Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe

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Sustainability of the Social Security System:

Demographic Challenges and Answers in Central Europe

Edited by
Nóra JAKAB

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| Chapter 1 |

Introduction

Nóra JAKAB

> *… a welfare state represents a set of interrelated institutional and normative solutions and procedures aimed at protecting and improving the standard of living of the population (in a broader sense), but it also encompasses the issues of fundamental rights and the social interpretation of subjective rights, i.e., legal relations that belong to private law (in a narrower sense).*[1]
>
> *Vrban, D. (2003)*

The concept of the book 'Sustainability of the Social Security System – Demographic Challenges and Answers in Central Europe' has been inspired by vital economic and social issues which are presented as follows.

The issue of social security is the subject of several international documents and treaties. Among the most relevant are International Labour Organisation (ILO) Convention No. 102 concerning Minimum Standards of Social Security, 1952; ILO Convention No. 128 concerning Invalidity, Old Age and Survivors' Benefits, 1967; and the International Covenant on Economic, Social and Cultural Rights (UN), 1966. Of the regional international treaties, the most important are the European Social Charter of 1961, the Additional Protocol to the European Social Charter and, the most recent document, the European Social Charter (Revised) of 1996 (see more in the next chapter).

Expenditure on 'social protection' remained, by far, the most important Classification of the Functions of Government (COFOG) division[2] in 2021 in the European Union (EU) and in all reporting Member States and European Free Trade Association (EFTA) countries. It reflects the government's core function to redistribute income

1 Vrban, 2003, p. 203; Vinković, 2023.

2 This classification divides general government expenditure into 10 categories per their purpose: general public services; defence; public order and safety; economic affairs; environmental protection; housing and community amenities; health; recreation, culture, and worship; education; and social protection. National Institute of Statistics and Economic Studies, 2021.

Jakab, N. (2023) 'Introduction' in Jakab, N. (ed.) *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 11–17. https://doi.org/10.54171/2023.nj.sotsss_1

and wealth, financed by compulsory payments. Unsurprisingly, the expenditure category dominating this division is 'social benefits and social transfers in kind (purchased market production)'. Social benefits are paid to households to alleviate social risks and needs. Examples include unemployment benefits and pension payments. In 2021 in the EU, the social benefits and social transfers in kind comprised slightly more than 89% of expenditure in the social protection COFOG division. In the EU in 2021, expenditure on social protection stood at €2,983 billion, equivalent to 20.5% of GDP and 39.9% of total expenditure. By far the most significant group in this division, 'old age' (10.8% of GDP), mainly regards pension payments. Expenditure in 'sickness and disability' (2.9% of GDP), the second largest group, represents mainly social payments in cash or kind (i.e. regarding social insurance schemes). Social protection represented the largest area of general government expenditure in 2021 in all EU Member States. The ratio of government social protection expenditure to GDP varied across EU Member States from 8.7% of GDP in Ireland to 24.8% in France.[3]

Globally, population ageing is expected to increase the costs of social security over the next few decades, with regional variations present in scale, timing, and impact. This situation mostly relates to long-term, income-dependent cash benefits such as (old age) pensions, social services, or social insurance in-kind benefits provided for sickness and long-term care. EU-14 countries are expected to overtake the dependency threshold, a critical point in the cross-section of the age distribution of the population beyond which tax revenue from direct taxation can no longer sustain the planned level of transfer to retirees well before the year 2100, especially relative to, for example, the United States of America, more generous pension systems, and older societies with higher dependency-ratios. Asian countries, such as China and Southeast Asian countries, projected to reach Australian and North American levels of age-dependency within the next 30 years, will, on median projections, reach the age structure comparable to the Organisation for Economic Co-operation and Development (OECD) countries by the year 2050. From a sustainability perspective, similar issues concerning social security can be observed across Europe.[4]

The EU is facing the global phenomenon of demographic changes in the ageing of the population. If the currently established growth continues, by 2030, the total percentage of elderly people (between the ages of 65 and 79 years) will amount to 37% of the entire population in the EU, which will affect the sustainability of the pension systems of the Member States. Special studies have been prepared on the

3 Nine EU Member States – France (24.8% of GDP), Finland (24.6% of GDP), Italy (23.4% of GDP), Austria (21.9% of GDP), Denmark (21.1% of GDP), Belgium (21.0% of GDP), Germany (20.9% of GDP), Greece and Spain (both 20.6% of GDP) – devoted at least 20% of GDP to social protection, with Norway being the highest among EFTA countries (18.6%). At the other end of the scale, Ireland (8.7% of GDP), Malta (11.0% of GDP), Cyprus (12.5% of GDP), Hungary (13.1% of GDP), Romania (13.3% of GDP), Bulgaria (13.4% of GDP), Estonia (13.5% of GDP), Czechia (13.6% of GDP) and Latvia (13.8% of GDP), including Iceland among the EFTA countries (13.2% of GDP), each spent less than 14% of GDP on social protection. Eurostat, 2023.
4 Bojić, 2023.

topic of demographic ageing of the population and the impact of ageing on existing pension systems. Demographic data also indicate that Europe is ageing much faster than other continents and regions of the world and that, of the 25 countries with the oldest population worldwide, 24 countries are from Europe. However, even among the EU countries, there are systemic differences in the approach to the problems of the ageing population. It cannot be said that there is a single concept of protection, especially if it is considered that building a system and providing care for the elderly is the responsibility and obligation of each Member State.[5] Despite the developed social security system, there remain people who are not covered by that form of security. Therefore, the integration of the elderly into society is necessary, which warrants adequate income in old age such that the elderly can meet various needs.[6]

Despite the narrowed competence regarding social policy measures, European officials often raise the question of the sustainability of pension systems and the constant demographic changes in Europe, which will soon represent a special challenge for the community. One of the conclusions of the Stockholm European Council related to the issue of demographic changes and the sustainability of the pension system. Accordingly, the application of the increasingly popular Open Method of Coordination was proposed, which, however, did not bring satisfactory results.[7] Moreover, the European Commission, after consultation with the Committee for Social Protection of the European Union and the Committee for Economic Policy, proposed joint goals in the implementation of appropriate pension measures. Thus, it is also mandated to ensure decent basic living standards for the elderly and prevent poverty and social exclusion.[8]

The Committee for Social Protection of the European Union, based on the submitted reports of the Member States of the community, issued a special report that addresses the issue of the sustainability of pension systems. Further, the Member States previously agreed on 10 common goals for future pension reforms: 1. Sustainability of a more appropriate pension amount; 2. Ensuring intergenerational equity; 3. Maintaining the idea of solidarity within pension systems; 4. Maintaining a balance between rights and obligations; 5. Ensuring that pension systems support equality between men and women; 6. Ensuring transparency and predictability; 7. Ensuring that pension systems are even more flexible in light of constant social changes; 8. Facilitating the adaptability of the labour market; 9. Ensuring the consistency of pension schemes in general pension systems; and 10. Ensuring the sustainability of public finances.[9]

This manuscript follows the following structure: dogmatic part (the place of social law in the legal system, constitutional grounds), demonstration of compliance with the (Revised) European Social Charter (benefits, financing, organisation, and

5 Bojić, 2023.
6 Bojić, 2023.
7 Jacob, 2002, pp. 40–41.
8 Ibid.
9 Fuchs, 2002, p. 63.

administration), current social law regulatory issues, and problems regarding sustainability in light of demographic challenges.

Considering the noted phenomena, the country reports dedicate a separate part to pension or healthcare system sustainability. The comparative chapter also highlights the key findings, reflecting Central-European solutions to the emerging problems. The general framework of this book hinges on the related Articles of the Revised European Social Charter; therefore, each chapter captures compliance with the related articles of this document.

Article 11 of the Revised European Social Charter, which guarantees the right to protection of health, posits that

> With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*: to remove as far as possible the causes of ill-health; to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Article 12 of the Revised European Social Charter, which guarantees the right to social security, posits that

> With a view to ensuring the effective exercise of the right to social security, the Parties undertake: to establish or maintain a system of social security; 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; to endeavour to raise progressively the system of social security to a higher level; 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: equal treatment with their own nationals of 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 protected may undertake between the territories of the Parties; 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 Parties.

Article 13 of the Revised European Social Charter, which guarantees the right to social and medical assistance, posits that

> With a view to ensuring the effective exercise of the right to social and medical assistance, the 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; to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want; to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

Article 14 of the Revised European Social Charter, which guarantees the right to benefit from social welfare services, posits that

> With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Parties undertake: to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment; to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

Article 15 of the Revised European Social Charter, which guarantees the right of persons with disabilities to independence, social integration, and participation in the life of the community, along with Article 16 of the Charter, which guarantees the right of the family to social, legal, and economic protection, posits that

> With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

Article 17 establishes the obligation of the Member States of the Council of Europe to provide children and young persons with the right to appropriate social, legal, and economic protection.

In the country chapters, the authors will also present the history of social rights in Central Europe. We believe history is key to understanding the notion of social security or social protection. The social security system would be largely steered towards sustainability by the development and implementation of long-term care rules. The country chapters have paid special attention to this notion. However, beyond

the Slovenian and Romanian examples, the region has, thus far, seen no progress. This book does not address migration issues, which are crucial for sustainability, as the population of Central Europe is dying, and migrants are increasingly using the services of the social security system. Finally, long regarded as second-rate rights or disregarded in practice, implemented sparingly, and partly insufficiently backed by active, coherent measures to guarantee their exercise, we believe social rights are reemerging in bad economic times. We agree with Vallasek that the question of social rights is a particularly important topic these days, as global society is facing renewed crises from economic recessions, inflations, the pandemic, and wars. In this context, the issue of sustainability of the social system is a key factor. The issue of social law and social policy can never be considered alone but must be interpreted along with the education, health, labour, and even tax policy of the given state. Thus, the need for a coherent, long-term planned social policy is unequivocal.[10]

10 Vallasek, 2023.

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| Chapter 2 |

The Theoretical Issue of Social Security—International and European Perspectives

Nóra JAKAB – Bernadett SOLYMOSI-SZEKERES

ABSTRACT

This chapter deals with the theoretical issue of social security. It has been presented by the main characteristics of social rights, the international social law and main features of the EU legislation in this regard. These provide a broad understanding of the issue at international and European level. It was highlighted that human rights are indivisible, interdependent and interrelated rights. The quality of human existence is determined by second generation rights. Social security is an integral part of a life worth living. There is a difference between the nature of each generation, one thing can be said with certainty: all human beings have an indivisible right to human rights, and the quality of human life is largely determined by the opportunities offered by these social rights, and the presence of the state is present in all generational rights, differing only in the extent and intensity of their presence.

KEYWORDS

international social law, social rights, sources of international social law, EU legislation

1. Introduction—Characteristics and problems of social fundamental rights

Social rights are among the most controversial areas of human rights and the most variably regulated in different states. According to some legal scholars, social rights are as important a factor in a person's becoming a citizen as are classical fundamental rights.[1] The declaration of social rights or some form of regulation of social rights always gives a picture of the values, the vision of man, and the role of a particular state. Moreover, it is generally linked to prevailing political views and, of course, to the more narrowly defined conceptions of constitutional law.

Economic, social, and cultural rights as second-generation rights are, in many ways, contrasted with civil and political rights as first-generation rights. One is the

1 Sári, 1997, p. 217.

Jakab, N., Solymosi-Szekeres, B. (2023) 'The Theoretical Issue of Social Security—International and European Perspectives' in Jakab, N. (ed.) *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 19–50. https://doi.org/10.54171/2023.nj.sotsss_2

difference in the state obligation that they entail.[2] According to Gábor Kardos, there is a behavioural obligation to second-generation rights. For a significant group of rights, to effectively guarantee them, the state must engage in well-defined conduct per the rules of the relevant constitution or international treaty.[3] The Committee on Economic, Social, and Cultural Rights sets out three types of state obligations: respect, fulfilment and satisfaction.[4]

We would like to point out here that, like Hajdú, we believe the generational division of human rights can be misleading. Human rights are indivisible, interdependent, and interrelated. The quality of human existence is determined by second-generation rights. Social security is an integral part of a life worth living. As we shall see, there is a difference between the nature of each generation. Indeed, one thing can be said with certainty: all human beings have an indivisible right to human rights, the quality of human life is largely determined by the opportunities offered by these social rights, and the presence of the state is present in all generational rights, differing only in the extent and intensity of their presence.[5]

The public service expected under economic, social, and cultural rights is relative. Their actual content is determined by lower-level legislation. For each social right, there may be a set of satellite rights that facilitate the realisation of the merits of the right, which helps achieve the highest possible level of realisation of the right. For example, the right to work is facilitated by the right to vocational training for all.[6]

State obligations can be absolute or relative. Some civil and political rights cannot be limited, even in exceptional cases, while others are relative, subject to appropriate guarantees. State obligations arising from social rights are always relative, measured in terms of the resources available.[7]

The difference between the two groups of human rights is the direct nature of the state obligation in the case of civil and political rights and its gradual nature in the case of social rights.[8] Civil and political rights are real human rights, while social

2 The question of whether the conduct of the State is a positive or negative sign has been raised in two cases: the Marckx case, judgment of 13 June 1979, European Convention on Human Rights (ECHR), Series A, No. 31, and the McCann and Others case, judgment of 27 September 1995, ECHR, Series A, No. 324.

3 Kardos, 2003a, p. 27. For example, to ensure the right to health, a social security system must be in place.

4 See Committee on Economic, Social and Cultural Rights, General Comment No. 12. (1999), UN doc, E/2000/22.

5 See on this Hajdú, 2021, p. 31; Halmai and Tóth, 2011. See also the Ministerial Conference on Human Rights held in Rome on 5 November 1990, which stressed the need to preserve the indivisible nature of all human rights (whether civil, political, economic, social, or cultural) and give new impetus to the Charter. Therefore, at the Ministerial Conference held in Turin on 21 and 22 October 1991, the decision was to modernise the ECHR and amend it to account for the fundamental social changes in the 30 years since the text was adopted. See Hajdú, 2021, p. 33.

6 For disadvantaged groups, the interdependence and interrelated nature of rights is even more important.

7 Kardos, 2003a, pp. 28–29.

8 Ibid., p. 29.

rights are more of a state objective.[9] The problem with economic, social, and cultural rights is judicial enforceability. Consequently, the nature of social rights is two-fold: they are partly real rights and partly state objectives for the optimal implementation of the service.[10] Civil and political rights do not impose a heavy financial burden on the community, while the provision of economic, social, and cultural rights is expensive and requires a heavy redistribution of state resources. However, the protection of civil and political rights is financially demanding, as the state must maintain a wide range of rule of law institutions.[11]

The protection of economic, social, and cultural rights started in internal legal systems. The decisive difference was whether these rights were included in the Constitution or whether only lower-level legislation created such distributive rights. From the perspective of international law, the core of the protection afforded by the domestic law of states is a system of accessible and effective remedies. The constitution contains a general formula for the social commitment of the state, which has normative consequences (German Basic Law). The constitution or an equivalent fundamental law lists the social rights it protects. However, this solution is not uniform. Social rights are declared to be objectives of the State (Spanish Constitution). Social rights retain their individual character but can only be the subject of judicial proceedings under the lower-level legislation to which they are subject (Czech Constitution). Social rights included in the Constitution can be the subject of constitutional or ordinary judicial proceedings by reference to the fundamental law (Hungarian Constitution). Some social rights are also expressed as subjective rights (the right to social security in the Danish constitution).[12] In some states, the Constitution does not contain a general rule of social commitment or social rights (US Constitution).[13] For certain rights, mainly in the context of employment, it is possible the parties' collective bargaining, rather than legislation, may regulate the protection of social rights (subsidiarity principle and reflexive legal concept).[14]

Economic, social, and cultural rights and human rights in general pressure the state to justify any regulation by its impact on those it regulates. Human rights also place the burden of proof on the state. Thus, human rights are reduced to the logical premise of the right to subsistence.[15] The right to subsistence must be interpreted

9 Cranston, 1973, p. 68. Criteria for human rights: the subject is clearly identifiable, the obligor is indeed obligated and clearly identifiable, the content of the obligation derives from the source or interpretation of the law itself, the obligation is judicially enforceable, and there is a definable area of law behind the individual right.

10 Kardos, 2003a, p. 30.

11 Kardos, 2003a, p. 31.

12 Ibid., pp. 37–38.

13 The US Supreme Court has ruled in numerous cases that there are no constitutional social rights. In Lindsey v. Normet (405 US 56, 74, 1972), for example, it held that there is no constitutional right to housing. The same was said of the constitutional right to education in San Antonio Independent School District v. Rodriguez (411 US 1, 30–31, 1973).

14 Kardos, 2003a, p. 39. Reflexive character means that legal norms do not prescribe conduct or outcomes but provide procedures and leave it to private parties to decide disputes. This is the rule in the USA, for example.

15 Ibid., p. 32.

broadly, including the need to satisfy all human needs.[16] The need for economic, social, and cultural rights can be justified by basic human needs and the avoidance of closely-related human suffering.

There is a great need for integrated protection of human rights. The exercise of civil and political rights is hardly conceivable without at least a minimum of social empowerment. The former presupposes the latter. Human dignity requires at least a minimum level of social entitlement. The guarantee of this entitlement can also be underpinned by solidarity within a community of citizens, national, ethnic, or religious communities. The idea of equality can also be raised as a basis for social entitlements. Raymond Aron states that economic equality does not follow from social or political equality but requires institutions to ensure that everyone has sufficient income such that they do not feel excluded from the community because of their poverty.[17] It also means the right to an adequate standard of living.[18]

Social rights provide distributive entitlements and guarantee services to people on the weaker side of a struggle along organised interests. The protection of the weaker is also often raised in political debate, but these are not absolute arguments, and economic and social rights do not lose their legitimacy because of it.[19]

Following this presentation of the characteristics and problems of social fundamental rights, the next section presents the international and EU rules on the protection of social rights.

2. International social law

2.1. International social law in the social rights dimension

Throughout history, the role of social rights has been defined in many ways, influenced by many circumstances.[20] If we look at the teleology of social rights in a broad

16 These include survival needs, needs arising from social participation, self-actualisation needs. See Nayar, 1996, pp. 171–194.

17 Kardos, 2003a, pp. 33–34.

18 The right to an adequate standard of living under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights includes food, clothing, and housing. The right to an adequate standard of living can be no more than a mere objective of the State. However, if we look at the individual elements of this right, we are already establishing a specific State service. On this basis, social rights can be grouped into rights that give concrete form to specific types of state services and rights that give legal entitlements to meet basic needs and beyond. Such rights include rights to property and rights to work, providing a basis for participation in social distribution. If these titles do not ensure that human needs are met, then the right to social security can be invoked. Here as well, there is a hierarchy, as services derived from social security must take precedence over social and health assistance. This hierarchy is also clear from Article 13(1) of the European Social Charter. For more, see Kardos, 2003a, pp. 42–44.

19 Ibid., p. 36.

20 One such circumstance is the economic crises that followed the economic growth after the Second World War. At the time, countries realised that economic growth was limited, for example, by environmental considerations, which changed how countries perceived the

sense, we must consider the first and most important aim of social rights to be the satisfaction of basic human needs.[21] The generic concept of social rights regards the set of 'umbrella rights' within human rights that protect against state interference. From this perspective, therefore, any entitlement that can protect the well-being of the individual against the state can be included in the scope of social rights.[22] This broad approach is undermined, however, by the general lack of protection of social rights, as the protection of these rights from constitutions and international treaties and the low level of protection limits the full enjoyment of social rights.[23]

Considering the conceptual and historical background, it is not necessarily possible to make a sharp distinction between labour law, social security,[24] and social law, as their origins and roots are common and are all linked to the industrial revolution and the plight of workers at the time and the struggle against it.[25] The idea of social justice appeared as early as the 19th century,[26] gradually becoming an increasingly important part of the legal systems of the individual states; it is now a fundamental

guarantee of social rights. Danilo Türk noted that, in fact, all states can justify their failure to guarantee a higher level of social rights. Rab, 2008.

Drinóczi considers the scope of social rights as controversial. In his view, we can speak of social rights in a narrower and broader sense. In a broader sense, social rights include second-generation rights and, at international levels, several newer-generation rights (e.g. right to clothing, protection against malnutrition and hunger). If social rights are understood in a narrower sense, considering their function, their relationship with the right to human dignity and the fact that they are sought to be enforced in the European area of fundamental rights, a fundamental rights character can be established. Social rights, thus understood, can typically be invoked when an individual finds himself, for reasons beyond his control, in a predetermined situation (e.g. orphanhood, sickness, unemployment), which ultimately somewhats threatens his humanity such that no other existing fundamental right can offer protect. The Hungarian perception in the literature and among constitutional judges tends to be that social rights cannot be considered fundamental rights and cannot be enforced. The approach of the Constitutional Court has gone through three phases in the 20 years of the Constitution's existence and seemed to accord with the European trend by linking social rights to the right to human dignity. However, this ambition and perception was broken with the entry into force of the Constitution. The new practice that has emerged does not fit international developments nor the evolving trend in constitutional or wider public law and professional considerations on social rights. See Drinóczi, 2019, p. 1; Halmai and Tóth, 2008; Lyon-Caen, 2002, p. 189; Macpherson, 1985, p. 23.

21 Kardos, 2000, p. 6.

22 A 2014 comparative Canadian constitutional law study on economic and social rights found that more than 90% of the 195 constitutions surveyed contain at least one economic and social right. Drinóczi, 2019, p. 2.

23 Rab, 2017, p. 1.

24 The Universal Declaration of Human Rights provides for the right to social security for all members of society. The concept of social security can also be linked to statistical data showing its low level of protection. According to available estimates, approximately 50% of the world's population has access to some form of social security, while only 20% enjoy adequate social security. International Social Security Association, no date.

25 Servais, 2020, p. 15.

26 In the first half of the twentieth century, the Prussian model spread throughout Europe. Closely linked to work, 'workers' insurance schemes were set up to provide benefits in the event of a breakdown in work, typically for industrial workers. The First World War and the world economic crisis of the 1930s reinforced the idea that market imbalances should be addressed

democratic value to be defended at the constitutional level.[27] Meanwhile, however, while the basic principles are common, social rights have not developed in the same way in different countries. Thus, during historical development, the measures that have created social rights have tended to include the first factory laws, which were provisions creating guarantees of labour rights[28] and provisions that created the roots of the state's social security—health insurance—obligations on the other.[29]

There are divergent views on the exact content and meaning of international social law.[30] One of the regionally defining documents, the list of social rights embraced by the European Social Charter, is related to several areas and, in Hoffman's view, has a broader content than the right to social security alone. This Charter includes the core rights of workers,[31] such as the right to work, the right to collective bargaining, and special protection for children, young people, and women. It also includes the right to health protection and the protection of the family, among others.[32] In comparison, the level of social security, as defined by the ILO, also includes coverage of the risks of old age, childhood, unemployment, and health.[33] The concept of social security also covers a wide range of issues, as it includes the provision of support in the event of risks, such as old age, sickness, and maternity, and, thus, has a strong human rights basis.[34] Accordingly, Kaltenborn uses the term social human rights in his research.[35]

Based on such a broad conceptual dimension, it is no exaggeration to say that international social law has a protective[36] and solidarity character.[37] These characters are defined by the rights guaranteed therein and the documents that capture the rights and the obligations deriving from them—that is, the sources of (international) social law.

through state intervention. Meanwhile, there was a growing demand in many countries for social protection for workers and all members of society. Dezse, 2020.

27 Téglási, 2021, p. 167.

28 Rab, 2016.

29 Rab, 2017, p. 1. Economic and social rights are increasingly protected in national constitutions, but in very different ways. Drinóczi, 2019, p. 3.

30 See e.g. Eichenhofer, 1994; Schuler, 1988.

31 Rab summarises that one of the fundamental aims of guaranteeing social rights is to create a framework for employment. Rab, 2017, p. 2.

32 Hoffman, 2015, p. 46.

33 Rab, 2017, p. 5.

34 The realisation of social security is not only perceived through social rights. Beyond fundamental social rights, the principle of legal certainty and the right to property are constitutional principles that serve to achieve social security. Rab, 2008.

35 Kaltenborn, 2015, p. 2.

36 Servais, 2020, p. 16. This is also a consequence of the fact that social rights are essentially a guarantee instrument for remedying social problems, thus carrying with them features that are fundamentally different from fundamental freedoms. Social rights are also rights for all, but they cannot be considered universal rights, as not everyone needs social-legal protection in all circumstances, given the protective nature of social law. Rab, 2008.

37 The constitutional provisions on social matters define the minimum level of social solidarity (i.e. state responsibility) to be achieved through the state (Rab, 2008). However, there are other dichotomies in the nature of social rights, which are also two-fold: they are partly genuine rights and partly state objectives for the optimal delivery of services. Gyulavári, 2004, p. 221.

2.2. Sources of international social law

To consider the international dimension of social law and social security, we must also consider the international legal sources and documents that influence national legislation.[38] The international legal environment also defines social rights as fundamental rights;[39] however, the documents drafted by different international organisations seek to identify the content of social rights in different ways,[40] but the definition of the level of social rights protection is protected by international law.[41] Social rights as second-generation fundamental rights are also reflected in certain international conventions on fundamental rights. Even so, because of the economic implications of social rights, international conventions with a broadly more general scope also contain several provisions that have implications for social administration and the exercise of these rights. If the sources are classified per their territorial scope, three levels can be distinguished. The first level comprises universal conventions, which are essentially adopted within the framework of the United Nations (UN) and its specialised agencies. The second level comprises regional conventions, which apply to specific groups of countries, and the third level comprises bilateral social policy conventions.[42] These sources should, thus, not be considered exclusively as documents dealing specifically with social rights, since other fundamental rights also affect social rights indirectly. Hence, human rights documents with a broader focus should also be considered when examining the sources of international social law.

Among the universal conventions, the 1948 Universal Declaration of Human Rights (UDHR), a soft law instrument, should be highlighted.[43] The wording of some articles of the document is typical, as the most frequently used formula is 'everyone has the right…' or 'no one shall be…', which also emphasises the universality of the rights contained in the Declaration.[44] The next major document is the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966,[45] which has

38 The development of international law in the post-World War II period and, consequently, the unprecedented globalisation of certain institutions, contributed decisively to the strengthening of the universality of fundamental rights. Kiss, 2010, p. 84.

39 Rab, 2008.

40 Rab, 2008.

41 Téglási, 2021, p. 170.

42 Hoffman, 2015, p. 44.

43 According to Gábor Kardos, the fact that the Declaration includes social rights shows the socialist influence; although, in his opinion, it is perhaps more correct to say communitarian, as social rights are not only linked to the socialist conception, and the Declaration also states that the individual has duties towards the community. Kardos, 2003b, p. 139.

44 The drafting of the Declaration was marked by a sharp dispute between the Western powers and the Soviet Union, *inter alia*, in the field of economic and social rights. Kardos, 2003b, p. 139.

45 At that time, civil and political rights were also the focus of regulation, and the original intention was to incorporate them into one document, but the challenge was that developing states would not commit to civil and political rights because of the burden of economic and social rights. Thus, in 1966, two separate Covenants on civil and political rights and on economic, social, and cultural rights were finally adopted. Téglási, 2021, p. 170.

strengthened the international recognition of social and economic rights[46] such that it has become legally binding as hard law. These two conventions are general in their scope. However, among the universal conventions, some formulate social rights for a specific group of persons with specific characteristics. These include the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. A common feature of these conventions, according to Hoffmann, is that they provide for the enforcement of social rights beyond the human rights they define as a public obligation, adapted to the Member States' capacity to bear the burden. [47]

The ILO is a specialised agency of the UN and is significant in shaping the international approach to employment and social security. The ILO has developed 24 Conventions and 11 Recommendations in the field of social security[48] and has established appropriate procedures to monitor their implementation, the most important of which is the ILO Social Security (Minimum Standards) Convention from 1952 (No. 102). [49]

Among the regional social-legal documents, the European Social Charter, adopted in 1961 and amended in 1966,[50] provides for social rights and the public commitments necessary for their realisation in a concise legal formulation (see later). This document is characterised by the flexibility of its evolving standards.[51] The document protects the right to social security through a series of articles forming a system.[52] The first part of the Charter sets out social rights as an objective to be achieved by all means, and the second part sets out the obligations of States Parties relative to each right. These obligations are selective, but there is much criticism of the monitoring of their implementation.[53]

A brief mention should be made of the bipartite conventions on matters of social law, mainly covering social security benefits, health services, and child support. However, for the EU Member States, they are unnecessary, as the relevant issues are covered by Regulation (EC) No. 883/2004.[54]

Of course, the listed sources are not exhaustive, as there are many other related codes and conventions related to social law, such as the European Social Security Code adopted by the Council of Europe or the European Convention on Social Security.

46 Kaltenborn, 2015, p. 2.
47 Hoffmann, 2015, p. 45.
48 For example, Convention No. 128 (Invalidity, Old-Age and Survivors' Benefits Convention) and Recommendation No. 202 on Social Protection Floors.
49 Kardos, 2000, p. 8.
50 The background to the adoption of this document is that after the Second World War, the incorporation of classical freedoms into international conventions began; since the 1960s, second-generation rights have also been included in international documents. Téglási, 2021, p. 169.
51 Kardos, 2003c.
52 Kardos, 2000, p. 8.
53 Kardos, 2003c.
54 Hoffman, 2015, p. 47.

However, the brief overview of the sources shows that, in the case of social rights, we can partly speak of independent sources, though we should not only look at documents specifically related to social law.[55]

At this point, however, it is important to take a closer look at the European Social Charter; the country chapters of this book have paid particular attention to the subject.

In a global context, the Charter corresponds to the UN International Covenant on Economic, Social and Cultural Rights.[56] In the European context, the Charter is the equivalent of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the overarching Council of Europe human rights convention.[57] The Charter was drafted roughly between 1953 and 1961. Two bodies worked on it: the Committee of Ministers of the Council of Europe and the Parliamentary Assembly. The Charter entered into force in 1965, with the ratification of the fifth Member State.[58] The Charter is also known as the 'conscience of Europe'.[59] Part I of the Charter contains social rights as a political objective in a brief subject-matter legal formulation[60] in 19 sentences. Part II sets out the public commitments necessary to achieve the objectives set out in Part I, failure to fulfil which constitutes a breach of the Member State's obligations. The main features of the regulatory concept of the Charter include a choice of obligations, limited

55 Gyulavári, 2004, p. 221. Notably, social rights are often considered to be secondary human rights, and it is not uncommon to find that social rights are not human rights at all in the literature. This simplistic statement is reached by contrasting economic, social, and cultural rights, labelled as second generation, with so-called first-generation human rights, such as civil and political rights. One of the undeniable differences is the different state obligation that arises from them and its limitability (i.e. its relative nature in the case of social rights).

56 'In Europe, according to the majority of experts, one of the most important depositories for the multilateral and regional protection of economic, social and cultural rights, which are among the second generation of human rights, is the European Social Charter of the Council of Europe (1961) and its Amended Charter (1996). The first Charter was inspired by the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948, Articles 22-26 of which also declared social rights in a broader sense. Moreover, its earliest antecedents are the ILO Declaration of Philadelphia of 1944 and, in the case of the article on social security (Article 12), ILO Convention No. 102 (1952). The revised Charter was also significantly influenced by the UN International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly in 1966. The 1961 Charter was essentially wedged between the two UN universal human rights standards and, well ahead of its time, brought together in one document a relatively broad catalogue of social rights'. Hajdú, 2021, pp. 31–32.

57 The fundamental social and economic rights enshrined in the Covenant are linked to Articles 22–25 of the UN Universal Declaration of Human Rights and the corresponding Articles 6, 7, 9, 10, 11, and 15 of the UN Covenant on Economic, Social, and Cultural Rights.

58 For the dates of signature and ratification of the Charter, see Samuel, 1997, pp. 109–121. For an illustration of the provisions adopted, see ibid., pp. 124–132.

59 György Könczei's formulation. Könczei, 1999, pp. 40–73.

60 Kardos, 1996, pp. 74–89.

by a hard core;[61] the breakdown of certain rights into specific public obligations; and monitoring implementations by independent bodies via reporting and collective complaints.[62] Since 1961, the Charter has expanded to include four additional protocols. Together, the five documents are known as the Charter package: Additional Protocol (1988) to modernise the Charter by incorporating four new rights; Amending Protocol (1991) to make the Charter's monitoring mechanism more effective; Additional Protocol on the provision of a collective complaints system (1995) to make the Charter's monitoring mechanism more effective; and Amended European Social Charter (1996), a major international document of the 21st century.

Since 1961, the two basic types of monitoring mechanisms for universal human rights conventions have been the reporting and petition systems. The reporting system was first applied to the Covenant, based on national reports sent every two years. The reports are written in English or French on the articles ratified by the Member State, using a questionnaire prepared for this purpose. Hungary has produced four country reports since ratifying the Charter.[63] The European Committee of Social Rights[64] can also act based on comments from international organisations of workers and employers and certain non-governmental international organisations (petition system). The European Committee of Social Rights examines the extent to which national law and practice accord with the provisions of the ratified articles of the Charter from a legal perspective. Its conclusions are published and sent to the Government Committee. The conclusions of the European Committee of Social Rights are also periodically discussed by the Parliamentary Assembly, though this is not relevant. The Governmental Committee compares the conclusions with the specific situation of the Member State concerned based on social, economic, and political considerations and decides whether to issue a warning[65] or a recommendation.[66] At the end of the review

61 An essential feature of the Charter is that, when signing or ratifying it, States Parties have the option of accepting only some of the 31 economic and social rights it contains as binding on themselves, rather than all of them. This is known as partial ratification. The full 'à la carte' freedom is somewhat limited by the fact that the ECHR sets a minimum number of articles to be accepted as binding. These articles are of paramount importance because they constitute the so-called 'hard core': of the seven articles included, at least five are mandatory. See Hajdú, 2021, p. 33.

