Law no. 214 of 22 December 2011, to the extent available, for the 2012-2013 period, the block of automatic equalization of pensions amounting to more than three times the minimum INPS (€1,441.58 per month in 2012, and €1,486.29 per month in 2013, before tax).

The legislature of the 'crisis' has set a decidedly low-end income that has strongly affected more than six million retirees who, in the face of constant loss of purchasing power of the currency, which has long been recorded in the country, have seen their pension benefits impoverish even further, against all logic and in defiance of their constitutionally protected rights.

From the moment when the above pension holders undergo, by law, the automatic revaluation block, they bear a financial loss of considerable scope that is not only imminent, but also for the future, in the absence of any provisions for recovery in the subsequent years, will continue bringing losses, without interruption, endlessly and so far as to affect the extent of survivors' pensions, and the benefits that the survivors can expect will be substantially reduced in respect of the real value of pensions, which appears manifestly unjust and irrational since it ignores inflation's objective impact on income, with serious repercussions on the economies of families. Hence the doubt as for the constitutionality of the regulations in consideration, since they would be detrimental to some of the principles enshrined in the Constitution, particularly those of the "adequacy" and "proportionality" protected by Articles 3, 36, paragraph 1 and Article 38 paragraph 2, CORI.

Accepting raised constitutionality issue, the CCRI, with the judgment no. 70/2015, declared unconstitutional Article 24, paragraph 25 of Decree-Law no. 201/2011, in so far as, for the years 2012 and 2013, limited the appreciation exclusively on pension benefits in total amount up to three times the minimum INPS treatment.

The Italian government was quick to limit the impact of this judgment, with the enactment of art. 1 of Decree-Law no. 65 of 21 May 2015, converted with amendments into Law no. 109 of July 17, 2015.

Numerous criticisms have been raised in relation to this legislative intervention, because it can not be considered fully respectful of the "appropriateness" and "proportionality" principles set by the CCRI in the judgment no. 70/2015.

It seems clear, in fact, that substitution rules introduced by Decree-Law no. 65/2015 for the years 2012/2013, similarly to the ones declared unconstitutional, deviate significantly from the regulations in force prior to 2012 and one introduced from 2014.

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<sup>52</sup> For a masterful reconstruction of the story: SANDULLI (2013) Le "pensioni d'oro" di fronte alla Corte europea dei diritti dell'uomo, alla Corte costituzionale e al legislatore, *Rivista di Diritto della sicurezza sociale*, 683 ff.; SANDULLI (2013), La Corte costituzionale distingue fra equità fiscale ed equità previdenziale: a proposito della sentenza n. 116/2013, at: [http://www.amministrazioneincammino.luiss.it/wp-content/uploads/2013/08/Sandulli\\_commento-CC\\_116\\_2013.pdf](http://www.amministrazioneincammino.luiss.it/wp-content/uploads/2013/08/Sandulli_commento-CC_116_2013.pdf). In the same vein, the Italian Court of Cassation, judgement no. 17892/2014, reaffirmed the non-retroactivity of laws or administrative acts that result in reductions in the amount of pensions already in payment.

This divergence is moreover identified by the CCRI as a ground of irrationality of the legislation and it therefore can be further complained of unconstitutionality as soon as possible.

The question is whether any of the Italian *policy makers* have comprehensive awareness of the commitments made at the time of signing and ratification of the revised European Social Charter (1996) and its Protocol on collective complaints; recent positions taken by the European Committee of Social Rights against Italy (I'm referring to the *warning* on inadequacy of economic levels of protection highlighted with reference to the minimum pension and disability benefits contained in the 2013 Report on Italy; in perspective it is not possible to exclude a path similar to that followed by the pension reform in Greece, with respect to a significant number of people at risk of social exclusion further penalized by the Italian reform of 2011).

In particular, one wonders whether anyone in Italy has been questioning the nature of the commitment (compliance with the European Code of Social Security) taken at the time of signing and ratification of the revised European Social Charter (1996), in terms of non-regressivity of social policies.

With regard to the assessment of the future of social security rights, it's quite a common impression that social rights (and not only in Italy) are slipping more and more towards the area of human rights *tout court*<sup>53</sup> (which could mean, given the trend to evaluate them according to the logic of minimum *standards*, that the dream of the Constitution's legislators based on the idea of *welfare* is definitively waning...) and that now in the limelight are the so-called "new rights" (so-called "third generation rights", such as for e.g., the right to proper use of Information Communication Technology<sup>54</sup>).<sup>55</sup>

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<sup>53</sup> Such a scenario seems to be the occupation of MODUGNO (2007) in *I diritti del consumatore: una nuova generazione di diritti?*, in *Diritti dell'individuo e diritti del consumatore* (ed. COCCO), Giuffrè 2010, 1, ff; the author reminds us that "The substantive equality is a necessary condition for positive freedom; but such an equality is inconceivable if not within the group or the community to which each person is integral, and therefore by virtue of decisions of the group or community the inequalities between people concretely considered are then removed (or tend to be removed). The need for such a determination is satisfied by the recognition of social rights – the rights of individuals that ensure (or tend to ensure) the "freedom through or by means of the State" (BOBBIO). In other words, while the formal equality – that in itself does not require specific services – is sufficient for the recognition (in addition to the civil rights) of political rights, only reference to the concept of substantive or factual equality makes it possible to conceive the social rights as co-essential to the person as a concrete dimension".

<sup>54</sup> Not coincidentally, in the last months of 2014 in Italy – promoted by the president of the Chamber of Deputies – has opened a public consultation (naturally, on the web) on a "Decalogue" to protect Internet users; the scientific coordinator of the initiative is Prof. Stephen Rodotà, the author of, among other, of *Il diritto di avere diritti*, Laterza 2012.

<sup>55</sup> They even shared the concerns of MODUGNO, cit. : "Now, apart from the preliminary finding that, with reference to the so-called 'third generation' rights, these constitute a category too heterogeneous and vague to enable us to understand what exactly they are, and a subsequent observation that it is difficult to find any unifying concept serving as a marker of such a distinct 'generation', it can not be denied that the very authors that propose them appear doubtful of the possibility of qualifying them as real rights, rather than as simple interests, aspirations or desires, those that belong to you. Therefore, the question arises as to the effectiveness of the recognition of the 'emerging rights': how and why these rights arise, how and why are they recognized, in what way and in what direction are they configured? The possibility (of course, empirically) of 'classifying' (melius: of identifying with a descriptive method of sociological inquiry) the rights into different 'generations' does not seem to prevent to bring 'new' rights, as emerging, to the basic paradigms of negative freedom and positive freedom, the formal equality and substantive equality. Therefore, the commitment to the removal of imbalances and inequities actually assumed in chapeau of Art. 3 CORI is not that of institutional aspect of the effectiveness principle of the rights. Hence, in the State form, as drawn from European constitutions after the World War II to claim freedom from want has been made a condition that makes it possible to access equal chances of freedom and the effective enjoyment of the rights of the individual. There is no doubt that the premise of this discussion lies in the evolution of social consciousness, and in facing new needs and demands, primarily due to technological development, which has rendered insufficient the catalogue of constitutional rights and that brought us today to speak of the 'new rights' not yet listed therein. If it is, in fact, historically true that the emergence of rights is a response to new needs as they come up in society, then it is now necessary, based on the catalogue of the rights enumerated in CORI, to assess whether and when we can properly speak of 'new rights'.

We must, in other words, ask whether new rights arising from social consciousness, irrespective of their legal recognition, can be envisaged and indeed constituted in legal terms, without implying a change in the constitutional catalogue."

### 5.2. A look at the scenario. A meta-right: the right to take advantage of rights

The problem of social exclusion, as a de facto denial of the recognized rights (civil, political, social, economic, cultural), this ‘new emergency’, seems to be able to draw increasingly significant legal attention, which in fact also refers to the aspects of the law (in the subjective sense meant not only for rendering of specific services, but for living in way that fully corresponds to the objective of human dignity) independently, that is, from the point of view of “full development of the human person” (Art. 3), and expression of the same human personality (Art. 2) to be impossible and to nullify the recognition and guarantee of fundamental human rights and to achieve equal social status.

Recognize and guarantee the inviolable rights to those who are marginalized or socially excluded is simply and hypocritically a *flatus vocis*.

Those who are socially outcast, while their rights can be recognized and protected, must be able to take advantage of those rights.

Hence a precondition right: the right to take advantage of the rights, which in Art. 12 of the Swiss Constitution of 2000 is proclaimed with a pragmatic formula as “right to assistance in cases of need”: *“those in need and unable to provide for themselves have the right to be helped and assisted and to receive appropriate means for a dignified existence”*.

Is it perhaps difficult to construct this ‘new’ way of conceiving<sup>56</sup> the right to social security in the Italian constitutional context on the basis of the expectation that *“fundamental duties of political, economic and social solidarity be fulfilled”* per Art. 2, CORI and bearing in mind the *“equal social dignity”* mentioned in Art. 3, CORI?

The sign of the acquired, express relevance of such a ‘precondition’ right, such a primary and fundamental right, is offered today generally by Art. 117, paragraph 2, letter. m), CORI, that, in listing the exclusive competence of the state legislature, requires *“determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory”*.

It is a law conditioning the guarantee of other rights, a meta-right, and at the same time a “right to minimum conditions of existence”. Today it is certainly not enforceable (but maybe with more chances of success in the future), but can receive effectiveness from positive institutions, subject to testing proposals, such as the “minimum income guarantee” or that of “citizen’s income”<sup>57</sup> which have already seen, under Italian law, a partial attempt at implementation through Legislative Decree no. 237/1988 and later by Art. 23 of Law no 328/2000 – discipline of the integrated system of social services – which deferred to a subsequent legislative act the determination of the terms and resources for the extension of the RMI institution as a general measure to combat poverty, which represents the central values/non-values which regroup other work income support), and again as in the case of the so-called social card, issued to residents of Italian nationality who are in conditions of need (Art. 81, paragraph 32, of Leg. Decree no. 112/2008, converted into Law no. 133/2008).

In this evolutionary scenario we also ought to point out the explicit recognition (and effective compliance) of the “right to social and housing assistance” contained in Article. 34, paragraph 3 of the Charter of Fundamental Rights (CFREU), *“to ensure dignified care to all those who lack sufficient resources ...”* and *“in order to combat social exclusion and poverty”*.<sup>58</sup>

Consequently, the European Parliament on 20 October 2010 adopted a “Resolution on the role of minimum income in combating poverty and promoting an inclusive society in Europe” (2010/2039 (INI)).<sup>59</sup> The same perspective is raised by the judgement of the German Constitutional Court on 9 February 2010,

<sup>56</sup> SCAGLIARINI (2012), “L’incessante dinamica della vita moderna” I nuovi diritti sociali nella giurisprudenza costituzionale, at <http://www.gruppodipisa.it/wp-content/uploads/2012/05/trapaniscagliarini.pdf>.

<sup>57</sup> For a full analysis of this issue, see: BRONZINI (2013), Reddito minimo garantito: il diritto ad una vita libera e dignitosa, at: <http://www.bin-italia.org/article.php?id=1914>; BRONZINI (2014), Il reddito di cittadinanza, tra aspetti definitivi ed esperienze applicative, in *Rivista del diritto della sicurezza sociale*, 1 ff.

<sup>58</sup> BRONZINI (2012) Le tutele dei diritti fondamentali e la loro effettività: il ruolo della Carta di Nizza, in *Rivista giuridica del lavoro*, I, 53 ff.

<sup>59</sup> LOLLO (2012) Prime osservazioni su eguaglianza e inclusione, at <http://www.giurcost.org/studi/Lollo.pdf>.

which declared unconstitutional a part of the Hartz IV system, calling it “unreliable” for the selective parameters adopted.

And – at least to the interpretative, if not supplementary effects – an explicit recognition that allows more comprehensive and adequate interpretation of this “*right to welfare support*” that Article 38, CORI recognizes as a right of “*every citizen unable to work and without the necessary means of subsistence*”.

In conclusion – and at a glance – in the dynamic perspective of the rights-values, it can be said that a right, even if in the early stage of its grounding it is not accompanied by instruments of judicial defence (individual or collective), can still be fundamental in the ability to link to the core values spread throughout the legal system, and to stimulate a strong cultural and political pressure, which ends up... remodelling its formal and substantive quality.

A fundamental right-value transcends, in this sense, both the dimension of constitutional law (in the sense of recognition/guarantee at the hands of formal constitutional provisions), and the constitutional and legislative dimension, the structure/discipline of an individual right and a protected interest.<sup>60</sup>

Considerations such as those above can not therefore be in contrast with the lines of development<sup>61</sup> of the supranational institutions: the commitment made by EU Commission (from the Impact Assessment Guidelines – SEC (2009) 92, according to an ever more effective *Roadmap*) to include in the process of formation of its initiatives a (hopefully increasingly) specific impact assessment (economic, social and environmental) shows that the objective of creating a ‘social Europe’<sup>62</sup> has not disappeared, even in a crisis like the current one.

<sup>60</sup> Please refer to the methodological guidance of PEZZINI (2001) *La decisione sui diritti sociali: indagine sulla struttura costituzionale dei diritti sociali*, Giuffrè\_Milano.

<sup>61</sup> These include: Proposal for a European Parliament Resolution on the impact of the financial and economic crisis on human rights (2012/2136 (INI)) 1 March 2013; the European Parliament Resolution of 13 March 2014 on the employment and social aspects of the role and activity of the Troika (ECB, the Commission and the IMF), in relation to the Euro area countries subject to a program (2014/2007 (INI)).

<sup>62</sup> On the indefectibility of the democratic principle: BIN (2005), *Diritti e fraintendimenti: il nodo della rappresentanza*, in AA.VV., *Studi in onore di Giorgio Berti*, I, Jovene, 370, who points – more generally – how reducing the level of public services related to fundamental rights, which we are witnessing today, is not a choice of the sovereign people, but it is a choice imposed from outside the representative system (European stability pact, need to maintain the standards set by the EU, conditions imposed by the fund IMF). See also: HABERMAS (2011), *Questa Europa è in crisi*, Laterza; SUPIOT (2010) *L'esprit de Philadelphie. La justice social face au marché total*, Seuil-Paris.

On the systematic profile of the new structure: BIFULCO e ROSELLI (ed.) (2013), *Crisi economica e trasformazione della dimensione giuridica*, Giappichelli; BUCCI (2010), *l'Unione Europea tra tecnocrazia e “modello sociale”*, in RIVOSECCHI, ZUPPETTA (ed.), *Governo dell'economia e diritti fondamentali*, Cacucci, 190 ff; D ELLA CANANEA (2014) *Lex fiscalis europea*, in *Quaderni costituzionali*, 7 ff; EVERSON, JOERGES (2013), *Who is the guardian of the constitutionalism in Europe after the financial crisis ?* London School of Economics – LEQS paper No. 63/2013, at <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper63.pdf>; FABBRIZI (2014) *The Euro-Crisi and the Courts: Judicial Review and Political Process in Comparative perspective*, in *Berkeley Journal of International Law*; FONTANA (2014) *Crisi Economica ed effettività dei diritti sociali in Europa*, at <http://csdle.lex.unict.it/docs/workingpapers/Crisi-economica-ed-effettivit-dei-diritti-sociali-in-Europa/4774.aspx>; GIUPPONI (2014) *Il principio costituzionale dell'equilibrio di bilancio e la sua attuazione*, in *Quaderni costituzionali*, 51 ff. GROPPi, SPIGNO, VIZIOLI (2013) *The Constitutional Consequences of the Financial Crisis in Italy*, in *Contiades X* (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Asbgate, 89 ff; GIOVANNELLI (2013) *Vincoli europei e decisioni di bilancio*, in *Quaderni costituzionali*, 933 ff; JOERGES (2012), *Europe's Economic Constitution in Crisis*, *Zantra Working Paper – Transnational Studies*, at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2179595](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179595); JOERGES, GIUBBONI (2014), *Diritto, politica ed economia nella crisi europea*, in ALLEG, BRONZINI (eds.), *Il tempo delle costituzioni*, Manifestolibri-Roma, 107, ff; KILPATRICK, DE WITTE (eds.) (2014), *Social rights in times of crisis in the Eurozone: the role of fundamental rights challenges*, *EUI Working Papers*, LAW 2014/05, at <http://www.cadmus.eui.eu/haandle/1814/31247>; LO FARO (2014) *Compatibilità economiche, diritti del lavoro e istanze di tutela dei diritti fondamentali. Qualche spunto di riflessione sul caso italiano*, in *Giornale di Diritto del lavoro e delle relazioni industriali*, 279 ff; LO FARO (2014) *Europa e diritti sociali: viaggio al termine della crisi*, in CORAZZA, ROMELI, *Diritto del lavoro in trasformazione*, Il Mulino; LUCIANI (2012) *Conclusioni*, in ANGELINI e BENVENUTI (eds.), *Il diritto costituzionale alla prova della crisi economica*, Jovene-Napoli, 571 ff; MORRONE (2014), *Crisi economica e diritti. Appunti per lo Stato costituzionale in Europa*, *Quaderni costituzionali*, 79 ff; PINELLI (2013) *Le misure di contrasto alla crisi dell'eurozona e il loro impatto sul modello sociale europeo*, *Rivista giuridica del lavoro*, I, 231 ff; RAFFIOTTA (2013) *Il governo multilivello dell'economia. Studio sulla trasformazione dello Stato costituzionale in Europa*,

*Note 62 continued on page 150*

Note 62 continued from page 149

Bononia University Press-Bologna; RIZZONI (2011) Il “semestre” europeo fra sovranità di bilancio e auto vincoli costituzionali. Germania, Italia e Francia a confronto, <http://www.rivistaaic.it/il-semestre-europeo-fra-sovranita-di-bilancio-e-autovincoli-costituzionali-germania-francia-e-italia-a-confronto.html>; TUORI e TUORI (2013) *The Eurozone crisis. A constitutional analysis*, Cambridge University Press; VITERBO, CISOTTA (2012) *La crisi del debito sovrano e gli interessi dell'UE: dai primi strumenti finanziari al Fiscal compact*, in *Il diritto dell'Unione Europea*, 323 ff; YANNAKOUROU (2014) *Challenging Austerity Measures Affecting Work Rights at Domestic and International Level*, in KILPATRICK, DE WITTE (eds.) (2014), *Social rights in times of crisis in the Eurozone: the role of fundamental rights challenges*, EUI Working Papers, LAW 2014/05, at <http://www.cadmus.eui.eu/haandle/1814/31247>.

On more specific issues of social security, see: TEGA (2012) *I diritti sociali nella dimensione multilivello tra tutele giuridiche e politiche e crisi economica*, at <http://www.gruppodipisa.it/wp-content/uploads/2012/06/trapanitega.pdf>; GIUBBONI (2013), *Cittadinanza, lavoro e diritti sociali nella crisi europea*, in *Rivista del Diritto della sicurezza sociale*, 491 ff; GIUBBONI (2014), *Diritto e politica nella crisi del “modello sociale europeo”*, in *Previdenza Sociale*, 12 ff; GIUBBONI (2014), *I diritti sociali alla prova della crisi: L'Italia nel quadro europeo*, in *Giornale di Diritto del lavoro e delle relazioni industriali*, 269 ff; and also: PESSI (2013), *Ripensando il welfare*, in *Rivista del Diritto della sicurezza sociale*, 473 ff; GAMBINO e NOCITO (2012), *Crisi dello Stato, governo dell'economia e diritti fondamentali: note costituzionali alla luce della crisi finanziaria in atto*, at [www.astrid.it](http://www.astrid.it); FUCHS (2013) *Il ruolo del diritto del lavoro e della sicurezza sociale nella crisi economica, relazione alle Giornate di studio A.I.D.La.S.S. 16-17 maggio 2013 – Bologna*, at [http://www.aidlass.it/news/convegni/archivio/2013/Fuchs\\_Aidlass\\_2013.doc](http://www.aidlass.it/news/convegni/archivio/2013/Fuchs_Aidlass_2013.doc); PERSIANI (2013) *Crisi economica e crisi del Welfare State*, in *Diritto del lavoro e delle Relazioni industriali*, 641 ff; TREU (2013) *Le istituzioni del lavoro nell'Europa della crisi*, in *Diritto del lavoro e delle relazioni industriali*, 597 ff; BRONZINI (2014), *Europa sociale, togliamo il welfare agli Stati*, at: <http://www.bin-italia.org/article.php?id=1954>; ALAIMO (2013) *Presente e futuro del modello sociale europeo. Lavoro, investimenti sociali e politiche di coesione*, *Rivista giuridica del lavoro*, I, 253 ff; CALVANO (2013), *La tutela dei diritti sociali tra meccanismo europeo di stabilità e legalità costituzionale europea*, at [http://www.costituzionalismo.it/articolo/462/CAROLI\\_CASAVOLA](http://www.costituzionalismo.it/articolo/462/CAROLI_CASAVOLA) (2012) *Le protezioni sociali alla prova*, in NAPOLITANO (ed.) *Uscire dalla crisi. Politiche pubbliche e trasformazioni istituzionali*, Il Mulino-Bologna, 293 ff; RODRIGUEZ (2014) *Labour Rights in Crisis in the Eurozone: the Spanish Case*, in KILPATRICK, DE WITTE (eds.), *Social rights in times of crisis in the Eurozone: the role of fundamental rights challenges*, EUI Working Papers, LAW 2014/05, at <http://www.cadmus.eui.eu/haandle/1814/31247>; RODRIGUEZ PINERO Y BRAVO FERRER (2013) *Globalizzazione, flessicurezza e crisi economica*, in *Rivista giuridica del lavoro*, I, 521 ff; ROMAGNOLI (2013) *Diritto del lavoro e quadro economico: nessi di origine e profili evolutivi*, *Diritto del lavoro e delle relazioni industriali*, 585 ff; SCIARRA (2013) *L'Europa e il lavoro. Solidarietà e conflitto in tempi di crisi*, Laterza.

We also won't miss out the social partners' manifesto: CES-ETUC (2012), *Proposta di “Patto sociale per l'Europa”*.

Un tentativo di superamento delle tendenze neo-liberiste è poi in CROUCH (2013), *Making capitalism fit for society*, Cambridge Polity Press, where must be added the critical considerations of: DEAKIN, KOUKIADAKIS (2013), *The sovereign debt crisis and the evolution of labour law in Europe*, in COUNTURIS, FREEDLAND (eds.); *Resocialising Europe in a time of crisis*, Cambridge University Press, 163 ff; DEFRAIGNE et al. (eds.) (2012), *Les modèles sociaux en Europe. Quel avenir face à la crise?*, Bruylant-Bruxelles; DICKMANN (2013), *Governance economica europea e misure nazionali per l'equilibrio dei bilanci pubblici*, Jovene-Napoli ESCANDE-VARNIOL et al. (2012), *Quel droit social dans une Europe en crise?*, Larcier-Bruxelles.

Let's not overlook the consistent stimulating action of the Council of Europe; of particular significance is the High-Level Conference on the European Social Charter, entitled: “l'Europa riparteda Torino” (17 e 18 ottobre 2014) and the “Brussels Document on the Future of the Protection of Social Rights in Europe”, 12-13 February 2015, developed by the Working group of experts belonging to the Academic Network RACSE-ANESC.

# LATVIA, REPUBLIC OF

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## THE CONSTITUTIONAL SOCIAL SECURITY RIGHTS IN THE REPUBLIC OF LATVIA

*Assoc. Prof. KRISTINE DUPATE*

### ***1. The constitutional guarantees of social security rights***

The Constitution of the Republic of Latvia<sup>1</sup> contains two articles explicitly providing social security rights. Article 109 provides: *'Everyone has the right to social security in old age, for work disability, for unemployment and in other cases as provided by law.'* Article 111 stipulates: *'The State shall protect human health and guarantee a basic level of medical assistance for everyone.'* However there are few more norms which are connected with the social security rights. Those are – Article 110 providing for the obligation of the state to protect marriage, family, rights of the parents and children, Article 105 providing the right to property and Article 91 providing the principle of equality.<sup>2</sup>

The social security guarantees like other human rights in Latvian Constitution “appeared” relatively recently. Only on 15 October 1998 the Constitution was amended by Chapter VIII Fundamental Human rights.<sup>3</sup> Previously the human rights of constitutional level were stipulated by the constitutional level laws and such system was recognized as inefficient and incompatible with the European standards.<sup>4</sup> Therefore human right provisions of the Constitution were elaborated taking into account impressive body of existing international human rights law by the end of 20th century.

The provisions of the Constitution providing for the social security right are laconic. Such style on 1998 was chosen intentionally to fit into old-style Latvian language and form of the original text of the Constitution adopted on 1922. However laconic wording of the social security rights has not led to their restrictive interpretation and application. Even opposite – the Constitutional Court of Republic of Latvia has adopted numerous decisions on social security rights.<sup>5</sup> It is worthy to mention that the precondition for the existence and development of such a considerable case-law body in the field is the right to constitutional claim provided for any private person who considers him/herself as a victim of incompatibility of legal norms with the fundamental human rights stipulated by the Constitution.<sup>6</sup> The majority of the cases decided were originated from the constitutional claims of private persons.

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<sup>1</sup> Latvijas Republikas Satversme, adopted on 15 February 1922, entered into force on 7 November 1922; renewed Official Gazette No.43, 1 July 1993, re-entered into force on 31 March 1994.

<sup>2</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, pages 553-555.

<sup>3</sup> Official Gazette No.308/312, 23 October 1998.

<sup>4</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, R.Balodis, Ievads, pages 14-15.

<sup>5</sup> All decisions of the Constitutional Court of Republic of Latvia in Latvian are available at: <http://www.satv.tiesa.gov.lv/?lang=1&mid=19>. Majority of the decisions are also available in English at: <http://www.satv.tiesa.gov.lv/?lang=2>.

<sup>6</sup> Satversmes tiesas likums (*The Law on the Constitutional Court*), Official Gazette No.103, 14 June 1996, Article 192.

## 2. *The scope of the material and personal social security rights guaranteed by the Constitution*

### *The material scope*

Regarding material scope of Article 109 the Constitutional court has stressed following:

*“It has been established in the case-law of the Constitutional Court that Article 109 of the Satversme [the Constitution] guarantees the inhabitants the right to a stable and predictable, as well as effective, fair and sustainable system of social protection that ensures a proportional social security.”*<sup>7</sup>

In its case-law the Constitutional court has interpreted the right to social security under Article 109 as entailing different social security measures including social insurance and other social security instruments.<sup>8</sup>

The majority of the cases decided by the Constitutional court regarding Article 109 concerns statutory social insurance – regarding contributions to statutory social insurance,<sup>9</sup> old-age<sup>10</sup> and disability<sup>11</sup> pensions, unemployment,<sup>12</sup> accident at work,<sup>13</sup> maternity<sup>14</sup> insurance and allowances.<sup>15</sup> However the Court has interpreted Article 109 as applicable also to other types of social security instruments, i.e., state funded old-age pensions,<sup>16</sup> long-term public service pensions<sup>17</sup> and flat-rate social subsistence allowance.<sup>18</sup>

The social security rights regarding parenting and child-care allowances are reviewed by the Constitutional court under Article 110. It is considered that in the context of social security rights under Article 109 Article 110 is a special norm which is applicable in cases concerning the social and economic protection of a family.<sup>19</sup> It is also approved by the Constitutional court which has stated in one of the cases regarding child-care allowance that such right may be reviewed under both – Article 109 and Article 110.<sup>20</sup> The Constitutional court has decided cases on social insurance parental allowance<sup>21</sup> as well as non-contributory child-care social allowances<sup>22</sup> and allowance in case of a loss of breadwinner.<sup>23</sup> It follows from the case-law of the Constitutional court that Article 109 definitely covers statutory social insurance as well as statutory allowances.

<sup>7</sup> Decision in case No.2010-17-01, paragraph 7.

<sup>8</sup> See also Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 557.

<sup>9</sup> Decisions in cases No.2000-08-0109, 13 March 2001; No.2011-03-01, 19 December 2011; No.2011-08-01, 25 January 2012.

<sup>10</sup> Decisions in cases No.2001-02-0106, 26 June 2001; No.2001-12-01, 19 March 2002; No.2002-15-01, 23 December 2002; No.2004-21-01, 6 April 2005; No.2005-08-01, 11 November 2005; No.2006-05-01; 8 November 2006; No.2007-01-01, 8 June 2007; No.2007-04-03, 9 October 2007; No.2009-08-01, 26 November 2009; No.2009-43-01, 21 December 2009; No.2010-29-01, 18 February 2011; No.2012-12-01, 13 February 2013.

<sup>11</sup> Decision in case No.2012-09-01, 31 January 2013.

<sup>12</sup> Decision in case No.2001-11-0106, 25 February 2002.

<sup>13</sup> Decisions in cases No.2003-22-01, 26 March 2004; No.2010-17-01, 29 October 2010.

<sup>14</sup> Decision in case No.2003-19-0103, 14 January 2004.

<sup>15</sup> See also Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 557.

<sup>16</sup> Decisions in cases No.2010-21-01, 1 December 2010, No.2011-08-01, 25 January 2012.

<sup>17</sup> Decisions in cases No.2009-43-01, 21 December 2009; No.2009-86-01, 21 April 2010; No.2009-88-01, 15 April 2010; No.2013-01-01, 8 November 2013.

<sup>18</sup> Decision in case No.2011-20-01.

<sup>19</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 554.

<sup>20</sup> Decision in case No.2006-10-03, 11 December 2006., paragraphs 12-14.

<sup>21</sup> Decisions in cases No.2009-44-01, 15 March 2010

<sup>22</sup> Decision in cases No.2006-07-01, 2 November 2006; No.2006-08-01, 21 February 2007; No.2006-10-03, 11 December 2006; No.2007-13-03, 19 December 2007; No.2007-15-01, 12 February 2008.

<sup>23</sup> Decision in case No.2005-19-01.

The Constitutional court has not given exhaustive definition on the scope of Article 109, in particular, in which cases and what forms the social security must be provided. It may be explained by following considerations.

First, is the fact that Article 109 itself explicitly stipulates only obligation to provide social security in case of old-age, inability to work, unemployment and *'in other cases provided by law'*. It means that the Constitution itself leaves it for the legislator to choose the cases in which the persons must enjoy social security.

However it has stated to that regard:

*'The system of social protection is aimed at eliminating consequences of such circumstances, which are the so-called social risks. Article 109 of the Satversme enumerates social risks: old age, the loss of ability to work, and unemployment. However, this is not an exhaustive list of risks. Article 109 of the Satversme committees the legislator to include other social risks into the social protection system. A part of risks that must be included into this system follow from fundamental rights of persons and duties of the State enshrined in other articles of the Satversme, for instance, health protection, provision of care to disabled persons, the rights of the child, family support. Other social risks must be included into the social security system based on the essence of the social rights, as well as international liabilities of Latvia. The Ombudsman indicates that the duty of the State to establish such social security system that would comprise "all traditional social risks" follow from Article 109 of the Satversme [...].'*<sup>24</sup>

Second, Article 109 does not stipulate what is 'social security'. The social security may be provided in many different forms, for example, in the form of social insurance allowances, non-contributory allowances (flat-rate, needs based) allowances, social services. Besides, social security may be provided not only by statutory schemes but also by private schemes.<sup>25</sup> The Constitutional court has not yet ruled on two latter forms of social security instruments. However the Court has approved that Latvian social security system comprises not only social insurance but also social assistance. Both of them are mutually connected and supplement each other.<sup>26</sup> Nevertheless it is the legislator who has to define particular instruments, because in the field of social rights *'the State enjoys freedom of action when selecting methods and mechanism to apply when implementing these rights'*.<sup>27</sup> Besides:

*'Article 89 of the Satversme provides that "the State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia". Consequently, in cases, when there is doubt about the contents of the human rights included in the Satversme, they should be interpreted in compliance with the practice of application of international norms of human rights.'*<sup>28</sup>

It follows that the content of the concept of 'social security' and instrument provided to ensure it also largely depend on international obligations of Latvia.

In addition to abovementioned the Constitutional court has stated two important principles. First, with regard to social insurance that Article 109 does not entitle a person to the right to request compensation to unearned labour incomes if they are already compensated due to another risk,<sup>29</sup> and, second, that the rights of a person in a form of statutory social insurance may not be replaced by social assistance in case a person has been insured.<sup>30</sup>

<sup>24</sup> Decision in case No.2010-17-01, paragraph 7.

<sup>25</sup> Like occupational social security schemes organised by an employer or a private insurance company, widely spread in Western Europe (see, for example, **Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)**, *OJ L 204, 26/07/2006*, p. 23–36, Chapter 2 Equal treatment in occupational social security schemes). See also Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 558.

<sup>26</sup> Decision in case No.2000-08-0109, 13 March 2001.

<sup>27</sup> See decision in case No.2009-08-01, 26 November 2009, paragraph 15.

<sup>28</sup> Decision in case No.2011-03-01, 19 December 2011, paragraph 15.2.

<sup>29</sup> Decision in case no.2010-17-01, paragraph 10.2.

<sup>30</sup> Decision in case No.2000-08-0109, 13 March 2001.



According to the Constitutional court the material scope of Article 111 includes the state obligation to observe, protect and provide the rights of the person to the health. An obligation to observe – means that the state has an obligation not to intervene in the rights and freedoms of a person, i.e., to refrain from actions which might restrict the opportunities of a person to take care of a health condition him/herself. An obligation to protect – means that the state has to protect a person from intervention of other persons in the realization of his/her fundamental rights. An obligation to provide the right to a health means that a state has to undertake particular actions to implement such fundamental rights.<sup>31</sup>

The Constitutional court has defined the obligations of the state under Article 111 by referring to the UNO International Covenant on Economic, Social and Cultural Rights in the Member States has interpreted the rights to health protection in its General Comment No. 14 “The right to the highest attainable standard of health”.<sup>32</sup> It has cited that:

*[...] the rights include the rights to availability of such medical assistance system that would ensure equal possibilities to reach the highest health level possible for everyone. It must be taken into consideration, however, that the State can not undertake full responsibility for the possibilities of a person to reach the highest health level possible if it is determined by genetic factors, resistance or non-resistance of a particular person against different diseases, as well as unhealthy life style. Consequently, the rights to health protection comply with the duty of the State to ensure availability and accessibility of medical care institutions, services, equipment and medical products, as well as other conditions that affect the possibility to reach the highest health level possible.’<sup>33</sup>*

In addition to that the Constitutional court has reviewed under Article 111 the cases regarding imprisonment conditions, in particular. the food and hygienic norms. It has recognized that the state has also an obligation within the scope of Article 111 to ensure the equal access of all groups of the society to the factors facilitating good health, in particular, it includes the right to minimum and balanced nurture accessibility of imprisoned persons.<sup>34</sup>

As regards material scope of Article 105 providing for the right to property in the context of social security rights the Constitutional court has in general followed the case-law of the European Court of Human Rights (ECtHR) on Article 1 of the Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It has referred to the finding of the ECtHR<sup>35</sup> that statutory social security benefits in a modern democratic state should be reflected under Article 1 of the Protocol 1 of the ECHR. In addition to that the Constitutional court admitted the ECtHR that social security benefits fall under Article 105 irrespective of the source of the funding of such benefits.<sup>36</sup> Consequently it follows that although the discussed case concerned old-age pensions of statutory social security system which is based on contributions of the persons, Article 105 is applicable to the non-contributory social security benefits.<sup>37</sup> At the same time:

*[...] the Constitutional Court stated that the rights to receive pension disbursements are deemed as property rights in the understanding of Article 105 of the Constitution. However, when determining the compliance of a legal provision to the article in question, one has to take into account whether the case is related to the area of social rights. If the case is related to this area, it should at the same time be taken into account that the rights and legal interests of the submitter of the Application cannot be protected to the same extent as they would be protected in the case of restriction of property rights in their “classic” understanding [...].’<sup>38</sup>*

<sup>31</sup> Decision in case 2012-14-03, 9 April 2013, paragraph 12.

<sup>32</sup> Decision in case No.2008-37-03, 29 December 2008, paragraph 11.2.

<sup>33</sup> Decision in case No.2009-12-03, paragraph 17.

<sup>34</sup> Decision in case No.2009-69-03, 9 March 2010, paragraph 8

<sup>35</sup> *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, 12 April 2006, paragraph 51.

<sup>36</sup> Decision in case No.2007-01-01, 8 June 2007.

<sup>37</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 554.

<sup>38</sup> Decision in case No.2009-43-01, paragraph 20.

Article 91 which is widely discussed in case-law of the Constitutional court in social security matters provides for the general principle of equality. The content of such principle is classical one – it prohibits different treatment of similar circumstances and similar treatment of substantially different situations.<sup>39</sup> With regard to application of the principle of equality in the field of social rights the court has stated following:

*'The principle of equality usually applies along with other fundamental rights – especially because often one cannot adjudicate a case on the basis of this principle alone. The rights established in Article 91 of the Constitution are "relative", namely, although they stipulate equal treatment, by themselves they do not reveal the nature of this treatment, i.e. whether it should be favourable or unfavourable. In order to arrive at one of these outcomes, one should take into account other considerations outside the limits of the principle of equality [...].'*<sup>40</sup>

### *Personal scope*

Wording of Article 109 indicates that *'everyone has the right to social security'* and Article 111 refers to *'everyone'* with regard to the rights to basic level medical assistance.

However the laws put certain restrictions with regard to personal scope on the basis of the place residence and on the basis of nationality. The Constitutional court has delivered several decisions regarding such restrictions. One restriction has even been reviewed by the Grand Chamber of the ECtHR.<sup>41</sup>

The Constitutional court has held that restriction to receive statutory social insurance allowance in case of unemployment to those foreigners who have permanent residency permit does not comply with Article 109 as far as it concerns spouses of permanent residents of Latvia, because such spouses usually have an intention to stay in Latvia permanently however they may be entitled to permanent residency permit only after 5 years of residence. Such a restriction however complies with Article 109 with regard to other foreigners who do not have permanent residency permit, because other groups of foreigners in general do not have an intention to stay in Latvia permanently.<sup>42</sup> It is doubtful if such finding was correct, because, first, all employees in the territory of Latvia are subject to mandatory statutory social insurance irrespective of nationality and type of residence permit, second, UN Economic, social and cultural rights Committee commentary No.19 indicates that contributory allowances in principle must be available to all persons, including foreign workers, third, permanent residency permit may be acquired only after 5 years residence which is comparably long term for the entitlement to the social rights.<sup>43</sup>

In case concerning flat-rate non-contributory breadwinner loss allowance for a minor descendent was contested the restriction providing that a deceased person have had resided in Latvia at least 60 months including the last 12 months continuously.<sup>44</sup> The claimant was a minor – Latvian citizen and the deceased person was his father also Latvian citizen who had worked and permanently resided in Russia for many years and has passed away there. The Constitutional court found that the case, first, concerns the rights of a child, because breadwinner loss allowance is intended for minor children thus the case must be reviewed under Article 110. It found that there is no reasonable ground for granting such an allowance on the basis of a place of residence of a deceased parent, because the beneficiary is child, besides it is non-contributory allowance where social security contributions and length of service requirements are irrelevant. Further it found that even though the contested norm has a legitimate aim, the measures chosen do not correspond to the best interest of a child and that there is no justification for differential treatment of the children living

<sup>39</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, E.Levits, 91.pants, page 89.

<sup>40</sup> Decision in case No.2009-43-01, paragraph 20.

<sup>41</sup> Andrejeva v. Latvia 18 February, 2009, application No.55707/00.

<sup>42</sup> 2001-11-0106, 25 February 2002.

<sup>43</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 560.; referring to European Committee of Social Rights. Conclusions XiX-2, 2009, Latvia.

<sup>44</sup> Decision in case No.2005-19-01, 25 December 2005.

in Latvia with regard to the entitlement to the breadwinner loss non-contributory allowance on account of the place of residence of a deceased parent.

However the most notable decisions with regard to personal scope of the constitutional social rights concerns ‘tricky’ status of ‘Latvia non-citizen’ and periods of employment taken into account for the calculation of the old-age pension. In particular, according to the Law on State Pensions the periods of employment during Soviet occupation completed outside territory of Latvia are not taken into account for the purposes of the calculation of old-age pension. Such restriction applies to Latvian non-citizens while it does not apply to Latvian citizens.

First regarding status ‘Latvia non-citizen’ – unknown concept under public international law but existing under Latvian law as a consequence of Soviet occupation. The Constitutional court has explained the reasons of the existence of such status in a following way:

*‘After reinstatement of independence, the legislator had to decide on establishing the body of Latvian citizens. Taking into consideration continuity of Latvia as an international legal subject, there was reason for renewing the aggregate body of Latvia in the same way as it was determined in 1919 “Law on Citizenship”. Thus, Latvia did not grant citizenship to persons, who had it before occupation of Latvia, but renewed the right of these persons de facto [...]. Consequently, continuity of Latvia as an entity subject to international law gave legal groups for granting the status of citizens to certain group of person, and it was necessary to grant a special legal status to those persons who travelled to Latvia during the occupation period without obtaining any other citizenship.’*<sup>45</sup>

Further the court has stressed that Latvian non-citizens has legal ties with Latvia and there exist mutual rights and duties, however it may not be considered as variety of Latvian citizenship and *‘the context of State continuity is the determining factor and serves as a crucial aspect to regard differences in the procedure for calculating pensions of citizens and non-citizens as grounded.’*<sup>46</sup>

According to this the Constitutional court on 26 June 2001 in case No.2001-02-0106 found that Latvia under public international law may not be responsible for the payout of old-age pensions to Latvian non-citizens for the periods of employment completed outside territory of Latvia for period until 1 January 1991. Consequently such a restriction complies with Articles 89, 91 and 109 of the Constitution and it also complies with Article 14 of European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the 1 Protocol of the Convention.

The restriction was also contested before the ECtHR.<sup>47</sup> The ECtHR reviewed the case in Grand Chamber and found that there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol 1. Even though under factual circumstances the dispute was about the situation in which periods of employment factually carried out in the territory of Latvia but formally at Kiev, Ukraine where particular State range enterprise had a head office, the ECtHR did not take into account the details and ruled that in principle such different approach towards periods taken into account for the purposes of the calculation of the old-age pensions for Latvian citizens and non-citizens is contrary to the ECHR. Such treatment constitutes unjustified discrimination on the grounds of nationality. The decision was analysed in detail from the perspective of public international law in partly dissenting opinion of judge Ziemele.<sup>48</sup>

Latvia did not implement the ECtHR judgement in its broader sense. It simply took into account employment periods of Ms. Andrejeva factually performed in Latvia and managed to conclude bilateral international agreements with numerous ex-Soviet republics on mutual recognition of employment periods for the purposes of social insurance. The most important, i.e., affecting considerable part of the population of Latvia, was agreement concluded with Russian Federation on 19 February 2011.

<sup>45</sup> Decision in case No.2010-20-0106, paragraph 13, by referring to Ziemele I. Starptautiskās tiesības un cilvēktiesības Latvijā: abstrakcija vai realitāte. – Rīga: Tiesu namu aģentūra, 2005, pp. 103.

<sup>46</sup> Decision in case No.2010-20-0106, paragraph 13.

<sup>47</sup> Andrejeva vs. Latvia, 18 February, 2009, application No.55707/00.

<sup>48</sup> A judge from Latvia.

Such an approach, namely, that Latvia is not under obligation to provide old-age pensions for the periods of employment carried out outside Latvia by Latvian non-citizens unless otherwise provided by bilateral international agreement was once again re-approved by the Constitutional court on 17 February 2001 by decision in case No. 2010-20-0106 where the court stated that ECtHR decision in case *Andrejeva vs Latvia* concerned only factual circumstances of the particular claimant, namely, periods of employment factually completed in Latvia. Consequently it does not follow from such a decision of the ECtHR and also from the public international law that Latvia has an obligation to provide old-age pensions to Latvian citizens and non-citizens on the same conditions.

### **3. *The Constitutional regulations' impact on the content of social security rights in the domestic legal system***

In general the impact of the constitutional regulation in the field of social security thanks to the Constitutional court is considerable. The fact is that the constitutionality of social security rights provided by lower range normative acts have been contested very frequently in comparison to other fundamental rights. It may be explained by the fact that social security rights affect the greatest part of the population and that they 'comes into play' of the life of people when social risk occurs.

The Constitutional court in such decisions has established certain very important principles.

First, the Constitutional court has provided the principle of socially responsible state. It has stated that:

*'The duty of the State to form a sustainable and balanced policy to ensure welfare of the society follows from the principle of a socially responsible state. Therefore the legislator has to elaborate such regulatory framework that would be aimed at sustainable development of the State.'*<sup>49</sup>

Second it has defined the obligations of the State in the field of social security rights as follows:

*'The Constitutional Court in its judgments repeatedly adjudicated the constitutional compliance of legal provisions pertaining to social rights, affirming that the State itself is responsible for the system of social and economic protection (types and amounts of allowances) and its maintenance. This system is dependent on the economic situation in the State and the available resources. Moreover, the State should be vested with wide-ranging freedom of action when deciding the matters of social rights.'*<sup>50</sup>

The Constitutional court has also defined its limits of competence when deciding cases regarding social security rights, in particular, that:

*'Character of the social rights also determines the boundaries of competence of the judicial power in respect to the particular domain. When realizing social rights the legislator enjoys an extensive freedom of action as far as it is reasonably connected with the economic situation of the State; however, this freedom of action is not unlimited [...]. Moreover, "the Judicial Power has the duty of assessing whether the legislator has observed the limits of the above freedom of action [...].'*<sup>51</sup>

The Constitutional Court in assessing if the state has fulfilled its positive duties in the field of fundamental social rights of the persons has to establish: 1) whether the legislator has performed any activities for realization of social rights; 2) whether the legislator has adequately realized the social rights, namely, whether persons had the possibility to exercise their rights at least at the minimum amount; 3) whether the legislator has not violated general legal principles.<sup>52</sup> Further, when the court has to establish, if restriction of the rights provided by Article 109 corresponds to the Constitution, it has to investigate: 1) whether the restriction has been established by law or based on a law; 2) whether the restriction has a legitimate aim; 3) whether it complies with the principle of proportionality.<sup>53</sup> The same formula applies also to other norms of the Constitutions providing fundamental rights.

<sup>49</sup> Decision in case No.2011-03-01, 19 December 2011, paragraph 22.

<sup>50</sup> Decision in case No.2009-43-01, paragraph 24.

<sup>51</sup> Decision in case No.2011-03-01, 19 December 2011, paragraph 15.4.

<sup>52</sup> Decision in case No.2011-03-01, 19 December 2011, paragraph 15.1.

<sup>53</sup> Decision in case No.2011-03-01, 19 December 2011, paragraph 15.1.

The cases decided by the Constitutional court in the field of social security rights may be divided in groups by the types of social security risks. The decisions usually deal with conditions under which the protection against social rights is provided.

One group of cases which was widely discussed was on the obligations of the state to cover the costs of medication, especially in cases where the medication is crucial for the survival and medication is very costly.<sup>54</sup> They were reviewed under Article 111. The Constitution the Constitutional court stated, first, that right to life under Article 93 of the Constitution and Article 2 of the ECHR is involved only as far it concerns cases where the threat to life is urgent and particular, second, that the obligation to ensure medication which is vital to the advanced life support may not be interpreted as equal to the urgent and particular threat to the life because no human rights document provides guarantees to a particular life expectancy and no state is able to provide the right to maximum possible life expectancy. The court in general recognized that neither Article 111 nor Article 110 (with regard to the children) requires provision of all necessary medical services free of charge. The state has an obligation to provide a medication free of charge only within the limits of available resources.<sup>55</sup> However the state has an obligation to find the most effective way of the use of available resources and provide the fair balance in distribution of the available resources with a view to provide accessibility to medical services to the wider circle of persons possible.<sup>56</sup> Thus in all cases regarding such matter the Constitutional court ruled that legal regulation on the state paid medication corresponds to Article 111 of the Constitution.<sup>57</sup>

Another group of cases concerns different kind of child-care allowances. They were reviewed under Article 110 which is usual case if the social rights concerns family or child related benefits.

The first 'child-care allowance' case was regarding the restriction to remain in active employment and to receive child-care allowance under social allowances scheme.<sup>58</sup> The court found that such a restriction does not correspond to the best interests of the family and the children, because the aim of the allowance is to assist to the family in case of birth of a child. However taking into account the low level of income in general many parents are forced to remain in active employment in order to provide sufficient subsistence and refuse from social allowance.

The case was followed by another application which contested newly adopted regulation entitling parents who remain in active employment during child-care to receive 50% of allowance they would receive if they would be on full-time child-care leave.<sup>59</sup> The Constitutional court found that new regulation does not correspond to the principle of equality as far as it treats parents on part-time and full-time work and families with good income and families with low income equally.

In next claims numerous mothers contested the upper limit of the child-care allowance (LVL 392 or EUR 556).<sup>60</sup> The court found that definition of maximum limit of child-care allowance is not contrary to Article 110 (Article 91) of the Constitution, primarily because the allowance was paid under state social allowance scheme not social insurance system and because maximum amount of allowance several times exceeded official minimum subsistence allowance.

Further mothers of disabled children contested the norm entitling to disabled-child-care allowance (flat-rate social allowance) only parents out of active employment<sup>61</sup> and norm restricting the right to receive maternity allowance (statutory social insurance) and disabled-child care allowance simultaneously.<sup>62</sup> In both cases the court found that restrictions are unconstitutional because disabled-child care allowance is

<sup>54</sup> Decisions in cases No.2009-12-03, 7 January 2010; No.2012-26-03, 28 June 2013.

<sup>55</sup> Decision in case No.2012-14-03, paragraph 1.2

<sup>56</sup> Decision in case no.2009-12-03, 7 January 2010, paragraph 17

<sup>57</sup> Decisions in cases No.2009-12-03, 7 January 2010; No.2012-14-03, 9 April 2013; No.2012-26-03, 28 June 2013.

<sup>58</sup> Decision in case No.2005-09-01, 4 November 2005.

<sup>59</sup> Decision in case No.2006-07-01, 2 November 2006.

<sup>60</sup> Decision in case No.2006-10-03, 11 December 2006.

<sup>61</sup> Decision in case No.2006-08-01, 21 February 2007.

<sup>62</sup> Decision in case No.2007-15-01, 12 February 2008.

not aimed at the replacement of lost income from employment but at the accommodation of the special (additional) needs of the family with disabled child.

The next set of cases on child-care (parental) allowances followed on account of restrictions adopted on account of economic crisis.

The series of cases on child-care allowances were important because it demonstrated considerable rise of number of the constitutional claims submitted by the natural persons, in particular, the first child-care allowance case showed that the Constitutional court is accessible to everyone and that such institution indeed may help to improve the quality of the life of the society. It encouraged other parents what resulted in number of following claims regarding the system of award of child-care allowances.

There were two interesting decisions on the same matter where second was followed the first after more than 10 years<sup>63</sup> and where the court has changed its opinion. The cases were about the entitlement of the persons to social insurance benefits in case an employer has not factually made the contributions. The court in first case found such restriction as unconstitutional by stating that this is the state's obligation to collect statutory social insurance contributions and that employees factually lack any enforcement mechanisms against employers which do not factually provide contributions to the statutory social insurance budgets. However in second case regarding the norm restricting the right to receive old-age pension for only factually made social insurance contributions the court found that the state has provided sufficiently effective mechanisms for the collections of contributions and it has provided the persons with effective access to the information on factual contributions made by an employer.

The court however did not changed its opinion in two cases followed each other within almost 9 years period<sup>64</sup> regarding the restriction on the right to receive full old-age pension for employed persons. Interesting that in principle in both cases the court used the same arguments although the restrictions were adopted in considerably different circumstances, i.e., the second one was adopted on account of severe economic crisis.<sup>65</sup>

#### **4. Threats to social security rights in time of economic crisis**

The impact of economic crisis in the Republic of Latvia was considerable.

*'The State budget revenues had been decreasing, unemployment growing, bringing about the increase of the social insurance special budget expenditures. In the second quarter of 2009 Latvia underwent the most rapid decline of economic activity in the European Union. So, for instance, the revenues of the State consolidated budget during the first six months of 2009 were for 15% lower than those of the corresponding time period in 2008. At the same time, the expenditures of the State consolidated budget during the first six months of 2009 were for 7.2% higher than those of the corresponding time period in 2008. The Gross Domestic Product drop in comparison to the first six months of 2008 was 18.7%. The drop persisted also in the third quarter of 2009, reaching 18.4% [...]. The prognosticated amount of the government's external debt for the second half of 2009 was approximately 33.2% from the Gross Domestic Product, and it has increased for approximately 70% since 2008 [...].*

*During this time, the financial deficit of the State consolidated budget reached 449.9 million lats or approximately 3.5% from the Gross Domestic Product, and the prognosis was that the deficit may reach 1.3 milliard lats or approximately 9.5% from the Gross Domestic Product by the end of 2009. As a consequence, both the performance of the functions of the State and the possibility of the economic activity renewal in the foreseeable future would be put in danger.'*<sup>66</sup>

<sup>63</sup> Decisions in cases No.2000-08-0109, 13 March 2001, and No.2011-03-01, 19 December 2011.

<sup>64</sup> Decisions in cases No.2001-12-01, 19 March 2002, and No. 2009-43-01, 21 December 2009.

<sup>65</sup> See particularities of the issue in next section on implications of economic crisis.

<sup>66</sup> Decision in case No.2009-43-01, 21 December 2009, paragraph 27.1.

The situation, i.e., budget cuts affected first of all social security rights. On 16 June 2009 the Parliament adopted the Law on pay-out of state pensions and state allowances for the period 2009-2012.<sup>67</sup> The Law envisaged many restrictions with regard to social security rights. The most considerable and contested ones were 10% cut of long-term service pensions, cut of old-age pension in amount of 70% and cut of parenting allowance in amount of 50% for persons in active employment. The law entered into force in two weeks after adoption – on 1 July 2009.

The Government and the Parliament the need for such law grounded on following considerations:

*'Concerning the need to balance the revenues and expenditures of the social security system, the Saeima indicated that, as a result of the economic crisis, wages had decreased and unemployment – increased. Consequently, the social insurance special budget revenues dropped. The number of socially insured persons has also decreased for 12.3%. It is also evident from the information furnished by the Ministry of Welfare that the actual expenditures of the social insurance special budget were for approximately 86 million lats higher than revenues during the first six months of 2009 [...]. At the same time, the rapid increase of wages during the preceding years has brought about the increase of the expenditures of the social insurance special budget. The budget in question is a constituent part of the State budget. It is prognosticated that its expenditures will exceed the revenues in the years 2009 and 2010, thus creating the budget deficit. In order to curb this tendency and to ensure further sustainability of the social insurance budget, the deficit had to be reduced.'*<sup>68</sup>

All the mentioned restrictions were contested before the Constitutional court. The most considerable public debate was about restriction for employed old-age pension recipients to receive pension in full amount and consequent case before the Constitutional court.<sup>69</sup> The court in this case started with reminding the following:

*'The Constitutional Court, interpreting the above article [Article 109], acknowledged that, on the one hand, the enactment of these fundamental rights depends on the resources at the disposal of the State and society; however, on the other hand, if any rights to social protection are included in the fundamental law, the State is not entitled to refuse the enactment of these rights. In this case these rights are not just declaratory, their protection has constitutional value in Latvia.'*<sup>70</sup>

Consequently the state has the right to restrict social security rights. However, the court continued, that the state in the situation of rapid economic regression has an obligation to provide the social rights only in a minimum level, i.e., in a way that the rights are not infringed in its substance, because *'the aim of these rights is to ensure life worthy of a human being'*. It found that the restriction has a legitimate aim – securing the sustainability of the social insurance budget by means of balancing its revenues and expenditures, thus ensuring the welfare of society. It also found that the means chosen are appropriate to attain the legitimate aim. Nevertheless the means chosen were not necessary to attain such aim. The court found that deficit in expenditure of social security budget occurred because of unreasoned political decisions, one of them – the decision to include new social insurance risk – parenting – without proper coverage in a form of additional social security contributions. The court also found that the restriction does not correspond to Article 1 of the Constitution or the general principles of law like principle of legal certainty on account of too short transitional period (two weeks) and equal treatment because not all recipients of old-age pension are in similar circumstances (with regard to the amount of old-age pension, other sources of income available and different amount of amount of income from decreased old-age pension and employment). Consequently the Constitutional court found that cut of old-age pensions in amount of 70% for recipients in active employment was contrary to Article 1 and 109 of the Constitution as from the moment of the adoption. The court took into account the difficulties the state budget may face in such a situation and gave the transitional period for pay-out of cut pensions until 1 March 2010. Interesting

<sup>67</sup> *Par valsts pensiju un valsts pabalstu izmaksu laika periodā no 2009.gada līdz 2012.gadam*, Official Gazette No.100, 30 June 2009.

<sup>68</sup> Decision in case No.2009-43-01, 21 December 2009, paragraph 27.1.

<sup>69</sup> Decision in case No.2009-43-01, 21 December 2009.

<sup>70</sup> Decision in case No.2009-43-01, 21 December 2009, paragraph 24.

that in this case the Parliament and the Government put forward an argument that the restrictions were justified by the international obligations, i.e., by loan agreements concluded with European Community and International Monetary Fund which envisaged, among many other measures, cuts in social security allowances. The Constitutional court replied to that strictly, namely, that the international obligations undertaken by the state itself may not serve a valid argument for the restriction of social security rights guaranteed under Article 109 of the Constitution.

The court in the same case reviewed decrease of amount of long-term service pensions in amount of 10% and under the same argumentation found such restriction also as unconstitutional.

The Constitutional court afterwards reviewed few more cases regarding long-term service pensions for prosecutors, militaries and system of interior.<sup>71</sup> The substance in these cases was the same as in old-age pension restriction case. The only difference was that the contested norms were contained by special long-term service pensions' laws however their content was the same as norms of Law on pay-out of state pensions and state allowances for the period 2009-2012. In all cases the Constitutional court made the same findings as in case No.2009-43-01.

The consequence of such decisions of the Constitutional court was adoption of the amendments by the Parliament envisaging other kind of restrictions of the social security rights which concerned almost all other social security risks.<sup>72</sup> They envisaged, in particular, that persons in case of maternity, paternity, parenting, accidents at work and illness are entitled to a daily social insurance allowance not exceeding amount of LVL 11.51 (EUR 16.37). In case statutory social insurance salary exceeds defined amount the persons were granted an allowance in amount of 50% from the sum exceeding LVL 11.51 (EUR 16.37).

The next most discussed case concerned the cut of parental allowances.<sup>73</sup> The parents contested the norm of the Law on pay-out of state pensions and state allowances for the period 2009-2012 providing the cut of parenting allowance in amount of 50% for parents in active employment. They contested the compliance of the restrictions with general, principles of law, namely Article 91 – equal treatment and Article 1 – legal certainty. The court found that there was no breach of the principle of equal treatment because parents of small children in active employment are not in comparable situation with parents on parental leave. In former case the state has an obligation to provide the support for a family while in latter case the state has an obligation to replace the lost income from employment. Further the restriction complies with the principle of legal certainty. It is because the provision of social security rights is dependent of resources available and in the sphere of provision of social security rights there is considerable political dimension where the legislator enjoys wide margin of appreciation, besides one may not expect from the legislator the same actions in the field of economic, social and cultural rights like in the field of civil and political rights. Even though principle of legal certainty implies an obligation to provide sparing transitional period nevertheless in the situation of the collision of the necessity to protect essential interests of the society and legal certainty the former must be given the priority. Taking into account the fact that the restriction has the legitimate aim – provision of sustainability of the social security budget and thus protection of the welfare of the whole society and that families even after restriction entered into force retained the support from the state in a form of social allowances the restriction corresponds to Articles 1, 91 and 110 of the Constitution.

But it was not the end of saga on restriction of amount of parental allowances and compliance with the principle of legal certainty. The restriction was contested before the ECtHR on the breach of Articles 6, 8, 14 of the ECHR and Article 1 of the Protocol 1. The application lodged by 23 applicants in case *Šulcs against Latvia and 22 other cases*<sup>74</sup> was found by the ECtHR as inadmissible. The ECtHR in its decision

<sup>71</sup> Decisions in cases No.2009-76-01, 21 April 2010; No.2009-86-01, 21 April 2010, No.2009-88-01, 15 April 2010.

<sup>72</sup> Grozījumi likumā "Par valsts pensiju un valsts pabalstu izmaksu laika periodā no 2009.gada līdz 2012.gadam", *official Gazette No.200, 21 December 2009.*

<sup>73</sup> Decision in case no.2009-44-01, 15 March 2010.

<sup>74</sup> Application No.42923/10. Available in English at HUDOC database at <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22docname%22:%5B%22C5%A0ulcs%22%22%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%22CHAMBER%22%22DECISIONS%22%22%22itemid%22:%5B%22001-108352%22%22%7D> (accessed on 19 May 2014).



relied to the great extent on the arguments provided in decision No.2009-44-01 by the Constitutional court. It also ruled that restriction is compatible with Article 1 of the Protocol 1 of the ECHR because *'the overall financial situation in the respondent State had an adverse effect to the parental benefit scheme which, if it had remained unchanged, it would have endangered the sustainability of the overall social budget'*.<sup>75</sup> In addition it found that the applicants were not deprived the right to parental allowance in its essence because they were given the choice either continue working and receive 50% of such allowance or to be on parental leave and receive 100% of parental allowance thus principle of proportionality has also been observed.

Consequently even the ECHR accepted the cuts itself and the way it was done in the circumstances of economic crisis.

### ***5. Assessment of the future of social security rights in light of the Constitution***

Although Latvia started to recover from economic crisis several years ago and no more considerable budget cut measures regarding social security rights were taken there are several cases on social security matters currently pending before the Constitutional court. It testifies that social rights are still topical for Latvian society, namely, that there are many persons and groups of persons to whom rights under social security system are crucial. It may be explained several reasons. First, is the fact that income of Latvian population is still among the lowest among the EU member state. The difference between income and number of high level earners and low level earners is highest in the EU. It makes considerable part of society in Latvia highly dependable on state support. Second, is the fact that usually social security system is regulated by series of complicated and very detailed legal acts which are closely and mutually connected. It means that any amendments to the legal acts regulating social rights must be elaborated very carefully not only taking into account available budgetary resources but also compliance with numerous general principles of laws like equality, legal certainty, proportionality etc. Third, the history demonstrates that pre-election periods result in populist amendments to social security laws with an aim to attract electorate. However such decisions are very frequently contrary to the interest of sustainability of the whole social security system.

In such a situation the role of the Constitutional court remains crucial in controlling the just, sustainable and reasonable distribution of the available public resources.

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<sup>75</sup> Paragraph 29.

## LITHUANIA, REPUBLIC OF

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### THE RIGHT TO SOCIAL SECURITY IN THE CONSTITUTION OF THE REPUBLIC OF LITHUANIA

*Dr. VIDA PETRYLAITE*

The fundamental human, social and citizen's rights were formulated in the Constitution of the Republic of Lithuania adopted by referendum in 25 October 1992. The Constitution is a legal act of supreme legal power. No law or other legal act may be in conflict with it because the Constitution lays down the legal basis for the rest of all Lithuanian legislation and determines the nature of all legal branches, including social security law. Thus, the Constitution provides several legal norms that have great importance to the whole system of further legislation regulating specific social security rights in Lithuania. The constitutional jurisprudence concerning social security is linked with different global and national processes. The economic crisis has also asked to amend or even to reinterpret already existing practice.

This article aims at providing basic principles of social security rights established in the Constitution and their interpretation in constitutional jurisprudence. Some aspects of the constitutional doctrine of social security rights, which were determined by changes in the economy, are also discussed.

#### ***1. The constitutional guarantees of social security rights***

Different provisions of social rights are included in Lithuanian Constitution. This inclusion has a strong historical background. Certain provisions concerning social rights were presented in the Constitutions of 1922, 1928 and 1938.

The Constitution of 1922<sup>1</sup> already contained in itself special chapter No XIII "Social Security", which established different rights of social security: public health, social welfare for families with children, security in case of old-age, sickness, unemployment and accidents at work. Provisions concerning labour regulation, family matters and education guarantees also were set in this Chapter. The same provisions remained in the text of the Constitution of 1928.

The Constitution of 1938<sup>2</sup> presented very similar provisions concerning social security rights in the chapter No IX "Social Security", with the exception of right to social security in case of unemployment. Differently from previous Constitutions, the chapter "Social Security" was devoted only to the guarantees of social security. Provisions concerning labour regulation, family matters and education were set in different specific chapters.

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<sup>1</sup> [http://www3.lrs.lt/pls/inter\\_archyvas/dokpaieska\\_arch.showdoc\\_l?p\\_id=112956&p\\_query=&p\\_tr2=2](http://www3.lrs.lt/pls/inter_archyvas/dokpaieska_arch.showdoc_l?p_id=112956&p_query=&p_tr2=2).

<sup>2</sup> [http://www3.lrs.lt/pls/inter\\_archyvas/dokpaieska\\_arch.showdoc\\_l?p\\_id=113395&p\\_tr2=2](http://www3.lrs.lt/pls/inter_archyvas/dokpaieska_arch.showdoc_l?p_id=113395&p_tr2=2).

Together with restoration of independence, further restatement and elaboration of social rights took place in the Constitution of 1992.<sup>3</sup> The Lithuanian Constitution of 1992 provides broader list of guarantees of social rights if comparing to the first Constitutions. Though, the very composition of the text of the Constitution is different – there is no single chapter which would be devoted to regulation of social rights. Specific rights to social security and related rights are distributed in different chapters of the Constitution.

Article 29 of the Constitution states that all people shall be equal before the law, the court and other state institutions and officers (Chapter II. The Human Being and the State).

Article 38 of the Constitution states that the family shall be the basis of society and the state. Family, motherhood, fatherhood and childhood shall be under the care and protection of the state (Chapter III. Society and the State).

Article 39 of the Constitution states that the state shall take care of families bringing up children at home and shall render them support in the manner established by law. The law shall provide for paid maternity leave before and after childbirth, as well as for favourable working conditions and other privileges (Chapter III. Society and the State).

Article 48 of the Constitution states that every person may freely choose an occupation or business and shall have the right to adequate, safe and healthy working conditions; adequate compensation for work; and social security in the event of unemployment (Chapter IV. National Economy and Labour).

Article 52 of the Constitution states that the state shall guarantee the right of citizens to old-age and disability pension as well as to social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner and other cases provided by law (Chapter IV. National Economy and Labour).

Article 53 of the Constitution states that the state shall take care of people's health and shall guarantee medical aid and services in the event of sickness. The procedure for providing medical aid to citizens free of charge at state medical facilities shall be established by law (Chapter IV. National Economy and Labour).

It should be noted, that the provisions of the Constitution without any initial intend, set almost the full list of 'standard' social risks provided in international legal acts:<sup>4</sup> medical care – Article 53; sickness benefit – Article 52; unemployment benefit – Article 52 and Article 48; old-age – Article 52; family benefit – Article 39; maternity – Article 39; invalidity – Article 52; survivors' benefit – Article 52; with the exception of not mentioning directly employment injury – Article 48.

Upon restoration of the independent state of Lithuania, it became evident that the inherited system of social guarantees did not correspond the relations of market economy. Devising a social protection corresponding changed economic and social living conditions, a model of social protection was chosen according to which state social insurance acquires the main role.

The principles of the relations of state social maintenance are consolidated by the Law on the Principles of State Social Security System<sup>5</sup> passed on 23 October 1990 whereby it is established that State Social Maintenance System is the basis of State Social Welfare. The law also provides that along with this system, other public and private systems of social maintenance may exist.

## ***2. The scope of the material and personal social security rights guaranteed by the Constitution***

Constitutional case law gives an explicit understanding of the meaning of principal constitutional provisions. The jurisprudence of the Constitutional Court established quite a broad understanding of specific social rights mentioned in the Constitution.

<sup>3</sup> Parliamentary record, 1992, No 11. Text in English: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=21892](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=21892).

<sup>4</sup> E.g. ILO Convention concerning Minimum Standards of Social Security of 1952; Council of Europe European Code of Social Security of 1964.

<sup>5</sup> Parliamentary record, 1993, No 1. Text in English: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=252627](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=252627).

### *The social nature of the state*

The social nature of the state is very important. Even though there is no such direct notion of the social nature of the state of Lithuania in the Constitution, the Constitutional Court has developed that principle in its jurisprudence. The main constitutional provision allowing recognizing the social state's conception is set in the article 52 of the constitution.

Article 52 of the Constitution stipulates that the State shall guarantee the right of citizens to old age and disability pension, as well as to social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and other cases provided by law. These provisions express social character of the state, while social maintenance, i.e. contribution of the society to maintenance of such its members who are incapable to provide themselves from work or other means or who are not sufficiently provided due to important reasons provided by law, is recognised as having the status of a constitutional value.

This is in line with the contemporary concept of functions of the state, as well as the constitutional tradition of the Lithuanian State of the 20th century, the origins of which is in the 1922 Constitution which provided that the state, pursuant to certain laws, shall protect employees in the event of sickness, old age, accident or unemployment.

Alongside, it should be noted that the provisions of Article 52 of the Constitution guaranteeing citizens' right to social maintenance, are in line with the principles of social protection consolidated in international legal acts, too.

### *The solidarity*

Measures of social protection express the idea of public solidarity. They help a person to protect himself from possible social risks. Of course, in a civic society the principle of solidarity does not deny personal responsibility for one's destiny. This is the most important condition of the expression of a free human being. The principle of solidarity and its relation to personal responsibility were described by the Constitutional Court in several cases.<sup>6</sup> The recognition of mutual responsibility of a person and the society is important in ensuring social harmony, guaranteeing freedom of a person and possibility to protect oneself from difficulties which could not be overcome by one person alone. Therefore the state creates a system of social maintenance which would help to maintain living conditions corresponding to personal dignity, and, in case of need, would render a person necessary social help. According the ruling of Constitutional Court, the principle of solidarity in Lithuanian law system is mostly expressed by the model of state social insurance (so-called "pay as you go" model).

