

Petros Stangos

Aristotle University of Thessaloniki

THE RIGHT TO SOCIAL SECURITY IN THE EUROPEAN CONSTITUTIONS: GREECE*

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.¹ However, Greek

* This article has been previously published in *The Right to Social Security in the Constitutions of the World. Broadening the Moral and Legal Space for Social Justice* (ed. M. Wujczyk), Geneva 2016.

¹ 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

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.² 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 benefits leads to unjustifiable discrimination or treatment that is manifestly arbitrary or unfair towards the individual.³

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.⁴

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 hit⁵ 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 interpreta-

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

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

⁴ 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.

⁵ 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.

tion 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).

I. 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.⁶ 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.⁷

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.⁸ 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

⁶ 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.

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

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

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.⁹

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.¹⁰ 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.¹¹ 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.¹²

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.¹³ 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

⁹ Supreme Court of Appeal No. 1638/1991.

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

¹¹ Council of State No. 2805/1991.

¹² Council of State No. 1461/1995.

¹³ See the detailed analysis of A. Stergiou, *Social Security Law* [in Greek], 2013, Thessaloniki: Zygos, pp. 138–143.

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.¹⁴ 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”.¹⁵ 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.¹⁶ 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.¹⁷

II. 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.¹⁸

Pensions are the backbone of the Greek welfare system, providing households with 24.1 per cent of their disposable income on average.¹⁹ Other social allowances (such as family support, healthcare benefits, housing benefits, unemployment benefits and social assistance) are minor and account, on average, for 3.2 per cent of the disposable income of households.²⁰ Employees in the public sector (e.g. the civil service, judiciary and public

¹⁴ Supreme Court of Appeal (Plenary session) No. 567/1986.

¹⁵ Council of State (Plenary session) No. 668/2012.

¹⁶ Court of Auditors, IV Section, Minutes of the Meeting No. 16/1.6.1999

¹⁷ Council of State (Plenary session) No. 92/2001.

¹⁸ M. Ferrera, “The Southern model of welfare in social Europe”, in *Journal of European Social Policy* 6 (1), 1996, pp. 17–37.

¹⁹ See *Survey of Income and Living Conditions 2008*, Press release, 9.3.2010, Pireaus: Greek Statistical Service [in Greek].

²⁰ *Ibid.*

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.²¹

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.²²

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). Dis-

²¹ M. Matsaganis, "Union structures and pension outcomes in Greece", *British Journal of Industrial Relations*, 45 (3), 2007, pp. 537–555.

²² 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>

ability 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.

III. 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,²³ 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.²⁴ 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.²⁵ Consequently, the Constitution does not require that the

²³ See above, in the Introduction.

²⁴ 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.

²⁵ Council of State No. 3251/1996.

level of contributions be calculated on the same basis as that of benefits.²⁶ 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.²⁷ 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.²⁸

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.²⁹ 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 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."³⁰

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

²⁶ Three-member Administrative Court of First Instance of Athens No. 7348/1998.

²⁷ 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.

²⁸ Three-member Administrative Court of First Instance of Athens No. 7348/1998, Council of State No. 1807/2001.

²⁹ 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.

³⁰ Council of State No. 4837/1997.

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.³¹

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.³² 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.³³ 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.³⁴

³¹ See Special Supreme Court No. 9/1980, Supreme Court of Appeal (Plenary session) No. 32/1995, Council of State (Plenary session) No. 540/1999.

³² 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.

³³ Council of State (Plenary session) No. 2692/1993.

³⁴ Council of State (Plenary session) No. 832/1985.

IV. 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.³⁵

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,³⁶ five complaints against Greece.³⁷ The

³⁵ 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.

³⁶ 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.

³⁷ 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

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.³⁸

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

(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.

³⁸ 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 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”.

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 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.

V. 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.³⁹ 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.

³⁹ 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.

Summary

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. The article describes in details constitutional grounds of Greek social security rights.

Keywords: Greece, social security rights, constitution