62 Kardos, 1996, p. 82.

63 The first was sent on 7 August 2001.

64 Formerly the Committee of Independent Experts.

65 If a country fails to fend off criticism at a meeting of the Steering Committee, it is reprimanded. In a minor, first-time case, a warning is given by the Government Committee on a specific issue. In a more significant and recurrent case, the Government Committee makes a recommendation, which is then adopted by a larger body, the Committee of Ministers. The recommendation is published in the Official Gazette, and everyone tries to avoid it, because it tends to make a big fuss. For more details see Gyulavári and Könczei, 2000, pp. 201–204; Weller, 1996, pp. 19–62.

66 There has been a long-standing debate in the Government Committee on the use of these words. The attention-grabbing power of the two terms is reversed in English. The debate over the meanings of the words is not alien to international documents (English and French translations of the UN Charter), as we have learned in undergraduate and postgraduate courses.

cycle, the Committee of Ministers issues recommendations to those states that do not comply. The time needed for this mechanism is approximately four to five years.[67] Based on the reports, all available facts about the country are examined. The facts in the report must correspond to reality. The most important aspect based on which any comment is made by the European Committee of Social Rights is whether the state has taken tangible steps to improve the commitments it has made. Based on the examination, the following comments can be made: 'satisfactory'; the Committee on Social Rights makes no comment; if there is progress, it reaches 'positive conclusions'; but if there is no progress, it sends a summary report to the Government Committee, which discusses it at its next meeting, calling the shortcomings criticised in the area concerned 'negative conclusions'. Thus, the Charter's case law is created following the logic of the common law.[68]

Some chapters of this book specifically address compliance with the relevant articles of the European Social Charter.

Beyond the monitoring procedure based on national reporting, the petition-based collective complaints procedure introduced in 1998 should also be mentioned. The fundamental difference between the two is that the reporting system is mandatory for all States Parties, whereas the collective complaints procedure is limited to States that have ratified the relevant Additional Protocol. In practice, both mechanisms work, but the primary means of compliance with the Covenant is necessarily the Commission's examination based on national reports, as the reporting obligation to the Commission applies to all States. Meanwhile, the Protocol on the collective complaints procedure has been ratified by only 17 States to date. These two monitoring mechanisms are complemented by a specific procedure, whereby the Commission, following a joint assessment with representatives of the Commission and the State Party concerned, seeks to encourage the State concerned to ratify the articles of the Charter not yet adopted and the Additional Protocol on the collective complaints procedure in a preliminary procedure called the 'procedure on non-accepted provisions of the Charter'.[69] Following this establishment of the most relevant sources of international social law, the next section presents the obligations under international social law shall be presented.

67 For an illustrative diagram of the control mechanism, see Gyulavári and Könczei, 2000, p. 202.

68 Lenia Samuel, whose work will serve as a basis for the presentation of the provisions of the Charter on persons with disabilities in the next chapter, provides a good summary of the case law.

69 Hajdú, 2021, p. 34.

2.3. Obligations under (international) social law

Social rights and state obligations are interdependent,[70] as social law requires positive, active action by the state.[71] Regarding classical freedoms, the guarantee of the right is explicitly the subordination of the state's role.[72] International social law imposes several obligations on states, as it requires governments to do their utmost to ensure that all actors in society can achieve respect for fundamental social human rights.[73] Therefore, regarding social states, the guarantee of fundamental social rights is considered a constraint on the state.[74] These obligations require States to formulate policies that accord with social rights and promote their realisation[75] to which Article 2 of the ICESCR adds that international assistance is necessary to ensure the guarantee of these rights.[76]

The State obligations stem primarily from the noted sources, of which the ICESCR, already examined, is a key element. In capturing the State obligations, the ICESCR, by its general nature,[77] provides a rich catalogue based on a broad conception of social rights, with an accompanying programme attached to the right in question,[78] and its specific codification and ratification technique has enabled almost all States worldwide to become parties to this Convention.[79] It has also meant that the overall level of protection and the system of legal protection under the Convention is lower than that of other conventions, particularly regional conventions.[80] Moreover, conventions generally formulate social rights as rights, but the commitments of States Parties typically use the terms 'recognise' or 'progressively

70 Historically, social rights—as second-generation constitutional rights—are derived from the social functions of the state, even though the state's social functions are older than the declaration of freedoms. Already, from the last decades of the 19th century, the organisational system of state governance developed social-legal institutions to prevent social tensions, with the help of legal theory. Rab, 2017, pp. 1–2.

71 States are obliged to provide for social protection rules in their constitutions, but the legal solutions on this subject differ considerably, of course, and the reasons are discussed several times in this chapter. Téglási, 2021, p. 167.

72 Rab, 2008.

73 Kaltenborn, 2015, p. 2.

74 Rab, 2017, p. 2.

75 Kaltenborn, 2015, p. 2.

76 Kardos, 2003.

77 The general feature is a double-edged weapon. Rab notes that the ICESCR's use of the word 'general' raises several problems of legal interpretation, as it does not allow for an objective assessment of the level of social rights protection. Rab, 2008.

78 These programmes are for implementation, for example, in the case of the right to work, the designation of technical and vocational counselling and training programmes, procedures, and methods. Kardos, 2003c.

79 The IESCSR expressly states that States Parties recognise that in the exercise of rights granted by the State in accordance with the Covenants, the State may subject such rights only to such limitations as are prescribed by law to the extent compatible with the nature of those rights and solely for the purpose of promoting the general welfare of a democratic society.

80 Hoffmann, 2015, p. 45.

ensure'.[81,82] This discrepancy may arise because international conventions do not require that social rights should be constitutionally guaranteed by the legislatures of the State Parties.[83] It is also significant because if a social right is a constitutionally declared fundamental right (i.e. it is not only declared as an aspiration), it is entitled to constitutional protection, whereas if it is only a state objective, legal protection is guaranteed by the judiciary.[84] Of course, while recognising that the guarantee of social rights is relative to the obligations of the State,[85] there are ancillary elements of these obligations for which the absolute nature of the obligations can be established. These include, according to Kardos, the obligations of the state in the area of defence and procedural and other matters of legal certainty.[86]

It is, therefore, beyond doubt that States have obligations under international social law.[87] The guarantee of social rights and the obligation to guarantee them is primarily a matter of state resources and requires a considerable degree of state redistribution.[88] Failure by the State to fulfil these obligations also has consequences regarding social perception, as citizens will not fulfil their obligations to the State to provide social services if the State fails to fulfil its duties as perceived by its citizens. It will strengthen the grey and black economy.[89] It is recognised in jurisprudence that the provision of social rights is determined by the level of development of the state concerned. However, there remain certain minimum standards, not necessarily regarding material benefits or services, that a state must provide to meet its international obligations. Compliance with international obligations can be achieved by the State through appropriate rule-making and enforcement.[90] Achieving an adequate level[91] of social rights in the national guarantee of social rights is also the foundation

81 The progressive granting of social rights is one of the major differences with civil and political rights. While the latter are an immediate task for the state, social rights must be implemented gradually. Gyulavári, 2004, p. 221.
82 Drinóczi, 2019, p. 3.
83 Rab, 2008.
84 Ibid.
85 Relativity is also supported by the fact that the ICESCR document provides that the progressive guarantee of the exercise of the right is based on the resources available and is, therefore, not measured against an objective standard (Article 2(1)). The European Court of Human Rights (EctHR) also considers in its judgments the economic and social context in the country concerned at the time the case in question occurred. (Téglási, 2019, p. 256) The question as to what limitation of legal enforcement is required by the relative nature of the state obligation is a question for the state constitutional courts to answer. (Kardos, 2003c) Meanwhile, even if only state objectives are discussed, they can be violated, in particular, by an unjustified diversion of resources. Gyulavári, 2004, p. 221.
86 Kardos, 2003c.
87 The positive role of the state is also a limit to the enforceability of social rights by leaving the courts to consider unenforceable rights. Rab, 2008.
88 Gyulavári, 2004, p. 221.
89 Rab, 2008.
90 Drinóczi, 2019, p. 3.
91 As has been repeatedly stressed, the consequence of relativity is the legal problem that the level of social rights cannot be objectively assessed. Budgetary resources are used as a yardstick. Téglási, 2021, p. 170.

of social justice.[92] However, the enforcement of these obligations raises a new set of questions, which also resonate in jurisprudence, as the most frequent criticism of social rights is the problem of their enforceability through legal means.[93]

The first point to note is that social rights are often enforced indirectly at the international level, rather than directly—that is, solely by reference to the (violated) social right concerned[94]—as it is indeed challenging to hold legally accountable the failure to create an ideal state of affairs arising from service rights.[95] Indirect enforcement is also exemplified by the ECHR (Convention) cited as a source. The Convention does not explicitly contain social rights,[96] but the ECtHR, established to implement the Convention, defends them if their interpretation is dynamic and constructive.[97] Moreover, the ECtHR has developed procedural and substantive guarantees[98] from the right to a fair trial, the right to property, and the prohibition of discrimination.[99] This indirect enforcement is also followed by national courts: the Austrian Constitutional Court, for example, has held that social benefits based on significant individual contributions constitute 'possessions' within the meaning of the First Additional Protocol to the European Convention on Human Rights and are, therefore, covered by the protection of the right to property. Another international example is the application by Romanian courts of the principle of vested rights and the principle of legitimate expectations, taken from ECtHR practice, in pension cases.[100]

At this point, the practice of the ECtHR should be briefly mentioned, given that, as can be seen from the above considerations, its case law is an integral part of the internationalisation of social rights. The ECtHR was established by the Convention for the Protection of Human Rights and Fundamental Freedoms to protect the rights it guarantees. It was originally envisaged that social rights would not be covered by the Convention, but, contrary to plans, the Charter did not acquire the same effective enforcement mechanism as the Convention, as the former requires States Parties to report on the fulfilment of their obligations, and the latter has a system based on

92 Téglási, 2021, p. 167.
93 Gyulavári, 2004, p. 221.
94 Kardos sees the enforcement of social rights as freedoms as fundamentally no different from the enforcement of civil and political rights. Kardos, 2003c.
95 Gyulavári, 2004, p. 221.
96 The Convention and its additional protocols are, thus, essentially civil and political rights, and do not provide for typical social rights such as the right to adequate housing, an adequate income for subsistence (or indeed any income at all), social security services in genera, or health or social security. However, many of the rights guaranteed by the Convention are economic and social. Téglási, 2019, pp. 255–256.
97 Forms of social security, such as the payment of benefits and pensions, are protected under Article 8 of the First Additional Protocol.
98 Téglási, 2017, p. 602.
99 The relationship between the prohibition of discrimination and social law is discussed below.
100 Drinóczi, 2019, p. 3; Téglási, 2017. Austrian Constitutional Court, ECLI:AT:VFGH:1998:G363.1997.

adjudication.[101] The prohibition of discrimination has been noted as an example of indirect enforcement; hence, it is worth elaborating on the ECtHR's practice, which illustrates the strength of its case law in influencing the international realisation of social rights. The ECtHR has accepted from its inception that, while the Convention does not oblige states to provide any particular social provision, if a state chooses to make such a provision, it cannot restrict access to it in a discriminatory manner. The ECtHR stated this principle in the Belgian Linguistics case in 1968, which examined the ineligibility of some French-speaking children to attend French-language schools in the Flemish districts of Brussels. According to the ECtHR, Article 14 of the Convention is not a self-standing provision, as it protects against discrimination in respect of the rights guaranteed by the Convention. However, the ECtHR has also explained that Article 14 may be invoked without the right itself, which is alleged to be granted in a discriminatory manner, being infringed. Hence, the ECtHR has created for itself the possibility of examining any right guaranteed by the Convention and its additional protocols for its compatibility with Article 14. Although the Convention does not grant a right to be educated in one's mother tongue (i.e. the fact that not all children in Belgium received education in their language of origin did not violate Article 2 of the First Additional Protocol), the ECtHR held that the Belgian State's access to French-language schools, which it had established of its own volition, was not based on objective and proportionate criteria and, therefore, resulted in a violation of Article 14 in conjunction with Article 2. This early case (Belgian Linguistics) opened the door for the ECtHR to hear cases traditionally conceptualised as socio-economic rights. Indeed, the ECtHR has not limited itself to intervening in discrimination cases that many would consider to be economic and social rights. In Airey v. Ireland, for example, the ECtHR explicitly rejected the open dividing line between civil-political and economic-social rights.[102]

Beyond immediacy, the enforceability and enforcement of social rights must also be assessed from other perspectives, namely according to the differences at national and international levels. As Drinóczi sees it, whether a given social right is directly enforceable within national law depends on domestic legislation,[103] and its international enforceability depends on regional international mechanisms and national legislators.[104] Regarding national legislation, how it is enacted can raise several additional problems, as the state must be careful when legislating because if social rights are extended, citizens become dependent on the state [for benefits], which leads to a violation of freedoms.[105] In this context, Kardos sees the state as enjoying a high

101 The ECtHR always acts on individual complaints. The ECtHR itself has made it clear in several cases that the Convention aims to guarantee rights that are practical and effective, rather than rights that are theoretical or illusory. Téglási, 2019, pp. 254, 256.
102 Téglási, 2019, pp. 254–255.
103 Social rights must be guaranteed by the legal system as a whole, with, of course, a wide degree of regulatory autonomy. Gyulavári echoes this view and stresses that the enforceability of social rights depends on the scope of lower-order legislation (i.e. the supporting norms). Gyulavári, 2004, p. 221.
104 Drinóczi, 2019, p. 3.
105 Rab, 2008.

degree of freedom to fulfil the needs arising from social rights.)[106] However, beyond Drinóczi's position, Kardos emphasises the international monitoring of the respect of the right to social security in the context of enforcement. International control, in his view, is direct and indirect. Direct control is provided by the enforcement mechanisms attached to international treaties containing economic and social rights. Among these, the ILO's activities are quite noteworthy. The implementation of the ICESCR and the Charter is monitored through the examination of periodic reports by States.[107] The right to collective complaints has entered into force for the Charter. Moreover, the right of individual complaint in international treaties containing civil and political rights also provides indirect enforcement of economic, social, and cultural rights, given the noted context. In this case, the complaint alleges a violation of a civil or political right contained in the convention, such as non-discrimination, the right to a fair trial or the right to property, but the case in which the violation occurred is based on facts affecting the content of an economic or social right. Hence, if not the whole economic or social right, some elements of it may be enforceable before an international judicial (ECtHR) or quasi-judicial (UN Human Rights Council) forum.[108]

3. Main features of EU legislation

The social model in European social policy usage means nothing more than a common European social model implemented in European states. However, it can also be understood as a project for an integration policy combining economic development and social balance.[109] The social model is, therefore, intrinsically linked to

106 Kardos, 2000, p. 5.
107 The Charter and the Amended Charter also institutionalise a specific monitoring mechanism in Part III to ensure the rights enshrined therein and to follow up on public commitments.
108 Kardos, 2000, p. 10.
109 According to József Hajdú and Henriett Rab, a single concept of the social dimension of the Union cannot be established in principle but can instead be described by an emerging single list of themes. (Rab, 2010, p. 15; See also Hajdú, 2001, p. 3) The social dimension of the Union therefore includes social law and social policy, including labour law and employment protection. This has its roots in legal history, as Community social law originally dealt with freedom of work and the two were linked from the outset. Kiss also takes a similar view, arguing that social protection is (also) provided by labour law. (See Kiss, 2010, p. 241) The European social model reflects a common set of values based on the preservation of peace, social justice, equality, solidarity, freedom and democracy, and respect for human rights, with the social economy or third pillar being one of the cornerstones of the European social model, although Member States' social systems are different and have different ways of implementing these values. Member States share a common objective of striking a balance between economic growth and social solidarity based on active interaction, and this intention is reflected in the European social model as a single set of values across different systems. There is a need to modernise and develop the European social model to respond to demographic change, meet the challenge of globalisation, and increase the adaptability of human resources to rapid technological change to achieve social inclusion, social justice, and poverty eradication more effectively. See on this Report on the future European social model, 13.7.2006 – (2005/2248(INI)), Committee on Employment and Social Affairs.

the combination of economic development and social balance. In the literature, the stages in the development of the social model are usually outlined before and after the Millennium. However, considerable time has elapsed since the start of the Millennium, and the European Pillar of Social Rights (Pillar) should be considered the reference point for the description of the social model.

The Pillar relates to the social dimension of the EU, Article 153 of the Treaty on the Functioning of the European Union,[110] which is linked to the European social model.

110 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01:
('(1). In order to achieve the objectives set out in Article 151, the Union shall support and complement the activities of the Member States in the following areas:
(a) in particular, improving the working environment to protect the health and safety of workers;
(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers in the event of termination of their employment;
(e) informing employees and listening to their views;
(f) the representation and collective defence of the interests of workers and employers, including, subject to paragraph 5, participation in management;
(g) the conditions of employment of third-country nationals legally residing in the Union;
(h) enabling the integration of persons excluded from the labour market, without prejudice to Article 166;
(i) equal opportunities and equal treatment of men and women in the labour market;
(j) the fight against social exclusion;
(k) modernisation of social protection systems, without prejudice to point (c).
(2) To this end, the European Parliament and the Council
(a) may, however, without prejudice to any harmonisation of the laws and regulations of the Member States, adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences;
(b) may, by means of directives, adopt minimum requirements in the fields referred to in paragraph 1(a) to (i) which shall apply progressively, taking into account the conditions and technical rules existing in each Member State. Such directives shall not impose administrative, financial or legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.
The European Parliament and the Council, after consulting the Economic and Social Committee and the Committee of the Regions, shall act in accordance with the ordinary legislative procedure.
In the areas referred to in paragraph 1(c), (d), (f) and (g), the Council, acting unanimously after consulting the European Parliament and the committees referred to in those points, shall act in accordance with a special legislative procedure.
The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may decide that the ordinary legislative procedure shall apply to paragraph 1(d), (f) and (g).
(3) The social partners may, at their joint request, be entrusted by any Member State with the implementation of directives adopted pursuant to paragraph 2 or, where appropriate, of Council decisions adopted in accordance with the provisions of Article 155.
In that case, that Member State must ensure that, by the date of transposition or implementation of the directive or decision at the latest, the social partners have introduced the necessary measures by agreement, while taking all necessary steps to enable it to guarantee at all times that the results imposed by the directive or decision will be achieved.

The term European social model was popularised by Jacques Delors in the 1980s and has also served as a counterpart to the American economic model, indicating the aim that Europe should pursue economic goals and keep in mind the state of social equilibrium in the way it shapes the economy. The development of the internal market has, thus, been given a social dimension.[111] According to Hendrickx, the Delors declaration redefines Europe as a place where Europe wants to develop in equal economic and social terms.[112]

On 26 April 2017, the Commission published its proposal[113] on the European Pillar of Social Rights. The Pillar was finally launched at the Social Summit on Fair Jobs and Growth in Gothenburg on 17 November 2017, further strengthening the social dimension of the Union in cooperation with the European Parliament and the Council. Juncker aims to create a fair and fully pan-European labour market that is responsive to changes in European societies and the world and can serve as a compass for eurozone members. He stressed that the Pillar should incorporate what the EU has

(4) The provisions adopted under this Article shall
– must not affect the right of Member States to determine the principles underlying their social security systems and must not significantly affect the financial balance of those systems;
– not prevent Member States from maintaining or introducing more stringent safeguard measures compatible with the Treaties.
(5) The provisions of this Article shall not apply to remuneration, the right of association, the right to strike or the right to exclude'.).

111 Hendrickx, 2018, p. 50.

112 Ibid.

113 The Pillar was born out of the combination of several documents:
Brussels, 26.4.2017 COM(2017) 250 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions Establishing a European Pillar of Social Rights; Brussels, 26.4.2017 C(2017) 2600 final Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights; Brussels, 26.4.2017, COM(2017) 251 final Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights; Brussels, 26.4.2017 SWD(2017) 201 final Commission Staff Working Document Accompanying the Document Communication From the Commission to the European Parliament, the Council, the European and Social Committee, and the Committee of the Regions Establishing a European Pillar of Social Rights; Brussels, 26.4.2017, SWD(2017) 206 final, Commission Staff Working Document, Report of the public consultation, Accompanying the document, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Establishing a European Pillar of Social Rights.
The first preliminary draft of the Pillar covered three main areas:
'Equal opportunities and access to the labour market, including skills development, lifelong learning and active support for employment to increase employment opportunities, facilitate employment transitions and improve the employability of individuals;
Fair working conditions that ensure an appropriate and reliable balance between the rights and obligations of employers and workers, and between flexibility and security of employment, in order to promote job creation, employment and subsequent career changes, and to encourage social dialogue;
Adequate and sustainable social protection and access to high-quality basic services, including childcare, health and long-term care, to ensure decent living conditions and protection against risks, and to enable individuals to participate fully in employment and society in general'.

already achieved in the field of worker protection. He attached particular importance to the social partners.[114] *However, how did we get here?*

In 1971, the European Commission set out principles for a Social Action Programme. It was prompted by the enlargement of the European Community and confirmed by the Paris Declaration, where the Heads of State and Government explicitly stated the importance of social space. The Declaration is significant because it was the first time in European politics that integration was considered more than economic cooperation. Although the Declaration did not set out any rights, the change in approach that came with enlargement was set out in the Social Action Programme,[115] which subsequently launched several labour rights initiatives. However, these initiatives did not rise to the level of legislation, as there was no legal basis for labour legislation. However, the Declaration is a great example of how it can have a huge impact on European policy. The realisation that integration policy is not just an economic but also a social issue takes us back to the 1980s when the economic crisis was tackled by deregulation in the name of flexibility. Economic conditions have, thus, not helped to strengthen social Europe.[116]

The European Commission, led by Jacques Delors, continued to focus on the creation of a social space based on the principles set out in 1971. Its strategy included a fundamental rights approach, which soon led to the creation of the Community Charter of the Fundamental Social Rights of Workers. The Commission published a second draft of the Charter on 2 October 1989, after consultation with the interest organisations, and, except for Great Britain, the document was adopted at the Strasbourg meeting in December 1989. The Community Charter was the social dimension of the single market. This document and the strategy behind it have many similarities with the Pillar. The Community Charter remained a declaration, but with a different concept: it set out fundamental rights. The Commission also announced an Action Programme to promote compliance with the Charter.[117]

114 'We need to step up work to create a fair and truly pan-European labour market (…) As part of this effort, I would like to see the creation of a European Pillar of Social Rights, which takes into account the changing characteristics of European societies and the world of work and which can serve as a guide for renewed convergence within the euro area. The European Pillar of Social Rights should complement what we have already achieved together in the protection of EU workers. I believe we are right to launch this initiative within the euro area, while allowing other Member States to join if they wish'. State of the Union 2015: Time for Honesty, Unity and Solidarity, Strasbourg, 9 September 2015, Jean-Claude Juncker President of the European Commission.

115 Council Resolution of 21 January 1974 concerning a social action programme.

116 Hendrickx, 2018, pp. 52–53.

117 COM (1989) 568: Communication from the Commission Concerning its Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights For Workers. The Action Programme set three principles as the flagship of the European Community's (EC's) social policy: improving employment and living and working conditions and mainstreaming social dialogue in decision-making. These objectives are not derived from primary sources of law but stem from the will of the parties. This expression of will has been fulfilled in the jurisprudence of the European Court of Justice, particularly in the areas of non-discrimination between men and women, better working conditions, coordination of social security systems, and health and safety at work.

However, alongside soft law, binding legislation in the form of directives has also emerged in the field of equal treatment as a priority area for social policy, including social protection for migrant workers and the development of the labour market.[118]

An improved version of the Community Charter is the Social Protocol, also referred to as the Social Protocol, annexed to the Maastricht Treaty in 1993. The UK only joined the Protocol at a later stage; meanwhile, it essentially refused to join the Charter. Moreover, part of the Maastricht Treaty was the Agreement on Social Policy between the Member States and the European Communities. Accordingly, regarding Maastricht, when we talk about social policy, we mean three documents: the Treaty on European Union, Protocol No. 14, and the Agreement on Social Policy. The last two are the most important documents for the development of social policy. The Protocol and the Agreement on Social Policy are part of the Treaty of Rome. Thus, the majority view is that both documents are part of the Community's primary law. However, the two documents cover only 11 Member States. The situation describes the dual legal framework of Community social law,[119] which comprises the social policy provisions of the Treaty of Rome and the legislation based on them and the Social Policy Protocol, the Social Policy Agreement, and the provisions adopted based on them. The incorporation of these documents into Community law has made them easier to implement and enforce.[120]

The actual social law provisions are contained in the text of the Social Policy Agreement. The objectives differ significantly from the Community's previous objectives: promotion of employment, improvement of living and working conditions, social protection, social dialogue, high and sustainable employment, and equal opportunities for men and women.[121]

The dichotomy in Community social law persisted until 1997, until the Amsterdam Treaty, when Tony Blair announced that Britain would sign the Social Policy Protocol. The Commission produced a Green Paper on the further reform of social policy at the Community level[122] in 1993 and a White Paper in 1994. The Green Paper brought European social policy to a critical juncture. Thus, to address high unemployment, the Green Paper clarified that the problem needed to be addressed at the national and European levels, and a new direction for social policy needed to be defined. This

118 Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood. Gyulavári and Kardos, 1999, pp. 63–145.

119 Sipos, 1996, p. 116. See also Prugberger and Jakab, 2016.

120 Gyulavári and Könczei, 2000, pp. 50–52.

121 Ibid., p. 53.

122 Green Paper – European Social Policy, Communication of 17 November 1993 COM(93) 551.

process fully accords with the need to reconcile economic and social objectives to tackle unemployment and remain competitive.[123]

The focus of the White Paper on Growth, Competitiveness, and Employment was clearly on employment and tackling unemployment. This White Paper also made direct reference to labour law, its modernisation, the flexibility of enterprises and the reform of social protection systems. Indeed, it identified the inflexibility of the labour market as the main cause of the crisis and unemployment.[124] Importantly for the development of the social dimension, the existing guidance on access to social protection provided in the context of the European Semester and the Open Method of Coordination in the social field[125] has developed a consensus among Member States and EU institutions on the need to modernise social protection systems.

The White Paper on European Social Policy set out a social policy agenda.[126] Linked to this agenda are the Essen priorities[127] for improving vocational training to increase employment intensity via flexible work organisation methods that contribute to increasing competitiveness while considering the interests of workers. In this, the social partners have an essential role to play. Flexibility has already been introduced on the employer's side while maintaining security on the worker's side. These priorities have led the Commission to produce an annual report on labour-market developments.[128]

The Treaty of Amsterdam (June 1997) amended the Treaty of Rome and made employment policy a top priority. Its guiding principle was absolute respect for human rights.[129] Thus, Title VIa (Title VIII in the current text), which dealt exclusively with employment policy and the coordination of Member States' employment policies, was included in the Amsterdam Treaty.

123 Hendrickx, 2018, p. 56.
124 Ibid., pp. 56–57. Growth, Competitiveness, Employment: the Challenges and Ways Forward into the 21st Century—White Paper. Parts A and B. COM (93) 700 final/A and B, 5 December 1993.
125 Council Recommendation (27 July 1992) on the convergence of social protection objectives and policies (92/442/EEC), OJ L 245, 26.8.1992, p. 49.
126 White Paper on European Social Policy, 1994.
127 Adopted by the European Council on 9-10 December 1994.
128 Gyulavári and Könczei, 2000, pp. 62–63; Hendrickx, 2018, pp. 58–59.
129 Gyulavári and Könczei, 2000, pp. 64–69; Hendrickx, 2018, p. 59. The most important changes are as follows: provision for a high level of employment, achievement of a high degree of competitiveness, coordination of national employment policies for a coordinated employment strategy, establishment and role of the Employment and Labour Market Committee, annual analysis of the employment situation in the Community by the Council, and adoption of a decision based on a joint annual report by the Council and the Commission. (Gyulavári and Könczei, 2000, p. 67) The former chapter on social policy has been renumbered: Articles 117–120 have been renumbered as Articles 136–143. Article 136 refers directly to the European Social Charter and the Community Charter, without conferring binding force on these documents. Article 137 provides for the Council to decide by co-decision on a matter requiring a qualified majority and for the Council to take measures to this end. Article 141 states that existing barriers to employment for both women and men must be removed. The concept of equal work for equal value has been introduced in this Article, endorsing previous case law.

It has become clear that unemployment in the Community requires an employment strategy from the Member States. In 1997, the Luxembourg summit adopted the European Council's employment strategy, which had two main aspects: economic growth alone would not solve social and labour-market inequalities and tensions, and employment policies needed to be much more targeted than in the past.

The European Employment Strategy has put the soft law mechanism at the forefront through the 'open method of coordination'.[130,131] It is also important to highlight the Luxembourg, Cardiff, Berlin and Cologne summits.[132]

In 1996, the 'Comité de Sages' was set up to try to ensure that the rights enshrined in the Community Charter were effectively and institutionally guaranteed to workers. This Committee recognised the need for a binding catalogue of rights and the Charter

130 The open method of coordination (OMC) in the field of social protection and social inclusion, one of the most important instruments supporting the social development of the EU and its Member States, was proclaimed by the Lisbon European Council in March 2000. The OMC was subsequently incorporated into the Employment Strategy and has provided a completely new direction for policy formulation and implementation, based on a non-legislative mechanism. However, as it was introduced in so many areas, it was also necessary to coordinate its coordination in 2003. A broader involvement of actors was introduced at the Member State level and economic, employment, and social open coordination mechanisms were linked to increase their mutual effectiveness. The results of the fight against unemployment have also linked employment and economic policies. Reflections of the open coordination mechanism can also be observed within social policy and have led to the linking of social and economic processes. Thus, national action plans were developed in an integrated way, bringing together social exclusion, pension systems, and healthcare, and became known in 2007 as the Joint Social Protection Report. The OMC has certainly become a key player in EU policy making. See Hajdú, 2008, pp. 7–9; Gyulavári, 2001, pp. 92–109; Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. Social policy agenda [COM(2000) 379 final – not published in the Official Journal]; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Renewed Social Agenda: Opportunities, access and solidarity in 21st century Europe COM(2008) 412 final. Bercusson, 2009, pp. 168–198; Deakin and Rogowski, 2011, pp. 230–238.

131 Luxembourg Presidency Summary 1998. Gyulavári and Kardos, 1999, pp. 153–166. The 1998 employment guidelines: improving employability, promoting entrepreneurship, developing adaptability, improving equal opportunities in the labour market.

132 The Cardiff Summit in June 1998 evaluated the national action plans drawn up under the Employment Directives. Although the national action plans were general, it became clear that without the Member States working together, unemployment rates could not be reduced. Accordingly, at the February 1999 meeting of the Council of Europe, the Heads of Government of the Member States adopted the proposed Employment Guidelines for 1999. The Berlin Summit adopted the principles for the reform of the Structural Funds for the 2000–2006 programming period. At the Cologne Summit, the European Council adopted in June 1999 the European Employment Pact, based on three pillars: economic policy coordination and wage developments through macroeconomic dialogue, further development and effective implementation of a coordinated employment strategy, and continuation and strengthening of structural reforms by increasing competitiveness. See Guidelines for Member States Employment Policies 1999, Communication from the Commission, COM(1998)574 final. For example, the employability pillar has been extended to include young people with learning challenges. Gyulavári and Könczei, 2000, p. 79.

of Fundamental Rights of the European Union was born as a result. The nature of the Charter of Fundamental Rights needed to be clarified to have the same legal status as the founding treaties and be binding.[133]

The directives adopted during the Millennium era have, indeed, sought to protect workers by promoting flexible working arrangements to tackle unemployment.

Employment policy issues are key to the post-millennium changes in the European social dimension. Thus, the impact on European labour law is significant.

Including flexibility, workers also need security. Security regards working for employment and keeping and progressing in work. It is where the transit labour market and social and labour-market programmes based on the individual development of skills come in. The Wim Kok report continues to formulate the key elements of employment policy in light of the objectives of the Lisbon Strategy. Increasing employment and productivity requires increasing the flexibility of workers and enterprises, integrating as many people as possible into the labour market, investing in human capital, and implementing reforms effectively through good governance.

As with the Wim Kok report, the focus of the Green Paper 2006 is on how to achieve the Lisbon Strategy's goal of sustainable development with more and better jobs.

Among the European legislation on social security, Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems are arguably the most important, the reasons for which can be summarised as follows. The rules on the coordination of national social security schemes are part of the free movement of persons and should contribute to improving living standards and conditions of employment. The purpose of the coordination is the autonomy of Member States regarding the design of their welfare state, but they must open it to EU citizens exercising their fundamental freedoms. Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons, and members of their families moving within the Community has been amended and updated several times to account for developments at the Community level, including judgments of the European Court of Justice (hereinafter referred to as the Court of Justice), and changes in legislation at the national level. These factors have played a role in making the Community coordination rules complex and voluminous. It is, therefore, important to replace, modernise, and simplify these rules to achieve the objective of free movement of persons. It is important to respect the specific characteristics of national social

133 Charter of Fundamental Rights of the European Union (2000/C 364/01) Article 34 is about social security and social assistance. Further, a distinction is made between social security as a form of service subject to insurance and, therefore, to the payment of contributions (Paragraph 1) and benefits of the assistance type (Paragraph 3). The latter, unlike the Social Charter, combines in one article the right to social security and assistance and the right to combat poverty. The Court of Justice of the European Union supervise the provisions of the Charter. However, the Charter introduces little novelty, as it builds on the rights referred to in the ECHR, the European Social Charter and the Covenant on Economic, Social and Cultural Rights.

security legislation and develop only one coordination system while respecting the sovereignty and autonomy of the Member States.[134]

In the post-Millennium perspective, the social dimension should be highlighted in the Commission Recommendation of 3 October 2008 on promoting the active inclusion of people excluded from the labour market,[135] the Commission Communication 'Investing socially for growth and cohesion, including through the European Social Fund 2014-2020',[136] the Commission Communication 'A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion',[137] the Council Decision (EU) 2015/1848 of 5 October 2015 on the 2015 Guidelines for the employment policies of the Member States, and the Council Decision (EU) 2015/1848 on the 2015 Guidelines for the employment policies of the Member States.