This model is based on the principles of universality and solidarity. The principle of universality means that all working persons (with some exceptions) who receive insured income from their activity, must pay state social insurance contributions, while the principle of solidarity means that the working (pursuing active economic activities) persons who receive insured income contribute to accumulation of social insurance funds, thus creating preconditions for paying payments to those persons, who must be paid the payments provided for in the law due to the fact that they have reached the pensionable age for old age pension, disability in their regard has been recognised or there are other reasons provided for in the law (*inter alia*, when these members of society cannot work and provide for themselves due to the objective reasons provided for in the law). On the other hand, the solidarity principle also implies that the persons who pay state social insurance contributions have the right to receive, in cases and under conditions provided for in the law, to receive themselves state social insurance pensions and/or other payments, thus, they acquire a corresponding legitimate and reasonable expectation.

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<sup>6</sup> Ruling of Constitutional Court of 12 March 1997 on State Social Insurance Pensions; Ruling of Constitutional Court of 26 September 2007 on State Social Insurance Contributions.

### *Forms of social security*

As a rule, social maintenance is rendered in 2 forms – social insurance and social assistance – for persons who due to the reasons that do not depend on them are incapable to provide themselves with sufficient means for the living.

The sources of social insurance are associated with the recognition of the right of employees to certain payments, as well as to old age pension. To implement this right social insurance funds are founded which are formed from contributions of employers and employees. As a rule, a certain part of means are allotted to these funds by the state. The contributions of employers and employees are calculated taking account of remuneration for work while sizes of would-be pensions or benefits are associated with the said contributions. This is an essential characteristic of social insurance. In this it differs from social assistance which is rendered to persons who need it but who are not entitled to get maintenance from a social insurance fund, or who get some means from it but they are insufficient for living. The source of social assistance is budgets of either the state or local governments.

### *Importance of social insurance as form of social security*

A special place in the relations of social insurance is occupied by the ensured working persons. First, with their work they create material preconditions for social insurance. The main portion of the budget of the Social Insurance Fund is comprised of deductions from calculated remuneration for work. On the other hand, the purpose of social insurance is to provide these persons with finances and services necessary for living if, for reasons established by law, they are unable to subsist on their earned income or other income, or for valid reasons established by law, they have additional expenditures.

Therefore the social insurance system established by legal norms is meaningful only in such a case when it ensures the constitutional right to social maintenance of the aforesaid persons.

It should be noted that the purpose of the designed social insurance system is not only to pay social insurance pensions and benefits but, first of all, to collect all the means provided by the law.

### *Implementation of constitutional guarantees of social security*

Under Article 52 of the Constitution, persons entitled to receive benefits must be indicated in the law. The wording “the State shall guarantee” as employed therein means that the pensions and other social benefits must necessarily be provided for.

Alongside, Article 52 of the Constitution pre-supposes the fact that the relations pointed out therein must be regulated by laws.<sup>7</sup> It is only the law that may establish the bases on the grounds of which state pensions are granted as well as the sizes of such pensions and conditions of their granting and payment. It is not permitted to establish any conditions of appearance of the right to social security benefits of individuals and to limit the extent of this right by a sub statutory regulation.<sup>8</sup>

In its rulings, the Constitutional Court has held more than once that by sub statutory legal acts (thus, the Government resolutions as well) one may establish solely the procedure of implementation of laws regulating relations of social protection and social assistance. The sub statutory legal regulation of relations of social protection and social assistance may comprise the establishment of respective procedures, as well as the legal regulation based on laws, where the need to provide more details about and particularise the legal regulation in sub statutory legal acts is objectively caused by the necessity in the law-making process to lean upon special knowledge and special (professional) competence in a certain area. However, as the Constitutional Court has held more than once in its rulings, one may not establish any conditions of appearance of person’s right to social assistance, nor to restrict the scope of this right by sub statutory legal regulation.

<sup>7</sup> “Laws” mean legal acts of the highest legal power which are adopted by the Parliament (The Seimas).

<sup>8</sup> eg. Resolutions of the Government or Orders of Minister.

### *Principle of the right to property*

The Constitutional Court consolidated that social right to receive pension (and other social benefits) has also close link with right to ownership. This position seemingly was influenced by the jurisprudence of the European Court of Human Rights.<sup>9</sup>

A complex analysis of case-law of the Constitutional Court leads to a conclusion that in Lithuania the right to protection of property may be recognised in respect of all social security benefits whether falling within the categories of social insurance or social assistance, or special non-contributory benefits. Attribution of social benefits to the principle of protection of the right to property does not, by itself, contradict solidarity and public character typical of social security. Though the jurisprudence of the Constitutional Court distinguishes pensions (old-age, invalidity, survivor, special state pensions) as more significant object of the property.

The inviolability of property and the protection of the rights of ownership mean *inter alia* that the owner as the possessor of the rights to property has the right to demand that other persons do not violate his rights, also, it means that the state has a duty to ensure the protection and safeguarding the rights of ownership.

In the case that the collection of funds necessary to pay pensions and the payment of the pensions themselves are based on social insurance (on social insurance contributions), the human being, to a certain extent, takes part in the creation of the material preconditions of payment of these pensions. While establishing the amounts of old age pensions by law, one is to take into consideration the fact as to the amount of contributions that had been paid when the material preconditions for the payment of these pensions are created.

Concerning the payment of pension, the Constitutional Court stated, that the person who meets the conditions established by law in order to receive the old age pension, and who has been awarded and paid this pension, has the right to a monetary payment of a respective amount, i.e. the right to possession. This right must be protected and safeguarded.

Though evaluating different type of social insurance benefits – maternity and paternity benefits, The Constitutional Court held that financial support rendered during leave granted for raising and bringing up children at home (maternity (paternity) benefits), by its nature, temporary (time-limited) character and purpose, differs from the pensions guaranteed in Article 52 of the Constitution, as well as from the other payments of pensionary maintenance provided for by laws, the right to which is related to the protection of ownership rights, consolidated in Article 23 of the Constitution.

The said difference is particularly distinct in the light of the fact that the financial support provided for by law is a targeted one, i.e. it should be linked to a concrete period of raising and bringing up a child at home as well as to such an amount of support that depends on the capabilities of the state and society.

Thus, the right acquired under law to the financial support of an amount provided for by law during leave granted for raising and bringing up children at home may not be equated with the right to the pensions guaranteed in Article 52 of the Constitution, nor with the right acquired under law to any other pensionary maintenance payment provided for by law, both of which have the aspects of the ownership right according to Article 23 of the Constitution.

### *Changes in the system*

A person who meets the conditions established by the law acquires the right to a pension established by the law. This person may reasonably expect that this right will be protected and defended by the state. When the pension established by the law which is not in conflict with the Constitution is granted and paid, this right and legitimate expectation acquired by the person are also to be linked to the protection of the rights of ownership of this person.

<sup>9</sup> Birmontiene T. Social rights in the jurisprudence of the Constitutional Court of Lithuania. *Jurisprudence*, 2008, No. 9 (111), p. 7-19.

Alongside, it needs to be noted that the constitutional protection of acquired rights and legitimate expectations does not mean that the system of pensionary maintenance established by law may not be reorganised. While reorganising this system, the Constitution must be observed in every case. The system of pensions may be reorganised only by law, only guaranteeing the old age and disability pensions provided for by the Constitution, as well as observing undertaken obligations by the state, which are not in conflict with Constitution, to pay corresponding payments to persons who meet the requirements established by the law. If, while reorganising the pensionary system, the pensions established by the laws which are not directly specified in Article 52 of the Constitution were eliminated, or the legal regulation of these pensions were amended in essence, the legislator would be obligated to establish a just mechanism for compensation of the existing losses to the persons who had been granted and paid such pensions.

The legislator, while reorganising the system of pensions so that the bases for pensionary maintenance, persons to whom the pension is granted and paid, the conditions of granting and payment of pensions, the amounts of pensionary maintenance are changed, must provide for a sufficient transitional time period during which the persons who have a corresponding job or perform corresponding service which entitles them to a respective pension under the previous regulation, would be able to prepare for these changes.

### ***3. The limitation of social rights during an economic crisis***

The Constitutional Court jurisprudence has been forming the doctrine on limitation of social rights during an economic crisis. The period of formation of this doctrine could be divided into two stages. First, from 2002 till 2006, when the Constitutional Court was deciding on the constitutionality of legal acts narrowing the social guarantees, when this had been determined by the impact of the effects of the so-called Russian economic crisis on the development of the economy of the State of Lithuania (during this period the Constitutional Court adopted several decisions which began the formation of doctrine on reduction of guarantees of social rights at the time of an economic crisis). Second, since 2009 until now where the Constitutional Court has been forming the constitutional doctrine on limitation of social rights, which has been determined by the effects of the global economic crisis on the economy of the State of the Lithuania.<sup>10</sup>

The main principles of the limitation of social security rights were established by the Constitutional Court with regard to social insurance and state pensions. There might occur such an extreme situation in the state (economic crisis, natural disaster etc.) when there is objective lack funds for the fulfilment of the state functions and satisfying of public interests, as well as the payment of pensions. According to the Constitutional Court, in such extraordinary cases the legal regulation of pensionary relations may be corrected also by reducing pensions to the extent that it is necessary to ensure vitally important interests of society and protect other constitutional values. The reduced pensions may only be paid on a temporary basis, i.e. only when there is an extraordinary situation in the state.

The doctrinal provisions on limitation of social guarantees, which were formulated in the jurisprudence of the Constitutional Court, were subsequently developed upon emergence of the global crisis in 2009.

In December 2009 the special Provisional Law on Recalculation and Payment of Social Payments was adopted.<sup>11</sup> By the provisions of the Provisional Law, was intended to ensure payment of the benefits in the period of economic crisis and to create a possibility to at least partially balance the budget of the state the recalculation procedure of social insurance benefits as well as social assistance benefits and special state pensions was established.

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<sup>10</sup> Birmontiene T. Challenges for the Constitutional Review: Protection of Social Rights During an Economic Crisis, 2012, <http://193.226.121.81/events/conferinta/birmontiene.pdf>.

<sup>11</sup> Parliamentary record, 2009, No 152-6820.

The Law was applied to persons who were receiving the following social payments:

- 1) the state pensions awarded and paid under the Republic of Lithuania Law on State Pensions, the Republic of Lithuania Law on the State Pensions of Officials and Servicemen, the Republic of Lithuania Law on the State Pensions of Judges, and the Republic of Lithuania Provisional Law on the State Pensions of Scientists;
- 2) the compensatory payments awarded and paid under the Republic of Lithuania Law on Theatres and Concert Establishments;
- 3) the annuities awarded and paid under the Law on the State Annuity of the President of the Republic of Lithuania, the Republic of Lithuania Law on the Status of the Signatories of the Act of the Independence of Lithuania and the Republic of Lithuania Law on Physical Education and Sport;
- 4) the relief compensations for the persons of working age who are capable of working <...> and target compensations for nursing or attendance (assistance) expenses awarded and paid under the Republic of Lithuania Law on State Relief Payments;
- 5) the state social insurance pensions of old-age, early old-age and of lost capacity to work (disability), the state social insurance orphans' pensions (pensions of loss of the breadwinner) exceeding half of the marginal amount of the state social insurance pension, the state social insurance survivors' pensions and compensations for special working conditions awarded under the Republic of Lithuania Law on State Social Insurance Pensions and the Republic of Lithuania Law on the Early Payment of State Social Insurance Old-age Pensions;
- 6) the sickness, professional rehabilitation, maternity, paternity, maternity (paternity) social insurance benefits awarded and paid under the Republic of Lithuania Law on Sickness and Maternity Social Insurance;
- 7) the sickness social insurance benefits awarded and paid under the Republic of Lithuania Law on Social Insurance of Accidents at Work and Occupational Diseases;
- 8) the maternity (paternity) payments awarded and paid for statutory state servants (officials) and servicemen of the national defence system from funds of the state budget under the special legal acts regulating their professional activities;
- 9) the child benefit awarded and paid under the Republic of Lithuania Law on State Benefits to Families Raising Children;
- 10) the unemployment social insurance payment awarded and paid under the Republic of Lithuania Law on Unemployment Social Insurance.”

The general principle of such a limitation of social benefits was accepted by the Constitutional Court quite positively, as established by taking into account the economic and financial situation that had emerged in the state. From the intentions of the legislator recorded in the *travaux préparatoires* it was clear that by means of the said Provisional law it was sought to reduce the expenditures from the state budget and the budget of the State Social Insurance Fund, by establishing, for that purpose, such legal regulation whereby state and social insurance pensions would be reduced alongside with other benefits.

The Constitutional Court approved several aspects of the said regulation. Firstly, certain marginal (minimal) amount of the pension was established and the pensions not exceeding that amount was not recalculated. That corresponded to the position of The Constitutional Court, that the state and state social insurance pensions not exceeding the marginal amount of pensions may not be reduced even when there is an extremely difficult economic and financial situation in the state.

Secondly, the Provisional Law established a time-limited validity of provisions of this law, i.e. the fact that the procedure, laid down by this law, for the recalculation and payment of social benefits, *inter alia* state and state social insurance pensions, which implied the reduction of these payments, was applicable from 1 January 2010 to 31 December 2011.

Thirdly, in addition, in the Provisional Law the Government was proposed to prepare and approve the inventory schedule of the procedure for the compensation for reduced state social insurance pensions of old-age and of lost capacity to work. According to the Constitutional Court, the Provisional Law must to



be construed as meaning that the Government is proposed to prepare and approve the inventory schedule of a such procedure for the compensation for reduced state social insurance pensions of old-age and of lost capacity to work that would include no essential elements of compensation for pensions: grounds, sizes, etc.; these elements of compensation for reduced pensions must be established by means of the law by the legislator; only if understood in this way the said legal regulation is not in conflict with the Constitution.

Though, not all provisions of the Provisional Law were accepted by the Constitutional Court as corresponding constitutional principles.

The jurisprudence of the Constitutional Court adopted already from 2000 held more than once that while regulating the pensionary relations, one must heed Article 48 of the Constitution, which enshrines the opportunity of a human being to choose a job and business at his own discretion. Under the Constitution, one may not establish any such legal regulation whereby a person, while implementing one constitutional right, would lose the possibility to implement another constitutional right. Thus, under the Constitution, it is not permitted to establish the legal regulation under which an opportunity for the person who has been awarded and paid an old-age pension, would be restricted, due to this, to freely choose a job and business.

According to the Provisional Law, pensions for those persons who were engaged in paid employment of self-employment were limited in the greater amount comparing to “non-working” pensioners. This provision was declared by of the Constitutional Court as contradictive to the Constitution. The opinion of the Constitutional Court was strict; the legal regulation under which the person cannot freely choose a job and business due to the fact that upon the implementation of this right he would not be paid the awarded old-age pension or part thereof which was paid until then, also must be considered as a restriction of an opportunity to freely choose a job or business; this provision is to be applied *mutatis mutandis* to other kinds of pensions, *inter alia* the state pensions provided for in the law.

#### ***4. The impact of the constitutional jurisprudence on the legal regulation of the system of social security***

The Constitutional Court passing the rulings during the periods of crisis has revealed quite a few requirements which stem from the Constitution and which must be heeded while correcting the legal regulation of pensionary maintenance relations in an extremely difficult economic and financial situation in the state. It is obvious that the main interest of the Constitutional Court was regulation of pensions. Though, the same principles, maybe with the more open interpretation must be applied to the whole system of social security.

There might occur such an extreme situation in the state (economic crisis, etc.) when there is objective lack of funds for the payment of pensions and that in such extraordinary cases the legal regulation of pensionary relations may be corrected also by reducing pensions to the extent that it is necessary to ensure vitally important interests of society and protect other constitutional values. The reduced pensions may only be paid on a temporary basis.

In itself the occurrence of an especially grave economic and financial situation (due to an economic crisis) in the state does not presuppose the right of the legislator to correct the legal regulation of pensionary relations—to reduce the awarded and paid pensions; when there is an especially grave economic and financial situation, the state must take all possible measures in order to overcome the economic crisis and to secure the accumulation of the funds necessary for payment of pensions; only in an exceptional case, when it is impossible to accumulate (one does not succeed in accumulating) the amount of the funds necessary to pay the pensions after all internal and external opportunities have been used, the pensionary legal regulation may be corrected by reducing the pensions.

The principle of proportionality implies that the reduction of awarded and paid pensions must be in line with the legitimate objectives which are important to society, such reduction must be necessary to reach the said objectives and may not restrict the rights and freedoms of a person clearly more than necessary in order to reach these objectives.

The peculiarities of state pensions, which, in their nature and character are different from old-age pensions, as well as from disability pensions, imply that the legislator may correct the legal regulation of such pensions of different nature by reducing these pensions to greater extent than old-age and disability pensions; however, while doing so, the proportions of the amounts of state pensions established prior to the occurrence of the particularly grave economic and financial situation in the state may not be violated.

The constitutional imperatives of a state under the rule of law, justice, proportionality, equality of rights, as well as social solidarity *inter alia* mean that the burden of the economic and financial crisis should be evenly and proportionately shared among the entire society.

Under the Constitution, it is not allowed to establish any such legal regulation whereby the pension becomes reduced to an amount, where the person receiving the pension would not be secured the minimal socially acceptable needs and the living conditions compatible with human dignity; the pension which secures only minimal socially acceptable needs and the living conditions compatible with human dignity to the person who receives the pension, may not be reduced at all.

It should be noted that the basis of the jurisprudence of the Constitutional Court were also motivated by the international legal provisions. According to the Constitutional Court, even though each state itself establishes the concrete means whereby the social rights of a human being are implemented, *inter alia* the right to social security, when using this competence, the state must comply with the obligations and means for coordination of the national social security systems which are entrenched in the international legal acts.

### **References:**

Ruling of the Constitutional Court

Ruling of 12 March 1997 on State Social Insurance Pensions;

Ruling of 10 February 2000 on Granting State Pensions;

Ruling of 30 October 2001 on State Pensions to Officials and Soldiers of the Systems of Internal Affairs, State Security, Defence and Prosecutor's Office;

Ruling of 25 November 2002 on State Social Insurance Pensions;

Ruling of 4 July 2003 on State Pensions of Officials and Servicemen;

Ruling of 3 December 2003 on the Law on State Social Insurance Pensions and the Law on State Pensions;

Ruling of 7 February 2005 on Social Insurance Indemnities for Occupational Diseases;

Ruling of 20 April 2010 on the Construction of the Provisions of the Acts of the Constitutional Court Related to Reduction of Pensions and Remunerations during an Economic Crisis;

Ruling of 29 June 2010 on State pensions to Judges;

Ruling of 6 February 2012 on the Recalculation and Payment of Pensions upon Occurrence of an Especially Difficult Economic and Financial Situation in the State;

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Ruling of 7 March 2014 on the Interpretation of the provisions of the Court's ruling of 6 February 2012 related to compensation for reduced old-age pensions.

## NETHERLANDS

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### CONSTITUTIONAL AND CONVENTIONAL PROTECTION OF SOCIAL SECURITY IN THE NETHERLANDS

*Prof. FRANS PENNINGNS<sup>1</sup>*

#### *1. Changes in Dutch Social Security and the Crisis*

Dutch social security law has been changed considerably since the 1990s, but the crisis itself has so far not had a large impact on the benefit system. In so far as social security laws have been changed in the years since the crisis (1998) or in so far as there are plans for reform, they are not motivated by the crisis as such, but on the wish to reform the scheme in question in order to change the responsibilities of the actors concerned. Although the changes may have led or may lead to lower expenditure for public funds, this is not the major objective.

Fundamental changes in the past decades include:

- The change of the Widows Benefits by the General survivors benefits (since equal treatment of men and women required change and since now more and more women had an income of their own) (1996);
- The replacement of entitlement to Sickness Benefit to sick pay (employers were made responsible for sick pay in order to increase their responsibility) (1994, 1996, 2004);
- An act linking benefit entitlement to residence status in order to make illegal stay less attractive (1998);
- An act reducing export of benefits to countries outside the EU in order to be able to better enforce benefit conditions (2000);
- The new Disability Benefits Act (to encourage partially disabled to keep or find work) (2004);
- Shortening unemployment benefits in order to activate beneficiaries to get back to work (2006; 2014);
- Decentralizing support for living (care, cleaning etc for elderly, disabled) to local communities (since these know better the circumstances and can better make use of the facilities (2015).

Whether the reasons for change mentioned are convincing and whether their objectives have been realized is a matter for long discussions, but for this contribution it is important to note that none of the measures are motivated by the Government by referring to the crisis. Moreover, most of the fundamental changes took place already before the beginning of the crisis.

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Still, it is interesting to investigate how constitutional standards and international standards relate to changes in social security since this may be valuable also for the constitutional protection in case of crisis measures.

## 2. *The Dutch Constitution and social security rights*

Since 1983 the Constitution (Article 20(1)) provides that public authorities have to ensure that the population has the means for subsistence and it has to take care of the distribution of wealth; Article 20(2) provides that by Acts of Parliament the rights to social security benefits are defined; Article 20(3) mentions that Dutch nationals resident in the Netherlands who are unable to provide for themselves shall have a right, to be regulated by Act of Parliament, to public assistance.

The Constitution thus includes a social fundamental right that ensures a subsistence income and guarantees the legal character of social security, and it gives public authorities, not only at the central level, but also municipalities, the task to ensure a subsistence income and distribution of wealth. However, Article 20 is not worded very specifically and will not easily lead to enforceable rights before a court.

The wording of Article 20(1) deviates significantly from the text proposed by the State Committee Cals/Donner, that wrote a proposal for the Constitution of 1983. Article 81(1) of the proposal provided that public authorities must ensure increasing of the level of subsistence means.

The Government, however, preferred that the Constitution ensures subsistence instead of a continuous increase.<sup>2</sup> The difference between concern for subsistence and increasing subsistence is that the latter wording requires activities to further increasing it; it would also be an obstacle against cuts in social security. As was remarked, the text of the Constitution as adopted does not require an increase.

Article 20(2) gives the legislature the task to establish a social security system and that entitlements have to be regulated by Acts. This means that the basic elements of a scheme for a particular risks have to be defined by an Act and cannot – even not in case of privatisation – be left to private parties. Thus, even if an Act allows employers to bear their own risk for ill or disabled employees, as is the case with the Disablement benefits act (WIA), the Act gives detailed rules on entitlements and obligations of the employees and employers.

Article 20(3) is the most concrete article and concerns persons who are unable to provide for themselves.

Thus, the Constitution provides for limited protection in case social security rights are affected by the crisis, since the Constitution does not require more than protection of subsistence means and that social security is regulated by Acts of Parliament.

Moreover, the protection given by the Constitution protect social security is limited, since it does not give courts the power to test a national act or proposal against the Constitution and did not establish a constitutional court. Still, the provisions of the Constitution mentioned are relevant in so far as the legislator has to take account of them when drafting new Acts. However, since the text of Article 20 leave much room for defining the exact contents of the guarantees to be given for subsistence means and since the arguments offered for the amending or new Acts are based on the need for structural changes, the Constitution plays only a very marginal role in these debates.

Therefore, it is doubtful whether the Constitution is a useful instrument against deteriorations of the social security system.<sup>3</sup> The provisions do not prevent the legislature from changing the laws.

Article 20(3) gives a more specific protection, but it also contains the reservation that the guarantee is given in so far as the persons cannot provide for their income themselves. This reservation gives the legislature considerable room to make assistance dependent on conditions (relevance of possible support by others (family members) and conditions on taking up work).

<sup>2</sup> *Kamerstukken II 1975/76*, 13 873, nr. 3, p. 11-12.

<sup>3</sup> F.M. Noordam en S. Klosse, *Socialezekerheidsrecht*, Deventer: Kluwer, 2008, 50.

Since the courts can test legislation against international treaties these treaties may have the effect that constitutions have in other countries. For this reason this protection by treaties is discussed in the following section.

### 3. Protection by Social Security Conventions

#### 3.1. Introduction

The Dutch Constitution provides that provisions of international law which, according to their wording are binding for anyone, have direct effect.<sup>4</sup> This wording leaves it to the courts to decide whether a rule has direct effect or not. National law which is inconsistent with an international provision with direct effect is overruled by that provision and must not be applied. An important criterion for direct effect of a rule is that the rule is so clear and unconditional that it does not require further implementing rules in order to have effect. Below I will discuss the relevant treaties.<sup>5</sup>

#### 3.2. International Labour Organisation

One series of conventions relevant to social security is that of the International Labour Organisation (ILO).<sup>6</sup> Important is, in particular, Convention 102 on Minimum Standards in Social Security. This convention gives general standards for the traditional branches of social security (ratified by the Netherlands in 1962). Others are Convention 103 concerning Maternity Protection (ratified in 1981); Convention 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (1962 ratified in 1964); and Convention 121 concerning Employment Injury Benefits (ratified in 1966); Convention 128 concerning Invalidity, Old-Age and Survivors' Benefits (ratified in 1969).

These conventions play a role in discussions during Parliamentary debates on social security bills and sometimes courts take account of these conventions. An example of impact in case law is a decision of the Central Appeals Court in 1996 on Convention 103. This convention was invoked by the plaintiffs in order to argue that the rule which required that self-employed women had to contribute to the costs of their treatment in the case of pregnancy and delivery in a hospital was not allowed. The court ruled that the contribution required from the self-employed was indeed inconsistent with the Convention.<sup>7</sup> As a result it became clear that also ILO conventions can have direct effect; however, that is the case only if, as the Constitution requires, they are clear enough and are unconditional. The rule invoked in the 1996 judgment was that no own contribution was allowed for this type of benefit and this interpretation of the rule was previously confirmed in a report by the Committee of Experts of the ILO. For the Dutch court this report by the Committee of Experts was important for making its decision.

Later, the Central Appeals Court decided that also Article 5 of ILO Convention 118 has direct effect.<sup>8</sup> The case concerned a Dutch Act, introduced in 1999, which stated that supplements on the basis of the *Toeslagenwet* were no longer exportable. Article 5 of the Convention provides – briefly – that a Member State has to pay the benefits falling within the scope of the convention to persons residing in other Member States which ratified Convention 118. As a result export has to be continued.

Such effect of a convention does not always have lasting effect; sometimes it amounts to a Pyrrhic victory, as in in Autumn 2004 Dutch Parliament agreed with the Government's proposal to denounce

<sup>4</sup> Article 93 of the Constitution.

<sup>5</sup> See on the meaning of international standards also U. Becker, B. von Maydell and A. Nußberger (ed.), *Die Implementierung internationaler Sozialstandards*, Baden-Baden, 2006, p. 21 et seq.

<sup>6</sup> See also Frans Pennings (ed), *Between Soft and Hard Law. The Impact of International Social Security Standards on National Social Security Law*, The Hague, 2006.

<sup>7</sup> CRvB 29 May 1996, *RSV* 1997/9; AB 1996/501. A translation of the decision is published in Frans Pennings (ed), *International Social Security Standards. Current Views and Interpretation Matters*, Antwerp 2007.

<sup>8</sup> CRvB 14 March 2003, *RSV* 2003/114, a translation is published in the book mentioned in the previous note.

Convention 118. Here we can see that awarding direct effect to a convention can have adverse effects, as Member States do no longer want to be bound by it.

In other decisions, the Dutch court denied direct effect to Conventions 121 and 128. This concerned the new survivors benefit act (mentioned as the first reform in Section 1). This new Law was considered necessary after a landmark decision of the Central Appeals Court, that the limitation of its predecessor, the *Algemene Weduwen- en Wezenwet* (AWW – General Widows’ and Orphans’ Benefits Law), to widows (i.e. women only) was contrary to Article 26 of the International Convention on Civil and Political Rights of the United Nations.<sup>9</sup> As a result men – widowers – became entitled to survivors’ benefit. This led to an increase in recipients. Under the ‘old law’ benefits were not means tested; as widowers most often had their own sources of income, this approach was no longer deemed acceptable.

The Central Appeals Court made a general statement in its decision: Conventions 121 and 128 will normally not have direct effect, since many terms are uncertain, like what is meant by widow, and since the conventions leave Member States choices.

Also in respect of Convention 128, the court ruled that the provisions of this convention do not have direct effect. A country is considered to satisfy the requirements of this convention, the court ruled, if the collective level of protection is adequate, without having to investigate what is paid in the individual case.<sup>10</sup>

### 3.3. Council of Europe

Also the Council of Europe has developed provisions that are relevant to social security; an important document is the European Social Charter (ESC).<sup>11</sup>

Article 12 ESC concerns the right to social security and provides that with a view to ensuring the effective exercise of the right to social security, the Parties undertake: (1) to establish or maintain a system of social security; (2) to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security; (3) to endeavour to raise progressively the system of social security to a higher level. (...)

Also this provision was invoked before the court. The outcome was disappointing: the Central Appeals Court decided that Article 12 ESC does not have direct effect. It considered that this provision does not impede deteriorations of national law, since Member States have the power to distribute the scarce means of their residents.<sup>12</sup>

Article 13 ESC provides that the States Parties undertake to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition.

Also Article 13 does not have direct effect, according to the Central Appeals Court.<sup>13</sup> Since these provisions have a content comparable to Article 20 of the Dutch Constitution, we may expect that if the Central Appeals Court had the power to test the national laws against the Constitution, the outcome would not be different.

### ***The Impact of Article 12 according to the Committee of Social Rights***

Article 12 was not only relevant in the case law of the Dutch court, but also in the conclusions of the European Committee of Social Rights, that is the supervising body for the Charter (initially called Committee of Independent Experts). The Committee gave an important interpretation of the relevance of

<sup>9</sup> CRvB 7 December 1988, *RSV* 1989/67, *idem*.

<sup>10</sup> CRvB 13 June 2003, *RSV* 2003/275, *idem*.

<sup>11</sup> See also A. Świątkowski, *Charter of Social Rights of the Council of Europe*, Alphen aan den Rijn, 2007.

<sup>12</sup> CRvB 14 February 1999, *JB* 1999/110.

<sup>13</sup> CRvB 21 January 1994, *RSV* 1994/192.

Article 12 in view of the Dutch changes that involved that employers were made responsible for sick pay for their sick employees, this replaced entitlement to benefit under the Sickness Benefits Act.<sup>14</sup>

This reform was intended to help curb social security expenditure and the government seeks to reduce absenteeism for reasons of sickness or invalidity by removing certain persons from the protection arrangements and making the employers responsible.

The Committee first referred to its general approach that alterations to social security systems in so far as they are necessary in order to ensure the maintenance of a given system of social security and where any restrictions still permit effective protection of all members of society against social and economic risks and do not tend to generally reduce the social security system to one of minimum aid.

The Committee considered that because of the close links between the economy and social rights, the pursuit of economic objectives is not necessarily incompatible with this requirement and that Contracting Parties may consider that the consolidation of public finances, in order to avoid increasing deficits and aggravating the debt service burden, is a way of helping to maintain the system of social security. They may in particular consider that the adoption of measures aimed at reducing the costs of the health system fit into this context.

However, the Committee considered that the means chosen by the Netherlands to attain these objectives are inappropriate. In its view, the goal of effective social protection for all members of society, which all States that have accepted Article 12(3) must pursue, presupposes that the Contracting Parties maintain social security systems based on solidarity, as this constitutes a fundamental guarantee against discriminatory treatment in this area. The collective nature of social security funding, through contributions and/or taxation, is a key factor in this guarantee, ensuring an apportionment of the cost of the risks between the members of the group. Another important factor is the participation of the persons protected in the management and supervision of the system. The Committee raised this question in connection with the above-mentioned reform of the supervision of the application of social insurance legislation, which since 1995 has been the responsibility of a board of experts from which the social partners are excluded, and refers to the questions raised above on this point. On the other hand, the Committee is already able to observe that the funding of the sickness branch in the Netherlands is no longer secured on a collective basis for the majority of workers. It considers that by linking the risk of sickness to the company, this reform calls the very foundation and spirit of social security into question, and that it is not, in principle, in conformity with Article 12(3) of the Charter.

Moreover, the Committee called the attention of the Dutch Government to the fact that this minimum requirement is recognised by the main international social security instruments, i.e. the European Social Security Code and ILO Convention 102 (Social Security, Minimum Standards) and that the level set by these instruments and the compliance of Contracting Parties to the Charter with the standards they set down are to be taken into account with respect to Article 12(3).

The Committee asked that the next report contain information on the practical implementation of the new system and, in particular, describe the guarantees which should prevent against any risk of abuse by employers such as dismissing a worker in order to avoid paying benefits or the possibility of contractually limiting workers' rights to protection, deal with the employer's or insurer's insolvency and prevent a person's state of health from becoming a criterion for recruitment selection.

However, since then there has been no final answer to whether the Dutch system is allowed or not. The Committee asked the Dutch Government for further information on how the measures work out.<sup>15</sup> Thus the problems with the Charter solely lead to a continuous monitoring of the rules (are sufficient people protected, are there no gaps in legal protection, is there a problem with risk selection etc etc).<sup>16</sup>

<sup>14</sup> Committee of Independent Experts, Conclusions XIV-1, Vol. 2, Strasbourg, 1998, p. 113 ff.

<sup>15</sup> See also B. Hofman and F. Pennings, *Privatisering en activering in de Nederlandse sociale zekerheid en solidariteit – een internationaal perspectief*, Deventer: Kluwer, 2013.

<sup>16</sup> See for the most recent report, European Committee of Social Rights, European Social Charter (revised), Conclusions 2013 (The Netherlands), articles 3, 11, 12, 13, 14, 23 and 30 p. 21, that does not make any principal remark on the case anymore, but only provides some statistical information, page 21.

The Committee also interprets Article 12 in the sense that the minimum benefit is at a sufficient level (50% of the median equivalised income, i.e. €846 per month for the Netherlands). It investigates whether this is the case. So far the Dutch benefits have satisfied this standard. This interpretation provides for some protection of the minimum benefits.<sup>17</sup>

### 3.4. *The United Nations*

Article 9 of the International Covenant on Economic, Social and Cultural Rights provides that the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.<sup>18</sup> Article 11 of the Covenant provides that The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Thus this provision is mainly aimed at protection against poverty. The Central Appeals Court provided that Article 9 Ivescr<sup>19</sup> did not have direct effect.

## 4. *Protection of property rights*

Another type of protection can be found in human rights conventions, and this concerns in particular the question whether existing social security rights of individuals can be affected by an amending act.<sup>20</sup> Have existing rights to be maintained or is a transitional period required in case of a revision?

In particular the First Protocol of the European Human Rights Convention of the Council of Europe has appeared to be important for this purpose. This appeared after the *Gaygusuz* judgment<sup>21</sup> of the European Court of Human Rights; in this judgment the Court decided that the First Protocol of the European Human Rights Convention of the Council of Europe is also relevant to social security. Article 1 of Protocol No. 1 of the Treaty provides: ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions...’

The Court ruled that entitlement to benefit, which is linked to the payment of contributions to the unemployment insurance fund, falls under the protection of property. The *Gaygusuz* judgment made it possible to invoke the protection of property under Article 1 in respect of social security.

This was further elaborated in the *Ásmundsson* judgment<sup>22</sup> of the ECHR, where reduction of benefit rights was challenged by invoking the protection of property provision. The case concerned a person who was first awarded a full disability benefit, but then the law as changed, and his benefit was withdrawn. Of the 336 re-assessments on the basis of this Act, 104 had a different disability benefit and 54 persons lost their benefit.

The Court considered that Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules. The first rule lays down the principle of peaceful enjoyment

<sup>17</sup> See for the most recent report, European Committee of Social Rights, European Social Charter (revised), Conclusions 2013 (The Netherlands), articles 3, 11, 12, 13, 14, 23 and 30 p. 21, page 21 and 22.

<sup>18</sup> Treaty of 19 December 1966. See also Eibe Riedel, *Social Security as a Human Right. Drafting a General Comment on Article 9 ICESCR – Some Challenges*, Berlin, et al. 2006.

<sup>19</sup> CRvB 1 November 1983, RSV 1984/147.

<sup>20</sup> See also Angelika Nußberger, *Sozialstandards im Völkerrecht. Eine Studie zu Entwicklung und Bedeutung der Normsetzung der Vereinten Nationen, der Internationalen Arbeitsorganisation und des Europarats zu Fragen des Sozialschutzes*, Berlin, 2005; Angelika Schmidt, *Europäische Menschenrechtskonvention und Sozialrecht Die Bedeutung der Straßburger Rechtsprechung für das europäische und deutsch Sozialrecht*, Baden-Baden, 2003.

<sup>21</sup> European Court of Human Rights, Case 39/1995/545/632, *Reports* 1996- iv, p. 1129. On the consequences of this judgment, see also S. van den Bogaerd (ed.), *Social Security, Non-discrimination and Property*, Antwerp, 1997; H. Verschueren, ‘EC Social Security Coordination Excluding Third-Country Nationals: Still in Line with Fundamental Rights after the *Gaygusuz* Judgement’, *CMLREV* 1997, p. 991; F. Pennings, ‘The Potential Consequences of the *Gaygusuz* Judgment’, *EJSS* 1999, p. 181.

<sup>22</sup> EHRM 12 oktober 2004, nr. 60669/00, AB 2005/102.



of property. The second covers deprivation of possessions and subjects it to certain conditions. The third recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to the peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule.

In that connection, the Court first noted that the introduction of the new pension rules had been prompted by legitimate concerns about the need to resolve the Fund's financial difficulties. Furthermore, the changes made to disability entitlements were based on objective criteria, namely, an obligatory renewed medical assessment of each disability pensioner's ability to carry out not just the same work he had performed before his or her disability but work in general, the standard that already applied in other sectors in Iceland. The Court was, however, struck by the fact that the applicant belonged to a small group of 54 disability pensioners whose pensions, unlike those of any other group, were discontinued altogether on 1 July 1997. The above-mentioned legitimate concerns about the need to resolve the Fund's financial difficulties seem hard to reconcile with the fact that after 1 July 1997 the vast majority of the 689 disability pensioners continued to receive disability benefits at the same level as before the adoption of the new rules, whereas only a small minority of disability pensioners had to bear the most drastic measure of all, namely the total loss of their pension entitlements. In the Court's view, although changes made to pension entitlements may legitimately take into account the pension holders' needs, the above differential treatment in itself suggests that the impugned measure was unjustified for the purposes of Article 14 of the Convention, which consideration must carry great weight in the assessment of the proportionality issue under Article 1 of Protocol No. 1. The discriminatory character of the interference was compounded by the fact that it affected the applicant in a particularly concrete and harsh manner in that it totally deprived him of the disability pension he had been receiving on a regular basis for nearly twenty years. Consequently, the Court found that, as an individual, the applicant was made to bear an excessive and disproportionate burden which, even having regard to the wide margin of appreciation to be enjoyed by the State in the area of social legislation, cannot be justified by the legitimate community interests relied on by the authorities.

In the *Goudswaard-van der Lans Case*<sup>23</sup> the *Ásmundsson* approach led to the conclusion that there was no infringement of the right to property. The case concerned the effects of the replacement by the Survivors Benefits Act of the old Widows Benefits Act, a deterioration of benefit rights already discussed supra when tested against ILO Conventions 121 and 128. At the time when the Widows Benefits Act was adopted, the assumption was that families' breadwinners were normally men. The Act was intended to protect vulnerable groups (their widows and children) from destitution by providing them with a guaranteed income sufficient to maintain a modest but decent standard of living. A further assumption, applicable to widows aged 40 or over, was that they were not otherwise provided for; that is to say, that they were not maintained by another adult or by income from paid employment. By the time of the events complained of, more than three decades later, those assumptions had been overtaken by developments in Dutch society. The European Court of Human Rights noted that it suffices to note that many widows were cohabiting with a person to whom they were not married, in a relationship comparable in economic terms to a family unit, or else themselves had income from another source: normally either paid employment or social benefits, such as unemployment or disability benefits, replacing income from earlier employment. Moreover, by this time it was not only widows who could qualify for a Widows Benefit Act pension but – following developments in domestic case-law based on human-rights considerations (Article 26 of the International Covenant on Civil and Political Rights) – widowers as well.

The new Act entailed for former recipients of benefits under the old Act a reduction in disposable income if they received additional income in the form of other social benefits or from paid employment or were born after 1940 and were cohabiting in a common household with another person.

The Court now decided that this case was different from the *Ásmundsson* judgment.

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<sup>23</sup> ECHR, Application no. 75255/01.

Firstly, it has not been argued, nor is it apparent, that the number of individuals whose old pensions have been reduced by the new Act is so limited that their impact can be considered insignificant. Secondly, provision has been made to ease the effects of the new legislation on persons in the situation of the applicant. Thirdly, and more importantly, the Court accepts that the introduction of the new Act has had effects on the applicant's disposable income. However, although the Convention, supplemented by its Protocols, binds Contracting Parties to respect lifestyle choices to the extent that it does not specifically admit of restrictions, it does not place Contracting Parties under a positive obligation to support a given individual's chosen lifestyle out of funds which are entrusted to them as agents of the public weal. In conclusion, the Court does not find that the applicant was made to bear an "individual and excessive burden".

In the Dutch case law Article 1 of the First Protocol has mainly had an impact on requirement on transitional rules. An example can be found in a series of decisions<sup>24</sup> on an Act that terminated the right to social security benefit for those who were imprisoned (Act on social security rights of imprisoned persons, 2000). The Central Appeals Court decided that the infringement on of property rights by this act is generally acceptable. However, the Court also ruled that the legislature should have implemented a larger transitional period for those who were, at the time the Act came into force, already entitled to benefit. This transitional period was one month. The Court considered that this period did not adequately realize the principles of proportionality and subsidiarity that have to be satisfied in case of infringement of the right to property in the sense of Art. 1 of the First Protocol. Instead, the Court ruled that a transitional period of six months since the coming into force of the Act would be consistent with this article.

##### ***5. Summary and conclusions: the Constitutional Guarantees of social security rights in the Netherlands***

The constitutional guarantees are very limited. It is only up to Parliament, and not to courts, to decide whether the guarantees of Article 20 have been infringed. These guarantees are very limited. They require ensuring a subsistence income, but this does not prevent the legislature from imposing conditions on claimants to undertake steps to provide for a living themselves. Such conditions can seriously influence the legal character of benefits.

Protection by international treaties can sometimes be invoked, provided that these rules are unconditional and clear enough. In practice this means that rules that are contrary to an equal treatment provision or prohibition of cost sharing are overruled.

Changing complete acts is not prevented so far, provided there is a legitimate reason and the effects are proportional for the persons affected. In this respect an adequate transitional period is required.

Although this is very important in individual cases, this does not principally prevent deteriorations of social security provisions.

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<sup>24</sup> CRvB 15-07-2004, ECLI:NL:CRVB:2004:AQ508900/56.

## POLAND, REPUBLIC OF

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### THE RIGHT TO SOCIAL SECURITY IN THE CONSTITUTION OF THE REPUBLIC OF POLAND

*Asst. Prof., Dr. MARCIN WUJCZYK<sup>1</sup>*

#### *Introduction*

Social security is understood to encompass the following nine branches: adequate health service, disability benefits, old age benefits, unemployment benefits, employment injury insurance, family and child support, maternity benefits, disability protections, and provisions for survivors and orphans.

#### *The meaning of social rights*

The Constitution of the Republic of Poland was adopted on 2 April 1997.<sup>2</sup> Decisions concerning its content had been accompanied by numerous discussions, including the issues of what social rights should be guaranteed in the content of provisions of the Constitution. The effect of the discussions was the inclusion of numerous regulations, which stipulate social rights, in the basic law. Nevertheless, for fear of imposing excessive obligations on the state, the regulation of many rights in the realm of social law was overly general, even for the basic law, which may, by principle, only contain some general guidelines for the content of particular rights.

#### *Constitutional guarantees of social security rights*

The Polish Constitution of the Republic of Poland has regulated key social rights in a separate chapter, entitled *Freedom and Economic, Social and Cultural Rights* (“Wolności i prawa ekonomiczne, socjalne i kulturalne.”). While analyzing this part of the Polish Constitution, special attention should be paid to the guarantees regulated in article 67, section 1, concerning social security in the event of incapacity to work due to illness or disability, as well as after reaching the age of retirement. The same article indicates the right to social security of the unemployed (article 67, section 2). The term of social security was not defined in the provisions of the Constitution. The Legislator was left to stipulate the content of the guarantees arising from this regulation. It is the obligation of The Constitutional Tribunal, a

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<sup>2</sup> Dz. U. [Journal of Laws] No.78, item 483 as amended.

judicial authority responsible for the verification of provisions of the law with constitutional provisions, to control whether legislative provisions meet the minimal requirements for the right to social security right.

The Constitution also grants every person the right to health care (article 68, section 1).<sup>3</sup> Constitutional provisions also recognise the need to provide health care for groups that are particularly vulnerable to illnesses and require increased health care. As a result, it was indicated in article 68, section 3 of the Constitution that public authorities are obligated to provide special health care for children, pregnant women, the disabled and the elderly.

Another important regulation stipulating the guarantees of social rights at the Constitution level, is the obligation imposed on public authorities in article 69 to help with securing the existence, vocational training and social communication.

The fact that special situation of the disabled was accounted for in the Constitution should be positively appraised. Such persons require increased support from the State. As it was discerned by the Constitutional Tribunal, the obligation of article 69 should be interpreted as “the obligation of public authorities to create a mechanism to conduct the tasks stipulated in it. Such mechanism must ensure the effective accomplishment of the objective.”<sup>4</sup>

The constitutional scope of social law also comprises protection of family rights. In accordance with article 71 “The State considers family welfare in its social and economic policy. Families who find themselves in a difficult financial and social situation, in particular multi-children families and single-parent families, are entitled to special help from public authorities. A mother, both before and after giving birth to a child, is entitled to special help from public authorities, the scope of which is defined by the relevant legal act.” This is another regulation that protects social groups that are most greatly exposed to social exclusion. This, in a way, emphasises the meaning of the family as the basic unit of society<sup>5</sup> and, at the same time, completes the principle stipulated in article 18 of the Constitution, according to which the family, motherhood and parenthood are under the protection and care of the Republic of Poland. It should be noted, however, that in both the doctrine of the Polish constitutional law and in the judicature of the Constitutional Tribunal, these norms are treated only as the determinant of specific actions. Article 71 of the Constitution, similarly to article 18, is considered not to define the rights the citizen is directly entitled to. Article 18 of the Constitution declares the protection of the marriage, family, motherhood and parenthood by the state however, article 71 of the Constitution formulates one of the elements of the welfare state by accounting for “family welfare” in its social and economic policy. These regulations, formulated in the form of the principles of state policy and not the rights of the individual, may not constitute the basis for the individual pursuit of claims. It is commonly presumed, not only in the doctrine of the Polish constitutional law, that thus formulated provisions stipulating the objectives of public authorities’ functioning constitute the programme norms and may not, as such, constitute the basis for the citizen’s pursuit of claims as their addressee is primarily the legislator.<sup>6</sup>

While analysing the scope of social rights guarantees in the Constitution, one may not omit article 75 of that act. It says that “Public authorities pursue a policy that creates favourable conditions for meeting the citizen’s housing needs and in particular prevent homelessness, support social housing development and support the citizen’s activity to obtain their own flats” (article 75, section 1). In the second section of this article, the necessity to protect the tenant’s rights has been emphasized. The limits of that protection have been, however, left to be defined by legislative provisions. As it has been discerned in the judicature, the wording of article 75 of the Constitution makes it impossible to talk about inconsistency with it apart from in extraordinary situations, in particular when: the legislator determines the obligations of public

<sup>3</sup> H. Zięba-Załużka, *Pojęcia prawa do ochrony zdrowia* [in:] *Zasady równości w prawie* eds. H. Zięba-Załużka, M. Kijowski, Rzeszów 2004, p. 44 at seq.

<sup>4</sup> Verdict of the Constitutional Tribunal of 6 February 2007, Ref. No. P 25/06, OTK Series A 2007 No. 2, item 9.

<sup>5</sup> M. Gołowkin, *Rodzina jako wartość chroniona w konstytucji na tle europejskich standardów ochrony praw człowieka* [in:] *Polska wobec europejskich*, p.101 at seq.

<sup>6</sup> cf. Z. Czeszejko-Sochacki, L. Garlicki, J. Trzeciński, *Commentary to the Act on the Constitutional Tribunal*, Warszawa 1999, Wydawnictwo Sejmowe, p. 163.

authorities at such a level that it prevents the performance of those obligations and deprives article 75 of the Constitution of its actual content,<sup>7</sup> the legislator will undertake actions that hinder the citizens meeting their housing needs<sup>8</sup> or will impose the burdens of performance of these obligations on private entities and not public authorities.<sup>9</sup>

The scope of the social law guaranteed by the provisions of the Constitution may not be analysed, however, without reference to the general principles regarding the freedom and social rights arising from the provisions of the Polish basic law. Above all, it is necessary to indicate regulations on the inviolability of human dignity (article 30 of the Constitution), statutory limitation upon the exercise of rights and freedom (article 31 of the Constitution), equality before the law and in the law and non-discrimination (article 32 of the Constitution) and the state's protection of citizens abroad (article 36 of the Constitution). It is also advisable to pay attention to the principle of social justice arising from article 2.<sup>10</sup> Although the usefulness of this notion is often questioned,<sup>11</sup> it has, in my opinion, particular significance in decoding the material scope of rights of the social law as guaranteed by the Constitution. It is assumed that directives of social justice are supposed to ensure social balance, thus persons of poor health, those in a difficult economic situation and others are enabled to live in dignity through access to goods of modern civilisation.<sup>12</sup> From the wording of this provision, the Constitutional Tribunal interpreted a number of citizens' rights that shape the content of the social law in Poland. It has presumed, among others, that the principle of social justice requires that the state provide citizens with the minimum subsistence level.<sup>13</sup> The Tribunal has pronounced that the principle of social justice is comprised, *inter alia*, of values such as creating conditions for sustainable and stable economic development, budget equilibrium, as well as the right of the citizens and their elected representatives to determine the directions and priorities of social and economic policy by means of democratic procedures.<sup>14</sup> The Constitutional Tribunal has also emphasized that the principle of social justice ensures "the balance of burdens and benefits".<sup>15</sup> It cannot be argued that while the social justice is connected with the constitutional principle of equality, it "does not denote the necessity to grant all categories of citizens (groups of entities) identical rights and obligations. Particular categories of citizens should be treated equally, i.e. according to the same standards, without discrimination and favouritism, only when particular legal provisions are based on the same factual situation of those categories of entities".<sup>16</sup> The principle of social justice provides the source for shaping many institutions of labour law and social security.<sup>17</sup> Finally, it consists of numerous, detailed legal rules, addressed to public authorities, including, for instance, the minimum of social security, protecting the very foundations of human existence for people who remain without work not of their own will, as well as the principle of equality. Thus, one cannot fail to observe that in view of the Polish Constitution, the principle of social justice should be treated as the foundation of rights within social law.

It must also be emphasised that in the doctrine of the Polish concept of constitutional law, rights arising from the Constitution such as freedom of labour, the right to remuneration, the obligation to

<sup>7</sup> Decision of the Constitutional Tribunal of 15 November 2000, file no. TS 86/00, OTK ZU No.8/2000, item 308; Verdict of the Constitutional Tribunal of 14 May 2001, file no. SK 1/00, OTK ZU No.4/2001, item 84.

<sup>8</sup> Decision of the Constitutional Tribunal of 12 January 2000, file no. TS 62/99, OTK ZU No.4/B/2002, item 240.

<sup>9</sup> Verdict of the Constitutional Tribunal of 10 October 2000, file no. P 8/99, OTK ZU No.6/2000, item 190.

<sup>10</sup> Article 2 of the Constitution reads: "The Republic of Poland is the democratic rule of law, realising principles of social justice."

<sup>11</sup> Cf. *Rozważania na ten temat J. Oniszek [in:] Zarys systemu prawa pracy* eds. K. W. Baran, Warszawa 2010, pp. 285-294.

<sup>12</sup> J. Karp, *Zasada sprawiedliwości społecznej [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, eds. W. Skrzydło, S. Grabowska, R. Grabowski, Warszawa 2009, p. 725.

<sup>13</sup> Judicature of the Constitutional Tribunal of 13.7.1993, P 7/92, OTK 1993, No.2, item 27, p. 266.

<sup>14</sup> Verdict of the Constitutional Tribunal of 25.2.1997, K 21/95, OTK 1997, No.2, item 23.

<sup>15</sup> Judicature of the Constitutional Tribunal of 26.10.1993, U 15/92, OTK 1993, No.2, item 36, pp. 343-344.

<sup>16</sup> Judicature of the Constitutional Tribunal of 11.12.1996, K 11/96, OTK 1996, No.6, item 54, p. 411.

<sup>17</sup> L. Florek, *Konstytucyjne podstawy indywidualnego prawa pracy [in:] Konstytucyjne podstawy systemu prawa* eds. M. Wyrzykowski, Warszawa 2001, p. 70.

implement the policy of full employment, the obligation to ensure the health and safety of employees, the employees' right to free days and paid leave, the guarantee of appropriate standards of working time are often included in the social rights. Due to the conception of the social security assumed for this study, they are, as a matter of principle, not contained in the notion and the aforementioned guarantees will not be discussed. They should be classified as the constitutional rules of labour law. One exception should be made for the obligation to implement the policy of full employment. This rule may, in my opinion, be also numbered among the guarantees within social law wherein this norm orders positive actions aiming at decreasing unemployment.<sup>18</sup>

### ***The scope of the material and personal social security rights guaranteed by the Constitution***

#### *Material scope*

The material scope of guarantees within social security rights should start with defining the content of the right to social security (as it was mentioned before the issue was regulated in article 67 of the Constitution). The Constitutional Tribunal has indicated three rights that in its assessment constitute the social security right: social insurance right, social provision right and social welfare right. The Tribunal has found the first of the institutions mentioned to be the most important form of the right to social security.<sup>19</sup> It has stressed that the right to social security is a system of obligatory benefits connected with work that are claimable and that satisfy needs caused by random events, in particular by illness and the incapacity to work. Yet, the Tribunal emphasized that the Constitution does not stipulate individual insurance situations and thus does not create an appropriate claim on the part of the insured person, which may arise only from the legal act. In principle, the Constitution grants the Legislator the freedom to stipulate the type of benefits from social insurance, the conditions of their acquisition and expiration, their amount and awarding procedures.<sup>20</sup> The conclusion of the impossibility to derive the right to individual benefit from the content of constitutional provision results from the fact that the provision of article 67, section 1 of the Polish Constitution has left the scope and form of social security to be stipulated by the legal act. Therefore, we may only talk about the legislator's breach of the Constitution when the legislator has, for instance, adopted a legal act depriving a particular labour group of old age or disability pension.<sup>21</sup>

Social welfare is treated as a form that is to complete the scope of guarantees arising from article 67 of the Constitution. It embraces such cases in which benefits cannot be paid within the social insurance or social provision institutions. The institution of social welfare is intended to help people who are unable to provide means for independent existence. It is assumed, however, to be temporary by nature and to guarantee only the most necessary benefits.<sup>22</sup>

The right to health has been regulated in the Constitution in quite a detailed way. From article 68 of the Polish basic law regulating this issue, at least some rights may be derived:

- Every person's right to health care
- Citizens' right to equal access to health care financed by public funds
- Obligation of public authorities to provide special health care for children, pregnant women, the disabled and the elderly.

<sup>18</sup> E. Polak, *Ewolucja państwa wobec problemu bezrobocia*, *Polityka Społeczna* 2003, No.8, pp. 813, J. Jończyk, *Prawo zabezpieczenia społecznego, ubezpieczenia społecznego i zdrowotne bezrobocie i pomoc społeczna*, Zakamycze 2001, p. 345 at seq.

<sup>19</sup> Cf. verdict of 22.6.1999, K 5/99, OTK 1999, No.5, item 100; verdict of 7.9.2004, SK 30/03, OTK-A 2004, No.8, item 82).

<sup>20</sup> Verdict of the Constitutional Tribunal of 22.08.1990, K 7/90, OTK 1990, item 5.

<sup>21</sup> Verdict of the Constitutional Tribunal of 6.02.2002, SK 11/01, OTK Series A 2002 No.1, item 2.

<sup>22</sup> A. Żukiewicz, *Prawo socjalne w systemie prawa stanowionego- przykład Polski*, *Polityka Społeczna* 2003, No.2, p. 7 at seq.

It has been demonstrated in the Polish doctrine that the constitutional guarantee of the right to healthcare is not only of declaratory nature. It should be recognised that it is a legal norm that imposes certain obligations on public authorities.<sup>23</sup> The Constitutional Tribunal has indicated the following conclusions from provisions of the Constitution:

- 1) it is necessary to develop, within the wide concept of health care, the mechanisms for gathering public funds and then spending them on healthcare. A detailed assessment of the legal character of means contributed by citizens is not important; it only matters whether they may be classified as public funds.
- 2) financial benefits from the aforementioned means are supposed to be available for citizens (so not for “everyone” anymore), but it is not about just formal availability, declared by legal provisions that constitute a “policy statement”, but real availability,
- 3) access to benefits financed by public funds must be equal for all citizens, regardless of their financial situation.
- 4) it is the obligation of public authorities to ensure the above-mentioned standard of accessibility of financial benefits from public funds.<sup>24</sup>

The healthcare right guaranteed by the Constitution does not allow the types of benefit categories embraced in this benefit to be specified with more precision.<sup>25</sup> Nonetheless, on the basis of the analysed regulation, it is imperative that legislative provisions guarantee the minimum scope of benefits available to every citizen without charge (the so-called basket of guaranteed services).

The necessity to ensure particular support for the disabled has entailed providing the guarantee for a number of rights for them in article 69 of the Constitution, *videlicet* i) help to secure existence, (ii) vocational training and iii) social communication training. These rights, in accordance with the provision of the invoked article, are to be specified in the legal act. For that reason it does not constitute a source of subjective rights. According to the judicature of the Constitutional Tribunal, the provision of the Constitution regulating the rights of the disabled includes only an ascertainment of the public authorities’ obligation to create appropriate legislative mechanisms.<sup>26</sup> The Constitution leaves the legislator with the freedom to choose the measures to perform the obligations indicated in it.<sup>27</sup> The Constitutional Tribunal has also ascertained that article 69 “cannot be considered to be the constitutionalisation of a specific level of benefits, their form, specific scope or the procedures of obtaining them. The indicated constitutional model should be interpreted as the responsibility of public authorities to create mechanisms for the performance of the tasks indicated in it. The mechanism must ensure the effective accomplishment of the objective.”<sup>28</sup> At the same time, however, attention should be paid to the Tribunal’s position that there are no grounds for a narrow understanding of article 69 of the Constitution (the sole determination of the relation between the state and the disabled), the breach of which would exclusively consist in the limitation of the rights of the disabled by those regulations which would directly harm the existence, vocational training and social communication of the disabled. Article 69 of the Constitution also protects the disabled against practices leading in an indirect (often hidden) way to the violation of their rights.

The rights regulated in article 75 of the Constitution are frequently referred to as the state’s assistance in meeting the citizen’s housing needs. The Public Authorities’ obligation to pursue a policy that creates favourable conditions for meeting the citizen’s housing needs does not mean that they are obligated to build flats, but orders the creation of legal, political, social conditions, etc. that provide the opportunity for meeting personal housing needs by every citizen. The Constitution does not provide precise guidelines

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<sup>23</sup> J. Cierniewski, *Konstytucyjne podstawy praw pacjenta*, Materiały Konferencji “Godność człowieka podstawą praw chorego i pacjenta”, 8th International Day of the Sick

<sup>24</sup> Verdict of the Constitutional Tribunal of 7.01.2004, K 14/03, OTK Series A 2004 No.1, item 1.

<sup>25</sup> D.E. Lech, *Zasada równego dostępu do świadczeń opieki zdrowotnej*, Warszawa 2011, p. 145.

<sup>26</sup> Verdict of 23.10.2007, P 28/07, OTK-A 2007, No.9, item 106.

<sup>27</sup> Verdict of 16.3.1999, K 35/98, OTK 1999, No.3, item 37.

<sup>28</sup> Verdict of 23.10.2007, P 28/07, OTK-A 2007, No.9, item 106

on what actions should be taken by public authorities. It must be noted, however, that it does assess the importance of particular aims of those actions by using the phrase “in particular”, determining those to which it gives priority. Those aims embrace the prevention of homelessness, support of social housing development and support of the citizen’s activities to obtain their own homes”.<sup>29</sup>

The provision of article 75 on the policy of meeting the citizen’s housing needs has constituted an inspection model for a number of rights within the wide concept of the right to accommodation. For example, it may be indicated that on the basis of this provision, the Constitutional Tribunal has recognized that it imposes on the legislator the obligation to provide every tenant (and not only the lessees) protection against the threat of homelessness by providing stability (but not absolute inviolability) of the legally acquired legal title to the occupied flat. This provision may not be treated as the source of claims to achieve the position of the owner. The statutory regulation of the protection of tenants’ rights may not reach so far as to grant them the right to decide who may become the owner of the flat they occupy, as it would be contrary to the constitutional principle of the protection of ownership.<sup>30</sup> The Tribunal has also derived from article 75 of the Constitution the principle of the protection of tenants against excessive rents for using flats.

Finally it is time to analyse article 65, section 5 of the Constitution. It indicates that public authorities pursue a policy aiming at full, productive employment, by implementing programmes to combat unemployment, including the organization and support of vocational consultancy and training, as well as public works and intervention works. This regulation has the character of the programme norm.<sup>31</sup> It indicates a certain objective (task) and gives public authorities the freedom to choose the measures to accomplish that objective. The Constitution indicates some methods to combat unemployment (programmes to combat unemployment, organising and the support of vocational consultancy and training, as well as public works) but it must be recognized that they are of an illustrative nature and they are not exhaustive. It must be also recognized that the methods to combat unemployment indicated in the Constitution are obligatory,<sup>32</sup> i.e. public authorities are obligated to use them in the first place in a situation when there is unemployment.<sup>33</sup> While interpreting the principle of perusal of the full employment policy, the Constitutional Tribunal recognized that job creation must constitute an element of the policy of the state, as referred to in article 65, section 5 of the Constitution that uses the wording: “full, productive” employment. Yet, there is no constitutional right to employment in the sense in which the principle of proportionality refers to the protection of rights and freedom of other persons and, indubitably, it is not the obligation of the state to create jobs. Otherwise, the solution to all the problems of the labour market would be mandatory employment of all unemployed persons in the wide concept of the state-budget sector. On the other hand, the state’s policy should not lead to a decrease in the number of jobs due to the excessive constraint of entrepreneurship and the hindering of flexible employment in non-public sector. It must be emphasised that the constitutional legislator has explicitly explained what the pursuit of the full and productive employment policy should consist of. It has indicated that this policy should be manifested by the implementation of the programmes to fight unemployment,<sup>34</sup> including the organization and support of vocational consultancy and training, as well as public works and intervention work.<sup>35</sup>

<sup>29</sup> B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, p. 154.

<sup>30</sup> Verdict of the Constitutional Tribunal of 30.10.2001, K 33/00, OTK 2001 No.7, item 217.

<sup>31</sup> M. Gersdorf, *Podstawowe dylematy związane z rozwojem prawa pracy w okresie transformacji ustrojowej*, *Praca i Zabezpieczenie Społeczne* 2003, No.5, p. 5.

<sup>32</sup> A.Świątkowski, *Polityka społeczna i prawo do pracy wobec bezrobocia*, *Państwo i Prawo* 2002, No.8, p. 15 at seq.

<sup>33</sup> Verdict of the Constitutional Tribunal of 10.1.2005, K 31/03, OTK-A 2005, No.1, item 1.

<sup>34</sup> Cf. Szerej W. Padowicz, *Rosnące bezrobocie i kryzys zatrudnienia w Polsce (przyczyny i uwarunkowania)*, *Praca i Zabezpieczenia Społeczne* 2002, No.1, pp. 2-11, B. Błaszczuk, *Bezrobocie i wykluczenie najważniejsze kwestie społeczne współczesnej Europy [in:] Europa w gospodarce, polityce i kulturze światowej. Między dziedzictwem i przyszłością eds. J. Osiński*, Warszawa 2004, pp. 405-418.

<sup>35</sup> Verdict of the Constitutional Tribunal of 21.04.2004, K 33/03, OTK Series A 2004 No.4.



### *Personal scope*

The Polish Constitution stipulates in many different ways the range of entities which are entitled to the rights described above that constitute the social security rights. Some of them are granted to every person, regardless of citizenship or national status. This refers to fundamental rights of rudimentary nature. Such rights include the right to health, guaranteed in article 68, section 1 of the Constitution. It is treated as the human right and such rights cannot depend on citizenship. As it was rightly discerned by the Constitutional Tribunal, the subjective individual right to health and the objective order to public authorities to undertake such actions that are necessary for appropriate protection and implementation of that right,<sup>36</sup> should be derived from the regulation of article 68, section 1 of the Constitution. In my opinion, the Polish Constitution also obligates public authorities to provide particular health care for children, pregnant women, the disabled and the elderly (article 68, section 3) for all persons who stay in the territory of the Republic of Poland, regardless of their citizenship or lack of it. It should be noted that the aforementioned rights refer directly to the issue of human dignity and express its essence. They are of fundamental nature and as such they do not depend on the lawmaker's will or on law-practicing authorities (courts, public administrative bodies). As it has been emphasised in the judicature of the Constitutional Tribunal, "Such understanding refers to the preamble and article 1 of the Declaration of Human and Citizen Rights, of which the principle emerges that one is human by birth – and not on the basis of any acts and legal actions – human beings constitute the subject of all rights arising from their humanity. In this denotation, human dignity does not depend on the legislator (lawmaker)"<sup>37</sup>.

Yet, the group of persons to whom most rights guaranteed by provisions of the Constitution, constituting social security rights, are addressed, has been limited to Polish citizens. This includes the right to health care financed by public funds (article 68, section 2 of the Constitution). Similarly, solely Polish citizens have been indicated as beneficiaries of the obligation of public authorities to pursue a policy that creates favourable conditions for meeting the citizen's housing needs, including actions to prevent homelessness. The same range of the entitled persons has been determined by the Constitution in regard to the social security right in the event of incapacity to work due to illness or disability, as well as after reaching the age of retirement (article 67, section 1 of the Constitution).

It is worth noticing that the Polish Constitution does not define the term citizenship. It is also not defined by legislative provisions.<sup>38</sup> Hence, it should be assumed that the status of the citizen will depend on the formal criterion, such as obtaining citizenship. In accordance with the Act on Polish Citizenship of 2 April 2009,<sup>39</sup> Polish citizenship may be acquired: 1) by the virtue of the law, 2) by the granting of citizenship, 3) by the recognition of Polish citizenship, 4) by the restoration of Polish citizenship.<sup>40</sup> In the analysed context, it is worth drawing attention to the fact that the right to apply for recognition of Polish citizenship may be exercised by, among others, a foreigner who has been constantly abiding in the territory of the Republic of Poland for at least 3 years on the basis of the permanent residence permit, long term European Union resident's permit or the right of permanent residence, who has a stable and regular source of income in the Republic of Poland and a legal title to the occupied abode, a foreigner who has been constantly abiding in the Republic of Poland for at least 2 years on the basis of the permanent residence permit, long term European Union resident's permit or the right of permanent residence, who has been married to a Polish citizen for at least 3 years or who does not have any citizenship.<sup>41</sup>

The limitation of the range of beneficiaries of many of the constitutional rights solely to persons who have the citizen status has been mostly justified by the necessity to maintain the stability of the

<sup>36</sup> Verdict of the Constitutional Tribunal of 23.3.1999, K 2/98, OTK 1999, No.3, item 38.

<sup>37</sup> Verdict of the Constitutional Tribunal of 15.11.2000, P 12/99, OTK 2000, No.7, item 260.

<sup>38</sup> A. Wróbel, *Obywatelstwo polskie a prawa i wolności konstytucyjne* [in:] M. Chmaj, L. Leszczyński, W. Skrzydło, J. Z. Sobczak, A. Wróbel, *Konstytucyjne wolności i prawa*, T. I *Zasady ogólne*, Kraków 2002, pp. 148-152.

<sup>39</sup> Dz. U. [Journal of Laws] from 2012, item 161.

<sup>40</sup> Article 4 of the Act of Polish Citizenship.

<sup>41</sup> Article 30 of the Act of Polish Citizenship.

state's finances that may not intrinsically incur excessive costs in such spheres as health care or social security. I consider, however, that in some cases, the lawmaker has wrongly excluded persons without Polish citizenship from the range of persons entitled to constitutional rights. It is true, for instance, in the case of the obligation to prevent homelessness. The right to accommodation or shelter should be treated as the fundamental right of human beings originated in human dignity. This position has been supported by the provisions of the Universal Declaration of Human Rights, ratified by Poland. Article 25, section 1 of this act indicates that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including, among other things, housing. Depriving non-citizens of the possibility to use the social security rights as guaranteed by the Constitution is also contrary to the more and more common phenomenon of constitutional universalisation of civil rights. As it has been emphasized in the doctrine, it should be "[...] noted that the catalogue of civil rights restricted solely for the citizens of a given country is being continually limited by the clear intervention of the lawmaker, who universalizes civil rights and freedom in such a way that they are qualified to be human rights [...]" The extension of the constitutional catalogue of human rights by the elimination of the scope of civil rights is undoubtedly closely related to the issues of obligating the states by provisions of international conventions and agreements that define human rights."<sup>42</sup>

Finally, it should be noted that only defined groups are entitled to the part of the constitutional guarantees regarding social security. This refers to the status of children, pregnant women or the elderly where the right to particular health care is concerned. Similarly, special status has been conferred to the disabled who are exclusive recipients of the right to special help pursuant to article 69 of the Constitution.

### ***The constitutional regulations' impact on the content of social security rights in the domestic legal system***

The constitutional provisions have an undoubtedly significant impact on the content of social security rights in the Polish legal system.