Beyond the directives, the Lisbon Treaty can be seen as an important point in the development of the social dimension. This primary source of law entered into force on 1 December 2009. In the text of the Treaty, the Treaty establishing the European Community was renamed the Treaty on the Functioning of the European Union, while the term 'Community' was replaced by 'Union'. The Community was, thus, replaced by the Union.[138]

The Treaty states in its preamble that the fundamental aim of the Union's efforts is the constant improvement of the living and working conditions of the peoples of the Member States. Title I sets out the Union's competences in concrete terms, specifying in Article 4 the competences shared with the Member States. The aspects of social policy defined in the Treaty are also covered by shared competence such that if the Union has not yet adopted a legal act on a particular social policy issue, it remains an option for the Member States. However, the Union may take the initiative to coordinate the social policies of the Member States.[139]

134 The first regulations of the European Council are European Council Regulation No. 3/1958 on social security for migrant workers and its implementation of Regulation No. 4/1958. The adoption of Regulation 3/58 remains considered by experts as a milestone in the development of coordination mechanisms. It was the first time that social law coordination mechanisms were governed by a multilateral, multilateral agreement. Regulations (EEC) No. 1408/71 and (EEC) No. 574/1972 were subsequently adopted and replaced by Regulation (EC) No. 883/2004 and its implemention of Regulation (EC) No. 987/2009. Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems was amended by Regulation (EC) No. 988/2009, Commission Regulation (EU) No 1244/2010, Regulation (EU) No. 465/2012 and Commission Regulation (EU) No. 1224/2012.

135 C (2008) 5737), OJ L 307, 18.11.2008, p. 11.

136 COM(2013) 83 final.

137 COM(2008) 418 final.

138 Moreover, the treaty has the added value of systematising and clarifying the competences of the EU. Three types of powers can be distinguished. Exclusive powers: only the EU has the power to adopt legal acts, the Member States only have the power or obligation to implement them. Shared competence: the Member States may adopt binding acts if the Union has not yet adopted an act on the matter in question. Supporting powers: the EU takes action to support or complement national policies.

139 Article 5.

The right of citizens of Member States to move and reside freely within the territory of the Member States was already established in the EU, but the Lisbon Treaty also declares in Article 21 that social security and social protection are, in fact, a part of the implementation of this fundamental freedom, as the article allows the Council, acting under a special legislative procedure, to adopt measures on social security and social protection for the right of free movement and residence. The social policy of the EU is, therefore, a policy directly derived from one of the four fundamental freedoms of the Union, and the Treaty provides the means for its regulation by the Union.

Social security is, therefore, an area of shared competence. Article 48 governs the decision-making mechanism of the Union. In the field of social security, the European Parliament and the Council, acting per the ordinary legislative procedure, shall adopt the measures necessary to ensure the free movement of workers. Thus, they shall establish a system of instruments to ensure that migrant workers and self-employed workers and those entitled under them can aggregate all periods considered under the legislation of the various countries for acquiring and maintaining entitlement to benefits and calculating the amount of benefits; that is, the payment of benefits to persons residing in the territory of the Member States.[140]

Title X of the Lisbon Treaty regulates social policy. It includes 11 articles, from Article 151 to 161. Fundamental social rights are mentioned as a category, but only by way of example: the rights set out in the European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers are among the fundamental social rights. Article 151 states that the Union and the Member States shall have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour and the development of human resources for lasting high employment and combating exclusion.

As social policy is among the shared competences, the Union and the Member States will implement measures that consider the diversity of national practices, particularly in contractual relations, and the need to maintain the Union's economic competitiveness.

In July 2008, the Commission published a renewed social agenda 'Opportunities, access and solidarity in 21st century Europe' as a response to rising unemployment caused by the financial and economic crisis. Measures were introduced to increase the impact of existing financial instruments such as the European Social Fund.

140 If a member of the Council states that a draft legislative act would affect important aspects of its social security system, including its scope, cost, or financing system, or would affect the financial balance of that system, it may ask for the matter to be referred to the European Council. In this case, the ordinary legislative procedure shall be suspended. Within four months of the suspension, the European Council, after discussing the matter, shall refer the draft back to the Council, which shall lift the suspension of the ordinary legislative procedure, or take no action, or request the Commission to submit a new proposal, in which case the act originally proposed shall be deemed not to have been adopted.

The successor to the Lisbon Strategy is the Europe 2020 Strategy, inspired by the realisation that the crisis had destroyed the gains of economic growth and exposed the fundamental weaknesses of the European economy.

The social dimension of European integration has, therefore, evolved considerably over the years. This social dimension is a key aspect of the Europe 2020 strategy to ensure 'inclusive growth' with a high level of employment and reduce the number of people living in poverty or at risk of social exclusion. This strategy is still being implemented today.

We consider the Pillar to be significant because it encapsulates the principles and rights of a fair and well-functioning labour market and welfare systems in 21st-century Europe. It reinforces existing rights[141] and highlights principles that respond to the challenges of economic, technological, and social development. Thus, Hendrickx posits that we should be cautious about its impact. One thing is certain: it has a new political impetus, different from the pre-millennium documents.[142] The Pillar provides guidance to meet people's basic needs. Where a principle applies to employees, it applies to all employees, regardless of their employment status, how they are employed, or the duration of their employment. In our view, a minimum standard of life worthy of the working person is set out in this document, where the value of work is unquestioned. A work-based society can remain truly competitive in the 21st century. In the Pillar, the European Commission provides a guideline on how and under what conditions this should be achieved. It has exercised considerable control over the Member States in terms of economic governance.

The Pillar's influence is felt in the development of the European social model. The effective implementation of the European Pillar of Social Rights is more important than ever and largely depends on the determination and action of the Member States, which are primarily responsible for employment, skills, and social policy. Action at the EU level can complement national action, and the recently adopted Action Plan is the Commission's contribution to the implementation of the principles of the Social Pillar, as called for by European leaders and the European Parliament. The Commission proposes three EU headline targets to be achieved by the end of the decade in the areas of employment, skills, and social protection, as per the UN Sustainable Development Goals. Together with the targets set out in the Pillar Principles and the financial support of the Multiannual Financial Framework (MFF) 2021–2027 and NextGenerationEU, these targets will guide the collective efforts towards a strong social Europe with sustainable impact. Complementing the EU's bold policy goals for a green and digital switchover, the social targets will help focus policy efforts to deliver results and provide an important incentive for national reforms and investments. They can influence policy decisions among Member States and their regions,

141 Preamble, 'The European Parliament called for the creation of a solid European pillar of social rights, which should strengthen social rights and have a positive impact on people's lives in the short and medium term, and enable the promotion of European integration in the 21st century'.

142 Hendrickx, 2018, p. 61.

including national recovery and resilience-building plans under the Recovery and Resilience Instrument, as per the relevant country-specific recommendations and in the context of the programming of cohesion policy funds for 2021–2027. They will also allow for measuring and monitoring progress and political commitment towards the Pillar's ambitions.[143]

What is the future of the European Social Model? Several documents stress the importance of balancing economic and social development. Among these, we highlight those linked to the European Semester. [144] However, following the adoption of the Pillar, several changes in the European Semester cycle are visible. We would like to draw attention to an analysis of the 2022 Country-Specific Recommendations (CSRs) by the Council on a proposal by the Commission concerning social and labour policies. Consider the main new features of the Semester cycle of 2022, notably the integration of the European Semester in the Next Generation EU strategy and the ongoing energy crisis. The social CSRs are probed from thematic and country perspectives. The inclusion of data from previous years' European Trade Union Institute analysis allows for a comparative outlook to grasp the overall evolution of the approach of the CSRs to national social and labour policies. Overall, similar to the CSRs adopted in 2020, the 2022 recommendations address the social dimension. However, the analysis

143 See The European Pillar of Social Rights Action Plan.

144 The European Semester was introduced in 2011 as the EU's response to the weaknesses in the EU's economic governance revealed during the financial and economic crisis. The EU took a wide range of measures to enhance policy coordination and strengthen its economic governance as the best way to return to sustainable economic growth, job creation, financial stability and sound public finances. It was done by adopting new legislation, which strengthened the Stability and Growth Pact by synchronising the timetables of the various existing policy coordination frameworks and aligning the objectives of national fiscal, economic, and employment policies. The areas of surveillance and coordination were extended beyond fiscal issues to broader macroeconomic imbalances and related policies under the Macroeconomic Imbalance Procedure. Compared to the previous set-up, the revamped legal framework allowed for more regular monitoring and a swifter response in case of problems. It also allowed for greater involvement of the European Parliament and national legislatures, social partners, and other relevant stakeholders at all levels. The European Semester ensures that Member States discuss their economic, social, and budgetary plans with their EU partners at specific times in the first half of the year—hence the term Semester—such that national action can be taken in the second part of the year, notably with the adoption of the budgets for the subsequent year. This early interaction allows them to comment on each other's plans and monitor progress collectively. It also allows them to take better account of common challenges. See European Commission, no date.
Several documents stress the importance of balancing economic and social development, such as Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, and the 2019 European Semester: country-specific recommendations, Brussels, 5.6.2019 COM(2019) 500 final. The main recent changes in the European Semester cycle are as follows: 2017: Pillar was adopted; 2018: Integration of the Pillar and Social Scoreboard in European Semester; 2021: Recovery and Resilience Facility (RRF) was adopted; Alteration of usual Semester cycle: national recovery plans instead of reform programmes and no CSRs; and 2022: Integration of RRF into the European Semester. The Semester process resumes, except that the Country Reports are published after the National Reform Plans, together with the CSRs. Rainone, 2022, p. 13.

also indicated a renewed emphasis on the sustainability of public finance and the macroeconomic situation of the countries. This indication is reflected in recommendations to limit public spending and social investment, especially in pension systems and long-term care.[145]

Strengthening the social safety net is among the recommendations that appear most often in the 2022 European Semester cycle. National governments are asked to target social assistance better to improve the adequacy and coverage of their social protection systems, as per what had been observed in 2020 (when the emphasis on those aspects was even more pronounced). Moreover, the recommendations in the social sense are not limited to the sphere of social welfare. In fact, four states have received recommendations to decrease the most flexible and precarious forms of employment. Moreover, a new category of social CSRs has appeared concerning inclusivity in education systems, addressed to five states (or seven, if recitals are also considered).[146]

Obviously, the sense of vulnerability could be overcome by strengthening economic resilience. There will be no well-functioning social system without a well-functioning economy. The challenge is combining the economic and social aspects in a balanced manner. In this dilemma, how to finance social security is crucial.[147] The public expenditure on social protection is high; therefore, in times of challenges, be it migration, an ageing society, or an energy crisis, it is crucial to find ways of financing social rights sustainably.

4. Closing remarks

In this part of the book, the theoretical issue of social security has been presented by the main characteristics of social rights, the international social law, and the main features of the EU legislation in this regard. These provide a broad understanding of the issue at international and European levels. This chapter has mainly presented the works of Central-European authors, highlighting that human rights are indivisible, interdependent, and interrelated rights. The quality of human existence is determined by second-generation rights. Social security is an integral part of a life worth living. As we shall see, the nature of each generation differs; however, one thing can be said with certainty: all human beings have an indivisible right to human rights, the quality of human life is largely determined by the opportunities offered by these social rights, and the state is present in all generational rights, differing only in the extent and intensity of their presence. There is a great need for integrated protection of human rights. The exercise of civil and political rights is hardly conceivable without at least a minimum of social empowerment, the former presupposing the latter.

145 See more: Rainone, 2022, pp. 4–5.
146 Ibid., p. 29.
147 See more: European Economic and Social Committee, 2018.

Social rights as second-generation fundamental rights are also reflected in certain international conventions on fundamental rights. However, given the economic implications of social rights, international conventions with a broadly more general scope also contain several provisions with implications for social administration and the exercise of these rights. The first level comprises the universal conventions, which are essentially adopted within the framework of the UN and its specialised agencies. The second level comprises regional conventions, applied to specific groups of countries. The third level comprises bilateral social policy conventions. The guarantee of social rights and the obligation to guarantee them are primarily a matter of state resources and require a considerable degree of state redistribution. Failure by the State to fulfil such obligations also has social perception consequences, given that the citizens will not fulfil their obligations to the State to provide social services if the State fails to fulfil its duties as perceived by its citizens. This situation will strengthen the grey and black economy.

The social model in European social policy usage means nothing more than a common European social model implemented in European states. However, it can also be understood as a project for an integration policy combining economic development and social balance. The social model is, therefore, intrinsically linked to the combination of economic development and social balance. According to the literature, the stages in the development of the social model have been outlined before and after the start of the Millennium. Further, the European Pillar of Social Rights (Pillar) should be taken as the reference point for the description of the social model.

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| Chapter 3 |

Czech Republic: Social Law One Step Forward Two Steps Back[1]

Martin ŠTEFKO

ABSTRACT

This article analyses Czech Social Security law from the perspective of sustainability. The first part describes what is it, its position in the Czech legal order, and the level of protection given to welfare rights in the formal constitution. A social security system that is overly costly is not sustainable in the long term (the principle of financial sustainability). There are no real welfare rights in the constitution; they are rather constitutional ideas for legislature that must consider the health of the Czech economy.

KEYWORDS

social security law, social benefits, occupational injuries

1. Dogmatic part

Czech Social Security law is built as a comprehensive system of social protection that protects the population from the negative consequences of social events from birth to death. Social security law comprises insurance and provision subsystems. Insurance comprises pension, sickness, and health insurance. The unemployed are covered by the state employment policy, though it is not an insurance system. Support for families with dependent children is provided through state-funded state social assistance. The last part of social security law is social assistance, comprising material need assistance, social services, and benefits for persons with disabilities. Relatively recently, the regulation of substitute maintenance has come into force, where the State takes over the payment of part of the alimonies owed by the child's parent.[2]

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2 Act No. 588/2020 Coll., on Substitute Maintenance for a Dependent Child and on Amendments to Certain Related Acts (the Substitute Maintenance Act).

Štefko, M. (2023) 'Czech Republic: Social Law One Step Forward Two Steps Back' in Jakab, N. (ed.) *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 51–70. https://doi.org/10.54171/2023.nj.sotsss_3

This system includes protection against all risks, as calculated in international conventions binding the Czech Republic.[3] It has ratified the European Social Charter[4] and the European Code of Social Security,[5] and those in connection with ILO Convention No. 102 create a basic framework of Czech Social Security law. Czech Social Security law is considered public law in Czech theory. As in other systems of continental written law, it primarily comprises laws. Collective agreements play only a limited role and if any social security relevant stipulations are included, they are agreed upon almost exclusively on the plant level.

Although social benefits under Czech regulations usually are based on statutes, there have been exceptions; benefits based on court decisions (i.e. allowances to Czech citizens who were adjudicated lower Slovak pensions) or governmental decrees without any statutory bases (benefits for emigrants invited by the government to the Czech Republic from certain parts of the former Soviet Union).

1.1. Evolution of Czech Social Security law

The origins of modern systems of social security in the Czech Republic stem from the Austrian Empire and the Soviet Union. On the former, the Czech social assistance system was established in the 1850s, and, at the end of the century, social insurance was introduced through the so-called Taafe's reform, which was strongly inspired by Bismarkian social reforms in Germany. On the latter, the system inherited from Austrians and developed during the First Czechoslovak Republic (in 1918–1938) was subsequently centralised and followed the Soviet model of social security. During the 1950s and 1960s, all private areas of social security, including the system of social assistance, were abolished; social security as such was run by the state and its institutions (including social services); and citizens were only socially secured by the state, regardless of their contribution to social welfare. The name of social security law (in Czech právo sociálního zabezpečení)[6] after the Soviet Union and, more so, the approach to individual security in case of social events originated from this period. Citizens still rely heavily on the state to provide for them in the event of old age or illness.[7]

Shortly after political changes in November 1989 (still, in former Czechoslovakia), economic reform was commenced, accompanied by an extensive and fundamental reform of the legal system. Surprisingly, academics could persuade respective

3 The Czech Republic fulfils its international obligations under Article 1(2) of the Constitution.

4 The European Social Charter was published under No. 14/2000 Collection of international agreements. Speaking about the subject of this chapter, the Czech Republic is bound by Article 11 (1, 2, 3), Article 12 (1, 2, 3, 4), Article 13 (1, 2, 3, 4), Article 14 (1 and 2), Article 15 (2), Article 16, and Article 17.

5 The Czech Republic ratified the European Code of Social Security on 8 September 2000 and has accepted Parts II–V and VII–X.

6 Social security is a term that stems from Russian. The term security (obespechenie) was first encountered in Europe in the programme of the All-Union Communist Party (Bolsheviks) (1919) to denote an all-encompassing system of social benefits for all workers, paid for from state resources, but not implemented given the lack of funds during the Civil War (1919-1923). The first attempt was made for miners 10 years later.

7 Koldinská, 2020, p. 12.

authorities to prepare a programme of social reform. In fact, on the same day the so-called scenario of economic reform was presented, the 'scenario of social reform' was also proposed. In the Czech version of the reform scenario, economic reform could not be performed successfully without social reform.

The new concept of social security (introduced gradually after 1989) represents a transition from state paternalism to the participation and responsibility of citizens and social groups for their social situation and future. It is based on the principle that citizens and families must ensure the widest possible scope of their needs on a socially acceptable level through their efforts. The state should interfere only when citizens or families cannot manage their affairs, for subjective or objective reasons. The state, however, must guarantee citizens' security on a dignified level, as many sources of international and EU law on fundamental social rights provide. In connection with the European Social Charter, the Czech Republic has already been forced to adapt its national law, especially in connection with ILO Convention No. 102 and, subsequently, the European Social Security Code.

1.2. Level of protection in the Constitution

The constitutional frame of the State's duties to protect its citizens and other natural persons against social risks, such as unemployment, lack of healthcare, disability to work, ageing, and, poverty, is not laid down in Act No. 1/1993 Collection (hereinafter 'the Constitution'). Rather, it is outlined in Articles 26, 30, 31, and 32 of the Charter of Fundamental Rights and Freedoms (hereinafter 'Charter'), declared as an appendix of the statute No. 23/1991 Collection.

Under the aforementioned Article 26, the State grants appropriate protection to an unemployed Czech citizen who cannot find work, unless this citizen is disabled by personal acts. The Employment Act denotes this right as the right to work.[8] Article 30 of the Charter lays down the base for obligatory Czech pension insurance and welfare assistance. The former must be developed and somewhat cover the needs of people endangered by age, disability to work, and death of 'breadwinner'. The latter represents the last safety net intended for people with insufficient income.[9] Jurisprudence refers to Article 30 as the regulation of rights to social security. Additionally, the ground for the right to free healthcare is incorporated into Article 31 of the Charter. By this Article, everyone has the right to the protection of their health, whereas only citizens may claim free healthcare. Article 32 particularly focuses on protecting pregnant women and minors. The State cares for them through either

8 However, the right to work, outlined in Section 26 of the Charter, is not designed to be a subjective right of an individual. See Pavlicek, 2002, p. 229. For further details of the right to work as a social right, see Constitutional Court Decision on 19th January 1994, file number Pl. ÚS 15/93, published in Sb.n.u.US. volume 1, Decision No. 3, p. 23.

9 Within the system of social support, the State introduced measures ('social services') in 2006 dealing with the problem of providing sufficient support for elderly persons and persons living entirely alone. These provisions are contained in the Social Service Act (No. 108/2006 Collection).

statutory sick leave insurance[10] or a special system designated for low-income families with children.[11]

According to Articles 3 and 112 of the Constitution, the provisions of the Charter maintain a unique position within the Czech legal order. The Charter has the same legal effect as the Constitution. Consequently, Czech statutes, secondary legislation, and international treaties must abide by the Charter, and it can be amended only by the same approval procedure as that of the Constitution. The amendments must be agreed by three-fifths of all members of the lower house of the Parliament and three-fifths of the majority of the senators present at the time of voting.[12]

Although the protection against social risks is outlined in the Charter, it does not enjoy the absolute highest effect of laws within the Constitution. In particular, Article 9 of the Constitution establishes another tier of law, determining a fundamental immutable rule. It prescribes that the 'fundamental requirements of Czech democratic state bound by law[13] cannot be changed even through amendments'. 'Welfare state' is, however, absent from Article 9.

Further, the Charter's level of granting constitutional protection to social security is reduced by two elements. First, according to the Charter, every natural person not a citizen of the Czech Republic is entitled to a limited number of rights (e.g. benefits in case of poverty and healthcare to some extent).[14] The second restriction is the possibility of claiming constitutional protection only within the frame of

10 There are particular benefits designed primarily for, or enjoyed by, female beneficiaries (e.g. maternity benefits or financial support for a mother taking care of a child or other family member). A man is entitled to claim paternity benefits only if he lives alone and there is no woman that can care for a child. This regulation is evidently contrary to the principle of equal treatment as set forth in the Charter; however, the effectiveness of the law that shall remedy this discrepancy has been postponed to 1 January 2009.

11 The system was introduced by the Family Policy Act (No. 117/1995 Collection), which came in force in 1995. The law was a part of a second stage of social reform; and its task was to outline a new system of cash benefits that had been either formerly incorporated in the system of sickness 'security' (there was no 'insurance' principle in social security during the Communist era) or had not existed at all because of education and property policies under Communism (e.g. free education and prescribed rent prices).

12 See Article 39 (4) of the Constitution.

13 The concept of 'state bound by law' means the State must act only in accordance with the law. The State may act only when three conditions are fulfilled: the law must be in force, the action must be authorised by the law, and the action must be in accordance with the procedure regulated by law. See Constitutional Court Decision on 25th September 1997, file number III. ÚS 31/97, published in Sb.n.u.US. Volume 8, Decision No. 66, p. 149.

14 Secondary legislation, such as the Pension insurance Act (statute No. 155/1995 Collection), the Sickness Insurance Act (No. 187/2006 Collection), the Health Care Insurance Act (No. 48/1997 Collection), the Family Policy Act (No. 117/1995 Collection), and the Poverty Assistance Act (No. 111/2006 Collection), does not condition participation in social security on the status of citizenship but on the place of residence. Therefore, the regulation incorporated into these social laws is more favourable than the regulation contained in the Charter.

secondary Czech legislation.[15] The Constitutional Court justified this latter restriction because of the character of social rights. The Court reasoned that the State's obligations given social rights are expensive because they, in principle, demand long-term financial support from the State (*status positivus*). As the economy is naturally unstable, and the State's revenue from taxes and other payments is unpredictable, the range of social protection is better regulated through secondary legislation.[16]

Hence, there is thus far neither a guarantee contained in the Charter nor another constitutional law nor an obstacle derived or developed by the Constitutional Court to change current social security. Nevertheless, the provisions contained in the Charter are not completely without legal impact. Actually, they form constitutional ideas on the Czech legal system; the State and its administrative agencies and courts are bound to follow and implement these ideas in their actions and decisions. Article 13 (2) of the European Social Charter certifies that no one can be alienated from their political rights only because they are beneficiaries of a certain welfare benefit.

1.3. Are there any gaps in the implementation?

On the subject of this chapter, the Czech Republic is bound by Articles 11 (1, 2, 3), 12 (1, 2, 3, 4), 13 (1, 2, 3, 4), 14 (1 and 2), 15 (2), 16, and 17 of the European Social Charter. The Czech Republic publishes reports on its policies, in which it is stated that the Czech Republic fulfils all its obligations.[17] Such a statement can be found in those reports regularly from 2000 onwards. Granted, those statements are somewhat misleading. In its recent conclusions, the European Committee of Social Rights found that the Czech Republic is in non-conformity with Articles 11 (1, 2, 3), 12 (1), 13 (1), and 14 (1).[18] Regarding the other six situations related to, among others, Articles 12 (4) and 13 (1), the Committee mentioned that it needs further information to examine the situation. The Czech Republic has been subject to several complaints.[19]

15 See Article 41 (I) of the Charter. See Constitutional Court Decision on 29 June 2005, file number III. ÚS 118/2005; or Decision on 23 November 2004, file number II. ÚS 599/02, published in Sb.n.u.US. volume 35, Decision No. 175, p. 343.

16 See Constitutional Court Decision 10 July 1996, file number Pl.ÚS 35/95, published in Sb.n.u.US. volume 5, Decision No. 64, p. 487. The Constitutional court continued specifically as follows: the possibility to provide free healthcare is dependent on the total premiums paid back by insured persons to insurance carriers. See Constitutional Court Decision on 25 December 2003, file number I. ÚS 504/03, published in Sb.n.u.US. volume 31, Decision No. 138, p. 227.

17 Reports can be found in Czech language at: www.mpsv.cz. Reports lodged to the Council of Europe can be found in English [Online]. Available at: https://www.coe.int/en/web/european-social-charter/czech-republic (Accessed: 13 July 2023).

18 European Committee of Social Rights, 2021, p. 2.

19 For example, Transgender Europe and ILGA-Europe v. the Czech Republic, Complaint No. 117/2015. Resolution CM/ResChS(2018)9, Transgender Europe and ILGA-Europe v. the Czech Republic, Complaint No. 117/2015, adopted by the Committee of Ministers on 24 October 2018 at the 1328th meeting of the Ministers' Deputies and its Appendix; Decision on the merits of 18 May 2018. Koldinská, 2021, p. 5.

In its previous conclusion, the Committee considered that the situation in the Czech Republic was not in conformity with the European Social Charter, as the minimum level of old age benefit fell below 40% of the Eurostat median equivalised income. The same opinion was mentioned in the last conclusion. We can only agree with the Committee, as it states that 'the minimum amount of pension is manifestly inadequate'. In its previous conclusion, the Committee considered that the minimum level of unemployment insurance benefit was manifestly inadequate, as it fell below 40% of the median equivalised income. The Committee considered that the situation where the Czech support required material need and social assistance was not in conformity with Article 13 (1) of the European Social Charter.

A long-standing problem is the obligation of foreigners to take out commercial health insurance, which does not provide the same coverage as public health insurance and is significantly more expensive.[20] The situation was only partially rectified in 2021 and only for newborns. They were included in the public health insurance system for two to three months. Members of the Parliament also refused to honour international commitments and include the older children of long-term resident foreigners in the public insurance system. This practice in the Czech Republic has long been criticised by the Public Defender of Rights and European and international organisations.[21] From the second report, the Czech Republic explained its policy by referring to the fact that, in the case of non-insurance welfare benefits, it has the right to require, as a precondition, a certain period of residence for foreigners, as articulated by Article 12(4) of the European Social Charter with the words, 'and subject to the conditions laid down in such treaties'. Accordingly, the Committee was further informed that the Czech Republic did not keep records of the number of foreigners who had received medical or social assistance.[22] This statement is only half true because the Ministry of the Interior has a register of people who are legally residing in the Czech Republic and have arranged commercial health insurance. Even so, the Committee referred to the conclusions adopted in 2017 under Article 13 (1) (personal scope) of the European Social Charter and reiterated that Article 13 (4) only covers emergency social and medical assistance for nationals of States Parties lawfully present (but not resident) in the territory. Another major problem is the virtually non-existent regulation of social housing and the poor state housing policy.

1.4. Place of social law in the national system

Social security is governed by several laws regarding its various areas. The overwhelming majority of these are considered to be public law statutes. According to experts,

20 Children of foreigners working in the Czech Republic and coming from outside the EU must rely on expensive and unreliable commercial insurance. If these children are chronically ill or are born prematurely, commercial insurance companies may exclude them from coverage or cover only a small part of their treatment.

21 For example, by Forum for Human Rights, Validity Foundation and Inclusion Czech Republic. Submitted by the Czech Government on 25 August 2021.

22 Second report to the European Social Charter, pp. 114 and 142.

Czech Social Security law is considered to be a part of public law. Social security law is not codified, part of which is recognized as follows: health insurance; sickness insurance (including maternity insurance); pension insurance; unemployment security (it is not understood to be an insurance scheme); insurance and security for accidents at work and occupational diseases; state social assistance and family assistance; social assistance; and social services. Marital equality within the meaning of Article 16 of the European Social Charter is regulated by Act No. 89/2012 Coll., the Civil Code, as amended. The tax benefit for a raised child is regulated in Act No. 586/1992 Coll. on Income Taxes, as amended.

1.5. Benefits

The Czech pension insurance scheme is based on the following principles: universality (it covers all the economically active population, such as wage earners, groups of people performing work or analogous activities, and the self-employed),[23] unification (one scheme for the whole population), equality (pension amounts are almost the same throughout population), and solidarity (mainly between generations). Under Act No. 155/1995 Coll. on Pension Insurance, the wage earners ('employees' in Czech legislation), like other persons performing work or simile activities, are entitled to old age, invalidity, and widow, widower, and orphan pension. Sick leave insurance is regulated through Act No. 187/2006 Coll. on Sickness Insurance, as amended. This Act represents a comprehensive regulation of sickness insurance and sets forth benefits as follows: sickness benefit, maternity benefit, paternity benefit (fathers post-natal-care benefit), attendance allowance, long-term attendance allowance, and compensatory benefit for pregnancy and maternity.

A specific feature of the Czech Social Security system is the separation of health insurance from sickness (or social) insurance, both regarding its codification, organisation and implementation, and financing and administration. Employees' compensation for injury caused by occupational accidents or occupational diseases remains regulated in the Labour Code (concretely following Sections 365–393 of the Labour Code) and based on the principle of liability of the employer for damage caused by occupational accidents or diseases.[24]

Legislation on employment, including unemployment benefits, which means legal regulation of relationships originating when the citizen exercises his right to gain the necessities of life by working, is deemed to be part of labour law in the Czech Republic. It is a traditional conception in the Czech Republic, but it cannot be ignored that given its aim (above all in the area of security in case of unemployment), the legislation is closer to social security law and administrative law in light of the method of regulation (this legislation is governed by public-law methods), the subjects whose

23 The range of insured persons (employees) and the conditions of their participation are identical to the rules applied in the field of sickness insurance—the participation in these two systems of insurance is tightly linked.

24 Pichrt and Morávek, 2020, p. 50.

relations are being regulated (because there is a public authority and there are private subjects—a citizen and an employer), and the rules of procedure (e.g. in proceedings related to disqualification from the job seeker register, an administrative procedure applies).[25]

For Article 16 of the European Social Charter, it is important to note that family grants are regulated in Act No. 117/1995 Coll., on state social support. This system was introduced in 1995, whereas previously family benefits were spread throughout the system of social security. Some allowances for children were included in the system of sickness insurance, while others were subject to the social care system. Conditions and concepts differed significantly from each other, and the whole sample of family benefits was somewhat chaotic and, therefore, legally not transparent. This problem was inherited from communist times and had to be solved by introducing a new and modern system of family benefits. The idea was to centralise the benefits, have them administered by state offices, and more effectively target them through income testing, at least in the case of some benefits.[26]

Under the state social support, the following benefits are available: child allowance, housing allowance, parental allowance, foster care benefits, birth grants, and funeral grants. The benefits of the state social support system are due to persons with residence in the territory of the Czech Republic. The entitlement conditions do not include nationality; thus, benefits may be granted to aliens with a permanent residence permit. For non-EU foreign nationals, registration as permanent residents in the Czech Republic is considered to be the period following the passage of 365 days from the date on which they registered to stay in the Czech Republic. This does not include any period during which a person is seeking asylum. Some benefits—the so-called means-tested benefits—can be granted only if the total family income does not exceed the statutory limit. This limit is the family subsistence minimum (regulated by Act No. 110/2006 Coll.), multiplied by the relevant coefficient. For people who have taken children into foster care, there are also special benefits legislated in Act No. 359/1999 Coll., on social and legal protection of children. There are four types of foster care benefits, three of which are provided to foster parents.[27]

Act No.111/2006 Coll., on assistance in material needs regulates a modern system to assist those with insufficient income; the system motivates them to actively strive to secure the resources they need to meet their living requirements. It is one of the

25 It notes from the report in this regard that the amount of unemployment benefits in the Czech Republic depends on the average monthly net earnings the applicant received in the last job before being included in the register of job seekers. The amount of unemployment benefit is determined by a percentage rate. The percentage of the unemployment benefit is 65% of the average monthly net earnings for the first two months of the support period, 50% of the average monthly net earnings for the next two months of the support period, and 45% of the average monthly net earnings for the remainder of the support period. During the reference period, no legislation was adopted that would change the conditions for determining the amount of unemployment benefits.

26 Komendová, 2021, p. 116.

27 Halirova, 2020, p. 288.

means applied by the Czech Republic to combat social exclusion. The Act is based on the principle that 'all persons who work must be better off than those who are out of work or who avoid work'. Benefits provided under the system of assistance in material need include Allowance for Living, Supplement for Housing, and Extraordinary Immediate Assistance.

Benefits for handicapped persons were reformed at the end of 2011. Originally, these benefits were regulated by old and non-functioning legislation from communist times. In 2011, the new act on benefits was proposed and adopted.[28] In the interest of social integration of handicapped persons, principal attention concentrates on their employment and all measures enhancing such employment, particularly their working rehabilitation. Instruments used in the framework of state employment policy for the promotion of the employment of the handicapped comprise economic incentives or administrative measures. A strong instrument is the possibility for an employer who employs people with disabilities to significantly reduce their income tax base. The tax rate of employers employing more than 50% handicapped from the total number of their employees is, thus, further reduced. Every employer who employs more than 25 employees must employ people with disabilities. The obligatory quota is 4% of handicapped employees of the total number of employees. Beyond employment of handicapped persons, employers may satisfy this obligation by purchasing products or services from special institutions employing more than 50% handicapped by commissioning certain production programmes to relevant organisations or buying products from sheltered workshops operated by citizen cooperatives or owned by the state, a church, or a religious assembly or by placing orders with the subjects or buying products or services from self-employed persons with a physical handicap. Another way to fulfil the obligation of employing handicapped persons is paying 2.5 times the average monthly wage within the national economy to the state budget for each person with a physical handicap who should be employed. The individual variants may be combined. However, should the employer not comply with the imposed obligation through one of these three forms, he would be sanctioned by a fine.