Most importantly, the constitutional norms define the minimum standards of social rights. Thus, they constitute, at least in theory, the guarantees that the legislator will not limit the rights to a standard below the minimum which arises from the Constitution. Yet, it does not mean that the rights may not be modified and even limited. It may not, however, lead to a breach of the essence of this right. Every right that constitutes the content of the social security has some characteristic features, without which it would be impossible to say that this right exists and it would be necessary to recognize that it is about some other rights. The collection of such features is frequently referred to as the core or kernel of the right. As it has been noted by the Constitutional Tribunal, the legislator's competence to modify and limit the social and economic rights may not be used to undermine the essence of those rights.<sup>43</sup>

It is also worth indicating that many constitutional norms regarding the social security right have the status of legislative provisions. These norms constitute certain direction that should be followed by the legislator. Therefore, the social rights are not static but dynamic.<sup>44</sup> Constitutional regulations influence their often slow but stable development. The provisions of article 67, section 1 of the Polish Constitution offer a good example. It imposes on public authorities the obligation to pursue a policy aiming at full, productive employment, by implementing programmes to combat unemployment, including the organization and support of vocational consultancy and training, as well as public works. This regulation is considered to be the typical programme norm.<sup>45</sup> Notwithstanding, the Constitutional Tribunal has,

<sup>42</sup> A. Wróbel, Obywatelstwo polskie a prawa i wolności konstytucyjne [in:] M. Chmaj, L. Leszczyński, W. Skrzydło, J. Z. Sobczak, A. Wróbel, Konstytucyjne wolności i prawa, T. I Zasady ogólne, Kraków 2002, p. 155.

<sup>43</sup> Verdict of the Constitutional Tribunal of 15.10.1997, K 11/97, OTK 1997 No.3-4, item 39.

<sup>44</sup> Na temat skutków orzeczeń Trybunału Konstytucyjnego cf. R. Banińska-Górecka, Skutki prawne orzeczeń Trybunału Konstytucyjnego w dziedzinie ubezpieczenia społecznego, Warszawa 2014.

<sup>45</sup> T. Zieliński, Prawo do pracy – problemy konstytucyjne, Państwo i Prawo 2003, col. 1, p. 11.

on the basis of this regulation, recognized that this regulation indicates a certain objective (task) for the public authorities. At the same time it should be noted that there is a dispute on the grounds of the Polish Constitution over the extent to which the legislator is obligated by the guidelines arising from the programme norms. It seems that the position in favour of admitting the normative nature only to those provisions of the Constitution from which it is possible to derive specific obligations for authorities that use them, is prevalent. Regardless of whether the programme norms included in the regulations on the social security rights are acknowledged as binding or just indicate a certain course of action, in my opinion their significance is crucial for the development of rights arising from the Polish Constitution.

Finally, the constitutional norms introduce an axiological element to the procedure of lawmaking.<sup>46</sup> Axiology, understood as a specific system of values, plays a significant role in the shaping of the social security rights as analysed in this study. One may even propose a thesis that the system in which social rights are to function and develop, must adhere to specific values. Those values on the grounds of the Polish legal and axiological system include, for example, social solidarity, democratic principles of the rule of law, concern about providing everyone with the basic conditions of social security. Naturally, the Polish Constitution embraces not only values fostering the development of social rights but also those that limit them. Such rights include the obligation to consider the necessity to ensure the budget equilibrium of the state and in consequence, the adaptation of the scope of social rights to the economic capacities of the State Treasury. Likewise, the recognition of the primacy of the interests of the individual, and not the community, in many issues may be interpreted as a difficulty in developing social rights. According to the judicature of the Constitutional Tribunal, “The obligation imposed on the legislator to fulfil the social guarantees expressed in the Constitution by means of appropriate normative regulations does not entail the obligation to increase the benefit system to the maximum. The protection of social rights should denote such a shaping of statutory solutions that will constitute the optimal realization of the content of the constitutional law.”<sup>47</sup>

### *Threats to social security rights in times of economic crisis*

It cannot be denied that economic crisis in the overwhelming majority of cases results in the limitation of social rights. It is caused by the fact that it is these very rights that generate the greatest costs for the budget of the state and, as such, they are the easiest way to counteract the decrease in income from taxes during a time of economic slowdown. Two cases resulting in the limitation of social rights might be indicated. First of all, the state may use institutional constraints. In this case, the withdrawal of certain benefits, the elimination of allowances or their suspension for a definite or indefinite period of time takes place. The second form, which causes a breach of social rights, entails the introduction of quantitative limits. These limits result from a lack of financial resources, as a result of which the state has no capacity to pay benefits. These limits mainly apply to benefits of an optional nature, initiated depending on the financial resources available in the budget of the entity responsible for the payment of a given benefit. In extreme cases, this limit may lead to the fact that obligatory benefits (e.g. pensions) are not provided. The more serious threat for social security rights is undoubtedly the first of the aforementioned limits. If a certain institution of a social right has been eliminated from a given legal order, the process of its restoration is long and very difficult. Yet, these situations are not as common as the cases of quantitative limits I have mentioned.

On the grounds of the Polish legal system, the economic crisis poses the greatest threat for those social provisions guaranteed by the Constitution, the content of which has been delegated by the lawmaker to the ordinary legislation or limiting the capacity of pursuing its performance only within the limits stipulated in the legal act. In such a case, provisions of the Constitution may, to a certain extent, prevent

<sup>46</sup> A. Kość, *Relacja prawa i wartości w społeczeństwie otwartym* [in:] *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego* eds. I. Bogucka, Z. Tobor, Kraków 2003, pp. 142-146.

<sup>47</sup> Verdict of the Constitutional Tribunal of 11.12.2006, SK 15/06, OTK-A 2006, No.11, item 170.

the limitation of social rights. According to the judicature of the Constitutional Tribunal, there are two categories of social rights, stipulated by provisions of the Constitution: those that may be pursued only “within the limits stipulated in the legal act” (generally their constitutional guarantees assume the form of the programme norms); and those to which no such limits apply. Obligating the Legislator with the latter constitutional guarantees is undoubtedly stronger, despite the fact that the concretisation of the scope and content of the rights belonging to that category will repeatedly take place by statutory authorisations. In consequence, it must be stated that the limits and character of reference to the statutory regulation cannot be the same for both analysed categories. With regard to the rights and freedom that may be pursued solely within the limits stipulated in the act,<sup>48</sup> establishing the content and wording of particular rights is left to the freedom of the legislator, in the case of the latter category, the content of rights in their fundamental elements and their limits are directly shaped by the constitutional norm, even if the concretisation or method of realisation of those guarantees depended on statutory regulations. It should be noted that the Polish Constitution allows the perusal of the majority of the social law guarantees discussed in this study, only within the limits prescribed by a legal act. This solution should be considered as negative. Social rights are, in my view, human rights and as such they should not depend in their entirety or in any substantial part on the ordinary legislator’s opinion. Their content (the core) should be defined by constitutional provisions. Such a solution provides a strong guarantee that the essence of social rights will not be violated.

An important role in preventing the threat that the economic crisis poses to the social security rights is played by the repeatedly quoted Constitutional Tribunal. It is a judicial authority, inducted to assess the compliance of normative acts with the Constitution. The Constitutional Tribunal adjudicates on the cases of compliance of international acts and agreements with the Constitution, the compliance of acts with ratified international agreements, the ratification of which required prior consent expressed in an act, the compliance of provisions of the law issued by central state authorities with the Constitution, ratified international agreements and acts and so on. It also examines constitutional complaints which may be lodged by everyone whose constitutional rights or freedom have been violated.<sup>49</sup> The Tribunal is perceived as a law enforcement body protecting the observation of rights and freedom, including the social security rights, as guaranteed by the Constitution.<sup>50</sup>

In respect to the analysed subject, the role performed by the Tribunal is mostly about adjudicating whether the ordinary legislator has not violated the constitutional standards of the social security rights. Furthermore, it exerts considerable influence on the interpretation of constitutional decisions and determines the precise content of often general regulations.

Within its judicature, the Constitutional Tribunal has discerned the threat which the attempts to limit the effects of economic crises pose to the social security rights. It has indicated that the concept of social equality and solidarity require that the burden of economic crisis be imposed on all social strata and not fall in particular on only some of them and that social solidarity underpins the redistributive function of the principle of social justice.<sup>51</sup> It has also indicated that the constitutional social security right does not therefore mean that the citizen should not suffer the consequences of the economic misfortunes of the country. It by no means absolves the legislator making decisions in view of the crisis of public finances from spreading specific burdens fairly to particular groups of citizens with respect for constitutional principles, norms and values.<sup>52</sup> It should be further noted that the Constitutional Tribunal consistently indicates that social rights are not absolute and may be limited in a situation of economic difficulties. The

<sup>48</sup> The catalogue of such rights is regulated on the grounds of the Polish Constitution in article 81.

<sup>49</sup> Z. Czeszejko-Sochacki, *Orzeczenia Trybunału Konstytucyjnego: pojęcia, klasyfikacja i skutki prawne*, Państwo i Prawo 2000, col. 12, p. 19.

<sup>50</sup> J. Trzeński, *Trybunał Konstytucyjny- regulacja konstytucyjna i praktyka* [in:] *Sądy i Trybunały w Konstytucji i praktyce* eds. W.Skrzydło, Warszawa 2005, p. 102 at seq.

<sup>51</sup> Verdict of the Constitutional Tribunal of 30 January 2001, file no. K 17/00, OTK ZU No.1/2001, item 4.

<sup>52</sup> cf. Verdict of the Constitutional Tribunal of 16 June 1999, file no. P 4/98, OTK ZU No.5/1999, item 98, part III, point 4.

border of acceptable limitations is, in such cases, the obligation to ensure the minimum guarantees arising from constitutional provisions.

Finally, it is worth noting that the economic crisis in Poland, milder than in other countries suffering from an economic slowdown, has had a lesser impact on the social security rights. The legislator has made endeavours to eliminate the effects of economic crisis, mainly by the liberalisation of provisions regulating the entitlements of persons that regulate employment.<sup>53</sup> This mainly refers to solutions regarding working time or the conclusion of employment contracts for a definite period of time. Despite choosing this direction of eliminating the effects of economic slowdown, even in Poland some erosion of social rights may be noticed.

### *Assessment of the future of social security rights in light of the Constitution*

The evaluation of social rights through the prism of the Polish Constitution leads to moderately optimistic conclusions. There are basic rights within the social security rights in the Polish Constitution. The definite stand of the Constitutional Tribunal on the necessity of the Legislator's maintenance of the minimum as guaranteed by the provisions of the basic law allows the assumption that social rights will constitute a permanent and vital element of the Polish legal system. It should be particularly noticed that many constitutional norms indicate the necessity to undertake positive action that should, in consequence, lead to the development of social rights.

One should also discern numerous threats. Many social security rights regulated in the provisions of the Constitution are the programme norms – hence, the Constitution indicates their realisation as a certain objective, and leaves the methods of its realisation to the legislators' discretion. In such cases the influence of the constitutional provisions on creating specific legal regulations is limited and often even illusory. The economic crisis may also have an adverse effect on the rights of Poles within the social rights. In this case, however, the impact should not be significant, as the economic crisis in Poland has not been particularly severe to the Polish economy. Finally, it is necessary to emphasise that judicatures of the Constitutional Tribunal have been repeatedly ignored. This carries the risk of the attempt to circumvent the minimum standards of social rights stipulated in provisions of the Polish basic law.

Despite the threats which have been indicated, in my opinion, social rights have found a permanent place in the Polish law system and even though they may be temporarily limited, these changes will not be of a fundamental nature. In conclusion, it is worth referring again to the position of the Constitutional Tribunal whose verdict issued on 14 June 2014 indicated that “the legislator's freedom to shape the scope and form and concretization of the content of social rights, including the right to sickness benefit is far-reaching. It is determined by the nature of social rights denoting the obligation for benefits, which requires the harmonization of needs and expectations as well as the possibility to satisfy them. In practice, the scope of implementation of the social security rights depends on the state's economic situation, the ratio of the number of working individuals to contribution-payers, the number of beneficiaries and their affluence, the established social pattern of securing one's existence in old age or in the period of decrease in vital forces, as well as anticipated economic and social trends, in particular the demographic ones (...) The legislator's freedom to shape this right is not, however, unlimited; (...) while regulating the subjective social security right, the legislator may not disregard the principles of the binding social insurance system, by which he became obligated within the legislative freedom granted and all the more may not violate the essence of this right (...) the obligation to maintain the essence of the social security right constitutes, in fact, the minimum scope of this right which the legislator is obliged to maintain (...). This is understood as the necessity to secure the individual's basic needs such as human dignity, freedom and equality which arise from such values of the democratic state.”

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<sup>53</sup> In particular, the act of **01.07.2009 on mitigating the effects of economic crisis for employees and entrepreneurs (Dz.U. [Journal of Laws] No.125, item 1035, as amended.)** constituted the element of anti-crisis legislature.

## ROMANIA

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### THE PROTECTION OF SOCIAL RIGHTS IN ROMANIA

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#### **Introduction**

Traditionally, it was considered that social and economic rights are fundamentally different from civil and political rights and, as such, they cannot be included in the category of fundamental human rights.

However, in the last decades, the international community has recognized the indivisibility of human rights, namely civil, political, economic, social and cultural rights. In this sense, social and economic rights were included in the category of fundamental rights upon the adoption of the Universal Declaration of Human Rights by the UN General Assembly, in 1948.

For instance, art. 22 of the Universal Declaration of Human Rights proclaims the right to social security, art. 23 regulates *everyone's right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment* and art. 24 enshrines *the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay*.

Furthermore, as a result of the regulatory action that took place at the UN level, two more covenants were adopted in 1966, i.e. **(i)** the International Covenant on Social, Economic and Cultural Rights,<sup>1</sup> and **(ii)** the International Covenant on Civil and Political Rights, which came into force in 1976.<sup>2</sup> The two covenants, alongside the Universal Declaration of Human Rights, form the International Bill of Human Rights.<sup>3</sup>

The European Union also acknowledged the indivisibility of human rights. Thus, the Charter of Fundamental Rights of the European Union<sup>4</sup> enshrines in Chapter IV, *Solidarity, the workers' right to information and consultation within the undertaking, right of collective bargaining and action, right of access to placement services, protection in the event of unjustified dismissal, fair and just work conditions, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of global economic interest, environmental protection and consumer protection*.

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<sup>1</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. URL: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 23 April 2014].

<sup>2</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171: URL: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 23 April 2014].

<sup>3</sup> Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

<sup>4</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at: URL: <http://www.refworld.org/docid/3ae6b3b70.html> [accessed 23 April 2014].

The inclusion of social rights in the category of fundamental rights is relevant in respect to the legal regime of guarantees that ensure both the effectiveness and the protection of the rights in question and, especially, their enforcement. In this regard, it was argued that social and economic rights, unlike civil and political rights, lack what the literature refers to as *justiciability*.<sup>5</sup>

Justiciability is an attribute of civil and political rights, that implies the following:

- People who claim to be victims of violations of these rights are able to file a complaint before an independent and impartial body;
- The right to request remedies if a violation has occurred; and
- The possibility to have any remedy enforced when the duty-bearer does not comply with its duties.

Proponents of the theory according to which social and economic rights lack justiciability consider that social and economic rights, such as the right to decent housing or the right to social services **are vague and progressive in nature**.<sup>6</sup> For this reason, their content cannot be accurately determined.

Even if these features hinder and, in some cases, prevent the enforcement of social and economic rights, it should be taken into account that, in many respects, civil and political rights, e.g. property rights, the right to a fair trial, freedom of speech, are faced with the same problem.

Thus, a careful analysis of the assertions regarding the lack of justiciability of social rights reveals that the difficulty in assessing the conditions in which they apply does not constitute an absolute legal impediment in relation to their justiciability, but rather restricts the latitude limits of the guarantees attached to them.

The circumstantial nature of social rights, which emerges from economic disparities, dynamic aspects, evolutionary character etc. is not likely to impair with their essence or their affiliation to the fundamental rights category, with all the guarantees attached to them, including justiciability.

Thus, we conclude that social and economic rights belong to the category of fundamental rights. For this reason, it is necessary both to analyse the provisions related to social and economic rights contained in international treaties or conventions, and to illustrate (i) the constitutional guarantees that accompany these categories of rights and (ii) the impact of the constitutional provisions on the content of social rights.

Such an analysis is particularly useful in the current economic climate, of economic crisis, whose negative effects have impacted the social security systems, leading to the restriction and, in some cases, even the limitation of social security rights.

In this conceptual framework, it is necessary to identify both the threats to social security rights in times of economic recession, and the constitutional “levers” that can be used in order to prevent the social regress.

## 1. *The constitutional guarantees of social security rights*

The Romanian Constitution<sup>7</sup> provides *expressis verbis* that Romania is a social state<sup>8</sup> and includes social rights in the category of fundamental rights and freedoms alongside other rights and freedoms, such

<sup>5</sup> Robin R. Churchill and Urfan Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’, *European Journal of International Law*, Volume 15 (2004), Issue 3, Oxford University Press, p. 417-456. URL: <http://ejil.oxfordjournals.org/content/15/3/417.short#target-1> (accessed 13.03.2014). International Commission of Jurists (ICJ), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability*, 2008, Human Rights and Rule of Law Series No. 2. URL: <http://www.unhcr.org/refworld/docid/4a7840562.html> (accessed 13.03.2014)

<sup>6</sup> For instance, art. 2.1 of the International Covenant on Economic, Social and Cultural Rights requires states: “to take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.

<sup>7</sup> Published in the Official Gazette of Romania no. 767 of 31 October 2003.

<sup>8</sup> According to art. 1 paragraph 3 of the Romanian Constitution, “Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.”

as the right to life, physical and mental integrity,<sup>9</sup> freedom of conscience,<sup>10</sup> freedom of speech,<sup>11</sup> right to private property,<sup>12</sup> economic freedom<sup>13</sup> etc.

We consider that before presenting the constitutional provisions that enshrine the main social security rights, it is necessary to clarify the concept of “*constitutional guarantees*”.

Thus, the concept of “*constitutional guarantees*” has been defined<sup>14</sup> as a legal measure that is characterized by the fact that **(i)** it protects fundamental rights against state interference and **(ii)** it may be amended or repealed only with the observance of special rules.<sup>15</sup>

*Ab initio*, it should be noted that the fundamental law regulates non-discrimination as a general principle,<sup>16</sup> by enshrining the equality of citizens before the law, without any privilege or discrimination.

Also, in Title II, “Rights, freedoms and duties”, the Constitution refers to the main rights of social security, such as:

■ **The right to the protection of health (art. 34)**

“(1) *The right to the protection of health is guaranteed.*

(2) *The State shall be bound to take measures to ensure public hygiene and health.*

(3) *The organization of the medical care and social security system in case of sickness, accidents, maternity and recovery, the control over the exercise of medical professions and paramedical activities, as well as other measures to protect physical and mental health of a person shall be established according to the law.”*

■ **Living standard (art. 47)**

“(1) *The State shall be bound to take measures of economic development and social protection, with a view of ensuring a decent living standard for its citizens.*

(2) *Citizens have the right to pensions, paid maternity leave, medical care in public health centres, unemployment benefits, and other forms of public or private social securities, as stipulated by the law. Citizens have the right to social assistance, according to the law.”*

■ **Protection of children and young people (art. 49)**

“(1) *Children and young people shall enjoy special protection and assistance in the pursuit of their rights.*

(2) *The State shall grant allowances for children and benefits for the care of ill or disabled children. The law shall establish other forms of social protection for children and young people.*

<sup>9</sup> Art. 22 of the Romanian Constitution.

<sup>10</sup> Art. 29 of the Romanian Constitution.

<sup>11</sup> Art. 30 of the Romanian Constitution.

<sup>12</sup> Art. 44 of the Romanian Constitution.

<sup>13</sup> Art. 45 of the Romanian Constitution.

<sup>14</sup> Laws John, “Constitutional Guarantees.” Statute Law Review 29, no. 1 (February 2008), p. 1-2.

<sup>15</sup> For instance, art. 151 of the Romanian Constitution provides the following:

“(1) *The draft or proposal of revision (of the Constitution) must be adopted by the Chamber of Deputies and the Senate, by a majority of **at least two thirds of the members of each Chamber.***

(2) *If no agreement can be reached by a mediation procedure, the Chamber of Deputies and the Senate shall decide thereupon, in joint sitting, by the vote of at least three quarters of the number of Deputies and Senators.*

(3) *The revision shall be final after the approval by a referendum held within 30 days of the date of passing the draft or proposal of revision.”*

Furthermore, art. 152 of the Constitution sets the limits of the revision.

“(1) *The provisions of the Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision.*

(2) *Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof.*

(3) *The Constitution shall not be revised during a state of siege or emergency, or in wartime.”*

<sup>16</sup> Art. 16 paragraph 1 of the Romanian Constitution.



- (3) *The exploitation of minors, their employment in activities that might be harmful to their health, or morals, or might endanger their life and normal development are prohibited.*
- (4) *Minors under the age of fifteen may not be employed for any paid labour.*
- (5) *The public authorities are bound to contribute in order to secure the conditions for the free participation of young people in the political, social, economic, cultural and sporting life of the country.”*

■ **Protection of disabled persons (art. 50)**

*“Disabled persons shall enjoy special protection. The State shall provide the accomplishment of a national policy of equal opportunities, disability prevention and treatment, so that disabled persons can effectively participate in community life, while observing the rights and duties of their parents or legal guardians.”*

In this context, it should be noted that the constitutional provisions to which we referred are detailed in the content of several laws,<sup>17</sup> governing issues such as personal and material scope of social security rights, conditions of access, amount of benefits etc.

## ***2. The scope of the material and personal social security rights guaranteed by the constitution***

As we have already pointed out, the main social security rights regulated by Constitution are: **(i)** old age, invalidity, survivors’ benefits; **(ii)** sickness benefits; **(iii)** benefits for accidents at work and occupational diseases; **(iv)** unemployment benefits; **(v)** family benefits (maternity leave, sick child care, parental leave, child allowance).

In Romania, the social security system is regulated as a public service.

*De lege lata*, the administrative organization of the social security system is based on the concept of specialization of competences, which implied the establishment of a specialized agency for each category of social risk.

As an example, the administration of the public pension system and the insurance system against accidents at work and occupational diseases is entrusted to the National House of Public Pensions, the unemployment insurance system is administered by the National Agency for Employment, while the social insurance system against risks such as sickness, maternity, sick child care is administered by the Ministry of Health.

The financial organization of the social security system is founded on the principle of contribution and the principle of distribution, thus promoting the idea of solidarity between generations.

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<sup>17</sup> Law no. 263/2010 regarding the unified public pension system published in the Official Gazette no. 852 of 20 December 2010; Emergency Government Ordinance no. 158/2005 regarding leaves and health insurance allowances, published in the Official Gazette no. 1074 of 29 November 2005; Emergency Government Ordinance no. 111/2010 on parental leave and allowance, published in the Official Gazette no. 830 of 10 December 2010; Emergency Government Ordinance no. 96/2003 on protection of maternity at work, published in the Official Gazette no. 750 of 27 December 2003; Law no. 76/2002 regarding the unemployment insurance system and employment stimulation, published in the Official Gazette no. 103 of 6 February 2002; Law no. 346/2002 regarding the insurance system for work accidents and occupational diseases, republished in the Official Gazette no. 251 of 08. April 2014; Law no. 95/2006 on healthcare reform, published in the Official Gazette no. 272 of 28 April 2006; Law no. 448/2006 regarding the protection and promotion of the rights of disabled persons, republished in the Official Gazette no. 1 of 3 January 2008; Law no. 292/2011 regarding the social assistance, published in the Official Gazette no. 905 of 20 December 2011; Law no. 416/2001 regarding the guaranteed minimum income, published in the Official Gazette no. 201 of 20 July 2001; Law no. 61/1993 regarding the states allowance for children, republished in the Official Gazette no. 767 of 14. 11.2012 etc.

## 2.1. Old age, invalidity and survivors benefits

In Romania, the pension system is structured on three pillars,<sup>18</sup> namely:

- (i) **The first pillar: The public pension system (“the pay as you go system”)**, which is compulsory. The National House of Public Pensions administers the funds. The system is based on the principle of distribution.
- (ii) **The second Pillar** is a privately managed compulsory pension system. Thus, the insurance is compulsory for all insured persons under the age of 35 years old and optional for insured persons aged between 36 to 45 years (art. 30 Para. (1) and (2) of Law no. 411/2004). Private pension companies manage the funds. The system is based on the principle of capitalization.
- (iii) **The third pillar:** The voluntary pension system,<sup>19</sup> which is formed of voluntary contributions of the insured to various pension funds. In the voluntary pension system pension, the status of insured person may be acquired by anyone obtaining income from professional activities, contributing either alone or together with the employer, as appropriate.

The public pension system is regulated by Law no. 263/2010,<sup>20</sup> which, *inter alia*, contains provisions relating to (i) the principles of the public pension system; (ii) category of persons for whom the insurance is compulsory; (iii) social contributions; (iv) benefits; (v) the establishment and payment of pensions.

### 2.1.1. The principles of the public pension system

In Romania, the public pension system is based on nine principles, namely:

1. **The principle of uniqueness** – according to which the state organizes and guarantees the public pension system based on the same rules for all the participants in the system.
2. The principle according to which **the natural and legal persons are, by law, required to participate in the public pension system**, the benefits being paid as a result of the fulfilment of obligations to the public pension system.
3. **The principle of contribution** – under which the social insurance funds consists of contributions paid by natural or legal persons participating in the public pension system, social security benefits being acquired by reason of contributions.
4. **The principle of equality** – that ensures that all participants in the public pension system, taxpayers and beneficiaries, benefit from a non-discriminatory treatment (between persons that are in the same legal situation), regarding the rights and obligations under the law.
5. **Principle of distribution** – under which funds are redistributed for the payment of the obligations incumbent to the public system, in accordance with the provision of the law;
6. **The principle of social solidarity** – under which the participants in the public system assume mutual obligations and enjoy rights in order to prevent, mitigate or eliminate social risks under the law. Example: certain periods of time, expressly regulated by the law, are taken into account when calculating the amount of the pension, even though they are not contributory periods (e.g.: the period of time in which the insured receive invalidity benefits).
7. **The autonomy principle** – based on independent administration of the public pension system, according to the law.
8. **The pension rights are not subject to any statute of limitation.**
9. **The pension rights cannot be yielded.**

<sup>18</sup> For further reading, please see Luminița Dima, “Social security law”, C.H. Beck Press, Bucharest, 2012, p. 11-13.

<sup>19</sup> Law no. 204/2006 on voluntary pension, republished in the Official Gazette no. 470 of 31 May 2006.

<sup>20</sup> Law no. 263/2010 regarding the unified public pension system, published in the Official Gazette no. 852 of 20 December 2010 and The rules for the implementation of Law no. 263/2010 regarding the unified public pension system (Government Decision no. 257/2011), published in the Official Gazette no. 214 of 28 March 2011.

### 2.1.2. Categories of insured persons

Romanian citizens, foreign citizens and stateless persons may acquire the insured status in the Romanian public pension system, provided that they domicile or reside in Romania.<sup>21</sup>

Likewise, Romanian citizens, foreign citizens and stateless persons may acquire the insured status in the Romanian public pension system irrespective of whether they domicile or reside in Romania, under the terms set out in international legal instruments to which Romania is a party.

In this field, relevant provisions are contained in Regulation no. 883/2004 EC of the European Parliament and of the Council on the coordination of social security systems.<sup>22</sup> Thus, the rules set forth in the Regulation enable the determination of the applicable legislation to persons exercising their right to free movement within the European Union.<sup>23</sup>

Furthermore, the coordination rules guarantee that persons moving within the European Union and their dependents and survivors retain the rights and the advantages acquired and in the course of being acquired.<sup>24</sup> According to art. 6 of Regulation no. 883/2004, the competent institution of a Member State whose legislation makes the acquisition, retention, duration or recovery of the right benefits conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member States.

Romanian citizens, foreign citizens and stateless persons who are not covered by the provisions contained in Regulation no. 883/2004 EC may acquire the insured status in the Romanian public pension system under the terms set out in international legal instruments to which Romania is a party.

Using similar wording to the one contained in Regulation no. 883/2004, Law no. 263/2010 enshrines the aggregation of periods principle and provides that<sup>25</sup> “*when establishing the social insurance rights, the competent institution shall take into account insurance periods completed or recognized as such both in Romania and in other countries, under the terms set out in international legal instruments to which Romania is a party*”.

In addition, recipients of social security benefits who do not reside in Romania are entitled to transfer the benefits in question abroad.<sup>26</sup>

Insured persons in the Romanian public pension system are largely divided into compulsory and voluntary insured persons.

#### A. Compulsory insured persons<sup>27</sup>

##### a. Employees and persons treated as such

- (i) Employees (who concluded individual employment agreements), including soldiers;
- (ii) Civil servants;
- (iii) Persons who obtain a professional income, other than salaries, from intellectual property rights, or contracts/agreements concluded under the Civil Code;<sup>28</sup>
- (iv) Active and reserve military personnel, police officers and civil servants with special status.

<sup>21</sup> Art. 5 Para. 1 of the Law no. 263/2010.

<sup>22</sup> Regulation no. 883/2004 (EC) of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, published in the Official Journal of the European Union L 166 of 30 April 2004.

<sup>23</sup> Please note that according to art. 2 of the Regulation no. 883/2004, “*it shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors. It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.*”

<sup>24</sup> Consideration (13), Regulation no. 883/2004 (EC) of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

<sup>25</sup> Art. 19 of Law no. 263/2010.

<sup>26</sup> Art. 111 Para 1 of Law no. 263/2010.

<sup>27</sup> Art. 6 Para 1 of Law no. 263/2010.

<sup>28</sup> Law no. 287/2009 regarding the Civil Code, published in the Official Gazette no. 505 of 15 July 2011.

- b. *Persons who perform their activity in elected or appointed positions within the executive, legislative or judicial branch, during their mandate or cooperative.*
- c. *The unemployed.*
- d. *The self-employed provided they obtain a gross income per calendar year equivalent to at least 4 times the average gross salary as determined for the state social insurance budget.*<sup>29</sup>
- e. *Reserve military personnel, police officers and civil servants with special status whose service relations have ceased and receive monthly benefits that are funded from the state budget.*

#### B. Voluntary insured persons

Any person may voluntary insure in the public pension system, by concluding a social insurance contract with the House of Public Pensions in whose jurisdiction it resides.

##### 2.1.3. The social insurance contribution

The social insurance contribution rates are differentiated according to the conditions in which the activity is performed, i.e.: **(i)** normal working conditions; **(ii)** particular conditions of employment;<sup>30</sup> **(iii)** special working conditions<sup>31</sup> and **(iv)** other conditions of employment.<sup>32</sup>

The social insurance contribution is due at the time of enrolment in one of the situations for which insurance in the public pension system becomes compulsory or, where applicable, from the date of conclusion of the social insurance contract.

Who pays the social contributions?<sup>33</sup>

- *Employees and persons treated as such:* the contribution is split between the employer and the employee;
- *The unemployed:* the contribution shall be borne entirely from the unemployment insurance budget at the rate established for normal working conditions;
- *The self-employed and voluntary insured persons:* the social contribution is due and payable in full by them at the rate corresponding to normal working conditions. Pursuant to the rules enshrined in the New Fiscal Code<sup>34</sup>, which entered into force on January 1st 2016, persons' obtaining income from independent activities may choose to pay only the individual contribution rate – in such a case they will only acquire a third of the contribution period.
- *Reserve military personnel, police officers and civil servants with special status whose service relations:* the contribution shall be borne entirely from the state budget at the rate established for normal working conditions.

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<sup>29</sup> In this category are included:

- Administrators or managers who have concluded management agreements;
- Members of individual or family enterprises;
- Sole traders;
- Persons employed in international institutions if they are not their employees;
- Other persons that obtain income from the performance of other professional activities.

<sup>30</sup> Employment under particular conditions – workplaces where the degree of exposure to occupational risk factors throughout the normal working hours can lead to occupational illnesses (art. 3 Para 1 g) of Law no. 263/2010).

<sup>31</sup> Employment under special conditions – workplaces where the degree of exposure to occupational risk factors for at least 50% of the normal working hours can lead to occupational illnesses (art. 3 Para 1 h) of Law no. 263/2010).

<sup>32</sup> Employment in other conditions – workplaces and activities in the field of national defence, public order and national security, involving constant threat of serious injury, disability, disfigurement, loss of life or suppress freedom – captivity, terrorism, kidnapping, taking of a hostage or other similar situations – and for which preventive or protective measures cannot be taken; (art. 3 Para 1 i) of Law no. 263/2010).

<sup>33</sup> Art. 31 of Law no. 263/2010.

<sup>34</sup> Law no. 227/2015 published in the Official Gazette no. 688 din 10.9.2015.

#### 2.1.4. Benefits granted in the public pension system

The main benefits granted in the public pension systems are **(i)** old-age pension; **(ii)** early retirement pension and partial early retirement pension; **(iii)** invalidity pension; **(iv)** survivor pension.

##### 2.1.4.1. Old age pension<sup>35</sup>

The old age pension is granted to social contributors who cumulative fulfil, at the age of retirement, the standard age for retirement and the minimum value of the contribution period.

The standard age of retirement is 65 for men and 63 for women. The minimum contribution period is 15 years,<sup>36</sup> for both men and women, and the complete contribution period<sup>37</sup> is 35 years, for both men and women.<sup>38</sup>

As it can be noticed, although both the minimum and complete contribution periods are the same for men and women, the standard retirement ages varies.<sup>39</sup>

The legal provisions that set out a different retirement age for men and women were repeatedly challenged before the Constitutional Court<sup>40</sup> on the grounds that (i) they violate the principle of equality before the law enshrined in art. 16 of the Constitution, and (ii) infringe EU law, namely Directive 2006/54/EC of the European Parliament and Council Directive on implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.<sup>41</sup>

The Constitutional Court dismissed the constitutional challenges, ruling that the Constitution only covers prohibited discrimination. *Per a contrario*, positive discriminations that aim to achieve “*distributive justice, to cancel or to diminish objective inequalities*” are permitted under the Constitution.

In connection with the claims regarding the breach of the provisions contained in Directive 2006/54 EC, the Constitutional Court stated that its provisions apply only to occupational social security schemes. Furthermore, the Constitutional Court pointed out that the statutory social security schemes are covered by Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment between men and women in matters of social security,<sup>42</sup> which allows Member States to exclude from its scope the determination of pensionable age for the purpose of granting old-age benefits and the possible consequences thereof for other benefits.

It is our contention that Law no. 263/2010, which sets out different retirement ages for men and women, violates the constitutional principle of equality before the law, especially taking into consideration the fact that both the minimum contribution period and the full contribution period are identical for men and women.

Thus, although setting different retirement ages for men and women aimed at favouring women, whose family charges are usually higher compared to men, in fact, the legislation in question creates a more disadvantageous situation for women, who are forced to start work 2 years earlier than men in order to achieve the minimum or full period of contribution.

The above-mentioned legal provisions create a direct discrimination, which must be eliminated as soon as possible, especially given the fact that **(i)** the Romanian legal system only regulates a compulsory

<sup>35</sup> Art. 52-62 of Law no. 263/2010.

<sup>36</sup> Minimum contribution period in order to receive an old age pension.

<sup>37</sup> Full contribution period, which entitles the insured to receive an old pension or an early old age pension/partial early old age pension.

<sup>38</sup> Under Law no. 263/2010, the old age pension can be obtained under different conditions than those set out above, in cases expressly regulated by law.

<sup>39</sup> For further reading on this subject, please see Bonnet, Carole, and Marco Geraci. “Correcting gender inequality in pensions. The experience of five European countries.” *Population & Sociétés* no. 453 (February 2009), p.1-4.

<sup>40</sup> E.g., please see, Decision no. 888/2006 of the Constitutional Court, published in the Official Gazette no. 54 of 24 January 2007; Decision no. 93/2008 of the Constitutional Court, published in the Official Gazette no. 154 of 28 February 2008.

<sup>41</sup> Published in the Official Journal of the European Communities L 204 of 26 July 2006.

<sup>42</sup> Published in the Official Journal of the European Communities L 6 of 10 January 1979, p.

retirement age (and not a statutory retirement age) and **(ii)** the Labour Code<sup>43</sup> regulates the automatic termination of the individual employment agreement, upon cumulatively fulfilling the standard age for retirement and the minimum value of the contribution period.

In conclusion, it is our contention that if the legislator's aim had been to ensure a higher degree of protection to women, it should have adopted other measures, such as **(i)** reducing both the standard retirement age and the minimum, respectively the complete period of contribution or **(ii)** equalizing the retirement ages, meanwhile granting women the right to receive an old age pension before reaching the compulsory retirement age (e.g.: at the age of 63, while the compulsory retirement age is 65), subject to completion of the minimum contribution period.

#### *2.1.4.2. Early retirement pension and partialearly retirement pension*

Early retirement pension may be granted to insured persons who shall reach the compulsory retirement age in maximum 5 years, if they have exceeded the complete period of contribution with at least 8 years.<sup>44</sup>

The amount of the early retirement pension<sup>45</sup> is determined in the same manner as the old age pension. Upon fulfilling the conditions prescribed for eligibility to the old age pension, the early retirement pension is automatically converted into old age pension.

Partial early retirement pension may be granted to insured persons who shall reach the compulsory retirement age in maximum 5 years as of the date they request to benefit from partial early retirement pension, if they have completed the full period of contribution or have exceeded the complete period of contribution with less than 8 years.<sup>46</sup>

The amount of the early retirement pension is determined in the same manner as the old age pension, which would have been due, by reducing it with 0,75%, for each month of anticipation, until the conditions for obtaining the old age pension are met.<sup>47</sup>

Upon fulfilling the conditions prescribed for the granting of the old age pension, the partial early retirement pension is automatically converted into old age pension and the reduction to which we referred shall be removed.

The partial early retirement pension and the early retirement pension may not be cumulated with income resulting from professional activities for which the insurance is compulsory.

#### *2.1.4.3. Invalidity benefits*

The invalidity pension is granted to persons who have lost all or half of their working capacity due to:

- a) Work accidents and occupational diseases;
- b) Malignancies, schizophrenia and AIDS;
- c) Common diseases;
- d) Accidents not related to work.

Students and apprentices who have lost at least half of their capacity to work as a result of accidents at work or occupational diseases, which occurred during and because of the professional practice, are entitled to receive invalidity benefits.

#### *The degree of invalidity*

The invalidity pension is determined in relation to the degree of invalidity.

<sup>43</sup> Art. 56 Para 1 c) of the Romanian Labour Code, republished in the Official Gazette no. 346 of 18 May 2011.

<sup>44</sup> Art 62 Para. 1 of Law no. 263/2010.

<sup>45</sup> Art 62 Para. 4 of Law no. 263/2010.

<sup>46</sup> Art 62 Para. 1 of Law no. 263/2010.

<sup>47</sup> Art 65 Para. 4 of Law no. 263/2010.

Thus, in relation to the degree of reduction of the working capacity, Law no. 263/2010 distinguishes between three degrees of invalidity, as follows:

- a) **First degree invalidity**, characterized by total loss of working capacity and self-caring capacity;
- b) **Second degree invalidity**, characterized by total loss of working capacity;
- c) **Third degree invalidity**, characterized by loss of at least 50% of the working capacity.

The invalidity pension is granted irrespective of the duration of the contribution period.

Conversely, when calculating the invalidity pension, insured persons who have lost their working capacity as a result of common illnesses or accidents not related to work shall be granted an extra score only if they have completed a period contribution established in relation to their age.

#### *2.1.4.4. Survivors' pension<sup>48</sup>*

The beneficiaries of the survivors' pension are the children and the surviving spouse of the deceased. The survivors' pension shall be granted only if the deceased was a pensioner or met the conditions for obtaining a pension.

Children are entitled to this pension:

- Up to the age of 16;
- If they continue their studies in an educational institution upon their completion, without exceeding the age of 26;
- Throughout the period of time in which they are disabled, if the invalidity emerged (i) before they turned 16 or (ii) during the time in which they were attending an educational institution (without exceeding the age of 26).

#### **The spouse is entitled to receive a survivors' pension under the following conditions:**

- Throughout the life, upon the fulfilment of the standard retirement age, if the duration of the marriage was at least 15 years;
- Throughout the life, upon the fulfilment of the standard retirement age, if the duration of the marriage was between 10 and 15 years; the amount of the pension shall be reduced by 0,5% for each month of marriage in minus, respectively by 6% for each year in minus.
- Regardless of age, throughout the period in which they are classified in the first or second degree of invalidity, if the duration of the marriage was at least 1 year;
- Regardless of age and the duration of marriage if the supporting spouse's death was the result of an accident at work / occupational diseases and if he/she has no monthly income resulting from the performance of an activity for which the insurance is compulsory or they are less than 35% of average gross earnings;
- The surviving spouse who does not meet any of the conditions above-mentioned is entitled to a survivors' pension for a period of six months calculated from the date the supporting spouse died, if he/she has no monthly income resulting from the performance of an activity for which the insurance is compulsory or they are less than 35% of average gross earnings;
- The surviving spouse who, at the time of the supporting's spouse death, cares for one or more children under the age of seven years, is entitled to a survivors pension until all the children turn 7, if she/he has no monthly income resulting from the performance of an activity for which the insurance is compulsory or they are less than 35% of average gross earnings.

<sup>48</sup> Art. 83-93 of Law no. 263/2010.

## 2.2. *Sickness benefits. Maternity benefits. Sick childcare benefits.*

G.E.O. 158/2005 on leave and health insurance allowances regulates sickness benefits, maternity benefits and sick childcare benefits.

### 2.2.1. *Categories of insured persons*<sup>49</sup>

- A. Employees, civil servants and any other person who performs a dependent activity;
- B. Persons who perform their activity in elected or appointed positions within the executive, legislative or judicial branch, during their mandate or cooperative.
- C. The unemployed;
- D. The self-employed:
  - a) Associates or shareholders;
  - b) Individual company members;
  - c) Individuals authorized to conduct business activities;
  - d) Wife/husband of persons performing independent activities who, without being registered with the Registry of Commerce participate at activities carried out by their spouses.

In addition, any person who does not fall within one of the categories above-mentioned may conclude an insurance contract with the Health Insurance Fund.

As a general rule, G.E.O. 158/2005 establishes that insured persons have the right to leave and health insurance benefits provided they reside in Romania.

Undoubtedly, this rule must be read in conjunction with Regulation no. 883/2004<sup>50</sup> on the coordination of social security systems, as it provides *expressis verbis*<sup>51</sup> that “cash benefits payable under the legislation of one or more Member States or under the Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated”.

Furthermore, indirectly, but unequivocally, G.E.O. 158/2005 recognizes the right of insured persons to benefit from leave and insurance benefits even if they do not reside in Romania.

Such a conclusion follows from the *per a contrario* interpretation of art. 41 b), which states that the payment of insurance benefits shall cease if the beneficiary has established its domicile in a state with which Romania has concluded a social security agreement, if according to its provisions, the benefits are paid by the other State. *Per a contrario*, social insurance allowances will be paid by the Romanian state, even if the beneficiary no longer resides in Romania, provided that the social security agreement contains stipulations to this end.

The above-mentioned provisions are not applicable to EU citizens.

### 2.2.2. *Benefits*

The insured persons are entitled to the following leaves and allowances:<sup>52</sup>

- a) **Sick leaves and allowances for temporary disability due to common illnesses or accidents outside work;**

<sup>49</sup> Art. 1 Para. 2 and 3 of the Emergency Government Ordinance no. 158/2005.

<sup>50</sup> Please note that according to art. 2 of the Regulation no. 883/2004, “it shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors. It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.”

<sup>51</sup> Art. 7 of Regulation no. 883/2004 on the coordination of social security systems.

<sup>52</sup> Art. 2 Para. 1 of Emergency Government Ordinance no. 158/2005.



- b) Maternity leave and allowances;**
- c) Sick childcare leave and allowances;**
- d) Maternity risk leave and allowances.**

### 2.2.3. Requirements for granting the benefits<sup>53</sup>

The insured persons are entitled to benefit from health insurance benefits if they meet the following conditions:

- a) They have paid the social security contributions;
- b) They have completed the minimum contribution period, which is one month in the last 12 months prior to the contingency;
- c) They submit a certificate issued by the person paying the benefits, attesting the number of days of temporary disability leave taken in the last 12 months, excluding surgical emergencies or illnesses included in Group A.

### 2.3. Family benefits – parental leave

The parental leave and childcare allowance are regulated by G.E.O. 111/2010, which transposed Directive 2010/18/EU implementing the revised Framework Agreement on parental leave.<sup>54</sup>

#### 2.3.1. Ratione personae scope

G.E.O. 111/2010 shall apply to:<sup>55</sup>

- (i) Persons whose children are born starting with January, 1, 2011;
- (ii) Persons who adopted a child or to persons whom the child was entrusted for adoption or have the child in foster care placement or emergency foster care placement; to the person who was appointed as guardian, starting with January, 1, 2011;

The rights are granted provided the applicant meets the following conditions:<sup>56</sup>

- (i) He/she is a Romanian citizen, foreign citizen or a stateless person;
- (ii) He/she resides in Romania;
- (iii) He/she lives in Romania and takes care of children (who also reside in Romania).

However, it should be noted that the aforementioned legal provisions do not apply to persons falling within the *ratione personae* scope of Regulation no. 883/2004 on the coordination of social security systems,<sup>57</sup> since, as we have pointed out, “cash benefits payable under the legislation of one or more Member States or under the Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated”.

<sup>53</sup> Art. 3 and art. 31 of Emergency Government Ordinance no. 158/2005.

<sup>54</sup> Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, published in the Official Journal of the European Union L 68 of 18.3.2010.

<sup>55</sup> Art. 1 of the Emergency Government Ordinance no. 111/2010 on parental leave and allowance.

<sup>56</sup> Art. 12 Para. 1 of the Emergency Government Ordinance no. 111/2010 on parental leave and allowance.

<sup>57</sup> Please note that according to art. 2 of the Regulation no. 883/2004, “it shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors. It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.”

### 2.3.2. Requirements for granting benefits

In order to qualify for parental leave and allowance, applicants must have obtained in the last year preceding the birth (or adoption) of the child income<sup>58</sup> subject to income tax, for a period of 12 months.<sup>59</sup>

In this context, it should be noted that the childcare allowance falls into the category of **non-contributory social security benefits**, as there is no requirement **for the payment** of contributions to one of the social security systems.

Our contention, according to which the parental leave allowance falls into the category of **non-contributory social insurance benefits**, is based on the fact that family benefits are accredited at both international,<sup>60</sup> and regional level<sup>61</sup> as social insurance rights that aim at covering risks arising from the increase of costs related to child rearing. Moreover, the purpose of granting parental leave allowance is to replace professional income and not to provide minimum subsistence income to its beneficiaries. Such a conclusion follows from the fact that **(i)** the childcare allowance is granted irrespective of the applicant's income; **(ii)** the amount of the childcare allowance is determined by reference to the beneficiary's net income.

### 2.3.3. Types of benefits

The main benefits provided under G.E.O. 111/2010 are the following:<sup>62</sup>

1. Parental leave for rearing the child up to one year, with pay;
2. Parental leave for rearing the child up to two years, with pay;
3. Parental leave for rearing the child with disabilities up to three years, with pay;
4. Parental leave for rearing the child aged between one and two years, without pay;
5. Parental leave for rearing the child with disabilities up to seven years, with pay.

## 2.4. Family benefits – States allowance for children

Law no. 61/1993 regulates the state allowance for children.

Under Romanian law, the state allowance for children is granted to all children aged up to 18 years and young people who have reached the age of 18, provided they attend high school or vocational courses, until graduation.

Both foreigners' children and stateless persons' children are entitled to receive state allowance, provided they reside in Romania.

## 2.5 Benefits in respect of accidents at work and occupational diseases

Law no. 346/2002<sup>63</sup> regulates the insurance for work accidents and occupational diseases.

Insurance for work accidents and occupational diseases is a personal insurance, part of the social insurance system, guaranteed by the state. It includes specific relations that provide social protection against the following categories of occupational risks: loss, reduction of work capacity and death as consequence of occupational accidents and diseases.<sup>64</sup>

<sup>58</sup> Such as salary, income from independent activities, agricultural activities etc.

<sup>59</sup> Art. 2 Para. 1 of the Emergency Government Ordinance no. 111/2010 on parental leave and allowance.

<sup>60</sup> Art. 39-45 of the International Labour Organization Convention no. 102/1952 concerning Minimum Standards of Social Security, adopted at Genève on 28 June 1952, ratified by Law no. 115/2009, published in the Official Gazette no. 325 of 15.05. 2009.

<sup>61</sup> Please see The European Code of Social Security, adopted at Strasbourg on 16.04.1964; art. 39-45, and art. 1 z) of Regulation no. 883/2004 on the coordination of the social security systems.

<sup>62</sup> Art. 2 Para. 2 and art. 6 of the Emergency Government Ordinance no. 111/2010 on parental leave and allowance.

<sup>63</sup> Law no. 346/2002 regarding the insurance system for work accidents and occupational diseases, republished in the Official Gazette no. 251 of 08. April 2014.

<sup>64</sup> Art. 1 of Law no. 346/2002 regarding the insurance system for work accidents and occupational diseases.

### 2.5.1. *The principles of the insurance system for accidents at work and occupational diseases*

The insurance system for accidents at work and occupational diseases is founded upon the following principles:

1. The insurance is compulsory for each employer that uses work force employed under an individual employment agreement.
2. The occupational risk is borne by those who benefit from the result of the work performed.
3. The insurance fund to occupational accidents and diseases is made up of differentiated contributions borne by employers, in accordance with the occupational risks.
4. Enhancing the role of prevention activities, in order to reduce the number of accidents at work and occupational diseases.
5. The principle of social solidarity – under which the participants in the insurance system for accidents at work and occupational diseases assume mutual obligations and enjoy rights in order to prevent, mitigate or eliminate social risks under the law.
6. Ensuring a non-discriminatory treatment for the beneficiaries of the rights provided by law.
7. Ensuring transparency in the use of funds.
8. The distribution of funds in compliance with the obligations incumbent to the insurance system for accidents and work and occupational diseases.

### 2.5.2. *Categories of insured persons*

Insured persons in the Romanian insurance system for accidents at work and occupational diseases are largely divided into compulsory and voluntary insured persons.

#### *Compulsory insured persons:*<sup>65</sup>

- a) Employees (who perform work under individual employment agreements), including civil servants;
- b) Persons who perform their activity in elected or appointed positions within the executive, legislative or judicial branch, during their mandate or cooperative;
- c) The unemployed, during the vocational training;
- d) Students and apprentices, during the vocational practice;
- e) Romanian employees who work abroad, upon the instruction of Romanian employers;
- f) Foreign citizens or stateless persons, who perform work on behalf of Romanian employers, provided they reside in Romania.<sup>66</sup>

#### *Voluntary insured persons:*

- Any person (e.g.: administrators or managers who have concluded management agreements; members of individual or family enterprises; sole traders; persons employed in international institutions if they are not their employees; other persons that obtain professional income) may voluntary insure in the public pension system, by concluding a social insurance contract with the House of Public Pensions in whose jurisdiction it resides.

<sup>65</sup> Art. 5 and art. 7 of Law no. 346/2002 regarding the insurance system for work accidents and occupational diseases.

<sup>66</sup> However, it should be noted that the aforementioned legal provisions do not apply to persons falling within the *ratione personae* scope of Regulation no. 883/2004 on the coordination of social security systems, since, as we have shown, “cash benefits payable under the legislation of one or more Member States or under the Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated”.

The insurance contract is concluded between<sup>67</sup> **(i)** the employer and the insurer; or between **(ii)** the insured and the insurer in the case of voluntary insured persons.

The insured status is acquired: **(i)** when the individual employment agreement is concluded; **(ii)** at the date on which civil servants are appointed into office; **(iii)** when the mandate is validated for persons who perform their activity in elected positions; **(iv)** at the date on which the appointment in positions within the executive, legislative or judicial branch takes place; **(v)** at the beginning of the professional practice for the unemployed, apprentices and students; **(vi)** when the individual insurance contract is concluded.

### 2.5.3. *The contribution rate*

The insurance contribution is owed by:<sup>68</sup>

- a) **Employers**, for the compulsory insured persons, with the exception of students, apprentices and the unemployed;
- b) **The voluntary insured persons;**
- c) **The National Employment Agency**, from the unemployment insurance budget, for the unemployed.

In the case of the compulsory insured persons, employers pay the contribution rate. The amount of the contribution varies depending on the tariff and class of risk.<sup>69</sup> Thus, the risk quote is situated between 0.15-0,85% of the total monthly salary fund.

In the case of the unemployed, the contribution rate is paid from the unemployment insurance budget. The contribution rate is 1%, applied to the rights granted during the vocational training.

In the case of the voluntary insured persons, contribution is borne by them. The contribution rate is 1%, applied to the monthly-insured income. The insured monthly income cannot be situated below the gross minimum wage threshold.<sup>70</sup>

### 2.5.4. *Types of benefits*

The persons insured for work accidents and occupational diseases are entitled, irrespective of their contribution period, to the following cash or in kind benefits:<sup>71</sup>

- a) Medical rehabilitation and recovery of work capacity;
- b) Rehabilitation and professional reconversion;
- c) Benefits for temporary disability;
- d) Benefits for temporary change of the work place;
- e) Benefits for the reduced work time;
- f) Benefits in case of death;
- g) Reimbursement of expenses;
- h) Compensation allocated to persons whose integrity is permanently affected and suffered a loss of work capacity between 20-50%.

## 2.6. *Unemployment benefits*

Law no. 76/2002 regarding the unemployment insurance system and employment stimulation regulates the unemployment benefits.

<sup>67</sup> Art. 9 of Law no. 346/2002 regarding the insurance system for work accidents and occupational diseases.

<sup>68</sup> Art. 9 of Law no. 346/2002 regarding the insurance system for work accidents and occupational diseases.

<sup>69</sup> The risk tariff is determined at industry level, depending on the risk of injury or of developing an occupational illness. The differentiation by types of activities is achieved through classes of risk.

<sup>70</sup> Art. 86 of Law no. 346/2002 regarding the insurance system for work accidents and occupational diseases.

<sup>71</sup> Art. 18 of Law no. 346/2002 regarding the insurance system for work accidents and occupational diseases.

Law no. 76/2002 aims to:

- Provide compensation for the loss of income;
- Prevent unemployment and combat its negative social effects;
- Enforce the non-discrimination principle;
- Protect the unemployed;
- Increase labour mobility.

#### 2.6.1. *Categories of insured persons:*<sup>72</sup>

- Romanian citizens who are employed or obtain professional income in Romania, except for those who are retired;
- Romanian citizens who work abroad;
- Foreign citizens or stateless persons, who perform work on behalf of Romanian employers, provided they reside in Romania.

##### *A. Compulsory insured persons*<sup>73</sup>:

- a) Employees (who perform work under an individual employment agreements), except for those who are retired;
- b) Civil servants;
- c) Persons who perform their activity in elected or appointed positions within the executive, legislative or judicial branch, during their mandate or cooperative;
- d) Other persons that obtain an income from conducting a professional activity, if, under the law, they are required to pay contributions to the unemployment insurance budget.

The above-mentioned legal provisions must be read in conjunction with the provisions contained in the Fiscal Code, which define the concept of “*independent activity*”. According to the Fiscal Code, if an activity is reconsidered as dependent, the income tax and social security contributions, including the contribution to the unemployment insurance budget, shall be recalculated. The payer and the recipient of the income owe these amounts jointly.

##### *B. Voluntary insured persons*<sup>74</sup>:

- a) Associates or shareholders;
- b) Administrators or managers who have concluded management agreements;
- c) Members of individual or family enterprises;
- d) Sole traders;
- e) Romanian citizens, who work abroad;
- f) Other persons, who obtain an income from conducting a professional activity.

#### 2.6.2. *Requirements for granting the benefits*

The recipients of the unemployment benefit are the unemployed and persons treated as such.

<sup>72</sup> Art. 18 Para. 2 of Law no. 76/2002 regarding the unemployment insurance system and employment stimulation.

<sup>73</sup> Art. 19 of Law no. 76/2002 regarding the unemployment insurance system and employment stimulation.

<sup>74</sup> Art. 20 of Law no. 76/2002 regarding the unemployment insurance system and employment stimulation.

In order to receive unemployment benefits, the unemployed must meet the following conditions:<sup>75</sup>

- To have completed a minimum contribution period of 12 months during the 24 months preceding the date in which the application was registered;
- They do not obtain income or, as a result of the performance of authorized activities, they obtain income lower than the reference social index;
- They are not entitled to receive an old-age pension;
- They are registered with the Territorial Employment Agency in whose jurisdiction they reside.

#### *2.6.2.1. Transferring the unemployment benefits in other countries<sup>76</sup>*

The contribution period consists of periods in which the contributions were due to both the unemployment insurance budget in Romania and in other countries, as stipulated by international agreements and conventions to which Romania is a party.

The unemployment benefits granted in accordance with the Romanian law may be transferred to other countries in which the insured resides, with the observance of the conditions prescribed in international agreements and conventions to which Romania is a party.

An unemployed person may retain his entitlements to unemployment benefits in cash if he travels to another EU country in order to seek work, under the conditions laid down by Regulation no. 883/2005 EC on the coordination of social security systems.<sup>77</sup>

Likewise, an unemployed person may retain his entitlements to unemployment benefits in cash if he travels to Romania from another EU country in order to seek work, under the conditions laid down by Regulation no. 883/2005 EC on the coordination of social security systems.<sup>78</sup>

### **3. *The constitutional regulations' impact on the content of social security rights in the domestic legal system***

As we have pointed out, the Romanian Constitution includes social rights in the category of fundamental rights and freedoms and provides that the State is bound to take measures of economic development and social protection, with a view of ensuring a decent living standard for its citizens.

Thus, the Constitution enshrines certain rights, such as the right to health care, pensions, paid maternity leave, health care, unemployment benefits etc.

The regulation of the above-mentioned social rights in the Constitution has its advantages, as it protects fundamental rights against state interference and, at the same time, requires the legislature to set up the necessary framework for their exercise.

In this conceptual framework, it is worth mentioning that, as in times of economic recession, States tend towards reducing social security rights, the existence of constitutional levers, aimed at restricting the adoption of such measures, appears to be indispensable.

As an example, we mention that the Constitutional Court has ruled<sup>79</sup> that the reduction of social rights, which are not covered by the fundamental law, is constitutional.

By contrast, the Constitutional Court held that because the right to pension is regulated under the Constitution, the legislature has the obligation, *inter alia*, to refrain from any conduct likely to restrict it.<sup>80</sup>

<sup>75</sup> Art. 34 of Law no. 76/2002 regarding the unemployment insurance system and employment stimulation.

<sup>76</sup> Art. 34 of Law no. 76/2002 regarding the unemployment insurance system and employment stimulation.

<sup>77</sup> Art. 61-65 of Regulation no. 883/2004 on the coordination of the social security systems.

<sup>78</sup> *Ibidem*.

<sup>79</sup> Decision no. 872/2010 of the Constitutional Court, published in the Official Gazette no. 433 of 28 June 2010.

<sup>80</sup> *Ibidem*.

#### 4. Threats to social security rights in times of economic recession

During the last major economic crisis, the constitutional levers to which we made reference in the previous sections proved to be insufficient for effectively protecting the social security rights against state interference.

Therefore, a series of regulations were adopted since 2009. These laws mainly aimed at reducing budget expenditures and fighting against “*the economic crisis, a global phenomenon that affects the structure of the Romanian economy*”.<sup>81</sup>

The following regulations reinforce our statements:

- **Law no. 329/2009**,<sup>82</sup> which banned the aggregation of pensions that exceed the gross average wage in the economy – used to support the state social insurance budget and approved by the law on the state social insurance budget – with wages or other income equivalent to salaries paid from public funds. According to the same law, in the event pensioners aggregate their pensions, which exceed the gross average wage in the economy with wages or other income equivalent to salaries from exercising certain activities, they **must choose in writing between suspending the pension payments during the exercise of their activity and terminating the employment relationship, the services or the act of appointment** within 15 days since the occurrence of the respective situation.

By failing to comply with this legal obligation, the employment relationships established under the individual contract of employment or the services resulting from the act of appointment are terminated *ope legis*.<sup>83</sup>

- **Law no. 118/2010 concerning certain measures for the restoration of the budgetary balance**,<sup>84</sup> which, in 2010, *inter alia*:
  - Reduced by 25% several wages of the staff of public authorities and institutions, regardless of their method of financing;
  - Reduced by 15% the amount of unemployment benefits and the monthly cash benefits paid from the budget of unemployment insurance fund;
  - Reduced by 15% the amount of childcare benefits.

Also, in the original version, the regulation provided that the amount of pensions had to be reduced by 15% in 2010. However, the Romanian Constitutional Court deemed this provision unconstitutional.<sup>85</sup>

- **Emergency Government Ordinance no. 108/2010 amending and supplementing Law no. 76/2002 regarding the unemployment insurance system and the stimulation of employment**,<sup>86</sup> which amended the index in accordance to which the amount of unemployment benefits were calculated.

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<sup>81</sup> Explanatory memorandum to Law no. 329/2009 on the reorganization of public authorities and institutions, rationalization of public expenditures, business support and compliance framework agreements with the European Commission and International Monetary Fund, published in the Official Gazette no. 761 of 9 November 2009. Decision no. 1414/2009 of the Constitutional Court, published in the Official Gazette no. 796 of 4. November 2009.

<sup>82</sup> Law no. 329/2009 on the reorganization of public authorities and institutions, rationalization of public expenditures, business support and compliance framework agreements with the European Commission and International Monetary Fund, published in the Official Gazette no. 761 of 9 November 2009.

<sup>83</sup> Art. 20 of Law no. 329/2009 on the reorganization of public authorities and institutions, rationalization of public expenditures, business support and compliance framework agreements with the European Commission and International Monetary Fund.

Please note that art. 20 of Law no. 329/2009 was repealed by Law no. 134/2014, published in the Official Gazette no. 753 of 16.10.2014. Consequently, *de lege lata*, pensioners may aggregate their pensions with income wages or other income equivalent to salaries paid from public funds.

<sup>84</sup> Law no. 118/2010 concerning certain measures for the restoration of the budgetary balance, published in the Official Gazette no. 441 of 30 June 2010.

<sup>85</sup> Decision no. 872/2010 of the Constitutional Court, published in the Official Gazette no. 433 of 28. June 2010.

<sup>86</sup> Emergency Government Ordinance no. 108/2010 amending and supplementing Law no. 76/2002 regarding the unemployment insurance system and the stimulation of employment.

Therefore, prior to amending Law no. 76/2002 by Emergency Government Ordinance no. 108/2010, the amount of unemployment benefits was established by relating to the minimum gross wage per country (i.e. 75% of the minimum gross wage in the Romanian economy). *De lege lata*, the amount of unemployment benefits is calculated by observing the social reference index,<sup>87</sup> which was established at approximately 50% of the minimum gross wage per country.

In accordance with the statement of reasons attached to Emergency Government Ordinance no. 108/2010, the respective regulation was adopted because, during the economic crisis, the unemployment insurance fund revenues were maintained at a low level. Thus, an increase in the minimum gross wage per country determined a raise of the unemployment benefits. This would create difficulties in providing the necessary financial resources for the implementation of programs financed from the unemployment insurance fund.

We believe that, since the unemployment benefit is a social insurance benefit that, as a rule, is based on the principle of contribution, it is inadmissible to link its amount to an index used for measuring social aid – subjective right which is regulated by social assistance laws and not by social insurance regulations.

It is widely known that social insurance benefits, which are financed from professional contributions, replace the professional income and are usually based on a rule of proportionality by referring to its value.

- **Law no. 119/2010 concerning certain measures in the field of pensions**,<sup>88</sup> which established that service pensions (that were composed of two parts, a contributory part and a non-contributory part, awarded as a supplement by the government) shall be integrated into the public pension system and recalculated in accordance with the retirement age, the duration and amount of contributions<sup>89</sup>.

These regulations were challenged on several occasions in the Constitutional Court, which ascertained their constitutionality in each case, by ruling that (i) legal measures that reduced social security rights do not affect any fundamental rights; or (ii) limitations to social security rights were adopted by observing the provisions of article 53 of the Romanian Constitution, which establishes that the exercise of certain rights or freedoms may be restricted under certain requirements.<sup>90</sup>

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<sup>87</sup> According to art. 39 of Law no. 76/2002, “*The unemployment benefit is a monthly amount paid in a differentiated manner depending on the length of service, as follows:*”

- a) *75% of the reference social index in force at date of its determination for persons with a contribution period of at least one year;*
- b) *75% of the reference social index plus an amount calculated by applying the average gross monthly base salary for the last 12 months subscription period, of a quota percentage depending on the length of employment:*

*The percentage shares differentiated in relation to the contribution period referred to in Para. (2). b) are:*

- a) *3% for persons with a contribution period of at least three years;*
- b) *5% for persons with a contribution period of at least five years;*
- c) *7% for persons with a contribution period of at least 10 years;*
- d) *10% for persons with a contribution period of at least 20 years.”*

<sup>88</sup> Law no. 119/2010 concerning certain measures in the field of pensions, published in the Official Gazette no. 441 of 30 June 2010.

<sup>89</sup> Please note that some of the service pensions reduced through law no. 119/2010 were recently reinstated. For instance, through Law no. 223/2015 published in the Official Gazette no. 556 of 27 July 2015 the state military pensions were reinstated. Similarly, Law no. 83/2015 published in the Official Gazette no. 270 of 22 April 2015 reinstated the service pensions for professional aeronautical staff.

<sup>90</sup> Art. 53 of the Romanian Constitution reads as follows: “(1) *The exercise of certain fundamental rights or freedoms may be restricted only by law, if it is necessary in a democratic society in order to: defend the national security, public order, health or morals; the rights and freedoms of citizens; prevent the consequences of natural disasters or an extremely severe catastrophe.*”

(2) *Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.”*



It should be noted that article 53 of the Romanian Constitution provides that the restriction of exercising certain rights or freedoms may occur only by observing the following requirements:

- The respective limitation must be regulated by law and is necessary in a democratic society;
- The limitation is necessary for **(i)** the defence of national security, of public order, health or morals, of the citizens' rights and freedoms; **(ii)** conducting a criminal investigation; **(iii)** preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe;
- The measure shall be proportional to the situation having caused it;
- The measure shall be applied without discrimination and without infringing on the existence of such right or freedom, which means that the restriction of exercising certain rights or freedoms shall occur within a time limit because otherwise it would affect the very existence of such right or freedom.

In the following sections we shall briefly present the case law of the Romanian Constitutional Court in this field, by emphasizing both various criticism of unconstitutionality referring to regulations that restricted social security rights and the reasoning of the Court, which rejected the respective constitutional challenges.

#### *4.1. Suppressing the aggregation of pensions with professional income*

**Ab initio**, as regards the possibility of aggregating pensions with professional income, Law no. 263/2010 on the unified public pension system (which is the common regulation in this field) established <sup>91</sup> that “*in the public pension system, the following categories of persons may cumulate their pension with the income arising from situations where insurance is mandatory by law: old age pensioners; blind persons; pensioners with level III disabilities,*”<sup>92</sup> as well as children which obtain survivor's benefits, which have level III disabilities”.

Consequently, the aggregation of old age pensions with wages or other types of income was prohibited for a period of 5 years .

As pointed out, Law no. 329/2009<sup>93</sup> banned the aggregation of pensions that exceeded the gross average wage in the economy <sup>94</sup> with wages or other income equivalent to salaries paid from public funds.

From the analysis of the above mentioned legal provisions we observe the fact that they established a limitation of their incidence, namely **(i) in terms of their scope**, they only applied to the aggregation of pensions with **professional income paid from public funds** and **(ii) in terms of the pension's amount**, the prohibition of cumulating the pension with professional income occurred only if the amount of net pension exceeded the average gross wage in the economy.<sup>95</sup>

Law no. 329/2009 was criticised on grounds that it violated the constitutional right to work, the right to a decent living standard, the non-discrimination rule, the non-retroactivity principle, as well as the government duty to ensure the necessary background to increase the quality of life.

The Constitutional Court,<sup>96</sup> by referring to its former case law, held that, “*No constitutional provision prevents the lawmaker from suppressing the aggregation of pensions with wages, provided that such*

<sup>91</sup> Art. 118 of Law no. 263/2010.

<sup>92</sup> According to art. 69 of Law no. 263/2010, individuals are enrolled in third grade degree of invalidity if they have lost at least half of their capacity to work, and can perform an activity corresponding to no more than half of the normal working time.

<sup>93</sup> Law no. 329/2009 on the reorganization of public authorities and institutions, rationalization of public expenditures, business support and compliance framework agreements with the European Commission and International Monetary Fund, published in the Official Gazette no. 761 of 9 November 2009.

<sup>94</sup> Utilized at the construction of the social insurance budget.

<sup>95</sup> For further information on this subject, please see Alexandru Athanasiu, Ana-Maria Vlăsceanu, *The aggregation of pension with professional income. The case of the Constitutional Court Judges. Examination of law and practice*, C.H. Beck Press, Second edition, Bucharest, 2013, p.10.

<sup>96</sup> Decision no. 1414/2009 of the Constitutional Court, published in the Official Gazette no. 96 of 4. November 2009; Decision no. 1149/2010 of the Constitutional Court, published in the Official Gazette no. 711 of 28 September 2010; Decision no. 206/2011 of the Constitutional Court, published in the Official Gazette no. 239 of 6 April 2011; Decision no. 409/2011 of the Constitutional Court, published in the Official Gazette no. 421 of 16 June 2011 etc.

measure applies equally to all citizens and any differences in legal treatment [...] have a lawful reason”.<sup>97</sup> Furthermore, “As regards the determination of the net pension level which may be aggregated with **the average gross wage in the economy** used to support the state social insurance budget and approved by the social insurance budget law, the Court states that it complies with the requirements of **objectivity** (it is expressly provided by law, foreseeable and determinable) and **reasonableness** (the level of the average gross wage in the economy is a fair and balanced option) demanded by the principle of non-discrimination. As regards **proportionality** between the aim pursued through the unequal treatment and the means employed, it is held that, according to the explanatory memorandum that led to the adoption of this regulation, its purpose is to fight against “the economic crisis, a global phenomenon that affects the structure of the Romanian economy”. Financial data, as well as forecasts made by authorities in the field, outline “the image of a deep economic crisis that might endanger Romania’s economic stability and, thereby, the public order and national security”. This situation called for “exceptional measures that, by their efficiency and timeliness of application, may help to reduce its negative effects and create the prerequisites of an economic recovery”.<sup>98</sup>

Also, the Constitutional Court stated that the measure is proportionate to the aim pursued, i.e. relieve the state budget from an unsustainable tax burden. Moreover, according to the Constitutional Court, the lawmaker is entitled to establish a threshold value of the pension amount from where the aggregation of net pensions with professional income is forbidden.

In this context, we note that in Case of Panfile vs. Romania,<sup>99</sup> the European Court of Human Rights stated that the restrictions regulated by Law no. 329/2009 are not to be regarded as a “deprivation of possessions”, but rather as an interference with the persons’ right to the peaceful enjoyment of their possessions.

Furthermore, the European Court of the Human Rights (“ECtHR”) referred to the reasoning made by the Constitutional Court in Decision no. 1414/2009. The European Court held that the impugned interference was prescribed by law and pursued a legitimate aim of public interest, i.e. to rationalise public expenditure.

Moreover, ECtHR concluded that Law no. 329/2009 struck a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights because, in the respective case, “the claimant did not bear an individual and excessive burden”.

However, in this conceptual framework, one has to bear in mind the fact that the decision rendered by the ECtHR was based solely on the analysis of the compatibility of Law no. 329/2009 with article 16 of the Convention and the first Protocol to the European Convention on Human Rights,<sup>100</sup> as the right to work is not guaranteed by the Convention.

However, from our point of view, these legal provisions flagrantly violate the right to work enshrined in article 41 of the Romanian Constitution, which establishes expressis verbis that “The right to work shall not be restricted. Everyone has a free choice of his/her profession, trade or occupation, as well as work place.”

Thus, indirectly, but unequivocally, Law no. 329/2009 restricted the right to work of pensioners that received net pensions which exceeded the average gross wage in the economy, as they were forced to suspend the payment of their pensions during the exercise of professional activities in the public sector.

Therefore, we believe that the Constitutional Court should either **(i)** have established the unconstitutionality of Law no. 329/2009 on grounds that it violates the right to work, or **(ii)** have applied article 53 of the Romanian Constitution which, as shown above, allows the restriction of certain fundamental rights or freedoms by observing certain requirements. We mention the requirement referring to the fact that this restriction shall be limited in time because otherwise it would infringe on the very existence of such right or freedom.

<sup>97</sup> Decision no. 375/2005 of the Constitutional Court, published in the Official Gazette no. 591 of 8 July 2005.

<sup>98</sup> Constitutional Court, Decision no. 1414/2009.

<sup>99</sup> Case of Panfile vs. Romania (Dec.), Judgment of 20 March 2012 (striking out), no. 13902/11. The application was declared inadmissible.

<sup>100</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

In our opinion, a revaluation of the legal provisions that banned the aggregation of pensions with professional income in the public sector should have taken place sooner, given that more than 4 years passed until art. 20 of Law no. 329/2009 was repealed, at the end of 2014.

As an example, we mention that in Lithuania, the Constitutional Court<sup>101</sup> stated that the fundamental law forbids the lawmaker to establish that the exercise of a constitutional right, i.e. right to pension, limits the exercise of another constitutional right, i.e. right to work. Therefore, the Constitutional Court ruled that the regulation under which the pensioners are forced to give up pension payments while exercising a professional activity is unconstitutional because it violates the right to work.<sup>102</sup>

Moreover, the Lithuanian Constitutional Court<sup>103</sup> listed a series of rules to be observed by the lawmaker when adopting measures aimed at restricting social rights during the economic crisis, namely:

- Restrictions on the exercise of social rights shall be limited in time and, in any case, they cannot exceed one budget year. Therefore, the regulations which limit the exercise of social rights are to be yearly reassessed in order to determine whether the economic situation requires the continuation of the respective measures;
- Restricting social rights shall be a last resort measure, which may be adopted only after having exhausted all other means of rationalising budgetary expenditures. Also, this kind of measures shall observe the following principles: non-discrimination, proportionality, protection of legitimate expectations, social solidarity, foreseeability etc.;
- The reduction of pensions shall be made only under extremely difficult economic situations, respectively only when there is an official statement which ascertains that the economy is severely affected on the long run, due to which the state is unable to perform its undertaken obligations;
- The lawmaker is not allowed to cut by a higher percentage the amount of pensions paid to persons which exercise their right to work during the period when they receive such pensions;
- Persons whose pensions were reduced are entitled to damages.

#### *4.2. The Reduction of the unemployment benefit and allowance for childcare*

Inter alia, budgetary wages, unemployment benefits (as well as other pecuniary rights which were monthly awarded from the unemployment insurance budget) and allowances for childcare were reduced by Law no. 118/2010 concerning certain measures for the restoration of the budgetary balance.<sup>104</sup>

Also, the draft law regarding certain measures for the restoration of the budgetary balance provided a reduction in the amount of pensions by 15% in 2010, but the Constitutional Court ruled that this measure was not constitutional.

This regulation was also unsuccessfully challenged before the Constitutional Court<sup>105</sup> on grounds that it violates art. 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, by imposing excessive and disproportionate burden borne by individuals without maintaining a fair balance between the general interest and the individual protection of fundamental rights.

The Constitutional Court held that the restriction provided by the criticised regulation is necessary in a democratic society, in order to maintain democracy.

<sup>101</sup> Decision of the Lithuanian Constitutional Court of 25 November 2002. All the Constitutional Court rulings, decisions and conclusions may be found at: [http://www.lrkt.lt/Documents1\\_e.html](http://www.lrkt.lt/Documents1_e.html) (accessed on 5 May 2014).

<sup>102</sup> Prof. Dr. Toma Birmontienė, “Challenges for the Constitutional Review: Protection of Social Rights during an Economic Crisis”, p. 7 (accessed on 5 May 2014).

<sup>103</sup> Decision of the Lithuanian Constitutional Court of 20 April 2010. For further reading on this subject, please see Prof. Dr. Toma Birmontienė, “Challenges for the Constitutional Review: Protection of Social Rights during an Economic Crisis”, p. 9-11 (accessed on 5 May 2014).

<sup>104</sup> Law no. 118/2010 concerning certain measures for the restoration of the budgetary balance, published in the Official Gazette no. 441 of 30 June 2010.

<sup>105</sup> Decision no. 872/2010 of the Constitutional Court, published in the Official Gazette no. 433 of 28 June 2010.

As regards the proportionality of the situation that caused the restriction, the Constitutional Court stated that the means employed (reducing the wage/unemployment benefits/childcare allowance) were proportional in respect to the legitimate pursued aim (reducing the budgetary expenditures/rebalancing the state budget). Therefore, the regulation maintained a fair balance between the demands of the general interest of the community and the protection of the individual fundamental rights.

Moreover, the Constitutional Court held that the legislative measure in question was applied without discrimination and without prejudice to the substance of the law, since the requirements provided in article 53 of the Constitution, as presented above, are met. Thus, the measure of reducing wages/unemployment benefits/childcare allowance is temporary, precisely not to affect the substance of the protected constitutional right. Consequently, the restriction on the exercise of a right shall last as long as the threat that caused the respective limitation remains.

As presented above, the draft law regarding certain measures for the restoration of the budgetary balance provided a cut in the amount of pensions by 15% in 2010.

The Constitutional Court decided that these legal provisions were not constitutional, arguing that the right to pension is a fundamental right regulated by the Romanian Constitution.

The right to pension is pre-established during the active time frame of the individual who contributes to the public social insurance budget. Correlatively, the government shall pay the pension which has an amount governed by the principle of contribution.

According to the Constitutional Court, the amount of pension determined by observing the principle of contribution is an acquired right. Consequently, a reduction in the pensions' amount may not be accepted even temporarily – as such a situation would affect the very substance of the right in question.

It is odd that in this case the Constitutional Court based its ruling on the acquired right status of pension rights, pursuant to its contributory nature, whereas in the case of unemployment benefits, which are also founded on the principle of contribution, it reached a different conclusion, resorting to other principles laid down in the Constitution (without a doubt, we are referring to unemployment benefits in payment).

#### 4.3. *The Reduction of the unemployment benefits*

Emergency Government Ordinance no. 108/2010 amending and supplementing Law no. 76/2002 regarding the unemployment insurance system and the stimulation of employment<sup>106</sup> modified the index used to calculate the unemployment benefits.

Therefore, as we pointed out, prior to the amendment of Law no. 76/2002 by Emergency Government Ordinance no. 108/2010, the amount of unemployment benefits was calculated by reference to the amount of the minimum gross wage per country (more precisely, 75% thereof).

Currently, the amount of unemployment benefits is calculated by considering the social reference index,<sup>107</sup> which represents approximately 50% of the minimum gross wage per country. Consequently, this measure diminished the amount of unemployment benefits.

<sup>106</sup> Emergency Government Ordinance no. 108/2010 amending and supplementing Law no. 76/2002 regarding the unemployment insurance system and the stimulation of employment, published in the Official Gazette 830 of 10 December 2010.

<sup>107</sup> According to art. 39 of Law no. 76/2002, “*The unemployment benefit is a monthly amount paid in a differentiated manner depending on the length of service, as follows:*

- a) *75% of the reference social index in force at date of its determination for persons with a contribution period of at least one year;*
- b) *75% of the reference social index plus an amount calculated by applying the average gross monthly base salary for the last 12 months subscription period, of a quota percentage depending on the length of employment:*

*The percentage shares differentiated in relation to the contribution period referred to in Para. (2). b) are:*

- a) *3% for persons with a contribution period of at least three years;*
- b) *5% for persons with a contribution period of at least five years;*
- c) *7% for persons with a contribution period of at least 10 years;*
- d) *10% for persons with a contribution period of at least 20 years.”*

Emergency Government Ordinance no. 108/2010 was adopted due to the fact an increase in the minimum gross wage would have created difficulties in providing the resources needed to pay the benefits financed from the unemployment insurance budget.

In this conceptual framework, we remind that article 47 paragraph (2) of the Constitution establishes the citizens' fundamental right to unemployment benefits, which means that this right may only be restricted by observing article 53 of the Romanian Constitution, which *inter alia* imposes for measures restricting fundamental rights to be temporary.

However, the Emergency Government Ordinance no. 108/2010 did not introduce a temporary measure. This is proved by the fact that its provisions are still in force.

Therefore, we believe that it is necessary to repeal Emergency Government Ordinance no. 108/2010 and, consequently, calculate the unemployment benefits in relation to the minimum gross wage in the country, especially given the fact that the unemployment benefits comply with the principle of contribution.

#### 4.4. Reduction of Special Pensions

Law no. 119/2010 concerning certain measures in the field of pensions<sup>108</sup> established that the service pensions (which were comprised of two parts – a contributory part and, respectively, a non-contributory part that was supplemented by the government) shall be integrated into the public pension system and recalculated by considering the retirement age, the duration and amount of contributions.

The above-mentioned legal provisions were challenged on several occasions in the Constitutional Court,<sup>109</sup> which ascertained their constitutionality.

The authors of the unconstitutionality exception argued the following:

**(i) Law no. 119/2010 breaches the non-retroactivity principle enshrined in art. 15 of the Constitution;**

In support of this view, it was argued that pensions in payment are acquired rights and changing their legal status represents a flagrant violation of the constitutional provision (namely art. 15).

Moreover, according to the Constitutional Court, “*a new regulation shall not prejudice the amount of pensions previously established, which are acquired rights*”.<sup>110</sup>

**(ii) The reduction or discontinuation of pension entitlements constitutes an interference with the right to peaceful enjoyment of possessions,** as prescribed in Article 1 of Protocol 1 to the European Convention on Human Rights.

According to the ECtHR, a “*claim*” concerning a pension can constitute a “*possession*” within the meaning of Article 1 of Protocol No. 1 where it has a sufficient basis in national law, for example where it is confirmed by a final court judgment.<sup>111</sup>

Thus, “*a substantial reduction of the pension amount could be seen as affecting the substance of the acquired right in question, and even the right to remain beneficiary of the social insurance rights*”.<sup>112</sup>

<sup>108</sup> Law no. 119/2010 concerning certain measures in the field of pensions, published in the Official Gazette no. 441 of 30 June 2010.

<sup>109</sup> Decision no. 871/2010 of the Constitutional Court, published in the Official Gazette no. 433 of 28 June 2010; Decision no. 873/2010 of the Constitutional Court, published in the Official Gazette no. 433 of 28 June 2010; Decision no. 1285/2010 of the Constitutional Court, published in the Official Gazette no. 759 of 15 November 2010; Decision no. 1264/2011 of the Constitutional Court, published in the Official Gazette no. 838 of 25 November 2011; Decision no. 1359/2011 of the Constitutional Court, published in the Official Gazette no. 895 of 16 December 2011; Decision no. 966/2012 of the Constitutional Court, published in the Official Gazette no. 23 of 11 January 2012 etc.

<sup>110</sup> Decision no. 375/2005 of the Constitutional Court, published in the Official Gazette no. 591 of 8 July 2005; Decision no. 57/2006 of the Constitutional Court, published in the Official Gazette no. 164 of 21 February 2006; Decision no. 120/2007 of the Constitutional Court, published in the Official Gazette no. 204 of 26 March 2007.

<sup>111</sup> *Buchen v. Czech Republic*, 36541/97, Council of Europe: European Court of Human Rights, 26 November 2002.

<sup>112</sup> *Gaygusuz v. Austria*, 39/1995/545/631, Council of Europe: European Court of Human Rights, 23 May 1996.

**(iii) Law no. 119/2010 infringes art. 47 Para 1 of the Romanian Constitution, which regulates the citizens' right to a decent standard of living.**

The State is bound to take measures of economic development and social protection with a view of ensuring a decent living standard for its citizens. *Inter alia*, this objective can be achieved through the implementation of social protection measures and by guaranteeing the right to pension.

Furthermore, Law no. 119/2010, which regulated the reduction of special pensions, infringes the principle concerning the protection of legitimate expectations.

**(iv) Law no. 119/2010 violates art. 53 of the Constitution, as the reasons underlying the decision to restrict the right to a pension have not been fully disclosed.**

Thus, the arguments relied upon in order to justify the adoption of the austerity measures, i.e. the reduction of public expenditures are superfluous and "*expressed pro causa*".

In a nutshell, the above-mentioned reasons cannot lead to the conclusion that the reduction of pensions (i) can effectively contribute to the balancing of the state budget and that (ii) all other means of rationalising budgetary expenditures have been exhausted.

The Constitutional Court emphasized that the special pensions were composed of two parts, a contributory part and a non-contributory part, awarded as a supplement by the government, constituting a "*partial compensation for the inconveniences resulting from the rigor of special statutes*".<sup>113</sup>

Furthermore, it was argued that since the supplement to which we referred is not based on the insured's contribution, the constitutional provisions do not cover it.

Therefore, in the view of the Constitutional Court, the granting of special pensions constitutes an obligation of means (assumed by the State), whose fulfilment is subject to variable factors, such as the financial resources available to the State.

For these reasons, it was held that only the benefits already paid constitute acquired rights.

Also, the Constitutional Court stated that the principle of non-retroactivity has not been infringed. In support of this view, the Constitutional Court referred to its jurisprudence according to which "*a law is not retroactive if (i) it amends for the future a legal situation that arose before its adoption; when (ii) it suppresses for the future the legal effects of a situation that arose under the repealed law.*"

Finally, even though the Constitutional Court expressly acknowledged the fact that service pensions are objectively and reasonably justified, it stated that their reduction was necessary in order to (i) reform the public pension system and eliminate inequities, as well as to (ii) combat the economic crisis.

In what concerns the claim according to which the pension cuts infringe the legitimate expectations principle, the Constitutional Court argued that the Romanian Constitution does not regulate the principle in question.

Moreover, while analysing complaints of unconstitutionality regarding the violation of art. 53 of the Constitution, the Constitutional Court stated that "*they are irrelevant because the right to pension concerns the pension acquired by considering the general retirement system; thus, the right to benefit from a special pension is no enshrined in the Constitution.*"

Subsequently, the application of legal provisions concerning the recalculation of special pensions resulted in an inconsistent practice. For this reason, the Romanian General Attorney filed a referral in the interest of the law.<sup>114</sup>

Thus, several courts admitted the appeals filed by persons who were entitled to receive service pensions and, consequently, quashed the decisions to recalculate the pensions.

While drafting these decisions, the courts examined the compatibility of domestic law with article 1 of the Additional Protocol no. 1 to the Convention and article 14 of the European Convention on Human Rights, as interpreted by ECtHR in its case law.

<sup>113</sup> Decision no. 20/2000 of the Constitutional Court, published in the Official Gazette no. 72 of 8 July 2000.

<sup>114</sup> Referral in the interest of the law no. 29/2011, published in the Official Gazette no. 925 of 27 December 2011.

It was held that, as concerns social insurance, the European Court of Human Rights stated that the payment of social insurance contributions may, under certain circumstances, lead to the emergence of a right protected under article 1 of Protocol no. 1 to the Convention in the sense that, at some point, it may benefit from the advantages of the human rights protection system.

Furthermore, the courts analysed the compatibility of such restriction with the requirements of article 1 paragraph 1 of Protocol no. 1 and article 14 of the Convention, by taking into account the scope of persons harmed by this limitation and the proportionality of the restriction in relation to the aim pursued when adopting Law no. 119/2010.

Thus, it was held that, although the objective pursued by adopting Law no. 119/2010 may be considered legitimate – considering that the respective regulation seeks to mitigate the negative consequences of the economic crisis – the legislator failed to maintain a reasonable relationship of proportionality between the means employed in order to achieve the above mentioned objective and the protection of individual interests. Law no. 119/2010 establishes a burdensome and excessive burden only for certain categories of pensioners, especially since **(i)** the envisaged measure is not temporary and **(ii)** not all service pensions were reduced.

In other cases, the courts dismissed the appeals on the ground that the Constitutional Court stated that Law no. 119/2010 does not infringe the Constitution.

*Ab initio*, the High Court of Cassation and Justice held that the decisions and reasoning of the Constitutional Court are mandatory as regards the compliance or non-compliance of domestic regulations with the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms and the ECtHR case law. However, it stated that the decisions of the Constitutional Court, which establish the constitutionality of a law or legal provision, have an abstract nature.

Therefore, “ordinary courts have the right to specifically assess, under the circumstances of each case, whether the application of the same legal provision does not entail consequences that are not compatible with the Convention, its additional protocols or the case law of the European Court of Human Rights for the claimant”.

Also, the High Court of Cassation and Justice held that the source of non-uniform practice stems from the analysis of proportionality between the measures established under Law no. 119/2010, i.e. reduction of special pensions and restriction on the exercise of the right to pension. In this conceptual framework, the High Court of Cassation and Justice stated that the ordinary courts have not applied the fair balance test in accordance with the specific circumstances of each case. Moreover, the “interference” was not examined in all cases in terms of right to “peaceful enjoyment of possessions” (the general rule and the first thesis of article 1 of Protocol no. 1), but as a violation such as “deprivation of possessions” (the second thesis of article 1).

Thus, by reassessing service pensions, the individuals targeted by these measures witnessed their right restricted by pension cuts between 30% and 80% (sometimes even more) as a consequence of suppressing the additional benefit granted from the state budget (so, by eliminating the non-contributory part) which varied from one professional category to another and, within the same category, from one person to another, in accordance with the requirements provided by the law concerning the professional status and qualifications of each beneficiary.

On these grounds, the High Court of Cassation and Justice dismissed the referral in the interest of the law, stating the following: “it is impossible to render, through a referral in the interest of the law, a general solution, that has the ability to be applied in each case brought before the courts, since the compliance with the proportionality principle should be analysed in concreto, depending on the specific evidence and circumstances related to each case or the particular facts; therefore, this is just a matter of applying the law”.

In this context, we mention the fact that ECtHR decided<sup>115</sup> that reforming the pension system – by recalculating the service pensions – is compatible with article 1 of Protocol no. 1 to the European Convention on Human Rights.

<sup>115</sup> Decision of inadmissibility. Joint cases: *Ana Maria Frimu, Judita Vilma Timar, Edita Tanko, Marta Molnar and Lucia Ghețu v. Romania* (no. 45312/11, 45581/11, 45583/11, 45587/11, 45588/11) Council of Europe. European Court of Human Rights, 7 February 2012.

ECtHR rejected as inadmissible under art. 35 paragraphs 3 and 4 of the Convention, the complaints regarding the violation of article 1 of Protocol no. 1 to the Convention, in conjunction with article 14 of the Convention.

ECtHR concluded that the pensions' reduction, although substantial, represents a way of integrating these benefits under the general system of pensions, in order to balance the budget and eliminate the differences between pension schemes. Therefore, these reasons may not be considered unreasonable or disproportionate.

Moreover, according to ECtHR, the pension reform did not have retroactive consequences, as it did not interfere with the right to receive benefits acquired under the social insurance contributions paid during the working years.

As regards the differences of treatment in relation to other categories of pensioners, the Court held that a difference of treatment is discriminatory under article 14 of the Convention if it has neither objective nor reasonable justification, that is, if it does not pursue a "*legitimate aim*" or if there is not a "*reasonable relationship of proportionality between the means employed and the aim sought to be realised*".

We believe that laws that regulated the reduction of service pensions violate the right to pension, governed by article 47 paragraph (2) of the Constitution and the principle of non-retroactivity of civil law, enshrined in article 15 of the Romanian Constitution.

As we mentioned above, the Constitutional Court emphasized that the special pension consists of two parts (contributory and non-contributory). The non-contributory part is paid by the government, as a supplement, and forms a "*partial compensation for the inconveniences resulting from special statutes*".<sup>116</sup>

Thus, it was argued that the special non-contributory part of the pension is not linked to the constitutional right to pension; therefore, it may be granted by considering the state's financial resources.

In this conceptual framework, we recall the fact that the fundamental law recognizes the right of citizens to pension, without distinguishing between contributory pensions and non-contributory ones. Thus, *ubi lex non distinguit, nec nos distinguere debemus*.

The right to pension may not have a constitutional nature only if based on the principle of contribution, but also in any form regulated by the laws in the respective field.

The calculation of the pension amount is regulated by law and not under the Constitution – thus, the fundamental law aims at guaranteeing the right to pension as a fundamental right and not as a specific embodiment.

Apart from the legal issues examined above, we consider that the legal provisions governing the reduction of special pensions violate the principle of non-retroactivity of the law.

We recall that the Constitutional Court held that the principle of non-retroactivity was not violated because the amount of pensions was reduced only *ex nunc* and the individuals who were entitled to receive service pensions were not forced to refund their benefits.

From our perspective, the Constitutional Court made confusion between the requirements of granting the right to pension and its payment, which involves successive performances.

Under the Romanian law, the pension is granted to the social contributors after the assessment of the following elements: **(i)** the standard age of retirement; **(ii)** the contribution period and **(iii)** the formula used for calculating the pension.

Therefore, the formula used for calculating the pension represents a requirement for accessing the pension, being less related to its exigibility. The fact that the pension is paid in instalments may not lead to the conclusion that it is a pending right – *facta pendentia*, given that the pension is not reassessed every month.

From this standpoint, we note that the legal situation concerning the recognition, as well as establishing and granting the respective pension was suppressed under the influence of the previous law – *facta praeterita*.

<sup>116</sup> Decision no. 20/2000 of the Constitutional Court, published in the Official Gazette no. 72 of 8 July 2000.



Consequently, the application of the amended formula in respect to benefits in payment blatantly violates the principle of non-retroactivity of civil law.

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At the end of our considerations, we shall briefly present the case law of the European Committee of Social Rights regarding the reduction of social security rights, in order to illustrate the compliance of such measures with the provisions contained in the European Social Charter

In this field, Decision no. 76/2012<sup>117</sup> is relevant. The Federation of employed pensioners of Greece submitted a complaint before the European Committee of Social Rights, alleging that certain regulations introduced by the Government of Greece from May 2010 onwards, that modified both public and private pension schemes, are in violation of Article 12§3 and 31§1 of the European Social Charter (1961).

The Greek Government argued that the reduction of social rights is necessary for the protection of public interests, having resulted from Greece's grave financial situation. In addition, the Greek Government made references to the commitments undertaken in relation to other international organizations (e.g.: E.U.; I.M.F.).

In this context, the Committee stated that a Member State is not exempted from the obligation to comply with the European Social Charter on the grounds that it undertook other commitments in relation to other international organizations.

Ab initio, the Committee recalled that reductions in the benefits available in a national social security system do not automatically constitute a violation of Article 12§3.<sup>118</sup>

However, the Committee considered that, even when reasons related to the economic situation of a state party make it impossible for a state to maintain their social security system at the level that it had previously attained, it is necessary by virtue of the requirements of Article 12§3 for that state party to maintain the social security system on a satisfactory level that takes into account:

- (i) The legitimate expectations of beneficiaries of the system and
- (ii) The right of all persons to effective enjoyment of the right to social security.

According to the European Committee of Social Rights, the above-mentioned requirement stems from the commitment of state parties *"to endeavour to raise progressively the system of social security to a higher level"*.

Furthermore, the Committee stated that, according to art. 31 of the European Social Charter, when issuing provisions that will restrict the rights guaranteed, the Member States must be capable of establishing that any restrictions or limitations are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

Taking into consideration all the circumstances of the case, the Committee has explicitly considered that restrictions or limitations to rights in the area of social security were compatible with the Charter in so far as the following criteria were taken into account:

- (i) The nature of the changes (field of application, conditions for granting allowances, amounts of allowance, lengths, etc.);
- (ii) The reasons given for the changes and the framework of social and economic policy in which they arise; the extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);
- (iii) The necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued);
- (iv) The existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made; and
- (v) The results obtained by such changes.

<sup>117</sup> Decision no. 76/2012 – Federation of employed pensioners of Greece (IKA – ETAM) v. Greece.

<sup>118</sup> Conclusions XVI-1, Statement of Interpretation on Article 12, p. 11.

As such, the Committee concluded that the income of the elderly should not be lower than the poverty threshold, defined as 50 per cent of median equivalised income, as calculated on the basis of the Eurostat at-risk-of-poverty threshold value.<sup>119</sup>

Otherwise, the reduction or limitation of the rights covered by the European Social Charter would lead to the deepening of the economic crisis and the “burdening” of the social protection systems, with special regard to the social.

With regard to the situation described by the Federation of employed pensioners of Greece, the Committee considered that the Greek Government has not conducted a minimum level of research and analysis into the effects of the measures undertaken.

Thus, in a nutshell, the Committee concluded that the Government did not undertake appropriate measures, in order to maintain a sufficient level of protection for the benefit of the most vulnerable members of society. As such, the general interest was not reconciled with individual rights, leading to **(i)** the deprivation of the population of a very substantial portion of their means of subsistence and **(ii) the infringement of the legitimate expectations principle.**

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<sup>119</sup> Conclusions 2009, Ireland; Conclusions 2009, Finland; Conclusions 2009, France.

## RUSSIAN FEDERATION

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### THE RIGHT TO SOCIAL SECURITY IN THE CONSTITUTION OF THE RUSSIAN FEDERATION

*Prof. ELENA EVGENJEVNA MACHULSKAYA*

The Constitution of the Russian Federation (the Constitution) was adopted on December 12, 1993 and came into force on December 25, 1993.<sup>1</sup> The Constitution has the supreme juridical force, direct action and is used on the whole territory of the Russian Federation. Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution.

According to the 2nd article of the Constitution: “Man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State”.

The Constitution of the RF contains all human rights and freedoms, including civil, political, economic, social, cultural and other rights, which are enumerated by the Universal Declaration of Human Rights 1948, International Pact on Economic, Social and Cultural Rights 1966, European Social Charter (revised) 1996 and other international treaties.

The Constitution provides for human rights and freedoms according to the universally recognized principles and norms of international law as they constitute a component part of its legal system (part 4 art.15).

In accordance with the Federal Law of 15.07.1995 N 101-FZ “On International Treaties of the Russian Federation”<sup>2</sup> an international treaty devoted to human rights (including the right to social security) should be ratified.

The article 15 (4) of the Constitution gives domestic legal force to those international treaties on social security which are ratified by the Russian Federation. Any international treaty on social security becomes part of the Russian legal system upon its ratification, more precisely, upon official publication of a law on the ratification of the treaty. This means that *dualistic approach* to application of international norms is used by the Russian legal system.

If the ratified international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

The Constitution affirms that the fundamental rights and freedoms shall not be interpreted as a rejection and derogation of other universally recognized human rights and freedom. The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health,

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<sup>1</sup> “Sobranie zakonodatel’sstva RF”. 14.04.2014. N 15. St.1691; <http://www.pravo.gov.ru>.

<sup>2</sup> “Sobranie zakonodatel’sstva RF”. 17.07.1995. N 29. St.2757.

the rights and lawful interests of other people, for ensuring defense of the country and security of the State (part 3, art.55).

Coordination of issues of health care; protection of the family, maternity, paternity and childhood; social protection, including social security is in the joint jurisdiction of the Russian Federation and the subjects of the Russian Federation. Legislation of the subjects of the RF (laws and other normative legal acts of the territories, regions, cities of federal importance, autonomous regions or autonomous areas) in the field of social protection should correspond to federal legislation. In cases of contradiction federal legislation has the supreme force. This means that regional legislation can be applied only in those parts that don't contradict to federal legislation.

In general the subjects of the RF are not able to decrease federal standards in the field of social protection that are established by legal normative acts. But they have the jurisdiction to increase federal standards for population, residing within their territory, at the expense of regional budgets.

The basis for socio-economic rights is laid by article 7 of the Constitution which proclaims that Russia is a *social state* in which policies should provide conditions for a worthy life and a free development of a person. This means that in Russia labour and health of people shall be protected, a guaranteed minimum wages and salaries shall be established, state support ensured to the family, maternity, paternity and childhood, to disabled persons and the elderly, the system of social services developed, state pensions, allowances and other social security guarantees shall be established.

The main aim of a social state is common development on the values of social justice, social solidarity and mutual responsibility between the state and its citizens. These values acquire not only a mere declarative but a fully normative, binding content. The social state has the constitutional obligation to intervene into market economy for the purpose of redistribution of resources in order to prevent and reduce poverty, inequality, social exclusion and social insecurity, and to ensure decent life to every member of the society.

Persons, who are able to work, should earn for themselves and their families. Thus, the Constitution entails the *right to work* in the article 37: "Labour is free. Everyone shall have the right to freely use his labour capabilities, to choose the type of activity and profession.

Everyone shall have the right to labour conditions meeting the safety and hygienic requirements, for labour remuneration without any discrimination whatsoever and not lower than minimum wages and salaries established by the federal law, as well as the right to protection against unemployment."

The social state is supposed to intervene only in cases of incapability for work when the needs of a human being can't be satisfied due of social contingencies (social risks) – unemployment, sickness, maternity, industrial injury, professional decease, old age, invalidity, death of breadwinner, poverty, etc.

It's worthy to mention that the constitutional content of the notion "social state" was clarified by the Constitutional Court of the Russian Federation. Thanks to its activities many Constitutional provisions (especially in the field of social security) were transformed from mere declarations (slogans) into a really effective legal rules having supreme legal force and capable to become a real means of protection of social rights.

According to the decision of the Constitutional Court of the Russian Federation of 16.12.1997 N 20-P<sup>3</sup> the existence of developed social security system is one of the main features of the social state. The social state is responsible for establishing and promoting of the state social security system, protection family, motherhood, fatherhood and childhood. Development of the state social security system is the necessary pre-condition for the achievement of the aims of social policy.

The Constitutional Court derives from the social state's clause a constitutional right to a minimum social subsistence, although not to concrete social services or provisions which are defined by federal and regional legislation. The constitutional duty of the state is to guarantee social protection to everyone in cases of social risks at a minimum level. The state should find the due balance between social demands of

<sup>3</sup> "Sobranie zakonodatel'stva RF" ("Collection of legislation") 22.12.1997. N 51. St.5878.

population and available economic resources. But this minimum should guarantee *human dignity* of the beneficiary. In the cases of social risks a person shall have the right to *decent life and human dignity*.<sup>4</sup>

The notion of “decent life” is still one of the most disputable between scholars and politicians. It’s obvious that they will never come to an agreement on all the aspects of this notion. But there is unanimity of positions on the minimum standards decent life. Thus, the minimum subsistence floor should be guaranteed to everyone irrespective of the economic situation.

The Constitutional Court of the RF is the only judicial body that gives official interpretation of the Constitution, its judgments are obligatory across the entire territory of the Russian Federation for all legislative, executive and judicial bodies.

The Constitutional Court has the jurisdiction to declare unconstitutional laws, presidential and governmental decrees if it finds that they are contrary to the Constitution (i.e. they violate certain rights and freedoms of citizens enumerated in and protected by the Constitution). In such instances, that particular law becomes unenforceable, and governmental agencies are barred from implementing it.

The Constitutional Court is not entitled to judge constitutionality of laws on its own initiative; the law may be submitted to the Constitutional Court by the President of Russia, the government of Russia, the State Duma and some other bodies. Any federal court may also request the Constitutional Court to judge on the constitutionality of a law if the law is to be implemented in a case, and a judge of the federal court is in doubt about whether the law is contrary to the Constitution. Also, any private citizen may submit in the Constitutional Court a claim challenging constitutionality of a particular law if that law was implemented in a particular case and thus violated rights of that citizen.

According to statistics one third of all complaints submitted to the Constitutional Court deal with social benefits: pensions, grants, allowances and the like.

The *right to social security* is specified in the article 39 of the Constitution. It states that everyone shall be guaranteed social security at the expense of the state in old age, in case of an illness, disability, loss of the bread-winner, for upbringing of children and in other cases established by law.

State pensions and social allowances are established by law.

Promotion is given to voluntary social insurance and the creation of additional forms of social security and charity.

Thus, the Constitution lays the basis for social security legislation. To elaborate this legislation is the constitutional obligation of the social state in order to protect persons who suffered from social risks (*Decision of the Constitutional Court of 15.05.2006 N 5-P*).<sup>5</sup> Discretionary freedom of legislative bodies is limited by the Constitution. While elaborating statutes they should bear in mind the values of social justice, equality, human dignity, etc.

Among 35 decisions of the Constitutional Court concerning different aspects of the constitutional right to social security in 24 cases legal regulations were found not compatible with the Constitution.

In order to give some illustrations it’s necessary to describe the national social security system.

The term social security is used in the art.39 of the Constitution in the broad sense. Article 39 is brought into practice through the state social security system which consists of three main branches:

- obligatory (compulsory) social insurance;
- budget schemes for special professional groups (military men, civil servants, etc);
- social assistance for persons whose income is below the regional subsistence level.

These branches differ from each other by the scope of coverage, sources of financing, kinds and amounts of payments, administrative organization.

The main government body (organ) dealing with the social security system in Russia is the Ministry of Labour and Social Protection.

<sup>4</sup> Determination of the Constitutional Court of 15.02.2005 N 17-O.//“Sobranie zakonodatel’sstva RF”. 2005. N16. St.1479.

<sup>5</sup> “Sobranie zakonodatel’sstva RF”. 29.05.2006. N 22. St.2375.

**Compulsory social insurance** covers all employees working under the contract of employment. Foreigners and stateless persons, permanently living and working in Russia, are insured on equal grounds with the Russian citizens. Migrants working under temporary contracts of employment are insured according with conditions of international treaties (reciprocity clause).

Self-employed persons and persons, working under contract for services, are covered only for the purposes of pension and health insurance. They can join obligatory (compulsory) social insurance scheme voluntarily. In this case they have to pay fixed contributions to Social Insurance Fund and will be entitled to sickness and maternity benefits.

Social insurance contributions are transferred by employers into three extra-budgetary funds: the Pension Fund of the Russian Federation (PFR), Social Insurance Fund (SIF), Health Insurance Fund (HIF).

The amount of contributions is calculated on the basis of payroll.

**Labour pensions** (Federal Law on “Labour Pensions in the Russian Federation” N 173-FZ, 17.12.2001)<sup>6</sup> are established and paid within the obligatory pension insurance (OPI). Employees, self-employed persons, and independent farmers are covered by OPI.

Labour pensions are financed by contributions. Payment of contributions is employer’s responsibility. Insured employees don’t have any contributions obligations. More than 10 million employers pay contributions to the State Pension Fund (PFR) for more than 72 million of employees.

The amount of contributions is calculated at a rate of 22 percent of payroll. Since 2010 the amount of employee income subject to insurance contributions was capped. Each year the government sets the threshold of employee’s annual income for contribution purposes.

Contributions are transferred to the State Pension Fund (PFR). About 38 million pensioners receive pensions through the Pension Fund. The PFR sets up and pays the pensions, both within the system of obligatory pension insurance and state pension security. In addition, the PFR provides with pension benefits 170 thousand citizens living in 99 states. The structure of the PFR includes 8 Offices in federal districts, 81 Branches of RF Pension Fund in constituent entities of the Russian Federation, as well as the Branch in Baikonur (Kazakhstan), and nearly 2,500 regional offices in all regions of the country. The system employs more than 133 000 specialists.

Employer’s duty to pay social insurance contributions is the necessary pre-condition for pension entitlement. Besides, there is direct interrelation between the amount of labour pension and the amount of paid contributions.

The Constitutional Court pointed out that the *right to a pension has a special significance and social value in a state with the rule of law*. The obligations of the state to respect and to protect the rights and freedoms of a person and citizen as a highest value presume a legal order which is able to guarantee everyone such protection.

The effectiveness criterion of social insurance includes procedural possibilities for obtaining a pension in full and in time. The Court stated that in the case that the employer has not fulfilled his duty to pay social insurance contributions, the state has to guarantee the social security system and take subsidiary responsibility. The Court pointed out that social insurance contributions by an employer are a necessary condition for a stable and autonomous system of labour pensions, built upon universal principles of fairness and equality.

The Court concluded that the current legal mechanism didn’t provide for enough guarantees for the protection of the rights and freedoms of employees and invited legislative intervention (*Decision of the Constitutional Court 10.07.2007 N 9-P*).<sup>7</sup>

In this judgment, “value” is interpreted as a contextual category which is connected to obligations on the part of the social state, and guaranteed by the Constitution and the whole legal order. “Value” in this sense establishes criteria for action on the part of the state.

<sup>6</sup> “Sobranie zakonodatel’sтва RF”. 24.12.2002. N 52 (part I). St.4920.

<sup>7</sup> “Sobranie zakonodatel’sтва RF”. 2007. N 29. St.3744.

Labour pension is a monthly cash payment aimed to compensate wage and other earnings lost by the insured person due to disability caused by age or invalidity. This pension also compensates wage and other benefits of breadwinner to disabled members of his family, lost due to his death.

There are three kinds of labour pensions:

- old age labour pension;
- disability labour pension;
- survivor's labour pension.

*Old age labour pension* is provided to all those reaching pensionable age with a minimum contribution record of 5 years. One important characteristic of the Russian pension system is its relatively early statutory pensionable age. Men, who worked in normal working conditions, can claim a full old-age labor pension at the age of 60 and women at the age of 55. Those persons, who worked in the hard and dangerous working conditions or in the regions of the Far North, are entitled to pension even earlier.

Prior to 2010, labour pension had three components: a basic pension, an insurance benefit based on a notional defined contribution account, and a funded defined contribution scheme (available only to individuals born after 1967). After 2010, the basic pillar has been folded into the pay-as-you-go (PAYG) portion of pensions.

*The labor insurance component is a notional defined contribution pension.* This is a pay-as-you-go scheme that includes old-age, disability, and survivor's benefits. Contributions to individual accounts are not invested in financial assets. Instead, these contributions are recorded in a notional individual account by the PFR. These accounts earn a "notional" return set by law. Between annual indexations on April 1, pensions can be indexed to inflation (if it exceeds 6 percent) to avoid a sharp drop in purchasing power during the year. When the individual retires, the amount in the account is divided by 228 (19 years of benefits) to get the monthly pension.

The *third component* is a funded defined contribution system, where individuals contribute to *pension fund accounts* which are invested by public or private asset managers. Under the default option, individuals keep the account in the RPF to be managed by a state financial institution. However, individuals can opt-out by choosing a private asset manager or by transferring the account to a private pension fund.

These funds are invested in investment instruments, defined by laws of the Russian Federation in order to earn additional income. Until late 2009, the default investment option was restricted to government securities. This was recently expanded to allow investment in a wider range of domestic securities (including corporate bonds, mortgage bonds, etc.).

The PFR cooperates with 57 management companies, including state management company Vnesheconombank, specialized depository and 129 private pension funds which are participants of the investment process.

At present more than 8 million people have an accumulative portion of labour pensions. Upon retirement, they will receive both the contributions and the investment returns earned on those contributions in the form of a lifetime annuity.

*It is worthy to mention that old-age labour pension is paid in full irrespective of retirement.*

*Disability labor pension:* Disabled persons (invalids of I, II or III group) are entitled to this pension. Three degrees (groups) of disability (invalidity) are determined. The amount of disability labor pension also can consist of three components: basic flat-rate component, insurance component and funded component (to individuals born after 1967).

Disability labor pension is paid for the period of disability. On reaching retirement age, the old age labour pension is paid.

Survivor labor pension is paid irrespective of the deceased's length-of-service period and coverage periods. Eligible survivors are:

- widows older than age 55 (widower(s));
- parents older than age 60 (men), 55 (women);
- family members who don't work because of caring for a child younger than age 14 or disabled;
- children up to age 18 (age 23 if a student, no limit if disabled before age 18);

- brothers and sisters up to age 18;
- grandfathers aged 60 or older and grandmothers aged 55 or older or disabled.

Pension is calculated as the sum of a basic flat-rate component according to the category of beneficiary and a component based on the notional account. Funded component, if there is any, is split equally among all eligible survivors.

Survivor's pension does not cease on the remarriage.

Since the 1 of January 2015 labour pension will be replaced by *insurance pension* (Federal Law of 28.12.2013 N 400-FZ "On Insurance pensions").<sup>8</sup> Conditions of pension entitlement will also change. Thus, a minimum contributions record will be raised gradually from 5 years to 15 years from 2015 to 2025. For each year of insurance points will be accumulated. The amount of pension will depend on the number of accumulated points. The price of one point will be adopted each year.

One very important Determination of the Constitutional Court should be mentioned in connection with the amounts of labour pensions. In her complaint to the Constitutional Court the plaintiff stated that the amount of her labour pension calculated in accordance with the federal Law "On Labour Pensions in the Russian Federation" of 17.12.2001 N 173-FZ was below the subsistence minimum level. Insofar that this Law admits such situations it should be deemed incompatible with the Constitution.

In its Determination of 15.02.2005 N 17-O<sup>9</sup> the Constitutional Court stated that the minimum level of the old age labour pension should be of such amount that it won't put to doubt the mere possibility of decent life and human dignity of a beneficiary. The minimum level of the old age labour pension combined with the other measures of social protection and indexation shouldn't fall below the regional subsistence minimum level.

This Determination had direct influence on the legislation. From the 1st January 2010 the Russian Federation introduced *social additional payments* to labour pension in order to supplement total pensioner's income to the level of subsistence minimum of pensioners in the region of residence. Only pensioner, who ceased working, receives such payments. It is one of the key RF Government measures aimed to eradicate poverty of the older people. *Federal social additional payments* are set up and paid by the territorial PFR offices in case if the pensioner's subsistence minimum in the RF subject is lower than in the Russian Federation as a whole. *Regional social additional payment* is set up and paid by the an authorized executive body of the RF subject for pensioners in case if the pensioner's subsistence minimum in the RF subject is higher than in the Russian Federation as a whole.

**Social pension** is provided under the system of state social security to those citizens, who for some reasons are not entitled to labour pension:

- I, II and III group disabled, including disabled from birth, disabled children;
- men of 65 and women of 60, who don't have enough length of insurance period for labour pension entitlement, etc.

The **state service pensions** are also provided to compensate citizens "lost salary" due to cessation of their state federal military, civil or other service when they reach long service term; or to undo the harm to health caused during military service due to radiation or technogenic disasters in case of disability or loss of breadwinner and in a number of other cases.

The state social security is funded by the Federal budget of the Russian Federation. PFR pays state social security pensions to more than 3 million people.

**Pensions for people residing abroad.** The total number of citizens residing outside the Russian Federation and receiving pensions from Russia exceeds 170000. They reside in 102 countries. The distribution of labour pensions, set up according to the Russian Federation legislation, is independent of the beneficiary country and citizenship. Cooperation with particular countries in the field of pension

<sup>8</sup> "Sobranie zakonodatel'stva RF". 30.12.2013. N 52. (Part I). St.6965; <http://www.pravo.gov.ru>.

<sup>9</sup> "Sobranie zakonodatel'stva RF". 2005. N 16. St.1479.



security is carried out in accordance with special contracts (agreements). In 2010 the PFR was executing 14 international pension security agreements of the Russian Federation with 18 countries.

The agreements with Commonwealth of Independent States (CIS) – Lithuania, Georgia and Estonia, and also Slovakia, Romania, Hungary and Mongolia, – are based on territorial principle, according to which the pension security of citizens is carried out according to the legislation and at the expense of the beneficiary's country. Mutual accounts are not settled.

The international agreements between the Russian Federation and the Republic of Bulgaria, Spain, Byelorussia and Ukraine are based on proportional principle, under which each side sets up and pays pension according to those pension rights (insurance time of service length) acquired on the side's territory.

In the Decision of 15.06.1998 N 18-P<sup>10</sup> the Constitutional Court stated that the constitutional right to pension was violated by the following provision of the former legislation. According with it payment of pension was ceased if pensioner left Russia for permanent residence in other country before 01.07.1993.

Federal laws that were adopted afterwards don't contain such provisions.

## ***Benefits***

The right to protection against unemployment is guaranteed by the Constitution (art.37).

### *a) Unemployment benefit*

Unemployment benefits are financed from federal and local government budgets. Regional and local governments may establish and finance supplementary benefits for unemployed persons and their dependents out of their own budgets. Unemployment benefits are paid by local employment services.

Citizens aged 16 to 59 (men) or aged 16 to 54 (women) are eligible for unemployment benefits.

In order to qualify for benefit unemployed persons must be registered at an employment office, have 26 weeks of full-time employment in the last 12 months (or the 26-week equivalent for part-time employment), and be willing and able to work.

Benefits may be reduced, postponed, suspended, or terminated if the worker is dismissed because of misconduct, leaving employment without good cause, violating conditions for job placement or vocational training, or filing a fraudulent claim.

Unemployment benefit is calculated as a percentage of previous average wages and is paid for up to 12 months. The benefit decreases over time: 75% of the previous average monthly wage is paid for the first three months, 60% for the next four months, and 45% for the last five months. The amount of unemployment benefit can't be less than minimum amount and exceed maximum amount prescribed by law. But even the maximum amount of unemployment benefit is below the federal subsistence minimum level. On this ground European Committee of Social Rights concluded that the situation in Russian Federation is not in conformity with article 12(1) of the European Social Charter (revised) 1996 which was ratified by Russia.<sup>11</sup>

### *b) Sickness benefit*

Employers pay temporary sickness benefits using funds from the State Social Insurance Fund and their own funds. The law provides for employers' obligation to pay for the first 3 days of sickness and from the 4th day onwards, such payment is made on account of the Social Insurance Fund.

Sickness benefits are paid in the following cases enumerated by law:

- illness or injury;
- care given to a sick family member;

<sup>10</sup> "Sobranie zakonodatel'stva RF". 22.06.1998. N 25. St.3003.

<sup>11</sup> Conclusions 2013. <http://www.coe.int>.

- quarantine of an insured person, as well as quarantine of a child under 7 years of age attending a pre-school educational institution;
- prosthetics done for medical reasons in a specialized institution;
- prescribed aftercare in sanatorium and spa resorts in Russia, immediately after hospitalization.

The amount of benefit varies according to the length of the insurance coverage period:

- less than five years of coverage – 60% of earnings;
- with five to eight years of coverage – 80% of;
- more than eight years of coverage – 100% with of earnings.

Sickness benefits are calculated on the basis of the average daily earnings. The daily earnings are defined as the ratio of the accrued employee's earnings for two preceding calendar years within the threshold divided by 730.

The period of payment of sickness benefit depends on the grounds for the entitlement. The minimum benefit is 100% of the legal minimum wage for employees with less than 6 month period of insurance coverage. This amount is also below the federal subsistence minimum level.

### c) *Maternity benefits*

According to article 38 of the Constitution maternity, childhood and the family shall be protected by the State.

Maternity leave is given under the Labour Code of the Russian Federation (art.). The duration of it is 140 days – 70 days before the birth and 70 days after. Duration of maternity leave can be increased to 194 days in the event of multiple pregnancies or complications – 84 days before the birth and 110 days after it for multiple births (such as twins or triplets) or 86 days after the birth if there are any complications.

Maternity benefit is calculated at a rate of 100% of the insured mother's average earnings for two preceding calendar years within the threshold divided by 730.

After maternity leave working parents (or other caretaker of a child) are eligible to ***child care leave*** until the child reaches the age of 1.5 years. The rights to childcare leave and allowance are not limited to the mother of the child. Other family members (such as the father, grand-parents and even other close relatives), who actually care for the child and contribute to compulsory social insurance, are also entitled to these rights. Childcare allowance is granted to one person only, so if another family member receives this allowance, then the mother will not be eligible for it.

Childcare allowance is calculated at a rate of 40% of the insured caretaker of a child average earnings for two preceding calendar years within the threshold divided by 730.

Non-working caretaker of a child is eligible to flat-rate childcare allowance.

***Lump sum childbirth benefit*** is paid under federal and regional law.

### ***Maternity capital***

Maternity (family) capital is the Government support of the families, which after 1st January 2007 gave birth or adopted the second child or the third, fourth or subsequent children, if the right to maternity capital was not registered before birth (adoption) of previous children.

The maternity capital can be used to:

- housing improvement: to buy housing, to pay off mortgage loans, or to build a house;
- any of the family children's education: in kindergarten, institutions of high education, postgraduate course;
- to augment the mother's future accumulative pension.

Maternity (family) capital can't be used to these three aims until the child has reached three years of age. Exception: maternity capital can be used to pay off mortgage loans before the child's three years, independent of the date of mortgage.

Eligible person can apply for maternity capital use to the local Pension Fund Office. The PFR has issued more than 4 million of certificates for maternity capital.

More than 2 million Russian families have already used the maternity capital, about 300 thousand families improved their housing conditions. The time of the capital's transfer does not exceed 2 months from the date of application to the PFR.

In 2014 amount of maternity capital is 468000 rubles (about 10000 euros).

**Conclusion.** Even brief description of the Russian social security system shows that it is complicated, not stable, not adequate for decent life. Some legal provisions and their implementation are not in conformity with the “letter and spirit” of the Constitution. For this reason the role of the Constitutional Court of the Russian Federation in revealing the inner content of constitutional provisions in the field of social security is difficult to overestimate.

The Constitutional Court formulated several principles that should characterize social security legislation in order to guarantee the Constitutional right to social security: legal certainty, stability, adequacy, proportionality.

## SLOVAK REPUBLIC

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### THE RIGHT TO SOCIAL SECURITY IN THE CONSTITUTION OF THE SLOVAK REPUBLIC

*Assoc. Prof. ANDREA OLŠOVSKÁ*

The primary source of constitutional law in the Slovak Republic is the Constitution of the Slovak Republic – No. 460/1992 Coll. as amended (hereinafter “the Constitution”). A part of the constitutional system of the Slovak Republic is also the Charter of Fundamental Rights and Freedoms (Constitutional Act No. 23/1991 Coll.) which includes provision of basic human rights and freedoms. In Slovakia there, thus, exists duplicity in provision for fundamental human rights and freedoms, therefore our analysis will be based on the Constitution.

Social security rights belong to the category of economic, social and cultural rights. The real content of social security rights differs in each country, because it depends primarily on the economic, demographic, political, territorial factors as well as the ethical views and traditions of each country.<sup>1</sup>

The basis for the legislative system pertaining to social security in the Slovak Republic are the principles of guarantees and application of social rights embedded in the national legislation as well as in the international and European legislative framework. The need for social protection (social security) of an individual by the state is usually derived from the right to human dignity, right to life and right to health protection.

The relatively extensive system of social security law is also divided in the Slovak Republic into three subsystems:

- **social insurance:** the insurance system is the most extensive as it covers health insurance and social insurance, which is further divided into sickness insurance, pension insurance, unemployment insurance, accident insurance and guarantee insurance.

The insurance system is mainly built on the principles of self-financing and the creation of insurance funds, the principle of the independence of an insurance relationship of the will of policyholders, multiple insurance, funding benefits replacing wages and the principle of legal and economic guarantees. The amount of contribution obligation of the insured does not derive from the nature of social risk but from the amount of the insured’s income. Regarding social insurance benefits, they vary according to the assessment base (simply stated – according to the incomes, in the case of an employee it is their salary), of which are paid contributions to various funds. At the same time, there is stated statutory maximum and minimum amount of the assessment base (in the case of an employee the minimum assessment base is the minimum wage fixed by law). However, there is not legally guaranteed a specific minimum

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<sup>1</sup> Por. Macková, Z.: Princíp solidarity v práve sociálneho zabezpečenia Slovenskej republiky. Bratislava, VO PF UK 2001, s. 17.

amount of social security benefits. It should be noted that although there is a maximum assessment base, the amount of social security benefit is provided even in a lower amount than it would appear from the maximum assessment base (shown in simplified example: In case of the unemployment insurance, the monthly maximum assessment base is currently of 4,000€, the maximum for the calculation of unemployment benefit is about €1,600 monthly, the max. unemployment benefit is equal to 50% of the amount of €1,600, i.e. of about €800 monthly). Due to the focus of the study we only provide the basic social insurance benefits.

Separation of the health insurance from the social insurance system (mainly from sickness insurance) is caused, on one hand, by the different principles and, on the other hand, by different character of the benefits of both systems. Unlike insurance in sickness, the health insurance is built on the full application of solidarity and medical services reimbursed by health insurance system are material benefits;

- **social support:** the social support system is not based on contributions, and allowances under the system are financed directly from the state budget; the system is applied mainly with respect to the field of family policy (benefits are not tested by parental income, but represent a regular sum of contributions, which are determined by the state; there is a legal right for the benefits from the system of social support). Due to the focus of the study we only report basic social benefits; and
- **social assistance:** it is built on the principle of subsidiarity. The social assistance system constitutes social allowances financed from public resources (in its majority from the state budget). Social allowances in the form of monetary or material allowances (services) serve the purpose of elimination of social risk of poverty in situations, when a socially dependent person does not have the capacity to provide themselves with basic living conditions or subsistence level by his/her own efforts. Under the subsistence level, a person may find themselves not only because of the lack of material resources (the material deprivation), but also because of severe physical disability, which deprives them from providing for themselves, their household, their rights or contact with the social environment (the so-called social need).

## 1. *The constitutional guarantees of social security rights*

Economic, social and cultural rights are governed by Title II of the Constitution: Fundamental Rights and Freedoms; specifically in the Section five: Economic, Social and Cultural Rights (Articles 35-43). These provisions include the right to work (Article 35), the right to material welfare (Article 39) and the right to protection of health (Article 40), protection of marriage, parenthood and family (Article 41).

In the terms of values these rights aim not only at preservation of “bare” life, but also at the quality of human life, which is related to the question whether for the quality of life should be responsible the man himself or the state. Range of economic, social and cultural rights is affected by the economic and legal factors,<sup>2</sup> which are the most apparent in the fact that an absolute majority of these rights may be claimed only within the limits of the laws, which implement these provisions. That mentioned rule is enshrined in Art. 51(1) of the Constitution, according to which claiming the rights provided for in Art. 35, 36, 37(4), Art. 38 to 42 and Art. 44-46 of the Constitution shall be confined within the limits of the law which implements these provisions. Exception to this rule would be only the situation, if the Slovak Republic acceded to an international treaty with priority over laws of the Slovak Republic, or if there was a binding act of the EU. Under this provision the Constitution gives a wide scope for the legislator to define the content of economic, social and cultural rights. The legislator is therefore able to take into account the economic capacity of the state at the time of the adoption of a specific law. The obligations which arise for the state in the area of these rights from international obligations must be also interpreted<sup>3</sup> in accordance

<sup>2</sup> Svák, J., Cibulka, L.: Ústavné právo Slovenskej republiky. Osobitná časť. 4. Vydanie. Bratislava. EUROKÓDEX 2009, s. 389.

<sup>3</sup> Rozhodnutie Ústavného súdu SR č. PL ÚS 3/04.

with this provision of the Constitutional Court of the Slovak Republic.<sup>4</sup> Since the mentioned constitutional rights require implementation by the law, their validity is confirmed by Art. 13(2) of the Constitution according to which the limits of the fundamental rights and freedoms can be subject to amendment only by the conditions laid down in this Constitution referred to as the Act.

Conditioning the applicability of the constitutional rights by a particular law (acts) reduces their possibility of constitutional protection and leaves the quality of the content of the relevant laws to the consideration of the legislator. According to the legal doctrine a contentious issue is whether citizens have or have not the possibility to constitutionally influence the quality of these laws. The theory was also adopted also by the Constitutional Court of the Slovak Republic.<sup>5</sup> The theory of positive commitment imposed to the state the obligations to not only declare the human rights, but also to ensure all conditions (including the physical and legal), necessary for their fulfilment. This should also lead the legislator to a constitutional obligation to adopt such laws that meet the content and meaning of the Constitution.<sup>6</sup>

Most of the economic, social and cultural rights in terms of Art. 51 of the Constitution, thus, meet the real content of the provisions of the relevant laws and their constitutional protection is only guaranteed within the limits of these laws (acts).

The method of enshrinement of such constitutional social rights has its roots in the economic dimension of social rights. This raises the fructiferous debate, since the level of implementation of social rights is often changed by relatively frequent change of regularization. It can be generally stated that the economic dimension of social rights differs social rights from fundamental human rights.<sup>7</sup> Social rights are relative, opposed to human rights that are absolute.

Relativity of the constitutional social rights (their indirect enshrinement – not in the Constitution, but in the acts) is reflected in the decision-making activities of the bodies responsible for protection of constitutionality, that means, that you cannot directly allege breach of the Constitution – a breach of the relevant constitutional social right, but only in relation with the violation of the principle of *Rechtsstaat*, which must be respected by the legislator in the implementation of social rights<sup>8</sup> (e.g. citizen can not directly claim that he/she has a low retirement pension and directly allege the Article 39 of the Constitution, but can allege the breach of the principle of *Rechtsstaat* – e.g. the principle of legal security (if there were frequent changes in the regularization of pension scheme) or the prohibition of discrimination).

## **2. The scope of the material and personal social security rights guaranteed by the Constitution**

Although, when referring to Social Rights the Constitution uses also the term “citizen”, the social rights in Slovakia are not based on the civic principle. It is because of the fact that the implementing legislation on social security recognizes in accordance with the principle of equal treatment and the constitutional principle of equality in rights (Article 12 (1,2) of the Constitution) the equal status and equal rights and obligations in the social security system as to the ***citizens of the Slovak Republic as well as stateless persons, foreigners and asylum seekers***. The laws in this way extend the personal scope of the constitutional social rights (the above referred is confirmed by the fact that these rights are guaranteed by law also for the ***EU citizens***).

<sup>4</sup> Svák, J., Cibulka, E.: Ústavné právo Slovenskej republiky. Osobitná časť. 4. Vydanie. Bratislava. EUROKÓDEX 2009, s. 390.

<sup>5</sup> Rozhodnutie Ústavného súdu SR č. II ÚS 8/96.

<sup>6</sup> Svák, J., Cibulka, E.: Ústavné právo Slovenskej republiky. Osobitná časť. 4. Vydanie. Bratislava. EUROKÓDEX 2009, s. 390-391.

<sup>7</sup> Lacko, M.: Hmotné zabezpečenie v starobe. Bratislava, Sprint dva 2011, s.19.

<sup>8</sup> Por. Lacko, M.: Hmotné zabezpečenie v starobe. Bratislava, Sprint dva 2011, s. 20-21.

### *Right to work and the material welfare if a citizen cannot work*

According to Art. 35(3) of the Constitution the citizens have the right to work. The state provides citizens who, not by their own fault, cannot exercise that right with material welfare in a reasonable level. The conditions are laid down by the law. The law may provide for a different regulation of the rights referred to in Article 35(1-3) of the Constitution for foreigners.

The right to material welfare of citizens who, not by their own fault, cannot exercise the right to work is closely related to the right to work. Taking into account the case law of the Constitutional Court, the right to work is not a legal entitlement for admission to employment or to perform a certain function, but it is more a right to procure the means of subsistence by one's own work.<sup>9</sup>

Subject of the right to work is the *citizen of the Slovak Republic*. Subject of the right to material security is **the citizen of the Slovak Republic, who, not by the fault of their own, cannot exercise the right to work.**

As it is possible via legal regulation within the meaning of Art. 35(4) 4 of the Constitution to adopt different regulation for foreigners, it is possible to grant the right to work and to adequate material security in the event of failure to perform the work also for foreigners.

The right to work is governed by the Act. No. 5/2004 Coll. on the employment services and on amending and supplementing certain acts, as amended (hereinafter the "Employment Services Act"). Employment Services Act provides for a system of institutions and instruments of assistance to the participants in labour market in searching or in changing the employment, education and training necessary for success in the labour market and also to the employers in filling vacancies and also regulates various contributions to the realization of the right of access to employment. The present legislation regulates the conditions for registration of the unemployed and of their cooperation with the competent authorities mainly represented by the Office of Labour, Social Affairs and Family. The inventory system is linked to a system for providing the unemployment benefit. Conditions for the provision of unemployment benefit as a social insurance benefit are regulated by the Act. No. 461/2003 Coll. on social insurance, as amended (hereinafter the "Act No. 461/2003 Coll.").

In general, the insured, not only the citizen of the Slovak Republic, is entitled to the unemployment benefit if, in the last three years, before registration in the database of unemployed jobseekers, was insured in unemployment (i.e. paid the corresponding levies) for at least two years, unless the law provides otherwise. The period for receiving the unemployment benefit is max. 6 months. The benefit is granted in calendar days, the amount is of 50 % of the daily assessment base. The maximum amount of the unemployment benefit is also given by the law (for example, currently, the sum for the month that has 31 days is of €820.50 and for the month with 30 days is of €794).

### *The right to adequate material security*

Material security as determined and the most important form of social security is a social measure addressing the particular risks of the life cycle of an individual such as birth of the child, education of the child, temporary incapacity, long-term incapacity, unemployment, death of breadwinner, accident at work and old age.<sup>10</sup>

The right to material security is closely linked to the natural law to preserve human dignity, which is protected by the Article 19(1) of the Constitution (everyone has the right to maintain their dignity, honour, good reputation and name). According to Art. 39(1) of the Constitution citizens have the right to adequate material security in old age and during their incapacity to work, as well as after the loss of their breadwinner. According to Art. 39(2) anyone who is in material need is entitled to such assistance that is necessary to ensure their basic living conditions. In accordance with Art. 39(3) of the Constitution on the rights listed above provided by law.

<sup>9</sup> Svák, J., Cibulka, L.: Ústavné právo Slovenskej republiky. Osobitná časť. 4. Vydanie. Bratislava. EUROKÓDEX 2009, s. 393-394.

<sup>10</sup> Por. Lacko, M.: Hmotné zabezpečenie v starobe. Bratislava, Sprint dva 2011, s.9.

The right to material security is therefore composed of two rights. The difference between these two rights is in the range of assistance provided, and in the subjects of these rights.

**The subjects** of the right to adequate material security are **only citizens**, while the subjects of **the right to assistance** are **all those in material need** (i.e. also foreigners).<sup>11</sup>

Regarding the level of protection, the lowest one is in providing assistance in the event of material need. Greater protection is in a material security in old age, incapacity to work and loss of breadwinner, because the Constitution requires that material support to be adequate.

The right for material provision is contained in many laws (acts).

#### *Adequate material security in old age*

Citizens' right to adequate material security in old age is implemented by three Acts. The Slovak pension scheme consists of three pillars:

- compulsory continuous pillar: organized by the Social Security Insurance Company (Act No. 461/2013 Coll. on social insurance as amended (hereinafter the “Act No. 461/2003”));
- capitalization pillar: organized by commercially licensed insurance companies – pension fund management companies (Act No. 43/2004 Coll. on retirement pension savings as amended); and
- supplementary pension insurance: organized by commercially licensed companies – pension funds (Act No. 650/2004 Coll. on supplementary pension insurance as amended). The participation in the supplementary pension insurance pillar is voluntary.

For the citizens not entitled to a retirement pension or for those who receive it in a small amount (the Slovak Republic has no guaranteed minimum pension rate), there is applied the principle of subsidiarity applied, and these people fall into the “safety net” and they are entitled for the benefit in material need (for more detailed information see the Section about the assistance in material need).

The pension scheme of the Slovak Republic (i.e., participation in the first two pillars) is based on obligatory contributions from every employer and employee as part of their social security contributions (there exist certain categories of persons who have special regulations regarding pensions, e.g. police officers, fire brigade members, etc.). With regards to the participation in the second (capitalization) pillar, the participation in the capitalization pillar is voluntary (in general for employees younger than 35 years). Participation in the third pillar is voluntary for all employees.

Obligatory contributions to retirement pension insurance are determined at 18% of the assessment base (i.e. gross monthly wage of the employee) and are divided between employees and the employer (the employee contributes 4% and the employer 14%). If an employee takes part only in the first pillar, all contributions are paid to the Social Security Insurance Company. If an employee takes part also in the second pillar (capitalization), the contributions are divided between the first (14%) and second pillar (4%).

The first pillar is continuously funded, defined-contribution pension system, which means that only the person who achieves income to pay contributions, is participating in a compulsory pension scheme. If there is a lack of income for the insured during certain periods (e.g., prolonged illness, unemployment), this will negatively influence the amount of the pension benefit. At the same time, this system does not guarantee the minimum amount of pension benefits. It can be noted that this system is determined by a strong principle of merit, which undermines the principle of social security of the individual.

The insured person is entitled to a retirement pension if he/she has had the pension insurance at least for 15 years and has reached retirement age (there are listed only general terms without specific cases). At the time of the submission of this study the retirement age is 62 years of age of the insured person (man and woman), unless provided otherwise (in the transitional period – from 2004 to 2014, the retirement age for women was under 62 years and depended on the number of children raised).

<sup>11</sup> Svák, J., Cibulka, E.: Ústavné právo Slovenskej republiky. Osobitná časť. 4. Vydanie. Bratislava. EUROKÓDEX 2009, s. 398.



In addition to retirement pension, the Act No. 461/2003 also provides for early retirement pension. The insured person is entitled to an early retirement pension if to the date from which he/she claims it (in general),

- a) was pension insured for at least 15 years,
- b) needs only maximum two years until they reach retirement age and
- c) the early retirement pension amount is more than 1,2 times higher than the subsistence minimum for one adult natural person under a special regulation.

#### *Adequate material security during the incapacity to work*

Incapacity to work due to the health reasons may include two types of incapacity: short-term or long-term. Depending on the type of incapacity there are provided other Social Security benefits. Since it is an insurance relationship, not only the citizens of the Slovak Republic, if they comply with the conditions of the Act No. 461/2003, are entitled to the benefits.

#### *Sickness allowance*

Sickness allowance is sickness insurance benefit. The insured is entitled for it if he/she complies with the conditions laid down by law. The insured is entitled to sickness allowance, if he/she has been due to the illness or injury recognized as temporarily incapable of performing their employment or under quarantine under a special regulation (temporary incapacity to work).

An employee is entitled to sickness allowance from the 11th day of temporary incapacity (first 10 days the compensation is paid by the employer). Compulsory sickness insured self-employed persons and voluntary sickness insured persons are entitled to sickness allowance from the first day of temporary incapacity. Entitlement to the sickness allowance shall cease on the day following the end of the temporary incapacity, no later than on the end of the week 52nd week since the creation of temporary incapacity, if the law does not provide otherwise.

The benefit is granted in calendar days, the amount is generally of 55 % of the daily assessment base (however, there are exceptions). The maximum amount of benefit is also given by law, and the Social Insurance pays to the insured the sickness allowance at a maximum of € 677 per month (31 – day month), respectively € 655 per month (30 – day month).

#### *Occupational Injuries Benefits*

If during the employee's performance of work tasks or in direct connection with it there has occurred an injury or accident leading to the employee's damage of health or resulting in the employee's death (accident at work), the responsible for resulting damage is the employer for whom the employee was working at the time of the accident in employment. For damage caused to the employee by occupational disease the responsible is employer for whom the employee has last worked in the employment relationship prior to the finding of the damage, under the conditions that give rise to occupational disease, which she/he is suffering for. The list of occupational diseases is listed in the Act No. 461/2003 Coll.

Within the liability for accidents at work and occupational diseases the Labour Code governs only property damage. The other specific claims are regulated by the Act No. 461/2003 Coll. (for the purposes of this liability the employer is under this Act compulsory insured against accidents); accident insurance provides the following benefits: accident extra-allowance, injuries pension, on-off compensation, accident pension for remaining relatives, one-off indemnity, occupational disease rehabilitation and rehabilitation fee, retraining and retraining allowance, compensation for pain and compensation for loss or difficulty of social interaction, refund of the cost of medical treatment, refund of costs associated with a funeral ceremony.