Current trends explicitly prefer that the handicapped should live in a family environment that provides better possibilities for their social integration. Act No. 108/2006 Coll., on social services, regulates social care services provided to people with a certain level of dependency. According to this Act, a person shall be considered dependent on the assistance of another physical person according to four degrees (slight, medium-strong, strong and total dependence) and their health status, as examined by a physician of the district social security administration, which narrowly collaborates

28 The problem however, was that it entered into force not even two months after it was adopted. Thus, many offices lacked adequate time to prepare properly for such a change (including some technical changes; for example, new software to provide the benefits to the clients). From its inception, the act was, thus, strongly criticised. Some organisations representing people with disabilities also complained that some benefits were reduced through the new system, and that, especially, for severely handicapped people who cannot work, it is even more difficult to pay for all the services and special treatment they urgently need. Cf. Lang and Štangová, 2018, p. 23.

with the Labour Office of the Czech Republic and decides on the degree of dependency for the care allowance. Social care services are provided as stay-in, ambulatory, or field services. There are several types of social care services, defined by the Social Services Act. For example, social care services help persons arrange for their physical and mental self-sufficiency to enable them to integrate with the common social life to the maximum possible extent and, when their health condition excludes such a possibility, to arrange for them a dignified environment and treatment.

1.6. Financing

In Czech Social Security law, all basic subsystems of social insurance (i.e. public health, sickness and pension insurance) are financed by PAYGO. A similar approach can also be found in unemployment insurance and statutory insurance of the employee in the case of injury caused to the employee, a work-related accident, or occupational disease. Public health insurance is mainly financed by public health insurance premiums collected by individual health insurance companies. If the collection of premiums is insufficient to cover the costs, the State makes up the revenue of the health insurance companies by contributing from the taxes collected. Sickness and pension insurance and passive employment policy are financed by social security contributions and a contribution to state employment policy or, in the case of pension insurance, by a matching contribution from the state budget from tax revenues. Sickness insurance premiums, pension insurance premiums, and the contribution to state employment policy are collected by the Czech Social Security Administration (Česká správa sociálního zabezpečení) and, under its authority, the district social security administrations (OSSZ) in Prague by the Prague Social Security Administration (PSSZ) and Brno by the Brno Municipal Social Security Administration (MSSZ).

The fund method is the standard for supplementary pension insurance systems (especially Act No. 427/2011 Coll., on supplementary pension saving, as amended, and Act No. 42/1994 Coll., on supplementary pension insurance with a state contribution and amendments to certain acts related to its introduction) and individual (private-law) insurance products.

State social assistance is fully and single-source financed from the state budget (from the budget chapter of the Ministry of Labour and Social Affairs).[29] Social assistance in the form of material needs and benefits for persons with disabilities is financed from the State budget. Social services are usually financed in a multi-source way via subsidies from the state or public budget to social service providers, a payment paid by the beneficiary, monetary and non-monetary donations (e.g. altruistic assistance from third parties through volunteer activities), and self-financing by the social service provider. The costs of providing social services are paid by the person in the amount agreed in the contract concluded with the social service provider; for some

29 Section 1(2) of the Act on state social assistance.

social services, the legislation sets a maximum amount of payment to be paid by the person to whom the social service is provided.

Regarding expenditures, Czech Social Security schemes are still modest. Of the 15 European countries for which there are preliminary data for 2019, social expenditure protection as a percentage of GDP was around 18.3%, which is still lower relative to 31% in France, 28.4% in Austria, or 28.9% in Germany. However, Hungary's spending was even lower, at approximately 16.3%.[30] In 2020, the Czech government tried to offer social protection to its citizens and preserve the Czech economy during the COVID-19 pandemic. It called in the military, fire fighters, students, and volunteers to keep the healthcare system going and announced a state of emergency (prolonging it by five times). During the first wave, many helped a lot without being asked to do so. An unseen wave of solidarity swept the nation. Moreover, Parliament approved several special laws supporting various branches of the Czech economy. Billions of CZK were spent to maintain social cohesion introducing mandatory vaccinations or scrutinising citizens on their health status.[31] Ultimately, they argued that the Czech government did not perform as well as other states, such as Germany or Denmark.[32]

Although it remains unclear how big a loss in revenues the state suffered in 2021, the Czech government ended the year 2020 with a deficit of CZK 367.4 billion. The deficit threshold had to be increased three times within the same year.[33] The state debt is around 39.1% of GDP,[34] and, all circumstances considered, public finances do not seem to be in good shape.[35] Even if the new government were to find additional sources of money to fund the ambitious policies launched by the Babiš government, this situation would inevitably yield high inflation rates, poverty, and further stratification of Czech society. As COVID-19 is unlikely to just disappear, the Czech

30 Pištorová, 2021, p. 42.

31 The Czech government tried to safeguard some sort of normality. However, the labour market changed, and the government and individual employers encroached on employees' liberties. Both disregarded the Labour Code and declared home-based office work without any previous agreement with the majority of the workforce. More than 30,000 people have died because of COVID-19, and dozens remain suffering from severe health problems. The number of people with mental problems has increased. An increased demand for psychopharmaceutic drugs can be discerned. During the second, third, and fourth waves of the pandemic, many people lost hope and questioned the authorities. Some scholars note that governments could be assessed and rated in accordance with their ability to manage the state during the pandemic.

32 Cf. Sivák, 2020, p. 9.

33 Cf. Ministerstvo Financí, 2021.

34 Cf. The respective state report at Ministerstvo Financí, 2021.

35 Notably, there was generous help form abroad. For example, the Czech Republic received an advantageous loan from the Development Bank of the Council of Europe, given which it could obtain up to EUR 300 million. This money was used to cover the extra costs in healthcare incurred because of the fight against COVID-19. The government consented to make an agreement on irrevocable and unconditional guarantees payable on demand within the meaning of Article 11 of the Council Regulation on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency following the COVID-19 outbreak. Given this agreement, the Czech Republic could obtain up to EUR 374 million to pay programmes announced by EU Member States to support the employment rate.

government will likely see the efforts of the earlier policies limited if not bashed. Such limits can define or derail the financial sanity of the official policy. The third year of the pandemic seems to have conjured the breakdown of the Czech welfare policy and even society. The legislator has come to realise that measures have been exhausted, nothing more can be done for those who by nature are vulnerable to this horrible virus, and the agency of even a social and democratic state can appear limited when anti-waxers do not trust the government and are not willing to limit themselves and obey state measures for the common cause. In 2021, the Czech Republic spent almost 37% of its state budget on social security and employment. Most of these expenditures are mandated and cannot be expected not to repeat in future years.

1.7. Organisation and administration

Legal regulations codifying the organisation of social security contain no umbrella term that would cover all institutions ensuring the implementation of the rights and obligations from legal relations in the field of social security. The term most frequently used in these regulations is 'social security bodies'. This term is defined in Section 3 of the Act of the Czech National Council No. 582/1991 Coll., on social security organisation and implementation, as amended. According to its provisions, the number of social security bodies includes ministries and other public institutions, such as the Ministry of Labour and Social Affairs, Czech Social Security Administration, District Social Security Administrations, Ministry of Interior, Ministry of Justice, and Ministry of Defence.

As per the noted Act, we can define the competence of the Ministry of Labour and Social Affairs as follows: management and control of the exercise of state administration in the field of social security, assurance of tasks connected with the further development of social security, assurance of tasks arising from international treaties in the field of social security, management of the Czech Social Security Administration, inspections concerning health conditions and citizens' working ability for judicial review proceedings in matters of pension insurance, possible establishment and administration of social institutions and institutes providing diagnostic service, and supervision of the provision of social services by organisations and citizens and the imposition of measures to remedy ascertained shortcomings.

A specific position is accorded to the Czech Social Security Administration. This social insurance carrier, with district offices, administers pension insurance and sickness insurance. In the case of a sickness insurance appeal, the Czech Social Security Administration is also an appeal institution. It collects all contributions to the sickness insurance and pension insurance systems. It is methodologically guided by the Ministry of Labour and Social Affairs. Without any doubt, it is the most important social security body in the Czech Republic, as it runs two important and costly systems of social insurance—pensions and sickness insurance.

Statutory public health insurance is implemented by health insurance companies, which are private companies, registered in the commercial register, and must meet several conditions to be established. The only exception is the General Health

Insurance Company of the Czech Republic, established directly by an act (Act of the Czech National Council No. 551/1991 Coll., as amended). Health insurance companies are used to cover the costs of healthcare provided in the territory of the Czech Republic. The companies are also used to refund the amount clients have expended on necessary and urgent treatment, the need for which has arisen during their stay abroad, up to the amount provided for such care in the territory of the Czech Republic. The EU coordination Regulations No. 883/2004 and 987/2009 are applied by the health insurance companies, whereas the Centre of International Reimbursements works as a liaison body for the coordination of sickness benefits provided in kind.

The administration of the system of employment policy as such is ensured by a state institution—the Labour Office of the Czech Republic through its local branches—labour offices. Their competencies are regulated by Act No. 73/2011 Coll., on the Labour Office of the Czech Republic and by Act No. 435/2004 Coll., on employment. State administration of state social support benefits is exercised by the Labour Office of the Czech Republic. The Ministry of Labour and Social Affairs is authorised by law to perform inspections. Social assistance, similarly to state social support, as a system of non-contributory benefits, is administrated by the Labour Office of the Czech Republic. All non-contributory benefits were entrusted to the Labour Office of the Czech Republic for efficiency and better control and to combat the misuse of benefits, especially social assistance benefits.

2. Current Issues

2.1. Punishment for communists and fragmentation of old age

On the last day of 2022, Act No. 455/2022 Coll.[36] came into force to primarily make a vivid mark, following the Czech communistic past in the previous century. The Act has condemned the communist era of Czechoslovakia and reduced the retirement pensions of communist leaders by CZK 300 for each year in office. Symbolically, Act 455/2022 Coll. was passed by the Parliament in which the Communistic Party has not even one Member. The reduction of the old-age pension hinges on the period spent in high office before November 1989 and will be reflected for the first time in the March 2024 instalment of the old-age pension. If someone becomes entitled to the old-age pension only after that date, the percentage will be calculated first and then an adequate reduction will be made. The reduction will not be made for people currently on disability pensions. The reduction will only be considered when the former official applies for a retirement pension.

36 Full name of said law: zákon č. 455/2022 Sb. ze dne 13. prosince 2022, kterým se mění zákon č. 155/1995 Sb., o důchodovém pojištění, ve znění pozdějších předpisů, a některé další zákony; in English: Act No. 455/2022 Coll. of 13 December 2022 amending Act No. 155/1995 Coll., on pension insurance, as amended, and certain other acts.

The Act reduced the retirement pensions of people included on the list of leaders of the communist regime compiled by the Institute for the Study of Totalitarian Regimes. The specific list will then be drawn up by the Office of the Security Service in cooperation with the Archive of the Security Forces. Those officials served in high political positions or the ranks of the Secret Police, the Police, the Border Guard, or the Main Staff of the People's Militia before 1989. The government assesses that the Act will punish around 3000 pensioners who are still alive. Regarding the reasons noted in minutes of discussions in the Parliament or somewhere else, the Act aims to come to terms with the totalitarian past, as other post-communist countries have done, including Slovakia, Germany, Hungary, Estonia, Latvia, and Poland. Reduction of pensions was chosen because high communist officials had received a retirement pension, which was often above average. Mr. Jurečka, the Minister of social affairs, who proposed the Act in a modified version, which had almost been approved by the prior Parliament, explained the mechanics of the law:

> So if today, for example, a former high-ranking Communist Party official receives a pension of CZK 25 000 a month and we know that he held a high-ranking party post for 10 years, his pension will be reduced by CZK 3 000.[37]

Honestly, such a measure came a little late to make any difference. Neither will the adjustment bring significant savings to the state budget nor is it an important measure, which could affect the highest representatives of institutions that maintain and deepen the totalitarian regime. The reason is obvious: most prominent figures are dead because it is now more than 30 years after the Velvet Revolution. Moreover, the reduction is capped such that the necessary level of social security in old age is maintained for these people.

The spiciest flavour, however, was added by the ongoing presidential elections of 2023. In January 2023, two candidates made it to the second round of the presidential election in the Czech Republic. The first is a convicted collaborator with the communist secret state security, and the second, as an officer, has completed a prestigious subversive course as part of his training for the communist military counter-intelligence and was thus prepared to serve abroad. As many commentators agreed regarding those two candidates, Czech voters are willing to support them. Nobody else stood the chance.

The same law also induced an adjustment to early retirement for medical doctors, paramedics, and firefighters, breaking the previously uniform retirement age, from which only miners were exempt. The new measure could affect more than 6,000 members of emergency response teams and another three thousand or so members of professional plant fire brigade units. Specifically, it will concern members of emergency response groups and ambulance drivers, operators of the medical operations

37 Citation for the quotation of the Minister is available at: www.mpsv.cz, news published by the Ministry of Labour and Social Affairs (Accessed: 10 June 2023).

centres, and mountain rescuers. They will be joined by members of company fire brigade units. Earlier entitlement to the old-age pension is linked to the increased premiums paid to employers for the time spent on work. Other employees who do not have these benefits will not pay extra for the reduced retirement age of the selected group. The reason for the special arrangement is the demanding nature of the work and the increased requirements for perfect health.

2.2. Sustainability in the valorisation

In March 2023, the president signed the amendment[38] that diminished the valorisation of old-age pensions. This piece of legislation was published under No. 71/2003 Coll. and came into force on 20 March 2023. According to the government, the reduction in indexation is necessary to stabilise public finances, and the state will save CZK 19.4 billion this year alone. The opposition, however, talks about impoverishing or robbing pensioners, who will lose an average of CZK 7,000 this year alone. The Czech Republic has acted quite vigorously against further extraordinary valorisation of pension insurance benefits. It did so in a rather controversial manner, using a state of legislative emergency. Further, some experts note that the amendment was delayed because of a clear political calculation not to influence the presidential elections in January 2023.[39] Significantly, the opposition and the president have said they intend to challenge the law in the Constitutional Court.[40]

2.3. Demographic challenges

Since the beginning of the 21st century, the population of the Czech Republic has grown every year, the only exception being 2013.[41] In the last 10 years, from the beginning of 2011 to the end of 2020, the Czech population has increased by approximately 2% to almost 11 million in 2020. However, the population growth was solely driven by a positive migration balance, while the natural change had an overall negative balance (i.e. Czechs died out). The situation seems to be similar to that in other Western European states.[42]

The situation in the Czech Republic can, thus, be described as one in which the population is ageing significantly, impacting the labour market, which suffers from a shortage of skilled and experienced labour. Today, it is already possible to identify some sectors of the economy that cannot do without foreigners. The ageing of the population has a significant negative impact on health insurance and pensions. All published forecasts show that the current demographic situation cannot be called

38 Act amending Act No. 155/1995 Coll., on Pension Insurance, as amended, and certain other acts (in Czech Zákon, kterým se mění zákon č. 155/1995 Sb., o důchodovém pojištění, ve znění pozdějších předpisů, a některé další zákony).

39 The average monthly pension will, thus, increase by CZK 760 from June instead of the expected CZK 1770, as would be the case under the ordinary statutory rules.

40 Cf. Komendová, Smejkal and Horecký, 2021, p. 358.

41 When there was a decline of 3.7 thousand inhabitants.

42 Cf. Data published by the Czech Statistical Unit. Czech Statistical Unit, 2023.

anything other than a crisis and that its satisfactory solution can no longer be found within the power of the Czech population.

3. Closing Remarks

The social situation in the Czech Republic cannot be described as stable. It is changing but not towards equality and social cohesion. The poor and the poorest are struck by high inflation, energy crises, and fear of another war in the neighbourhoods. Political elites seem unable to address the real problems for ordinary people, such as expensive housing, costly food, missing medication supplies, and not helping the educational system. According to official data, 10% of the population is endangered by poverty, and up to 100,000 individuals are homeless. The process of social stratification is continuing. Once almost equal in every aspect of social life, Czech society lags behind Western democracies and still searches for a new balance.

Regarding democracy and political dialogue, we must conclude that the Czech political scene has still not maintained a constructive dialogue no matter what is at stake. Consider two demonstrative examples in connection with a description of the current political fight. The former government, with Necas as Prime Minister, shaped the recent pension reform without a consensus across the parliamentarian political parties. Thus, its opposition repeatedly informed the government, pension insurance companies, and the broad public that, after a victory in the parliamentarian elections, it intends to abolish the pension savings system. Now, the opposition has become the government and seeks ways to reverse the current supplementary retirement insurance. Regardless of what reform law will be prepared, the public has lost confidence, and it will take years to regain it. The second example regards the pandemic. The main changes in paid leave in response to the COVID-19 containment measures concerned the attendance allowance (in Czech 'ošetřovné'), a benefit for the care of dependants provided by the Statutory Sick Leave Insurance Act.[43] During the pandemic, access conditions and the benefit level were adjusted to support parents, particularly during the extended periods of school closures. The number of cases of long-term attendance benefits has been relatively low since its introduction. However, in 2020, numbers were skyrocketing for obvious reasons, and the whole scheme was pushed in red numbers for the first time in the last 27 years.[44]

Although the pandemic did not end, and the new government faces the war efforts connected with the War in Ukraine, it is not willing to find additional sources of money

43 The benefit aims to support insured workers while they look after a sick member of their household or a relative.
44 Cf. Ministry of Labour and Social Affairs, 2023.

to fund the ambitious populistic policies launched by the Babiš government.[45] Currently, the bold governmental suggestions to increase the retirement age to 65 and other saving proposals were wildly refused by the opposition. Trade unions threatened the government with strikes. The strong refusal by the opposition remains a bad sign that not even the current ruling elites can find a workable compromise on sustainable pension and healthcare insurance for the short- and long-term.

3.1. De lege ferenda *and best practice regarding sustainability*

For the last 30 years, the legislator proved wisdom by regulating the ideas rather than particular welfare rights in the Charter. A social security system that is too costly is not sustainable in the long term (the principle of financial sustainability). This principle has already been reflected in the construction of social rights in the Charter of Fundamental Rights and Freedoms in the case of social rights and, more generally, in Article 41 of the Charter. The Constitutional Court of the Czech Republic justified the limitation of social rights by implementing laws given the nature of these rights. According to the Court, mandatory requirements arising from the guarantee of social rights are usually of a long-term (permanent) financial support nature, thus requiring certain actions from the state. There is an obligation on the state to act (performance rights in the narrower sense). However, the state's revenues in the form of taxes and insurance premiums are entirely dependent on the performance of the national economy, which is a volatile factor in the long term. Thus, regulation via 'ordinary' laws is preferred for better legislation adaptability to the possibilities of the Czech economy and changing views of society.

On specific questions connected with Czech social security law, the achievements are not great. In the context of the persistent economic problems of the public health insurance system, which are further aggravated by the emerging demographic crisis throughout Europe and in the Czech Republic, in particular, it would be appropriate to look for structural reserves in the area of public health insurance. In the Czech Republic, there is a pluralistic system of health insurance companies, which, however, shows serious distortions given its still relatively short-lived existence. This fact can be traced to the markedly servicing trend in both countries. Indeed, the long-term trend in the public health insurance market is clearly towards merging health insurance companies. However, the question is whether it is appropriate to intervene politically and, if so, to what extent, to hasten the merger of two or more health insurance companies. For greater financial stability of social insurance, it is necessary to consider unifying the collection of public health insurance premiums with social security premiums and contributions to state employment policy. Hence, considerable administrative costs

45 The Ministry of Labour and Social Affairs published a proposal for pension reform in 2021. However, the proposal was criticised for not improving the long-term financial sustainability of the pension system, and its main proponent, the ČSSD (Czech social democratic party), which went into the elections with the slogan of 'Fair Pensions', did not make it to the Chamber of Deputies of Parliament. Thus, no consensus was reached on the pension reform, the reform proposal was rejected in Parliament, and another opportunity to carry out a more fundamental reform of the public pension system was missed.

associated with the operation of these systems can be saved.[46] However, neither of the administrative boards of the insurance carriers in question found the courage to agree with the merger. Therefore, three insurance companies still somewhat focus on the same insureds, which seems highly uneconomical.

On the procedural aspects, the social security legislation is overly complicated, unclear, and, therefore, difficult to apply. Currently, when a problem arises, a separate solution is adopted, regardless of the existing legislation (e.g. substitute maintenance). The idea that sick, elderly, or immobile beneficiaries can successfully defend their rights on their own is further weakened by the complexity of the legislation. The *de lege ferenda* idea aims to unify administrative decision-making and remedies in all sectors of social insurance and social security by introducing a two-stage administrative procedure and non-independent administrative tribunals as a second administrative instance body deciding on appeals against decisions of the Czech Social Security Administration and the Social Security Administration. Moreover, the courts' competences in administrative proceedings in social insurance matters should be adjusted to focus on legal issues, and the system of bodies assessing health status for social security purposes should be unified. Most of the key institutes of social security proceedings are currently regulated differently from the Social Security Code. Therefore, from a conceptual perspective, it would be possible to combine the solution of the shortcomings of procedural rules and adopt a single homogeneous regulation of the specifics of administrative proceedings in all areas of social security for proceedings in the social insurance, state social support, and social assistance systems. The scope of the future Czech Social Security Code could then be limited to the basic principles of administrative proceedings. From the good administration perspective, it would be advisable to decentralise the organisation of social security and bring it closer to those in need. Overall, citizens' participation in decision-making on social security benefits should be strengthened, not only for insurance benefits.

46 One of the key issues repeatedly raised in the Czech Republic in this context is a change in the structure of the organisation of this insurance. In fact, two options are conceivable. In a Bismarckian system, a single insurance carrier and a plurality of health insurance companies are possible. Each of these options has its advantages. If the plurality model guarantees the possibility of free choice and competition, which should result in an improvement in the quality of services for the insured and the healthcare provider, then, theoretically, significantly lower costs of the system and easier control by the insured and the state speak in favour of the existence of a single carrier.

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| Chapter 4 |

Croatia: Social Rights in a Welfare State—Wandering Between Symbolism, Irrationality and Economic Sustainability

Mario VINKOVIĆ

ABSTRACT

This chapter focuses on the analysis of social rights and social security in the Republic of Croatia, primarily through the lens of Articles 11-17 of the European Social Charter of the Council of Europe, which Croatia ratified on 26 February 2003, along with the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

The vulnerability of social rights is undisputed in the conditions of their permanent stratification as a consequence of social and political transitions in recent decades and demographic challenges and migrations that Europe predominantly faces. Thus, the provision and realisation of rights in the areas of social welfare, healthcare, and assistance to vulnerable groups, such as persons with disabilities, children, youth, and the elderly, pose a particular risk.

Croatia is already determined as an indivisible, democratic, and social state by Article 1 of the Constitution, with social justice, inter alia, elevated to the level of the highest value of the constitutional order and the foundation for interpreting the Constitution itself, as stated in Article 3. In such conditions, political elites have an undeniable responsibility to ensure and implement the rights proclaimed by constitutional provisions, which are perpetually threatened by national, regional, and global challenges, including material deficiencies that inevitably accompany planned measures of relevant social policies. Therefore, this chapter furnishes insight into the reality of implementing constitutional provisions, the application of relevant legislative solutions, and compliance with the aforementioned provisions of the European Social Charter of the Council of Europe. The substantive structure of the chapter should serve as a scientific foundation for further research efforts of interested PhD students in the Central-European environment.

KEYWORDS

social law, social security, social welfare, European Social Charter, Croatia

1. Introduction

New demographic trends, observed globally, encompass the 'population ageing' trend, which includes a decline in mortality and fertility rates, and the strengthening

Vinković, M. (2023) 'Croatia: Social Rights in a Welfare State—Wandering Between Symbolism, Irrationality and Economic Sustainability' in Jakab, N. (ed.) *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 71–91. https://doi.org/10.54171/2023.nj.sotsss_4

of the 'longevity' trend, which poses unquestionable challenges for the world of work[1] and social security. Historically, family members have been the primary source of financial support for older members, but such approaches and support are becoming increasingly uncertain even in the most developed countries.[2] In conditions of inadequate, underdeveloped, or vulnerable pension systems, along with diminishing family financial support and insufficient savings, for older workers, it will mean engaging in vulnerable forms of employment and consequently facing increased vulnerability and greater exposure to jobs in the informal economy.[3] Approximately 80% of the world's population is insufficiently protected against ageing risks, particularly regarding health protection, potential disability, and stable income, which could affect nearly 1.2 billion people worldwide by 2050.[4] Demographic changes directly affect family dynamics, demography, and stability, leading to increasingly unstable family relationships, particularly among economically vulnerable groups. Consequently, this situation yields the inability to find support, financial security, care, and assistance among (other) family members (family and family relationships are understood in the broadest sense as an elusive concept).[5] Demographic divergences in the EU exacerbate economic, regional, and social divisions; impact the reduction of the working-age population; can affect the development and maintenance of sustainable, knowledge-based, and competitive societies and economies; and can *pro futuro* contribute to disparities and stratification of rural areas *in favorem* urban areas.[6] The increase in the share of older persons in the EU population will lead to increased demand for care services and long-term endangerment of the financial stability of the European welfare states.[7] Moreover, inflation and rising energy prices are pushing an increasing number of EU citizens at risk of poverty, social exclusion, and the inability to keep their homes adequately warm. In 2021, almost 7% of people living in the EU could not keep their homes adequately warm during the winter months.[8] Moreover, global warming, environmental protection issues, and natural resource management will directly impact migration within the EU Member States and between the EU and third countries.[9]

In such conditions, discussions about the sustainability of national social security systems, pension insurance, and the protection of vulnerable population groups gain importance and require ongoing efforts, planning, and projections for their sustainability. More than ever, the concept of a social Europe seems to be endangered and seriously questioned in terms of its survival.

1 International Labour Office, 2013, p. 1.
2 Ibid., p. 39.
3 Ibid., p. 40.
4 Ibid., p. 42.
5 Seltzer, 2019, pp. 405–426.
6 European Commission, 2023, p. 16.
7 Ibid.
8 Ibid., p. 14.
9 Ibid., p. 16.

In the global and regional environment of numerous risks and challenges, the Republic of Croatia has been confronting its uncertainties, capacity, resilience, and sustainability. Natural disasters such as strong earthquakes in multiple geographic areas and floods; the ongoing emigration of young, highly educated, and economically productive citizens; declining birth rates; depopulation of rural areas; and the increasing difficulty of finding adequate workforce for the thriving tourism sector (and other economic sectors), which for now makes up a significant percentage of national GDP, have recently contributed to this situation.

In normative terms, Croatia is a social state by its Constitution and has inherited communist and socialist legacies that have undoubtedly influenced citizens' perceptions and experiences regarding social security, an adequate standard of living, and free healthcare. Furthermore, Croatia ratified the European Social Charter of the Council of Europe as a kind of counterpart to the European Convention on Human Rights and Fundamental Freedoms in the field of economic and social rights. In this context, it should be regarded as a country that, in its political, economic, and democratic post-transitional development as an EU Member State, follows a similar evolutionary path and faces similar challenges as its Central-European counterparts.

2. Croatia as a welfare state—Demographic changes, financial capacities, social rights, and social security in the youngest Member State of the European Union

2.1. Demographic changes and financial capacities—Key indicators

From the 2021 Census, the Republic of Croatia has 3,871,833 inhabitants, recording a decrease of 9.64% or 413,056 people relative to the 2011 Census.[10] Population aged 0-14 years accounts for 14.27%, the 15-24 years age group comprise 10.27%, those aged 25-34 years comprise 11.40%, the 35-49 years age group comprise 20.23%, those aged 50-64 years comprise 21.38%, and the population aged 65 and over represents 22.45%.[11] That is, individuals aged 50 and older make up almost 44% of the total population. In terms of gender in Croatia, women (men) comprise 51.83% (48.71%),[12] which *pro futuro* poses a risk of the feminisation of poverty.

Regarding the number of insured persons in the health insurance system, it is especially interesting to note that Croatia has more than 230,000 health insurance beneficiaries than residents. Moreover, even after deducting 41,000 individuals living outside the Republic of Croatia who are entitled to health insurance in Croatia based on the rules of coordinating social security systems in the EU and international social security agreements (e.g. pensioners living in other EU or third

10 Croatian Bureau of Statistics, 2022.
11 Ibid.
12 Ibid.

countries, insured persons living in other countries but working in Croatia as cross-border workers and their family members, and posted workers),[13] there remain almost 170,000 health insurance beneficiaries more than residents in Croatia.[14] These figures suggest that a significant number of Croatian economic emigrants who have moved to other EU Member States (especially Germany[15] and Ireland[16]) are still taking advantage of health insurance benefits in Croatia, from which they have not deregistered (even though they have not been paying taxes and contributions in Croatia for some time, they have continued to enjoy benefits at the expense of legal and natural persons who live and do business in Croatia and allocate significant funds to public health insurance, simultaneously financing healthcare for a large number of beneficiaries who do not participate in the costs because of various reasons or their status recognised under relevant regulations). It may sound like an anecdote, but there have been numerous cases of Croatian economic emigrants who arrived from Ireland in Croatia on extended weekends by using low-cost airlines, underwent medical examinations, and consumed public health services. Meanwhile, they also visited their relatives, spent money to get their hair and nails done, and paid for other services, spending way less money than if they had paid for the same healthcare services or partially participated in these services in Ireland. The recent amendments to the Mandatory Health Insurance Act, which came into effect on 1 April 2023, aim to address such absurd situations. Pursuant to these amendments, insured persons who are not registered as unemployed individuals with the Croatian Employment Service (and are not entitled to mandatory health insurance based on some other basis but have regulated mandatory health insurance status) must personally report to the Employment Service every three months to verify the circumstances in which their insured person status is based.[17] Otherwise, they will be deregistered from mandatory health insurance *ex officio*.[18] It seems these legislative changes are neither a response to public outrage and the absurdity of the situation nor a reduction of rights for economic emigrants who have emigrated from Croatia and who were once intentionally or unintentionally provided with a certain level of health insurance in their homeland. They are a necessary consequence of

13 N1 Info, 2022.

14 Ibid.

15 Pursuant to available data, in 2009, more than 46% of the total number of residents who emigrated to EU Member States immigrated to Germany, while three years after full membership in the EU (i.e. in 2016, as many as 71% of the total number of emigrants to the EU immigrated to Germany). The true extent of emigration is not reliable, as many residents did not deregister their residence before emigrating, although they were required to do so according to the 2012 regulations. See Pokos, 2017, p. 16.

16 A trend in emigrating to Ireland has been particularly pronounced since Croatia's full membership in the EU, probably because Ireland opened its labour market for Croatian citizens and did not introduce transitional periods in the context of freedom of movement of workers. See Jerić, 2019, p. 22.

17 Article 7(7) of the Mandatory Health Insurance Act, Official Gazette, Nos. 80/13, 137/13, 98/19, 33/23.

18 Article 7(8) of the Mandatory Health Insurance Act.

the lack of responsibility towards spending (public) money and inadequate interconnection of national records, which could prevent obvious abuse. However, preventing abuse will not solve the consequences of emigration from the Republic of Croatia, as, according to Pokos, after a decade or two, remnants in the country will have a significantly lower reproductive health effect given the large outflow of the population in reproductive age.[19] Beyond economic reasons, the main motives for emigration are linked to the perception that the values of work ethics and honesty are not institutionally accepted. Thus, citizens' trust in institutions is low, leading to a 'moral breakdown' of Croatian society.[20] Emigration is not only a deduction of the number of emigrants from the total population; it is also a long-term disruption in the age structure of the population and the direct reduction of the biological basis for its renewal,[21] which will lead to long-term and significant consequences for the enjoyment of social rights *pro futuro.*

Eurostat data indicate that in 2019, Croatia spent 21.4% of GDP on social protection (significantly higher than other EU Member States in terms of healthcare or sickness and disability payments).[22] However, costs for unemployment and housing were lower relative to other Member States, which is explained by the high number of those who have emigrated from Croatia and the fact that the percentage of privately-owned homes in Croatia is high.[23] The national healthcare system is constantly facing financial deficits and serious risks to its future financial sustainability. Although it is inclusive and practically accessible to everyone, waiting lists for certain healthcare services and procedures are long.[24] Deficiencies in the childcare system and the lack of available and necessary infrastructure, such as an adequate network of kindergartens and nurseries, hinder the reconciliation of work and family life.[25] Regarding the elderly population, it is certain that the pension system is unsustainable and inadequate in terms of intergenerational fairness.[26]

19 Pokos, 2017, p. 23.
20 Jerić, 2019, p. 23; Jurić, 2017, pp. 356, 342 and 362.
21 Akrap and Strmota, 2015, cited in Jurić, 2017, p. 348.
22 Bertelsmann Stiftung and Sustainable Governance Indicators, 2022.
23 Ibid.
24 Ibid.
25 Ibid.
26 Ibid. In April 2023, Croatia had 1,639,698 insured persons in the pension insurance system and 1,227,071 pension beneficiaries, which makes a ratio between the number of pension beneficiaries and the number of insured persons of 1:1.34. In other words, 1.34 working-age individuals support one pensioner. Of this number, 1,417,601 are employees employed in legal entities, 104,633 are natural person employees, 75,914 are self-employed, 18,445 are farmers, 18,087 are self-employed professionals, 4,887 enjoy extended insurance status, and slightly over a hundred are insured persons employed by international organisations abroad and in the territory of Croatia but with employers with a seat abroad. Women (men) make up 53.88% (46.12%) of pension beneficiaries. The average pension for 40 or more years of service is 624 euros, and its share in the average net salary is 55.24% (1,130 euros). The average old-age pension is 403 euros. See: Hrvatski Zavod Za Mirovinsko Osiguranje, 2023.

2.2. Croatia as a welfare state—How to perceive social rights and social security

Croatia is defined *inter alia* as a social state in Article 1 of the Constitution. In Article 3, social justice is elevated to one of the highest values of the constitutional order and the foundation for interpreting the Constitution.[27] However, in its constitutional case law, the Constitutional Court has primarily focused on personal and political rights, excluding the possibility of regulating social rights by virtue of organic laws and leaving them in the hands of the legislature and political debates.[28] Arguably, in doing so, the constitutional position of social rights has been deconstructed by separating them from the sphere of organic laws, which are adopted by a qualified majority and by allowing Parliament to delegate the authority to the Government to interfere with economic, social, and cultural rights through regulations.[29] However, it does not mean that the Constitutional Court makes a distinction in the possibility of enjoying constitutional judicial protection for economic and social rights relative to civil and political rights.[30]

The idea of a social state, most consistently embedded in German constitutional doctrine and social laws in the Bismarck era,[31] which marked the beginning of state intervention in the fight against the risks of illness, disability, and old age, now encompasses the protection of a much wider range of vulnerable social categories through financial and institutional forms of social benefits. The Croatian social welfare system undoubtedly belongs to the Bismarck model of the social state.[32] However, it has also inherited the system of social assistance and social welfare from the socialist era of the former Yugoslavia.[33] Ravnić argues that, pursuant to the Croatian Constitution, social law comprises social security and social insurance.[34] Article 57 specifies that the right of employees and their family members to social security and social insurance shall be regulated by law and collective agreements, while Article 58 guarantees that the state shall ensure the right to assistance for weak, infirm, or other persons unable to meet their basic subsistence needs, given their unemployment or incapacity for work. This article also mentions that the state shall devote special care to the protection of persons with disabilities, Croatian war veterans, disabled Croatian war veterans, and the widows, parents and children of fallen Croatian war veterans. The Constitution guarantees everyone the right to healthcare in conformity with the

27 See Articles 1 and 3 of the Constitution of the Republic of Croatia, Official Gazette, Nos. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10 and 05/14. Article 3 of the Constitution proclaims: 'Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution'.

28 Barić and Miloš, 2016, p. 141.

29 Kuzelj, Cindori and Horvat Vuković, 2021, p. 67.

30 Ibid., p. 68.

31 Vrban, 2003, p. 203.

32 Babić and Šućur, 2022, p. 162.

33 Žganec, 2002, p. 181.

34 Ravnić, 2004, p. 226.

law,[35] which stipulates that the family shall enjoy the special protection of the state (with marriage defined as a union between a man and a woman),[36] and emphasises state protection of maternity, children, and the youth by creating social, cultural, educational, material and other conditions that promote the realisation of the right to a dignified life.[37] However, in such a constitutional construct, Ravnić wonders what social security would encompass (individual subjective rights or something broader)[38] while analysing German law, according to which social benefits and services include only those recognised by the public authorities responsible for public social benefits and services.[39] That is, social law regulated by state public law norms establishes a relationship between the individual and the state, in which individuals are granted benefits and services regulated by public authorities.[40] According to Ravnić, social content regulated by a contract voluntarily, unilaterally by a charitable institution, or even compulsorily determined by public authorities would be part of the content of social protection law as a gender concept comprising different forms of insurance and assistance for individuals and, to a lesser extent, for groups.[41] Social protection in this sense is only part of social law and by no means represents its sole task.[42] However, Ravnić clearly emphasises that the concept of social security has displaced the concept of social protection,[43] and social security, seen as a system, encompasses social areas based on insured risks, social needs, and other insured cases, overlapping with the concept of social law or the right to social security.[44] Objectively, social law is a set of norms, regulations, and rules that regulate legal and social relationships. Subjectively, it is a set of powers conferred by law to individuals and less frequently to groups to demand certain social benefits (provision or action) in a state of social need, provided that they meet certain conditions.[45] Although he worked on labour and social legislation during a specific period of socialist Yugoslavia, as early as the late 1960s, one of the greatest Croatian labour law theorists, Nikola Tintić, criticised the ambiguity of the attribute 'social' and its usage in various meanings of the term.[46] The term 'social' is seen as the totality of protective legislation *in favorem* workers; the limitation of the employer's contractual dictate, particularly regarding vulnerable groups of workers (minor workers and women); a system of social assistance and protection in the broadest sense (regarding members of society in a state of social need); or provisions elevated in such cases to the level of specific social rights of

35 Constitution, Article 59.
36 Ibid., Article 62.
37 Ibid., Article 63.
38 Ravnić, 2004, loc. cit.
39 Ravnić, 2004, loc. cit.
40 Ravnić, 2004, p. 227.
41 Ibid.
42 Ibid., p. 228.
43 Ibid., p. 229.
44 Ibid., p. 234.
45 Učur, 2000, p. 39.
46 Tintić, 1969, p. 29.

individuals.[47] Moreover, he clearly stated that social law and social security in different periods of history, social, political, and economic systems are based on different conditions, social relations, interests, possibilities, goals, and concepts.[48] For such reflections on social law by Tintić, social policies, generally speaking, become a very important instrument because, unlike static social law or social security law, they reflect a more dynamic nature and the ability to adapt to different social challenges, needs, and, ultimately, different programmes of political elites.

Probably the most accurate assessment of social law in Croatia was given by Professor Vera Jelčić almost three decades ago when she stated at an international conference[49] that there has been little research on social law, particularly from the perspective of legal theory, as most of the scientific attention has been focused on labour law. Such a claim could be extended to the period after this statement since scientific research has been predominantly focused on labour law given a small number of researchers dealing with related topics and the clear scientific interests of a small group of legal theorists. It is supported by the fact that Social Law is not taught in Croatia as a separate course at law faculties but as part of the joint course of Labour and Social Law. The only exception is the field of social work, whose professors and researchers have been fairly actively involved in the analysis of the Croatian social welfare system and relevant social policies in the broadest sense. In the 1980s, Vera Jelčić defined social law as a set of legal rules that regulate the rights and obligations of insured persons under social insurance, including the entirety of social protection measures that belong to citizens to satisfy social needs.[50] Therefore, the content of social law would encompass social insurance (health, pension, and disability) and social protection of vulnerable groups, including the protection of citizens from natural and other disasters.[51] The words of Professor Ravnić, who emphasises the suppression of the concept of social protection, social law, or social security law, reflect its preventive and curative function, including its ability to support social cohesion and social control as a concept that is broad and inclusive in content.[52] Considering the discussion thus far and the vagueness of the attribute 'social' criticised by Tintić over 50 years ago, the question arises as to whether it would be more appropriate to focus on the term 'social security law' (which is, arguably, a more suitable and specific term).

According to Vrban, a welfare state represents a set of interrelated institutional and normative solutions and procedures aimed at protecting and improving the standard of living of the population (in a broader sense). However, it also encompasses the issues of fundamental rights and the social interpretation of subjective rights;

47 Ibid.
48 Tintić, 1978, cited in Učur, 2004, p. 41.
49 International conference: 'Pravne posljedice raspada SFRJ u području radnog i socijalnog prava', Zagreb, 26. i 27. ožujka 1999. See Puljiz, 1999, pp. 187–188.
50 Jelčić, 1988, p. 1.
51 Ibid., pp. 2–3.
52 Cf. Učur, 2000, pp. 39–41.

that is, legal relations that belong to private law (in a narrower sense).[53] Constitutional experts highlight that the Croatian Constitution maker, by constitutionalising the concept of a welfare state, has placed the Constitution of the Republic of Croatia in the group of socially sensitive European constitutions, obliging the legislator to care for the general social welfare and the development of social rights.[54] A welfare state, social justice, and social rights are constitutionalised categories, but their concretisation is left to the legislative level.[55] The Constitutional Court, however, holds that the principle of social justice, as part of the concept of a welfare state, is undoubtedly abstract in nature but with various degrees of abstraction.[56] Despite reducing certain social rights during economic crises,[57] the Constitutional Court has reaffirmed its commitment to the welfare state, emphasising that the constitutional character of social rights implies the implementation of fair and equal redistributive policies to reduce extreme inequalities and align limited resources with constitutional social objectives.[58]

The evolution of the Croatian welfare state has progressed from abandoning the socialist statist model of the welfare state (which privileged employees in the public sector through state interventions) to reforming the social security system and introducing elements characteristic of reformed states in the West, with an increased role of the market and individual responsibility for one's destiny.[59] The entire social security system remains based on Bismarck's foundations of social security but with Beveridge's elements of financing social security through tax payments, where the negative consequences of the neoliberal approach should be avoided, and social costs, as Puljiz notes, should be considered an investment in society.[60]

3. Compliance with the European Social Charter of the Council of Europe

On 26 February 2003, Croatia ratified the European Social Charter of the Council of Europe, together with the additional protocols and the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.[61] Thus, from the so-called à la carte system of ratification, Croatia ratified the following articles that are important for this discussion: Article 11 – The right to protection of health; Article

53 Vrban, 2003, p. 203.
54 Kuzelj, Cindori and Horvat Vuković, 2021, p. 69.
55 Tucak and Blagojević, 2015, p. 286.
56 Ibid., p. 290.
57 Ibid., p. 293.
58 Kuzelj, Cindori and Horvat Vuković, 2021, p. 70.
59 Pezo, 2007, p. 1485.
60 Puljiz, 2004, pp. 218–219.
61 Act on the Ratification of the European Social Charter, the Additional Protocol to the European Social Charter, the Protocol Amending the European Social Charter and the Additional Protocol Providing for a System of Collective Complaints, Official Gazette – International Agreements, No. 15/2002.

12 – The right to social security; Article 13 – The right to social and medical assistance; Article 14 – The right to benefit from social welfare services; Article 15 – The right of persons with disabilities to independence, social integration, and participation in the life of the community; Article 16 – The right of the family to social, legal, and economic protection; and Article 17 – The right of children and young persons to social, legal, and economic protection. Notably, pursuant to Article 20 of the Charter, which regulates the obligations of the contracting parties, it is *expressis verbis* stated that states have the option to undertake from the à la carte system at least five out of the following seven Articles (1, 5, 6, 12, 13, 16, and 19).

By ratifying the Additional Protocol Providing for a System of Collective Complaints, Croatia became one of the 16 contracting parties that recognise the quasi-judicial role of the European Committee of Social Rights in the process of deciding on submitted collective complaints. However, it has not allowed the submission of such complaints by national non-governmental organisations through a separate declaration *per se*.[62] Moreover, although Croatia ratified the 1961 European Social Charter and signed the revised European Social Charter of 1996, it has not yet ratified the revised version, placing itself among the smaller number of Member States still bound by the original text of the Charter. In the context of the relation between national and international law or, in legal terminology, the monist or dualist relationship between national and international law, it is clearly stipulated by the Croatian Constitution that international treaties concluded and confirmed in accordance with the Constitution, published, and in force constitute part of the internal legal order and have legal force superior to that of national laws. Their provisions, as specified in the Constitution, may only be altered or repealed under the conditions and in the manner determined therein or in accordance with the rules of international law.[63] For the true implementation of the obligations undertaken by the Charter (i.e. the implementation of social rights at the national level, it is of utmost importance to monitor the conclusions of the European Committee of Social Rights from the monitoring process of the Charter's application through the system of periodic reports). Therefore, national normative solutions and their implementation represent one dimension of formal compliance with obligations, while the Committee's assessment in each specific case reflects the true reality of the application and realisation of the undertaken obligations. This study will primarily focus on the areas of health, accidental insurance, and long-term care.

3.1. The right to protection of health (Article 11 ESC)

The European Committee of Social Rights interprets health as physical and mental well-being in accordance with the Constitution of the World Health Organisation (WHO), and it is particularly focused on the highest attainable standards of health

62 See Council of Europe, no date.

63 Article 134 (i.e. Article 141 of the consolidated text of the Constitution of the Republic of Croatia). See: Consolidated text of the Constitution of the Republic of Croatia, 2010.

and the right to access healthcare. It entails, as a positive obligation, the realisation of the highest possible level of protection through, *inter alia*, adequate health services, and, as a negative obligation, to refrain from direct or indirect interference with this right.[64] The healthcare system must respond appropriately to eliminate health risks. The main indicators developed by the European Committee of Social Rights in this regard are life expectancy, causes of mortality, child mortality, and maternal mortality (the latter two being decisive indicators).[65] Access to healthcare facilities implies accessibility for all, and restrictions must not yield hindrances to the enjoyment of the right to health for vulnerable groups.[66] According to the case law of the Committee, access to healthcare *inter alia* entails that healthcare costs do not excessively burden individuals. Healthcare access management must not lead to unnecessary delays or postponements, waiting lists must be based on transparent criteria established at the national level, and access must be ensured to everyone as a fundamental human right without discrimination.[67] In the assessment of infrastructure and equipment at the national level, the Committee applies criteria established by the WHO.[68]

In its 2021 conclusions in assessing the situation in the Republic of Croatia, the Committee deferred its decision regarding Article 11(1) and requested, *inter alia*, additional information on maternal mortality and measures taken to reduce maternal deaths and the protection of health and access to healthcare for transgender persons.[69] Regarding Article 11(3), the Committee also requested additional information on the number of partially or fully closed institutions for persons with disabilities (in the context of deinstitutionalisation), the number of beds in long-stay psychiatric hospitals, deinstitutionalisation strategies (including deadlines for the closure of all institutions), community-based services, personal assistance, access to services, including data on education and employment, the number of people living in group housing (small group homes, family-type homes), the methods of financing and monitoring community-based services, and information on mental healthcare services for children.[70]

In the context of the above questions and requested data and from a normative standpoint, healthcare is provided on the basis of the Health Care Act,[71] which guarantees healthcare to every person while striving to achieve the highest possible level of healthcare per Croatian legislation.[72] Healthcare measures are extensively specified by the noted Act and bylaws. Health insurance, founded on the principles of mutuality, solidarity, and equality based on the Mandatory Health Insurance Act[73] is

64 Lukas, 2021, pp. 162–163.
65 Ibid.
66 Ibid., p. 164.
67 Ibid., p. 165.
68 Ibid.
69 European Committee of Social Rights, 2022, pp. 3–6.
70 Ibid., p. 11.
71 Health Care Act, Official Gazette Nos. 100/18, 125/19, 147/20, 119/22, 156/22 and 33/23.
72 Health Care Act, Article 3.
73 Mandatory Health Insurance Act, Official Gazette, Nos. 80/13, 137/13, 98/19 and 33/23.

widely established to cover almost all citizens (except for recent legislative changes mentioned *supra* and related to a larger number of insured individuals than the total population of the country). However, what is particularly emphasised and posed as a difficulty is the fact that the rights of the insured are not aligned with the resources allocated for healthcare, which significantly burdens the functioning of healthcare institutions and questions the public healthcare system's sustainability.[74] That is, the Croatian healthcare system is also based on a combination of the Bismarck and Beveridge models of financing, predominantly funded by mandatory health insurance contributions paid by employees, with additional transfers from the budget,[75] especially in the case of substantial hospital debt accumulation. The greatest problem, as assessed by Vehovec, Rašić Bakarić, and Slijepčević,[76] lies in the normative planning of healthcare, which includes the principle of comprehensive healthcare based on the 'all rights for all' approach, and in the methods of determining healthcare service prices by the Croatian Health Insurance Fund, which acts as a monopolistic entity that directly influences the accumulation of debt in the public hospital system in Croatia.[77] Citizen participation in mandatory health insurance services is mainly conducted through contracts for supplementary health insurance, which can be concluded with the Croatian Health Insurance Fund and private insurance companies. The average monthly premium for a supplementary health insurance policy (for those who pay for it, as there are various categories entitled to it at the expense of the Republic of Croatia's budget) amounts to approximately EUR 10, which is not a significant financial burden for the insured individuals.

In accordance with the Act on Vocational Rehabilitation and Employment of Persons with Disabilities,[78] persons with disabilities (looking at disability as a social concept encompassing physical, mental, intellectual, or sensory impairments) are entitled to vocational rehabilitation and the use of services provided by a centre for vocational rehabilitation via a wide range of measures and activities.[79] The entities responsible for vocational rehabilitation can be the Croatian Pension Insurance Institute; the Croatian Employment Service; the Institute for Expert Evaluation, Vocational Rehabilitation, and Employment of Persons with Disabilities; the ministry

74 Dubovečak et al., 2019, pp. 61–63.

75 Pešić and Vinković, 2019, p. 329.

76 Vehovec, Rašić Bakarić and Slijepčević, 2014, p. 188.

77 Pešić and Vinković, 2019, pp. 338–341.

78 Act on Vocational Rehabilitation and Employment of Persons with Disabilities, Official Gazette, Nos. 157/13, 152/14, 39/18, 32/20.

79 Act on Vocational Rehabilitation and Employment of Persons with Disabilities, Article 4. Pursuant to Article 4(4), vocational rehabilitation includes assessment of remaining working capacity and general abilities, vocational information, advice and assessment of vocational options, analysis of the labour market and possibilities for finding and securing employment, evaluation of possibilities for introducing, developing and improving vocational training programmes, individual and group programmes to improve vocational and social integration, vocational training, advisory suggestions on the use of various technologies and techniques for learning and work, motivating and training persons with disabilities to use selected technologies, and technical assistance and support in vocational rehabilitation.

responsible for social policy; an insurance company; an employer; a local or regional self-government unit; or a natural person (a person with a disability, a legal representative), obliged to finance vocational rehabilitation.[80] Persons with disabilities can be employed in the open labour market or under special conditions with reasonable adjustments provided in interviews or tests.[81] Legislative solutions also include the category of integrative workshops as places of employment for persons with disabilities who cannot be employed in the open labour market. The Croatian model also allows for the possibility of quota employment of persons with disabilities, thus incorporating modalities present in EU anti-discrimination labour law but with the legislative option to exempt certain categories of legal entities from the obligation of quota employment.[82] However, particular challenges are posed by the employment opportunities for individuals with mental impairments given a lack of general awareness of this population, existing stereotypes, and objective difficulties for certain job positions.[83] The Act on the Protection of Persons with Mental Disorders[84] lays down basic principles, the protection of rights, and conditions for the implementation of measures and actions concerning persons with mental disorders. The Commission for the Protection of Persons with Mental Disorders under the Ministry of Justice established under this Act is, *inter alia*, competent to discuss matters of importance for the protection of persons with mental disorders; monitor the respect of their human rights, freedoms, and dignity; monitor the implementation of medically approved procedures; examine individual cases of retention and placement in psychiatric institutions and the use of coercive measures; and approve projects of biomedical research involving persons with mental disorders.[85] The impression gathered in the eight years of work in the said Commission is that Croatia chronically lacks hospital capacity for children with mental disorders, as there is only one children's hospital in the entire country. Therefore, the urgent placement of children with auto- and hetero-aggressive behaviour, both with and without autism, can be a challenging mission given the justified inability to accommodate them with adults.

Regarding the deinstitutionalisation measures highlighted by the Committee, it is worth noting that the Social Welfare Act of 1997 laid the foundation for non-governmental organisations and private individuals to register and open family homes (under certain conditions) for the accommodation of beneficiaries, primarily from the social welfare system.[86] However, today, such a system of family homes and foster care has expanded to include persons with disabilities and other protected categories, mainly supplementing insufficient public capacities and infrastructure. The role of personal assistants will be regulated by the Personal Assistance Act, which is

80 Act on Vocational Rehabilitation and Employment of Persons with Disabilities, Article 6.
81 Act on Vocational Rehabilitation and Employment of Persons with Disabilities, Article 7.
82 Act on Vocational Rehabilitation and Employment of Persons with Disabilities, Article 8.
83 Lulić and Vinković, 2018, pp. 815–818.
84 Act on the Protection of Persons with Mental Disorders, Official Gazette, No. 76/14.
85 Act on the Protection of Persons with Mental Disorders, Articles 74 and 75.
86 Žganec, 2002, p. 183.

expected to enter into force on 1 July 2023.[87] Hence, the role of personal assistants, who assist persons with disabilities in their daily lives, would be regulated by law and funded by the state budget, rather than primarily relying on programme and project funds financed by the EU.

Considering the specific questions that the European Committee of Social Rights addressed to Croatia in its 2021 conclusions and based on the structured elaboration of national circumstances, this chapter will no longer make specific reference to Article 15 of the European Social Charter, as its content is *mutatis mutandis* partially covered *supra*.

3.2. Pensions

The issue of pensions in the European Social Charter context is quite complex and encompasses analysis through several articles. Article 13(1) applies to states that have not accepted the obligations of Article 23 of the Revised European Social Charter and those bound by the original text of the Charter (as with Croatia). Within its framework, it examines non-contributory pensions paid to a single elderly person without resources.[88] Given the assessment of the situation indicating that in Croatia over 60,000 persons aged 65 or above do not meet the minimum requirements to be entitled to a pension (i.e. a minimum of 15 years of pensionable service), most of whom are women, [89] the Act on the National Benefit for the Elderly was passed.[90] This Act lays down the conditions for acquiring the right, the scope of persons entitled to the exercise of the right, and the competent authorities responsible for implementing the procedure.[91] However, beyond the requirement that the person must not be a beneficiary of a pension under national or foreign regulations and that their monthly income (or the income of their household members) in the previous calendar year does not exceed the determined amount of the national benefit for the elderly, it also applies to individuals not entitled to the guaranteed minimum benefit[92] under social welfare regulations.[93] Furthermore, they must neither be entitled to accommodation services under social welfare regulations nor have concluded a support-until-death or lifelong support agreement in the capacity of a supported person.[94] The Croatian

87 The draft act was subject to public discussion but generated many comments and criticism. [Online]. Available at: https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=22652. (Accessed: 12 February 2023).

88 Lukas, 2021.

89 Ministry of Labour, Pension System, Family and Social Policy, no date.

90 Act on the National Benefit for the Elderly, Official Gazette, No. 62/2020.

91 Act on the National Benefit for the Elderly, Article 1.

92 The guaranteed minimum benefit is the right to a sum of money ensuring the right aimed at meeting basic needs of a single person or a household that does not have enough funds to meet basic needs, and it is regulated by Articles 21–29 of the Social Welfare Act, Official Gazette, Nos. 18/22, 46/22, and 119/22. The homeless, victims of domestic violence, and victims of human trafficking are, *inter alia*, entitled to the right to the guaranteed minimum benefit.

93 Act on the National Benefit for the Elderly, Articles 5(1), 1–3.

94 Act on the National Benefit for the Elderly, Article 5(1), Sub-Paragraphs 4 and 5.

Pension Insurance Institute decides on the right to the national benefit for the elderly, and the procedure is initiated upon the request of a person who must be a Croatian citizen who has reached the age of 65 and has resided in the territory of the Republic of Croatia for 20 years without interruption before submitting the application for the benefit.[95] The benefit currently amounts to approximately EUR 120, but an increase to EUR 150 has been announced.

From a developmental perspective, the Croatian pension system has undergone multiple reforms, of which the systemic reform from 1998 to 2002 introduced the three-pillar pension insurance system.[96] The first pillar is based on intergenerational solidarity and provides pensions for current pensioners. The second and third pillars are based on individual capitalised savings. The first and second pillars are mandatory for all employees residing in Croatia, while the third pillar constitutes voluntary pension insurance, which implies individual savings that receive state incentive funds and are managed by privately-owned pension companies. The Croatian Health Insurance Fund manages the first pillar, and pension contributions (i.e. 15% of gross salary) are paid directly to the State Treasury for the payment of pensions to current pensioners. The second pillar involves monthly contributions of 5% of gross salary, and the funds are deposited into a personal account in one of the mandatory pension funds chosen by the employee.[97] Supervision of the operation of companies man ageing the second pillar of pension insurance is conducted by the Croatian Financial Services Supervisory Agency. Among much criticism directed towards the Croatian pension system, the most significant one regards its fragmentation via various privileged groups, which reduce the potential for regular pension payments and question equal treatment of beneficiaries, while another relates to the definitions of partial and total disability introduced in the past, leading to an increase in disability pensions.[98] From an economic perspective, considering the aforementioned data on Croatia's depopulation and the unfavourable ratio of pensioners to insured employees, it is evident that since the beginning of the pension reform, the pressure on annual transfers from the state budget has continued to increase. Thus, Samodol stresses that, *inter alia*, responsible and planned changes and adjustments to the pension system are necessary based on known variables and the adoption of pension stabilisers implemented by countries with similar pension reform models.[99]

The Mandatory Pension Insurance Act,[100] which regulates mandatory pension insurance based on generational solidarity and the principles of reciprocity and solidarity, ensures mandatory rights for old age and reduced work capacity with residual work capacity, partial or complete loss of work capacity, and rights for family

95 Act on the National Benefit for the Elderly, Articles 4, 6 and 7.
96 Vukorepa, 2015, p. 285.
97 Ibid., pp. 286–290.
98 Ibid., p. 301.
99 Samodol, 2020, pp. 90–92.
100 Mandatory Pension Insurance Act, Official Gazette, Nos. 157/13, 151/14, 33/15, 93/15, 120/16, 18/18, 62/18, 115/18, 102/19, 84/21 and 119/22.

members in the event of the insured person's death. In this regard, the Act regulates the right to an old-age pension, an early old-age pension, a disability pension, a family pension, a minimum pension, a basic pension, vocational rehabilitation, and bodily injury compensation.[101] These rights are personal property rights and cannot be transferred to another person or inherited.[102]

3.3. Accidental insurance

The European Committee of Social Rights assesses accidents at work under Article 3 of the European Social Charter (Right to safe and healthy working conditions), but the concept of accidents and its scope are broadly interpreted and include accidents at work, at home, at school, and during leisure activities.[103]

Croatian social security law is specific in that it does not have a unified system regarding work-related injuries and occupational diseases that would imply short- and long-term benefits on these grounds. This problem would likely be better addressed in organisation and structure if Croatia had a certain Code of Social Security. However, in its absence, it is mainly regulated through two systems: the healthcare and pension insurance systems. As mentioned earlier, the Mandatory Pension Insurance Act regulates, *inter alia*, the issue of the right to vocational rehabilitation and bodily injury compensation, including disability and family pensions as forms of long-term care. Furthermore, it provides for the rights based on reduced work capacity with residual work capacity, partial loss of work capacity, and total loss of work capacity (a disabled worker entitled to the right to a disability pension or the right to vocational rehabilitation). Reduced work capacity exists when, given permanent changes in health status that cannot be eliminated through treatment, work capacity is reduced by more than half relative to a healthy insured person with the same or similar level of education.[104] Residual work capacity exists when a reduction in work capacity has occurred, but considering health status, age, education, and ability, the person can be rehabilitated to work full-time in other jobs through vocational rehabilitation.[105] Partial loss of work capacity exists when, given health status, age, education, and ability, the person cannot be rehabilitated to work full-time in other jobs but can work at least 70% of the working time in adjusted jobs of the same or similar level of education.[106] Illness, a work-related injury, an occupational disease, and a non-work-related injury are recognised as the causes of reduced work capacity with residual work capacity, partial loss of work capacity, and total loss of work capacity.[107]

By contrast, salary and healthcare compensation are regulated in such cases through the provisions of the Mandatory Health Insurance Act as a form of short-term

101 Mandatory Pension Insurance Act, Article 3.
102 Mandatory Pension Insurance Act, Article 4.
103 Lukas, 2021, p. 172.
104 Mandatory Pension Insurance Act, Article 39(1).
105 Mandatory Pension Insurance Act, Article 39(2).
106 Mandatory Pension Insurance Act, Article 39(3).
107 Mandatory Pension Insurance Act, Article 39(5).

benefits. Hence, beyond salary compensation during temporary incapacity for work or occupational disease, the insured person is entitled to the reimbursement of travel and transportation costs for access to healthcare resulting from an occupational disease or a recognised work-related injury, even funeral expenses in the event of the insured person's death when the death is a direct result of a recognised work-related injury or occupational disease.[108]

3.4. Long-term care

Regarding long-term care, Croatia is criticised for the lack of strategic approaches that would identify long-, medium-, and short-term priorities, goals, responsibilities, and financing methods. A fundamental complaint is the lack of community- and home-based services that would be evenly distributed across the country.[109] Long-term care is predominantly implemented through the social welfare system and other ministries, particularly regarding war veterans. Although the private sector is significantly growing, especially as previously mentioned, there is a lack of capacity in public care homes for the elderly and facilities for patients in the final stages of terminal illness (hospices) and those suffering from various mental illnesses.[110]

In the context of analyses by the European Committee of Social Rights, *mutatis mutandis*, similar conclusions could be drawn regarding the national report and targeted questions of the Committee.[111]

4. Concluding remarks

Croatia, as a constitutionally defined social state, was undoubtedly protected by this constitutional determinant from potential neoliberal interventions in the area of healthcare, health, pension, and disability insurance. However, another question is how generous the material rights are in the respective systems and how long-term the health and pension insurance systems are financially sustainable. Knowledge of local conditions suggests great challenges for the health and pension system given pronounced depopulation, ageing of the population, and large emigration of citizens in productive life age, the consequences of which will mark the coming decades. A particularly aggravating circumstance is the lack of medical doctors (partly caused by their emigration to other, more economically developed members of the EU and third countries)[112] and a sufficient number of medical teams in almost the entire country, especially in less populated rural areas and areas and on Croatian islands.

The problem of normative complexity and partially reduced transparency can be observed in the exercise of various rights from the pension and disability insurance

108 Mandatory Health Insurance Act, Article 37.
109 Stubbs and Zrinščak, 2018, p. 4; Rusac et al., 2011, pp. 67–80.
110 Stubbs and Zrinščak, 2018, p. 5.
111 European Committee of Social Rights, 2022.
112 Čipin, Smolić and Vlah Jerić, 2017, pp. 357–359.

system, including health insurance and health protection. The necessity and challenge of finding one's way in the forest of legal and by-law texts of the observed systems, as a nomotechnical deficiency, could potentially be eliminated by the adoption of a Croatian Code on Social Security (though overall codification of a targeted legal area is not a tradition of Croatian legislative activity). Unfortunately, given the format and primary function of this chapter, we could not focus sufficiently on the rights from the social welfare system, as this complex matter represents a separate research topic.

In summary, it cannot be said that Croatia is not realising its constitutional determination as a welfare state, but serious questions arise regarding the sustainability of the social security system, at least, at the same level of rights for generations to come in the coming decades. For a system that rests dominantly on intergenerational solidarity regarding pension insurance (by which current pensions are provided exclusively by the work of currently employed people and transfers from the state budget), with an unfavourable ratio of actively employed persons or insured persons, where the number of pensioners (which amounts to almost 1:1) does not offer hope for optimism, Bismarck's model of social security (with undoubted Beveridge elements) posits a collapse.

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| Chapter 5 |

Poland: Social Law and Social Security—Disproportionality to Demographic Challenges

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ABSTRACT

Social law exists in Poland as an area of research and didactics. However, it is questionable whether social law constitutes a separate scientific discipline (this is the case in Germany, for example). It is partly caused in Poland by the lack of a legal definition of social law. However, it does not change the fact that Poland is currently facing the massive challenge of mastering the demographic crisis and limiting its adverse effects, which requires undertaking deep systemic reforms, especially in such areas as healthcare, social assistance, employment policy, social insurance, and family policy. The most critical factors contributing to demographic ageing in Poland are falling fertility rates and increasing life expectancy. Moreover, the ageing of the post-war baby boomers contributes to demographic ageing in Poland. It is also worth signalling the low labour force participation of older age groups, which consequently means that the actual number of pensioners in Poland is higher than the demographic situation would indicate. All these phenomena undoubtedly pose a challenge to Poland's social security and healthcare systems. The point of reference for the noted considerations was the European Social Charter, which Poland acceded to in 1997 (Poland was bound by the provisions of all 19 articles of the second part of the Charter, but excluding some paragraphs of these articles). This study first shows the status of the regulation of social rights at the level of the 1997 Polish Constitution. Considering the jurisprudence of the Constitutional Tribunal, the following are described: 1) the right to healthcare and the citizen's right to equal access to publicly funded healthcare services, 2) the right to social security, 3) assistance to persons with disabilities, 4) the family's right to assistance from the state, and 5) the protection of children's rights. Next, the study presents the place of social rights regulations in the Polish legal system. Then, focusing on Poland's realisation of the right to social security under the European Social Charter, it presents the conclusions of the European Committee of Social Rights from the reporting cycles to date, starting from 1997. Finally, the study details current regulatory issues in the field of social law, showing the problems of sustainable development in light of the aforementioned demographic challenges.

KEYWORDS

Poland, social law, social security, European Social Charter, demographic challenges

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1. Initial remarks

Poland acceded to the European Social Charter in 1997[1] but chose neither to ratify the Revised European Social Charter nor ratify the 1995 Additional Protocol to the European Social Charter, introducing a system of collective complaints. Notably, Poland has bound itself to the provisions of all 19 articles of the second part of the Charter but to the exclusion of some paragraphs of these articles. From the perspective of this study, it is significant that Poland does not consider itself bound by the provisions of the Charter in terms of Articles 13(1) and 14(2).

2. Level of protection in the Polish Constitution[2]

2.1. The right to protection of health and the right to equal access to publicly funded healthcare services

According to Article 68(1) of the Polish Constitution 'everyone shall have the right to have his health protected'. The provision of Article 68(2) of the Polish Constitution states that 'equal access to healthcare services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute'. In turn, according to Article 68(3) of the Polish Constitution, 'public authorities shall ensure special healthcare to children, pregnant women, handicapped people and persons of advanced age'. Moreover, 'public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment'.[3] Meanwhile, 'public authorities shall support the development of physical culture, particularly amongst children and young persons'.[4]

From Article 68(1) of the Polish Constitution, it is necessary to derive the individual's subjective right to health protection, and the objective order for public authorities to take such measures as are essential for the due protection and realisation of this right.[5] In its judgment of 7 January 2004, the Constitutional Court added that the content of the right to healthcare is not some abstractly defined (and essentially undefinable) state of 'health' of individuals, but the possibility of benefiting from a healthcare system functionally aimed at combating and preventing disease, injury and disability.[6] The Constitutional Tribunal stressed that the norm of Article 68(1) of the Polish Constitution does not prejudge the construction of this system or its elements: the legal nature of the sources of funding for health benefits, the nature and

1 Journal of Laws of 1999, No. 8, item 67.
2 Constitution of the Republic of Poland, Journal of Laws of 1997, No. 78, item 483, as amended.
3 Article 68(4) of the Polish Constitution.
4 Article 68(5) of the Polish Constitution.
5 Judgment of the Constitutional Tribunal of 23 March 1999, K 2/98, OTK 1999/3/38.
6 Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK-A 2004/1/1.

structure of the payer(s) of these benefits, and the ownership structure of healthcare providers.