#### *Invalidity pension*

According to the Act No. 461/2003 Coll. the insured (not only citizen) is entitled to an invalidity pension if they became disabled, obtained the statutory number of years of pension insurance and to

the date when they became invalid, they do not meet the conditions for entitlement to a retirement pension or were not granted early retirement pension. The insured person is invalid if because of their long-term adverse health condition experiences a decrease in their earning capacity by more than 40% compared to a healthy individual occurred. A long-term adverse health condition is such a medical condition that causes a decrease in earning capacity and according to the medical knowledge will last longer than one year.

The rate of decline in earning capacity percentage is determined by the type of disability, which is the decisive cause of the long-term adverse health condition, and having regard to the seriousness of other disabilities. A certain problem with the amount of the invalidity pension is that the individual percentages of reduction of earning capacity must not be aggregated in the same individual.

*Adequate material security in the case of losing a breadwinner*

*Widow's pension*

According to the Act No. 461/2003 Coll. a widow is entitled to a widow's pension for her husband, who (in general)

- a) to the date of his death was a beneficiary of a retirement pension, invalidity pension or entitled to early retirement pension,
- b) to the date of his death, fulfilled the conditions for a retirement pension or obtained the number of years of pension insurance for the entitlement to invalidity pension, or
- c) died as a result of an accident at work or occupational disease.

The widow is entitled to payment of a widow's pension for one year from the death of her husband. After this period, the widow is entitled to payment of a widow's pension if (in general)

- a) she takes care of a dependent child,
- b) is invalid because of a decline in earning capacity by more than 70% or
- c) raised at least three children,
- d) is not less than 52 years old and raised two children,
- e) reached the age of retirement.

The entitlement to a widower's pension after the wife has the same conditions. The amount of the widow's / widower's pension is of 60% of the retirement pension or invalidity pension to which he/she would be entitled or the deceased husband / wife to the date of their death.

*The orphan's pension*

Entitlement to an orphan's pension has (in general) a dependent child whose parent or adoptive parent died, if the parent or adoptive parent was a beneficiary of a retirement pension or invalidity pension to the date of their death, or was entitled to early retirement pension or to the date of their death obtained the number of years of pension insurance for the entitlement to an invalidity pension or qualified for a retirement pension, or died as a result of an accident at work or due to an occupational disease. The entitlement to an orphan's pension shall cease to the date when the child reaches the age of 26 years.

The orphan's pension is of 40% of the retirement pension or invalidity pension to which the parent or adoptive parent was or would have been entitled and by whose death there arose entitlement of a dependent child to an orphan's pension.

*Anyone who is deprived from material subsistence is entitled to such assistance that is necessary to ensure basic living conditions*

The assistance in the material need can be simply reported as "safety net" built on the principle of subsidiarity – if a person is unable to obtain the means of subsistence and is not entitled to benefits from other social security systems, they have the opportunity to receive assistance in material need.

Regarding the scope of the aid, it does not depend on individual needs and concepts of the dependent person, but it depends on rating (acceptable by society) – which living conditions are basic and what measures are necessary to achieve them.<sup>12</sup>

Issues of material need are regulated by the Act. No. 417/2013 Coll., on assistance in material need and on amendments to certain laws (effective from January 1st 2014).

This Act regulates the legal relations in providing assistance in material need and the specific contribution and the one-off contribution. The law applies to a citizen of the Slovak Republic, who is resident of the Slovak Republic and to a foreigner residing on the territory of the Slovak Republic in accordance with special legislation or international agreement according to which the Slovak Republic is bound to provide this assistance.

Material need (deprivation) is a condition where the income of household members under this Act is below the subsistence level determined by special regulation and household members are unable to or cannot either by work, or by exercising their property rights or other rights to property or claiming to provide an income or increase their income. Basic living conditions for the purposes of this Act are one hot meal per day, necessary clothing and shelter (housing).

Material need is determined by assessing the income, property and opportunities of the claims of the members of a household (the Act specifies detailed examination of the conditions of material deprivation).

Assistance in material need consists of the following benefit:

- Benefit in material need (hereinafter referred to as “benefit”),
- Protection benefit,
- Activation benefit,
- Dependent child benefit,
- Housing Benefit.

Given that the amount of assistance in material need depends on various factors, for illustration we only present an overview of assistance in material need. The benefit is intended to ensure the basic living conditions. The amount of the benefit depends on the number of jointly assessed persons. For an individual the benefit is of €61.60 per month. The benefit for each dependent child is of €17.20 per month. The housing benefit is €55.80 per month in the case of a household with one member of the household. Stated in a simplified way, the roles of the government in the area of assistance in material need are performed by the Offices of Labour, Social Affairs and Family.

The living wage, which determines the material need assistance as well as various other benefits, is governed by law, specifically by the Act No. 601/2003 Coll. on subsistence minimum and the amendment of certain acts as amended.

Living wage within the meaning of this Act shall be deemed a socially recognized minimum level of personal income, under which there is a state of material deprivation. The amount of living wage shall be assessed according to whether it is for an individual, a jointly assessed natural person or a dependent child. The amounts shall be adjusted each July 1st for the current calendar year. As an example we provide living wage for an individual – for this is considered to be the sum of € 198.09 per month in the case of one adult natural person.

### *Child care*

Marriage, parenthood and family are under the protection of the law and there is guaranteed a special protection of children and minors in Art. 41(1) of the Constitution. Subsequently, the Art. 41(2) of the Constitution guarantees the special care, protection in employment and appropriate working conditions for a woman during pregnancy.

<sup>12</sup> Drgonec, J.: Ústava Slovenskej republiky. Komentár. 3. vydanie. Šamorín, Heuréka 2012, s. 677.

According to Art. 41(5) of the Constitution parents who are raising children are entitled to assistance from the State. Details about the rights referred to in Art. 41(1-5) of the Constitution under Art. 41(6) of the Constitution shall be laid down by the law. The content of this positive obligation of the state are the measures aimed to actively promote marriage and to meet its essential target mission – to start a family and raise the children within it. In supporting this objective there appears an obligation of the state to create a suitable legal environment.<sup>13</sup>

Material assistance to a family consists of both Social Security benefits – parental leave as well as state social assistance – parents are provided regular benefits, regardless of their income, because they are intended to parental care of children.

#### *Maternity benefit*

Generally stated, insured woman who is pregnant or is caring for a newborn child is entitled to maternity benefit if the last two years before the birth she paid sickness insurance for at least 270 days. She is entitled to maternity benefit for a period of maternity leave which is for a period of 34 weeks if the Act No. 461/2003 Coll. does not provide otherwise; it is 37 weeks for the insured woman who is a single mother and 43 weeks for the one that gave birth to two or more children (the father of the child can also be entitled to maternity benefit under the terms of the law, or another insured person who took the child into care, however, the period for receiving the benefit is, however, 6 weeks shorter than of the insured woman, who gave birth to the child). Receiving the maternity benefit copies the period of the maternity leave under Section 166(1) of the Act no. 311/2001 Coll., the Labour Code, as amended (hereinafter the “Labour Code”).

Maternity benefit is provided and calculated for the days and its amount is of 65% of the daily assessment base. Currently, the maximum maternity benefit is of €800 per month (31-day month), respectively of €774 per month (30-day month).

#### *Parental allowance*

If the parent of a child was not insured for sickness and was not entitled to maternity benefit, she/he is entitled to parental allowance during maternity leave under Section 166(1) of the Labour Code.

After maternity leave, a parent under Section 166(2) of the Labour Code can take the parental leave up to 3 years of age of the child, or up to 6 years of child’s age, in the case of child’s adverse health condition requiring special care and during this period is entitled to parental allowance.

Parental allowance is state social benefit, governed by Act No. 571/2009 Coll., on parental allowance and on amendments to certain laws, as amended.

In general, the beneficiary – child’s parent is entitled to parental allowance if

- she/he provides the child with adequate care and
- she/he has a permanent or temporary residence in the Slovak Republic or is a person under special regulations – in terms of the Regulation No. 883/2004.

Parental allowance is of €203.20 per month (regarding the fact that the law lays down certain modifications). The amount of parental allowance valid until December 31st is adjusted by quotient from January 1st which adjusts also the living wage under a special regulation.

#### *Childhood benefit*

Act No. 600/2003 Coll. on childhood benefit, as amended, provides for the provision of childhood benefit (hereinafter the “benefit”) and for the provision of additional allowance to the benefit. The childhood

<sup>13</sup> Svák, J., Cibulka, E.: Ústavné právo Slovenskej republiky. Osobitná časť. 4. Vydanie. Bratislava. EUROKÓDEX 2009, s. 405.

benefit is a state social benefit, by which the state contributes towards the education and maintenance of a dependent child.

Premium allowance for the childhood benefit is a state social benefit, by which the state helps towards the education and maintenance of a dependent child, for which there cannot be applied the tax bonus under a special regulation.

In general, the beneficiary (parent of a dependent child and an adult dependent child if s/he is orphan) is entitled to the childhood benefit (in general):

- if she/he is caring for a dependent child;
- has a permanent or temporary residence in the Slovak Republic or is a person under a special regulation – under Regulation No. 883/2004.

The benefit is of €23.52 per month. The amounts of the childhood benefit and of the premium allowance applicable until 31st December of the calendar year shall be adjusted on January 1st of the calendar year by the quotient which adjusts also the amount of living wage under a special regulation.

#### *Childbirth benefit*

Act No. 383/2013 Coll., on the childbirth benefit and on benefit for multiple childbirth, as amended, regulates the provision of childbirth benefit and provision of a benefit for multiple childbirth.

Childbirth benefit is a state social benefit, by which the state contributes to cover expenses related to the provision of essential needs of the new-born. In general, the beneficiary – the child's parent is entitled to childbirth benefit, if she/he is a resident and domiciled in the Slovak Republic and the child was born. Entitlement to childbirth benefit for the same child arises only once. If more children are born at the same time, there arises a claim to childbirth benefit for each child.

The amount of the childbirth benefit is of

- €829.86 in the case of a child born from the first birth to third birth that survived at least 28 days,
- €151.37 in the case of a child born from the fourth birth and another birth, or if is the child from the first birth to third birth, which died before 28 day period.

If there were born simultaneously two or more children and at least two of them survived 28 days, the sum of childbirth benefit increases by €75.69 for each child who survived at least 28 days. Entitlement to childbirth benefit expires six months after childbirth.

The Slovak Government can increase the sum of the childbirth benefit and the amount of the multiple childbirth benefit to the date of September 1st of a calendar year via a government regulation

#### *The right for health protection*

According to Art. 40 of the Constitution everyone has the right to health protection. On the basis of health insurance the citizens have the right to free health care and medical devices under the conditions provided for by law.

As for the subjects, only citizens who are **subjects of health insurance and meet the conditions of the law**, have the right to free health care.

Due to the imperfection of the legislation contained in the second sentence of Article 40 of the Constitution, within the theory we can meet with the question of whether the burden of payment for the health care is to be taken by the State, since it guarantees this right to citizens, or whether the purpose of the Art. 40 of the Constitution is to recognize for citizens the prospect of such medical care, the cost of which will be borne by and paid by another entity of the health insurance funds (not of the state budget). Therefore the mentioned imperfection of the legislation so does not constitute grounds for legal certainty.<sup>14</sup>

<sup>14</sup> Por. Drgonec, J.: Dostupnosť základných práv v zdravotníctve. Dostupné na: <http://www.pravo-medicina.sk/aktuality/479/doc-judr-jan-d-r-g-o-n-e-c-drsc-dostupnost-zakladnych-prav-v-zdravotnictve> [cit. 1.5.2014].

The provision of health care and services related to health care, the rights and obligations of natural and legal persons in the provision of health care, the procedure for death and execution of the state administration in the field of health care are governed by the Act No. 576/2004 Coll., on health care, services related to health care and on amendments to certain laws, as amended.

Range of the health care covered by the public health insurance under the conditions stipulated by special regulations and payments for services related to health care are governed by the Act No. 577/2004 Coll., on the scope of health care covered by the public health insurance and payments for services related to health care, as amended.

Functioning of the public health insurance system, payment of contribution for health insurance are regulated by another law, Act No. 580/2004 Coll., on health insurance, as amended.

Status of health insurance companies as well as supervision of healthcare provision are governed by Act No. 581/2004 Coll., on health insurance companies, health care supervision and on amendments to certain laws, as amended.

According to Art. 3 of the Act No. 580/2004 Coll., compulsory publicly insured person (in general) is a natural person who has permanent residence in the Slovak Republic, regarding the exceptions provided in this Act as well as the natural person who does not have permanent residence in the Slovak Republic, and is not medically insured in another Member State of the European Union or in a Contracting State of the Agreement on the European Economic Area and in Switzerland, again with regard to the exceptions provided by this Act.

Free health care covered by the health insurance is based on the principle of solidarity. As each person fulfilling the conditions laid down by law, pays levies to health insurance, regardless of whether s/he is at the time of the payment of the levy in a state of dependence on health care or whether s/he will sometimes in the future need such care.<sup>15</sup>

The insured has the right to reimbursement of health care constituted by Act No. 580/2004 Coll. (if there are fulfilled the conditions given by this Act) to the extent stipulated by special regulations.

### ***3. The constitutional regulations' impact on the content of social security rights in the domestic legal system***

As mentioned in the introduction, the specific scope and content of social security rights are regulated by law, the Constitutional Court within its decision-making activities has not given yet a framework for the content of social security rights. However, it addressed certain aspects of these social security rights by which it at least partially defined those rights. Here we present the fundamental points of the Constitutional Court of the Slovak Republic as well as the opinions of professional community expressed on social rights. Given the range of this study we only list some important comments.

#### *Assistance in material need*

As mentioned above, the material need assistance consists not only of benefits, but also of other forms of assistance. To obtain these additional forms of assistance an individual needs to develop a certain form of activity (e.g. through activation works for the community, or by caring for family members). In summary, the provision of material need assistance should reach the level of living wage. There happens, however, that some individuals are not able to realize legally planned activities for obtaining various forms of assistance in material need (e.g. medical reasons) and often are entitled only to a benefit in material need, which is for an adult person – an individual the amount of €61.60 per month, while the amount of the subsistence minimum for an individual is of the amount of €198.09 per month. Such regularization is therefore the target of criticism.

<sup>15</sup> Por. Drgonec, J.: Dostupnosť základných práv v zdravotníctve časť II. Dostupné na: <http://www.pravo-medicina.sk/aktuality/480/doc-judr-jan-d-r-g-o-n-e-c-drsc-dostupnost-zakladnych-prav-v-zdravotnictve-cast-ii> [cit. 1.5.2014].

### *The right to health protection*

In relation to the provision of health care there are discussed, in particular, the questions on the range and content of its gratuitousness. Given that fact, the health insurance companies have the status of companies – joint-stock companies; there resonates the question whether the provision of health care is a business activity and if the health insurance companies can make a profit. These issues were therefore addressed also by the Constitutional Court.

### *Range and gratuitousness of the provision of health care*

In accordance with the decision of the Constitutional Court the right to health protection as a fundamental right of a citizen is to some extent, modified by the Constitution and provided to the citizen, free of charge. Conditions for the free provision can only be modified by law, which is a guarantee of the citizen's legal certainty.<sup>16</sup>

It can be stated from the case law of the Constitutional Court can be stated that the constitutional concept of free health care and medical devices based on health insurance finds its legal expression in the concept of health care by public health insurance.<sup>17</sup> The Constitutional Court of the Slovak Republic addressed the issue of the scope of cost-free health care and medical devices and stated that the mere existence of health insurance excludes that all health risks were insured (i.e. that the gratuitousness was absolute), but only those which are recognized as claims. The provided health care under this insurance is not boundless, but limited by law within established conditions, i.e. within scope and content of health care covered by health insurance. Should it not be so, the legislator of the Constitution would not “limit” the provision of free health care by the health insurance, but would “generously”, on the basis of full and universal solidarity guarantee the provision of free health care for all, respectively, for “everyone” (however, neither in this case the health care would be absolutely free, because the state would acquire the funds for its provision through other sources, most likely through a universal tax system without further obligation to the patient's participation – the insured at some type of insurance). Subsequently, it was stated that the provision of any content of health care covered by public health insurance, i.e. “adjustment of insurance claims” and determination of its scope is necessarily conditioned by the society possibilities and sustainability of the health insurance system.<sup>18</sup>

The Constitutional Court also adopted a legal interpretation that the law may determine the extent of healthcare to which citizens will not have free access. Thus, the right to health protection is granted to any person, but access to it is being implemented through health care, which is only for Slovak citizens participating in the free health insurance in statutory limits. The Constitution of the Slovak Republic therefore implies that the law separated the cases for which the compulsory sickness insurance will pay for patients (amount of insurance) and cases which are covered by insurance only partially, or which are not covered at all.<sup>19</sup>

### *Provision of health care as a business activity and profit of health insurance companies*

The health insurance company is under Section 2 of the Act No. 581/2004 Coll., a joint-stock company with its seat in the territory of the Slovak Republic established for the implementation of public health insurance (Act here refers to Section 56(1) 1 of the Commercial Code, under which a company is a legal entity, established for business purposes. Company with limited liability and joint-stock company may also be based for any other purpose, unless prohibited by a special law) based on the permission

<sup>16</sup> Rozhodnutie Ústavného súdu SR č. PL. ÚS 8/94.

<sup>17</sup> Svák, J., Cibulka, L.: Ústavné právo Slovenskej republiky. Osobitná časť. 4. Vydanie. Bratislava. EUROKÓDEX 2009, s. 401.

<sup>18</sup> Rozhodnutie Ústavného súdu SR č. PL. ÚS 16/05.

<sup>19</sup> Nález Ústavného súdu PL. ÚS 38/03-89.

to the implementation of public health insurance and must not engage in activities other than activities relating to health insurance (Section 6 Act No. 581/2004 Coll.)

Given that this provision explicitly declares that the health insurance company carries out the public health insurance and also refers to the Commercial Code, there is not complexly solved yet the legal nature of health insurance – i.e., whether they can carry out business activities as usual companies.

In the opinion of the Constitutional Court the specificity of free health care (its purpose and nature) is also due to the fact that health insurance is one of such social relationships, which are excluded from the competition and can be evaluated as (non-business) service in public interest aimed at application of constitutional rights of the individual.<sup>20</sup> However, the Constitutional Court, however, subsequently granted the right to health insurance companies to carry out business activities. It considers health insurance companies as legal entities performing public health insurance as a business for profit.<sup>21</sup>

#### ***4. Threats to social security rights in time of economic crisis***

It can be noted that the effects of the economic crisis are reflected also in the system of material security. As the Constitution leaves the content and scope of social security rights in the hands of legislator, the specific conditions of each material security benefits and their amount do not get into non-compliance with the Constitution. In relation to benefits provided under adequate material security, the conditions for their provision may not be changed retroactively, as the real retroactivity is unacceptable, only to the future. In the view of the economic crisis it may be noted that some of the benefits were changed due to it. We present them briefly.

##### *The right to material security*

The original legislation of the Act No. 461/2003 Coll. allowed the beneficiaries of early retirement pension to perform a gainful employment, i.e. to work. Given that many of these beneficiaries took the new opportunity and claimed the early retirement pension for purpose, the legislator abolished this option since 2011 (and also due to the reduction of the high government deficit). However, old-age pensioners can work without any restrictions. The condition for being entitled to payment of an early retirement pension is non-enforcement of employment, of which the person is mandatory pension-insured. A natural person must therefore decide whether to receive an early retirement pension or will engage in gainful employment.

As mentioned above, the obligatory contributions to retirement pension insurance are set at 18% of the assessment base. If an employee takes part also in the second pillar (capitalization), the contributions are divided between the first (14%) and second pillar (4%).

However, initially the ratio was 9% and 9%, but due to the lack of funding, this ratio changed in favour of the Social Insurance Company in 2012.

##### *The right to health protection*

In general it can be stated that the economic capacity of the state is related to the extent of free health care and services related to health care. Therefore, the determination of the scope of them is left to the legislator, and can be adapted to the current situation and possibilities of the state. Possibility of such a modification was declared also by the Constitutional Court of the Slovak Republic, which held that “the provision of any scope of health care covered by public health insurance, i.e. “adjustment of

<sup>20</sup> Rozhodnutie Ústavného súdu SR č. PL ÚS 13/97.

<sup>21</sup> Rozhodnutie Ústavného súdu SR č. PL ÚS 3/09.

Por. Drgonec, J.: Dostupnosť základných práv v zdravotníctve časť II. Dostupné na: <http://www.pravo-medicina.sk/aktuality/480/doc-judr-jan-d-r-g-o-n-e-c-drsc-dostupnost-zakladnych-prav-v-zdravotnictve-cast-ii> [cit. 1.5.2014].



insurance claims” and determination of its content and scope is necessarily conditioned by possibilities of the society and by the sustainability of the health insurance system.”<sup>22</sup>

In times of crisis there can be seen efforts to increase contributions to public health insurance, as well as efforts to reduce the amount of contributions for state-insured and finally reduce the range of available free healthcare, as the state tolerates the possibility of the health insurance companies to make a profit from the resources that are recollected by the insured persons under the statutory obligation of the insured.<sup>23</sup> The State usually changes the rate for its insured (reducing it) according to its decision for a period of one year during the adoption of the state budget and it enshrines this rate in the transitional provisions of Act No. 580/2004 Coll.

### ***5. Assessment of the future of social security rights in the view of the Constitution***

Studying the constitutionality of the current legislation on social rights by the Constitutional Court of the Slovak Republic still arises several questions. One of the questionable aspects is whether even the Constitutional Court may review the economic and social rights realized by the legislation, since it does not have sufficient information about the current overall economic situation of the Slovak Republic and the economic and social rights are closely linked with the economy of the state and the constitutional judges are not experts in economics.

Specific provision of economic and social rights depends mainly on the economic situation of the country, which is declared also by the fact that even during the existence of a left-wing government, there appears reduction of the legal protection of social rights.

When examining the social rights, opinion of some judges is that there should not be a reduction of protection of social rights due to Article 1 of the Constitution, under which the Slovak Republic is a sovereign, democratic country and *Rechtsstaat*. It will therefore be interesting to follow the development of decision-making activities of the Constitutional Court of the Slovak Republic.

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<sup>22</sup> Rozhodnutie Ústavného súdu SR č. PL. ÚS 16/05.

<sup>23</sup> Por. Drgonec, J.: Dostupnosť základných práv v zdravotníctve časť II. Dostupné na: <http://www.pravo-medicina.sk/aktuality/480/doc-judr-jan-d-r-g-o-n-e-c-drsc-dostupnost-zakladnych-prav-v-zdravotnictve-cast-ii> [cit. 1.5.2014].

# SLOVENIA

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## CONSTITUTIONAL PROTECTION OF THE RIGHT TO SOCIAL SECURITY IN SLOVENIA

*Prof. GREGA STRBAN*

### 1. Introduction

The right to social security is recognised as one of the fundamental human rights in international<sup>1</sup> and European Union (EU)<sup>2</sup> law. It is also enshrined in many national constitutions, including the Slovenian one. As such, it cannot be regulated as a very precise and concrete legal rule. It is one of the basic values and guidance for all legal subjects in a society.

The content of the right to social security is rather open and there might be no direct correlation between the constitutional provisions and concrete rights stemming from the social security system. Hence, the right to social security has to be determined foremost by the national legislator, by regulating individual social security rights of insured persons (and other beneficiaries). National legislator is bound to respect minimum standards of international law and constitutional guarantees, as well as the EU law.

It could be argued that the Slovenian Constitution is a modern one. It was passed at the beginning of 1990<sup>3</sup> and includes the social state principle as well as fundamental social rights. Among them is the right to social security, which gained importance during the times of economic recession.

In order to comprehend the complexity and the meaning of the constitutional provisions, interpretations of the Constitutional Court have to be taken into account. Also the right to social security is construed by the Court, which has to determine the constitutional core of the right to social security that cannot be invaded by the legislator. By doing so, the delimitation between social and private risks can be drawn. Especially during the times of economic recession the question, which is not really new, can emerge, i.e. who is responsible for providing income security when one of the traditional social risks or a specific situation of need occurs. Is it the duty of legal subjects (natural and juridical persons) governed by civil

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<sup>1</sup> See Articles 22 and 25 of the Universal declaration of human rights, Article 9 of the International Covenant on Economic, Social and Cultural Rights, Article 12 of the European Social Charter (ESC) and the revised ESC. For defining the content of the right to social security the ILO Convention No. 102 concerning minimum standards of social security has to be applied. Similar obligations arise also from the European Code of Social Security.

<sup>2</sup> The right to social security (and social assistance) is enshrined in Art 34 of the Charter of Fundamental Rights of the European Union, OJ C 83/389, 30. 3. 2010. See also other articles of this Charter which may influence the content of the right to social security, e.g. Articles 1 (Human dignity), 20 and 21 (equality and non-discrimination), 23 (gender equality), 24 (the rights of a child), 25 (the rights of the elderly), 26 (Integration of persons with disabilities), 35 (the right to health care), 36 (access also to social services of general interest).

<sup>3</sup> Official Journal RS, No. 33/1991-I, last amendment in 47/2013.

law, i.e. the individual him/herself, his/her family or his/her employer, or is it the responsibility of legal persons governed by public law, i.e. the State, local communities and public institutes.

Moreover, when shaping the legal position of an individual in a concrete case, not only decisions of the Constitutional Court, but also case-law of international courts of law and especially highest national courts is of the greatest importance. Due to very specific subject matter of social disputes, specialised (labour and) social courts have been established in Slovenia.<sup>4</sup>

In order to analyse the more general constitutional right to social security or more concrete individual social security rights, it is important to define what can be understood under social security. In more general terms social security is a public system of income protection in case of its loss or reduction (e.g. due to old age, invalidity, decease, accident at work or occupational disease, sickness, maternity or unemployment) or increased costs (e.g. for health care, raising of children or long-term care services), organised through a process of (broader or narrower) social solidarity.<sup>5</sup>

In international and EU law there is a clear distinction between social security and social assistance,<sup>6</sup> also due to historical differences between subjective and enforceable social security rights and more discretionary right to social assistance. The Slovenian Constitution was inspired by the international documents and social assistance is not mentioned as part of social security. Nevertheless, the distinction between social security and social assistance has become more fluid, since elements of minimum (social assistance) protection can also be found in social security (in Slovenia predominately exercised by social insurances), and social assistance has become a subjective and enforceable right (although, some discretion has remained). Hence, the Slovenian legislator includes social assistance in the national social security system. Since there is no codification of social security law, the only legislative act, speaking of social security system is the Labour and Social Courts Act.

Focus of the present article is on the general constitutional guarantees in the form of constitutional social state, equality and rule of law principles and fundamental social rights. It is especially important to analyse the interpretation of the constitutional provisions by the Constitutional Court, and its impact on social security rights. This might be of utmost importance also during the economic recession, when social security rules are being more often challenged and modified.

## 2. *Slovenia as a social State*

There are several constitutional provisions, which are rather important for shaping the social security system and limiting the legislator when he wishes to reduce the (personal and/or material) scope of social security rights. First, the general constitutional principle of Slovenia being a social State has to be mentioned.

Many national constitutions entail the social state principle. In some it has been subject to a very dynamic interpretation<sup>7</sup> and in others the interpretation has been rather reserved. In Slovenia its meaning has been explained by the Slovenian Constitutional Court and legal theory, although, to far lesser extent than the principle of the state governed by the rule of law.

Both, social state and the rule of law principles are regulated in the same article of the Constitution.<sup>8</sup> It has to be established, that this is no coincidence. Both are constitutional values, giving the state and the law a comprehensive and binding social policy task.<sup>9</sup> The Constitution makes it clear that Slovenia

<sup>4</sup> Labour and Social Courts Act (*Zakon o delovnih in socialnih sodiščih-ZDSS-1*), Official Journal RS, No. 2/2004.

<sup>5</sup> Strban, 2010/2011, p. 356. See also Pieters, 2006, p. 2.

<sup>6</sup> For instance, the ILO Convention no. 102 contains no provisions on social assistance, In the European Social Charter Article 12 is regulating the right to social security and Art. 13 the right to social and medical assistance.

<sup>7</sup> For instance in Germany the *Sozialstaatsprinzip* has been very dynamically interpreted, with its principles of social justice, social equality and social security. Extensively, Zacher, 1993/1.

<sup>8</sup> Article 2 of the Slovenian Constitution.

<sup>9</sup> Zacher, 1993/2, p. 279.

is a social state governed by the rule of law, In other words, it is normative social state, which provides security and dignity of each person with legal regulation and within limits of the law.<sup>10</sup> It is distinct from welfare state, which is realised especially within family and civil society.<sup>11</sup>

Therefore, social nature of the Slovenian State cannot be perceived only as a programmatic, legally non-binding norm. It is a State goal, legally binding for all branches of State power.<sup>12</sup> According to the rule of law principle, constitutional provisions are legally binding for the legislative, executive and judicial power. The legislator has freedom to (re)shape more concrete social security rights, obligations and legal relations only within the constitutional framework and according to the criteria set therein.<sup>13</sup> However, due to its general nature, social state principle could hardly be directly applied by the executive and judicial branches of State power. Thus, it is foremost binding for the legislator,<sup>14</sup> which has to accommodate the obligations arising from the social state principle.<sup>15</sup>

There is also no coincidence, that the principles of social state and the rule of law are regulated at the very beginning of the Slovenian Constitution, among the general provisions, showing basic values of the Slovenian society. Such placement indicates their priority over other constitutional provisions, including the so called golden rule of fiscal policy, which has been introduced in the Slovenian constitution in 2013.<sup>16</sup> In the event of possible collision the priority should be awarded to the basic constitutional values, among them to the (normative) social state principle.

The constitutional review from the viewpoint of the social state principle is traditionally very cautious and reserved. The Constitutional Court leaves a wide field of discretion to the legislator in choosing the most appropriate type and content of a measure, used to implement the social state principle.<sup>17</sup>

In its decisions, the Constitutional Court usually links the social state principle with other constitutional provisions. On several occasions it has linked it with fundamental social rights, also the right to social security.<sup>18</sup> The social state principle has so far not been subject to a very dynamic interpretation by the Slovenian Constitutional Court. Only one sub-principle has been mentioned so far, i.e. the principle of solidarity, the content of which was not precisely defined either.<sup>19</sup>

### 2.1. Solidarity

Solidarity is the most important characteristic of social state and social security system as such. It is *differentia specifica* between social and private insurance (where certain reciprocity between insured persons may exist, but solidarity is as a rule absent).

Some argue that the notion solidarity stems from the Roman law, more precisely from *obligatio in solidum* (Latin phrase that means in total or on the whole). It regulates the situation, when two or more debtors vouch for the entire (total or whole) obligation of one of them.<sup>20</sup> In the times of the French revolution (1789) its slogan of liberty, equality and brotherhood (fr. *liberté, égalité, fraternité*) was developed. These values were incorporated also in the Universal Declaration of Human Rights. In its first

<sup>10</sup> On the development of the modern state governed by the rule of law, which is regulating social relations and promoting its citizens and social democracy (inspired by the Napoleon III, *Extinction du pauperisme*, 1844), Eichenhofer, 2000, p. 18.

<sup>11</sup> Bubnov Škoberne, Strban, 2010, p. 29.

<sup>12</sup> Decision of the Slovenian Constitutional Court No. Up-39/94, 4. 4. 1995, OdlUS IV, 147.

<sup>13</sup> Slovenia is a State governed by the rule of law (Article 2 of the Constitution). Additionally, the legislator (Article 153), the state administration (Article 120) and judiciary (Article 125) are bound by the Constitution.

<sup>14</sup> Decision of the Slovenian Constitutional Court No. 282/94, 18. 10. 1995, OdlUS IV, 108.

<sup>15</sup> Decision of the Slovenian Constitutional Court No. U-I-13/13, 14. 11. 2013, Official Journal RS, No. 98/2013.

<sup>16</sup> Article 148 of the Slovenian Constitution.

<sup>17</sup> Decisions of the Slovenian Constitutional Court Nos. U-I-310/96, 5. 2. 1998, OdlUS VII, 24, and U-I-128/97, 6. 4. 2000, OdlUS IX, 79.

<sup>18</sup> Decision of the Slovenian Constitutional Court No. U-I-338/96, 9. 12. 1999, OdlUS VIII, 277.

<sup>19</sup> Decisions Nos. U-I-137/03, 26. 5. 2005, OdlUS, XIV, 30, and U-I-36/00, 11. 12. 2003, OdlUS XII, 98.

<sup>20</sup> Kranjc, 2010, p. 545.

Article we can read that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. In the times of gender equality, it would be only equitable to add also in the spirit of sisterhood, or maybe a more general term of solidarity could be used (instead of brotherhood).

The notion of solidarity has gradually evolved in the French civil law (fr. *solidarité*). Later on in Catholic social ethics, solidarity was founded on charity and in social philosophy on nationality, since it reflected the idea of the nation as the great community in solidarity.<sup>21</sup> Some define solidarity broader, as friendship on collective level,<sup>22</sup> without limiting it to nationality. Others use solidarity when defining the measures of justice. An expression of justice is also solidarity justice, measure of which is each according to his/her needs.<sup>23</sup> This is most visible when the scope of sickness benefits in kind (health care) is determined. Medical benefits are not dependent on income or property or the level of contribution paid by the insured person. They are granted according the needs of health situation of each patient.<sup>24</sup> So solidarity is expressed between healthy and sick insured persons. It is a form of horizontal solidarity, where a measure is not the level of income, but other personal circumstance, next to sickness or health also gender or family situation.<sup>25</sup>

Solidarity has gained importance also in the EU law, where it is expressly mentioned. The EU Treaty emphasises the values, which are common to all member states<sup>26</sup> in a society characterised not only by pluralism, non-discrimination, tolerance, justice, equality between women and men, but also solidarity. Among distinctive forms of solidarity, solidarity between generations is stressed and should be promoted.<sup>27</sup>

Moreover, the Charter of Fundamental Rights of the EU, which has the same legal value as the Treaties, explicitly mentions solidarity as an indivisible and universal value of the Union.<sup>28</sup> In a special chapter, titled Solidarity, the Charter regulates the rights do social security, social assistance and health care.<sup>29</sup> Although the Charter does not introduce new competencies of the EU,<sup>30</sup> it is an important guidance in interpretation of the EU law, also by the Court of Justice of the EU.<sup>31</sup>

Solidarity in a more specific sense also plays a role when it comes to the influence of basic economic freedoms and the EU competition law on national social security systems. According to the Court of Justice of the EU, systems based on solidarity (or carriers of such systems) cannot be qualified as undertakings and are exempted from the application of competition law.<sup>32</sup>

Solidarity constitutes a core principle of European social security and unites European national constitutions by their shared values. It is laid down as an express legal norm in many constitutions.<sup>33</sup> In Slovenia, the Constitutional Court on several occasions mentioned solidarity between persons with higher and those with lower income (so called vertical solidarity) in parental care insurance.<sup>34</sup> Similarly,

<sup>21</sup> Becker, 2007, p. 1.

<sup>22</sup> Kranjc, 2009, p. 92.

<sup>23</sup> Pavčnik, 2001, p. 11.

<sup>24</sup> Strban, 2005, p. 160.

<sup>25</sup> For instance, women could purely technically present a higher risk, since they use hospital services when giving birth, also children may be insured as family members, without additional contributions.

<sup>26</sup> The values are human dignity, freedom, democracy, equality, the rule of law and human rights. Article 2 of the EU Treaty UL C 326, 26. 10 2012 (consolidated version).

<sup>27</sup> Article 3 of the EU Treaty.

<sup>28</sup> Second paragraph of the preamble of the Charter of Fundamental Rights of the EU.

<sup>29</sup> Title IV, Articles 34 and 35 of the Charter of Fundamental Rights of the EU.

<sup>30</sup> Article 6 of the EU Treaty and Article 51 of the Charter of Fundamental Rights of the EU.

<sup>31</sup> For instance C-34/09 *Zambrano* [2011] I-01177 or C-571/10 *Kamberaj* [2012] ECR not yet published. Solidarity is expressly mentioned in Case C-140/12 *Brey* [2013] ECR not yet published.

<sup>32</sup> More in cases C-159/91 and C-160/91 *Poucet et Pistre* [1993] ECR I-637, but also in some later cases like C-437/09 *AG2R Prévoyance* [2011] ECR I-973. C-350/07 *Kattner Stahlbau* [2009] ECR I-1513 or in the field of social security of migrant workers C-345/09 *van Delft et al.* [2010] ECR I-9879.

<sup>33</sup> For instance, in Austria, Italy, Spain, France, Belgium and the Netherlands, the solidarity principle is at any rate invoked to establish and legitimate the existence of social insurance. Becker, 2007, p. 1.

<sup>34</sup> It established that limiting (to both ends) the calculation basis for the parental benefit is grounded in the principle of solidarity (decision No. U-I-137/03, 26. 5. 2005, OdlUS XIV, 30).

it decided that the legislator followed the solidarity principle when determining the lowest and the highest pension calculation base. It stressed that acknowledgment of this principle does not oppose the social state principle and also not from it deriving right to social security.<sup>35</sup>

The Constitutional Court explicitly mentioned the intergenerational solidarity, i.e. solidarity between younger (active) and older (retired) generations.<sup>36</sup> Also the longer duration of the right to unemployment benefit for elderly insured persons was found to be in accordance with the Constitution, since it reflects the principle of solidarity.<sup>37</sup>

Next to that the expression of social or societal solidarity was used in a concurring opinion of one of the Constitutional Court judges.<sup>38</sup> It was argued that the constitutional right to a pension is secured in a system that should enable social welfare and certain standard of living in a country, according to the principle of social solidarity. In another case solidarity between family members was taken as a basic starting point. The Constitutional Court argued that when the legislator decides to completely replace the family solidarity with social solidarity, it has to ensure such solidarity.<sup>39</sup>

Sometimes the principle of mutuality is mentioned next to the principle of solidarity. They are not entirely overlapping principles. The Constitutional Court argued that social insurance is insurance which is not completely based on the principle of mutuality, but also on the principle of solidarity.<sup>40</sup> Mutuality as distribution of an insured risk to an insurance community, especially if all are equally at risk, may be characteristic of private insurances. Social insurances are guided by the principle of solidarity, which cover persons with different levels of risk and distributes burdens among them.<sup>41</sup>

Therefore, social insurance has to be mandatory. It is the only way to establish relations between persons who present a higher (social) risk with those who present a lower (social) risk. It may sound as a paradox, but due to such coercion (and mandatory pooling of risks) both groups may enjoy more freedom. An individual would be willing to engage in more risky activities, if he/she would be confident that there is a legally regulated social security system guaranteeing certain rights in case of sicknesses or injury, unemployment, old-age, invalidity or to the family members in case of decease.

## 2.2. Social justice

It could be argued that next to solidarity and social security (analysed under next point), also social justice is among the basic emanations of the social state principle. Social justice is also at the core of the oldest specialised organisation of the United Nations, i.e. already in the year 1919 founded International Labour Organisation (ILO). The ILO received the Nobel peace prize at the occasion of its 50 years of existence in 1969. On that occasion, Mrs. Aase Lionaes, Chairman of the Nobel Committee, stated that beneath the foundation stone of the ILO's main office in Geneva lies a document on which is written: *Si vis pacem, cole justitiam* – If you desire peace, cultivate justice.<sup>42</sup> ILO is therefore opposing the old military tradition, which is loyal to the maxim *Si vis pacem, para bellum* (if you want peace, prepare for war).

ILO is endeavouring to achieve universal and lasting peace, which can only be established, if it is based on social justice.<sup>43</sup> Social justice and social (security) rights are inevitably linked, since social justice can hardly be achieved without social rights. They are based on the presumption of principal

<sup>35</sup> Constitutional Court decision No. U-I-36/00, 11. 12. 2003, OdlUS XII, 98.

<sup>36</sup> Constitutional Court decision No. U-I-6/03, 19. 5. 2005, not published.

<sup>37</sup> Constitutional Court decision No. U-I-282/94, 18. 10. 1995, OdlUS IV, 108.

<sup>38</sup> To the decision No. U-I-281/09, 22. 11. 2011, OdlUS XIX, 29.

<sup>39</sup> Constitutional Court decision No. U-I-11/07, 13. 12. 2007, OdlUS XVI, 86.

<sup>40</sup> For instance decision of the Constitutional Court No. U-I-137/03, 26. 5. 2005, OdlUS, XIV, 30.

<sup>41</sup> Strban, 2013/1, p. 346.

<sup>42</sup> The entire Award Ceremony Speech is accessible at [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1969/press.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1969/press.html), May 2014.

<sup>43</sup> ILO Constitution (1919) and ILO Declaration of Philadelphia (1944).

equality of everyone and belief that optimisation of individual benefit does not necessary guarantee the highest social benefit.<sup>44</sup>

Discussion on social justice is not only discussion on the role of the State in the society that is based on free economic initiative<sup>45</sup> is also discussion on the legal position of an individual. It can be appealing to promote freedom as living from other independent live, in which the State should not intrude or its regulation should be reduced to a minimum. Reducing social security benefits (in cash and in kind) means less public revenue and expenditures, less redistribution and less social rights. Within this idea it is advocated that individual should dispose with more income, whereby private spending (within or outside the country) is promoted, demand and working places guaranteed. Less State should be not only more equitable, but also more efficient. In Slovenia there is an ongoing discussion on introducing the cap on social security contributions (paying them only from certain amount and higher income would be contribution free). Advantage would be given to persons with higher income, who would have to be privately insured in order to protect their position, and vertical solidarity would be reduced.<sup>46</sup>

Advocates of social justice promote increased role of the state, more social (security) benefits and higher public expenditure. The State is not only responsible to protect the rights of an individual, but equal freedom of all and thereby social peace. Social inequality may lead to distinctive forms of inequality, and divides the society. Reduction of social rights may disproportionately affect the most vulnerable groups in the society (like sick, elderly, disabled persons and children) and deepens social inequalities. In Slovenia there is an in depth discussion on equal access of medical treatment outside of Slovenia (in another EU member state), is it guaranteed to all or just those who can afford it.

Discussion on social justice reveals that social justice is not very precisely defined notion, which can be subject to distinctive interpretations. Nevertheless, there is no doubt, that more social (security) rights, which are adjusted to distinctive legal position of person in the country, may increase social justice. It would be wrong to presume that economic outcome and social justice are mutually excluding concepts. Economic and social policy should promote not only economic growth, which can be the basis for social redistribution, but also social justice.<sup>47</sup>

### **3. Fundamental social rights**

The Slovenian Constitution enshrines not only the social state principle, but also fundamental social rights, among them the right to social security. It is situated in the second part of the Constitution under Human Rights and Fundamental Freedoms. This means that it enjoys equal legal status as other human rights, including civil and political rights. This implies that the way the right to social security is exercised has to be determined by legislative acts, it has to be guaranteed equally to all, regardless of their personal circumstances, and there has to be a possibility of judicial review. The right to appeal, when deciding on social security rights, and the right to constitutional complaint have to be guaranteed.

#### *3.1. Personal and material scope of the right to social security*

Personal scope of the constitutional right to social security is restricted to citizens, i.e. to Slovenian citizens. This might be contested. Foreign citizens, legally or even habitually residing in Slovenia and employed there are not expressly protected. However, it is argued that such a provision might be justified, if it is construed in the manner that Constitution only provides minimum protection, which might be restricted to nationals. However, the legislator is free to extend the personal scope of the right to social security. Moreover, it is argued that the legislator is obliged to do so. Provisions of the international legal

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<sup>44</sup> Eichenhofer, 2012, p. 10.

<sup>45</sup> Article 74 of the Slovenian Constitution is advocating free enterprise.

<sup>46</sup> Strban, 2013/2, p. 3.

<sup>47</sup> Ibid.

instruments prohibiting discrimination on the grounds of nationality, especially in contributory schemes, and equal treatment of the EU nationals, have to be respected.

As a consequence, social security rights, stemming from social insurance schemes are covering also non-nationals, if they meet the eligibility conditions. In addition, no permanent residence in Slovenia is required to be socially insured. Such conditions might be set in non-contributory schemes, like social assistance and family benefits schemes. But also there, Union nationals have to be treated the same way as Slovenian nationals.

Material scope of the right to social security is neither defined nor fully determined in the Constitution. There is also no codification of social security law. Hence, this vague and multi layered notion has to be filled by the legal science and (constitutional) jurisprudence with its case-law. The Constitutional Court acknowledged that the right to social security presents a very complex structure of possible contents and relations, dictated by various circumstances. The constitutionality review is therefore necessarily reserved and restricted to the test, whether the legislator's solution is in accordance with public interest. The Constitution gives the legislator a possibility to choose between the measures available that are appropriate to meet his obligations. At the same time the legislator is bound to respect fundamental rights and general constitutional principles.

As in some other continental European states, also in Slovenia the main path to exercise the right to social security is social insurance. Slovenian Constitution explicitly determines the obligation of the State to regulate mandatory health, pension, invalidity and other social insurance, and ensure its proper functioning. Although, only some social insurance branches are mentioned, enumeration is not exhaustive, since (all) other social insurance branches enjoy constitutional protection as well. The legislator has introduced next to mandatory health, pension and invalidity insurance, also unemployment insurance and parental care insurance, which have been assessed by the Constitutional Court. Under discussion is also separate long-term care insurance.

The Constitution stresses that insurance has to be mandatory and social. The State has to introduce and supervise insurance which is characterised not only by the principle of mutuality, but principle of solidarity as well. It is argued that the legislator could not fulfil his obligation by obliging the citizens to conclude private insurance contracts for social risks. Next to being mandatory and social, social insurance remains based on the insurance principle. It is argued that introducing solely national protection (in a form of national pensions or national health service) or only social assistance schemes, would go against the constitution.

Despite of these restrictions, the legislator has a wide field of discretion to determine the rights and obligations of legal subjects involved in the social insurance relation. For instance, it determines which rights should be provided, eligibility conditions, scope of rights, i.e. their level and duration, the amount of contributions to be paid, number and internal structure of insurance carriers.

One of the recent decisions of the Constitutional Court is emphasising the social insurance relation established in mandatory (social) health insurance. Sickness cash benefit has to be provided by the employer, as a rule for the first 30 days of absence from work. After that it is provided from the funds of the mandatory health insurance carrier (*Zavod za zdravstveno zavarovanje Slovenije-ZZZS*). However, it still has to be paid by the employer, who may ask for the refund from the ZZZS. The Court argued that the possibility of insured person to claim sickness cash benefit only from his/her employer, even when it has to be paid by the ZZZS, is against the constitutional right to social security. Problems could arise, if the employer was insolvent, and the worker was directed to the public guarantee fund, without direct claim against the ZZZS.

The decision caused modifications of the Labour relations act and the Rules of mandatory health insurance. Now a direct claim at the ZZZS is available, but only if the employer has no possibility to pay his workers. Otherwise, the employer still has to pay the sickness cash benefit and ask for refund from the ZZZS. Hence, it is clear that it cannot be the employer's choice not to deal with his workers in the case of sickness, and leave them to seek their right at the ZZZS alone. Employers still have all the information required to pay the sickness cash benefit. The other option would be that the ZZZS collects more information and pays the sickness cash benefit directly. In either case, no excessive burden should be transferred to the workers.



From 2004 the constitutional right to social security was amended and one of the social security rights is now expressly mentioned, i.e. the right to a pension. Legal value of such addition was questioned at first, since the Constitution already mentions mandatory (social) pension insurance, which obviously enough, has to provide a pension to active, insured persons, based on their contributions and proportional to their wages. Additionally, the Constitution does not define the notion pension. It may encompass various pensions based on contributions, including old-age, invalidity, widow/er's or family pension. The constitution cannot determine the eligibility conditions and the exact scope of the right to a pension is the task of the legislator. Nevertheless, the Constitutional Court used the opportunity and provided not only social security, but also property protection argument (discussed below) to secure the right to a pension.

It is argued that one of the deficiencies of the Slovenian Constitution might be no express guarantee of the right to social assistance. However, the Constitutional Court ascertained that an individual or a family without sufficient resources enjoys constitutional protection. It has linked a constitutional social state principle with a fundamental human right to social security in order to establish the duty of the State to provide the endangered individual appropriate assistance. It also recognised that personal dignity could be invaded, when changes to the pension and invalidity insurance scheme would lead to poverty of the claimant. In this case his/her freedom, protected by the right to personal dignity and safety, could become questionable.<sup>48</sup> It is also clear that the legislator perceives social assistance scheme as an integral part of the Slovenian social security system.

### *3.2. Other fundamental social rights important for social security position of an individual*

Slovenian Constitution acknowledges not only the right to social security, but also some other social rights. Among them is the right to health care. It is not limited to nationals, since everyone has the right to health care, under the conditions determined by law (it can be guaranteed from public and private means). The State is rather hesitant to precisely determine the right to health care in its Constitution, as it could turn out to be a large investment.

It could be argued, that the right to health care supplements and broadens the constitutional right to social security, which is exercised also by mandatory health insurance. It is the duty of the State to guarantee all forms of access to health care, among them geographic, financial, timely, informational and procedural access to high quality health care to everyone.

Slovenian Constitution confers special rights to disabled persons. This provision is broader than the right to social security, which is exercised also via the invalidity insurance. The State is under obligation to provide protection and work training not only to work invalids, i.e. those who acquired the rights under the mandatory invalidity insurance, but also all other disabled persons. This provision should enable the inclusion of disabled persons into the life of the society. The constitutional obligation to provide special protection to disabled children and severely disabled persons is partially met by providing such protection in the social security system.

The constitutional obligation of the State to protect family, motherhood, fatherhood, children and youth, and to create proper conditions for this protection have to be considered also when the legislator introduces modifications of social security rights.

## **4. Slovenia as a state governed by the rule of law**

Slovenia is not only social state, but also state governed by the rule of law. This principle or argument has been extensively construed by the Constitutional Court and many sub-principles were deduced from it. It proved to be of importance also when reshaping social security rights.

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<sup>48</sup> Constitutional Court Decisions Nos. U-I-330/97, 30. 11. 2000, OdlUS IX, 281 and U-I-36/00, 11.12.2003, OdlUS, XII, 98.

#### 4.1. Adjustment of the law to social relations

Even before the economic recession and especially during it, the social security law was subject of many modifications and amendments. It can be argued that it is one of the most rapidly changing areas of law. When the social security system wants to fulfil its basic task and provide security to the people, it has to be adapted to continuously changing society. Also the Slovenian Constitutional Court recognises the principle of adjustment of the law to social relations as one of the principles of the state governed by the rule of law. The legislator does not only have the right, but is under obligation to modify and amend legislative acts in the social security field, if that is dictated by the changed relations in the society.<sup>49</sup>

Social security rights have to be faithful companion of every member of the society from his/her birth (or even before, with benefits to a pregnant women), during the life time (with benefits during the periods of sickness, invalidity, unemployment or rearing of children) and even after that (with certain benefits to family members of a deceased socially insured person). The Slovenian Constitutional Court argues (using the example of pensions) that social security (in the form of social insurance) has to provide continuity of the standard of living.<sup>50</sup> Cash benefits have to be proportional to income from which the contributions have been paid. Suitable (not only minimum) protection has to be provided, in order to prevent poverty and social exclusion and enable free development of each individual and the society.

#### 4.2. Protection of vested rights

Even before the economic recession and especially during it, the social security law was subject of many modifications and amendments. It can be argued that it is one of the most rapidly changing areas of law. When the social security system wants to fulfil its basic task and provide security to the people, it has to be adapted to continuously changing society. Also the Slovenian Constitutional Court recognises the principle of adjustment of the law to social relations as one of the principles of the state governed by the rule of law. The legislator does not only have the right, but is under obligation to modify and amend legislative acts in the social security field, if that is dictated by the changed relations in the society. Slovenian Constitution allows that some provisions of the law may have retroactive effect (*ex tunc*), but only if that is in public interest and already acquired rights are not invaded.<sup>51</sup> Hence, already acquired rights are explicitly protected by the Constitution. However, this does not mean that they cannot be changed for the future (*ex nunc*). The condition is that changes do not oppose the constitutional principles and other constitutional provisions, including the principle of trust in law. Therefore, the scope of rights determined by law may be diminished by law, but only with validity for the future and taking into account the right to social security.

The principle of trust in law is neither an explicit constitutional principle nor is it a constitutional right. The latter enjoy stricter constitutional protection against possible limitations and other intrusions.<sup>52</sup> Therefore, the principle of trust in law does not enjoy absolute protection and may to a larger extent be subject to certain limitations. In case of its collision with other constitutional principles or rights, it should be weighed in the process of balancing of values, to determine which of the constitutionally guaranteed values should be given priority in each case.

For instance, the Constitutional Court established that in the case of relative diminishment or slower increase of pensions as expected according to the former legislation, the principle of legal certainty or trust in law was affected. However, the intervention was been urgent to secure other principle or value of public interest, which should be given priority. The burden of the active generation (and the economy in general) to finance pensions should not be of a proportion to make economic growth impossible and disturb the acceptable relation between the active and the retired generations. Intrusion into the principle of trust in

<sup>49</sup> Constitutional Court decisions Nos. U-I-69/03, 20.10.2005, OdlUS XIV, 75 and U-I-307/11, 1. 12. 2011, Official Journal RS, Nr. 100/11 and 36/12.

<sup>50</sup> Constitutional Court decisions No. U-II-1/11, 14. 3. 2011, Official Journal RS, Nr. 20/2011.

<sup>51</sup> Article 155 of the Slovenian Constitution.

<sup>52</sup> Article 15 of the Slovenian Constitution.

law was therefore seen as admissible. It was necessary and it was not excessive. The Court argued that otherwise it might come to unbearable differences between the active and the retired generations and serious breach of the social state principle.<sup>53</sup>

The question of intrusion into vested right was raised also during the economic recession (in 2012), when the right to a state pension was abolished, also of persons who were already receiving it. The argument was that it was a specific form of social assistance for elderly, financed out of the state budget and not social insurance based right. As such it was not protected by the Constitution. Distinctive forms of social assistance should be interchangeable and the legislator is responsible to choose the most appropriate ones. Recipients of the abolished state pension could be entitled to social assistance or newly shaped supplementary allowance. Although the mere abolishment of the right (without constructing any new right) was criticised, the Constitutional Court did not have a chance to evaluate constitutionality of such legislative decision. One of the reasons might be that social assistance recipients are less active with (constitutional) enforcement of their rights.

#### 4.3. Protection of legal expectations

Not only acquired rights, but also legal expectations and promise of future social security rights enjoy constitutional protection to a certain extent. Slovenian Constitutional Court emphasised that an individual may not rely on the fact that the law is never going to be changed. Legal expectations are safeguarded indirectly, taking into account the principle of trust in law and the principle of equality.

When the legislator encroaches upon the right in course of acquisition (the so called retrospective effect), it is not allowed to act arbitrarily. It is bound to choose appropriate and proportionate changes, which conform to set objectives and the principle of equity. When weighing the constitutional values it is important, on one hand, to estimate the significance of the expected right for the life of the affected person and the importance of the change. On the other hand it is important to define whether changes were relatively foreseeable and the affected persons could expect the law to change.<sup>54</sup>

In order to protect legal expectations, the new legislative act has to regulate appropriate transitional periods. They have to be longer when modifying benefits which required longer qualifying periods and are provided for a longer period of time, like pensions. The Constitutional Court argued that pension insurance cannot tolerate quick radical changes. Reforms may be adopted only for the future and with a longer transitional period.<sup>55</sup> For instance, the minimum age for acquiring an old-age pension for women is progressively raised and the pension calculation base is progressively prolonged, since the latest pension reform, applicable from the beginning of 2013.

Longer adjustment period is required to respect the principle of trust into law. The length of the transitional period may be dependent on the nature of the change. Hence, the duration of the transitional period for each individual change cannot be ascertained on beforehand.<sup>56</sup> Transitional periods are rather important when the new legislative act is reducing social security benefit. If they are sufficiently long, the foreseeability of action is guaranteed and unequal treatment and disproportional burdening of certain generations of insured persons, prevented.<sup>57</sup>

Modifications of the transitional period before its expiration are also possible. However, it should not be altered soon after it was adopted nor should it be changed very often. If the legal situation of insured persons would be worsened again rather quickly, the constitutional principles of trust into law and equality

<sup>53</sup> Constitutional Court decisions Nos. U-I-31/96, 26.11.1998, OdlUS VII, 212, U-I-150/94, 15.6.1995, OdlUS IV, 63, and U-I-277/05, 9.2.2006, OdlUS XV, 15.

<sup>54</sup> In the Decision No. U-I-31/96, 26.11.1998, OdlUS VII, 212, the Constitutional Court argued that in the case of valorisation of pensions, changes of the law are not a rare occurrence. Strban, 2010, p. 412.

<sup>55</sup> For instance Slovenian Constitutional Court decisions Nos. U-I-29/96, 8.5.1997, OdlUS VI, 56 and U-I-86/96, 12.12.1996, OdlUS V, 176.

<sup>56</sup> Constitutional Court decision No. U-II-1/11, 10. 3. 2011, Official Journal RS, No. 20/2011.

<sup>57</sup> Bubnov Škoberne, Strban, 2010, p. 201.

could be breached, as well as the essence of right to social security invaded.<sup>58</sup> The Constitutional Court also argued that although the principle of the rule of law obliges the legislator to adjust the law to social relations, new changes to the legislation should not be done in a very short period after the initial changes to the same legislation were introduced, as this may breach the constitutional equality principle.<sup>59</sup>

#### 4.4. *Proportionality of legislative measures*

When the legislator is modifying the scope of social security rights, he has to respect the principle of proportionality. It prohibits excessive legislative measures and was developed by the Constitutional Court from the constitutional provision on the state governed by the rule of law. The legislator is not entirely free when limiting human rights, including the right to social security.

The principle of proportionality is applied in two steps. First is the so called legitimacy test. It should be verified that the goal pursued by the State is legitimate, i.e. substantively justified, and the measures used by the State are legally admissible as such.

In the second step the quality of applied measures is tested and the adequate (legally correct) proportion between the goal and the measure is ascertained. This is the so called proportionality test. It consists of weighing whether the chosen measures are appropriate (the pursued goal can be achieved by using them), necessary (there is no lenient measure at the legislator's disposal to achieve the set goal), and proportionate to the value of pursued goal (the benefits that will result thereof). This principle of proportionality in the narrower sense should ensure proportionate relation between the burden, i.e. intrusion in the constitutional right of an individual (socially insured person), and the advantage gained (to protect rights of others and thus public interest).

Only, if all of these conditions are met, the legislator is allowed to intrude in the constitutional right. This test was often applied by the Constitutional Court, when changes to the social security system were introduced. In some, it was established that legislative action when changing the pension and invalidity insurance was based on the legitimate goal and the measures to achieve it were reasonable and proportionate.<sup>60</sup> In others annulled certain modifications of the pension and invalidity insurance act, because the reasonable and direct relation to the legislator's goal and used measure could not be established.<sup>61</sup>

#### 4.5. *Clarity and precision of legal rules*

When the legislator is allowed to change individual's legal position, he may do so only with clear and precise legal rules. Individual's future behaviour and legal position has to be foreseeable, and legal certainty as an important element of the rule of law principle has to be guaranteed. The Constitutional Court reviewed certain legislative provisions also in the social security field.

It argued that legislative solutions have to be general and abstract. Their purpose should be clear, and the measures to achieve it accurately described. The legislator has to pass clear legal rules and determine their content. It is not admissible to leave such clear determination to some other body. If the norm is not clearly defined, the danger of different application of the law and arbitrariness of the social security administration, which decides on social security rights, may be present. The legislative act is in line with the Constitution, if its content can be determined by using grammatical and teleological interpretation and action of the bodies that have to apply it is clearly defined.<sup>62</sup>

Conversely, if with the application of the interpretation tools, clear content of the challenged rule could not be determined and the behaviour of bodies deciding on the social security rights could not be

<sup>58</sup> Strban, 2010, p. 416.

<sup>59</sup> Constitutional Court Decision No. U-I-69/03, 20. 10. 2005, OdlUS XIV, 75.

<sup>60</sup> Constitutional Court decisions Nos. 150/94, 15.6.1995, OdlUS IV, 63, and 83/03, 15.9.2005, not published.

<sup>61</sup> For instance Constitutional Court decisions No. U-I-29/96, 8.5.1997, OdlUS VII, 3 and OdlUS VI, 56.

<sup>62</sup> Constitutional Court Decision No. U-I-282/94 18.10.1995, OdlUS IV, 108 (unemployment insurance).

foreseeable, then such legal rule is contrary to the rule of law principle.<sup>63</sup> It seems that especially in the field of mandatory health insurance legislative action is inadequate. The legislator leaves the determination of rights and duties of involved legal subject to the rules and regulations passed by the mandatory health insurance carrier (with consent of the minister of health).<sup>64</sup>

In this sense, the Constitutional Court did not allow a so called naked mandate (i.e. a mandate without further instructions, guidelines and frameworks) of the legislative act to the mandatory health insurance carrier in order to determine lump-sum contributions for certain groups of insured persons. It establishes that legislative rule is not allowed to leave an independent regulation of rights and duties to the executive branch regulation, without precise grounds in the legislative act.<sup>65</sup>

Constitutional Court decisions concern not only financing side of social security, but also the benefits side. One of the latest decisions was passed recently, again concerning the regulation of mandatory health insurance. It concerned the right to health care outside of Slovenia.

Slovenian legislator recognises the right of mandatory health insured persons to health care abroad, which is regulated in a more detailed manner in the Rules of mandatory health insurance.<sup>66</sup> The Constitutional Court argued in its decision<sup>67</sup> that until the last amendment (which transposed the Directive 2011/24/EU on the application of patients' rights in cross-border healthcare),<sup>68</sup> the Health care and health insurance act (ZZVZZ) enshrined the right to health care abroad without any limitation.<sup>69</sup> Its delegation to more precise regulation in the executive branch rules and regulations was found to be against the constitutional rights of social security and health care. The Constitutional Court established that it is for the legislative act to determine the scope of rights (including their limitations) and it is not admissible to do so originally in the Rules of mandatory health insurance.

With this decision the Constitutional Court protected the right to health care abroad, but also opened many questions. For instance, did before the last amendment of the ZZVZZ insured persons have an unlimited right to (necessary and planned) health care abroad, also for the benefits not covered under the Slovenian mandatory health insurance (like helicopter transport)? Such, broad construction of the right would not be appropriate. It is enshrined in the ZZVZZ, which is regulating the rights from mandatory health insurance (in Slovenia and the same rights abroad). In addition, limitation of financial responsibility of the member state of insurance to cover medical treatment in another (EU) member state exists only for benefits covered under its legislation (regardless the legal instrument used, i.e. social security coordination Regulations or Patient mobility Directive).

The question of validity of already decided cases by the ZZVZZ and social court, which have become final before the decision of the Constitutional court was taken, might become questionable. However, there are limited possibilities for their review. Distinctive decisions after annulment part of the Rules of mandatory health insurance may lead to unequal treatment of insured persons. More generally, the validity of entire Rules might become questionable. Although, slightly formalistic decision of the Constitutional Court, it is a good incentive for the legislator to regulate the rights from mandatory health insurance in a more precise manner. At the end, this may improve the legal position of socially insured persons.

<sup>63</sup> Constitutional Court Decision No. U-I-279/00, 16. 1. 2003, OdlUS XII, 1 (mandatory health insurance).

<sup>64</sup> Strban, 2005, p. 151.

<sup>65</sup> Constitutional Court Decision No. U-I-390/02, 16. 6. 2005, OdlUS XIV, 58.

<sup>66</sup> Official Journal RS, No. 79/1994 – 25/2014.

<sup>67</sup> Decision No. Up-1303/11, U-I-25/14, 21.3.2014. Official Journal RS, No. 25/2014.

<sup>68</sup> So called the Patient mobility Directive, OJ L 88/45, 4. 4. 2011. Strban, 2013-3.

<sup>69</sup> Article 23/1 point 2 of the Health care and health insurance act (*Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju – ZZVZZ*), Official Journal RS, No. 9/1992, last amendment in 91/2013.

## 5. Equality of treatment

Principle of equality is one of the fundamental constitutional norms.<sup>70</sup> It ensures the right of the individual to equality in the law and before the law, i.e. when the law is being applied. It is argued that together with the principle of the state governed by the rule of law and the social state principle, it presents the realisation of the principle of justice (equity) in the Constitution. The equality principle is one of the most common arguments used by the parties before the Constitutional Court.

It is settled case-law of the Court that the principle of equality could not be understood as simple general equality of all, but as equal treatment of equal factual situations. The principle of equal treatment does not mean that the law should not regulate the position of legal subjects differently. It means that this should not be done arbitrarily, without sound and valid reason. The principle of equality binds the legislator to regulate equal situations in an equal way and dissimilar situations in a distinct way.

The Constitutional Court evaluates the admissibility of the impact on the right to equality according to the arbitrariness test (and not according to stricter test of proportionality, where *inter alia* the necessity of intrusion for the safeguarding of the rights of others must be demonstrated). For the admissibility of intrusion, any non-arbitrary, i.e. sound and from the nature of the matter derived reason for distinction suffices.

In many cases the Constitutional Court found no breach of the Constitution and rejected the claim. For instance, such decisions in the field of social security were issued when different professional groups were treated distinctively,<sup>71</sup> when elderly unemployed were provided special protection,<sup>72</sup> or when the legislator distinguished between men and women in pension insurance.<sup>73</sup>

Allowing women to be entitled to an old-age pension earlier than men was found in accordance with the Constitution. The Court argued that distinction based on gender is allowed, when it serves to establishment of substantive (material) equality between genders, where there are objective biological or functional differences. In this case the legislator is not only bound by the prohibition of discrimination, but (in particular) by the duty of positive action. Discrimination is thus allowed when the equalisation of disadvantages is based on traditionally and historically distinctive social roles.<sup>74</sup>

This decision was taken decade and a half ago, and it might be interesting to see how the Court would react today, especially after the new pension reform was passed at the end of 2012. Women and men are as a rule treated equally in relation to qualifying conditions, but the distinction remained when calculating the pension. The question may be, whether distinctive calculation is in line with Directive 79/7/EEC,<sup>75</sup> since this exception is not explicitly mentioned in its Article 7. The Court of Justice of the EU argued that Article 7(1)(a) of the Directive entitles the Member State concerned to calculate the amount of pension differently depending on the worker's sex, if national legislation has maintained a different pensionable ages for women and men.<sup>76</sup> However, when national legislation has abolished the difference in pensionable ages, Member States are no longer authorised to maintain a difference according to sex in the method of calculating the pension.<sup>77</sup>

In some other decisions the Constitutional Court annulled some of the provisions of the law, because they were discordant with the constitutional principle of equality. For instance, setting self-employed in a worse position compared to employed persons concerning the right to a partial pension<sup>78</sup> or social security rights

<sup>70</sup> Article 14 of the Slovenian Constitution.

<sup>71</sup> E.g. decisions Nos. U-I-307/98, 5. 12. 2002, OdlUS XI, 252 (pension and invalidity insurance), and U-I-66/98, 18. 4. 2002, OdlUS XI, 68 (child benefit).

<sup>72</sup> Constitutional Court Decision No. U-I-282/94, 18. 10. 1995, OdlUS IV, 108.

<sup>73</sup> On gender differences in social protection Strban, 2012/1.

<sup>74</sup> Decision No. U-I-298/96, 11. 11. 1999, OdlUS, VIII, 246.

<sup>75</sup> Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10. 1. 1979.

<sup>76</sup> Distinctive calculation has to be necessary and objectively linked to the difference in retirement age. Joined Cases C-377/96 to C-384/96 *De Vriendt and Others* [1998] ECR I-2105.

<sup>77</sup> Case C-154/92 *Van Cant* [1993] ECR I-3811.

<sup>78</sup> Constitutional Court Decision No. U-I-358/04, 19. 10. 2006, OdlUS XV, 72.

of disabled persons (of category III invalidity),<sup>79</sup> permanent residence of the child as one of the eligibility conditions for acquiring the right to child benefit,<sup>80</sup> or citizenship of the child to calculate certain period of child rearing into pension insurance period<sup>81</sup> were found to breach the constitutional equality principle.

## 6. *Threats to and protection of social security rights in the times of economic crisis*

In Slovenia the economic crisis or even recession persisted for quite a long period of time. Fiscal policy was focusing on reducing public spending, which included cutting back social security rights. However, there was strong opposition, especially from trade unions and the first proposal of reforming the pension and invalidity insurance was rejected at the referendum in 2011.<sup>82</sup> In 2012 economic activity in Slovenia further declined by 2.3 per cent, according to the report of the Slovenian Institute of macroeconomic analysis and development.<sup>83</sup> However, in 2014 the good news was that in the last quarter of 2013 the gross domestic product increased for 2.1 percent<sup>84</sup> and continued to grow in 2014 and 2015.

During the economic crisis, some, relatively modest measures were undertaken, for instance increasing the pensionable age to 65 years (or 60 with at least 40 years of qualifying period), different calculation of pensions (which may under certain circumstances fall below 40 per cent if reductions for early retirement are taken into account, which may be questioned from the ILO minimum standards point of view),<sup>85</sup> no indexation of pensions, which was prolonged in years 2014 and 2015<sup>86</sup> (and they will never reach the same levels again).<sup>87</sup> In addition a general tax relief for persons aged 65 or more when determining the personal income tax has been abolished at the end of 2013.

Conversely, more benefits have been introduced for unemployed workers, like special rules apply to younger unemployed persons, i.e. those below 30 years of age. Instead of nine months, six months of unemployment insurances (in the same period, i.e. last 24 months) suffices for acquiring an unemployment benefit. However, entitlement lasts only for two months (normally from three to 12 months or longer for older unemployed persons). It might be questioned whether this is in line with the ILO Convention No. 102 on minimum standards of social security. According to the Convention, minimum duration of unemployment benefit should be at least 13 weeks (which is app. three months).<sup>88</sup> Additionally the entitlement of paying pension contributions for elderly unemployed persons, who have exhausted the right to unemployment benefit, was prolonged from one year to two years, if a person could retire in this period. However, the entitlement is limited *ratione temporis* until March 2018.