However, certain limitations on the legislator's freedom may arise from other constitutional principles or values. Even so, from the obligation of public authorities to ensure the conditions for the realisation of the right to healthcare, which cannot be treated as an illusory or purely potential entitlement, comes the requirement that the entire system must be effective.

Moreover, a subjective right is the citizen's right to equal access to publicly funded healthcare services,[7] which has a guarantee character, including the right of children, pregnant women, disabled persons, and the elderly to particular healthcare.[8] These rights, like the right to healthcare, are not absolute and can be restricted.[9] According to the Constitutional Tribunal, the following consequences follow from Article 68(2) of the Polish Constitution: 1) it is necessary to function within the broadly defined healthcare system of mechanisms that allow the collection and subsequent disbursement of public funds for healthcare services,[10] 2) the benefits financed from the funds mentioned above are to be available to citizens (and, thus, no longer to 'everyone'), whereby it is not a matter of mere formal accessibility, declared by legal regulations of a 'programmatic' nature, but of real accessibility, constituting the realisation of the right to healthcare, 3) access to publicly financed benefits must be equal for all citizens, regardless of their material situation,[11] 4) the obligation to ensure a certain standard of availability of publicly financed benefits is charged to public authorities (the task of public authorities).[12] The provisions of Article 68(4) and (5) of the Polish Constitution are programmatic and are not a source of subjective rights.[13]

Article 68 of the Polish Constitution has a guaranteed significance primarily at the institutional and procedural level. The proper definition by the legislator of the organisational sphere is of crucial importance in this connection, related to the precise, unambiguous, and functional construction of the healthcare system. It is closely related to the proper distribution of competencies granted to institutions that conduct public tasks in the sphere of healthcare. It is then followed by the adequate definition of the principles of their operation, ensuring the necessary transparency of activities, effective supervision of them, and clear, legible, and unambiguous principles of responsibility.[14]

7 Article 68(2) of the Polish Constitution.
8 Article 68(3) of the Polish Constitution.
9 Florczak-Wątor, 2021a.
10 A detailed assessment of the legal nature of the funds disbursed by citizens is irrelevant here. Whether they qualify as public funds is what matters.
11 Equality in access to healthcare services is an extension of the principle of equality expressed in Article 32 of the Constitution and the concept of social solidarity.
12 Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK-A 2004/1/1.
13 Florczak-Wątor, 2021a.
14 Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK-A 2004/1/1.

2.2. The right to social security

According to Article 67(1) of the Polish Constitution 'a citizen shall have the right to social security whenever incapacitated for work because of sickness or invalidism and having attained retirement age. The scope and forms of social security shall be specified by statute'. Meanwhile, 'a citizen who is involuntarily without work and has no other means of support, shall have the right to social security, the scope of which shall be specified by statute'.[15]

In the indicated provision, social security is framed as a subjective right.[16] The Constitutional Tribunal notes that social security is 'a system of facilities and benefits to meet the justified needs of citizens who have lost the ability to work or have suffered a limitation of this ability, or have been excessively burdened with the cost of supporting their families' and that 'the essence of the right to social security includes the protection of citizens in the event of the occurrence of certain insurance risks, resulting in the total or partial loss of the ability to support themselves'.[17]

The Constitution does not prejudge the forms of implementation of the right to social security, leaving the ordinary legislator a considerable margin of freedom to determine the specific requirements and rules for granting certain benefits.[18] Such a solution is dictated by the need to respond to the economic changes taking place in the state and the related possibilities of fulfilling the state's obligations to citizens, which would be impossible if a single model of this security were specified at the level of the Constitution.[19] The right of the legislature to determine the scope of social security includes, in particular, the right to set the retirement age inside a specific time frame, the limits of which are determined by the essence of the right to a pension.[20]

Meanwhile, the Constitutional Tribunal emphasises the legitimacy of particularly intensive protection of the right to social insurance benefits, especially pension rights. The special protection of these rights is in close connection with the principle of citizens' trust in the state and the laws made by it and with the principle of reciprocity of social insurance benefits. The insured participates in creating the insurance fund from which benefits are paid. He expects to receive the benefits stipulated by the law in the event of certain events that prevent him from gainful activity.[21] Changes to the detriment of citizens, to which the pension system may be subjected, for example, in the event of an economic crisis, must, therefore, not be arbitrary and should be made considering the obligation to distribute the burden fairly among all insured.[22]

15 Article 67(2) of the Polish Constitution.
16 Judgment of the Constitutional Tribunal of 31 July 2014, SK 28/13, OTK-A 2014/7/81.
17 Judgment of the Constitutional Tribunal of 7 February 2006, SK 45/04, OTK-A 2006/2/15.
18 Judgments of the Constitutional Tribunal of: 22 June 1999, K 5/99, OTK 1999/5/100; 20 November 2001, SK 15/01, OTK 2001/8/252.
19 Judgment of the Constitutional Tribunal of 31 July 2014, SK 28/13, OTK-A 2014/7/81.
20 Judgment of the Constitutional Tribunal of 22 June 1999, K 5/99, OTK 1999/5/100.
21 Judgment of the Constitutional Tribunal of 28 February 2012, K 5/11, OTK-A 2012/2/16; Judgment of the Constitutional Tribunal of 4 January 2000, K 18/99, OTK 2000/1/1.
22 Judgment of the Constitutional Tribunal of 4 November 2015, K 1/14, OTK-A 2015/10/163.

Article 67 of the Polish Constitution also statutes a subjective public right to social assistance within a narrow scope. It is essential that a social assistance benefit can only be granted when a person and family cannot meet their basic needs in any other way.[23]

2.3. Assistance to people with disabilities

According to Article 69 of the Polish Constitution 'public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication'. This provision is not a source of a subjective right to which disabled people are entitled.[24] Instead, it is treated as a programmatic norm that statutes the state's task and designates the legislator's duty to create solutions to ensure effective support for people with disabilities in various areas of social life. The provision of Article 69 of the Polish Constitution refers to the law in terms of the level of satisfaction of the needs of people with disabilities and the subject of the regulation that concerns this issue. Thus, this provision 'does not mean to set at the constitutional level a specific level of benefits, their forms, a specific scope or mode of obtaining them, but leaves the legislator free to choose the means to achieve the goals listed therein'.[25]

Given the differences in the definition of disability in various fields of science and national legislation and international regulations, the Constitutional Tribunal recognizes that in light of Article 69 of the Polish Constitution, which is related to human dignity, it is not necessary to formulate a single, strictly defined definition of disability, as it could have an exclusionary effect.[26] This situation is all the more so because different understandings of disability are somewhat permissible within the framework of the duties of public authorities to assist in various areas of life, such as 1) securing existence, 2) adoption for work, and 3) social communication. Public authorities should provide adequate assistance to those who need it in each of these areas.[27]

2.4. The family's right to state assistance

According to Article 71(1) of the Polish Constitution:

> The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances – particularly those with many children or a single parent – shall have the right to special assistance from public authorities.

23 Gapski, 2018, p. 195.
24 Decision of the Constitutional Tribunal of 6 September 2000, Ts 69/00, OTK 2000/7/277.
25 Judgment of the Constitutional Tribunal of 20 December 2012, K 28/11, OTK-A 2012/11/137 and the case law cited therein.
26 Judgment of the Constitutional Tribunal of 7 July 2015, K 47/12, OTK-A 2015/7/99.
27 Ibid.

In turn, Article 71(2) of the Polish Constitution states that 'a mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by statute'. An expression of the same axiology that inspired the content of Article 71 of the Polish Constitution is Article 18 of the Polish Constitution, according to which 'marriage as a union between a man and a woman, family, maternity and parenthood are under the protection and guardianship of the Republic of Poland'.[28] Therefore, according to the Constitutional Tribunal, Article 71 of the Polish Constitution should be understood as a provision ordering 'the state to take such measures as strengthen the bonds between the persons who make up the family, especially the bonds that exist between parents and children and between spouses'.[29] Meanwhile, Article 71(2) of the Polish Constitution clarifies the state's obligation to provide care to all pregnant women under Article 68(3) of the Polish Constitution.[30]

The Constitutional Tribunal accepts that the concept of 'the good of the family' includes, first and foremost, its permanence, which forms the basis for the sense of security of all its members, especially the most vulnerable—children and sick or disabled persons. The family's good is formed by strong and enduring ties—positive emotional relations linking its members, fostering their personal development and feelings of happiness given their closeness to other family members. Finally, the family's well-being is also the possession by the family of the elementary material conditions necessary to meet the life needs of its members, with the need for independent housing at the forefront.[31]

To the extent that the state is obliged to consider the family's welfare in its social and economic policies, Article 71(1) of the Polish Constitution is programmatic (their addressee is primarily the legislature).[32] The next two sentences of this provision are the source of a subjective right, namely the right to special assistance from the public authorities, which has been granted to families in difficult material and social situations, especially those with many children and incomplete children, and to the mother before and after the birth of her child.[33]

2.5. Protection of children's rights

According to Article 72(1) of the Polish Constitution 'the Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation, and actions, which undermine their moral sense'. Meanwhile, 'a child

28 Judgment of the Constitutional Tribunal of 18 May 2005, K 16/04, OTK-A 2005/5/51. The Article 18 of the Constitution of the Republic of Poland is framed more generally than Article 71, due to the fact that it is included in Chapter I of the Constitution, which defines the basic principles of the Republic's political system.
29 Ibid.
30 Florczak-Wątor, 2021b.
31 Judgment of the Constitutional Tribunal of 18 November 2014, SK 7/11, OTK-A 2014/10/112.
32 Judgment of the Constitutional Tribunal of 10 July 2000, SK 21/99, OTK 2000/5/144.
33 Florczak-Wątor, 2021b.

deprived of parental care shall have the right to care and assistance provided by public authorities'.[34] Under Article 72(3) of the Polish Constitution, 'organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child'. Moreover, 'the competence and procedure for appointment of the Commissioner for Children's Rights shall be specified by statute'.[35]

Article 72(1) of the Polish Constitution subjects the good of the child to analogous constitutional protection to that which, by Articles 18 and 71(1) of the Polish Constitution, belongs to the good of the family. However, the concept of 'good of the child', unlike the concept of 'good of the family', does not appear in any constitutional provision.[36] According to the Constitutional Tribunal, 'the good of the child is a kind of constitutional general clause, the reconstruction of which should be carried out by reference to constitutional axiology and general systemic assumptions'.[37] The obligation to protect the child's rights, which is an expression of the recognition of the child's welfare as a constitutionally protected value, is not the source of any subjective right.

In turn, Article 72(2) of the Polish Constitution guarantees a child the right to demand care and assistance from the state, which has the status of a subjective right.[38] It follows from Article 72(3) of the Polish Constitution that the right to a child's hearing is a constitutional value in its own right. The child's right, as defined in this provision, 'is framed, as it were, in opposition to the entities to which final decisions belong'.[39] These entities—parents, persons responsible for the child, public authorities, and the state—constitute 'a kind of buffer between the child and the outside world'.[40] They help the child determine his position in the world, guided by his well-being, respecting his opinions, beliefs, and distinctiveness, but filtering them through their own experience and knowledge, which the child naturally does not have.[41] The provision of Article 72(3) of the Polish Constitution already implies a limitation on the child's rights.[42]

3. Place of social law in the national system

First, it should be noted that it is not legitimate to analyse social law only through the prism of social human rights (the latter, together with economic and cultural rights, form a category of rights that secure the material existence and intellectual development of the individual and the nation).[43] In social human rights,

34 Article 72(2) of the Polish Constitution.
35 Article 72(4) of the Polish Constitution.
36 Florczak-Wątor, 2021c.
37 Judgment of the Constitutional Tribunal of 21 January 2014, SK 5/12, OTK-A 2014/1/2.
38 Florczak-Wątor, 2021c.
39 Judgment of the Constitutional Tribunal of 11 October 2011, K 16/10, OTK-A 2011/8/80.
40 Ibid.
41 Ibid.
42 Judgment of the Constitutional Tribunal of 21 January 2014, SK 5/12, OTK-A 2014/1/2.
43 Sierpowska, 2014, pp. 115–116.

> ...it is necessary to see, on the one hand, the concern to ensure the basic conditions of social security for everyone, and on the other hand to define them in such a way that they can not be the basis for excessive claims, to prosperity and economic equality.[44]

The relationship between social human rights and social law is defined as follows: 'guarantees for the realisation of social human rights, as well as their qualitative and quantitative dimensions, are covered by the regulation of social law'.[45]

The literature emphasises that social law occurs in Poland as an area of research and didactics. However, it is questionable whether social law constitutes a separate scientific discipline (this is the fact, for example, in Germany).[46] The issues included in social law fall within the scope of other sciences of law, primarily labour law, social security law, and administrative law. The way of defining social law and delimiting its research space is not uniform, and there is no shortage of highly different concepts.[47] According to I. Sierpowska, this state of affairs is partly due to the lack of a legal definition of social law (in the rich literature dealing with social-legal issues, systemic studies are not common); one can even get the impression that 'the doctrine is reserved in defining social law, delimiting its object, scope, and research methods'.[48]

There is little doubt in Polish legal science that labour law is outside the scope of social law. According to J. Jończyk, the proposal to combine labour law with social security institutions under the common name of 'social law' has not been accepted in science.[49] Meanwhile, the literature assumes that 'social security law focuses on the problem of benefit systems and the methods (techniques) and social risks attributed to them, which allows, it seems, to treat it as a component of social law'.[50] Seeking an answer to the question of how social law differs from social security law reveals that 'social law more broadly than social security law exposes the state's concern for the social existence of citizens, which is also noted by researchers who do not advocate the separation of social law'.[51]

At the statutory level, the idea of social security is implemented in three organisational and financial forms. These forms are classified as the insurance method,[52] the

44 Skrzydło, 2002, p. 66.
45 Sierpowska, 2014, p. 116.
46 Ibid., p. 114.
47 Ibid., p. 115.
48 Ibid.
49 Jończyk, 2006, p. 9. See also Baran, 2010.
50 Sierpowska, 2014, p. 121.
51 Ibid.
52 The insurance method is characterised by the fact that: '1) the state creates either a special purpose fund within the budget or a separate one; 2) the funds come from a certain portion of the national income earned by participants in the production process; 3) the contribution is a measure of the participation of the producers in the creation of this fund, not a part of the labour remuneration; 4) the benefits are differentiated (...); 5) the right to the benefit and its amount are guaranteed by law; 6) insurance coverage is compulsory (...); 7) the right to benefits is a subjective right (...); social insurance is performed by special public institutions' (Jędrasik-Jankowska,

supply method[53] and the care method (social assistance).[54] The tasks in the sphere of social security are exercised by many institutions, including Social Insurance Institution (Zakład Ubezpieczeń Społecznych, ZUS)—pays cash benefits and provides benefits in kind as part of disability pension prevention from social insurance; Agricultural Social Insurance Fund (Kasa Rolniczego Ubezpieczenia Społecznego, KRUS)—pays cash benefits and provides benefits in kind as part of disability pension prevention from social insurance of farmers; Ministry of Family and Social Policy (Ministerstwo Rodziny i Polityki Społecznej)—provides family and social benefits (from social assistance); National Health Fund (Narodowy Fundusz Zdrowia, NFZ)—finances benefits in kind from health insurance.[55]

However, the development of research in the area of social-legal topics indicates that the use of the above methods is becoming insufficient. Thus, science has formulated a postulate to distinguish one more system of benefits—Social support.[56] According to S. Nitecki, forms of social support are benefits that meet specific needs

2018, p. 27). In Poland, social insurance is divided into pension insurance, disability insurance, sickness insurance, and accident insurance (in Poland, social insurance is divided into general insurance and agricultural insurance). The Polish social insurance system is defined primarily by Act of 13 October 1998 on the social insurance system (consolidated text, Journal of Laws of 2022, item 1009, as amended), Act of 17 December 1998 on pensions from the Social Insurance Fund (consolidated text, Journal of Laws of 2022, item 504, as amended), Act of 25 June 1999 on cash benefits from social insurance in case of illness and maternity (consolidated text, Journal of Laws of 2022, item 1732, as amended), Act of 30 October 2002 on social insurance for accidents at work and occupational diseases (consolidated text, Journal of Laws of 2022, item 2189, as amended), Act of 28 August 1997 on the organisation and operation of pension funds (consolidated text, Journal of Laws of 2022, item 2342, as amended), Act of 21 November 2008 on capital pensions (consolidated text, Journal of Laws of 2018, item 926, as amended), and Act of 19 December 2008 on bridging pensions (consolidated text, Journal of Laws of 2023, item 164, as amended). Health insurance is a type of social insurance, separated by the object of protection. The rules for the provision of health benefits are primarily determined by Act of 27 August 2004 on healthcare services financed from public funds (consolidated text, Journal of Laws of 2022, item 2561, as amended) and Act of 15 April 2011 on medical activity (consolidated text, Journal of Laws of 2022, item 633, as amended).

53 The supply method is characterised by the fact that '1) the supply system generally covers the entire population of the country regardless of their labour activity; 2) the funds for the realisation of benefits are provided by the state budget; 3) benefits are generally uniform and determined according to the criterion of need or merit; 4) the types of benefits and their amount, including the circumstances and conditions entitling to them, are determined by law; 5) the right to benefit is a subjective right; 6) the system is administered by public offices' (Jędrasik-Jankowska, 2018, p. 28).

54 The care method is characterised by the fact that '1) social care systems cover the entire population, all who find themselves in need, regardless of their professional activity, either on the basis of citizenship or domicile; 2) need is sometimes defined by law by indicating the level of income that cannot be exceeded (the so-called income criterion); 3) benefits are granted from public funds derived from taxes or other sources (e.g. foundations, donations); 4) benefits are, as a rule, uniform, fixed in amount, at a level that ensures the security of minimum subsistence; 5) the right to a benefit acquires the nature of a claim only after a decision is issued; 6) social care systems are administered by public bodies – mostly local' (Jędrasik-Jankowska, 2018, p. 28).

55 Social Insurance Institution, 2021, p. 13.

56 Sierpowska, 2014, p. 127.

(housing allowance), benefits justified by a specific factual situation (unemployment), and help for families raising children (family benefits).[57] The literature notes that the development of the concept of social support could be one of the hallmarks of social law.[58] After all, following I. Sierpowska, it should be assumed that in Poland:

> (...) practical, social, didactic and research considerations argue for the separateness of social law, for the recognition of its own research problems, which require the creation of its own theory. However, regardless of the further development of scientific concepts, it is possible today to treat social law as a separate field for research purposes, especially interdisciplinary research and teaching needs. It is to be hoped that further scientific endeavours will contribute to the identification of the identity of social law and its unquestionable recognition as an independent scientific discipline.[59]

4. Demonstration of compliance with the European Social Charter

The implementation of the European Social Charter in Poland took place in stages through the introduction of various laws and changes in the legal system. Amendments were made, for example, to the Act of 28 November 2003 on family benefits,[60] the Act of 17 December 1998 on pensions from the Social Insurance Fund,[61] or the Act of 15 April 2011 on medical activity.[62] Among them was the introduction of social programmes for the poor and unemployed, educational programmes for children and young people, and health and prevention programmes. One of the most important measures in the implementation of the European Social Charter in Poland was also the formation of the Children's Ombudsman, which upholds children's rights as defined in the Constitution of the Republic of Poland, the Convention on the Rights of the Child and other laws, respecting the responsibilities, rights and duties of parents.[63] In matters of children, the Children's Ombudsman cooperates with the Ombudsman (the latter is generally responsible for protecting the rights of citizens, including social rights).[64] Poland is constantly working to improve the living standards and protection of its citizens' social rights per the assumptions outlined in the European Social Charter.

57 Nitecki, 2009, pp. 16–17.
58 Lach, 2009, p. 123.
59 Sierpowska, 2014, p. 121. See also Muszalski, 2010, p. 11.
60 Consolidated text, Journal of Laws of 2023, item 390, as amended.
61 Consolidated text, Journal of Laws of 2022, item 504, as amended.
62 Consolidated text, Journal of Laws of 2022, item 633, as amended.
63 See Article 1(2) of the Law of 6 January 2000 on the Children's Ombudsman, consolidated text, Journal of Laws of 2023, item 292.
64 See Articles 2 and 2a of the Ombudsman Act of 15 July 1987, consolidated text, Journal of Laws of 2020, item 627, as amended.

Further, to assess the compliance of national regulations with Articles 11–17 of the European Social Charter, it is necessary to bend to the conclusions of the European Committee of Social Rights from previous reporting cycles, starting from 1997. In the framework of this monitoring system, States Parties regularly submit a report on the implementation of the Charter in law and practice. These reports are examined by the European Committee of Social Rights, which decides whether the national situations they describe comply with the Charter. The decisions adopted by the European Committee of Social Rights in the framework of the reporting system (called 'conclusions') are published every year.[65] Given the framework of the study by focusing solely on Poland's implementation of the right to social security, it should be noted that:

> In the first reporting cycle, the inspection body assessed that the situation in Poland corresponds to the recommendations of Article 12(1) of the Charter. However, it asked for clarification of what action is taken by the state in case of delays in payment or refusal by employers to pay social security contributions, as well as in preventing the use of part-time work as a form of undeclared labour. The Committee reiterated its positive assessment in the second cycle, falling in 1999-2000. On the other hand, in four consecutive cycles (2001-2015) [the situation was also repeated in 2021 – M.B.'s note], the Committee's conclusion was negative, as it found that the number of benefits paid to the unemployed was insufficient. It explained that such a situation occurs when the level of the income replacement benefit falls below 40 percent of the median equivalent income, and even its combination with other benefits cannot bring the situation into compliance with Article 12(1) of the Charter.[66]

Concerning the implementation of Article 12(2) of the Charter, the European Committee of Social Rights initially generally withheld its final assessment, first because Poland failed to ratify ILO Convention No. 102 and the European Social Security Code and then (after Poland ratified the ILO Convention in 2003) because the ILO had not yet issued an opinion on the status of Poland's implementation of the provisions under the Convention, which could affect the Committee's decisions. However, in the 2008–2011 period and subsequent inspection cycles, the Committee confirmed, as did the ILO, the compliance of the situation in Poland with Article 12(2) of the European Social Charter, emphasising the country's obligation with Parts II, V, VII, VIII, and X of ILO Convention No. 102. On the implementation of Article 12(3) of the Charter:

> The Committee postponed its final assessment of the adequacy of Polish legislation to Article 12(3) until the government provides additional clarification. The review body pointed out that since unemployment benefits were

65 All the conclusions of the European Committee on Social Rights can be found [Online]. Available at: https://hudoc.esc.coe.int (Accessed: 13 July 2023).
66 Binaś, 2022, p. 65.

> introduced (i.e., since 1989), their scope has been systematically narrowing, which could lead to a transformation into a system of minimum assistance that will not provide effective protection against unemployment. Thus, in a subsequent report, the Committee required the government to present the practical effects of this narrowing. In the 1999-2000 report, the government explained only the economic reasons for this trend. Hence, the Committee reiterated its request for information on any consequences of this phenomenon and the submission of statistics on the number of unemployed people, including job seekers, receiving unemployment benefits and the number of people receiving social assistance benefits. Thus, the Committee's evaluation remained on hold. Subsequently, in three consecutive follow-up cycles, with the exception of the deferral of the evaluation in the 2005-2007 cycle, the Committee's conclusions about Poland's implementation of Article 12(3) were negative due to the modification of the structure of the unemployment benefit. The possibility of receiving this benefit was reduced from 18 to 12 months. In the last cycle, falling in 2012-2015 [the situation was also repeated in 2021 – M.B.'s note], the Committee withheld its final conclusions until it explained why the increase in unemployment benefits during the reference period was significantly lower than the increase in old-age, disability and survivors' pensions (almost 15 percent for unemployment benefits compared to about 20 percent for other benefits).[67]

However, in the case of Article 12(4) of the Charter, the European Committee of Social Rights withheld its final assessment only in the first reporting cycle. Meanwhile, in the others, it pointed to Poland's failure to implement this provision. The rationale for these negative conclusions (also for 2021) is the lack of equal treatment of citizens of all Charter states in access to family benefits and the aggregation of periods of employment or insurance, which allowed for the retention of acquired rights.

5. Current social law regulatory issues—problems regarding sustainability in the light of the demographic challenges

In the 1960s, the median age in Poland was 26.4 years and was, along with Iceland (25.6 years), one of the lowest among European countries.[68] Meanwhile, in 2060, it is expected to reach 51.2 and will be one of the highest in the European Economic Area, after Romania (52.4 years) and Latvia (51.9 years).[69] Consequently, Poland, currently one of the relatively young societies in Europe, will be among the oldest in 2060. Poland is, therefore, among the EU countries with the worst demographic prospects.[70]

67 Ibid., p. 66.
68 Pleśniak, 2014, pp. 43–44.
69 Ibid.
70 Merit and legal opinion to the Presidential draft Act amending the Act on pensions from the Social Insurance Fund and certain other acts (Sejm Paper No. 62).

The most critical factors contributing to demographic ageing in Poland are falling fertility rates and increasing life expectancy. Moreover, a factor affecting the demographic ageing of the population in Poland is the ageing of the vintages of the post-war baby boomers.[71] It is also worth signalling the low labour force participation of older age groups, which consequently means that the number of pensioners in Poland is higher than the demographic situation would indicate.[72] All these phenomena undoubtedly pose a challenge to Poland's social security and healthcare systems.[73] In 2013–2017, as a result of the pension reform, the process of gradually increasing and equalising the universal retirement age for both sexes to the ceiling of 67 years was underway in Poland.[74] The method used to raise the retirement age slowly meant that the indicated retirement age limit was to be reached by men in 2020 and women in 2040. The introduced changes in the retirement age affected the legal regulation of other social benefits: they increased the age that determines the status of an unemployed person and, thus, enlarged the population potentially eligible for unemployment benefits; they extended the period for collecting pre-retirement benefits, periodic capital pension, bridging pension, teacher's compensation benefit and nursing benefit for the care of a disabled child; and they raised the age at which a permanent benefit due to age-related inability to work can be obtained from social assistance.

Nevertheless, under the Act of 16 November 2016, amending the Act on pensions from the Social Insurance Fund and certain other acts,[75] as of 1 October 2017, there was a return to the old (in effect before 1 January 2013) universal retirement age (60 for women and 65 for men). Thus, this age's gradual increase and equalisation for men and women were abandoned.

The size of the pension depends on two basic parameters: the sum of contributions accumulated in the insured's account (possibly supplemented by initial capital) and life expectancy (the general rule for determining the monthly pension amount is to

71 Pleśniak, 2014, p. 45.

72 Ibid., p. 47.

73 Notably, the Social Insurance Institution received awards for 11 projects submitted for the ISSA Good Practice Awards. The award ceremony occurred on 2 May 2022 at the ISSA Regional Social Security Forum in Tallinn. The projects that received certificates with special mention include 1) automated granting of benefits to families in Poland, 2) digitisation of ZUS documentation (efficient access to electronic documents using innovative solutions), 3) enabling customers self-service data confirmations on the ZUS Electronic Services Platform (automation of the process to issue certificates required by other institutions), 4) implementation of e-visit in ZUS, 5) ZUS statistical portal as a platform for universal data sharing, 6) Anti-Crisis Shield, 7) handling of the Polish Tourist Voucher, 8) increasing efficiency and improving the quality of external customer service by identifying and developing competencies of ZUS employees, 9) optimisation of the process of granting reliefs and remissions through specialised counsellors, and 10) transformation of the Department for Employee Affairs into the Human Resources Management Department. International Social Security Association, 2022.

74 Act of 11 May 2012 amending the Act on pensions from the Social Insurance Fund and certain other acts, Journal of Laws of 2022, item 637.

75 Journal of Laws of 2017, item 38, as amended.

divide the sum of indexed contributions by life expectancy). Therefore, lowering the retirement age will significantly impact the monthly pension in the future, as it will reduce the number of accumulated contributions given increasing life expectancy.[76] It means an increase in the number of people in the future who will become entitled to a guaranteed payment of the lowest pension, financed from the state budget.[77]

The possible positive effects of current family policies, yielding an increase in the fertility rate, cannot change trends, and their mitigating effects will not appear in the labour market until 20 years from now at the earliest. Meanwhile, the demographic changes facing Poland are so significant that even a renewed increase in the retirement age cannot halt the decline in the number of working-age people. In none of the considered variants of forecasts does the Polish pension system reach total capacity in the 2060 perspective.[78] The restoration of the previous retirement age has, therefore, worsened the system's dependency ratio and the financial prospects of the pension fund.[79]

The healthcare system is also facing challenges related to demographic changes and limited possibilities for increasing financial outlays for health. The literature emphasises that the increase in the number of older people in social life due to increasing life expectancy and reaching old demographic age and the decline in the birth rate in recent years will cause increasing problems in fulfilling health needs.[80]

76 Merit and legal opinion to the Presidential draft Act amending the Act on pensions from the Social Insurance Fund and certain other acts (Sejm Paper No. 62).

77 In Article 15 of the Act on pensions from the Social Insurance Fund, the legislator has prejudged the manner of determining the basis of assessment, indicating the time from which wages may be accepted to determine the pension. According to Article 15(5), the index of the assessment base cannot be higher than 250%. This limitation results in the so-called degression of the benefit, which means that the higher the actual earnings of the insured person (the more they exceed the amount of 250% of the average salary), the lower the percentage of those earnings constitutes the pension received (i.e. the so-called replacement rate decreases). Further, the limitation of the pension assessment base is related to the limitation of the annual contribution assessment base to 30 times the average monthly remuneration for work (monthly 2.5 times this remuneration). In conclusion, in a defined benefit system, the principle of equivalence of benefit and contribution cannot be understood strictly; it cannot be deduced that there is a prohibition on certain modification of the amount of the benefit and the way in which valorisation is conducted. Regarding life expectancy, a woman who decides to retire at the age of 60 will receive a pension the Social Insurance Institution (ZUS) will determine by dividing her accumulated capital by 254.3 months of life expectancy (238.9 months – in 2022). For a man who will end his working life after the age of 65, ZUS will calculate his pension by dividing his capital by 210 months (196.2 months – in 2022). The latest tables published by the Central Statistical Office show that life expectancy has increased over the past year for women (men) by 15.4 (13.8) months. The new pensions will, therefore, be lower. The gross amount of the minimum pension in 2023 is PLN 1588.44, resulting in a net amount of PLN 1445.48.

78 Merit and legal opinion to the Presidential draft Act amending the Act on pensions from the Social Insurance Fund and certain other acts (Sejm Paper No. 62).

79 Ibid.

80 Lechowicz-Kępa, 2017, p. 191.

6. Closing remarks

Given the noted constitutional regulations, which are essentially coincident with the social rights under the European Social Charter, Poland should make special efforts to guarantee the realisation of these rights. Unfortunately, in Poland, the state of observance of social rights still does not partially correspond to the standards established by the Council of Europe. Meanwhile, the cyclical negative assessment of the European Committee of Social Rights on Poland's realisation of social rights may indicate the low effectiveness of the mechanism for monitoring compliance with the European Social Charter.[81] Although the European Social Rights Committee performs control over compliance with the Charter, the Committee's interpretation of the Charter's provisions does not constitute an authentic interpretation of the treaty, as this can only be done by the Charter states parties (the Committee's assessment is only a guideline for the interpretation of the Charter's provisions and has no binding force in this regard).[82]

Meanwhile, it should be emphasised that Poland is currently facing a huge challenge of containing the demographic crisis and limiting its negative consequences, which requires undertaking deep systemic reforms, particularly in such areas as healthcare, social assistance, employment policy, social insurance and family policy.[83] Paradoxically, despite the difficult economic situation caused by the COVID-19 pandemic and Russia's armed attack on Ukraine, it may be the right moment to justify a return to talks on Poland's ratification of the Revised European Social Charter, introducing a higher level of social protection. As A. Binaś notes, guaranteeing the rights under the European Social Charter admittedly requires increased spending from the state budget. However, in the long term, this outlay can be compensated for economic growth, improvement of citizens' quality of life, activation of groups at risk of exclusion or disadvantage in the labour market, and increased confidence in government.[84] Inadequate implementation of the provisions of the European Social Charter and failure to ratify its revised version or the Additional Protocol of 1995 'may affect the pejorative opinion of Poland in the international arena'.[85]

81 Binaś, 2022, p. 71.
82 Ibid.
83 Lechowicz-Kępa, 2017, p. 191.
84 Binaś, 2022, p. 73.
85 Ibid.

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| Chapter 6 |

Hungary: Social Challenges of an Aging Society

Hilda TÓTH – Gábor MÉLYPATAKI

ABSTRACT

One of the main challenges facing the Hungarian social security system is demographic change. The steadily shrinking labour force in a pre-ageing society will soon pose a problem for finance. In the current payments model, contributions should cover the entire expenditure side, which already works only with corrections. And changes in the structure of society will raise a host of issues for which the present legislator is not prepared. This study highlights these important issues such that, together, we can find good practices to prevent the demographic changes that are a harbinger of the future.

KEYWORDS

social rights, Constitutional Court, pension system, healthcare system, social security benefits, solidarity, green health, sustainability

1. Introduction—Place of social law in the national system

In Hungary, the following division of the system of social law is possible, which is the one most commonly used in the legal literature.[1]

The first group is the insurance system, the most important feature of which (and this is the basis for its name) is that the services are mostly covered by the contributions of the recipients, and these benefits are usually regulated by social security. People who participate in the insurance scheme and are exposed to the same risk form a community of risk. In the event of a risk situation, known as an insured event, the insured person receives benefits from the common property. In Hungary, social security covers health, accident, and pension insurance and, more broadly, unemployment benefits. The provision of services through this system constitutes the largest part of the state (social law) functions.