For the first three months of unemployment, the unemployment benefit was increased to 80 per cent of the calculation base (average salary in last eight months), for the next nine months it was reduced to 60 per cent and after a year it is only 50 per cent of the calculation base. The legal situation has deteriorated the most for elderly unemployed persons, who are entitled to unemployment benefit for more than year. However, they have more difficulties for finding a job and should enjoy more, not less protection.

<sup>79</sup> Constitutional Court Decision No. U-I-40/09, 4. 3. 2010, Official Journal RS, No. 27/2010.

<sup>80</sup> Constitutional Court Decision No. U-I-31/04, 1. 12. 2005, OdlUSXIV, 86.

<sup>81</sup> Constitutional Court Decision No. U-I-273/01, 18. 11. 2004, OdlUS, XIII, 78.

<sup>82</sup> Strban, 2011, p. 2.

<sup>83</sup> More at <http://www.umar.gov.si/en/>, May 2014.

<sup>84</sup> More at <http://www.stat.si/>, May 2014.

<sup>85</sup> ILO Convention No. 102 on minimum standards of social security advocates pension level of at least 40 per cent (Article 67). Novak et al., 2006, p. 375.

<sup>86</sup> Article 56 of the Implementation of the Republic of Slovenia Budget for 2014 and 2015 Act (ZIPRS1415, Official Journal RS, Nr. 101/2013).

<sup>87</sup> Pensions are (partially) adjusted to the increase in wages. It was argued that in the time of economic crises, pensions could be increasing. The reason may be that many low paid workers lost their jobs and the average wage increased. Such effect was prevented by not adjusting pension amounts during the economic crisis. But this may affect persons with low pensions (mostly women) to a larger extent. Strban, 2012/1, p. 31.

<sup>88</sup> Article 24 of the ILO Convention No. 102.

Social security rights are protected by already analysed general constitutional principles, like the social state, the rule of law, and equality principles, as well as fundamental social rights. Next to that the constitutional guarantee of the right to private property<sup>89</sup> is gaining importance in protecting social security rights (especially from contributory schemes, and in particular pensions). This might be important, since traditional concepts of private property usually afford the best legal protection.

Slovenia is bound by the European Convention on Human Rights (ECHR)<sup>90</sup> and its interpretation by the European Court of Human Rights (ECtHR). The latter has already applied the property protection arguments<sup>91</sup> to social security rights. It considered a social security right as pecuniary right without it being necessary to rely solely on the link between entitlement to social security right and the obligation to pay taxes or other contributions.<sup>92</sup> The ECtHR has gone even further and recognised property protection also to non-contributory rights,<sup>93</sup> which was not undisputed.

Also the Slovenian Constitutional Court has confirmed the double nature of the right to a pension. It is protected with the constitutional right to social security as well as the right to private property.<sup>94</sup> The latter is broader from the civil law concepts of property. It is guarantee that provides freedom of a person with respect to his/her property.<sup>95</sup> The Court broadened the personal scope of the constitutional right to social security (or at least to a pension)<sup>96</sup> also to non-Slovenian citizens.

The Constitutional Court argued that the constitutional essence of the rights to a pension is the right of a person to receive a pension (under reasonably set conditions) which provides social security.<sup>97</sup> It established that the Constitution cannot guarantee a pension at a certain level, but the pension has to be proportional to income from which the contributions were paid. It cannot be reduced to a social assistance minimum.<sup>98</sup> It went even further and found that the possibility of an employer to negotiate deferment, payment in instalment or writ-off of social security contributions may be to the detriment of a worker and is against the constitutional right to private property.<sup>99</sup>

## 7. *Development of social security rights de lege/constitutione ferenda*

Social security rights will have to be developed and adjusted to ever changing social relations also after the economic crisis. In Slovenia there is a discussion on long term care insurance. Long-term care benefits are very diverse across Europe and there is hardly any common definition. In Slovenian social security system persons reliant on long-term care might be entitled to distinctive benefits in kind and in cash, ranging from social insurance to social assistance and social compensation schemes. Benefits in kind are provided in a form of social services (home, semi-residential and residential care) or linked with health services in recently established nursing hospitals.

<sup>89</sup> Article 33 of the Constitution.

<sup>90</sup> Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, Rome 1950.

<sup>91</sup> C.f. Article 1 of Protocol 1 to the ECHR.

<sup>92</sup> E.g. *Gaygusuz v. Austria* (16.9.1996, Reports 1996-IV), also *Klein v. Austria*, no. 57028/00, 3. 3. 2011, final 30. 6. 2011.

<sup>93</sup> *Koua Poirrez v. France*, no. 40892/98, 30. 9. 2003, final 30. 12. 2003, Reports 2003-X. Kapuy, Pieters, Zaglmayer, p. 278.

<sup>94</sup> Constitutional Court decision No. Up-770/06, 27. 5. 2009, Official Journal RS, No. 54/2009, also U-II-1/11, 10. 3. 2011, Official Journal RS 20/2011.

<sup>95</sup> Constitutional Court decision No. Up-156/98, 11. 2. 1999, OdlUS VIII, 118.

<sup>96</sup> The Constitutional Court used the property argument with regard not only to an old-age, but also to widow/er's pension (Up-1419/08, 22. 10. 2009, OdlUS XVIII, 87).

<sup>97</sup> Constitutional Court decision No. Up-360/05, 2. 10. 2008, OdlUS XVII, 85.

<sup>98</sup> Constitutional Court decision No. U-II-1/11, 10. 3. 2011, Official Journal RS, No. 20/2011.

<sup>99</sup> Constitutional Court decision No. U-I-281/09, 22. 11. 2011, OdlUS XIX, 29.



Cash benefits are paid directly to a person reliant on long-term care. How the money will be spent (will a formal or informal caregiver be paid or will it be saved for future days) is in the discretion of the recipient. Assistance and attendance allowance is provided to (old-age, invalidity, widow/er's or family) pension recipients in two levels. Similar one is granted to social assistance recipients, disabled persons not entitled benefits from invalidity insurance and war invalids. Special family benefits are provided to parents of children reliant on long-term care.

Problems of a mixed system could be that the overview of long-term care benefits might be lost, since they are linked to health care, pensions, disabled children, social assistance etc. In addition, no common social policy could be developed. Therefore, reliance on long-term care has been recognized not as a completely new, but as independent social risk in the proposal for the new legislative act.<sup>100</sup>

New social insurance branch should be established, but long-term care insurance should be linked to mandatory health insurance (and its carrier). For instance, it should suffice that the reliance on long-term care is expected to last for at least three months and at least four hours a day. No levels of reliance on long-term care are foreseen. Instead, the long-term care coordinator (of the insurance carrier) should organize care and propose an individual plan of long-term care in cooperation with the beneficiary and his or her family. Priority should be given to benefits in kind, provided by contracted providers. This way, a double social risk might be avoided, i.e. at the person reliant on care and person (usually female family member) providing it.<sup>101</sup>

Introducing long-term care insurance would fit under already existing constitutional provisions, mentioning also other social insurances. However, if more drastic modifications of social security rights would be proposed, the constitution would have to be changes as well. One of such proposals, which at the end did not find its way into the governmental coalition agreement, concerns the universal basic income.

There are still some open questions, how should universal basic income look like (should it be unconditional or not), who should be entitled, which social security schemes should be abolished (social assistance, family benefits, unemployment, or even pension insurance), and what should be its level? For the moment the arguments that universal basic income is neither suited to social security benefits in kind, nor to distinctive legal positions of persons entitled to social security rights, and that lump-sum payment could cause more inequalities than introduce equality, prevail. For the moment there is no concrete legislative proposal or proposal to modify the constitution accordingly. It is argued that effort should be invested and adjust the already existing social security rights.

## 8. *Concluding thoughts*

In the times of economic recession, in many countries social security rights were in the frontline of austerity measures. In Slovenia, cuts in social security rights were rather important, but at the same time not excessive. When many legislative acts are modified, or new are adopted, more questions on their harmony with constitutional principles and values could be raised. Hence, the constitutional protection of social security rights is tested more often in the times of crisis.

Legal position of the individual is better protected, if the State has to respect not only the social state principle (which may be broader than social security, touching upon the regulation of taxes, housing benefits, labour and education rights) and fundamental social rights, but other principles and human rights as well. Among them are the most relevant the equality and the rule of law principles (protecting also legal expectations and preventing drastic changes during the recession periods) and the right to private property. The latter might be important not only in purely internal situations, but also when people move to a country with which no social security coordination instrument exists.

<sup>100</sup> The proposal was prepared by the Ministry of labour, family, social affairs and equal opportunities in 2010.

<sup>101</sup> Strban, 2012/2.

However, also the Constitution may have its limits and might not afford complete protection. For instance in the Slovenian Constitution the right to social security is limited to Slovenian citizens, there is no mentioning of social assistance or equal treatment of same sex partners (explicitly so in the EU law). In addition, there are no minimum standards of social security rights prescribed by the constitution. Therefore, the interpretation of constitutional provisions by the Constitutional Court (and social courts) is of utmost importance. It has to be dynamic and adjusted to the modified social relations. Constitutional guarantees are only as much effective as they are protected by the Constitutional Court as the guardian of the Constitution.

Moreover, it seems that social security rights are best protected, if not only constitutional and EU law provisions are respected, but also minimum standards of the International Labour Organisation and the Council of Europe are ratified and applied. Only this way the duty of the State to provide security to its citizens, including social security, can be fulfilled.

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## SPAIN

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### THE RIGHT TO SOCIAL SECURITY UNDER THE SPANISH CONSTITUTIONAL SYSTEM

*Prof. Luis Jimena Quesada*

#### 1. *The spanish social security model: constitutional framework*

##### 1.1. Brief reference to social security before the current 1978 Constitution

The so-called “social constitutionalism”, which implies the recognition of a catalogue of social rights, was first introduced in Spain through the 1931 Constitution, approved in the Second Republic. From this point of view, it is futile any attempt to find a reference, explicit or implicit, to the right to social security in previous Spanish constitutional texts.<sup>1</sup> In particular, Article 46§2 of the 1931 Constitution recognised the right to social security by stating that “the Republic ensures every worker the necessary conditions for a dignified existence. Its social legislation regulates the cases of sickness, accident, unemployment, retirement, disability and death; (...) the conditions of Spanish workers abroad (...)”.<sup>2</sup>

In connection with the right to social security, Article 43§5 of the 1931 Constitution also provided that “the State shall assist the sick and elderly, and protect motherhood and childhood, endorsing the ‘Geneva Declaration’ of children’s rights”. Due to the limited scope of international commitments in such period, before the birth of International Human Rights Law after World War II, this opening to international rules in Article 43§5 in fine, by reference to the protection of children,<sup>3</sup> appears reasonably unique. In addition, it implied a specific clause that complemented the more general reference to “international social treaties” in Article 15§1 of the 1931 Constitution.

Afterwards, in the context of the isolation of the Franco regime and the paternalism of the dictatorship,<sup>4</sup> the system of Fundamental Laws formally assumed similar social protection clauses,<sup>5</sup> but without any

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<sup>1</sup> Before the current 1978 Constitution, Spain adopted previous constitutional texts in 1812, 1834, 1837, 1845, 1869, 1876, 1931, and during Franco’s regime (the so-called seven “Fundamental Laws”).

<sup>2</sup> As highlighted by TORRES DEL MORAL (*Constitucionalismo histórico español*, Madrid, Universidad Complutense, 5th ed., 2004, p. 191), this last clause is similar to the wording of Article 42 of the current Spanish Constitution (“The State shall be especially concerned with safeguarding the economic and social rights of Spanish workers abroad, and shall direct its policy towards their return”).

<sup>3</sup> Like Article 39 of the current 1978 Spanish Constitution (“Children shall enjoy the protection provided for in the international agreements safeguarding their rights”).

<sup>4</sup> That means from the end of the Spanish Civil War (1936-1939) to Franco’s death (1975).

<sup>5</sup> In particular, the Charter of the Spaniards (*Fuero de los Españoles*) of 17 July 1945 included in its Article 28 a similar provision to Article 46 of the 1931 Constitution, by stating that “the Spanish State guarantees workers safe protection in case of misfortune and recognizes their right to assistance in cases of retirement, death, sickness, maternity, occupational accidents, disability, unemployment and other risks that may be subject to social insurance”. Earlier, the Labour Law (*Fuero del Trabajo*) of 9 March 1938 (still during the Civil War) had established a similar provision of social

*Note 5 continued on page 262*

reference to international standards. This observation is considerably significant, since the development of the right to social security within the current constitutional system, established in 1978, has been achieved in parallel to the progressive incorporation of international legal standards into the Spanish legal system.

### *1.2. Constitutional principles governing the right to social security under the current 1978 Constitution*

The main provision recognising the right to social security lies in Article 41 of the current 1978 Constitution,<sup>6</sup> according to which “public authorities shall maintain a public Social Security system for all citizens guaranteeing adequate social assistance and benefits in situations of hardship, especially in case of unemployment. Supplementary assistance and benefits shall be optional”.

This provision is complemented by other relevant constitutional provisions (in particular: Articles 25, 39, 43, 49 and 50, *infra*) and legally implemented and developed through national legislation (most notably the Social Security General Act of 1994, which repealed most provisions from the previous Social Security Act of 1974) as well as through national pacts (especially, the so-call “Toledo Pact” of 1994). The constitutional principles governing the right to social security derive to a great extent from this normative framework. Which are those main principles? Allow me to introduce a kind of constitutional Decalogue of principles concerning the right to social security.<sup>7</sup>

First of all, Article 41 expresses the principle of “constitutional flexibility” in delimitating the Social Security System. The emphasis might be put on public or private choices, on contributory or non-contributory levels, depending on the Government and the majority in Parliament.<sup>8</sup> This is also the expression of the Spanish constitutional mix model of “social market economy”.<sup>9</sup> Secondly, it is relevant to outline the principle of “publicity” or “public character” of the Social Security System must be ensured (according to national case-law: e.g., Judgment No. 103/1983, 22 November 1983).<sup>10</sup> Thirdly, in connection with the previous one, the principle of “universality”, which involves the maximum coverage of the protective action, should be remarked. Fourthly, the principle of “sufficiency”, which integrates the guarantee and the improvement of the levels of well-being through appropriate benefits, appears closely connected to the idea of public character. Fifthly, the principle of “state sustainability” or “General Fund”, according to with the State is the sole owner of all Social Security resources, obligations and benefits, without prejudice of the competences under the jurisdiction of Autonomous Communities, must be also outlined in connection with the principle above mentioned of “public character”.

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*Note 5 continued from page 261*

protection (clause X), with special reference to the social security benefits of the elderly: “1. Workers shall be provided with safe protection in case of misfortune. 2. Social insurance concerning retirement, disability, maternity, occupational accidents and diseases, tuberculosis and unemployment, will be increased in order to achieve the implementation of a full insurance. Old workers shall be primarily protected with a sufficient retirement”.

<sup>6</sup> A general view in SÁNCHEZ-URÁN, Y., *Seguridad Social y Constitución*, Madrid, Civitas, 1995.

<sup>7</sup> An interesting summary of some of these constitutional principles in GARCÍA ROCA, J., Constitutional Principles regarding the Spanish Social Security System: A Citizen’s Right”, *Revista de Derecho Político*, No. 89, 2014, pp. 65-90.

<sup>8</sup> See VIDA SORIA, J., “Artículo 41. Seguridad Social” in ALZAGA VILLAAMIL, O. (ed.): *Comentarios a la Constitución española de 1978*, Madrid, Cortes Generales-Editoriales de Derecho Reunidas, 1983, pp. 112, and MONEREO PÉREZ, J.L., “El derecho a la Seguridad Social”, in MONEREO PÉREZ, J.L. et alii (eds.): *Comentario a la Constitución socioeconómica de España*, Granada, Comares, 2002, p. 1441.

<sup>9</sup> Among others, see ARAGON REYES, M., *Libertades económicas y Estado social*, Madrid, McGraw Hill, 1995, and BASSOLS COMA, M., *Constitución y Sistema económico*, Madrid, Tecnos, 1985.

<sup>10</sup> In Judgment No. 103/1983, the Constitutional Court stated (paragraph 6) that the right set forth in Article 41 is a constitutional minimum guarantee. The Parliament may, according to motivations of legal and social policy, extend the scope of protection” of social security rights. See extensively, for a summary of the constitutional case-law, GONZÁLEZ ÓRTEGA, S., “Los principios caracterizadores del sistema de Seguridad Social en la jurisprudencia del Tribunal Constitucional”, in *VII Jornadas Universitarias Andaluzas de Derecho del Trabajo y Relaciones Laborales*, Sevilla, Consejo Andaluz de Relaciones Laborales, 1991, pp. 326-357.

Sixthly, as a result of the principles of “universality” and “state sustainability”, the principle of “equality of rights” plays an important role both from a substantial perspective<sup>11</sup> and from the context of the Spanish decentralised territorial configuration (irrespective of the time and place of residence of the insured person).<sup>12</sup> Seventhly, the principle of “necessity” incorporates a broader protection action than the notion of social risk and contingency, since it goes beyond them by allowing protection of any social need of a person, regardless of any origin or cause.<sup>13</sup> Eighthly, the principle of “contribute fairness” implies proportionality between the amount received and the amount contributed. For its part, the principle of “intergenerational solidarity” means that while we are working we make contributions to fund current pensions. Finally, the importance of the principle of complementarity (between public – contributory or not – and private actions) has been amplified in the context of the economic crisis and privatisation winds.

## ***2. The impact of constitutional social security provisions in establishing the domestic legal system***

### ***2.1. Incorporation of international standards***

First of all, at the universal level, Spain was consistent with the idea of indivisibility by ratifying both the 1966 International Covenant on Economic, Social and Cultural Rights, which recognises the right to social security in Articles 9 and 10, together with the 1966 International Covenant on Civil and Political Rights in April 1977, that is to say during the transition to democracy which announced the international opening; later reflected in Articles 10.2 and 93-96 of the 1978 Spanish Constitution. Furthermore, Spain was, in consistency with the idea that mere recognition of human rights without concrete guarantees rest meaningless, the first European country having accepted the 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights establishing a procedure for individual communications.<sup>14</sup>

On the other hand, Spain may be defined as a “leader country” in ratifying ILO instruments, which amount to 133, including the 1952 Convention (No. 102) on Social Security (Minimum Standards).<sup>15</sup> However, this formal rate of ratification does not necessary imply that these universal social security standards are fully respected in practice. In such sense, in the field of social security, Spain has excluded the acceptance of an important number of significant ILO conventions which paradoxically develop substantial provisions of Convention No. 102.<sup>16</sup>

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<sup>11</sup> E.g. Organic Law 3/2007, 22 March 2007, on Effective Equality for Women and Men has created the paternity benefit. With the paternity benefit, the protected situations are considered to be (childbirth, adoption; whether pre-adoptive, permanent or simple, in accordance with the Civil Code or the governing civil laws in the Autonomous Communities, providing that, in this latter case it is not for less than one year, and although said foster care may be temporary, for the periods of leave that are legally taken by workers for these situations.

<sup>12</sup> See also Judgments of the Constitutional Court No. 40/2014 (11 March 2014), No. 44/2014 (7 April 2014), No. 45/2014 (7 April 2014), No. 51/2014 (7 April 2014) and No. 60/2014 (5 May 2014): the diversity of regional laws of partners is under the jurisdiction of Autonomous Communities (their own regional civil law) and is compatible with the state conditions to ensure equal access to a benefit of the Social Security System (survivor’s pensions within and outside marriage).

<sup>13</sup> PALOMEQUE, M.C., “Los derechos de la Seguridad Social y a la salud en la Constitución”, in *Derecho del Trabajo y de la Seguridad Social en la Constitución*, Madrid, Centro de Estudios Constitucionales, 1980, p. 327.

<sup>14</sup> It was the third one in accepting this Protocol (the two first countries were Ecuador and Mongolia). The Protocol entered into force on 5 May 2013 after ten ratifications (the tenth one was provided by Uruguay).

<sup>15</sup> Ratified by Spain in June 1988. It accepted Parts II to IV and VI.

<sup>16</sup> E.g., among others, 1962 Convention (No. 118) on Equality of Treatment (Social Security); 1964 Convention (No. 121) on Employment Injury Benefits; 1967 Convention (No. 128) on Invalidity Old-Age and Survivors’ Benefits; 1969 Convention (No. 130) on Medical Care and Sickness Benefits; 1974 Convention (No. 139) on Occupational Cancer; 1975 Convention (No. 143, Supplementary Provisions) on Migrant Workers; 1985 Convention (No. 161) on Occupational Health Services; 1988 Convention (No. 167) on Safety and Health in Construction; 1988 Convention (No. 168) on Employment Promotion and Protection against Unemployment; 1990 Convention (No. 171) on Night Work; 1993 Convention (No. 174) on Prevention of Major Industrial Accidents; 1994 Convention (No. 175) on Part-Time Work; 1996 Convention (No. 177) on Home Work; 1996 Convention (No. 178) on Labour Inspection (Seafarers); 2000 Convention (No. 183) on Maternity Protection; 2001 Convention (No. 184) on Safety and Health in Agriculture; 2007 Convention (No. 188) on Work in Fishing, and 2011 Convention (No. 189) on Domestic Workers.

At European level, in particular in relation to the Council of Europe, it must be highlighted that Spain ratified the 1961 European Social Charter in May 1980 and accepted all 72 paragraphs of the Charter.<sup>17</sup> Then, in January 2000 it ratified the 1988 Protocol adding new rights as well as the 1991 Protocol reforming the supervisory machinery. By contrast, Spain has signed but not yet ratified the 1996 Revised Charter and it has not yet signed nor ratified the 1995 Additional Protocol Providing for a System of Collective Complaints.

In spite of these European “social debts”, which show an unacceptable asymmetry between European countries,<sup>18</sup> inconsistent with the principle of indivisibility, the operation of the original reporting system has made possible a fruitful supervision by the European Committee of Social Rights (see below, in Section 4, the progress achieved in the implementation of social security rights under the Social Charter). Moreover, the action of the Committee in relation to Spain has produced a positive inter-action of the Social Charter with other ILO instruments (e.g. Convention No. 102) or Council of Europe treaties (e.g. European Code of Social Security).<sup>19</sup> Of course, these synergies should be guided by the principle of “favor libertatis” or most favourable in case of eventual divergent parameters, as imposed by Article 32 of the Social Charter (Article H of the Revised Charter).

At the same time, it is certain that the European Union Law has also had a clear impact on social security rights at domestic level since the accession of Spain to the European Communities in 1986. Apart from non-binding acts, the EU social security law has been developed through significant regulations and directives. In particular, as well known, on the basis of the initial coordination of social security systems under the Council Regulation (EEC) No. 1408/71, which guaranteed equal treatment and social security benefits to all workers who are Member State nationals, regardless of their place of employment or residence, the current Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April, which applies to all traditional branches of social security,<sup>20</sup> has developed the basic principles.<sup>21</sup>

For its part, the EU Court of Justice has also developed and nuanced these principles, especially in relation to the principle of equal treatment as well as the personal scope of application,<sup>22</sup> and also involving Spain in some cases (see Section 4, *infra*). Unfortunately, the synergies between Council of Europe and EU

<sup>17</sup> On 4 April 1990 Spain denounced Article 8§4b of the Social Charter (prohibition of the employment of women in certain dangerous occupations).

<sup>18</sup> At present, among the 47 member States of the Council of Europe, 43 have accepted (the only 4 States of the Organisation not having accepted it being Liechtenstein, Monaco, San Marino and Switzerland) the Social Charter (and, therefore, its mandatory reporting system), 10 are bound by the 1961 original Charter and 33 by the 1996 revised Charter. And only 15 have accepted the collective complaints procedure.

<sup>19</sup> An illustration of this synergy in Conclusions XX-2, Spain (2013, published in January 2014): *Article 12 – Right to social security, paragraph 2 – Maintenance of a social security system at a satisfactory level at least equal to that necessary for the ratification of the International Labour Convention No. 102*. “The Committee takes note of the information contained in the report submitted by Spain. Spain has ratified the European Code of Social Security and its Protocol on 8 March 1994 and has accepted parts I-VI, VIII, IX, XI, XII, XIII, IX, and XIV of the Code. The Committee notes from Resolution CM/ResCSS(2012) 15 of the Committee of Ministers on the application of the European Code of Social Security and its Protocol by Spain (period from 1 July 2010 to 30 June 2011) that the law and practice in Spain continue to give full effect to the parts of the Code which have been accepted, as amended by the Protocol. In so doing, Spain maintains a social security system that meets the requirements of ILO Convention No. 102. Conclusion. The Committee concludes that the situation in Spain is in conformity with Article 12§2 of the 1961 Charter”.

<sup>20</sup> The coverage includes sickness, maternity, accidents at work, occupational diseases, invalidity benefits, unemployment benefits, family benefits, retirement and pre-retirement benefits, and death grants.

<sup>21</sup> Which basically means the compatibility between coordination and margin of discretion (determination at national level, depending on the traditions and culture of each country, of the social benefits and the conditions under which they are granted), without forgetting the core principle to guarantee the right to free movement of persons in the EU and the principle of the aggregation of periods. Regulation (EC) No. 883/2004 has specifically been amended by Regulation (EC) No. 988/2009 (OJ L 284 of 30 October 2009), Regulation (EC) No. 1231/2010 (OL L 344 of 29 December 2010) and Regulation (EU) No. 465/2012 (OJ L 149 of 8 June 2012). Moreover, Regulation (EC) No. 987/2009 (OJ L 284 of 30 October 2009) laying down the procedure for implementing Regulation (EC) No. 883/2004 has relevance for the EEA and for Switzerland.

<sup>22</sup> Regulation (EC) No. 883/2004 applies to **all nationals of an EU country** who are or who have been covered by the social security legislation of one of those countries, as well as to the members of their family and their survivors. It also applies to **third country nationals** living legally in the EU and whose situation connects them to several Member States.

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standards in the field of social security are not always fluid, since, on the one hand, the European Committee of Social Rights has not accepted the so-called “Bosphorus doctrine” of the European Court of Human Rights<sup>23</sup> concerning social issues<sup>24</sup> and, on the other hand, has logically tackled the personal scope of application of the Social Charter in a different way, mainly in comparison with the idea of EU citizenship.<sup>25</sup>

## 2.2. Configuration and articulation of national legal provisions concerning the Social Security model

The Social Security model that the 1978 Constitution sets forth on the basis of Article 4, considered to be the expression of the “social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system” established in Article 1, is shaped by other two constitutional provisions concerning the configuration and articulation of the Social Security model: through, respectively, participation of the persons concerned (Article 129.1) as well as participation of regional entities (Article 149.1.17).

According to Article 129.1 of the Spanish Constitution: “the law shall establish the forms of participation of the persons concerned in Social Security and in the activities of those public bodies whose operation directly affects quality of life or general welfare”. In truth, the main pillars of this constitutional participation have been integrated, instead of by elements derived directly from the civil society, by the so-called “Toledo Pact” (from political or parliamentary actors) and by the “Social Agreement on development and tendencies of the Social Security System” (from social partners).

The Toledo Pact, inspired by other international sources, including some recommendations made by the World Bank and the 1993 Delor’s White Paper,<sup>26</sup> intended to face the problems of funding the

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*Note 22 continued from page 264*

The Regulation also applies to members of their families and their survivors. According to the **principle of equal treatment**, nationals of an EU country and persons residing in that country without being nationals of it are equal in terms of the rights and obligations provided for by the national legislation. In practice, however, the concrete determination of the applicable is complex when, for example, involving certain categories of workers (civil servants, workers who are employed or self-employed in several EU countries, frontier workers, etc.), benefits in kind (sickness, maternity and paternity) or special non-contributory benefits.

<sup>23</sup> See case of *Bosphorus Hava Yollari Tutizim ve Ticaret Anonim Sirketi v. Ireland*, Judgment of 30 June 2005.

<sup>24</sup> Indeed, the Committee has not accepted a general presumption of compatibility between social standards of EU law and the Social Charter. Such issue has been held by the ECSR in controversial areas such as organisation of working time (e.g. Decision on the merits of 23 June 2010 on Complaint No. 55/2009, *Confédération Générale du Travail v. France*, §§31-42.) or delocalisation of undertakings and social dumping (E.g. Decision on admissibility and the merits on Complaint No. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*), §§72-74).

<sup>25</sup> From this last perspective, in the last conclusions of the Committee (2013, published in January 2014), with respect to coordination of social security for persons who move between the States Parties (Article 12§4) a very large number of States Parties do not comply with the requirements of the Charter (21 out of 26 countries examined). While the situation between EU member states concerning equal treatment as well as maintenance of accrued rights (for example the export of old-age pensions) and accruing rights (for example the taking into account of employment periods completed in other countries for the calculation of benefits) is satisfactory on the basis of EU law, the necessary multi- or bilateral agreements to ensure these principles have not been concluded between EU member states, on the one hand, and the non-EU states, on the other hand, nor among the non-EU states which are bound by the Charter.

<sup>26</sup> *Growth, competitiveness, employment. The challenges and ways forward into the 21st century*. White Paper [COM(93) 700, 5 December 1993, Commission of the European Communities, Bulletin of the European Communities, Supplement 6/1993, Luxembourg, 1993, p. 139: “The objective being to reduce labour costs the reduction could differ from one Member State to another depending on the extent to which it is applied to employers social security contributions and/or employees’ social security contributions and/or to taxes levied directly on wages. Social security contributions themselves are sometimes divided up according to the various objectives involved: family, health old age, unemployment. In these cases, the reduction could relate primarily to contributions which finance expenditure normally pertaining to national solidarity: family allowances, the minimum old-age pension, serious illnesses, or long-term unemployment. In the case of schemes in which the benefits are more directly related to the contributions (e.g. retirement pensions), it is for each Member State to determine the respective proportions of compulsory and voluntary contributions to be paid under insurance schemes or savings arrangements”.



Social Security and its future development to plan ahead for the actions that should be adopted in order to prevent the increase in the public deficit, as a result of the increased benefit payments and, in particular, the retirement pensions. With such spirit, and especially with the idea of not using retirement pensions as an electoral weapon, the Toledo Pact was approved by the Spanish lower house (Congress of Deputies) on 6 April 1995; being its main purpose “to guarantee a future public pension system that is fair, balanced and shared, in accordance with the principles contained in Article 41 of the Spanish Constitution”.

It is worth highlighting that some of the recommendations included in the Toledo Pact have been reflected in the 1994 current Social Security Act and its main amendments.<sup>27</sup> Furthermore, a non-permanent commission was set up to assess the results achieved in implementing the adopted recommendations and to study, according to such results, its future development within the criteria of stability, sustainability and equality of benefits for the whole of Spain; enabling the continuity in the improvement in the welfare of pensioners, with a particular focus on smaller pensions, to be guaranteed. On 2 October 2003, the Congress of Deputies adopted new recommendations on substantial issues that have also implied relevant legislative changes.<sup>28</sup>

In the same line, on 13 July 2006 the aforementioned Social Agreement was adopted by the Government and the more representative social partners which, together with the priorities set out by the Toledo Pact in 2003, led to the adoption of Law 40/2007, of 4 December, on urgent Social Security measures. This Law improved both the principle of solidarity and guarantee of sufficiency, through the gradual improvement and expansion of the protective intensity as well as the strengthening of the general fund, and the principle of contributive fairness of the system, providing greater proportionality between the contributions made and the benefits received and, at the same time, encouraging the voluntary extension of working life beyond the legal retirement age and alleviating the negative consequences experienced by older workers prematurely forced out of the labour market.<sup>29</sup> Then, without special controversy, the parliamentary committee of the Toledo Pact negotiated the adoption of Law 27/2011, 1 August 2011, regarding the updating, improvement and modernization of the Social Security System. It also introduced some adjustments concerning the parameters of some social security benefits, especially affecting the scope of retirement pension, in view of the recent challenges of demographic and economic factors that had been observed in countries in the vicinity of the EU.<sup>30</sup>

Nevertheless, the guiding principles of fairness and contributory nature of the Social Security System, highlighted in the 1995 Toledo Pact and in the 2006 Social Agreement,<sup>31</sup> according to the new circumstances related to the goal of modernizing the system (based on tackling new circumstances such as an ageing population, phenomenon of immigration and harmonisation of criteria in the sphere of the EU), have been precisely submitted to fluctuations in the case of pension schemes, derived from different electoral winds and political colours, which has been accentuated in the context of the global financial and economic crisis.

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<sup>27</sup> For example, strengthening of the principle of solidarity, insofar as the financial situation allows, adopting measures such as the increase in the maximum age for continuing to receive the orphan’s pension or the improvement in widowhood pension in the case of lower incomes.

<sup>28</sup> Among these proposals having become formal legislative acts, the following ones: 1) The advisability of examining the situation of workers affected by modern methods of work organisation, in particular with regard to the expansion of part-time work, the incidence of temporary employment and the possibilities of making wages and pensions consistent; 2) To study mechanisms that include periods of care and support of children or dependent people as “elements to consider in contribution histories”; 3) To set up an integrated system that tackles the phenomenon of dependency from a global perspective; 4) To give special consideration to people with physical, psychological or sensory disabilities; 5) To adopt the measures needed to guarantee the inclusion of citizens from other countries into the social protection system with full rights and obligations.

<sup>29</sup> However, the consensus expressed by this Agreement had a restrictive background in the access to pension schemes: see GARCÍA NINET, J.I., “Comentarios breves al Acuerdo sobre medidas en material de Seguridad Social”, *Revista General de Derecho del Trabajo y de la Seguridad Social*, No. 12, 2006, p. 5.

<sup>30</sup> See CONDE-RUIZ, J. I. and GONZÁLEZ, C.I., “Reforma de pensiones 2011 en España”, *Hacienda Pública Española/Review of Public Economics*, No. 204, 2013, pp. 9-44.

<sup>31</sup> Strengthening the validity of these principles in such a way that, without prejudice to the principle of solidarity and in a gradual way, benefits are more proportional to the amount of contributions made.

In this scenario, the current Government, with Prime Minister Rajoy since November 2011, adopted, on the one hand, the Organic Law 2/2012, 27 April 2012, on Budgetary Stability and Fiscal Sustainability, which reviewed the terms and conditions of the pension system provided in Law 27/2011. On the other hand, it appointed a Committee of Experts, composed of twelve “wise” people, which issued in June 2013 a controversial report, under the guiding principles of the Toledo Pact, on the *sustainability factor of pensions*.<sup>32</sup> This latter report has become Law 23/2013, 23 December 2013, regulating the Sustainability Factor and the Revaluation Index of the Social Security Pensions System.

Furthermore, Article 149.1.17 of the Spanish Constitution declares that the State shall have exclusive competence over “basic legislation and financial system of Social Security, without prejudice to the implementation of its services by the Autonomous Communities”. Indeed, if at state level the aim of guaranteeing the financial system of Social Security; in particular, guaranteeing the financial sustainability of the pension system, is already complex and controversial, the competences of implementation in the hands of the Autonomous Communities in this field have increased even further the level of complexity and controversy.

In fact, the uneasy coexistence of different Spanish Regional Finance Systems, set forth in the Spanish Constitution as a “fruit” of the *constitutional consensus*,<sup>33</sup> has become even more difficult in the recent years as a result of the last major reforms of several Statutes of Autonomy, the so-called “new Statutes”, since they have implied far-reaching reforms. Such major reforms include, for the first time into the Spanish legal order, not only a catalogue of human rights (in particular, social rights as an expression of some social policies under the jurisdiction of Autonomous Communities), but also the particularities in the management of certain aspects specifically concerning the right to social security. These are the lights and shadows of the multi-level protection of human rights.

The first example of such tendency to create regional catalogues of social rights has been provided by the new Valencian Statute of Autonomy, approved by the Organic Act No. 1/2006, 10 April 2006 and validated by the Spanish Constitutional Court by Judgment No. 247/2007, 17 December 2007. Consequently, the experience was followed with different levels of intensity by other Fundamental Regional Laws.<sup>34</sup> On the other hand, the way the Autonomous Communities have developed in their new Status the regional competence to implement the state basic legislation and financial system of Social Security has also been validated, in general terms, by the Constitutional Jurisdiction (*see* Judgment No. 31/2010, 28 June 2010, concerning the Statute of Catalonia). On the contrary, the Constitutional Court has repealed secondary regional legislation on social security matters invading the sphere of state competence<sup>35</sup> and, correlatively, has also repealed secondary state legislation which implied the blocking of the exercise of regional competence.<sup>36</sup>

<sup>32</sup> The report calls for maintaining the general principles of the Spanish Social Security System, that is, the distribution model, essentially contributory, and the intergenerational solidarity. With these premises, it proposed to introduce a sustainability factor with two components: 1) a coefficient related to the life expectancy of a worker to be entitled to a pension; 2) another one that would apply annually to reassess the pension depending on the level of expenditure and revenue of the system.

<sup>33</sup> See ZABALZA, A. and LÓPEZ-LABORDA, J., *The Uneasy Coexistence of the Spanish Foral and Common Regional Finance Systems*, Working Paper, Valencia, Instituto Valenciano de Investigaciones Económicas, February 2014 (<http://www.ivie.es/downloads/docs/wpasec/wpasec-2014-02.pdf>, visited on 5 September 2014)

<sup>34</sup> Such as the new Statutes of Autonomy of Catalonia (Organic Act No. 6/2006, 19 July 2006), Balearic Islands (Organic Act No. 1/2007, 28 February 2007), Andalusia (Organic Act No. 2/2007, 19 March 2007), Aragon (Organic Act No. 5/2007, 20 April 2007), Castile and León (Organic Act No. 14/2007, 30 November 2007) and Extremadura (Organic Act No. 1/2011, 28 January 2011).

<sup>35</sup> For an illustration see Judgment No. 172/1996, 31 October 1996, concerning Decree No. 307/1985, 31 October 1985, adopted by the Government of Catalonia on provisions and procedures to implement the incompatibility system of health personnel at Catalan hospitals. See also Judgment No. 39/2014, 11 March 2014, concerning Act 10/2010, 9 July 2010, adopted by the Valencian Parliament on planning and management of the Valencian public servant (in relation to enjoyment of rights in the framework of the National Social Security Scheme).

<sup>36</sup> E.g., Judgment No. 78/2014, 28 May 2014 (conflict of jurisdiction No. 10694/2009, promoted by the Government of Galicia against the decision of 16 July 2009 of the Directorate of Integration of Immigrants of the Spanish Government) concerning grants in aid to municipalities to develop innovative programs for immigrant integration. The regional government of Galicia challenged this decision by arguing that it invaded its competence on social assistance. In effect,

*Note 36 continued on page 267*

### 3. *Personal and material scope of social security rights guaranteed by the Spanish Constitution*

A first approach to the personal and material scope of social security rights derives from several constitutional provisions connected with Article 41. A first one is Article 25.2, which states that a person sentenced to prison shall in any case be entitled “to paid work and to the appropriate Social Security benefits, as well as to access to cultural opportunities and the overall development of his or her personality”. Moreover, four other constitutional provisions complete the personal and material scope of social security benefits: the family protection benefit (Article 39); the health protection (Article 43); the treatment and rehabilitation of physically disabled persons (Article 49), and the financial sufficiency of citizens during old age, through adequate and periodically updated pensions (Article 50).

The constitutional mandate introduced by Article 41, in conjunction with the other above mentioned provisions, means that the protective action of the Spanish Social Security System is currently based on a comprehensive and universal protection model that includes: pharmaceutical-health care, family protection, social services and, in certain cases, unemployment benefit. All citizens can access this protection, under identical terms, irrespective of whether or not they have made contributions to the Social Security System. Such protection is completed, on the one hand, by a financial benefits system which, in a harmonious and differentiated manner is included in the contributory level with proportionality between salary-contributions and benefits, and, on the other hand, by the non-contributory level aimed at providing compensation income for basic needs to those citizens who, finding themselves in a situation of need, are unable to access the contributory model.

The most important development of the non-contributory model was achieved by the 1990 Non-Contributory Benefits Act, which introduced three concrete benefits: in cases of retirement, disability and family benefits for dependent children. Then, this Act was integrated and consolidated into the current 1994 General Social Security Act. Thus, the State guarantees their protection “either for carrying out a professional activity, or for meeting the requirements at the non-contributory level” (Art. 2 of the 1994 Act). There is, therefore, a two-tier level of protection: contributory (occupational) and non-contributory (welfare).

It is in Article 7 of the 1994 Act where the personal scope of application of the Social Security System is set out in a more detailed way. On the one hand, the contributory level refers to Spanish citizens residing in Spain and foreign citizens residing legally in Spain,<sup>37</sup> providing that they are carrying out an activity in national territory and are included: in particular, employed workers, self-employed workers over the age of 18, worker-members of Associated Work Cooperatives; students and civil servants or military personnel. On the other hand, with regard to the non-contributory level, Article 7 mentions “Spanish citizens residing in national territory” and places “Hispanic-American, Portuguese, Brazilian, Andorran and Philippine citizens residing in Spanish territory” on an equivalent level; citizens from other countries will be subject to the provisions of the Treaties, Agreements, Pacts, etc., or will be dealt with according to the principle of reciprocity, implicitly or explicitly recognised.

The complexity of the system particularly affects the non-contributory level, since the basic state competence on social security matters (Article 149.1.17) has to be conciliated with the competences that the Autonomous Communities “may assume”, in particular in matters of “social assistance” (Article 148.20

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*Note 36 continued from page 267*

the Constitutional Court ruled in favour of the regional competence, “which excludes the possibility of centralized management”. A similar solution (in favour of the regional competence in the field of social services) can be found in Judgment No. 33/2014, 27 February 2014.

<sup>37</sup> In this area, it is important to mention the Multilateral Ibero-American Social Security Agreement (signed on 10 November 2007), which is an instrument for coordinating the Social Security legislation on pensions of the different Ibero-American Countries that ratify the agreement and, in addition, sign the Implementation Agreement. In Spain and Bolivia, the Agreement is effective from 1 May 2011, in Brazil from 19 May 2011, in Ecuador from 20 June 2011, in Chile from 1 September 2011, in Uruguay from 1 October 2011, in Paraguay from 28 October 2011 and in El Salvador from 17 November 2012.

of the Spanish Constitution).<sup>38</sup> Therefore, the difference between what is basic and complementary moves in a thin line. As a matter of fact, the differences between Autonomous Communities concerning the levels of social assistance and the eligibility criteria have been found contrary to Article 13 of the Social Charter (see below, Section 4), even if in theory foreign residents are entitled to social and medical assistance under the same conditions as Spanish nationals (Articles 12 and 14 of Organic Act No. 4/2000, 11 January 2000, as amended by the Organic Act No. 2/2009, 11 December 2009).<sup>39</sup>

In addition to these two public and compulsory levels (contributory and non-contributory) there is, in line with Article 41 of the Constitution, a third level, which is optional and consists primarily of Social Welfare Organisations and Pension Funds. For different reasons, these two options have been increasingly emphasised in the context of the economic crisis: the first one, certainly, by balancing anti-privatisation movements, whereas the second one, obviously, by the growth of the privatisation trends. Once again, concerning the social welfare services, some controversies between the State and the Autonomous Communities have arisen, since all regions have adopted their own Social Services Act and, in parallel, the State has adopted a kind of general framework law in 1996 (Act No. 39/2006, 14 December 2006, on Dependency).<sup>40</sup>

#### **4. Constitutional guarantees of social security rights**

##### *4.1. The important role played by the Spanish Constitutional Court*

The supreme guardian of the Spanish Constitution has designed its main jurisprudential trends in the field of social security rights through both general procedures: the constitutionality of the state or regional legislation as well as the conflicts of competences between territorial levels, and the individual procedures: the so-called “amparo” appeal. Through the first type of procedures the Constitutional Court, apart from previous leading cases dealing with equality in the access to social security rights (e.g., Judgment No. 103/1983, 22 November 1983),<sup>41</sup> has certainly assessed the legislative amendments adopted in the context of the economic crisis (e.g., Judgment No. 83/2014, 29 May 2014).<sup>42</sup>

The individual approach to social security rights has logically focused on the fundamental rights, in Articles 14 to 30 of the Spanish Constitution, mostly civil and political rights, apart from the non-discrimination clause of Article 14, which can be invoked by means of the individual amparo appeal. In other words, the Constitutional Jurisdiction has been unable to proceed to a direct protection of the right to social security set forth in Article 41 of the Constitution or even through the protection of property recognised in Article 33 (unlike the European Court of Strasbourg – Article 1 of Protocol No. 1), since both provisions are formally excluded from the amparo procedure.

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<sup>38</sup> See chapters by GIL y GIL, J. (“El derecho a la seguridad social”, pp. 1017-1072), JIMENA QUESADA, L. (“El derecho a los servicios sociales”, pp. 1487-1576) and CARMONA CUENCA, E. (“El derecho a un mínimo vital”, pp. 1577-1616), three of them in ESCOBAR ROCA, G. (dir.): *Derechos sociales y tutela antidiscriminatoria*, Cizur Menor, Aranzadi, 2012.

<sup>39</sup> See also the criterion of most favorable standard developed by the Spanish Constitutional Court Organic Law 8/2000 (Judgment No. 236/2007, 7 November 2007, on Organic Act No. 8/2000).

<sup>40</sup> In its Explanatory Memorandum, Act No. 39/2006 states that “if in 1978 the key elements of this model of welfare state focused, for every citizen, on health protection and social security, the social development of our country has placed from that moment onwards at a fundamental level social services, mainly developed by the Autonomous Communities, with special collaboration of the third sector, as the fourth pillar of the welfare system, for addressing situations of dependency”. It also adds the “need to ensure” a stable framework of resources and services for the dependent persons, which now “makes the state intervene in this area in accordance with the provisions contained in this Act, which conceives it as a new form of social protection that extends and complements the protective action of the State and the Social Security System”.

<sup>41</sup> In Judgment No. 103/1983 the Constitutional Court repealed the provision (Article 160 of the previous 1974 General Social Security Act) establishing the entitlement to survivor’s pensions only in favour of women. The Court considered this exclusion of men from eligibility for widow’s pension was discriminatory.

<sup>42</sup> In Judgment No. 83/2014 the Constitutional Court has validated the social cuts in pharmaceutical-health care, since it has confirmed the constitutionality of a Royal Decree-Law on urgent measures to contain pharmaceutical expenditure and the rational use of drugs.

Taking this into account, the Constitutional Court has developed the technique of indirect protection of social security rights, especially in connection with the principle of non-discrimination (Article 14) and the due process of law (Article 24 of the Spanish Constitution). With this premise, in Judgment No. 49/2005, 14 March 2005, the Constitutional Court declared a violation of Article 14 based on the ground that, in the 1995 Worker's Statute, "what does not appear justified is that a difference of treatment is established between full-time and part-time workers in meeting the requirement of lack of access to contributory social security benefits"; therefore, this differentiation is "arbitrary and also leads to a disproportionate result" affecting part-time worker and, in addition, it "involves indirect sex discrimination because the regulation predominantly affects women workers".<sup>43</sup>

On the other hand, the other technique through Article 24 of the Spanish Constitution is illustrated by Judgment No. 95/2000, 10 April 2000. The Constitutional Court declared a violation of Article 24 on the ground that the denial, by Social Security Administration and a Spanish Labour Court, of the right to be beneficiary of health care in the framework of the Spanish Social Security System, established by Articles 41 -social security- and 43 -protection of health-, affecting the partner's applicant (a Romanian national) was unreasonable. Therefore, the contested judicial decision "ignored the existence of an earlier (administrative) court decision that had provisionally exempted his partner visa requirements for obtaining the residence permit"; and, consequently, that resolution provided for legality of stay in Spain and "should have been the criterion used to access the requested benefit".<sup>44</sup>

#### 4.2. *The opening to social security international standards*

In consistency with Section 2.1 (*supra*), it is relevant to explain the positive impact that in Spain have the supervisory bodies which ensure the effectiveness of the social security rights set forth in international treaties, by focusing on the judicial ones at the Council of Europe (European Committee of Social Rights and European Court of Human Rights) and the EU (Court of Justice) levels.

Concerning the European Social Charter, the European Committee of Social Rights has turned it into a living instrument in Spain regarding a wide range of relevant social security issues. As a starting point, it is worthwhile to recall the adoption of the Worker's Statute (10 March 1980) in view of Spain's ratification of the Charter. Then, in the framework of the reporting system, several examples may illustrate the progress achieved in the implementation of social rights under the Charter. Firstly, apart from connecting aspects such as the prohibition of dismissal during pregnancy (Act No. 33/1999, 5 November 1999, on Promotion of Conciliation of Family and Professional Life) or the entitlement of domestic worker to time off for breastfeeding (Royal Decree No. 1620/2011, 14 November 2011), Spain has improved, in the field of social protection, the social security coverage for self-employed (Royal Decree-Law No. 2/2003, 25 April 2003, and Royal Decree No. 1273/2003, 10 October 2003) and it has also extended the payment of old-age, invalidity and family benefits to all citizens concerned in cases where they have insufficient means (the above mentioned Act No. 26/1990, 20 December 1990, on Non-Contributory Pensions).

Nonetheless, the Committee has declared or even reiterated in its most recent conclusions concerning Spain<sup>45</sup> that there have been significant breaches of the Social Charter in the field of social security rights to be remedied. Firstly, the Committee has considered that the denial of access to health care for adult foreigners (aged over 18 years) present in the country irregularly<sup>46</sup> is contrary to Article 11 of the Charter. Secondly, the Committee has stated that the right to social security has been violated on different

<sup>43</sup> This same doctrine was previously settled in Judgment No. 253/2004, 22 December 2004.

<sup>44</sup> Two other cases illustrate the potential role of Article 24: Judgment No. 304/1994, 14 November 1994 and Judgment No. 64/1996, 16 April 1996, both concerning violation of due process of law in having access to unemployment benefits.

<sup>45</sup> Conclusions XX-2, Spain (2013, published in January 2014).

<sup>46</sup> In relation to the controversial legislation the Committee noted that "an amendment in Article 1 of the said Royal Legislative Decree 16/2012 (which the report states is supplemented by Royal Decree 1192/2012), which has the effect of denying foreigners irregularly present in the country access to health care except in "special situations" (emergency resulting from serious illness or accident; care for pregnant women, both prenatal and postnatal; foreign minors aged under 18 years)".

grounds: the minimum level of sickness benefit is manifestly inadequate (Article 12§1), equal treatment with regard to social security rights as well as with regard to access to family allowances is not guaranteed to national of all other States Parties, and the length of residence requirement (ten years) for entitlement to non-contributory old-age pensions is excessive (Article 12§4). Thirdly, the right to social assistance has also been declared violated on different grounds (Article 13§1): minimum income eligibility is subject to a length of residence requirement and to age requirements (25 years old), this minimum income is not paid for as long as the need persists, and the level of social assistance paid to a single person is manifestly inadequate (except for the Basque country and Navarra). Fourthly, the realisation of the right to benefit from social services (Article 14§1 and §2) is not satisfactory in relation to promotion or provision of these services; effective access, supervisory arrangements and conditions to be met by providers, as well as in relation to public participation in the establishment and maintenance of them; means of monitoring the actions of non-governmental organisations and other non-public service providers and equal access to social services provided by non-governmental organisations and other non-public service providers. And fifthly, there was a violation of Article 4 of the 1988 Additional Protocol (Article 23 of the Revised Charter, right of the elderly to social protection) due to the lack of explicit legislation protecting elderly persons from discrimination on grounds of age.

For its part, the European Court of Human Rights has also directly (through the right to property, Article 1 of Protocol No. 1) or indirectly (through Articles 6, 8 or 14 of the European Convention) tackled social security rights in relation to Spain. From the first point of view, in the case of *Muñoz Díaz v. Spain* (Judgment of 8 December 2009), the Court considered that the refusal to award a survivor's pension to a Spanish Roma citizen married according to the community's own rites and without any civil effects in Spanish law was a violation of Article 14 (non-discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property). Similarly, in the case of *Manzanas Martín v. Spain* (Judgment of 3 April 2012) the Court concluded that the difference between retirement pensions of Catholic priests and Evangelical ministers amounted to discrimination (once again, violation of Article 14 taken together with Article 1 of Protocol No. 1). Under the second perspective, a first case (*García Mateos v. Spain*, Judgment of 19 February 2013) concerned a supermarket employee who asked for a reduction in her working time because she had to look after her son who was then under six years old (violation of Article 6§1 – due process of law – combined with Article 14); and a second case (*R.M.S. v. Spain*, Judgment of 18 June 2013) concerned the applicant's daughter's placement with a foster family by social services against the wishes of the applicant (violation of Article 8 – private and family life).<sup>47</sup>

Within the EU, the Court of Justice has contributed to consolidate the domestic legal order (the 1994 General Social Security Act) on the basis of the Social Security EU Law. For example, in case C-306/03, *Salgado Alonso*, Judgment of 20 January 2005,<sup>48</sup> the Court delimited the periods of insurance taken into account for calculating the amount of benefit, in particular the possible aggregation of periods of unemployment in a case concerning the award of a retirement pension under the Spanish legislation.<sup>49</sup>

<sup>47</sup> In particular, in the case of *R.M.S. v. Spain*, the applicant complained that she was deprived from all contact with her daughter and observed that the administrative authorities had decided to place her daughter in foster care with a view to adoption before the domestic courts had even ruled that her daughter had been abandoned. In a more recent case (*Fernández Martínez v. Spain*, Judgment of 12 June 2014) the Court found no violation of Article 8: the case concerned the non-renewal of the contract of a married priest and father of five who taught Catholic religion and ethics, after he had been granted dispensation from celibacy and following an event at which he had publicly displayed his active commitment to a movement opposing Church doctrine.

<sup>48</sup> See LLORENTE ÁLVAREZ, A. and TRILLO GARCÍA, A.R., “Las sentencias del Tribunal de Justicia de la Unión Europea dictadas en los asuntos *García Blanch* (C-225/02) y *Salgado Alonso* (C-306/03), a propósito de la Disposición Adicional 28 de la Ley General de la Seguridad Social”, *Revista del Ministerio de Trabajo e Inmigración*, No. 59, 2005, pp. 225-250.

<sup>49</sup> Mrs Salgado Alonso, who was born on 30 May 1936, applied to INEM (National Employment Institute) on 7 August 1992 for the special unemployment allowance for unemployed persons over 52 years of age. At the time, she was able to establish actual periods of insurance of 74 months – more than six years – under German legislation, between 29 June 1964 and 30 July 1970, of 26 months under Swiss legislation, between 1 December 1971 and 31 March 1975, and 182 days under Spanish legislation, between 8 January and 7 July 1992. The Court ruled as follows: “Articles 39 EC and

*Note 49 continued on page 272*

Finally, the Court of Justice has also developed its case-law on social security issues in relation to Spain, especially in non-discrimination cases. From this perspective, two cases may be mentioned. Firstly, in the case C-438/99, *Jiménez Melgar*, Judgment of 4 October 2001, the Court of Justice ruled that the dismissal of a worker on account of pregnancy constitutes direct discrimination on grounds of sex, whether her contract of employment was concluded for a fixed or an indefinite period.<sup>50</sup> Secondly, in the case C-13/05, *Chacón Navas*, Judgment of 11 July 2006, the Court of Luxembourg tackled the concept of disability (as opposed to sickness) and reached the conclusion that it “must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”; for this reason “a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation”.<sup>51</sup>

### 5. *The future of social security rights under the Spanish constitutional standards in times of economic crisis*

The future of social security rights under the Spanish constitutional standards is obviously influenced by the current economic crisis. Indeed, different types of secondary legal provisions developing Article 41 of the Spanish Constitution have introduced restrictive measures. For example, through Royal Decree No. 8/2010, 20 May 2010, the Spanish Government adopted extraordinary measures for the reduction of public deficit. On the other hand, the increase of pensions was suspended for the year 2011. For its part, the Spanish Parliament, through Law 39/2010, 22 December 2010, on the general budgets of the state for 2011, introduced restrictive amendments to the social security contributions.

The evolution of the Spanish legal order in this field (Law 27/2011, 1 August 2011, on updating, improvement and modernization of the Social Security System, or Organic Law 2/2012, 27 April 2012, on Budgetary Stability and Fiscal Sustainability) has been completed by Law 23/2013, 23 December 2013, regulating the Sustainability Factor and the Revaluation Index of the Social Security Pensions

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42 EC and Article 45 of Council Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No. 118/97 of 2 December 1996, as amended by Council Regulation (EC) No. 1606/98 of 29 June 1998, must be interpreted as not precluding a national provision, such as that set out in the 28th Additional Provision of the General Social Security Law, which does not allow the competent authorities of a Member State to take into consideration, for the purposes of acquiring the right to a retirement pension under the national scheme, certain periods of insurance completed on the territory of that State by an unemployed worker during which contributions to old-age insurance were paid by the unemployment benefit agency, such periods being taken into consideration solely for the calculation of the amount of that pension”.

<sup>50</sup> An important aspect of this judgment is that the Court of Justice confirmed its case-law on the direct effect of Directives, since the national court submitting the preliminary ruling pointed out that, at the time of the events in question in the main proceedings, Directive 92/85 had still not been transposed into Spanish law. In this sense, the ECJ ruled that “Article 10 of Council Directive 92/85/EEC of 19 October 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), has direct effect and is to be interpreted to the effect that, in the absence of transposition measures taken by a Member State within the period prescribed by that directive, it confers on individuals rights on which they may rely before a national court against the authorities of that State”.

<sup>51</sup> In the absence of a definition in the Directive, the Court of Justice used the *medical model of disability*, which focuses on a person's impairment. The judgement has also been criticised for failing to refer to the social model of the disability which had been referred to in European Commission documents underpinning the Directive. See this critical approach in the commentary to this Judgment by WADDINGTON, L., in *Common Market Law Review*, No. 44, 2007, pp. 487-499.

System, which has been considered a necessary reform, with its lights and shadows,<sup>52</sup> but, from another perspective, criticized as implying a breakdown of political and social consensus.<sup>53</sup>

In my view, the main concern is that economic crisis may always be overcome with financial and economic measures. By contrast, “anti-crisis” legislation may imply a profound setback for the social legal *acquis* and, in addition, may mean a lost and irrecoverable generation. From this perspective, the Spanish Constitutional Court has validated the recent use and abuse of urgent legislation (through Royal Decree-Law) in labour and security rights issues,<sup>54</sup> by confirming the margin of discretion in the hands of public authorities under the pretext of the austerity measures adopted within the EU.<sup>55</sup>

Furthermore, the current position of the Spanish Constitutional Court has not been sensitive to European standards on national “anti-crisis” legislation affecting labour and social security rights.<sup>56</sup> This is a serious matter, since the synergy between national and international standards is essential in order to keep the *acquis* in the field of social security rights. For this reason, to conclude, Spanish authorities should be more committed in implementing the social security international standards already assumed (e.g. sensitiveness of the Constitutional Court to global judicial dialogue) as well as in incorporating the international instruments not yet accepted both at universal (ILO Conventions, such as No. 189 of 2011 on Domestic Workers) and European levels (1995 Protocol establishing a procedure of collective complaints and 1996 Revised European Social Charter. See above, Section 2.1).

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<sup>52</sup> RAMOS, R., “The New Revaluation and Sustainability Factor of the Spanish Pension System”, *Economic Bulletin*, July-August 2014, Banco de España, p. 20: “The existence of floors and ceilings in the new revaluation index ensures that future pensions will not fall in nominal terms. However, by removing the link between pension revaluation and inflation, the new legislative framework does not guarantee that pensions will always maintain their purchasing power. Hence, according to how inflation moves, they could decline in value in real terms”. See also SÁNCHEZ, A. R., *The automatic adjustment of pension expenditures in Spain: an evaluation of the 2013 pension reform*, Working Paper No. 1420, Banco de España, 2014.

<sup>53</sup> TORTUERO PLAZA, J.L., “La crisis económica y la reforma del sistema de pensiones”, in GARCÍA NINEZ, J.I. (dir.): *El impacto de la gran crisis mundial sobre el Derecho del Trabajo y de la Seguridad Social. Su incidencia en España, Europa y Brasil, 2008-2014*, Barcelona, Ariel, 2014, p. 655-656.

<sup>54</sup> On the theoretical reasons to justify an “urgent need”, see CARMONA CONTRERAS, A.M., “El decreto-ley en tiempos de crisis”, *Revista catalana de dret públic*, No. 47, 2013, p. 1-20. This abusive use of the decree-law implies a “radical transformation of the Law sources system”, as pointed out by ÁLVAREZ CONDE, E., “El Derecho constitucional y la crisis”, *Revista de Derecho Político*, No. 88, 2013, p. 115.

<sup>55</sup> See Judgment No. 83/2014, 29 May 2014, in particular paragraph 4.

<sup>56</sup> E.g. in its Decision on the Merits of 23 May 2012 [Complaint No. 65/2011, *General federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*], the European Committee of Social Rights declared that the 2010 Greek legislation allowing dismissal without notice or compensation of employees in an open-ended contract during an initial period of twelve months is incompatible with Article 4§4 of the 1961 Charter as it excessively destabilizes the situation of those enjoying the rights enshrined in the Charter. Unfortunately, the Spanish Constitutional Court has decided to fully ignore these international parameters (whose application is imposed by Articles 10§2 and 94 to 96 of the 1978 Spanish Constitution) by not even mentioning them in its recent Judgment No. 119/2014, 16 July 2014 (appeal on unconstitutionality No. 5603/2012 against Law 3/2012, of 5 July, on urgent measures to reform the labour market). It has to be noted that one of the main grounds of unconstitutionality is precisely dealt with a new so-called contract to support entrepreneurs (similar to the Greek one, in both cases imposed by the Troika).



## SWEDEN

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### CONSTITUTIONAL LAW AS AN INSTRUMENT FOR SOCIAL PROTECTION IN SWEDEN?

*Prof. BIRGITTA NYSTRÖM, Dr. LENNART ERLANDSSON*

#### 1. Introduction

Social protection could refer to both social security and labour rights. From a Swedish perspective the notion social protection in the first instance refers to social security rights. This paper will in the main deal with social security rights, but some words will also be said about labour rights.

##### 1.1. Background

At the moment Europe is trying to recover from the economic and financial crisis and at the same time trying to cope with the migrant and refugee crisis. The economic crisis has led to cuts in social standards and have affected living and working conditions for the citizens. Economic stability seems to be an overriding interest to social policy considerations. Cuts in different kinds of social standards have in many cases been directed towards those that are the most vulnerable. The economic crisis also highlights the conflict between the exercise of economic freedoms and the exercise of fundamental rights by trade unions and workers. Sweden is a member of the European Union since 1995, and from the Swedish perspective it is especially obvious that economic rights prevail over labour rights following the CJEU's decision in the *Laval*-case 2007 (see further below).

Sweden is not a part of the Euro-zone, and is one of the countries where the economic crisis not has been so obvious. Sweden suffered from an economic crisis in the early 1990s. Back then a social democratic government succeeded in reducing the state budget deficit through heavy cuts in the public sector and increased taxes. The parties on the labour market, under the leadership of an experienced mediator, agreed to moderate wage increases. These arrangements brought down inflation almost to zero. Between 2007 and 2014 a coalition of non-socialist parties was in power and they started immediately to reduce public costs by savings in labour market policy and cuts in unemployment and sickness benefits. The aim of these changes was in the first instance to raise employment. This has been fairly successful, and the measures during the 1990s and the beginning of the century is seen as important reasons behind that Sweden not has – compared to most EU countries – been affected so much from the economic crisis that began in 2008. The coalition between the Social Democrats and the Green Party, which came into power at the end of 2014, has not introduced any considerable changes in budget policy. But the refugee crisis has caused considerable strain on Swedish society, including the social security system, education, housing, health care etc. Sweden is the European country that has received most refugees per capita.

All kinds of social security benefits have during the last years been under discussion in Sweden and in 2010 a Parliamentary Commission was appointed. The Commission (Inquiry) should examine if

it was possible to coordinate different kinds of social security benefits in connection with sickness and unemployment, discuss appropriate levels etc. The Inquiry presented its final results in 2015.<sup>1</sup> The report proposes a number of improvements in health insurance (including support for a return to work), in work injury insurance and in unemployment insurance. The purpose is to safeguard confidence in social insurance and make insurance sustainable. A priority is to increase the upper ceiling for different kinds of social benefits. The Inquiry's work has not yet resulted in any new legislation.

## 1.2. The Swedish Constitution

Like most other democracies Sweden has a written Constitution which has a special position in the hierarchy of norms. The Constitution consists of four fundamental laws: the Instrument of Government (*Regeringsformen*), the Act of Succession (*Successionsordningen*), the Freedom of Press Act (*Tryckfrihetsförordningen*) and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*).

A fundament in the Swedish Constitution is that public administration power shall be governed under the law (Instrument of Government Section 1 Article 1).<sup>2</sup> This is called the principle of legality. The principle of legality is the very ground for decision-making in Swedish public administration.

In Section 1 Article 9 of the Instrument of Government the principle of objectivity prescribes that courts, administrative authorities and others performing public administration functions shall pay regard in their work to the equality of all before the law and observe objectivity and impartiality. This rule is applicable both in situations between citizens and authorities or courts, and between the public employee and the public employer. According to the Constitution Section 12 Article 5 appointments within the state administration shall be based only on objective factors such as service merits and competence.

There were no provisions in the Swedish Constitution concerning labour rights until a new Constitution was passed in the 1970s. In Section 2 of the Instrument of Government, under the title "Fundamental rights and freedoms" every citizen is in relation to the community secured freedom of opinion, freedom of expression, freedom of assembly, of association and of demonstration (Section 2, Article 1).

According to Section 2 Article 14 of the Instrument of Government a trade union or an employer or employers' organizations shall have the right to take industrial action unless otherwise provided for in an act of law or under an agreement.

Discrimination is dealt with in Section 2 Articles 12 and 13 that prescribe that no act of law or other provision may imply unfavourable treatment of a citizen because he/she belongs to a minority group by reason of ethnic origin, colour or sexual orientation. No act of law or other provision may apply unfavourable treatment on grounds of gender.

According to the Freedom of Press Act and in the Fundamental Law on Freedom of Expression there are additional rights regarding freedom of expression and the right to anonymity, a ban to inquire into the identity of persons that have communicated information, and to apply any form of sanctions to those who have communicated information.

All these provisions are regarded more as statements of existing law, as a codification and a solemn declaration of fundamental democratic principles, than an expression of the intention to establish new legal principles.

The European Convention on Human Rights was implemented as a new Act in Sweden in 1995.<sup>3</sup> It has had a growing impact as a source of law in Sweden. According to the Instrument of Government Section 2 Article 19 acts and other legislative measures shall not be in contradiction with the Convention.

<sup>1</sup> SOU 2015:21 (*the Swedish Government Official Reports*) Mer trygghet och bättre försäkring (*A more secure and better insurance*).

<sup>2</sup> SFS (the Swedish Code of Statutes) 1974:152, 2010:1408, 2011:109.

<sup>3</sup> SFS 1994:1219.

### *1.3. How Sweden is governed and margin of appreciation in local decision-making*

Sweden is a parliamentary democracy that is governed nationally, regionally, and at a European level by the membership in the EU.

At national level, the people are represented by the Parliament (*Riksdag*), which has the legislative power according to the Constitution. The Government governs the nation, implements the decisions of the Parliament and proposes new laws or amendments to legislation. It is assisted in its work by the Government Offices with a number of ministries, and some 300 government agencies.

The task of the government agencies is to implement the decisions that have been taken by the Parliament and the Government. They are autonomous in the sense that they act on their own responsibility, according to the Constitution. But they must of course follow the principle of legality according to the Constitution Section 1 Article 1.

At regional level, Sweden is divided into 21 counties. Each county has a county administrative board, which is the Government's representative at the regional level. The county administrative board's responsibilities include supervision of the municipalities' social services, traffic safety, environmental work and nature conservation, to name just a few.

At county level there is also the county council, whose decision-makers are directly elected by the population of the county. By far the most important field of responsibility for the county council is health and medical services. Activities are financed primarily from taxation and to some extent from fees and government subsidies.

At local level Sweden is divided into 290 municipalities. Each one has an elected council that has the power over most matters of local administration such as schools, preschools, care of the elderly, social services, housing, roads, water supply etc. Activities at this level are financed primarily from taxation and some extent from fees and government subsidies.

### *1.4. How the Swedish labour market is organized*

The Swedish state has always avoided involving itself in dealings between the social partners whenever possible. The state has sought to remain neutral and tried not to introduce unnecessary measures. The system is based on the fundamental principle that it is the social partners that are responsible for bargaining and collective agreements. The traditional Swedish model for regulating employment relationships is through collective agreements.<sup>4</sup> An important principle is that the social partners have the possibility to use industrial action in order to exercise pressure on the other party in collective bargaining.

In 1905 the first nationwide collective agreement was concluded between the Metal Workers' Union and the Swedish Engineering Industries. In 1906 a very important step was taken when the Trade Union Confederation (LO) and the Employers' Federation (SAF) agreed that the employers should accept employee unionism, and in turn the employee side accepted that it was the employer who directed and distributed the work as well as to hire and fire workers (the "December compromise"). In 1928 legislation regarding collective agreements and the Labour Court was introduced and in 1936 an Act about freedom of association and collective bargaining. In 1938 LO and SAF, under the threat that the state should regulate the right to industrial action, concluded the Basic Agreement or the so called Saltsjöbaden agreement. The agreement contains rules about bargaining procedures prior to industrial action, restrictions in industrial action, for example rules to protect neutral third parties and procedures for bargaining. Parts of the agreement are still in force.

Although the principle of self-regulation still is the point of departure, legislation in the labour law area has grown rapidly since the 1970s. In the 1970s several new laws were enacted in order to increase the rights of employees and trade unions and for example legislation on security of employment was

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<sup>4</sup> Nyström, B., The evolving structure of collective bargaining in Sweden (1990-2003). Report to the EU Commission 2004-09-16.

introduced. The 1976 Co-determination Act<sup>5</sup> replaces the Act from 1936 and the legislation on collective agreements from 1928 and adds new rules about participation rights for trade unions. Pre-existing legislation was revised and a long succession of completely new enactments was introduced. Since 1995 when Sweden became a member of the EU legislative measures to implement EU labour law has extended the area of labour legislation even more.