1 This dogmatics – shared by German and Austrian authors – is essentially the same system outlined by Katalin Szamel in one of her studies. Szamel, 1998, pp. 15–22; as well as Tamás Prugberger. Prugberger, 2008, pp. 413–430; Eichenhofer, 2004, p. 8.

Tóth, H., Mélypataki, G. (2023) 'Hungary: Social Challenges of an Aging Society' in Jakab, N. (ed.) *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 111–133. https://doi.org/10.54171/2023.nj.sotsss_6

The second group is the so-called care or compensation system, where benefits are linked to objective life situations, with citizens becoming entitled to a service if this particular situation exists, without any other prior criteria. It also differs from the previous one in that it is not insurance-based. Essentially, these services are almost a citizen's right under the law, and since their purpose is not to meet a need for existence, they can be described as assuring a life worthy of human dignity. Such life situations include, child-rearing, participation in war and access to housing, and the state provides a corresponding service, such as family allowances and benefits for war victims. These benefits are covered by the state budget (i.e. the taxes paid by citizens).

The third type is the benefit system, characterised by means-tested benefits and is subsidiary in nature (i.e. the state only provides a service if the claimant has no other source of subsistence). Here as well, there is a life situation that gives rise to a claim for benefits. However, if there is a change in the life situation and the claimant is no longer entitled to benefits because the claimant claims benefits from another group, the claimant is excluded from that group. In essence, this type of scheme provides benefits for a transitional period according to the principle. These benefits are also funded from the state budget.

According to this grouping, the Hungarian social system is of a mixed nature, with insurance and benefit elements present and the insurance elements predominating. Based on the above criteria, benefits provided by social law institutions can be broadly grouped into three broad systems: social security benefits, family benefits and other benefits for families with children, and benefits provided by the social administration system. However, this division is not set in stone, and the dynamic nature of social law is constantly changing. Moreover, this system may change as the catalogue of protected values expands or contracts.[2]

2. Social rights in the Constitution

Social rights, together with economic and cultural rights, are generally referred to as the second generation of human rights, a group of rights that emerged in the second half of the 19th century. This categorisation suggests that social rights appeared later in constitutional theory and constitutional law than classical liberties.[3] Social rights were included in written constitutions about a hundred years later than liberties. While freedoms are a constraint on the state and have legal safeguards, social rights require the state to be active and have material guarantees. Social rights are referred to in the literature as 'participation' rights, while civil liberties are referred to as

2 Fabók and Prugbeger, 2009, p. 16; Tóth, 2008, pp. 403–425.

3 For more on the concepts and dilemmas of social rights, the social state, and the welfare state, see Sári, 2000, pp. 192–198.

'protective' rights.[4] International regulation aims to guarantee social rights by the state, but the limit to this is the economic capacity of the state concerned.[5]

It is now accepted[6] that social (economic, cultural) rights should be enshrined in the Constitution. Economic, social, and cultural rights can be divided into two groups according to whether the state's action is manifested in some positive behaviour. In the first category regarding so-called freedoms, such as the freedom of association, the state's action is aimed at toleration, its task being only to protect the exercise of the right. In the second group of economic, social, and cultural rights, the state's conduct is active, and the state is obliged to provide a service.[7] Beyond the classical first-generation rights, where non-intervention by the State is the regulating principle, social rights are characterised by the active role of the State.[8]

According to some authors,[9] only those social rights that are enforceable by the state have a place in the catalogue of citizens' rights in the Constitution, and this does not contradict the dogma that social rights induce the state to behave in an otherwise positive, active manner.[10] Thus, social security rights, such as the right to unemployment benefits, family allowances, social security, the right to social security benefits, and, among the broader social rights, the right to compulsory education, for example. Another group of social rights (according to the same author) are not considered civil rights, such as the right to work and the right to education; they are not 'pure' rights but are a mixture of state objectives and enforceability.

Overall, the most crucial question in raising social rights to the level of a fundamental constitutional right is whether they can be legally enforced or whether they can only be codified as a state objective. The incorporation of social rights into the Constitution suggests the former: the rules governing the exercise of most of these rights are contained in lower-level legislation, and it is the task of the Constitutional Court to prevent the legislature from infringing social rights when enacting legislation of this kind, a task which the Constitutional Court has fulfilled in several decisions.[11]

4 Takács, 2011, pp. 76–86.
5 Drinóczi, 2018, pp. 27–28.
6 Some posit that social rights have no place in the Constitution. According to Szamel's later revised view, 'Economic, social, cultural rights – if it is possible to speak of such 'rights' at all – have always been the most sensitive categories of human rights, the least legally comprehensible'. Szamel, 1993, pp. 27–42. See Sajó, 1995, pp. 5–12.
7 Thus, the most important feature of these rights is the provision of services by the state. Someone else could provide these services, but there is not much demand for it, given the lack of financial resources and the (never) return on investment. However, the state provides these services within the financial means at its disposal, which can change constantly. Thus, the nature of the services is not constant. See Kardos, 2003, pp. 1279–1283; Kardos, 1996, pp. 20–32.
8 See Sári, 1997, pp. 217–220.
9 These two types of constitutional concepts can be read in Schmidt, 1994, pp. 3–9.
10 János Sári agrees with this position. See Sári, 1997, pp. 217–220.
11 See Szamel, 1998, pp. 15–22. See, *inter alia*, CC Decision 64/1993 (XII.22.); CC Decision 11/1991 (III.29.); CC Decision 26/1993 (IV.29.); CC Decision 43/1995 (VI.30.); CC Decision 56/1995 (IX.15.).

2.1. Social rights in the Constitution (1989-2012)

The Hungarian legislature reorganised the Constitution from 23 October 1989 with Act XXXI of 1989. The Praembulum contained the objective of establishing a social market economy:[12] '...in order to facilitate the peaceful political transition to a state based on the rule of law and realising a social market economy...'. However, the Constitutional Court emphasised in a decision[13] that the declaration of the Praembulum does not imply a declaration of the principle of the social state based on the rule of law and that the achievement of the social market economy as formulated here is only a state objective.[14] According to Article 2(1) of the Hungarian Constitution: 'The Republic of Hungary is an independent, democratic state governed by the rule of law'—that is, the Constitutional Court stated in its 1990 decision that this concept of the rule of law does not refer to social rights and that it is not necessary to make social security a characteristic of the rule of law for it to be guaranteed.

According to the explanatory memorandum of the constitutional amendment, the regulation considers the fact that Hungary has recognised the content of the relevant international conventions, such as the Universal Declaration of Human Rights, the ICESCR and the International Covenants on Civil and Political Rights, and its obligation to uphold them. Given the amendment to the Constitution, two chapters of the Constitution have been amended to include social measures and social rights. One set of provisions on social matters set out the objectives and tasks of the State, while the other set out the rights of subjects. The former group is highlighted in Chapter I of the Constitution, under the heading of General Provisions and should be mentioned as including support for young people and the needy.[15] Regarding these provisions, the Constitutional Court has held that the establishment of these provisions as a State objective does not give rise to a subjective right and does not imply that the legislator is required to establish specific forms of assistance or legal institutions.[16] Among the fundamental social (economic, cultural) rights, Chapter XII of the Constitution included the equality of women and men, support for mothers, children's rights, the right to work, the right to health, social security, and education.[17]

12 In Czúcz's view, however, the presence of the social adjective in the preamble of our former Constitution is of purely symbolic significance, since it is not possible to derive a constitutional right from the preamble, but its presence may indicate the social sensitivity of the state. See Czúcz, 1996, pp. 177–187.

13 CC Decision 772/B/1990/5.

14 CC Decision 33/1993 (I. 28.); see for further details Rácz, 2008, pp. 129–149.

15 Article 16 of the Constitution: 'the Republic of Hungary shall pay special attention to the security, education and upbringing of youth, and shall protect the interests of youth'.

16 CC Decision 652/G/1994.

17 Articles 66–67 of the Constitution The right to work and the right to education are not included among the social rights in the narrow sense. See also Rab, 2008, pp. 1–4.

Social rights in the narrower sense are regulated in the Constitution in two broad areas: the right to mental and physical health,[18] including the right to healthcare, and the right to social security. According to Article 70/D (1) of the Constitution, people living in the territory of the Republic of Hungary have the right to the highest possible level of physical and mental health, while (2) of the same article stipulates how the state organises the institutions to ensure this right: 'The Republic of Hungary shall implement this right by organising occupational safety, healthcare institutions and medical care, by ensuring regular physical exercise, and by protecting the built and natural environment'.[19]

The other major area of social rights, the right to social security, was defined in Article 70/E of the Constitution, which listed the insured events in the event of which the state provides assistance: 'Citizens of the Republic of Hungary have the right to social security; in the event of old age, sickness, disability, widowhood, orphanhood and unemployment through no fault of their own, they are entitled to the benefits necessary for their subsistence'. The Constitution has specified the institutions through which services are provided. Social security was interpreted by the Constitutional Court in a 1991 decision in a civil law case, which stated that

> ...social security does not mean either a guaranteed income or that the standard of living once achieved by citizens cannot be reduced as a result of unfavourable economic conditions. The State's obligations with regard to the social security of its citizens are set out in general terms in Article 70/E paragraph (1) of the Constitution.[20]

The Constitutional Court has examined, *inter alia*, the extent of the State's obligation to ensure the application of this principle. In this context, the Constitutional Court has ruled in several decisions that it is the responsibility of the State to organise the provision of social security and to operate the social security and social assistance system.[21] However, it has also stated that 'social security does not operate exclusively on the basis of market principles'—that is, the right to a pension is not a right acquired by the insured person based on the principle of a right to be bought, as there is no genuine insurance but a mixed insurance system with social elements in Hungary. As early as 1993, the Constitutional Court saw the need for a modernisation and complete overhaul of social security. Regarding vested rights, such as family allowances, the

18 The Constitutional Court explained that the right to health, which is not in fact a civil right, 'cannot be interpreted as a subjective right in itself, it is formulated as a state obligation under Article 70/D(2) of the Constitution, which includes the obligation for the legislator to define subjective rights in certain areas of physical and mental health'. CC Decision 54/1996 (XI.30.).
19 The institutions included as a guarantee of the right to health are listed in the second paragraph, the current text of which was adopted by Parliament in 1990, and regular physical exercise has been included as a means of protecting this right. See Act XL of 1990.
20 CC Decision 32/1991 (VI. 6.).
21 CC Decision 26/1993 (IV.29.), CC Decision 43/1995 (VI.30.).

Constitutional Court took the view that they should be protected and that, in the event of their conversion – a change in the scope of entitlement – adequate time should be allowed for their introduction.[22]

2.2. Social rights in the Fundamental Law after 2012—Provisions in force

The Fundamental Law of Hungary, which entered into force on 1 January 2012, significantly amended the fundamental right to social rights. The current Fundamental Law has lowered the level of protection of social security by not providing social security but only seeking it. In doing so, it defined the establishment of a social security system as a state objective: 'Hungary shall endeavour to provide social security for all its citizens'.[23] As the Constitutional Court stated in a 2012 decision, 'Article XIX of the Fundamental Law on Social Security does not provide for rights, but rather for obligations and objectives of the state'.[24] The legislation in force before 2012 contained a stronger state role. Notably, the Fundamental Law is also characterised by the fact that it sets out other state objectives as aspirations; for example, it only seeks to ensure decent housing.[25] In a decision, the Constitutional Court considered that, when drafting the above new concept of the Fundamental Law, it was necessary to reduce the previous entitlements because of 'sustainable economic development and the gradually deteriorating demographic situation' and 'changed economic circumstances'.[26] The positive economic changes in the period that has elapsed have not yet prompted the legislator to amend the Fundamental Law, and the reasoning of the Constitutional Court is, therefore, questionable.

In situations in life where individuals cannot meet their needs, the state provides support. Article XIX of the Fundamental Law identifies seven situations in which an individual is entitled to state assistance: maternity, sickness, disability, invalidity, widowhood, orphanhood, and involuntary unemployment. The Constitutional arrangements previously in force have been extended to include two insured events, disability, and maternity. It is a positive change, but the taxonomy of insurance events does not allow the legislator to further expand the list, which is not a positive change.[27] The Fundamental Law guarantees entitlement to 'statutory benefits' upon the occurrence of an insured event, a definition interpreted as a subjective entitlement by the noted Constitutional Court decision.[28] Another Constitutional Court decision went beyond this, noting that the protection of property continues to apply in the case of social security services.[29]

22 CC Decision 56/1995 (IX.15.); Hoffman, 2018, p. 22.
23 Article XIX (1) of the Fundamental Law.
24 CC Decision 40/2012 (XII.6.).
25 Article XXII (2) of the Fundamental Law.
26 CC Decision 23/2013 (IX.25.). Several authors have criticised the decision of the Constitutional Court, see Téglási, 2019, p. 335. They even see them as a more restrictive interpretation of social entitlements. Kiss, 2016, p. 362.
27 Hajdú, 2015, pp. 37–38.
28 Szatmári, 2018, pp. 65–66.
29 CC Decision 4/2016 (III.1.).

By introducing two more new elements, the literature analysis shows that the Hungarian social benefit system, which considers Bismarckian insurance principles, is more similar to the Anglo-Saxon system. This system is characterised by the limited role of the state and the 'compulsory' self-care of the individual. In this model, the state assesses the deservingness of the individual to receive benefits and only provides benefits to the individual as a last resort when no other option is available.[30]

In contrast to the previous legislation, the current Fundamental Law provides that social security is not implemented by the state through social security and social institutions but only through social institutions and measures. This solution has integrated social security and defined it as a social institution. The other significant change is that the extent of social measures—a change that is particularly significant for means-tested benefits—may also depend on the activity of the individual, which is useful to the community. Similar to the Anglo-Saxon system, the test of merit may arise: 'A law may determine the nature and extent of social measures according to the activity of the person receiving social measures which is useful to the community'.[31] The activities that are useful to the community are not listed at the level of the basic law;[32] in this context, in our view, the contribution to the burden can be mentioned.

The Constitution gives priority to the pension system by fixing its organisation. It provides that voluntary institutions may operate alongside the state pension system. The public pension system is a single system based on solidarity, ruling out the possibility of rebuilding the compulsory private pension fund system, which was abolished in 2012.[33] In 2012, the pension system was significantly reformed, with the abolition of early retirement benefits to ensure the sustainability of the pension system. According to the Constitutional Court, one of the benefits—a service pension—is no longer a pension insurance benefit and, therefore, the beneficiary has no vested right to it. These benefits are now only social benefits under Article XIX of the Fundamental Law, for which the need factor must be considered.[34]

The preferential pension scheme for women only, introduced in Hungary in 2012, is mentioned in the Fundamental Law. Women benefit from more favourable rules than the general pension eligibility conditions. The Constitution includes social rights, such as the right to physical and mental health. The right to health is promoted 'by ensuring agriculture free of genetically modified organisms, access to healthy food and drinking water, organising occupational safety and healthcare, promoting sport and regular physical exercise, and protecting the environment'. Overall, we do not consider the provisions of the Fundamental Law on social entitlements to be adequately regulated, and we agree with Professor Hajdú that the legislator would

30 Hoffman, 2018, p. 21.
31 Article XIX (3) of the Fundamental Law.
32 Szatmári, 2018, pp. 66–68.
33 Article XIX (4) of the Fundamental Law.
34 CC Decision 3061/2015 (IV.10.).

rather focus on individual self-care than on state responsibility for social security benefits.[35]

3. Social security benefits

3.1. Benefits

In 1998, Hungary replaced the unified, code-like Social Security Act with four separate laws regulating social security. In 2012, disability benefits were moved from pension benefits to health insurance benefits, and the possibility of early retirement was abolished, transforming pensions paid until then into social benefits. The provisions on the coverage and subjects of social security were also amended in 2019.

Thus, four important laws currently regulate benefits in the compulsory social security system: Act CXXII of 2019 on persons entitled to social security benefits and on the coverage of these benefits,[36] Act LXXXI of 1997 on social security retirement pensions,[37] Act LXXXIII of 1997 on Compulsory Health Insurance,[38] and Act CXCI of 2011 on the Benefits of Persons with Disabled Work Ability and on the Amendment of Certain Acts[39]. Benefits are grouped according to whether they are available under health insurance or pension insurance:

Health insurance benefits	Pension insurance benefits
a) Health service; b) Cash benefits; c) Accident benefits; d) Benefits for persons with reduced working capacity.	a) Pension in its own right; b) A survivor's pension.

3.1.1. About the benefits available under the compulsory health insurance scheme

3.1.1.1. Health services

The purpose of healthcare delivery and patient care is to restore health. The legislation groups the services that can be provided by type of care, according to five areas. The range of people entitled to health services is the widest, and for a minimum fee, anyone in Hungary today—who is not entitled to them by law—can receive care of any level. The high degree of solidarity in these benefits poses serious challenges to the sustainability of social security. Changes to eligibility for services are in our view inevitable, but the slightest change—partly due to inadequate education—will meet

35 Hajdú, 2015, pp. 34–38.
36 The abbreviation of the Act in Hungarian is 'Tbj.', in the following: Act on Social Security.
37 The abbreviation of the Act in Hungarian is 'Tny'., in the following: Act on on the Eligibility for Social Security Benefits and Private Pensions.
38 The abbreviation of the Act in Hungarian is 'Ebtv.', in the following: Health Insurance Act.
39 In the following: Act of Amendment.

with huge resistance from society (e.g. the introduction of the visit fee in 2007 [300 Ft. approx. 0.8 EUR], which was mandatory when using a healthcare provider, was in force for one year).

A) Free health services
It is the largest group of benefits. Within this, benefits can be further divided into three parts. Disease prevention and early detection services include screening and preventive care, based on the age of the population. For medical care, the insured person is entitled to general medical care, dental care, specialised outpatient care and inpatient care. For so-called other services, the healthcare provider provides obstetric care, medical rehabilitation and patient transport and rescue.

B) Services eligible for aid in addition to the price
In the context of outpatient care, the insured person is entitled to a subsidy for the cost of medicines, special dietary supplements, medical aids, and medical care ordered by a doctor.

In the cases listed in the law, the insured person is entitled to a travel allowance if, for example, the insured person uses specialised outpatient care or inpatient hospital care.

C) Benefits available on a part-pay basis
These benefits have been significantly reduced by the legislator, and only three types remain: orthodontic appliances under the age of 18; dentures to restore chewing ability; and interventions to change external sexual characteristics. For an additional fee, the insured person may receive comfort services and accommodation and nursing care, provided that the conditions are available at the healthcare provider. As a general rule, healthcare providers can offer accommodation in a single room as a comfort service.

D) Services available on grounds of fairness
The health insurer may, on a fair and equitable basis, cover the reimbursement of procedures not yet included in the financing or provide a subsidy for the cost of allopathic medicines, nutritional supplements for special nutritional needs, and medical aids that cannot be prescribed with social security support.

E) Provisions concerning treatment abroad
In the territory of a European Economic Area Member State, the homesickness insurance body may also reimburse the insured person for emergency benefits under the conditions and to the extent provided for by law.

3.1.1.2. Cash benefits

There are four cash benefits in the statutory comprehensive insurance scheme: the infant care allowance, the childcare allowance, the adoption allowance, and the

sickness allowance. One of the basic principles of the law is that health insurance benefits in cash may be claimed in proportion to the social security contribution payable unless otherwise provided by law. This does not mean, however, that the rate of health insurance benefits in cash is proportional to the obligation to pay contributions, given that (and the reference to the statutory exception implies this) two of the four cash benefits are capped (i.e. the rate is capped). Of the cash benefits, the infant care allowance, which is 100% of average earnings, and the adoption allowance are not capped. Meanwhile, the other two are capped, though there is no upper limit on contributions.

Three benefits are linked to the birth of a child. The infant care allowance is paid from birth until 168 days, and the childcare allowance is paid until the child is 2 years old. The adoption allowance is also a benefit for 168 days, from the age of 2 to 3 years.

Sickness benefit is paid in the event of incapacity for work, the most common form of incapacity for work being sickness. It is paid for the duration of the incapacity for work but for a maximum of one year. If the insurance relationship is terminated during the incapacity for work, the insured person is not entitled to sickness benefit, with the result that no benefit is payable on a passive basis. The limit on the amount of sickness benefit was introduced in 2009, but, although justified by the principle, no contribution ceiling was introduced by the legislator.

3.1.1.3. Accident benefits

Accident benefits are paid in the event of an accident at work or occupational disease. An occupational accident is an accident that occurs to insured persons while working during or in connection with their occupation or while travelling to or from work (accommodation). It is also an accident that occurs to the insured person while he is carrying out work for the public benefit or while claiming certain social security benefits. Occupational disease is a disease caused by the particular hazards of the insured person's occupation.[40] Accident benefits include accident medical services, accident sickness benefits, and accident allowance. The accident benefit is payable if the insured person's health impairment reaches 14%. Although it is recognised as a health insurance benefit in the Act, the average earnings on which it is based are subject to the provisions on the calculation of the average monthly earnings on which the pension is based.[41]

3.1.1.4. Benefits for people with reduced working capacity

Since 2012, disability benefits have been significantly reformed, with the former pension-like benefits (disability pension) being abolished and paid as a social benefit or old-age pension. From 2012, people with reduced capacity to work (other than accidental) can claim either rehabilitation benefits or invalidity benefits. Rehabilitation benefits can include rehabilitation services and cash benefits. Rehabilitation services include job placement. The cash benefit is small, based on previous earnings, but, as

40 Health Insurance Act, Article 57.
41 Health Insurance Act, Article 59 (4).

with health insurance cash benefits, it is limited in amount. The insured person is entitled to rehabilitation benefits for up to three years.

Disability benefit is a cash benefit only; the amount depends on the remaining state of health but is also capped. The benefit is paid for an indefinite period, or, if the insured person reaches retirement age, a pension can be claimed instead. From 2021 onwards, it will be possible to work with both benefits without limit.

3.1.2. About the benefits available under the compulsory pension scheme

By the end of the 1990s, it was no longer feasible to operate the Hungarian pension insurance system on a pay-as-you-go basis. Thus, in 1998 the second pillar of the pension insurance system was introduced, the mandatory private pension fund system, which operated on a funded basis. From 2010, compulsory private pension fund membership was abolished, and members could choose to have their contributions deducted by the state when they transferred to the state pension scheme or remain members, in which case contributions would become voluntary. Thus, the Hungarian mandatory pension system became a single pillar again in 2012, which can be supplemented by voluntary pension fund membership. Pension insurance benefits are either payable in your own right or under a dependant's right.

3.1.2.1. Pension under own right

Currently, the only such benefit is the old-age pension, to which you must be over 65 and have 20 years of service to be entitled. Exceptions to the age limit are women who have 40 years of qualifying service (employment) but at least 32 years and 8 years of childcare. It is possible to continue to work while receiving pension benefits but only in the competitive sector; in the public sector, you do not receive both a salary and a pension. From August 2022, some professions classified as shortage occupations, such as teachers, will be exempt.

3.1.2.2. Dependants' benefits

All benefits are subject to the condition that the deceased person, for whom the survivors claim a pension, has acquired the right to an old-age pension until death, has been entitled to an old-age pension, or has acquired the periods of service defined by law for each age group.

A) Widow's pension

Widowed or widower pensions are available to spouses, divorced spouses, and life partners. The temporary widow's pension is paid for at least one year after the death of the spouse and until the orphan reaches the age of 18 months if the widow is dependent on a child under one and a half years old and is entitled to an orphan's pension under the deceased's right. After the temporary widow's pension has ceased, a widow's pension is payable to a person who, at the time of the death of her spouse, was over the age for entitlement to an old-age pension or was looking after a disabled person with reduced capacity for work or a disabled or permanently sick person entitled to

an orphan's pension by virtue of her spouse, or at least two children entitled to an orphan's pension.

The provisional widow's pension is equal to 60% of the old-age pension to which the deceased was entitled or would have been entitled at the time of death. Once the provisional widow's pension has been terminated, the widow's pension is normally 30% of the deceased's pension.

B) Orphan care

A child is entitled to an orphan's benefit, including a child of a married or cohabiting couple who is being brought up together in the same household, if the parent meets the primary conditions.

Orphan's benefit is payable from the date of the parent's death until the child reaches the age of 16. If the child is in full-time education, the orphan's benefit is payable for the duration of the education, but not beyond the age of 25. The orphan's pension per child shall be equal to 30% of the pension the deceased was receiving or would have received as an old-age pension at the time of death or 60% of that pension as an orphan's pension for that child, where both parents are deceased or the living parent is disabled.

C) Parental pension

A parent whose child fulfils the conditions set for the deceased spouse is entitled to a parental pension if the parent is disabled or aged 60 or over at the time of the child's death and the parent was predominantly dependent on the child for a year before the death. The parental pension is the same as the widow's pension.

D) Accidental survivors' pensions

An accidental survivor's pension (accidental widow's pension, accidental parent's pension, accidental orphan's pension) is paid to dependants if the injured person dies from the accident at work.

E) Widow's or widower's pension

For a deceased beneficiary who has withdrawn from the private pension scheme to the social security pension scheme, a person who meets the conditions for entitlement to a widow's pension is entitled to a widow's pension instead of a widower's pension if the amount of the widow's pension is higher than the amount of the widower's pension. No widow's pension is payable in the case of payment of a widow's pension.

3.2. Financing

One of the basic principles of social security law is that insured persons' entitlement to benefits is based on their obligation to pay social security contributions—contributions and taxes. In addition to the insured person, the employer is also liable for the payment of contributions, which is also laid down in the basic principles. You must pay tax on income that is defined by law. In particular, the part of the income from

self-employed and non-self-employed activities included in the consolidated tax base under the Personal Income Tax Act that is considered as income for the calculation of the advance tax is income that is subject to contributions.

Some incomes are not subject to contributions (i.e. they do not constitute a social security contribution base). Thus, for example, social security (e.g. sick pay) and social (e.g. family allowances) benefits not paid by the employer and not payable by the employer and remuneration paid under a contract for the exploitation of copyrighted work as consideration for the use of the property right are not social security contributions.

Contribution is the collective term for all contributions paid by insured persons, beneficiaries, employers, or other persons to cover social security benefits and labour market purposes. It includes social security contributions, pension contributions, health service contributions, agreed pension contributions, health insurance contributions, and sickness contributions. From 1 January 2012, the employer pays social contribution tax instead of contributions.[42]

The social security contribution rate is 18.5%, the pension contribution rate is 10%, and the monthly health service contribution is HUF 9,600 (approximately 25 EURO). Note that the latter is paid by people who are not insured (they are not employed) and are not covered by the budget (e.g. for those receiving childcare allowance). Thus, anyone employed without being registered with the authorities becomes entitled to all health services by paying a minimum fee of 9600 HUF, which is compulsory for them if they are residents of Hungary. The current rate of social contribution tax payable by the employer is 13%.

Contributions are paid into the social security funds. The Health Insurance Fund has a projected revenue (and expenditure, as there can be no deficit) of approximately HUF 4033 billion, while the Pension Insurance Fund has a projected revenue of approximately HUF 5554 billion by 2023.[43]

3.3. Organisation and administration

From 1 November 2017, there has been a major change in the organisation. The administrative bodies of Pension Insurance are the government offices of the capital and counties, the Pension Disbursement Directorate of the Hungarian State Treasury, and the Central Body of the Hungarian State Treasury. The administrative bodies of Health Insurance are the government offices of the capital and counties, the Central Body of the Hungarian State Treasury, and the National Health Insurance Fund Management. In 2021, the National Directorate General of Hospitals was established, which is responsible for the management or professional supervision of hospitals. Employers who employ more than 100 persons entitled to social security benefits are obliged to set up a social security and family support payment office or conclude an agreement with another payment office to perform these tasks.

42 Act CLVI of 2011 amending certain tax laws and other related acts.
43 Act XXV of 2022 on the Central Budget of Hungary for 2023.

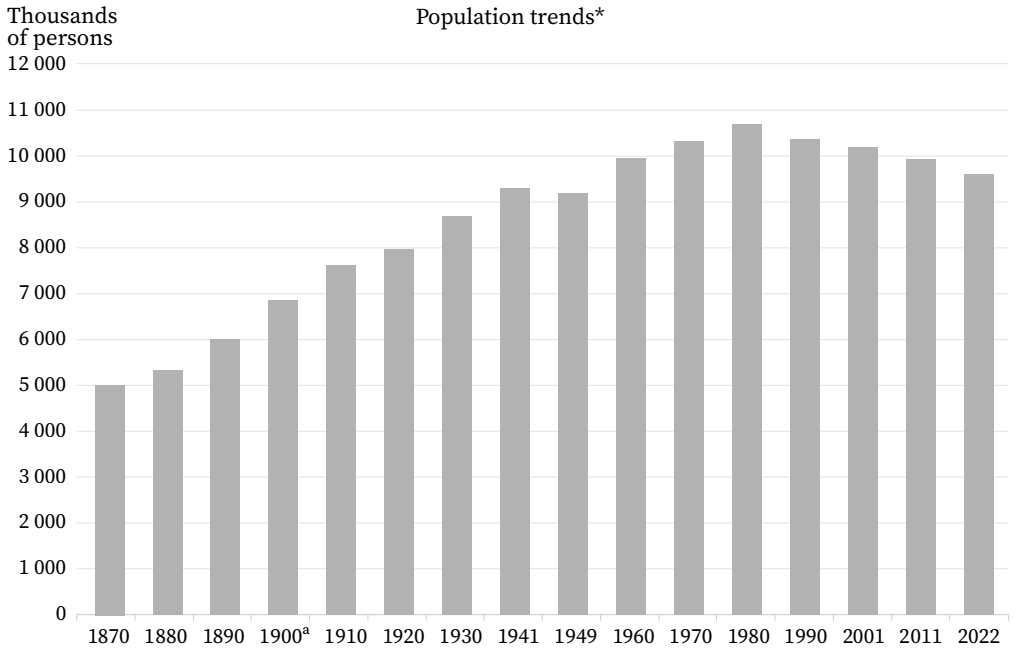
4. Current social law regulatory issues—Problems regarding sustainability in the light of the demographic challenges

The sustainability of the systems outlined is largely a consequence of changing demographics. This is particularly true for pension benefits. Looking at the system as a whole, the Hungarian social security system relies quite heavily on contributions from employers and employees. One element of this is that, recalling the principles set out at an earlier point in this chapter, solidarity is the soul of the Hungarian system, and the nature of this fund is that contributions are not labelled amounts. Thus, contributions are collected in a common hat, from which each insured person uses as much as necessary. They must, of course, be accompanied by a commitment and backing from the State. The system is not self-sustaining. Contributions cannot even now cover the full cost of social security payments. It is, therefore, important to examine how demographic effects affect its financing. As a starting point, it is worth looking at the data already available from the 2022 census. The population is 9,604,000, which represents a 3.4% decrease in population relative to the last census. Considering the age distribution, the population aged 65 and over are 20.8% of the total population. This number will keep increasing in the coming period. A significant proportion receive old-age care. The working-age population is 6,201,000 (64.6% of the population). The third large group is the 0-14 age group, with 1,407,000 people.[44] The picture must be nuanced, however, because these categories are underestimated, as there are many pensioners under 65, and members of the 0-14 age group are the least likely to be insured. What is certain is that population decline is a continuing trend.

The population decline represents natural and non-natural decreases in total. The other category includes migration. The EU itself, with certain rules, sees the promotion of migration within its borders as the key to its competitiveness. Thus, it has itself created the legal instruments of the four freedoms, including the right of free movement for workers and, later, for persons, and the coordination of social security rules.[45] Given the difficulty of measuring emigration, we can accept as a guide the figures for 2022 from the Hungarian Central Statistical Office, which show that 26,500 people emigrated from Hungary. The former figure only indicates one year. The emigration figures for previous years are similar. In the light of these, migration entails two things. First, the working-age population that emigrates disappears from the Hungarian system as contributors to the social security system. However, they may later appear as claimants, for example, in the case of pension provision to be determined in the coordination process.

44 Official data from Népszámlálás 2022 [Online]. Available at: https://nepszamlalas2022.ksh.hu (Accessed: 29 May 2023).
45 James, 2007, pp. 337–354.

Table: *Population of Hungary (1870-2022)*[46]



* Population data refer to the resident population for the period 1870-1970 and the resident population for the period 1980-2022.

a) Civilian population: 6804 thousand persons

We must also talk about the sustainability of the health insurance system, not just pensions. The health insurance system has different problems from the pension system, but its sustainability is questionable, as the application of the solidarity principle and the principles of social security create situations in which the service quality provided and received is constantly deteriorating, with the same funding. By matching funding, we mean that a significant part of the funding comes from insured and employed persons and from the corresponding contributions and taxes paid, which form a contribution base. This contribution base is used by the decision-making process to fund the various subsystems. In the financing of health insurance, there is a kind of underfunding by the state, supplemented in vain by the contributions paid by the individual insured and the employers. The sums paid are constantly being passed on and used up in the health sector. From the health insurance perspective, we are also talking about an extensive care system, and, as far as can be seen, the biggest problems are in the provision of benefits in kind; that is, the so-called health insurance benefits.

46 Source: Népszámlálás 2022: A népesség számának alakulása [Online]. Available at: https://nepszamlalas2022.ksh.hu/eredmenyek/elozetes_adatok/#/4 (Accessed: 3 June 2023).

The sustainability of social security is a key issue that is not only raised in the expert debate but will also affect our daily lives. For reasons of space, the sustainability of health insurance and pensions will be highlighted only relatively briefly.