The social partners have a strong position in the fields of industrial conflict and the resolution of industrial disputes. It is the trade unions that are responsible for the control of compliance of legislation. It is only concerning the work environment that there is a public agency; the Labour Market Authority.<sup>6</sup> To combat wage dumping the normal way is for the trade union to ask the employer to negotiate for a collective agreement, and to use industrial action if the employer does not want to negotiate or if he/she does not sign an agreement.

The rate of unionization has always been very high in Sweden, but as in other European countries it has been on the decline during the last 20 years. Today, the average rate of unionization is about 70 per cent. Employees in the public sector are more unionized than those in the private sector. Some of the blue-collar unions affiliated to the LO have seen the membership rates decrease from over 90 per cent to almost 60 per cent. The coverage of collective agreements is still very high, about 90 per cent, due to a high rate of organization on the Swedish employers' side. In the public sector collective agreement coverage is 100 per cent. It is not possible in Sweden to extend a collective agreement by some kind of decree or legislation in order to cover all employees, but the employer is obliged to apply the main rules in the collective agreement also to non-unionized employees and employees that belong to other unions than the signatory.

## **2. Constitutional guarantees for labour rights**

It is the State that has to secure the rights for the citizens mentioned in the Constitution, these rights are not constructed as civil rights. But it is possible for public employees to maintain rights in the Constitution towards their employer.<sup>7</sup>

### *2.1. Freedom of association*

Freedom of association was already in the December compromise 1906 considered to be a right that should be safeguarded both for employers and employees. "The right of association shall be left inviolate on both sides."

Freedom of association is in relation to the community secured in Section 2 Article 1 p. 5 of the Instrument of Government. (It could be restricted according to Section 2 Article 20 Instrument of Government.) Freedom of association between private subjects on the labour market is dealt with in the 1976 Co-determination Act. It is not possible to deviate from the rules on freedom of association in the Co-determination Act. Here, the right of association is defined as the right of employers and employees to belong to an employers' organization or a trade union, to make use of such membership and to work for the organization or for its formation. Freedom of association was already secured in the blue-collar sector by the December Compromise in 1906. In 1936 Freedom of association was confirmed in legislation, and these rules are now found in the Co-determination Act. Trade union representatives enjoy special protection through the 1974 Act on Employees' Representatives at the Workplace (the Shop Stewards Act).

Freedom of association is not questioned on the Swedish labour market.

<sup>5</sup> SFS1976:580 *Lag om medbestämmande i arbetslivet*.

<sup>6</sup> [www.arbetsmiljoverket.se](http://www.arbetsmiljoverket.se).

<sup>7</sup> See AD 2011 No. 74 (the Labour Court's judgment number 74 done 2011). The Labour Court's decisions can be found on [www.arbetsdomstolen.se](http://www.arbetsdomstolen.se) (only in Swedish). In AD 2011 No. 74 a dismissal of a policeman who had used the constitutional freedom of speech was declared invalid.

## 2.2. Industrial action

The right to take industrial action is, as mentioned above, protected in the Swedish Constitution, Section 2 Article 14 of the Instrument of Government. Trade union or an employers or employers' organizations have the right to take industrial action unless otherwise provided for in an act of law or under an agreement. The constitutional right is equal for both sides of the labour market. It protects trade unions, employers and employers' organizations, not individual employees.<sup>8</sup> The right in Section 2 Article 14 is an exception from the main rule that a constitutional right only is applicable towards the community; Section 2 Article 14 is applicable also to private subjects. The Labour Court has accepted industrial action according to Section 2 Article 14 because there were not grounds, neither in legislation nor in collective agreements to limit this right.<sup>9</sup>

The limitations according to law is mainly found in the 1976 Co-determination Act, but there are also a few minor limitations in the Act on Public Employment concerning those employees that exercise public authority.<sup>10</sup> The most important limitation in the Co-determination Act is that there is as a main rule a peace obligation during the life of a collective agreement.

There are a number of limitations according to collective agreements, the *Saltsjöbaden* agreement has been mentioned above, section 1.4. There are also agreements for the different sectors on the labour market where the parties have agreed on arrangements when industrial action dangers vital interests. Further, for the main of the industry sector there is the so called Industry Agreement, where the parties have agreed on a certain order to follow regarding collective bargaining and made arrangements for private mediators that have a more active role than the state mediators; all with the aim to conclude collective agreements without industrial action.<sup>11</sup>

The outcome in the *Laval*-case<sup>12</sup> has led to new Swedish legislation that limits the right to industrial action for trade unions. It is no longer possible for Swedish trade unions to resort to industrial action in order to force the employer to sign a Swedish collective agreement in a situation where an employer has posted workers to Sweden and already is bound by a foreign collective agreement. Further, trade unions can only use industrial action towards an employer posting workers to Sweden in order to demand minimum conditions within the so called "hard core" of minimum employment conditions mentioned in the Posting of Workers Act.<sup>13</sup> The CJEU's interpretation of the Posting of Workers Directive in the *Laval*-case has been widely discussed and criticized. Also the Swedish legislative amendments in response to the outcome are controversial. The ILO Committee of Experts on the Application of Conventions and Recommendations has criticized the amendments with respect to the ILO Conventions No. 87 and 98.<sup>14</sup> The European Committee of Social Rights has found the amendments to be a violation of several articles in the European Social Charter.<sup>15</sup> The Swedish Government appointed in 2013 a Parliamentary Committee (Inquiry) to review possible options to solve the conflict between EU labour law and Swedish labour law in order to prevent social dumping. The Inquiry reported in 2015,<sup>16</sup> and makes a number of proposals to safeguard the Swedish labour market model and the status of collective agreements in situations involving posted workers.

<sup>8</sup> It is also trade unions, employers and employers' organizations that have the right to bargaining and that can be parties to collective agreements.

<sup>9</sup> See AD 2003 No. 46, AD 2006 No. 58. See also AD 2003 No. 25, 2001 No. 89, 2008 No. 34 (concerning political strikes).

<sup>10</sup> SFS 1994:260 *Lag om offentlig anställning*. The main rule in the public sector is that industrial action is permitted to the same extent as in the private sector.

<sup>11</sup> The Industry Agreement has, like the *Saltsjöbaden* agreement, become pattern agreement for other sectors of the Swedish labour market.

<sup>12</sup> Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetarförbundet et al*, 18 December 2007.

<sup>13</sup> SFS 1999:678 *Lag om utstationering av arbetstagare*, which has implemented the Posting of Workers Directive 96/71/EC in Sweden.

<sup>14</sup> International Labour Conference, 102nd Session, 2013.

<sup>15</sup> Swedish Trade Union Confederation (LO), and Swedish Confederation of Professional Employees (TCO) v. Sweden. Collective Complaint No. 85/2012.

<sup>16</sup> SOU 2015:83 Översyn av *Lex Laval* (*Review of Lex Laval*). The report contains a summary in English.

### 2.3. Whistle-blowers

There is no specific regulation in Swedish law for the protection of employees who report or disclose wrongdoings in the workplace. Employees in the public sector are protected by the Instrument of Government Section 2 Article 1 and further by the Freedom of Press Act and the Fundamental Law on Freedom of Expression. The constitutional right to anonymity applies to all citizens, but the ban to inquire into the identity of persons that have communicated information and the ban to apply sanctions on those who have communicated information do apply only to public employers. An employer in the private sector is, for example, free to try and find out which of his/her employees that have reported information to the press or public authorities and can also impose labour law sanctions, which in very serious cases could mean dismissal because of disloyalty.

Studies show that employees who observe wrongdoings often do not report this. This is due to several reasons, one is that the employees are afraid of retaliation; another is that they are uncertain about their legal protection.

Recently a Governmental Inquiry has proposed new legislation in this field in order to strengthen the protection for employees (especially in the private sector) who blow report and disclose serious wrongdoings in the employers' organization.<sup>17</sup> This report has recently (March 2016) led to a Government proposal suggesting an entirely new law regarding the protection for employees in this field.<sup>18</sup>

### 2.4. Protection of employment and wages in times of crises

From the above mentioned it is quite obvious that very few labour rights are protected by the Swedish Constitution. In this section, we will mention some developments in Swedish labour law that could be of interest in the fundamental rights perspective.

There is no legislation concerning wages in Sweden. Not even minimum-wages. This is a question entirely for the labour market parties to regulate in collective agreements and individual labour contracts. Free movement of workers and services has led to discussions about unfair competition that will lead to a wage race-to-the bottom or so called social dumping. These worries have also to be interpreted in the light of the CJEU's decision in the *Laval*-case (see section 2.2.).

In 2008, due to the economic situation in Swedish industry, the social partners in the manufacturing industry reached a unique collective agreement which allowed local agreements meaning that working hours, and thus salaries, were reduced by up to 20 per cent. The hours when work was not performed could be used for vocational training in order to improve the company's competitiveness. Few local agreements were concluded.

In 2012 the social partners in industry submitted a proposal to the Government concerning how future severe economic crisis could be met. This suggestion led to new legislation in 2014 about so called short-time work. According to the Act on short-time work the State can under certain circumstances subsidize short-time work arrangements in the private sector of the labour market. The aim is that the State, the employer and the employees should share the costs for shorter working hours in times of deep crisis. Short-time work can be agreed in collective agreements and under certain circumstances also in written agreement between employer and employee.

The 1982 Security of Employment Act<sup>19</sup> imposes certain restrictions on the possibility to conclude employment contracts for limited periods. The main rule is that employment contracts should be for indefinite periods. During the 1990s the possibility to conclude short-term contracts was extended. The amount of fixed-term contracts has increased, especially for young people. The possibility to use combinations of different types of fixed-term contracts for long periods raised concern from the EU

<sup>17</sup> SOU 2014:31 Visselblåsare (*Whistleblowers*). The report contains a summary in English.

<sup>18</sup> Prop. (Government Bill) 2015/16:128 Ett särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden (*Special protection for employees that blow report and disclose serious wrongdoings*).

<sup>19</sup> SFS 1982:80 *Lag om anställningsskydd*.

Commission about the Swedish implementation of Directive 1999/70/EC regarding the framework agreement on fixed-term work. As a result changes have been made to the Security of Employment Act that somewhat limits the possibilities to use combinations of different types of fixed-term contracts. The changes enters into force in May 2016.<sup>20</sup>

Demands for a more flexible labour market have not only resulted in more fixed-term contracts, also agency work has been more frequent.<sup>21</sup> Agency work was in principle forbidden in Sweden until the early 1990s, but nowadays agency work is in principle treated as any other kind of employment. Regular labour legislation applies as well as special legislation due to the implementation of the EU directives 91/383/EEC regarding health and safety for temporary employees and 2008/104/EC on temporary agency work. Already in the 1980s (before agency work was legalized!) the social partners concluded collective agreements adapted to the special triangular situation concerning temporary agency work. Today, over 90 per cent of temporary agency employees are covered by collective agreements that contain some kind of wage guarantee between assignments.

In cases of redundancy there are redundancy programme agreements between the social partners for different sectors on the labour market.<sup>22</sup> These programmes are financed by employer's contributions and governed by agencies that are owned by the social partners. The aim is to help employees that are in danger of being redundant, or already are becoming redundant by economic support and professional advice, which could include redundancy benefits, vocational training, studies or other kinds of professional help to find a new job.

### 3. Social security rights

Social security rights could be defined as the financial security that a society provides to individuals and households, particularly in cases of old age, unemployment, sickness, invalidity, work injury, parental leave or maternity. The principle is to ensure the lost of income to a certain level. In this section we will give a very short overview of the most important social security benefits in Sweden and their development during the last years. This is not a complete account of social security rights, for example housing benefits, activity support, survival's benefits are not included.

The social insurance system is administered by the Swedish Social Insurance Agency (*Försäkringskassan*).<sup>23</sup> The Agency administers, among other things, pensions, sickness benefits and occupational injury insurance. Family allowances are also administrated by the Social Insurance Agency, but they are mere transfers, not based on insurance principles. Unemployment insurance is still in the main based on the old system of unemployment benefit societies, connected with the trade unions, but they are to a considerable extent financed by government grants and regulated by special legislation (see further 3.2). Social assistance and service are administered by Municipalities.

The social insurance scheme has during almost 100 years been increasingly extended. It provides a safety net, but is also intended to preserve a decent standard of living. It is primarily funded by statutory contributions from employers and employees. The social insurance cover all Swedish residents. Generous benefits and high replacement rates have been characteristic of the Swedish social insurance system for a long time. A report from the Swedish Social Insurance Inspectorate in 2014 shows that many of the social insurance benefits have not followed the changes in prices or wages after the economic crisis in the 1990s

<sup>20</sup> Prop. 2015/16:62 Skärpta åtgärder mot misbruk av tidsbegränsade anställningar (*More stringent measures against the abuse of fixed-term contracts*), SFS 2016:248.

<sup>21</sup> The agency sector has expanded quickly, but includes only about 1,5 per cent of Swedish employees.

<sup>22</sup> Westregård, A., *Changes in the Swedish Sickness Insurance System and Labour Law due to the Influence of Flexicurity*, EuZA Bd, 7(2014) S. 30-50, pp. 42-45; Sebardt, G., *Redundancy and the Swedish Model. Swedish Collective Agreements on Employment Security in a National and International context* (diss.), Iustus Förlag, Uppsala 2005.

<sup>23</sup> [www.forsakringskassan.se](http://www.forsakringskassan.se).

when benefit levels were cut or frozen. An increasing share of the working population has an income that exceeds the income ceilings in some of the insurances.<sup>24</sup>

If a person is not satisfied with a decision on social security rights it is possible to appeal to the Administrative Courts.

### 3.1. *Sickness benefit*

The system of sickness benefit has recently undergone considerable changes. During the period 2000-2009 Sweden faced structural problems in the form of high sickness rates and many early retirements. The number of people on long-term sick leave started to increase during the economic crisis in Sweden in the beginning of the 1990s. It was decided that something has to be done in order to get people back to work.<sup>25</sup> The rules regarding sick pay have gradually become stricter from 2008 in order to reduce sickness absenteeism and measures have been directed towards rehabilitation efforts.

No sick pay is due for the first day. The employer pays sick pay (*sjuklön*) as from the second up to the 14th day of illness at 80 per cent of wages up to a certain ceiling. This was introduced by an Act in 1991<sup>26</sup> with the aim to increase the employers' interest in the working environment and also to make the control system more efficient. The Social Insurance Agency (*Försäkringskassan*) pays sickness cash benefit as from the 15th day in a period of illness. The remunerations here depend on the yearly salary up to a certain ceiling. This ceiling has in practice been more or less constant during the last 20 years<sup>27</sup> with the result that very few employees today receive 80 per cent of their income. It is not uncommon that the employer pays an addition on top of sick wages or sick pay according to a collective agreement. Also, several trade unions have arranged for an additional voluntary insurance for their members to top up the sick pay.

After 90 days with sick pay the Social Insurance Agency tries to see if there is some other work the employee can perform at the ordinary workplace and only if this is not the situation the employee gets continued sick pay. After 180 days the employee's ability to work should as a main rule – if it not is considered unreasonable – be tested on the whole labour market. If the Agency is of the opinion that the employee can take any job somewhere on the Swedish labour market, the employee gets no more sick pay and is instead sent to the Public Employment Service.<sup>28</sup> Sick pay is as a general rule, if it is not considered to be unreasonable, terminated after 365 days. After 365 days an employee's ability to work shall always be tested on the whole labour market.

### 3.2. *Unemployment benefit*

It is not compulsory to be a member of an unemployment benefit society, but those who are not insured receive very small benefits if they are unemployed.

The unemployment benefit insurance consists of two parts. A basic insurance providing a flat-rate benefit for those who are not voluntary insured. And a voluntary insurance administrated by the trade unions providing an earnings-related benefit financed by membership fees and tax money contributions. It is possible for unemployed persons to receive economic social assistance or housing benefits in addition to unemployment benefits. The benefit levels were not increased for many years, but the Social Democratic/

<sup>24</sup> ISF Report 2014:4. In 2010 nearly half the men and a quarter of the women aged 20-64 years had an income that exceeded the income ceiling in the sickness insurance. The corresponding figures in 1992 were 14 per cent of men and 2 per cent of women.

<sup>25</sup> Government White Paper, Fokus på åtgärder – En plan för effektiv rehabilitering i arbetslivet (*Focus on Measures – a plan for rehabilitation in working life*). SOU 2006:107 pp. 71 ff, and Government White Paper, Mera försäkring och mera arbete (*More insurance and more work*), SOU 2006:86 pp. 57ff. See also Westregård, A., changes in the Swedish Sickness Insurance System and Labour Law due to Influence of Flexicurity. *EuZA*, Bd7 (2014), pp. 30-50.

<sup>26</sup> Law on sick pay (Lag om sjuklön) SFS 1991:1047.

<sup>27</sup> ISF (the Swedish Social Insurance Inspectorate) Report 2014:4 The Development of the Swedish social Insurance since the 1990s.

<sup>28</sup> [www.arbetsformedlingen.se](http://www.arbetsformedlingen.se).



Green Party coalition that came into power at the end of 2014 decided in 2015 an increase in the daily allowances and the ceiling of the unemployment benefits.

An attempt by the non-socialist government in the early 1990s to establish an unemployment insurance system outside the trade unions was abolished by the next Social Democratic Government. The non-socialist coalition that came into office in 2006 immediately issued changes in the rules regarding unemployment benefits. One of them was to strengthen the financial contributions from the insured with the aim of underlining the connection between high unemployment in a branch and higher membership fees. Another suggestion was to make membership of an unemployment insurance association compulsory, but this suggestion was not successful. The increased membership fees lead to a large decrease in membership of the unemployment societies but had apparently no effects on unemployment rates or wage demands. In 2013 the rules were changed again, almost back to the earlier situation.

### 3.3. Old age pension

The basic and most important system of pension provisions is the state social insurance which is compulsory for the entire population. The general legislation about retirement benefits was entirely revised just before the turn of the century. The new system is extremely flexible. It is built upon three parts of benefits; an earnings-related retirement pension, a premium pension and a supplementary pension. General age pension benefits can be used at the earliest at the age of 61 years, but no upper limit is set for the age at which take-up must commence. Guarantee pension could be used at the earliest from 65 years of age. Retirement benefits could be used only partial; it could be combined with paid work. There is no upper age limit for earning pension benefits in the state social insurance system. According to the Security of Employment Act an employer has the right to retire off an employee at the expiry of the month in which he/she reaches the age of 67 years. The retirement benefits are estimated on the ground of the prospected average life time of the group of people born that year, so the pension will be considerably lower if it is drawn at 61 instead of, for example, at 66.

Guarantee pension is a kind of a minimum pension. Very few receives full guarantee pension, but it is rather common that people get some reduced guarantee pension to reach a minimum pension level because they have earned small pension benefits during their working life. (Guarantee pension is rather often combined with housing benefits for elderly).<sup>29</sup>

General retirement pensions under the state social insurance system are supplemented by various schemes established under collective agreements. Many employees also have supplementary voluntary private pension schemes.

### 3.4. Disability pension

For persons who are young and will probably not be able to work full time for at least one year due to illness, injury or disability can receive activity compensation from the Social Insurance Agency. Working capacity shall be diminished by at least one fourth in all jobs on the entire labour market. This also includes jobs that are arranged for persons with disabilities, such as employment with salary grants. Activity compensation may be income-related or in the form of guarantee compensation. The right to compensation is re-examined regularly.

### 3.5. Parental leave, maternity benefit

Parents' allowances are according to the Social Insurance Code 2010 (*Socialförsäkringsbalken*)<sup>30</sup> essentially the following. In connection with child birth parents are entitled to allowances for a total of

<sup>29</sup> The Swedish old age pension system is described in the CJEU's decision in *case C-141/11 Torsten Hörnfeldt v. Posten Meddelande AB*.

<sup>30</sup> SFS 2010:110.

480 days. The mother has this right as from the 60th day before the assumed date of birth. After the child has been born it is the parent who takes primary care of the child who is entitled to the allowance, but during the child's first year it is possible for both parents to use the allowance and take leave at the same time for a few days. Parents' allowance can also be used for occasional care of a sick child not yet 12 years of age, for up to 60 days per child and year (temporary parental benefit).

Parental benefit has three different compensation levels depending on how many days of parental leave that is used and if the parent has had any income before child leave. The most important part of the allowance is in principle the same amount as sickness benefit.

There are different arrangements in collective agreements to extend the support to parents.

### 3.6. *Personal assistance, health care and social security for disabled*

The cornerstone of the Swedish disability policy is the principle that every person is of equal value and has equal rights. In Section 2 Article 12 of the Instrument of Government protection against discrimination in the meaning that no act or norm are legal if someone can be mistreated or discriminated due to disability at work, at school or elsewhere in the society is granted. General efforts to improve accessibility in the community are central to achieving the goals of inclusiveness and equality.

Actions such as housing with special services for adults, or daily activities for those who are inactive and not enrolled in education are regulated by the Act Concerning Support and Service for Persons with Certain Functional Impairments.<sup>31</sup> County councils and municipalities are responsible that health care assistance is provided in the form of rehabilitation and habilitation.

Persons with disabilities who are in need of individual support and service from the community have the right to aid to ensure a good living standard. The state, municipalities and county councils are jointly responsible for this aid with the aim that people with disabilities receive good health, economic and social security.

County councils and municipalities are responsible for health care, rehabilitation and habilitation. The municipalities are responsible for personal assistance, housing with special service, or daily activities for those who are inactive and not enrolled in education according to the Act Concerning Support and Service for Persons with Certain Functional Impairments. The Swedish Insurance Agency is responsible for economic security and cost for personal assistance more than 20 hours per week.

### 3.7. *Work injury*

The first act giving the employer special responsibility when a worker has been ill or injured due to accidents or injuring effects of work came already in 1916. Today the rules about compensation for incapacity due to industrial accident or other injurious effects of work (occupational disease) are found in the Social Insurance Code 2010. With few exceptions such incapacity is treated in the same way as illness in general. Those who have incurred permanent incapacity to work may be awarded special life annuities.

Special insurance arrangements by collective agreements give the employees extra allowances when they are injured by work.

### 3.8. *Social assistance*

Social assistance is a financial support under the Social Service Act,<sup>32</sup> and it is the social service office in the municipality that is responsible for persons that are in need for assistance. Each application for social assistance is assessed individually and the social worker looks at what the social services can do to help persons to become self-supporting. In the meantime a person can receive support for upkeep and for other items needed in order to have a reasonable standard of living. If the person is unemployed he/she

<sup>31</sup> SFS 1993:387 *Lag om stöd och service till vissa funktionshindrade.*

<sup>32</sup> SFS 2001:453 *Socialtjänstlagen.*

must be registered with the employment office and actively looking for a job. If the person is ill and are on sick leave the social services can demand to see the doctor's rehabilitation plan and contact the Social Insurance Agency office and the employment office to find out what help the person need to become self-supporting. The social services do not usually grant social assistance to students during semester time. The students are assumed to be able to manage on study allowance or other study assistance.

People who are in the need for social assistance can receive help for upkeep and for other items that a person need to have a reasonable standard of living. Help with upkeep is called income support and consists of a standard sum (the national standard) plus reasonable costs for other common needs such as housing and household electricity. The Social Services will assess the situation in each individual case but the national standard is based on calculations from the National Council for Consumer Affairs.

Under the Parental Code<sup>33</sup> parents have a duty to support their children until their 18th birthday. If the child is still at school (upper secondary) after 18 years of age, this obligation is extended. It then applies until the child have left school, but not after the child's 21st birthday. That means that young people aged 18–20 who have left school can apply for social assistance on their own behalf. Young people who want to move out of the family home can only receive assistance with their housing costs when there are strong reasons for them to move. The usual assumption is that young people will not move out until they can provide for the costs for their own home themselves.

In certain cases persons can receive assistance, which is to be repaid, for example under an occasional situation.

#### 4. *Constitutional guarantees for social security rights*

The legal right to social security is created by political decisions at national level. According to the Constitution it is only the Parliament that has legislative power.<sup>34</sup> Rules regarding social protection are however not regulated in the Constitution but instead laid down in national legislation according to the Constitution. Then the social security rights are advocated by authorities which are by law given the competence to make decisions in individual cases.

The principle of legality is one of the cornerstones of the Swedish Constitution.<sup>35</sup> The principle of legality means that the exercise of public authority and public administration shall be managed under the law. This principle is a question about realization of justice in social and welfare legislation that is depending on the legal system and the rule of law. In other words, the first Section Article 1 of the Instrument of Government underlines that the power of public administration shall be governed under the law (good administration).

The rule of law is by the principle of legality expected to guarantee a fair and equal treatment for the individual before the law. Due to the fact that two cases never are identical in all aspects it gives the judges and the administrators a relatively high degree of discretion in determining the rights and benefits. There is always a margin of appreciation in local decision-making depending on the large diversity of humanity and social facts in each case. Theories on public administration reveals that discretion is neither good nor bad, it is how the discretion is used by the administrators in the decision-making process that is vital.<sup>36</sup> Discretion can be abusive in a number of ways; the clients can be categorized to fit standardized definitions and administrators use organizational and administrative guidelines instead of legal rules and principles.<sup>37</sup>

<sup>33</sup> SFS 1949:381 *Föräldrabalken*, Section 7.

<sup>34</sup> The Instrument of Government Section 8 Article 1.

<sup>35</sup> The Instrument of Government Section 1 Article 1.

<sup>36</sup> See for example Brandon T., Street-level Bureaucracy: dilemmas of the individual in public services, *Classic Review, Disability & Society* Vol. 20, No 7, December 2005, pp 779-783.

<sup>37</sup> Erlandsson, L., Law, Norms and the Rule of Welfare Law, *Lund Studies in Sociology of Law* 44, 2014, p. 158.

The intent of social security rights is that citizens should be ensured protection for civil rights as well as decent standard of living and help and support in situations where the individual has a casual or a permanent need for aid. There are many dilemmas in the decision-making process and at worst, the administrators may give in to favouritism, stereotyping, convenience, and routinizing – all of which serve their own or the authority's purposes.<sup>38</sup> Organisational and administrative guidelines can also be used instead of legal rules and principles.

The organisation can develop guidelines and rules of their own within the system and studies show that the authorities in practice do this.<sup>39</sup> Law in action therefore becomes something else than the law in the books. Local guidelines could in times of economic problems easily be influenced by economic arguments. If there is an interaction between how the administrators work with discretion and the development of local guidelines we have a problem which the legislators have to deal with. Different authorities seem to have different opinions on similar cases, depending on local guidelines and standards that often are in contrast with the political aim of the legal act.

For example, the legislative intent of the law is that persons with functional impairments should be ensured good living standards. In the individual case it is the bureaucrats in the local authorities that are the decision-makers regarding the right to support and services according to the law. The local authorities have to deal with individual aspects to achieve the objectives of the legislation. Even if the law sets up rights to support and service, the legislation is goal-oriented and gives the bureaucrats a high degree of discretion in deciding the rights in individual cases. Therefore, the decision-makers must have knowledge about legal method but also about social work in order to achieve the legislative intent of the legislation, and that is not always the case. Instead of using legal method and implementing the goal-oriented legislation in each individual case, there is often an element of institutionalized processing. The decision-making process is governed, not by the legislative intent of the legal act, but by other circumstances, such as the authority's own internal documents and internal decision-making processes. The decision-makers come from different professions, with different educational backgrounds, some of them are lawyers and some are not. Some have an educational backgrounds in social science and social work and some have other background.

Empirical studies shows that there are different norms used in different arenas on similar cases and a parallel norm creating process is a reality.<sup>40</sup> The municipalities refer to different standards when applying rules and principles in the decision-making process. Although internal norms and rules exist and are used in the municipalities, the decisions are in general goal-oriented and the decision-makers try to fulfil the legislative intent of the legislation. The Social Insurance Agency uses internal norms and guidelines and the bureaucrats working here are loyal to the organization's voluminous internal documents rather than to the legislative intent. The findings from the regional Administrative Courts of Appeal do not show a fixed number of legal standards but they almost always refer to the law in question and other legal documents in their decisions.<sup>41</sup>

To sum up, it is the Parliament that has the legislative power in the light of the Swedish Constitution, but it is the local authorities that have the power to make decisions in individual cases. Therefore, there is a problem when local standards sometimes are in conflict with the law and different authorities apply different standards on similar cases. Parallel norm creating processes is the result when the principle of legality doesn't comes in to play the main role. Further there are no sanctions when local authorities use internal norms instead of the legal sources and as a consequence good administration under the Constitution is not fulfilled.

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<sup>38</sup> Lipsky, M., *Street-level Bureaucracy*, Russel Sage Foundation, New York 2010, p. xiv.

<sup>39</sup> Erlandsson, L., *Law, Norms and the Rule of Welfare Law*, Lund Studies in Sociology of Law 44, 2014, pp. 107 ff.

<sup>40</sup> Åström, K., *Parallel Norm Creating Processes*, Ed. Baier, Social and Legal Norms, Ashgate England 2013, pp. 71 ff.

<sup>41</sup> Erlandsson, L., *Law, Norms and the Rule of Welfare Law*, Lund Studies in Sociology of Law 44, 2014, pp. 137 ff.

## 5. *Conclusions*

From the above follows that in Sweden the constitutional protection for social and labour rights has developed rather late. When it comes to fundamental labour rights the constitutional rules are more of a confirmation of a state of things that had developed in practice and legislation long before these rules appeared in the Constitution. The constitutional protection is also rather weak. In fact, the protection of fundamental freedoms and rights has traditionally not had a strong position in Sweden. The Swedish welfare state has had other points of departure than fundamental rights.

Constitutional law is not a strong instrument for social protection in Sweden due to the fact that social and welfare law is governed by different local authorities and the administrators are not lawyers. Judicial review according to the principle of legality are therefore often in conflict with local norms and guidelines.

Constitutional rights are rarely mentioned in Swedish courts. The administrative courts do not refer the principle of legality in their judgments. The Swedish Labour Court has during the last 20 years in a couple of judgments referred to the Constitutional right to take industrial action. When we looked at the table of contents in several text books concerning labour law and social law, constitutional law was not mentioned at all under the heading “Sources of law”.

The restrictions regarding industrial action and collective bargaining introduced in Sections 41c and 42a of the Co-determination Act implement the CJEU’s decision in the Laval-case where the Court gave preference of economic rights to labour rights.

For labour market rights the social partners uphold a system of additional benefits and a surveillance system. In the main, it is the trade unions that are responsible for controlling both that collective agreements and labour legislation are followed. It is the social partners that by means of collective bargaining and collective agreements give extra benefits such as additional sickness pay, additional parental benefits, redundancy arrangements etc. In times of declining union membership this system could be in danger. Still, because of high rate of unionization on the employers’ side the coverage of collective agreements is about 90 per cent.

The changes in social security rights, on the other hand, are results – more of awareness of misuse with human resources and misuse of tax money – than results of economic restrictions. Also political convictions about the possibility to move people from passive benefit receivers to active workers earning money and paying taxes by means of decreased social benefits play an important role. Nevertheless, we can conclude that the benefit level of at least some of the social insurance benefits not have followed changes in prices and wages and the cuts in sickness and unemployment benefits during the last years have had the effect that the part of the Swedish population depending on social welfare or different kinds of private insurances (often through the trade unions) has grown. Measures taken have had a greater impact on the most vulnerable groups.

In the introduction we mentioned that Sweden not has been very much affected by the economic crisis. In Sweden there is still a trust in the strong welfare society, and regarding labour market questions also trust in the labour market parties’ competence to bargain and conclude collective agreements. This could, of course, be some of the reasons for the Constitution playing such a minor role in Swedish social and labour law. It is not foreseen that the Constitution will have a larger role, at least not in the near future. In a longer perspective it is probable that constitutional rights will play a more prominent role. The main reason though for the few threats on social security and labour rights is the consensus in the Swedish society that although there might be a need for economic restrictions the welfare society should be protected.

## UKRAINE

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### THE RIGHT TO SOCIAL PROTECTION IN THE CONSTITUTION OF UKRAINE

*Dr. MYKHAYLO SHUMYLO*

With the declaration of independence by Ukraine in 1991, a new phase of the formation and consolidation of social rights started. The Constitution, adopted in 1996, determined in Article 1 that “Ukraine is a sovereign, independent, democratic, social, law-based state.” This provision was detailed in particular articles of Chapter II “Human and Citizen’s Rights, Freedoms and Duties” of the Constitution. For example, Article 46 states: “Citizens have the right to social protection that includes the right to provision in cases of complete, partial or temporary disability, the loss of the principal wage-earner, unemployment due to circumstances beyond their control and also in old age, and in other cases established by law.

This right is guaranteed by general mandatory state social insurance on account of the insurance payments of citizens, enterprises, institutions and organizations, and also from budgetary and other sources of social security; by the establishment of a network of state, communal and private institutions to care for persons incapable of work.

Pensions and other types of social payments and assistance that are the principal sources of subsistence, shall ensure a standard of living not lower than the minimum living standard established by law”.

If the given article establishes the right and gives the main types of social security, Article 48 of the Constitution indicates the qualitative characteristics of social protection: “Everyone has the right to a standard of living sufficient for himself or herself and his or her family that includes adequate nutrition, clothing and housing”.

Separately, the right to social protection for special categories of people is defined in the Constitution of Ukraine, namely, Part 5, Art. 17 states that “The State ensures the social protection of citizens of Ukraine who serve in the Armed Forces of Ukraine and in other military formations as well as of members of their families”.

It is known that Constitutional norms are of general, fundamental character, but to implement their provisions a series of legal acts are to be adopted. Therefore, we can say that the Constitution of Ukraine became the starting point in the formation of the block of legislation providing social security. New social legislation of Ukraine is built on the principles of social insurance, as defined by the Law of Ukraine “Basic Law of Ukrainian on compulsory social insurance” of 14.01.1998, No. 16 and the Law of Ukraine “On state social standards and state social guarantees” of 05.10.2000, No.2017. The Law of 14.01.1998, No. 16 on states that “Compulsory social insurance is a system of rights, obligations and guarantees stipulating the granting of social security, which includes provision to citizens in case of sickness, partial or complete disability, loss of breadwinner, unemployment under circumstances independent of the person’s will, as well as in old age and other cases provided for by law. These are guaranteed at the expense of

monetary funds formed of insurance premiums paid by owners or body empowered by him (hereinafter referred to as employer), citizens, as well as budgetary and other sources stipulated by law". These are the first basic social laws that can be divided into several groups:

- the first one comprises the social unemployment insurance (Law of Ukraine "On Mandatory State Social Unemployment Insurance" of 02.03.2000, No. 1533);
- the second group comprises insurance against temporary disability (Law of Ukraine "On Mandatory State Social Insurance against temporary disability and expenses related to burial" of 18.01.2001, No. 2240);
- the third group includes social insurance against accidents at work and occupational diseases (Law of Ukraine "On Mandatory State Social Insurance against accidents at work and occupational diseases that caused disability" of 23.09.1999, No. 1105);
- the fourth group includes legislation that determines pension benefits (Law of Ukraine "On Mandatory State Pension Insurance" of 09.07.2003, No. 1058, "On the private pension system" of 09.07.2003, No. 1058);
- the fifth group of social legislation includes regulations that define social assistance (Law of Ukraine "On Ensuring Organizational and Legal Conditions for Social Protection of Orphans and Children Deprived of Parental Care"<sup>1</sup> of 13.01.2005, No. 2342, "On the Basis of Social Protection of Homeless People and Street Children" of 02.06.2005, No. 2623, "On State Support to Families with Children"<sup>2</sup> of 21.11.1992, No. 2811, "On State Social Assistance to Disabled from Childhood and Disabled Children"<sup>3</sup> of 16.11.2000, No. 2109, "On State Social Assistance to Low-income Families"<sup>4</sup> of 01.06.2000, No. 1768, "On State Social Assistance to Persons Who Are Not Eligible for a Pension, and Disabled"<sup>5</sup> of 18.05.2004, No. 1727);
- the sixth group includes legislation governing the provision of social services (Law of Ukraine "On Social Services"<sup>6</sup> of 19.06.2003, No. 966);
- the seventh group includes social protection of certain categories of citizens (Laws of Ukraine "On the Victims of Nazi Persecution"<sup>7</sup> of 23.03.2000, No. 1584, "On Social Protection of Children of War"<sup>8</sup> of 18.11.2004, No. 2195).

Of course, this classification does not include a number of other laws and regulations, but we presented enough of them to see how the norms of the Constitution of Ukraine on the right to social security are reflected in the laws of Ukraine. From the abovesaid it can be concluded that consolidation in the Constitution of Ukraine of the right to social security greatly influences the development of social legislation. In fact, norms of the Constitution became a reference point for the creation of legislation providing social security. Today, the main task of the Ukrainian state is, basing on the Constitution, to fill the legislation with the content of high quality and high national social standards as well as international ones.

The Constitutional Court of Ukraine plays important role in ensuring compliance with the Constitution in general and social rights in particular, according to Article 1 of the Law of Ukraine "On the Constitutional Court of Ukraine" of 16.10.1996 , No. 422 – it is the sole organ of constitutional jurisdiction in Ukraine, the aim of which, according to Art. 2 of this law is securing the supremacy of the Constitution of Ukraine as the Fundamental Law of the State throughout Ukraine's territory. Precisely,

<sup>1</sup> <http://zakon1.rada.gov.ua/laws/show/2342-15>.

<sup>2</sup> <http://zakon4.rada.gov.ua/laws/show/2811-12>.

<sup>3</sup> <http://zakon4.rada.gov.ua/laws/show/2109-14>.

<sup>4</sup> <http://zakon1.rada.gov.ua/laws/show/1768-14>.

<sup>5</sup> <http://zakon4.rada.gov.ua/laws/show/1727-15>.

<sup>6</sup> <http://zakon2.rada.gov.ua/laws/show/966-15>.

<sup>7</sup> <http://zakon4.rada.gov.ua/laws/show/1584-14>.

<sup>8</sup> <http://zakon4.rada.gov.ua/laws/show/2195-15>.

the Constitutional Court of Ukraine is the organ that does not allow the narrowing of the content and scope of the existing rights and freedoms while adopting the new laws or amendments to the existing laws, including the regulations by the Cabinet of Ministers of Ukraine. In general, during its activity since October 18, 1996, the Constitutional Court of Ukraine adopted 18 resolutions that in one way or another related to the right to social security. Among them we can distinguish resolutions concerning compliance to the Constitution of the Laws of Ukraine on State Budget – 6 resolutions; on social protection of special categories of citizens (civil servants, law enforcement officers, prosecutors, military men, etc.) – 6 resolutions; on social protection of judges – 3 resolutions; concerning industrial accidents and occupational diseases – 2 resolutions; concerning temporary disability – 1 resolution; on jurisdiction of social affairs – 1 resolution; concerning payments of pensions to persons permanently residing abroad – 1 resolution. It is obvious that for a deeper understanding of the Constitutional right to social protection it is necessary to analyze in detail these resolutions.

The most quantity of resolutions of the Constitutional Court of Ukraine has been devoted to the constitutionality of the law on the State Budget. The point is that in the situation of permanent deficit of budget the State is trying to evade the execution of certain constitutional social guarantees.

To the resolutions of the Constitutional Court of Ukraine, which were examining the laws on State Budget, exactly in the part of social rights of citizens, we can refer the following ones:

- 1) concerning compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On State Budget of Ukraine for 2001”<sup>9</sup> (Case of benefits, compensation and guarantees) of 20.03.2002, No. 5/2002;
- 2) concerning compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On State Budget of Ukraine for 2004”<sup>10</sup> (the case of suspension of validity or limitation of benefits, compensation and guarantees) of 1.12.2004, No. 20/2004;
- 3) concerning compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On State Budget of Ukraine for 2007”<sup>11</sup> (the case of social guarantees for citizens) of 09.07.2007, No. 6/2007;
- 4) concerning compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On State Budget of Ukraine for 2008”<sup>12</sup> (on the subject matter and content of the State Budget of Ukraine) of 22.05.2008, No. 10/2008;
- 5) concerning compliance with the Constitution of Ukraine (constitutionality) of paragraph 4, section VII “Final Provisions” of the Law of Ukraine “On State Budget of Ukraine for 2011”<sup>13</sup> of 26.12.2011, No. 20/2011;
- 6) concerning official interpretation of certain provisions of the Constitution of Ukraine, the Budget Code of Ukraine, the Code of Administrative Procedure of Ukraine in the system connection with the specific provisions of the Constitution of Ukraine<sup>14</sup> of 25.01.2012, No. 3/2012.

The main conclusion of the Constitutional Court of Ukraine in the above resolutions was that the Law on the State Budget sets only revenues and state expenditures for social needs, and that is why the Law on the State Budget cannot cancel or modify the scope of rights and obligations, benefits, compensations and guarantees provided for by the other laws of Ukraine. In this connection, stopping by the Law on the State Budget of Ukraine of the effect of other laws of Ukraine concerning the provision of benefits, compensations and guarantees, of amendments to other laws of Ukraine, and establishing of

<sup>9</sup> <http://zakon3.rada.gov.ua/laws/show/v005p710-02>.

<sup>10</sup> <http://zakon3.rada.gov.ua/laws/show/v020p710-04>.

<sup>11</sup> <http://zakon2.rada.gov.ua/laws/show/v0a6p710-07>.

<sup>12</sup> <http://zakon2.rada.gov.ua/laws/show/v010p710-08>.

<sup>13</sup> <http://zakon2.rada.gov.ua/laws/show/v020p710-11>.

<sup>14</sup> <http://zakon1.rada.gov.ua/laws/show/v003p710-12>.



legal regulation of relations other (additional) than the legislation of Ukraine does not meet the norms of the Constitution of Ukraine.

As it can be seen from the above, the Government, in preparing the drafts of the State budget due to the economic crisis or the high deficit of the budget, has repeatedly tried to narrow down the content and scope of social rights guaranteed to citizens by the Constitution of Ukraine. The Constitutional Court of Ukraine has always responded negatively to such attempts by other branches of government and abolished this kind of norms of law. We can conclude that the court has guarded the rights and interests of citizens.

In addition, the Constitutional Court of Ukraine has repeatedly pointed out the unconstitutionality of the parliament's activity that with the budget for the current year suspends the effect of the legislation concerning the provision of social benefits and social guarantees. The Court has repeatedly stated that the withdrawal or suspension of provisions concerning social security is unconstitutional and the norms that implement such suspension become invalid from the date of delivering by the Constitutional Court of Ukraine of its resolution.

Usually the resolution of the Constitutional Court of Ukraine has always limited the executive and legislative powers in their effort not to provide the state social guarantees, but one of the latest resolutions by the Court of 26.12.2011, No. 20/2011 was of the opposite character. The reason for the departure of the Constitutional Court of Ukraine from its previous principles was sustainable economic crisis, although in recent years it has also been the cause of such unconstitutional activities of parliament and government.

The Constitutional Court of Ukraine stated that the socio-economic rights provided for by the laws are not absolute. The mechanism of implementation of these rights can be changed by the state, in particular, because of the impossibility of their financing through proportional redistribution of funds in order to maintain the balance of the whole society's interest. Besides, these measures may be due to the need to prevent or eliminate real threats to the economic security of Ukraine that, in accordance with Article 17 of the Constitution of Ukraine, is the most important function of the state. That is the wording with which the Constitutional Court of Ukraine upheld the narrowing of the content and scope of the constitutional right to social protection.

Great response and conflicting assessments provoked the resolution of the Constitutional Court of Ukraine concerning official interpretation of certain provisions of the Constitution of Ukraine, the Budget Code of Ukraine, the Code of Administrative Procedure of Ukraine of 25.01.2012, No. 3/2012. In terms of constitutional introduction, one of the hallmarks of Ukraine as a social state is the provision of the general-public needs in the area of social protection at the expense of the state budget of Ukraine based on the financial capacity of the state, which is obliged to fairly and impartially distribute social wealth between citizens and local communities and strive for balanced budget of Ukraine. Herewith the level of state guarantees of the right to social protection should conform to the Constitution of Ukraine, and the purpose and means of changing of the mechanism of calculation of benefits and assistance – to the principles of proportionality and fairness.

In addition, the Court pointed out that the powers of the Cabinet of Ministers of Ukraine to develop the draft-law on the State Budget of Ukraine and enforce the relevant law are related to its functions, including the implementation of policies in the sphere of social protection and other spheres. Cabinet of Ministers of Ukraine regulates the order and amounts of social payments and benefits, which are financed from the State Budget of Ukraine in accordance with the Constitution and laws of Ukraine.

Moreover, the Court noted that the courts in dealing with cases concerning social protection are governed, in particular, by the principle of legality. This principle envisages the application of the laws of Ukraine, as well as legal acts by the relevant state bodies issued on the basis and within their authority and in the manner envisaged by the Constitution and laws of Ukraine, including legal acts of the Cabinet of Ministers of Ukraine issued within its competence on the basis and in pursuance of the Budget Code of Ukraine, the Law on the State Budget of Ukraine for the corresponding year and other laws of Ukraine.

So, the Parliament adopted, and the Constitutional Court of Ukraine recognized to be corresponding to the Constitution of Ukraine, the provisions that restrict or suspend action of some norms of legislation guaranteeing the right, defined by the Fundamental Law of the state, to social security. Besides, the Constitutional Court allowed the Cabinet of Ministers of Ukraine to change certain amounts of social

benefits envisaged by the law on the State Budget by its acts. Thus leveling the general rules concerning validity of normative-legal acts, under which the Law is of higher validity than the Acts by Cabinet of Ministers of Ukraine.

Such a resolution of the Constitutional Court of Ukraine was not adopted unanimously, some judges made their reservations about such a legal position in separate opinions. Thus, Judge V. I. Shishkin, P. B. Stetsyuk, D. D. Lylak, M. A. Markush agree that the resolution under analysis has a number of contradictions. In a separate opinion Judge V. I. Shishkin noted:

Firstly, such “innovations” distorted conceptual direction and substance of the prescriptions by Art. 3 of the Constitution of Ukraine on the State’s obligations to the person as the highest social value, not the opposite – a person to public authorities.

Secondly, this statement requires, as a minimum, the disclosure of such multidimensional thesis as “financial capacity” at the interdisciplinary scientific level, but not just at the level of legal analysis, which in its turn, causes a variety in its interpretation, including outside the scope of law and powers of the Constitutional Court of Ukraine.

Thirdly, the provisions of the resolution part regarding the legal effect of bylaws evokes not less critical remarks. This interpretation brings imbalance into established court practice that with the adoption of the Constitution of Ukraine in 1996 was based on a clear understanding of the rule of Constitutional provisions. Besides, the Constitutional Court of Ukraine actually brought the status of the Cabinet of Ministers of Ukraine at the level of the legislature by requiring courts of general jurisdiction to apply directly the provisions of bylaws, not paying attention to the law, while considering social cases.

However, the decision is made and it is binding throughout the whole territory of Ukraine, final and cannot be appealed. Although, in our opinion, this decision caused considerable damage to the system of protection of human rights in general and the implementation by the state of its obligations in terms of the right to social protection in particular.

Many resolutions concerning social cases, the Constitutional Court of Ukraine brought concerning the right to social protection of special categories of citizens (civil servants, police officers, prosecutors, military men, etc.).

The resolutions of the Constitutional Court of Ukraine which guarantee the inviolability of the social protection of special categories of citizens include the following ones:

- 1) concerning official interpretation of the provisions of Part 6 of Article 22 of the Law of Ukraine “On Militia” and Part 7 of Article 22 of Law of Ukraine “On Fire-fighting Service”<sup>15</sup> (case concerning the right to benefits) of 06.07.1999, No. 8/99;
- 2) concerning the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On State Budget of Ukraine for 2000”<sup>16</sup> (the case concerning benefits, compensations and guarantees) of 20.03.2002, No. 5/2002;
- 3) concerning the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On State Budget of Ukraine for 2003”<sup>17</sup> (the case on social protection of military men and law enforcement officers) of 17.03.2004, No. 7/2004;
- 4) concerning compliance with the Constitution of Ukraine (constitutionality) of certain amendments to legislature on military pensions of the Law of Ukraine “On Amendments to Article 43 of the Law of Ukraine “On pensions to military personnel, officers higher and low ranks of the bodies of Internal Affairs and some others” and the official interpretation of the provisions of paragraph 3 of Article 43, Articles 51, 55, paragraph 3 of Article 63 of the Law of Ukraine “On pensions to persons retired from military service, and some others”;<sup>18</sup>

<sup>15</sup> <http://zakon2.rada.gov.ua/laws/show/v008p710-99>.

<sup>16</sup> <http://zakon1.rada.gov.ua/laws/show/v005p710-02>.

<sup>17</sup> <http://zakon2.rada.gov.ua/laws/show/v007p710-04>.

<sup>18</sup> <http://zakon3.rada.gov.ua/laws/show/v003p710-07>.

- 5) concerning compliance with the Constitution of Ukraine (constitutionality) of paragraph 10 of the Resolution of the Cabinet of Ministers of Ukraine “Some issues of social protection of certain categories of citizens”<sup>19</sup> of 8.09.2009, No. 19/2009;
- 6) concerning official interpretation of part 13 of Article 37 of Law of Ukraine “On Civil Service” in systematic connection with provisions of paragraph 2 of parts 1, 2, of Article 40 of the Labour Code of Ukraine, Article 21 of the Law of Ukraine “On the Fundamentals of social protection of veterans of labor and other elderly people in Ukraine”<sup>20</sup> of 26.11.2013, No. 11/2013.

The prevailing idea of these resolutions is the thought that service in the police, the State Fire Service, armed forces provides a number of specific requirements, as reflected in the legislation. The norms governing social relations in these areas, take into account the extreme conditions related to constant risk to life and health, stringent discipline, occupational competence, professional, physical, strong-willed, and other qualities. This has to be compensated with the availability of increased guarantees of social protection, i.e. the complex of organizational, legal and economic measures aimed at ensuring the welfare of exactly this category of people both during the service and after its completion. Part 5 of Article 17 of the Constitution of Ukraine imposes the responsibilities for social protection of not only these people but also their families on the state.

Hence, the Constitutional Court of Ukraine has repeatedly suspended the norms of Laws on the State Budget, which narrowed, in this or that part, the right of these persons to social protection.

To a separate group we should allocate resolutions of the Constitutional Court of Ukraine on social protection of judges, namely:

- 1) concerning the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On Mandatory State Pension Insurance” and the official interpretation of the provisions of paragraph 3 of Article 11 of the Law of Ukraine “On the Status of Judges”<sup>21</sup> (the case concerning the level of pension and monthly lifetime monetary allowance) of 11.10.2005;
- 2) concerning the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On State Budget of Ukraine for 2011”<sup>22</sup> of 26.12.2011, No. 20/2011;
- 3) concerning the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On Measures of Legislative Provision of the Pension System Reform,” Article 138 of the Law of Ukraine “On the Judicial System and Status of Judges”<sup>23</sup> (case concerning changes of the pension payment and monthly lifetime monetary allowance of retired judges) of 06.03.2013, No. 3/2013 and other resolutions that have already been analyzed above. The main issues raised in these resolutions was to preserve the existing and prevent future narrowing of the content and scope of the right to social protection of judges.

Important place in the constitutional justice is taken by the resolutions which determine these or those aspects of social protection of workers suffering from results of industrial accident or occupational disease, among which are the following:

- 1) the official interpretation of the provisions of Paragraph 3 of Article 34 of the Law of Ukraine “On Mandatory State Social Insurance against accidents at work and occupational diseases that caused disability”<sup>24</sup> (the case concerning indemnification of punitive damages effected by the Fund social insurance) of 27.01.2004, No. 1/2004 according to which the provision of the mentioned above law does not preclude the obligation of the Fund to compensate moral damage caused by the conditions of work, in other cases where the right of the insured to compensation of moral (non-property) damages caused by the conditions of work must be made by the Fund.

<sup>19</sup> <http://zakon4.rada.gov.ua/laws/show/v019p710-09>.

<sup>20</sup> <http://www.ccu.gov.ua/doccatalog/document?id=227660>.

<sup>21</sup> <http://zakon2.rada.gov.ua/laws/show/v008p710-05>.

<sup>22</sup> <http://zakon4.rada.gov.ua/laws/show/v020p710-11>.

<sup>23</sup> <http://zakon4.rada.gov.ua/laws/show/v003p710-13>.

<sup>24</sup> <http://zakon4.rada.gov.ua/laws/show/v001p710-04>.

- 2) for compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On Insurance Rates for mandatory social insurance against accidents at work and occupational diseases, which caused disability,” “On Amending the Law of Ukraine “On Mandatory State social insurance against accidents at work and occupational diseases that caused disability”<sup>25</sup> (the case concerning insurance premiums) of 8.10.2008, No. 20/2008.

Controversial resolution was brought by the Constitutional Court of Ukraine concerning compliance with the Constitution of Ukraine (constitutionality) of the provisions of Paragraphs 1, 2 of Article 2 of the Law of Ukraine “On the installment rates for certain types of obligatory state social insurance”<sup>26</sup> (the case concerning assistance for temporary disability) of 17.03.2005, No. 1/2005. By these resolutions it is recognized to be in line with the Constitution of Ukraine (constitutional) of the provision of certain norms of this Act, according to which the allowance for temporary disability due to illness or injury not related to an accident at work is paid to the insured persons by the Social Insurance Fund, for temporary disability from the sixth day of disability for the entire period until rehabilitation or establishment by a medical-social expert commissions of disability regardless of the retirement of the insured person during the period of disability in the manner and amount prescribed by law. The first five days of temporary disability due to illness or injury not related to an accident at work are paid by the employer. However, not all the judges agreed with this legal position and in a separate opinion Judge V. Shapoval stresses that Paragraph 1 of Article 46 of the Constitution of Ukraine provides for the right of citizens to social security, including, in particular, the right to security in the event of temporary disability. According to the resolution, temporarily disabled citizens during the first five days of their disability are actually deprived of the right to require from the State the allowance provided by the Constitution of Ukraine and can apply with such an aim only to the respective employer. Besides, the right to receive from the state allowances for temporary disability for the mentioned five days is not given to persons participating in mandatory state social insurance on a voluntary basis, self-employed (members of artistic unions; artists, non-members of artistic unions), individuals who are registered as business entities, and persons who perform work (services) in accordance with the civil-law agreements, and certain other categories of citizens who for mandatory state social insurance concerning temporary disability and expenses related to the birth and burial, pay 3.4 % of taxable income (profit). We cannot agree with such resolution of the Constitutional Court of Ukraine as the Law defined an employer to be the subject of the respective responsibilities instead of the state, as a result of which the constitutional relationship turn into civil-legal ones, and the constitutional right of the citizen – into the usual subjective right of an individual. In addition, a significant number of people are actually deprived of special, that is connected with their right, stipulated in paragraph 1 of Article 46 of the Constitution of Ukraine, constitutional guarantee – provision of assistance through the mandatory state social insurance.

The following fact is important – the law cannot release the State (even partially) from the constitutional duty concerning implementation of the citizens’ right to social security, in particular from paying social benefits and providing assistance.

Absolutely fair is the resolution of the Constitutional Court of Ukraine concerning the conformity with the Constitution of Ukraine (constitutionality) of the provisions of Paragraph 2 of Part 1 of Article 49, the second sentence of Article 51 of the Law of Ukraine “On Mandatory State Pension Insurance”<sup>27</sup> of 10.07.2009, No. 25/2009. The constitutional petition raised the issue of the unconstitutionality of certain provisions of the Law of Ukraine “On Mandatory State Pension Insurance” concerning suspension of payment of pensions to pensioners currently residing abroad if Ukraine has not concluded with the corresponding State the International Agreement on Pensions and if the Verkhovna Rada of Ukraine has not given consent that such International Agreement is to be binding.

<sup>25</sup> <http://zakon4.rada.gov.ua/laws/show/v020p710-08>.

<sup>26</sup> <http://zakon4.rada.gov.ua/laws/show/v001p710-05>.

<sup>27</sup> <http://zakon2.rada.gov.ua/laws/show/v025p710-09>.

In this case, the Court pointed out that by the impugned provisions of the Law the constitutional right to social protection is made dependent on the fact of concluding of the International Agreement on Pension provision between Ukraine and the corresponding State. Thus the state, despite constitutional guarantees of social protection for all persons who are entitled to a pension in old age, at the legislative level deprived pensioners of this right in cases when they have chosen as their permanent place of residence a country, with which such an Agreement had not been concluded. Based on the legal, social nature of pensions citizen's right to receive the assigned him pension cannot be associated with such condition as permanent residence in Ukraine. The State in accordance with the constitutional principles must guarantee this right irrespective of where a person to whom a pension is assigned lives – in Ukraine or abroad.

Because of the mentioned reasons – the provisions of the law to stop paying pensions to pensioners at the time of residence (stay) abroad, if Ukraine has not concluded with this State International Agreement, contradicts the norms of the Constitution of Ukraine.

One of the key resolutions of the Constitutional Court of Ukraine deals with compliance with the Constitution of Ukraine (constitutionality) of the provisions of the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine regarding jurisdiction of cases related to social benefits”<sup>28</sup> of 9.09.2010, No. 19/2010. Its essence is in the fact that since the creation of administrative courts (public law disputes) and the entry on September 1, 2005 into force of the Code of Administrative Procedure of Ukraine, all public law disputes in which at least one party is an authority are referred to the jurisdiction of administrative courts. Such a scope of subject-matter jurisdiction contained legal disputes related to social benefits, if the respondent in the case was any of the mentioned bodies or officials – an authority.

Law of Ukraine of December 25, 2008 No. 808 -VI introduced amendments to the Code of Administrative Procedure of Ukraine, according to which local courts of general jurisdiction started to hear the disputes related to social benefits, in the order of administrative proceedings. Instead, the Parliament irrationally adopted the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine regarding jurisdiction of cases related to social benefits”<sup>29</sup> of 18.02.2010, No. 1691, under which the cases concerning social protection will be considered in the order of civil proceedings. By its resolution, the Constitutional Court of Ukraine recognized changes concerning the jurisdiction of social cases to civil proceedings to be unconstitutional and returned them for consideration to administrative justice.

The Supreme Administrative Court of Ukraine makes significant contribution to the improvement of judicial practice concerning the review pension cases; it summarizes judicial practice and promotes proper use of pension legislation that enables a person to exercise his constitutional right to a pension. An example of this generalization is a Surveying Newsletter “On the practice of use of law on pension provision (based on cases considered by the Supreme Administrative Court of Ukraine in the order of cassation)”<sup>30</sup> of 14.08.2008, No. 1406/100/13-08.

Thus, as it can be understood from the reviewed resolutions of the Constitutional Court of Ukraine, in most cases the Court protects and prevents narrowing of the content and scope of the right to social security. Some opposite resolutions, are probably motivated by political factors, but they are not the dominant.

Talking about the future development of system of social rights and the boundaries of their extension, we can make an unambiguous conclusion that Ukraine is under the influence of global trends that are existing. Obviously, the twentieth century was the century of consolidation and affirmation of the right to social security. In fact, in the twentieth century the index of social rights formed, it is not exhaustive and will be supplemented in connection with the development of society. Basic social rights have not only been just consolidated in the constitutions of the states of the world, but have become common in the mass consciousness of citizens. In the twentieth century high standards of social protection were incorporated, which Ukraine is just trying to achieve. In the twentieth century, there are new challenges, among which the main are the economic crisis, globalization, population aging, unemployment, migration, wars, refugees,

<sup>28</sup> <http://zakon1.rada.gov.ua/laws/show/v019p710-10>.

<sup>29</sup> <http://zakon2.rada.gov.ua/laws/show/1691-17>.

<sup>30</sup> <http://zakon4.rada.gov.ua/laws/show/v1406760-08>.

and others. The aim of Ukraine is to keep social standards and to develop them to the level of standards of the European Union and the International Labour Organization. Global trend that can be observed in Ukraine as well is departure from the concept of paternalistic social state, according to which the burden of social protection lies on the state, especially acute this problem is in Ukraine. This trend is inevitable, rather slowly, but the state is moving away from the paternalism, which is interpreted as material welfare of all citizens, without exception, who are in trouble in the form of direct payments from the state budget. Today in Ukraine we can observe the emergence neo-paternalistic state, in which the social function is performed by the wider use and extension of methods of implementation of social policy, based on the prevention of social risks. Such a state is intended to encourage maximum employment activity of able-bodied citizens, and while ensuring pensioners and unemployed vicariously solve these problems as by the state and by non-governmental organizations. Besides, future Social Security recipients should be aware of the fact that the presence and size of social benefits depends on their active work and participation in social insurance. The basis of the new approach to the development of the social state should be, above all, the principle of personal responsibility of citizens. Everyone should do his best to maintain his standard of living now and in the future. Exactly the introduction into the Labor and Social-providing legislation interim principle of personal responsibility for one's financial security in the event of old age and disability will be decisive in the formation of a new paradigm of the country of social well-being. Under these conditions the State is being modified from the provider of social protection into a guarantor of social protection, regulator and organizer of the effective functioning of social protection of citizens.

## UNITED KINGDOM

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### A MEANINGFUL RIGHT TO SOCIAL SECURITY IN THE UNITED KINGDOM: BEYOND THE POLICIES AND POLITICS OF AUSTERITY?

*Prof. ELLIE PALMER*

#### *Introduction*

Welfare systems have the core aims of reducing destitution, providing for social contingencies and promoting greater income and consumption equality.”<sup>1</sup>

Irrespective of the model designed to deliver welfare goals,<sup>2</sup> since World War II, in Europe and beyond, it has been widely accepted that states have obligations to provide a normative and administrative legal framework, whereby basic necessities of social organization, personal welfare and development can effectively be met within the constraints of available resources.<sup>3</sup> Welfare law therefore, has not only served as a framework for the delineation of government obligations, guaranteeing access to individual entitlements when prescribed conditions are met. It also legitimates the bureaucratic decision-making tasks involved in the administration and fair distribution of socio-economic benefits.

Notably however, in the United Kingdom, since the early eighties, broader economic and social goals of collective economic progress and personal social responsibility have challenged traditional understandings about the extent of states’ responsibilities to provide a universal safety net of socio-economic provision, in accordance with individual needs.<sup>4</sup> Moreover, the contracting out of diverse areas of welfare and increased involvement of private actors in the delivery of services, have not only altered the relationships between state, providers and citizens,<sup>5</sup> but added further layers of complexity and uncertainty to the law.<sup>6</sup> Indeed, it is now recognized that the complexity of the UK welfare system has become one of its defining features; most clearly reflected in the law relating to social security – a

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<sup>1</sup> D. Ghai, *Social Security Priorities and Patterns: A Global Perspective* DP 141/2002 (Geneva ILO) .

<sup>2</sup> See G. Esping Andersen, *The Three Worlds of Welfare Capitalism*, (Cambridge Polity Press 1990) for the development of a threefold typology of the welfare state (conservative; liberal; and social democratic).

<sup>3</sup> N Timmins: *A Biography of the Welfare State* (1995).

<sup>4</sup> Arguably the UK welfare state has now moved into the liberal category (above at n. 4) typified by the USA where universalism is limited, means testing predominates and private provision is encouraged. See N Harris, *Law in a Complex State: Complexity in the Law and Structure of Welfare* (Hart, Oxford, 2013) p. 5.

<sup>5</sup> See P Vincent-Jones, *The New Public Contracting: Public Versus Private Ordering?* (2007) 14(2) *Indiana Journal of Global Legal Studies* 2009.

<sup>6</sup> See N Harris, ‘Welfare’s Mixed Economy in the UK: Public Rights and Private Actors’ in F Pennings, T Erhag and S Stendhal eds. *Non Public Actors in Social Security Administration* (Volters Klewer, 2013) p 159.

labyrinthine web of benefit schemes and administrative processes that determine access to individual entitlements.<sup>7</sup>

Moreover, it is also notable that, in the United Kingdom, maintenance of citizens' welfare through provision of financial support has become the largest single area of government expenditure,<sup>8</sup> 'making it highly sensitive to national economic pressures, as well as to ideological forces directed at limiting the role of the state'.<sup>9</sup> Therefore, for the past three decades, successive government reforms of social security have been strongly influenced, if not wholly driven, by the desire to contain and where possible reduce such escalating burdens on the public purse. Furthermore, whether by design or merely as 'an unintended consequence of a reduction of a benefit's sensitivity to individual circumstances',<sup>10</sup> efforts at structural simplification have often resulted in a shift of resources from vulnerable claimant groups, to those with the potential to exercise greater political pressure.<sup>11</sup>

Against this background, it is not surprising that wholesale reform of the social security system under the Welfare Reform Act 2012, and other punitive reforms such as the bedroom tax, introduced by the Conservative-led Coalition government in the midst of the economic downturn, with the purported aims of structural simplification and 'getting people back to work', had until recently enjoyed broad cross party support. However, from the outset, social policy experts had argued that the reforms reflected a more constrained and qualitatively different deal for citizens than envisaged by the architects of the post World War II welfare state.<sup>12</sup> Concerns had therefore been raised about the degree of conditionality inherent in the system,<sup>13</sup> the prevailing characterization of vulnerable claimants as inappropriately benefit dependent; and a lack of realistic opportunities for young people and other vulnerable individuals to engage in labour markets; especially in a recessionary climate.<sup>14</sup> Moreover, critics identified weaknesses in the design and operation of universal credit that could cause short term fluctuations in household incomes; with potential to push vulnerable claimants and their families into destitution.<sup>15</sup>

Thus, as the system of universal credit has gradually been rolled out, it is clear that the Welfare Reform Act 2012 and cost-cutting measures such as the bedroom tax, restriction of entitlement to housing benefit for EEA nationals,<sup>16</sup> an unfettered sanctions regime and tougher functional tests for sickness-related benefits, have combined to reduce income for vulnerable individuals and households reliant on benefits to supplement poverty wages. Moreover, problematically, during the same period, The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) has restricted both the ability to secure individual remedies and the ability of practitioners to challenge government policy in order to

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<sup>7</sup> See N. Harris *Law in a Complex State: Complexity in the Law and Structure of Welfare* (Hart, Oxford 2013). The Government White Paper, *Universal Credit: Welfare that Works*, (Department for Work and Pensions) DWP, (CM 7957) characterised the existing UK social security system as 'an array of benefits each with its own rules and criteria interacting in complicated ways, creating perverse incentives and penalties, confusion and administrative costs.' P 7.

<sup>8</sup> J. Wenchao P Levell and D Phillips, *A Survey of the UK Benefits* (London Institute for Fiscal Studies 2010) .

<sup>9</sup> N. Harris, above at n. 9, p 13.

<sup>10</sup> Harris *ibid* , p.25.

<sup>11</sup> S. Mc Kay, 'Benefits, Poverty and Social Justice', *Journal of Poverty and Social Justice*, Vol 22,(1), February 2014, pp. 3-10(8).

<sup>12</sup> See P Dwyer and S. Wright, 'Universal credit ubiquitous conditionality and its implications for social citizenship,' *Journal of Poverty and Social Justice*, vol. 22 no 1 27-35, *Policy Press* 2014.

<sup>13</sup> See Ruth Lister, 'The Age of Responsibility: Social Policy and Citizenship in the Early 21st Century' in C Holden, M Kilkey, and G Ramia (eds.) *Social Policy Review* 23 (Bristol Policy Press 2012) 79.

<sup>14</sup> D Owen, L Gambin, C. Hasluck, C Lyolette B. Casey, *The Equality Impacts of the Current Recession*, (2009) Equality and Human Rights Research Report: [http://www.equalityhumanrights.com/sites/default/files/documents/research/47\\_the\\_equality\\_impacts\\_of\\_the\\_current\\_recession.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/research/47_the_equality_impacts_of_the_current_recession.pdf), last accessed 29-01-15.

<sup>15</sup> A Tarr, D Finn, *Implementing Universal Credit: will the reforms improve the service for users?* (2012) Joseph Rowntree Foundation Report: <http://www.cesi.org.uk/publications/implementing-universal-credit-will-reforms-improve-service-users> access 29-01-15.

<sup>16</sup> Housing Benefit (Habitual Residence) Amendment Regulations 2014, Adjudication and Operations HB Circular, A6/2014 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299052/a6-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299052/a6-2014.pdf) accessed 25-01-15.



secure more compassionate incremental developments in the case law<sup>17</sup> Nevertheless, having failed to persuade government of the normative importance of a rational evidence-based approach to evaluating the impact of draconian cost-cutting measures on the living standards of socially marginalized and vulnerable individuals, strategic challenges have continued to be mounted in administrative courts and tribunals across the United Kingdom.<sup>18</sup>

In the unwritten constitution of the United Kingdom, sensitive policy issues concerning fairness in the distribution and administration of public resources have long been regarded as the preserves of the elected organs of government and not of courts. Moreover, it is also clear, that in determining the scope of government welfare duties, difficulties in the interpretation of malleable concepts such as “human need” or “poverty” have been compounded by a complex legal framework of broad statutory discretions and mandatory rules, that have been criticized in equal measure, for undermining the potential to hold government to account on one hand, and the realization of social justice in individual cases on the other.<sup>19</sup> However, since statutory welfare duties have most usually been framed in terms of overriding administrative discretion, judicial review challenges against government for failure to provide have generally been regarded as non-justiciable.<sup>20</sup> It is also well established however, that since the enactment of the Human Rights Act (HRA) 1998, in the unwritten constitution of the United Kingdom, there has been increased potential for a more intensive justificatory review of the fairness of government welfare policies than traditionally provided by the principles and procedures of administrative law.<sup>21</sup>

Moreover, during the past two decades, incremental development by the ECtHR of positive socio-economic duties in the ECHR rights, has at times resonated with the notion of entitlement embedded in the European Social Charter,<sup>22</sup> the EU charter of Fundamental Rights<sup>23</sup> and in key UN and ILO instruments to which the UK is signatory.<sup>24</sup> Furthermore, the judgment of the ECtHR in the case of *M.S.S. v Belgium and Greece*<sup>25</sup> has recently confirmed<sup>26</sup> that even beyond the prison gates, the State’s responsibility to provide an appropriate level of financial support for vulnerable claimants may be engaged under Article 3 ECHR, when an applicant, who is wholly dependent on State support, finds herself faced with *official indifference* in a situation of serious deprivation or want that is incompatible with human dignity.

Against this background, this article turns to explore the parameters of a meaningful constitutional right to social security in the unwritten constitution of the United Kingdom; one that has the potential, to be used as a legal instrument of social protection against the hazards of destitution and the rolling back of the welfare state. Moreover it is notable that, without underplaying the important symbiosis between non-judicial and judicial mechanisms of accountability<sup>27</sup> emphasis has been placed on the role of courts.

<sup>17</sup> Lorna Reid, ‘Thirteen Years of Advice Delivery in Islington: A Case Study’, E Palmer, T Cornford, A Guinchard and Y Marique ed. *Access to Justice: beyond the policies and politics of austerity* (Hart, Oxford, 2016) 143

<sup>18</sup> See Part III of this Chapter.

<sup>19</sup> D.J. Galligan (ed) *Judicial Review of Administrative Action in English Law* (Giuffrè 2008).

<sup>20</sup> Jeff A King, ‘the Justiciability of Resource Allocation’, Vol. 70, Issue 2, March 2007; E Palmer, ‘Resource Allocation and Welfare Rights: Mapping the Boundaries of Judicial Restraint in Public Administrative Law’ (2000) OJLS Vol. 20 pp 63–68; E Palmer, M. Sunkin, ‘Needs Resources and Abhorrent Choices’ 61 (1998) MLR 401–14. But compare the recent Supreme Court resource allocation decision in *R (KM) v Cambridgeshire County Council* (2012) UKSC (qualifying the Barry case on the interpretation of the Chronically Sick and Disabled Persons Act 1970).

<sup>21</sup> Jeff A King, *Judging Social Rights* (CUP 2012) Palmer, *Judicial Review Socio-economic Rights and the Human Rights Act 1998* (Hart, Oxford 2007).

<sup>22</sup> Article 12 European Social Charter (Revised) 1996.

<sup>23</sup> Article 34, Charter of Fundamental Rights of the European Union (2000/C 34/61); Yet, for the limiting effects of Protocol 30 on the UK’s Charter obligations see S. Peers, The “Opt-Out” that Fell to Earth: the British and Polish Protocol Concerning the EU Charter of Fundamental Rights (2012) 12(2) *Human Rights Law Reports* 375.

<sup>24</sup> UN treaties.

<sup>25</sup> Above at n. 1.

<sup>26</sup> See *Budina v Russia*, no. 45603/05.

<sup>27</sup> Generally see E Palmer, T. Cornford, A Guinchard and Y. Marique (eds) *Access to Justice: beyond the policies and politics of austerity* (above at n. 17).

Thus, adjudication of common European wide issues such as the legality of caps on pension cuts, differences in levels of pension provision for men and women as in *Stec and Others v the United Kingdom*<sup>28</sup> the rights of asylum seekers, refugees and other vulnerable people to receive a level of support that is consistent with the human right to be treated with dignity will be addressed. Furthermore, UK specific issues, including the detrimental impact of work capability assessments (WCA's) on benefits of vulnerable claimants, and the legality of punitive policies, such as the so called 'bedroom tax' introduced at the height of the recession, will also be considered. Moreover, although we have focused primarily on questions about the willingness of the ECtHR and EU institutions to promote greater income and financial equality,<sup>29</sup> and the development of common standards across the European region,<sup>30</sup> we are also mindful of the significant role that has been played by the UN treaty bodies in this regard.<sup>31</sup>

The chapter is in three main parts. Part I examines the scope of the duty to provide financial support (as opposed to benefits in kind) through the development of positive socio-economic obligations in the ECHR; focusing in particular on the approach of the ECtHR to the interpretation of Articles 6, 14, Article 1 Protocol 1, and the duty to provide financial support under Article 3 ECHR; mention having been made of Article 34 of the EU Fundamental Charter where relevant.

Part II turns to evaluate the approach of administrative courts, in key challenges that, during the past decade or more, have tested the scope of government duties to provide appropriate levels of financial support consistent with the dictates of UK non-discrimination and equalities legislation on one hand, and obligations under the ECHR and the Fundamental Charter on the other. Thus, focussing on ECtHR developments relating to financial benefits (as opposed to benefits in kind) under Articles 6, Article 14 standing alone or in conjunction with A1P1, it recognizes the obstacles raised by the entrenched resistance of the ECtHR to intervene in socio-economic policy decisions of national courts. However it concludes that in accordance with the robustly humanitarian approach of the ECtHR in *MSS v Belgium and Greece*,<sup>32</sup> in European states, where vulnerable individuals are required to live for indeterminate periods at the margins of human existence; without expectations of shelter, access to basic living needs, or the wherewithal to acquire them, there may be an avenue of redress under Article 3 ECHR.

Part III focuses on incremental developments in the United Kingdom, in key test cases concerning the detrimental impact of social security reforms and other national cost cutting measures such as the 'bedroom tax' on categories of vulnerable individuals and households that have been pushed into poverty as a result of the wholesale reform of the welfare system.

It is argued that despite continuing reluctance of UK courts to engage in the review of government socio-economic policies, recent challenges in the Supreme Court have demonstrated the potential successfully to challenge the discriminatory implications of the wholesale reform of the welfare system, in accordance with Article 14 ECHR used in conjunction with A1. P1, and in accordance with the primacy of the "best interests of children" under Article 3(1) UNCRC; thereby paving the way for further challenges.

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<sup>28</sup> 2005-X; 41 EHRR SE18 Admissibility decision; For a comprehensive review of Strasbourg jurisprudence following *Stec v UK*, see Ingrid Leijten, 'From *Stec* to *Valkov*: Possessions and Margins in Social Security Case Law of the European Court of Human Rights', *Human Rights Law Review* 13:2 (2013), 309-349.

<sup>29</sup> See Regulation 883/2004 on the coordination of social security systems; (corrected version [2004] OJ L 200/1; and Article 42 EC Treaty (now Article 48 of the Treaty on the Functioning of the European Union post the treaty of Lisbon). See RCA White *The New Social Security Regulations in Context* (2010) 17 *Journal of Social Security Law* 144. See also Directive "004/38, 29 April 2004, on the Right of the Citizen and Family Members to move and reside freely within the territory of the member states [2004] OJ L 158/77; and P Minderhoud, 'Directive 2004/38 and Access to Social Assistance Benefits' (2011) 18(4) *Journal of Social Security Law* 153. But see UK restrictions under Housing Benefit (Habitual Residence) Amendment Regulations 2014, (above at note 18).

<sup>30</sup> There are no established international standards by which to measure the provision of social security which depends on the level of provision allocated by the state. In the EU region Article 12, the Revised EU Charter (to which the UK is not a signatory) requires 'maintenance by a state of social security at a satisfactory level' but expects the level to be at least equal to that prescribed in the European Code of Social Security.

<sup>31</sup> The CESCR; CEDAW; UNCRC; UNDRP

<sup>32</sup> Above at n.1.

## Part I

### *Material and Financial Social Security Rights: the European Region*

By contrast with other European states, substantive socio-economic rights of the kind delineated in Articles 9-14 of the International Covenant on Economic Social and Cultural Rights (ICESCR) or in Article 34 of the European Charter of Fundamental Rights do not have formal protection in the United Kingdom constitution. Thus, despite continuing appeals by academic commentators, that, in resolving welfare needs disputes, UK courts should have regard to relevant provisions in UN treaties to which the UK is signatory, human rights advocates have primarily had recourse to the ECtHR or, where relevant to the EU Fundamental Charter of Rights, which is binding on UK courts.

Thus, for the past three decades, the ECtHR has increasingly been faced with questions from UK courts (as from other jurisdictions) concerning the boundaries of state responsibilities for meeting basic human needs, such as life-prolonging treatment for terminally-ill patients, facilities to increase the ability of people with disabilities to live a fulfilling life in the community, or for making basic provision including shelter, for those who have suffered extreme deprivations or psychological injury as a result of conduct by the state, its agents, or third parties.<sup>33</sup> Moreover, during the past decade or more, there has also been a notable rise in the number of complaints concerning the fairness of financial benefits (as opposed to benefits in kind)<sup>34</sup> of the kind protected by Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) or by Article 12 of the Revised European Social Charter (ESC) 1996<sup>35</sup> even where the vulnerability or social deprivation of individual claimants has not been at issue. The following section considers the significance of this trend; in the context of leading complaints before the ECtHR, grounded on Article 6, Article 14 and 1 Protocol 1, standing alone or in conjunction with Article 14 ECHR. It is argued that, despite willingness by the ECtHR to interpret the ECHR in accordance with state obligations which give rise to legally enforceable possessory claims, the degree of deference afforded to national courts, militates against the success of such claims in UK courts.

#### *Article 6 ECHR: procedural rights: access to socio-economic entitlements*

The right to free legal assistance as a ‘social’ dimension of the right to a fair trial was first emphasized by the ECHR in *Airey v Ireland*.<sup>36</sup> Moreover, since then, the ECtHR has continued to recognize, that specific guarantees protected by Article 6, such as the right to an oral hearing or legal aid, can be crucial in assisting disadvantaged individuals to gain access to assistance that might otherwise be denied in criminal proceedings.<sup>37</sup>

However, Article 6 does not apply to all proceedings – only to those concerning the ‘determination of civil rights and obligations’ or ‘a criminal charge’ – and, that in interpreting these concepts the ECHR has given them ‘autonomous meanings’ that in many cases depart from their meanings in domestic law. Thus, gradually, the scope of the concept of ‘civil rights and obligations’ in Article 6, has been widened to encompass a right of access to courts or tribunals in public law disputes over most discretionary

<sup>33</sup> See L Clements and A Simmons, “European Court of Human Rights: sympathetic unease”, in Langford, *Social Rights Jurisprudence*, n. 5 above; E Palmer, “Protecting socio-economic rights through the European Convention on Human Rights: trends and developments in the European Court of Human Rights” (2009) 2 *Erasmus Law Review* 397.

<sup>34</sup> See *Carson v UK* (2009) 48 EHRR 41. The case concerned the general policy of the United Kingdom to pay index-linked pensions to residents while refusing to up-rate in the case of pensioners abroad unless they were resident in countries having reciprocal agreements with the UK.

<sup>35</sup> Article 12 (4) states: “The Parties undertake . . . to take steps by the inclusion of bilateral agreements and multi-lateral agreements . . . to ensure equal treatment of their own nationals and the nationals of other parties . . . in respect of social security rights including the retention of benefits arising out of social security legislation whatever movements the persons undertake between the territories of the parties.

<sup>36</sup> (1979) 2 EHRR 305.

<sup>37</sup> Article 6(3)(c) guarantees the right to a person charged with a criminal offence to have access to practical and effective legal assistance. See *Lundevall v. Sweden*, Application No. 38629/97, 12 November 2002; *Sallomonsson v. Sweden*, Application No. 38978/97, 12 November 2002; *Miller v. Sweden*, Application No. 55853/00, 8 February 2005.

socio-economic benefits. For example, early in the Court's jurisprudence, even though the right to health insurance benefits under social security schemes was treated as a public law right in the Netherlands, in *Feldbrugge v. the Netherlands*,<sup>38</sup> it was held to constitute a civil right within the autonomous meaning of Article 6(1).

Moreover, the ECtHR has held that the formal principle of equality of treatment dictates that Article 6 should apply, even in cases where a socio-economic benefit is derived from a discretionary, non-contributory form of public assistance granted unilaterally by the state and where the cost is fully borne by the public purse, without any link to a private contract of employment.<sup>39</sup> Thus, in *Salesi v. Italy*,<sup>40</sup> the definition of a civil right was said to cover social security or welfare benefits regarded as 'sufficiently well defined to be analogous to rights in private law' and to be of 'economic significance to the claimant'.<sup>41</sup> Since the features of private law claims predominated, the right to social security benefits was a civil right within the meaning of Article 6.<sup>42</sup>

However, the Court's 'dynamic' albeit formalistic approach to remedying the Convention's failure to include rights of due process in public law disputes has been problematic. In many jurisdictions, including the United Kingdom, the requirement of a 'full hearing' under Article 6 disturbs existing models of administrative dispute resolution and the public private jurisdictional divide. Thus, seeking a flexible accommodation in the case of *Bryan v. UK*,<sup>43</sup> the ECtHR concluded that 'full jurisdiction' in public law disputes means jurisdiction to deal with the case as the nature of the decision requires, in accordance with the dictates of 'democratic accountability, efficient administration and the sovereignty of Parliament'. Problematically, however, there is no clear guidance as to how the criteria enunciated in *Bryan* are to be applied in national jurisdictions. Thus, in the United Kingdom, following *Bryan* there was intense litigation concerning the limits of the right to a 'full hearing' in administrative disputes over discretionary socio-economic benefits relating to housing,<sup>44</sup> that culminated before the ECtHR in the case of *Tsfayo v. United Kingdom*.<sup>45</sup>

*Tsfayo's* case concerned the application of Article 6 ECHR to a decision by a housing benefits review tribunal to refuse payment of housing benefit to a non-English-speaking asylum seeker, because she had failed to show 'good cause' why she had not submitted her renewal claim on time. On her complaint to Strasbourg, the ECtHR decided that the tribunal had been in breach of Article 6, irrespective of whether the claimant had had access to a traditional judicial review hearing on appeal. In Ms Tsfayo's case, the ECtHR insisted that intricately linked to the tribunal's manifest lack of independence was the 'limited control' that could be exercised by the reviewing court.<sup>46</sup> It did not have jurisdiction to rehear the evidence or to substitute its own views as to the applicant's credibility. Nor indeed did it have the power to order the decision to be taken by a different body. This meant 'that there was never a possibility that the central issue of the applicant's credibility would be determined by a tribunal that was independent of one of the parties to the dispute. Accordingly, there had been a violation of Article 6(1)'.<sup>47</sup>

<sup>38</sup> (1986) 8 EHRR 245.

<sup>39</sup> Where a pension is linked to employment, even to employment in the civil service, the ECtHR has held a fortiori that Article 6 will be engaged. See *Lombardo v. Italy* (1992) 21 EHRR 18, at paras. 14-17; *McGinley and Egan v. United Kingdom* (1999) 27 EHRR 1, at para. 84.

<sup>40</sup> (1996) 21 EHRR 342.

<sup>41</sup> *Ringelsen v. Austria* (No. 1) (1971) 1 EHRR 455.

<sup>42</sup> This was despite a powerful dissent from seven members of the court, who said that the distinctions between public and private law were being eroded in a way that would cause great uncertainty.

<sup>43</sup> (1996) 21 EHRR 342.

<sup>44</sup> In *Runa Begum* the House of Lords held that administrative burdens and other societal costs associated with constitutional entitlements to a full evidentiary hearing should legitimate a more limited form of adjudication in disputed claims to discretionary welfare benefits.

<sup>45</sup> Application No. 60860/00, 14 November 2006.

<sup>46</sup> Under the system as it applied, the hearing had taken place before a tribunal that consisted of members of the same local authority that would be required to pay 50% of the benefit awarded in the event of a finding in the applicant's favour.

<sup>47</sup> *Id.*, at paras. 46-49.

In seeking to give effect to rights that were ‘real and not illusory’, in the circumstances of the case, the ECtHR concluded that there had been an infringement of the claimant’s right to a fair and impartial hearing. However, if the ECtHR’s approach to the interpretation of Article 6 in that case had been given general application in the United Kingdom, it would mean that disputes of fact could no longer be determined internally at first instance: the existing supervisory administrative structure is inadequate to guarantee an impartial determination of all aspects of the dispute. The decision therefore threatened to disrupt established internal administrative procedures and court hearings for the allocation of housing benefits that have long been regarded by courts in the United Kingdom as uniformly hedged by sufficient safeguards to satisfy the guarantees in Article 6.

Therefore, in the later case of *Tomlinson v Birmingham City Council*,<sup>48</sup> the UK Supreme Court sought to row back from the pragmatic, albeit technically generous interpretation of “civil rights” in the leading case of *Runa Begum*,<sup>49</sup> where, although rejecting the applicant’s claim to be housed, the House of Lords had decided (in order to avoid over judicialisation of the issue) that a review of homelessness appeals by a local authority housing officer under section 193 (5) of the Housing Act 1996 constituted a determination of the applicant’s “civil rights” within the meaning of article 6(1) of the ECHR. Thus, in *Tomlinson* reviewing a small number of ECtHR authorities since *Runa Begum*, (including *Stec v UK*)<sup>50</sup> the Supreme Court unanimously concluded that:

... cases where the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent on a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met ... do not give rise to “civil rights” within the autonomous meaning that is given to that expression for the purposes of ... article 6(1)<sup>51</sup>

Despite its fundamental constitutional importance the right to administrative due process is one of the most amorphous and malleable rights in the unwritten constitution of the United Kingdom.<sup>52</sup> Thus, despite the rising numbers of destitute and socially disadvantaged claimants seeking access to a wholly depleted stock of public housing and other socio-economic benefits, in cases such as *Tfsayo v UK*,<sup>53</sup> we see very clearly the disadvantages of a jurisprudence that has not developed according to abstract principles and standards but, in accordance with a formal notion of equality and by analogy with private law dispute resolution, where very different principles, procedures and remedial standards apply.

#### *Article 14 ECHR: equality in the fair distribution of social security benefits*

By contrast with more general provisions in many written constitutions and human rights instruments, most notably the 14th amendment of the US Constitution,<sup>54</sup> it is well known that Article 14 has been restricted in two ways. First the substantive arena in which discrimination or prejudice is forbidden has been restricted to the ‘enjoyment of the rights and freedoms set forth in [the] Convention’. Secondly, the

<sup>48</sup> [2010] UKSC 8.

<sup>49</sup> *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5.

<sup>50</sup> Above, note 30.

<sup>51</sup> Lord Hope [49]. Lord Collins preferred to place ‘less emphasis on the evaluative nature of the exercise under section 193 and greater emphasis on the nature of the applicant’s rights...and in particular on the absence of what the Strasbourg Court has characterised as an important and perhaps necessary feature, namely an individual economic right in the applicant’ [58] See also the Supreme Court decision in *R(A) v Croydon London Borough Council* [2009] UKSC where the Court concluded that a local authority decision as to whether or not to provide accommodation for children in need under section 20 of the Children Act 1989 was a determination of a civil right within the meaning of article 6(1).

<sup>52</sup> The access to justice movement in the United States spearheaded by M. Cappelletti and had a bias towards collective group action. See M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobs-Merrill 1971).

<sup>53</sup> Above at note 47.

<sup>54</sup> The 4th Amendment to the US constitution states.

grounds upon which discrimination is forbidden have been restricted to ‘any ground such as [the specified grounds] or other status’.<sup>55</sup>

Nevertheless, the Strasbourg organs have adopted an expansive approach to the interpretation of both types of restriction,<sup>56</sup> gradually bringing allegations of discriminatory treatment in the allocation of economic social security benefits within the ambit of article 14. Indeed, more than three decades ago in *Muller v Austria*<sup>57</sup> the Commission had already decided that by analogy with the proprietary right of a contributor to a private pension fund, a claim to contributory benefits in the Austrian municipal system was a ‘possession’, thereby grounding the complaint within the ambit of article 14, taken together with the right to enjoyment of property protected by Article 1 of the First Protocol (article 1P1).

However, the nexus between private economic property interests and social security entitlements<sup>58</sup> which has been developed since *Muller v Austria*, has been particularly problematic in countries such as the UK, where as noted by Lord Hoffman in *R (on the application of Carson) v Secretary of State for Work and Pensions (Carson)* contributions to the social security fund are hardly distinguishable from general taxation.<sup>59</sup> Nevertheless, this deficit has been addressed in Strasbourg by the technical argument, that a claim to a discretionary social security benefit can have the characteristics of a possessory right, thereby falling within the ambit of article 1 Protocol 1, without entitling the claimant to ‘anything in particular’.<sup>60</sup> Moreover, this artificial line of reasoning developed a new twist following the case of *Koua Poirrez v France*<sup>61</sup> where paradoxically the ECtHR emphasized disparities between contributory and non-contributory benefits, as justification for further expanding the ambit of Article 14 in the socio economic sphere.<sup>62</sup> Therefore, against this background, it is not surprising that in the United Kingdom, following the HRA, article 14 taken together with article 1P1, was relied on by claimants to challenge the substantive fairness of government policies concerning the distribution of different *types* of social security payments.

In *Carson*<sup>63</sup> the UK House of Lords heard two conjoined discrimination cases of which the first, Carson’s case, concerned alleged discrimination in the level of state retirement pension paid to some UK citizens living abroad, by contrast with those living in the UK and elsewhere. The complainant argued that government policy of refusing to allow a British pensioner, (resident in South Africa at the time of her retirement with a full record of social security payments) the annual cost of living increase available to UK pensioners and expatriates in countries with relevant treaty arrangements, constituted a breach of article 14, taken together with article 1P1. Therefore, the applicant questioned whether the payment of different rates to some pensioners could be justified as a proportionate response to the requirement that states must balance the rights of individual claimants against those of other claimants in analogous situations under article 14, in order to afford consistency of treatment. Moreover, raising similar article 14 issues, albeit in a very different welfare context, the twenty five year old applicant in *Reynolds*<sup>64</sup> questioned, whether a lower rate of contributions-based job-seekers allowance paid to a claimant less than

<sup>55</sup> Article 14 states: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex race colour language, religion political or other opinion national or social origin, association with a national minority birth or other status’. Cf the Canadian constitution.

<sup>56</sup> See for example *Abdulaziz v UK* (1985) 7 EHRR 471. Although there was no breach of the right to respect for family life guaranteed by article 8, (wives could join husbands abroad) there was a violation of article 14. By refusing to allow foreign men to join partners or wives in the UK the state discriminated between men and women in the respect afforded to their family lives. See also *Ghaidan v Mendoza*. Although no state duty to provide a home or guarantee security in the home by a private person, if security granted the state must do so indiscriminately.

<sup>57</sup> (1975) 3 DR 25.

<sup>58</sup> See *Gaygusuz v Austria* (1997) 23 EHRR.

<sup>59</sup> [2005] UKHL; [2005] 4 ALL ER 545 –672, at [12].

<sup>60</sup> See *Jankovic v Croatia* (2000) 30 EHRR CD 183.

<sup>61</sup> (2005) 40 EHRR 34 at 45 (para 37).

<sup>62</sup> This issue is shortly to be considered in the case of *Hepple v UK* (Application Nos 65731/01 and 65900/01) by the Grand Chamber.

<sup>63</sup> Above at note 36.

<sup>64</sup> *R (Reynolds) v Secretary of State for Work and Pensions* See Carson above at note 65.

25 years old, *as a result of which she suffered financial hardship*, constituted a breach of article 14 taken together with article 1P1.

Before the House of Lords, it had been common ground that the pension and benefit entitlements of the respective claimants were possessions within the meaning of article 1P1.<sup>65</sup> Further, in Carson's case, consistent with *Kjeldsen v Denmark*<sup>66</sup> it was agreed that foreign residence was a personal characteristic which fell within the scope of the ECHR rights, so that article 14 was engaged. Thus, the question to be addressed was whether Social Security Benefits Up-rating Regulations 2001 were *ultra vires* in so far as they interfered with her right not to be discriminated against in the enjoyment of her possessions, in accordance with article 14 taken together with A1P1. In *Reynolds* case, the substantive question was whether payment to the applicant of lower rates than paid to a person aged 25 or more, in accordance with Regulation 17(1) and Schedule 2 of the Income Support (General) Regulations 1987, violated her rights under articles 14 and article 1P1.

The majority in the House of Lords rejected both contentions, holding that social security benefits were part of an interlocking system of domestic social welfare according to which a decision to pay different rates to persons living abroad was rationally justifiable, as indeed was the decision to enter into reciprocal treaties with some countries, without having to pay the same rates to all expatriates. Further, in the case of *Reynolds* it was held, that to limit the payment of jobseekers allowance according to the prescribed age was also justifiable, since it was within the bounds of rationality to conclude that persons under 25 could, as a group, be regarded as having lower earnings and lower living costs. Moreover, in light of the very wide interpretation given by the ECtHR to Article 14, it was considered necessary to distinguish between those grounds of discrimination which appeared to offend against notions of respect due to the individual (race colour etc.) and those which merely required some rational justification. Furthermore, it was argued that, despite the treatment by the ECtHR in *Stec v UK* of all manner of social security benefits as possessory entitlements, the scope of the duty to provide was 'national in character, by contrast with obligations recognized, 'in treaties such as the ILO Social Security (Minimum Standards) Convention 1952 (article 69) and the European Code of Social Security 1964.'<sup>67</sup> Thus, although agreeing that the words 'insurance' and 'contributions' deceptively conjure up notions of a private pension scheme, the majority was clear that in the UK, 'from the point of view of the citizens who contribute, national insurance contributions are little different from general taxation which disappears into the communal pot of the consolidated fund'.<sup>68</sup>

In short, Ms Carson's argument that she had been discriminated against by comparison with other UK pensioners, failed to take account of the broad interlocking nature of the UK social security system: National Insurance contributions provide only part 'of the revenue which pays for all social security benefits and the National Health Service (the rest comes from ordinary taxation)'.<sup>69</sup> Crucially, none of these interlocking features were applicable to non-residents such as Ms Carson: 'on the contrary, her pension would go to reduce the social security benefits (if any) to which she is entitled in her new country'.<sup>70</sup>

Following the decision by the House of Lords, before the ECtHR, thirteen British nationals complained under Articles 8 taken in conjunction with Article 14 of the Convention and under Article 1 of Protocol No. 1 taken alone and in conjunction with Article 14, about the refusal of the United Kingdom authorities to uprate their pensions in line with inflation.<sup>71</sup> However, setting aside the issues raised under Article 14

<sup>65</sup> Since the case of *Marckx v Belgium* [1979] 2 EHRR 330 there had been arid jurisprudential controversy as to whether article 1P1 applied to a person's existing possessions rather than guaranteeing a right to acquire possessions.

<sup>66</sup> (1976) 1 EHRR 711 at 732 – 733 (para 56) the court held that article 14 only applied if the discrimination was on the basis of 'a personal characteristic'.

<sup>67</sup> Lord Hoffman at [18].

<sup>68</sup> *Ibid* at [24].

<sup>69</sup> At [20].

<sup>70</sup> *Ibid* at [23].

<sup>71</sup> A Chamber of that Section unanimously declared the complaint under Article 1 of Protocol No. 1 taken alone inadmissible and the complaint under Article 14 taken in conjunction with Article 1 of Protocol No. 1 admissible; found, by six votes to one, no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

taken in conjunction with Article 8, (in agreement with the UK House of Lords) the Grand Chamber concluded as follows: (i) it did not suffice for the applicants to have paid National Insurance contributions in the United Kingdom to place them in a relevantly similar position to all other pensioners, regardless of their country of residence; (ii) unlike private pension schemes, National Insurance contributions had no exclusive link to retirement pensions and formed a part of the revenue which paid for a whole range of social security benefits, including incapacity benefits, maternity allowances, widow's benefits, bereavement benefits and the National Health Service; (iii) the pension system was primarily designed to serve the needs of and ensure certain minimum standards for those resident in the United Kingdom.<sup>72</sup>

Nor were applicants in a relevantly similar position to pensioners living in countries with which the United Kingdom had concluded a beneficial bilateral agreement providing for up-rating. States clearly had a right under international law to conclude bilateral social security treaties and indeed this was the preferred method used by the Member States of the Council of Europe to secure reciprocity of welfare benefits.

### *Article 1 Protocol 1 (A1P1 ECHR)*

For a long time, social security issues hardly appeared in the case law concerning A1P1, since, in general a successful property claim should be 'sufficiently established' as well as 'adequately definable'. According to the ECtHR's case law, only those social security systems that created definable individual shares in specific funds, often by payment of directly related contributions could be viewed as property-creating systems. It therefore followed that only claims to benefits derived from such schemes could have the status of 'possessions' according to the meaning of ECHR jurisprudence. However, in many collective social security systems based on the principle of solidarity, benefits can rarely be linked to contributions that can be individualised in any way, and for that reason the notion of a definable proprietary interest has generally been rejected.<sup>73</sup> Nevertheless, from the time of the admissibility decision in *Stec and others v the United Kingdom*<sup>74</sup> to the recent case of *Valkov*,<sup>75</sup> the ECtHR has afforded the *prima facie* protection of an individualised possessory entitlement under A1P1. Problematically however, although in the majority of cases the ECtHR has engaged in complicated comparative socio-political analysis of the nature and origins of the social security scheme in question, those issues have ultimately been dealt with in a deferential manner, that can be of little practical benefit to claimants when they are challenging the refusal of benefits or the level of provision in national courts.

The facts of *Stec* were that the complainant, a UK citizen who had severely injured her back at work was unable to continue working and was therefore awarded a reduced earnings allowance (REA). Significantly however, her income-related additional benefit was a non-contributory one; that is, it was not conditional on any direct contributions to an insurer. Furthermore, since this was a work related benefit, it fell under legislative measures that had been adopted to remove or reduce its availability to claimants who were no longer of working age at the relevant time. Thus, when Mrs Stec reached the age of 60 years, her award was replaced by a less valuable retirement allowance (RA). However, since at that date the pensionable age in the UK was not the same for men and women, Mrs Stec would have received

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<sup>72</sup> "The essentially national character of the social security system was recognised both at domestic (in the Social Security Administration Act 1992) and international (the 1952 International Labour Organisation's Social Security Convention and the 1964 European Code of Social Security) levels.

<sup>73</sup> In *G v Austria*, for example, the Commission held that '[a] claim of entitlement to a survivor's pension for civil servants does not constitute a possession attracting the protection of this provision where, as in Austria, these pensions are based on the principle of maintenance and are not entirely founded by prior contributions.' Moreover, for a legitimate expectation to arise, the Court has held that all the conditions the state has set for awarding the benefit have to be fulfilled at the moment the individual makes a claim to the benefit. Fluctuations due to changing regulations are presumed to be 'in the general interest'. Only when a substantial and unacceptable reduction has taken place, might this eventually lead to a violation of the Convention.

<sup>74</sup> Above at note 30.

<sup>75</sup> *Valkov v Bulgaria*.



the more valuable REA until the age of 65 years if she had been a man. Thus, before the ECtHR Mrs Stec argued that UK government policy breached the non-discrimination principle in Article 14 in conjunction with the right to property in A1 P1. Questions were therefore raised as to whether the non-contributory benefit to which she was entitled amounted to a possession under A1P1 and, if so, whether legislative measures adopted by the UK government amounted to discrimination under Article 14.

In the UK, as in many other European countries (particularly new accession countries) contributions to the social security fund are hardly distinguishable from general taxation. However, as noted above, that difficulty had been surmounted in *Stec* by means of a technical argument that, although a claim to a social security benefit is a possessory right falling within the ambit of Article 1 of Protocol 1, it differs from a purely private law right, to the extent that it does not entitle the claimant to “anything in particular”. Nevertheless on the issue of discrimination, the ECtHR held that there had been no violation of Article 14 taken together with Article 1 of Protocol 1 in respect of the cessation of Reduced Earnings Allowance at different ages for men and women. Indeed the ECtHR opined that a difference of treatment that is *prima facie* discrimination under Article 14 could generally be justified in cases where it is intended to correct “factual inequalities”. It is also notable, that in A 14 social security cases which immediately followed *Stec*, the ECtHR appeared to have further restricted the ambit of the *Stec* judgment in that regard.

*Minimum standards and the right to be treated with dignity:  
towards a humanitarian approach to destitution?*

It is often conceded that due to the variation in welfare benefits systems and the political sensitivities of national socio-economic policies, the ECtHR can do little to determine the level at which benefits should be set in national jurisdictions. However, where circumstances of severe destitution sustained poverty, and other vulnerabilities result from ill-considered or ostensibly punitive government policies, as in the landmark case of *MSS v Belgium and Greece*,<sup>76</sup> a more individualized approach to determining the scope of government duties to provide an appropriate level of support has been found under Article 3 ECHR.

In the United Kingdom the extent to which Article 3 ECHR requires states to provide a minimum level of welfare to the destitute had already been the subject of a complex and controversial series of cases concerning the scope of section 55(5) of the Nationality Immigration and Asylum Act (NIAA) 2002; a measure that can only properly be understood against the background of a complex web of legislative provisions that from the middle of the 1990's had been directed at *denying* welfare support to asylum seekers awaiting the hearing of their claims. Thus, in a series of cases which culminated in the House of Lords decision in *R v Secretary of State for the Home Department ex parte Limbuela* (hereafter *Limbuela*)<sup>77</sup> administrative courts had been required to determine whether the Secretary of State could refuse support to destitute asylum seekers, struggling to exist from day to day, without any certainty of food or shelter, without thereby subjecting them to inhuman and degrading treatment; and whether, if there were such circumstances, how to define them, and, ‘what procedures must be used to ensure that [the Secretary of State does not stray outside them?’<sup>78</sup>

The House of Lords unanimously decided that section 55 NIAA 2002 had placed an unqualified duty on the Secretary of State to take positive measures to ensure that elementary needs of asylum seekers with no other means of support are met, since a decision to withdraw support under section 55(1) was an intentionally inflicted act for which the Secretary of State was directly responsible so as to engage article 3. Thus, as Lord Bingham put it:

‘Where (and to the extent) that exercise of the power [under s.95] is necessary, the Secretary of State is subject to a duty, and has no choice, since it is unlawful for him under section 6 of the [HRA]

<sup>76</sup> Application No. 30696/09 21 January (2011) Grand Chamber.

<sup>77</sup> [2005] UKHL 66, [2006] 1 AC 396 HL.

<sup>78</sup> See Lord Phillips MR *ibid* at [3].

to act incompatibly with a Convention right. Where (and to the extent) that exercise of the power is not necessary, the Secretary of State is subject to a statutory prohibition, and again has no choice. Thus, the Secretary of State (in practice, of course, officials acting on his behalf) must make a judgment on the situation of the individual applicant matched against what the Convention requires or proscribes, but he has in the strict sense, no discretion.<sup>79</sup>

Moreover, it was unanimously agreed that the obligation under article 3 in relation to such acts was absolute, so that in determining whether the treatment in a particular case had reached the minimum level of severity, the court should not apply a more exacting test where treatment or punishment which would otherwise be found to be degrading was the result of legitimate government policy.<sup>80</sup>

Thus, Lord Hope who gave the most comprehensive speech, specifically rejected the suggestion, that “a decision made in the exercise of lawful policy, which may expose the individual to a marked degree of suffering, not caused by violence, but by the circumstances in which he finds himself in consequence of the decision”, is lawful unless the degree of suffering which it inflicts (albeit indirectly) reaches so high a degree of severity that the court is bound to limit the state’s right to implement the policy on article 3 grounds.<sup>81</sup> Not only was it impossible to find any foundation for this analysis in the Strasbourg jurisprudence, it was also difficult to ‘find a sound basis for it in the language of article 3’.<sup>82</sup>

Lord Hope therefore concluded that, irrespective of whether inhuman or degrading treatment or punishment results from deliberate infliction of harm,

‘Where it results from acts or omissions for which the state *is directly responsible*, (emphasis added) there is no escape from the negative obligation on states to refrain from such conduct, which is absolute.’

Although there was no reference by the Grand Chamber in *MSS* to the landmark decision in *Limbuela*, the later decision clearly resonates with the humanitarian thrust of the UK House of Lords decision in which some members of the House of Lords came close to identifying a core minimum standard of provision.

*MSS* concerned the story of an Afghan asylum seeker who fled Kabul in 2008, entered the European Union through Greece, and travelled on to Belgium where he applied for asylum. According to the Dublin rules, Greece was held to be the responsible Member State for the examination of his asylum application. The Belgian authorities therefore transferred the applicant there in June 2009, where he faced detention in insalubrious conditions before living on the streets without any material support. At issue in the judgment was the risk of violating Article 2 (the right to life) Article 3 (prohibition of inhuman or degrading treatment or punishment) and/or Article 13 (the right to an effective remedy). Thus, focusing on the conditions of the applicant’s detention, the ECtHR noted that the situation for States, which form the external borders of the European Union, is exacerbated by the transfer of asylum seekers by other Member States in the application of the Dublin Regulation. However, given the absolute character of Article 3, the ECtHR was clear that the difficulties faced by Greece should not be taken into account when examining the applicant’s complaints under Article 3.

Following the examination of Article 3 issues relating to the applicant’s *detention in the holding centre*, the ECtHR then turned to consider whether a situation of extreme poverty of the severity experienced by the applicant, could raise an issue under Article 3 beyond those constraints. Thus, reiterating its opinion in *Budina v Russia*,<sup>83</sup> that the State’s responsibility may be engaged under Article 3 in circumstances where an applicant, who is wholly dependent on State support, finds herself faced with *official indifference* in a situation of serious deprivation or want, incompatible with human dignity. Notably however, while

<sup>79</sup> Ibid at [5] per Lord Bingham.

<sup>80</sup> Ibid per Lord Hope at [55]: ‘It would be wrong to lend encouragement to the idea that the test is more exacting here the treatment ... is the result of what Laws LJ refers to as legitimate government policy’.

<sup>81</sup> Lord Hope at [50] – [54].

<sup>82</sup> The spectrum analysis was also rejected by Baroness Hale (at 77) and Lord Brown although he found it useful in so far as it highlighted the many different considerations in play.’ (At [89]).

<sup>83</sup> *Budina v Russia*, no. 45603/05).

extending the notion of degrading and inhuman treatment to the living conditions of asylum seekers, the Court stressed that this did not per se constitute an obligation to give financial assistance.<sup>84</sup>

Thus, the ECtHR took into account a wide range of factors that pointed to a breach of Article 3, including obligations on the Greek authorities as set out in the Reception Directive: the authorities' lack of positive action to resolve the situation for the applicant; the prolonged uncertainty and the humiliating living conditions the applicant experienced (p.263). Moreover, recognizing that conditions faced by the applicant outside the detention Centre in this present case were particularly serious – the applicant had been living for months in extreme poverty and unable to cater for basic needs: food, hygiene, place to live (p.254) – the ECtHR found a violation of Article 3.<sup>85</sup>

It is also notable that for the first time in *MSS*, the ECtHR identified asylum seekers themselves as a vulnerable group, in respect of whom states may have heightened positive obligations to protect (including against detention or living conditions in breach of Article 3).<sup>86</sup> Moreover, in finding a violation of Article 3 against Belgium, the ECtHR found the general country situation rather than the *individual* circumstances of the asylum seeker, as most significant in assessing whether the Belgian authorities “knew or ought to have known” of the risk of ill-treatment in Greece.<sup>87</sup>

## Part II

### *Discriminatory socio-economic policies: the intensity of judicial scrutiny in hardship cases?*

#### *Contrasting approaches in Reynolds and Refugee Action*

*Reynolds* case<sup>88</sup> decided by the House of Lords in 2002 is consistent with well established resistance to the use of a justificatory human rights approach to welfare needs challenges in UK courts,<sup>89</sup> a formalistic approach which is in striking contrast to the intensive scrutiny of the ministerial by the first instance High Court judge in the more recent *Refugee Action Case* considered below.

The discrimination case in *Reynolds* which had been brought by the Child Poverty Action Group and founded on Article 14 ECHR was one of hardship (in contrast to Carson's case discussed above).<sup>90</sup> The facts were that the applicant was under 25 and before the birth of her son, in accordance with Regulation 17(1) and Schedule 2 to the Income Support (General) Regulations 1987, section 4 of the Jobseekers Act 1995, and regulation 79 of the Jobseeker's Allowance Regulations 1996, she had received jobseeker's allowance and income support at the weekly rate of £41.35, whereas, had she reached the age of 25, she would have received £52.20. Accordingly, she claimed (facts which the Secretary of State did not accept in their entirety) that during a period of about eight months to which her claim related, despite receiving other benefits, such as housing and council tax benefit, and also maternity benefit during the last three months of her pregnancy, she suffered severe hardship, partly because of high expenditure on gas

<sup>84</sup> See the dissenting opinions of judges Rozakis and Sajo on this point. How far the scope of Article 3 is inextricably linked to the Reception Directive remains to be tested in future litigation.

<sup>85</sup> Additional factors included an ever present fear of being robbed and attacked and total lack of the situation improving. It is notable that No violation of Article 13 was found against Greece in regard to detention and living conditions.

<sup>86</sup> Specific 'vulnerable' categories of asylum seekers, such as unaccompanied minors have since been recognized as in *Rahimi v Greece* where despite the short duration of the detention the ECtHR found a violation of Article 3 ECHR because of the child applicant's particularly vulnerable situation.

<sup>87</sup> The ECtHR gave much weight and consideration to the wealth of NGO and UNHCR reports on the situation in practice in Greece over time. However, the ECtHR application of the general test has been questioned as inconsistent with the Court's own practice of as regards interim measures in cases of transfers to Greece. See the dissenting judgment of Judge *Bratza*.

<sup>88</sup> Above at 66.

<sup>89</sup> For a comprehensive examination of contrasting judicial approaches in welfare needs disputes see E Palmer, *Judicial Review Socio-economic Rights and the HRA 1998* above at note.

<sup>90</sup> Above at note 36.

and electricity for the flat, and partly because she had to spend £10 a week in repaying a loan which she had obtained to furnish the flat.

The argument in *Reynolds*' case, that she had been the victim of a difference in treatment on grounds of her age under article 14, had been fully aired in Carson's case. It was therefore regarded as unnecessary to cover issues of principle relating to discrimination on 'other grounds', or to discuss the limits of judicial intervention in social policy disputes in 'non-suspect' categories. Instead, Ms Reynold's case was viewed like that of Ms Carson, as one in which it was a matter for Parliament 'to choose', (in this case, whether different levels of benefit should be obtained according to age, and where that age differential should be set).

Accepting that claimants on either side of the age divide were in 'analogous' situations, it was regarded as enough for the House of Lords to ensure that there was an objective justification for a difference in the treatment of claimants in the under 25 age group. Further, it was considered unnecessary for the House of Lords to consider whether the appropriate intensity of scrutiny had been applied in the Court of Appeal when considering the Secretary of State's justifications for enactment of the disputed provisions.

In seeking to explain the policy choice which had been taken, an official in the DWP had enumerated some of the considerations taken into account in the decision-making process. For example, these had included the fact that 18-24 age-group in general earn less than those 25 or over, and may legitimately be regarded as having lower earnings expectations; that the majority of those 18-24 do not live independently and may legitimately be regarded as having lower living costs than the group of claimants aged 25 or over; the payment of lower rates of JSA and IS to those between 18-24 may be expected to have the effect of discouraging them from living independently, and encouraging them to live together with others, notably parents or other family members, which may be seen to have wider social benefits; Other aspects of the social security system serve to prevent any resultant hardship to the minority of persons in the position which was that of the claimant who are aged between 18-24 and do live independently and that it had been considered important from the point of view of good administration for the social security system to *be based upon clear, easily applicable rules, rather than attempting to cater for the individual situation of every claimant.*

Finally, counsel for the Secretary of State had elaborated on the fifth justification, by explaining that structural reforms of social security benefits in the late 1980's, had drawn a distinction between 'householders' and 'non-householders', with a view to recognising that some persons entitled to income support would have responsibilities for housing costs (such as rent and rates) which did not fall on other claimants. However, as subsequently pointed out, in the White Paper Reform of Social Security (1985)<sup>91</sup> "the increase of shared housing arrangements had made the existing rules, (with their connotation of a clearly identifiable head of the household) increasingly difficult to administer"; ultimately leading to 'disputes which reached the social security appeal system and, in some cases, the court'.<sup>92</sup> Accordingly, it was argued by the Secretary of State that however apparently arbitrary or disadvantageous to individual claimants under 25,

'there were sound reasons, in the interests of good administration, for providing for housing costs by other, more selective benefits (principally housing benefit and council tax benefit, both of which Ms Reynolds received.'<sup>93</sup>

Moreover in considering the appropriate degree of scrutiny in article 14 disputes of this kind, Lord Walker who gave the most extensive review of the policy background and facts in Reynolds case, agreed with the view of Wilson J at first instance, who had observed:

"In light of the above guidance I regard it as unnecessary, indeed inappropriate, for me to address the arguments presented by the [Secretary of State] by way of justification for the demarcation with a degree of detail into which, drawing upon a statement of an eminent statistician as well as a host of other material,

<sup>91</sup> (Cmnd 9691).

<sup>92</sup> At para 2.34.

<sup>93</sup> Carson at [86].

Mr Gill would have me descend. Indeed, as his enthusiastic argument proceeded, I increasingly sensed the incongruity that such a debate was *proceeding* (emphasis added) *in court* instead of in Parliament. The [Secretary of State] accepts that the appropriateness of the demarcation is a subject on which views may reasonably differ but articulates five considerations of policy which allegedly justify it.”<sup>94</sup>

*Refugee Action v Secretary of State for the Home Department, (Refugee Action)*<sup>95</sup>

The Charity *Refugee Action* was established in 1981 to facilitate the successful resettlement in the UK of refugees and asylum seekers, of whom there were estimated to be 23,000 living in the United Kingdom at the time of the judgment. Moreover, for many years, along with other groups, Refugee Action had attempted, through political channels, to persuade the Secretary of State for the Home Department (SSHD), that rates of asylum support cash payments were insufficient; by undertaking research projects, meeting with Home Office officials and participating in various Parliamentary enquiries on the issues. However, despite growing evidence of deteriorating living standards, Refugee Action had never succeeded in establishing a fruitful dialogue with the Secretary of State.

As noted above<sup>96</sup> UK asylum seekers have been excluded by section 55 NIAA from most forms of social security benefits. However, before the claim for asylum can finally be determined, they are provided with “asylum support” in accordance with a twofold statutory duty on the Secretary of State: to ensure that support consists of “adequate accommodation” and support to meet asylum seekers’ “essential living needs”.<sup>97</sup> The second category of support is provided by a combination of services such as NHS healthcare and free education for children and weekly cash payments which had been set for 2013 as follows: single adult £36; qualifying couple £72.52; lone parent aged eighteen or over £43.94; 16 and 17 year olds £39.80; children under 16, £52.96.<sup>98</sup> In addition pregnant women are granted a maternity payment (for each pregnancy) of £300 payable in the period from 8 weeks before the estimated delivery date to six weeks after the birth. Problematically however, the rate of asylum support had not been increased since April 2011. Moreover, although when first introduced in 2000 the payments had been fixed at 70% of the rate of basic income support for adults and 100% of the level of income support for dependent children, over time, they had continued to fall in proportion to the rate of such payments.<sup>99</sup>

Therefore, in July 2013, having exhausted other channels, Refugee Action commenced judicial review proceedings against the Secretary of State’s decision not to raise the level of asylum support in June of that year, arguing in accordance with basic public law principles that she had:

- (i) acted irrationally in concluding that the level of asylum support was sufficient to meet the asylum seekers’ essential living needs, in light of her obligation to provide minimum standards of support under the EU Receptive Directive (in particular by taking account of irrelevant and erroneous considerations and in failing to have regard to relevant factors and;
- (ii) breached her duty to have regard to the need to safeguard and promote the welfare of children in coming to that decision.<sup>100</sup>

Moreover, notably, applying an unusual degree of forensic scrutiny to the financial evidence and other material, Popplewell J concluded that the Secretary of State’s decision to freeze the level of asylum support in 2013-2014 had been *Wednesbury unreasonable*. In setting the level of cash support, not only

<sup>94</sup> Per Wilson J [2002] EWHC (Admin) at[28] cited by Lord Walker at [86].

<sup>95</sup> [2014] EWHC 1033 (Admin) 09/04/2014.

<sup>96</sup> See text around footnote 76 for discussion of background to UK Article 3 ECHR disputes.

<sup>97</sup> Section 95 NIAA.

<sup>98</sup> The following additional weekly payments are also made to pregnant women and children under the age of three: pregnant women £3; babies under the age of one, £5, children aged one and two £3.

<sup>99</sup> By 2013/14 asylum support rates were at the following proportion of equivalent income support payments: single adult (25+) 25%.

<sup>100</sup> The judge concluded that it was necessary for him only to consider the first and third of Refugee Action’s grounds for review since this was sufficient to require that the Secretary of States’ decision be quashed.

had she overlooked certain categories of essential living needs: basic household goods such as washing powder, cleaning products and disinfectant; nappies, formula milk and other necessities for new mothers, babies and very young children; non-prescription medication; and the opportunity to maintain interpersonal relationships and a minimum level of participation in social, cultural, and religious life. The Secretary of State had also wrongly failed to consider whether travel by public transport to attend appointments with legal advisors, (where not covered by legal aid) and telephone calls to maintain contact with families and legal representatives concerning the progress of their asylum claims were essential living needs.

Furthermore, in assessing the sums necessary to meet those needs, the Secretary of State had erred by relying on the proposition that the level of cash support for adults and children had increased by 11.5% since 2007 when in fact, for most adults it had *decreased* in absolute terms by 11%. Thus, since the Secretary of State for the DWP had overlooked the extent of the erosion of rates in real terms over several years (due to inflationary price pressures) Popplewell J decided that the decision must be taken again in accordance with detailed guidance contained in the judgment.

In so far as it requires the Secretary of State to review the evidence in order to reach a decision that is “fair and respects the right to dignity of one of the most vulnerable groups in our society”, there can be little doubt that *Refugee Action*, (a challenge founded on the fundamental principle of rationality in UK administrative law (rather than on Article 3 ECHR) was viewed as a landmark moral victory for campaigners. However, its remedial value has been less encouraging. Despite Popplewell J’s injunction that the SSHD must review the evidence in order to reach a decision that is ‘fair and respects the right to dignity of one of the most vulnerable groups in our society’, at the time of writing the status quo remains.

### **Part III**

#### *Universalism, a double edged sword? Reviewing the discriminatory implications of ‘structural simplification’*

As noted above,<sup>101</sup> whether by design, or merely as ‘an unintended consequence of a reduction of a benefit’s sensitivity to individual circumstances’ purported efforts at uniformity or structural simplification have frequently resulted in a shift of resources from vulnerable claimant groups, to those with the potential to exercise greater political pressure.<sup>102</sup> It is not therefore surprising to discover on one hand that the process of standardization which had driven the Coalition welfare reforms, has had little effect on the levels at which state pensions have been set; or on the other hand, that some of the most vulnerable disabled claimants in greatest need of support, have fallen into acute poverty since the introduction of universal credit and other standardizing measures such as the bedroom tax.

#### *Universal Credit*<sup>103</sup>

In 2010, the UK Coalition government introduced the system of universal credit, gradually to be rolled out from 2013-2017, with the multiple aims of ‘simplifying the system of working age benefits; making work pay; increasing take-up; and reducing fraud and error’.<sup>104</sup> Building on earlier pathfinder projects and pilot schemes, the system was designed to replace six existing payments for people of working age: income support, income- based job seekers allowance, income-related employment support allowance, housing benefit, child tax credit and working tax credit.

<sup>101</sup> See text surrounding note 12.

<sup>102</sup> See N. Harris et al, *Social Security Law in Context* (Oxford OUP) 2000 Ch 4.

<sup>103</sup> See R Sainsbury, ‘Universal Credit the Story so Far’ *Journal of Poverty and Social Justice*, Vol. 22 no 1, 11-13 (2014) This paper (among others) in this special first edition of the formerly named UK ‘benefits’ journal, provides an excellent review of the conditionality and discriminatory implications of the system of universal credit.

<sup>104</sup> DWP (Department for Work and Pensions), *Universal Credit, Welfare that Works* CM 7937, The Stationery Office 2010.

Nevertheless, from the outset, it had been recognised that universal credit would involve inappropriate expectations of disabled people;<sup>105</sup> and that for poorer households, including those with poor literary and numeracy skills, who are likely to budget on a weekly or fortnightly basis, monthly payments would undermine their habitual money management strategies.<sup>106</sup> Moreover, as the system was gradually implemented, it became clear that it would cause a dramatic increase in hardship and poverty to so many vulnerable groups, including 600,000 children entering absolute poverty.<sup>107</sup>

In the case of disabled claimants, widespread concerns first focused on the design and application of Work Capability Assessments (WCAs); a stringent medical examination necessary for anyone claiming a reformed disability-related benefit, known as Employment Support Allowance (ESA). However, masterminded by two private sector organizations to ‘design, deliver or manage the WCA’ under contracts worth hundreds of millions,<sup>108</sup> the process was far from the idealized welcoming and listening approach depicted in government policy documents.<sup>109</sup> Indeed, it soon became clear that the assessment process was intolerably distressing and humiliating for many of the poorest and severely disabled people in the country, often exacerbating their conditions. Thus, in light of mounting evidence of widespread hardship, and in face of government intransigence, in the landmark case of *MM and DM v Secretary of State for Work and Pensions*<sup>110</sup> two disabled complainants challenged the fairness of WCA’s on grounds that they failed to comply with the fundamental principle of *rationality* in English administrative law.

In *MM and DM*, the challenge sought to highlight the problem, that the system *uniformly* places the burden of acquiring evidentiary clinical reports of incapacity on *claimants*, rather than on officials charged with performing assessments; with the result that some of the most vulnerable claimants (particularly those with mental health problems (MHP’s) had frequently been assessed without crucial evidence being heard. Thus, with the support of a consortium of Charity Interveners, (Mind, the National Autistic Society Rethink Mental Illness and the Equality and Human Rights Commission) two anonymous MHPs in receipt of sickness benefits, challenged the lawfulness of the WCA process, on grounds that it discriminates against people with MHPs, by reason of the failure of the SSWP to make ‘reasonable adjustments’ in their cases, as required by s20 (3) the Equality Act 2010.

Furthermore, it was argued that, the ‘reasonable adjustment’ required of the SSWP is to ensure that further medical evidence is *always* sought in the case of a claimant for ESA with MHP. It was also argued in the alternative, the decision maker must at least *consider* obtaining further medical evidence in the case of MHP claimants and that in cases of failure to do so, there should be an explanation as to why it had not been considered necessary. Thus, in light of the fact-sensitive nature of the complaint, the case was transferred from the High Court to the Upper Tribunal (Administrative Appeals Chamber (AAT)) (hereafter the Tribunal) on grounds of their specialist membership and experience of the complex state benefits system.<sup>111</sup>

Having reviewed the evidence, the Tribunal was clear, that the current process for assessing eligibility for ESA had placed MHP’s at a substantial disadvantage when compared with other claimants, making

<sup>105</sup> R. Patrick, ‘The wrong prescription, disabled people and welfare conditionality’ (2011) *Policy and Politics* Vol. 39, 2, pp 275-291.

<sup>106</sup> Y Hartfree, ‘The impact of monthly payments on low income households’, *Journal of Poverty and Social Justice*, Vol. 22 no 1, 51-26, (2014); See also House of Commons Work and Pensions Committee, 2011.

<sup>107</sup> Gillies A, Krishna, H, Paterson J, Shaw J, Toal A, Willis M, ‘Universal Credit What you Need to Know’ (London Child Poverty Action Group, gov.uk 2013 <http://www.cpag.org.uk/content/benefit-cuts-who-hurting> accessed 30-01-15.

<sup>108</sup> ESA initially replaced new claims in 2008 and from 2011 was extended to existing claimants (WCA) have proved to be among the most contentious issues since Employment Support Allowance (ESA) was first introduced in 2008 have been most vigorous in relation to mental health patients. By 2014, approximately 1.5 million people on incapacity benefits were due to have been re-assessed for ESA.

<sup>109</sup> DWP, *Universal Credit: Welfare that Works* (2010).

<sup>110</sup> [2013] UKUT 0259 (AAC).

<sup>111</sup> For a review of the complex relationship between Upper Tribunal and Court of Appeal in the development of administrative law, see T. Mullins, ‘Access to Justice in Administrative Law and Administrative Justice’, E. Palmer eds. *Access to Justice; beyond the policies and politics of austerity* (above at n..

a formal declaration to that effect. However, when considering the *reasonableness* of the complainants' proposal, that evidence should be sought in the case of every MHP, the Tribunal concluded that such an adjustment would be too onerous; without addressing the more nuanced proposal, that in cases of *failure* to seek medical evidence on behalf of an individual claimant, the decision maker should give reasons for her decision. Instead, arguing that it would be impossible to reach a final determination, or make an order on the reasonable steps that the Secretary of State for Work and Pensions (SSWP) might take 'to avoid substantial disadvantages found to exist' the Tribunal concluded that the SSWP should be required to undertake an investigation/assessment within a defined time, as to how the Evidence Seeking Recommendation could best be implemented.<sup>112</sup> Moreover, the Tribunal then gave a 'remedies decision' in which it spelt out in some detail, evidence that would be required from the SSWP and the form it should take.

In *SSWP & Ors v MM & DM*,<sup>113</sup> the government therefore appealed against the Tribunal decision, *inter alia*, on a technical argument that: 'Although at first sight placing them at a disadvantage, adverse circumstances of the kind experienced by the claimants, did not necessarily amount to a substantive disadvantage in law'. Furthermore, it was argued, that in giving directions to the SSWP, the Tribunal had inadvertently acted beyond its powers. Thus, on appeal from the tribunal decision, the Court of Appeal was not only required to consider the scope of the SSWP duty to make reasonable adjustments in the case of WCA's for mental health patients, but also to consider fundamental constitutional questions as to whether the Upper Tribunal had overstepped its powers by issuing detailed directions to the SSWP.

Although noting the respectful tenor of the report, and the tribunal's acknowledgement that the SS is the 'ultimate statutory decision maker under the Equality Act 2010',<sup>114</sup> Elias J who gave the only judgment of the Court, concluded that the Tribunal had exceeded its jurisdiction by issuing such directions. Nevertheless, despite this caution, the Court of Appeal unanimously agreed with the tribunal finding, that the process used to decide whether hundreds of thousands of people are eligible for ESA, discriminates against people with mental health problems, learning disabilities and autism. Accordingly, the Court of Appeal unequivocally concluded, that the SSWP had failed to make "reasonable adjustments" that would ensure fairness in the process for all those vulnerable individuals who may lack the capacity to navigate the system themselves.

### *The 'bedroom tax'*

Encouraged by this moral victory for disabled claimants in SSWP and others (above), it was not surprising that the first test case concerning the 'bedroom tax' to reach the Court of Appeal was similarly mounted on behalf of disabled claimants.

Like universal credit, the so-called bedroom tax had been introduced as a purported simplification strategy in selected localities in 2008. It had been claimed, that by limiting housing benefit in the private rented sector to the median level for regional private rents in that locality (regardless of the rate that tenants had actually been paying) it would no longer be necessary to assess the amounts paid according to appropriate rents for each individual property'.<sup>115</sup> Subsequently however, in 2013, it was decided that the scheme would be rolled out *nationally*, at an estimated saving of £65 million per annum. Caps would now *uniformly* be set on the level of rent that would be covered by housing benefit, based on an amount for properties of different *sizes* such as £340 for any three bedroom property, irrespective of locality.<sup>116</sup>

<sup>112</sup> Para 79.

<sup>113</sup> [2013] EWCA Civ 1565.

<sup>114</sup> Para 78.

<sup>115</sup> Known as a local housing allowance, the measure had first been introduced on a pilot basis in 2003 before being rolled out nationally in 2008. The scheme allowed for an excess of £15 over the capped rent.

<sup>116</sup> The rationale here was that previously in the absence of such limits claimants had been 'able to enter into rental commitments that people earning a reasonable wage would not consider'. *Work and Pensions Committee, Local Housing Allowance: Government's Response to the Committee's Fifth Report of Session 2009-2010* (2009-10 HC 509) 8. Nine months grace was given against the imposition of the caps.



Accordingly, from 1 April 2013, people in the social housing rented sector deemed to have 1 spare bedroom had their housing benefit reduced by 14% and people deemed to have 2, or more, spare bedrooms had their housing benefit reduced by 25%. Moreover, this rule applied, even in the case of *severely* disabled applicants, whose disabilities meant they were unable to move to smaller accommodation because they needed the extra space. Thus, as local authorities began to run out of emergency funds to rescue those worst affected, it was estimated that thousands of people were being driven into destitution;<sup>117</sup> However, although government ministers had disingenuously claimed that anyone forced into hardship by the regulation would have recourse to their local councils for ‘discretionary housing payments’ (DHPs), there was clear evidence that demand for DHP’s across the country had soared by more than 300% within months of the introduction of the ‘bedroom tax’;<sup>118</sup> as a result of which, many local authorities had exceeded that part of their budget, many weeks before the end of the financial year.<sup>119</sup> Thus, a number of strategic test cases were mounted in order to challenge the discriminatory implications of the ‘simplification’ measure for vulnerable claimants; including the important Court of Appeal challenge: *MA and others v Secretary of State for Work and Pensions*<sup>120</sup> (below)

*MA and Others v Secretary of State for Work and Pensions: discrimination, disability and the ‘bedroom tax’*

In July 2013, before a differently constituted Court of Appeal, 10 disabled claimants represented by 3 law firms, all argued that these new Housing Benefit rules discriminate against people with disabilities.

First, it was claimed that the reduction in eligible rent, had discriminated against disabled persons like the claimants, *without justification*, thereby violating their rights under article 14 ECHR when read in conjunction with A1P1. Secondly, it was argued that the Secretary of State had introduced the new measures in breach of his public sector equality duty (“PSED”) under section 149 of the Equality Act 2010 (“EA”) to have “due regard” to the need to eliminate discrimination and advance equality of opportunity between persons who are disabled and those who are not. Thus it was common ground that housing benefit falls within the ambit of A1P1 as a “possession” and disability falls within the concluding words of article 14 as “other status”.

Nevertheless, although Lord Dyson (MR) and Longmore LJ (Ryder LJ concurring) found that the new housing benefit regulations discriminate against people with disabilities because of their needs for accommodation larger than the rules allow, they had no difficulty in reaching the conclusion that the Secretary of State for Work and Pension had *justified* the discriminatory effect of the policy.

Thus, the Court of Appeal was satisfied that the needs of disabled people who are subject to the bedroom tax were being met by means of Discretionary Housing Payments; and that for Appellants and other disabled persons in a similar situation their needs for assistance with payment of their rent were in fact better dealt with by Discretionary Housing Payments rather than Housing Benefit.<sup>121</sup> Nevertheless, widespread incredulity at the apparent inhumanity of the Court of Appeal decision in *MA and others* prompted renewed disability litigation across the United Kingdom in bedroom tax cases founded on Article 14. Thus, in September 2014 with 100 disability discrimination cases waiting in the wings, an Upper Tribunal (whose decisions are binding on all British Courts at the same level or below) ruled that first tier tribunals must in future follow ‘*MA and others*’ in bedroom tax cases.<sup>122</sup>

<sup>117</sup> See the Independent, ‘New Chapter in Bedroom Tax Saga: now councils run out of emergency funds to help the worst cases’. Sat 5th April 2014.

<sup>118</sup> The Independent, above, note 50 Freedom of Information requests have been made by the *False Economy Campaign Group* to local authorities England Scotland and Wales.

<sup>119</sup> *ibid*

<sup>120</sup> [2014] EWCA Civ. 13, 21/02/2014.

<sup>121</sup> See especially Paras 93-99.

<sup>122</sup> Case CSH/188/2014. The Upper Tribunal judge distinguished a series of earlier challenges, arguing that the wrong test of justification had been used by the first tier tribunal. He distinguished the bedroom tax challenge in *Carmichael* and following cases in which Article 8 ECHR had been implicated.

Nevertheless, despite this ruling, in the landmark case of *(R)SG v SWP (Child Poverty Action Group and another intervening)*<sup>123</sup> (a challenge founded on Article 14 ECHR in conjunction with A1P1 the Supreme Court had for the first time, an opportunity to consider the discriminatory implications of the ‘Benefits Cap’ (Housing Benefit Regulations 2012) for a different category of vulnerable claimants: a group of lone parent families with young children who claimed to have been driven into poverty as a result of the housing benefit cap. However, although Baroness Hale and Lord Kerr dissented, the majority decided (consistent with the hands-off approach since *Stec v UK*), that so far as the Article 14 claim was concerned, the legislature’s policy choice was to be respected ‘unless it was manifestly without reasonable foundation’.

Significantly however, a differently constituted majority (Baroness Hale, Lords Kerr and Carnwarth) concluded, (albeit by very different lines of reasoning) that, the Secretary of State was required by international law to “treat the best interests of children” in Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC) 1989, as a primary consideration, when making the Regulations; although the Court remained split on the consequences of the failure of the State properly to *evaluate* the impact of the ‘Benefits Cap’ on children, “in light of its legitimate aim of imposing a reasonable limit on the amount of benefits which a single household could receive.”

Nevertheless, shortly after SG the Supreme Court had opportunity to revisit this issue in Cameron Mathieson’s case (below)

*Cameron Mathieson, a deceased child (by his father Craig Mathieson) v SSWP*:<sup>124</sup>  
Poverty discrimination and the Disability Living Allowance (DLA)

In Mathieson’s case, the Supreme Court had further opportunity to revisit legal issues explored in SG in relation to the impact of a different ‘standardizing’ measure, on the living standards of a family with a severely disabled child, known as the ‘84-day rule’ (a cut-off point for the receipt of Disability Living Allowance (DLA)). And in this case, by contrast with SG (above) the Supreme Court had no difficulty in reaching the unanimous conclusion that the Department of Work and Pensions had been “grossly unfair” when it stopped paying the child’s DLA to his parents after 84 days.

Moreover, in contrast to the laborious and at times conflicting arguments in the Supreme Court in SG (above), in Mathieson’s case, arguments concerning the issue of justification and the intensity of review in Article 14 disputes were brief, direct and strongly critical of the SSWP’s refusal to understand the financial realities of the ‘84-day rule’ for families with chronically sick children needing such intensive care as Cameron Mathieson had done in the period leading up to his death. Thus, the Court concluded that, although DLA was one benefit among several, it should have been understood by the SSWP that *continuation of the benefit* was crucial to maintaining an ‘adequate standard of living’ during the time when the parents of Cameron Mathieson had given such devoted care to the their critically sick child in a distant hospital. Surely the stark fact alone that Cameron Mathieson’s family had lost income of £7,000 as a result of the 84 day DLA cap; and that they had been forced to borrow £4,000 from friends to survive should have caused the Secretary of State to review the policy?

Furthermore on the relevance of Article 3 (1) UNCRC to the resolution of the DLA dispute, in *Mathieson* the Supreme Court not only confirmed the constitutional significance of the ECHR rights but also the State’s obligation to read the ECHR in harmony with the principles of international law (see *Neulinger v Switzerland*) and Lord Wilson in *Mathieson* at para 44); and therefore found that the government was in breach of its international law obligation to treat disabled children’s “best interests” as a primary consideration.

<sup>123</sup> [2015] UKSC 16

<sup>124</sup> [2015] UKSC 47

## Conclusion

At the beginning of the Coalition tenure, the maintenance of citizens' welfare through provision of financial support had become the largest single area of government expenditure. Thus, the newly appointed Government published an emergency budget in June 2010, which set out a five-year plan to rebuild the British economy and reduce the deficit, while supporting people into work and out of poverty. Further, recognising the problems of administrative complexity that had become one of the most defining features of the UK social security system, from 2010-2015 wholesale changes to the benefit system were introduced under the Welfare Reform Act 2012 with the purported aims of "structural simplification" and "incentivising work".

However, it had been clear that many of the reforms including the so-called 'bedroom tax', the 'Benefit Cap' (a ceiling on the financial sum that could be received by any individual or household in receipt of benefits), an unrestrained sanctions regime, much harder functional tests for sickness-related benefits, and changes from the Independent Living Allowance (ILA) to Disability Living Allowance (DLA) had combined to reduce income for vulnerable individuals and households reliant on multiple benefits to supplement poverty wages.

Thus the aim of this chapter has been to explore the parameters of a meaningful constitutional right to 'social security' in the unwritten constitution of the United Kingdom; with a particular focus on the availability and adequacy of *financial benefits* of the kind encompassed by Article 9 CESCR or in Article 3(1) of the UNCRC.

Moreover, it is noteworthy that throughout the article, in our review of cases concerning the adequacy of benefits, we have used the concept of 'economic hardship' to connote the relative idea of government failure to ensure an 'adequate standard of living', in the sense in which it is used in Article 11 ICESCR or in Article 27 UNCRC, in contrast to the more absolute concept of 'destitution' as it is used in refugee or asylum seeker cases founded on Article 3 ECHR (*Limbuela*; *MSS v Belgium and Greece*).

In our review of UK cases in Part III, we have demonstrated the difficulties in practice of challenging the legitimacy of government aims or the proportionality of policies; even where they are shown to be manifestly discriminatory in their effects. (*MA and others v SSWP*; *SG v SSWP*).

However, we have also indicated that where dogmatic commitment to financial cost-cutting has been shown to outweigh government responsibilities to carry out appropriate evidence-based analysis of the impact of reforms on some of the most vulnerable claimants in the United Kingdom, courts have engaged in more intensive scrutiny of executive decisions than is generally considered to be constitutionally appropriate in UK administrative courts. (*Refugee Action*; *Mathieson*).

Moreover, developments in the leading Supreme Court decisions of *SG* and *Mathieson* (founded on Article 14 in conjunction with A1P1) have not only demonstrated the willingness of the Supreme Court in appropriate cases of government intransigence to challenge the legitimacy of standardization measures. Thus, in *Mathieson*, the confirmation by the Supreme Court that the ECHR must be read in harmony with the principles of international law (thereby recognising the UK international law obligation in Article 3(1) UNCRC to treat disabled children's "best interests" as a primary consideration) has opened the way for further incremental developments in socio-economic policy challenges founded on Article 14 ECHR in conjunction with A1P1, in households where adults are facing impossible uphill struggles to meet moral and legal responsibilities for the welfare needs of children in their care.