4.1. Sustainability of the pension system

The sustainability of the pension system[47] is also a key issue in light of the recent increase in the number of people aged 65 and over in Hungary from 16.6% to 19.9%. The EU average increase was approximately 3%.[48] Beyond the number of retired people, the replacement rate and the income conditions underpinning the pension are important considerations for pensions. If we analyse income relations in more detail, we can see that a significant part of the workforce is registered as minimum wage earners. Some of the workers employed on the minimum wage receive wages above the minimum wage 'in the black'; thus, neither the insured nor employer pays contributions or taxes on this part of their income. It is also the case that an amount higher than the minimum wage is the worker's official income, and the excess is received 'in the black' (e.g. in the health sector, this is also the case for healthcare gratuities, the acceptance and provision of which will be a criminal offence under the new law that will enter into force from 2021. However, in practice this institution continues to operate and is a major problem for the healthcare system). This may mean that these large numbers of minimum wage workers will subsequently only be entitled to a basic pension. It is also a problem because it will preserve a certain income situation that will lead to the phenomenon of poverty in old age.[49] This can be argued in light of the fact that the minimum total pension that can be received in Hungary is 28,500 gross. Ft. The amount of this pension has remained unchanged for approximately 15 years, which could be a problem in the current economic situation, as the Hungarian economy is struggling with high inflation.[50] This amount was not too high even when it was introduced. If we look at the shopping basket that can be put together with this money, we can see that it is completely deflated. Retirement benefits in the Hungarian system are based almost exclusively on social security pensions, which are covered by the state in the case of old-age benefits, and the principle of self-care is very much in the background. Among the major reasons for the marginalisation of the principle of self-sufficiency is precisely minimum wage employment. If we look at the sections of society that do not earn the minimum wage, we must also talk about the fact that a significant proportion of these people cannot afford early savings, such as pension savings accounts or various other insurance schemes or voluntary pension funds. In response to this situation, the national association of pensioners has repeatedly spoken out, stating that the

47 There are two monographs on sustainability, see also Rab, 2010, pp. 10–389; Menyhárt, 2013, pp. 336.
48 Országgyűlés Hivatala, 2021.
49 Spark, 2017, pp. 287–309.
50 Mélypataki, 2020, pp. 216–222.

introduction of a basic pension would be appropriate and might help to alleviate the trend towards increasing poverty in old age. The idea of a basic pension has already been implemented in several European countries. Thus, it is not particularly new. The most that can be said is that perhaps the introduction of such a basic benefit or, at least, the introduction of such a level of benefit is alien to the Hungarian system. This solution was mooted before the 1997 pension reform. Per the plan proposed by the then Self-Government of the Pension Insurance Fund, the compulsory state pension scheme would have comprised two subsystems. One would have been a basic pension. This system would have made a clear distinction between social assistance and social security. The first component would have been a basic pension of the same amount, to which all citizens would have been entitled. According to the economists involved, this would have been an obvious redistributive measure and would have been covered by general taxation after appropriate restructuring of social security and social security contributions. The second sub-scheme would have been a defined contribution pension.[51]

Another aspect that we must consider for pensions is the EU's strategy, which embraces the idea of active ageing.[52] Ageing policy should not just be about the level of pension provision we are thinking about, whether at the Member State or EU level, but also about developing strategies and implementing programmes that specifically promote active ageing. This includes legal measures to allow and promote employment during retirement. In the Hungarian social policy system, this includes the public interest pensioners' cooperative, which aims to keep retired persons in the labour market and reintegrate them into the labour market. However, for the sustainability of the pension system, we must also talk about the implementation of the Women 40 programme. As noted, it means that if a woman has 40 years of qualifying service, she is entitled to a pension regardless of her age, and if she has 32 years of earnings-tested service out of these 40 years, she is entitled to a full pension regardless of her age. The introduction of this pension could result in a significant proportion of women disappearing from the labour market. Meanwhile, it is necessary to consider that women who retire under the Women in 40 scheme can expect, on average, lower pension amounts than if they claim pension benefits at retirement age.[53] There was also a political initiative to allow men to retire after 40 years of service, but the referendum initiative was annulled by the Constitutional Court because a state referendum cannot be held on matters covered by the Budget Law.[54] In this case, the Constitutional Court did not consider its own previous ruling on the issue of hospital fees to be binding, according to which the budget, as an excluded

51 Augusztonovics et al., 2002, pp. 473–517.
52 Rauh, Talyigás and Csizmadia, 2023.
53 Farkas, 2022.
54 CC Decision 28/2015 (IX.24.). Its content in English is. Available at: http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2015-3-006 (Accessed: 3 June 2023).

subject of referendums, cannot be applied to all referendum questions with budgetary implications.[55]

4.2. Sustainability of health insurance

The issue of the sustainability of health insurance is always at the forefront in the provision of benefits in kind. That is why we will begin with this presentation. Primary care and specialised out- and in-patient care face constant challenges. There is a marked shortage of specialists in these areas and the resulting inequality. There is a steady decline in care in peripheral areas in particular, but it is not uncommon for services to be stretched in the centre. The system is heavily overburdened, with the result that the right of access enshrined in the European Charter of Patients' Rights is not guaranteed in many places. Recent measures have not helped improve this situation. These measures include the state maintenance of some outpatient specialised care facilities, the creation of community practices, and efforts to reduce the use of pay-as-you-go.[56] Such measures alone may not be sufficient. Accordingly, the Ministry of Human Resources published the Healthy Hungary 2021–2027 Sector Strategy for Health in January 2021.[57]

The measures outlined in the strategy are increasingly shifting towards centralisation. Some elements, such as the reform of the on-call doctor system, the plan to change the boundaries of general practitioner districts, and the adoption of uneconomic practices are in preparation, are already in place. There are also plans to set up a national primary care professional centre. In the context of the transformation of chronic care, the strategy notes that, given Hungary's demographic situation and morbidity, a more economically efficient care system can make a greater contribution to improving population health indicators, which supports demographic and competitiveness objectives.[58]

Thus, the government sees centralisation as the key to sustainability in health services. However, in parallel with the transformation, there is not necessarily a perception that the previous funding model will change to a degree that would attract additional revenue streams.

5. Closing remarks

Most developed countries are implementing a welfare model. The welfare state is a common pool of resources in which many welfare gains are inherited from the past, including those that allow adults to care for the young and the young to care for the elderly later.[59] Effective and swift reforms would be needed to preserve the character

55 CC Decision 16/2007 (III.9.).
56 Ferencz and Nyerges, 2020, p. 664.
57 Ministry of Human Resources, 2021.
58 Ibid., p. 102.
59 European Commission, 2023, p. 35.

of the welfare state given the challenges facing the domestic social security—social care system.

As regards pensions, even the smallest methodological change or even no change in the pension calculation can impact the level of pensions.

For example, on the degressivity in the calculation of pensions, only a certain percentage of the average earnings on which the pension is based can be considered. On the degressivity threshold, only 90% of the part of the income above HUF 372 000 and 80% of the part above HUF 421 000 can be considered. It has remained unchanged since 2013, even though average earnings have more than doubled in the past 10 years. It would be appropriate to reintroduce the rule previously in force, which obliged the legislator to increase the threshold in proportion to the increase in average net earnings. Sustainable pensions may be a solution to the problem, but it is by no means a palliative solution.

The current level of care provided by the health system will not be sustainable in the future without major reforms, and the only way to provide a higher level of care would be to attract additional resources. In recent years, the number of people using private health services in Hungary has increased significantly, and the number of providers has also evolved rapidly. According to some surveys, the population buys nearly HUF 1000 billion (1/4 of the contributions paid into the public system) worth of services from the private health system. However, the increase in demand is not necessarily matched by an increase in the supply side providing adequate quality of care, and the unregulated and uncontrolled nature of private healthcare providers may raise more problems in the near future, leading to a predicted increase in malpractice cases. The state's uncertainty is apparent as to whether it should finance private healthcare providers from the contributions paid into the state system.

The advantage of a well-organised public health system over private providers is that its administrative costs are low. Thus, a large proportion of the contributions paid can be spent on benefits. By reintroducing local government management of the health insurance system, the impact of the adverse changes would not be subject to political attacks.[60]

Education on healthy lifestyles is also lacking in Hungary; except for a few EU projects, there is no continuous awareness-raising on the importance of this area. Harnessing the benefits of digitalisation is also important for health awareness, prevention, and treatment. Germany is a good example, where a digital care law regulates access to effective digital applications for social security patients.[61]

IT, green health, and telemedicine also hold huge potential for the Hungarian healthcare system, which should be brought together as soon as possible to ensure the sustainability of healthcare. Furthermore, it is essential to establish and develop

60 Similarly, Prugberger would support the introduction of local government. Prugberger, 2014, pp. 134–140; see also Prugberger, 2019. p. 108.
61 Mezei and Dózsa, 2022, pp. 64–68.

a transparent and rigorous quality assurance system for healthcare providers—public ones—that can be used to establish processes that increase patient satisfaction. It would also be important to establish as a general principle at the level of the law that the social security institution is obliged to use contributions appropriately and economically to take the necessary measures.

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| Chapter 7 |

Romania: Striving for Balance in the Face of Demographic Challenges

Magdolna VALLASEK

ABSTRACT

Long regarded as second-rate rights or disregarded in practice and implemented sparingly and partly insufficiently backed up by active, coherent measures to guarantee their exercise, social rights are coming back into focus in bad economic times.[1]

Accordingly, it is relevant to say that the question of social rights is a particularly important topic these days, as the global society faces renewed crises generated by economic recession, inflation, pandemic and war. In this context, the issue of sustainability of the social system is a key factor.

This chapter presents the regulatory framework and sustainability issues of social benefits in Romania. As a starting point, we will set out the constitutional foundations and legal principles of social law and briefly outline the main stages in the development of Romanian social law regulation and the role of social law in the Romanian legal system.In *the second half of the paper, we will go into more detail on some of the most important areas, such as the regulation of the pension system, accident insurance, and healthcare and long-term care, with an emphasis on demographic aspects and sustainability.*

KEYWORDS

social law, social benefits, demographic issues, Romania, sustainability

1. Brief introduction to the development and evolution of Romanian social law

1.1. Historical evolution

The development of Romanian social law basically accords with the general development of the field of law, as it was also observed in other countries of the region. Similar to the development of social security law in other European countries, the first legal provisions in the field of workers' insurance appeared in Romania. The first law of this kind ('Legea minelor') in 1895 introduced compulsory insurance in the mining sector and provided for the creation of insurance funds and pension funds,

1 Moroianu Zlătescu, 2009, p. 3.

Vallasek, M. (2023) 'Romania: Striving for Balance in the Face of Demographic Challenges' in Jakab, N. (ed.) *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 135–154. https://doi.org/10.54171/2023.nj.sotsss_7

with the joint contribution of employers and employees. It was followed in 1902 by the law providing for compulsory insurance for craftsmen ('Legea meseriilor') and, in 1912, by the law on workers' insurance ('Legea pentru asigurările muncitorești').

The most significant social security legislation of the pre-World War II period was the Social Insurance Act of 1933, which provided for the equal sharing of the 6% contribution between employer and employee, treated occupational diseases in the same way as accidents at work for the first time, and made incapacity benefit compulsory from the first day of incapacity. After the Second World War, social security legislation was also affected by the political and ideological attitudes of the time. The great ideological slogan and the main political target of the period in Romania was zero unemployment, and given the practical implementation of this slogan, despite the general social poverty, everyone had some income that at least allowed for a minimum standard of living. Meanwhile, the social security system, particularly the pension system, provided in many respects more relaxed and favourable eligibility conditions than today. Soon after the change of regime at the end of December 1989, Romania faced a crisis in the social security system, as the previous system and standards of benefits became impossible to maintain in the changed economic and demographic circumstances.

1.2. Constitutional principles

Article 1 of the Romanian Constitution declares, that

> 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.

Even so, how should we understand the term 'social state' in this constitutional framework? In his work, professor Ion Deleanu considers that the meaning of this concept, often paired with the concept of the rule of law, is straightforward: it does mean the involvement of the state in the social and economic sphere.[2] Meanwhile, the extension of social and economic rights and freedoms and the accentuation of the functions of these rights and freedoms, in the context of a market economy, resolves the activism of the state and multiplies its social value. The state's obligations, which are linked to social and economic rights and freedoms, are not just a rhetorical figure, but also a prerequisite for its responsibility.[3]

Despite declaring Romania a social state by the very first Article of the Constitution, only a few other articles deal specifically with the issue of social security; indeed, they do that only tangentially. These articles are limited to the statement of the right to social security in principle and enumerating the main elements of it. Moreover,

2 Deleanu, 1996, p. 71.
3 Ibid., p. 72.

Articles 49 and 50 of the Constitution set out general principles for the protection of people with disabilities and of children and young persons.[4]

The first of these constitutional provisions relate to the right to health protection, as set out in Article 34. This right to health is guaranteed, and the State is obliged to take measures to ensure hygiene and public health. Meanwhile, the organisation of medical care and the social security system regarding illness, accidents, childbirth and the restoration of health, the control of the medical professions and activities related to medicine, and other measures to protect the physical and mental integrity of the person are also laid down by law, as provided for in the Constitution.

The second Article of the Constitution that can be considered a fundamental principle of social law is the declaration of the right to a standard of living. Under Article 47, the State is obliged to adopt economic development and social protection measures to ensure a decent standard of living for its citizens. Meanwhile, citizens are entitled to a pension, paid maternity leave, medical care provided by public health institutions, unemployment benefits and other types of public or private social security prescribed by law. The constitutional provision also stipulates that citizens have the right to social security measures under the terms of the law.

As Attila Varga, constitutional lawyer and judge of the Romanian Constitutional Court, notes in his work, although the state is obliged to take appropriate economic and social measures,

> ...the achievement of a high standard of living is possible only through the joint efforts of individuals and the state, since it is necessary to create a well-functioning market economy and a high-quality and diversified social security system that enables adequate living conditions.[5]

Thus, the state's obligation to provide a high standard of living remains essentially declarative in meaning.

The protection of children and youth is stated in Article 49 of the Romanian Constitution. According to this Article, children and youth will enjoy special protection and assistance in realising their rights. In achieving this protection, the state will grant benefits to children and provide aid for the care of sick or disabled children.

4 Some authors also place Article 41 of the Constitution firmly within the constitutional basis of social rights. Under the provisions of the article on labour and social protection of labour, it is stated that the right to work shall not be restricted, and everyone has the right to freely choose their profession, trade, or occupation, including work place. All employees are also entitled to measures of social protection. Such measures concern employees' safety and health, working conditions for women and young people, the establishment of a national minimum wage, the weekly time off, paid annual holidays, work under difficult or special conditions, and other specific situations, as defined by law. The maximum duration of a working day is eight hours on average, and women receive the same pay as men for equal work. The right to collective bargaining and the binding nature of collective agreements are also guaranteed in this article of the Romanian Constitution. Țiclea and Georgescu, 2021, p. 26.

5 Varga, 2013, pp. 137–139.

Meanwhile, the Constitution states that other forms of social protection for children and youth will be determined by law. Linking social protection to labour rights, the same Article says that the exploitation of minors and their employment in activities that might be harmful to their health or morals or which might endanger their life or normal development are prohibited. Therefore, minors under the age of 15 cannot be hired as employees. Regarding the right of young persons to social, legal, and economic protection, the Article states that public authorities must contribute to ensuring conditions for the free participation of the youth in the political, social, economic, cultural, and sports life of the country.

The last Article of the Romanian Constitution closely linked to the system of social rights of the European Social Charter is Article 50, which addresses the social protection of disabled persons. Under the constitutional provision, disabled persons have the right to enjoy special protection. The State will ensure the implementation of a national policy of equal opportunities, disability prevention, and treatment such that disabled persons can take part effectively in community life while respecting the rights and obligations of their parents or legal guardians.

A closer look at Articles 34, 47, 49, and 50 of the Romanian Constitution leads to the conclusion that their provisions reflect the spirit of the European Social Charter. Although the noted constitutional Articles do not contain the full range of rights listed in Articles 11-17 of the Charter, they do outline its general framework.[6]

2. The place of social law in the Romanian legal system

2.1. The concept of social law in Romania

As part of Romanian social law, it is necessary to look at social security institutions and benefit institutions. As remarked by Professor Dan Țop, the national social assistance system operates as a subsidiary or, where appropriate, is complementary to social security systems and consists of the social benefits system and the social services system.[7] In this context, social assistance, through its specific measures and actions, aims to develop individual, group or collective capacities to meet social needs, increase the quality of life and promote the principles of social cohesion and inclusion.[8]

The definitions in the Romanian literature are quite uniform, highlighting the same characteristics, and, thus, fit into the internationally accepted definition and

6 The Constitution of Romania was adopted shortly after the change of regime in 1991. The European Social Charter was ratified in 1999, when ratification law No. 74/1999 was published in the Official Gazette No. 193/1999 (Moarcăș-Costea, 2011, pp. 12–14.). A few years later, Law No. 429/2003 amending the Constitution entered into force but made relatively few changes to fundamental rights and freedoms. In this area, only the right to a healthy environment and the right of access to culture were added to the norms of the Constitution.

7 Țop, 2017, p. 291.

8 Țop, 2018, p. 124.

characterisation of social law. For example, social law is interpreted as 'all the legal rules governing social security relations'[9] or

> ...a set of cash and in-kind benefits provided to protect income in the event of social risks; a system of protection against loss of income or a system of rules ensuring solidarity with people facing loss of income from work or costs to prevent social risks[10]

by Romanian authors.

However, the emphasis on the autonomous nature of social law is not as strong as in the case of labour law. Even so, social law as an autonomous field of law remains a clear leitmotif in the explanations of the concepts provided by Romanian scholars. The best example of this kind of approach is the simple yet clear and traditional definition of Professor Athanasiu, who considers that social law is an autonomous branch of the legal system, made up of all the legal rules governing social security and social assistance relations.[11]

Some scholars emphasise the strong links between social law and labour law, illustrating the autonomous nature of social law exactly with the close link between labour law and civil law, despite which labour law is an autonomous area of law. In this context, Vieriu explains that social security is not only an activity, a concern of states, but also a set of legal rules governing this activity, the protective measures, their specifics, and their beneficiaries. The legal rules governing social relations make up the branch of law known as social law. Just as labour law has separated from its parent discipline—civil law—social law has also separated from labour law to become an autonomous discipline and a new branch of law.[12] In the author's view, this new branch, although separated from labour law, belongs to public law, not private law.

The same parallel is drawn by Țiclea and Georgescu in their book about Romanian social law. They consider that, until recently, legal relationships in the field of social law were considered to be related to legal employment relationships, established by the conclusion of the individual employment contract and included in labour law. Today, however, legal provisions in the field of social law have developed towards acquiring their own specificity, which gives them the individuality necessary to constitute a distinct branch of law.[13] Based on these considerations, the definition given by Țiclea and Georgescu reads as follows: social law is 'that autonomous branch belonging to the system of public law, made up of legal rules governing social insurance relations as well as social assistance'.[14]

9 Marian, 2020, p. 22.
10 Roș, 2018, p. 14.
11 Athanasiu, 1995, p. 24.
12 Vieriu, 2016, p. 113.
13 Țiclea and Georgescu, 2021, p. 13.
14 Ibid., p. 14.

2.2. The main principles of social law in Romania

Beyond the general principles that apply to several domains of law, such as the principle of ensuring the legal basis for the functioning of the state, the principle of equity, or the principle of accountability,[15] Romanian scholars also analyse certain specific principles of social law.

The first principle, considered to be specific to social law is the principle of equality. According to Țiclea and Georgescu, this principle of equality concerns all rights regardless of the field of activity and the normative act that enshrines them.[16] The practical application of the principle of equality in social law is regulated by Emergency Ordinance No. 67/2007 on the application of the principle of equal treatment between men and women in occupational social security schemes.[17] According to Article 7, the principle of equal treatment implies the absence of any direct or indirect discrimination on grounds of sex, with particular reference to marital or family status, especially regarding the scope of occupational social security schemes and the conditions of access to them; the obligation to contribute and the calculation of contributions; the calculation of benefits, including supplementary benefits payable to spouses or dependants, and the conditions governing the duration and maintenance of entitlement to benefits. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women in the event of maternity laid down by law and the applicable collective agreements.

The second principle considered to be specific to social law is the principle of universality. Without needing to analyse this principle, we can see that it considers two aspects: first, the scope of the persons protected and the nature of the benefits to be granted, and, second, the lawful social purpose of providing some financial or other assistance in the event of loss or reduction of income.[18] The third principle is the principle of compulsory insurance for social security benefits, acquired only through insurance, and the fourth principle concerns the financing of non-contributory benefits from the state budget. Finally, we must also mention the principle of indexation and compensation of benefits, measures necessary to maintain purchasing power and mitigate the effects of inflation on living standards.[19]

2.3. Legal framework of social law in Romania

The regulation of social law is based on a wide range of legal sources, with specific legislation dealing with each area or type of benefit. As the legislation is, thus, quite dense, we will present below the specific sources of law within each sub-chapter presenting the different benefits.

In the area of social security benefits, the legislator has attempted to bring the legislation together in a single framework as a veritable 'Social Code' but has not succeeded.

15 Popa, 2020, p.113.
16 Țiclea and Georgescu, 2021, p. 19.
17 Official Gazette of Romania No. 443/2007.
18 Marian, 2020, p. 24.
19 Vieriu, 2016, pp. 115–116.

In the field of social security, including pension insurance, Law No. 19/2000 was the first complex piece of legislation to enter into force after the change of regime in 1989 in Romania. This view is supported by the fact that the final provisions of the law abrogated 35 normative acts regulating the social law institutions and implicitly repealed all provisions that were contrary to the new legislation. The legislator's original intention, as reflected in the title of the law, 'law on pensions and other social insurance rights', was to regulate the entire Romanian social security system within a single framework. In our opinion, it was an unfortunate decision by the legislator, as it would have been more appropriate to regulate the pension system in a separate law from the outset, especially as this would have been more appropriate in the long term, starting from the perspective that other services still financed from the social security fund should gradually be separated from the pension system and removed from the pension fund. During the application of the law, it became clear relatively quickly that this objective had not been achieved. Given an ill-conceived legislative concept, after only a few years of application, the regulations on other social security entitlements and institutions were removed from the initial law. In 2005, the since repealed Emergency Government Decree No. 148 on family support and child-raising benefits and Emergency Government Decree No. 158 on social security leave and benefits were published. As a consequence of the publication of these two pieces of legislation, the chapter of Law No. 19/2000 on maternity, childcare, and sick child care allowances and temporary incapacity of work and reinstatement allowances was almost entirely repealed with effect from 1 January 2006. Around the provisions under the heading 'other social security benefits', only the rules on funeral allowances in the event of the death of an insured person remained in force under the initial normative act. Following the repeal of Law No. 19/2000, the Romanian legislator no longer proposed to regulate the social field in a single normative act in the form of a genuine social security code.

3. Social benefits in the Romanian system

3.1. Healthcare

3.1.1. Regulatory and institutional framework

The basis for the regulation of healthcare in Romania is the noted constitutional provision, Article 34 of the Constitution, according to which the state guarantees the right to health protection. Pursuant to Article 34, which provides for the right to guaranteed health protection, where the State must take measures to ensure hygiene and public health, the law organises healthcare and the social insurance system for sickness, accidents, maternity and rehabilitation, control of the practice of the medical professions and paramedical activities, and other measures for the protection of the physical and mental health of the individual.[20]

20 Țichindelean, 2009, pp. 185–187.

Currently, the main source of legislation on health insurance is Law No. 95/2006 on health insurance reform,[21] which has been amended several times since it entered into force. Further, the role of Act No. 136 of 1995 on insurance activities, Decree No. 633 of 2012 of the National Health Insurance Fund on the national health insurance card, laws on the annual social insurance budget, and numerous decrees issued by the National Health Fund are also significant. The coordination and control of the system is the responsibility of the Ministry of Health through the National Health Insurance Fund as an organisational unit with territorial units in each county.

3.1.2. Objectives and features of the health policy

The general and main objectives of the state's health policy, declared by the law, are to improve the health status of the population, reduce health inequalities and health risks in society, and create an environment that supports the good health of the population. In the Romanian system, there are three broad categories of health insurance benefits: healthcare services, cash benefits for incapacity for work due to sickness, and accident benefits, including health services and cash benefits. Perhaps one of the most striking characteristics of health insurance is that, unlike pension insurance, for example, it is only partially insurance-based. While the cash benefits of health insurance are only available against actual contributions, the solidarity principle is much stronger for health benefits. Another important feature of Romanian health insurance is that it does not cover all health services, only those listed by the law.[22] The law sets out the rights and obligations of the parties. Insured persons are entitled to a basic package of services under the terms of the Law on health insurance reform. The concrete rights and the content of the basic service package are determined by the multiannual framework contract published in the form of a Government Decision. Insured persons are entitled to the services of the legal basic package from the first day of illness.

According to the legal definition contained in Article 219 of the Law on health insurance reform, social health insurance is the main system of financing the healthcare of the population, ensuring access to a package of basic services for the insured. It is compulsory and quasi-universal, covering virtually the entire population of the country. Meanwhile, according to Article 219 (4), it may operate in various special situations, along with other forms of health insurance. They are, of course, not compulsory and may be offered voluntarily by insurance bodies authorised by law. Thus, health insurance in Romania can be compulsory or voluntary, the voluntary insurance complementing the compulsory basic one. The purpose of private, voluntary health insurance is to finance access to a higher level or, where applicable, a wider range of health services. However, as a general rule, voluntary insurance does not cover the risk of occupational accidents and occupational diseases. According to the law, any Romanian citizen, foreign citizen, or stateless person who is a member

21 Official Gazette of Romania No. 652/2015.
22 Vallasek, 2021a, pp. 65–66.

of the compulsory health insurance system is entitled to private health insurance. Article 349 of the law defines two forms of voluntary private insurance: the voluntary complementary health insurance to pay the reimbursement fee from the voluntary insurance and the voluntary supplementary health insurance, which may be applied for the full or partial reimbursement of the costs of the health services not included in the basic health package, the choice of a certain healthcare provider or doctor, the reimbursement of the costs of an additional expert opinion, the reimbursement of accommodation costs required for medical treatments, or the reimbursement of the costs of other medical services specified in the contract.

3.1.3. Contribution and the types of benefits

The regulation of the health insurance contribution is determined by the Financial Code, Law No. 227/2015. Starting from 1 January 2018, the health insurance contribution rate is 10% and is owed by all employees and everybody with the obligation by law to pay the social health insurance contribution. Based on the provisions of the law, Article 156, the employer will not pay any contribution, as the whole contribution is covered by the employee.

Notably, there are several types of services financed by the National Health Insurance Fund (NHIF). Though this chapter will not present every type in detail, we can observe the following services in the Romanian system: preventive medical services, curative medical services, provision of medicines, sanitary materials, medical devices and other therapeutic means (with or without personal contribution) based on medical prescription, home care medical services, and medical services provided to insured persons on the territory of other states. Moreover, several medical services cannot be financed from the NHIF, their costs being borne by the insured, the units that request them, the state budget, or other sources. Exemplifying these categories are some dental medical services, aesthetic corrections with certain exceptions, different kinds of rehabilitation services and procedures, and medicines.

Persons with residency in Romania, insured for social health insurance benefits in the social health insurance system, have the right to various social health insurance benefits, regulated by Emergency Ordinance No. 158/2005.[23]

Article 2 of this Act defines six types of benefits: medical leaves and allowances for temporary incapacity for work, caused by common illnesses or accidents outside of work; medical leaves and allowances for the prevention of illnesses and the recovery of work capacity, exclusively for situations resulting from work accidents or occupational diseases; maternity leaves and allowances; medical leaves and allowances for the care of a sick child; medical leaves and allowances for the care of patients with oncological conditions;[24] medical leaves and maternity risk allowances granted to insured persons under the conditions provided for by Government Emergency Ordinance No. 96/2003 regarding maternity protection at workplaces, approved with

23 Official Gazette of Romania No. 1074/2005.
24 Țop, 2022, pp. 25–29.

amendments and additions by Law No. 25/2004, with subsequent amendments and additions.

The minimum period of previous contributions for granting the rights is six months completed in the last 12 months before the month for which the benefits are granted,[25] except in the situation of maternity risk benefits, when no previous insurance is needed. The mandatory contribution rate for the health insurance benefits is 1% of the so-called 'labour insurance contribution', which also includes unemployment insurance, accident insurance and the mandatory contribution to the wage guarantee fund, resulting in a 2.25% contribution paid by the employer.

3.2. Romanian pension system

3.2.1. Development and general regulatory framework

After the regime change in Romania, pension reform has developed extremely slowly. The first wave of the reform dealt with the mandatory public pension pillar, and it was marked by the entry into force of Law No. 19/2000, followed by further corrective measures in Law No. 263/2010, which remains in force. However, how long it will be in force is uncertain, which negatively affects the stability and sustainability plans of the pension system. In 2019, Law No. 127 was published,[26] repealing the current Law No. 263/2010, but the start of the application of the law has been delayed several times by now. What is even more disturbing from the perspective of legal certainty is that, in the meantime, we are witnessing the drafting and tabling of new pension bills, which are ultimately neither put on the agenda of Parliament nor voted on. Under these circumstances, it is completely uncertain whether Law No. 217/2019 will ever be applied. Further, to add to the legislative absurdity, although it has not been applied yet, Law No. 217/2019 has already been amended several times by the legislator.[27]

It is obvious, however, that the basic aim of all the laws on the state pension pillar that have been drafted up to now, was to tighten the conditions for pension eligibility

25 In the past, until 1 July 2018, only one month, not six months, of contribution was required of the previous 12 months to be eligible for benefits. From this perspective, the amendment of the law should be interpreted as a significant tightening of the eligibility criteria.

26 Official Gazette of Romania No. 563/2019.

27 The title of Law No. 127/2019 would have only concerned the regulation of the pension scheme. However, Chapter IV also contains provisions on other social security benefits, such as a monthly benefit separate from the survivor's pension, called the 'monthly allowance for the surviving spouse', a benefit to assist insured persons and pensioners for balneological treatment or a so-called 'funeral benefit' in the event of the death of an insured person, a pensioner or a member of their family. Regarding the pension scheme, the law would introduce changes in the areas of the calculation of the applicable pension point, the indexation of benefits, the simplification of administrative procedures, the possibility to 'purchase' the necessary insurance period, and early retirement and early payment of pensions. Moreover, the minimum social (pension) benefit should be regulated not by a separate law but within the framework of this law. The amount of this minimum benefit would vary per the length of service, set as a percentage of the current gross minimum wage.

and introduce and apply a points-based calculation of pensions, which can now be considered the most successful step of the Romanian pension reform.

This Romanian public pension system is complemented by parallel social security schemes for certain state-recognised churches and lawyers.[28] The second major wave of pension reform of the public pension pillar seemed to have come to an end in 2010, with the entry into force of Law No. 263/2010. However, from 2015 onwards, we have witnessed a process of regression, with new, in our opinion, fundamentally ill-considered and harmful provisions being introduced into several elements of the pension system, which was designed to be sustainable. It abolished the universality of the public pension system by introducing separate legislation for military, police, and law enforcement personnel[29] and reintroducing the so-called 'special pensions' for certain professional categories, such as prosecutors, judges, members of parliament and senators, and local government officials. The impact of this process and the direction that this process will take remain uncertain, and, unfortunately, the issue of the medium- and long-term sustainable development of the pension system has become a political battleground, the fierce but empty discussions often shifting attention from the more pressing issues of obtaining and maintaining a sustainable pension system.

From 2008 onwards, the mandatory public pension pillar was complemented by a mandatory private pension pillar[30] and an optional private pension pillar,[31] creating a three-pillar mixed-funded pension system. This system was supplemented by a fourth pillar quite recently by introducing an occupational pension scheme regulated by Law No. 1/2020.[32] Given the low incidence of occupational pension schemes, this fourth pillar is not particularly significant for now, and it is questionable to what extent its introduction can contribute to the sustainability of the pension system.

3.2.2. The Romanian public pension pillar

The Romanian public pension pillar operates based on the principles of universality (although, as indicated, given the amendments to the law, nowadays, this is at best a quasi-universality), compulsory contributions, and social solidarity.

Old-age pensions are granted to people who have reached the standard retirement age and have completed the minimum period of contribution to the public pension system. The retirement age is set at 65 (63) years for men (women). The issue of the retirement age is, however, a much-discussed problem in Romania. At the time Law No. 263/2010 entered into force, the Romanian Constitutional Court analysed the issue of differentiating the retirement age for women and men and concluded that this differentiation was fair because, in Romania, women traditionally conduct family and household tasks.[33] However, the Constitutional Court's change of position is indicated

28 Law No. 72/2016, published in the Official Gazette of Romania No. 342/2016.
29 Law No. 223/2015, published in the Official Gazette of Romania No. 556/2015.
30 Law No. 411/2004, published in the Official Gazette of Romania No. 482/2007.
31 Law No. 204/2006, published in the Official Gazette of Romania No. 470/2006.
32 Official Gazette of Romania No. 10/2020.
33 Vallasek, 2021b, pp. 100–106.

by Decision No. 387/2018, which, while still declaring the age limit provision of Article 53 of Law No. 263/2010 regarding public pensions as being constitutional, also declared unconstitutional the provision of Article 56 (1) of the Romanian Labour Code, which states that the attainment of the age limit for retirement is a legal case of termination of the employment contract. Following the intervention of the Constitutional Court, the Labour Code was amended to allow female workers to notify, prior to 30 days before reaching the retirement age of 63 years, their employer of their intention to continue the employment relation such that the legal termination of the employment contract would only take place at the age of 65, the same age as it is set for men.

As far as the contribution period is concerned, it is the same for men and women: 15 years is the minimum contribution period and 35 years is the full contribution period necessary for the old-age pension. Following the entry into force of Emergency Government Decree No. 79/2017, from 1 January 2018, the pension contribution of 25% is fully and exclusively borne by the employee, the employer having only the obligation to withhold and pay this contribution, except in the situation of special or specific working conditions, when the employer contributes an additional 4% or 8%. Pension benefits in this public pillar include old-age pensions, survivors' pensions, invalidity pensions, and early retirement pensions but the eligibility criteria have become increasingly strict, as per the objectives of the parametric pension reform and the necessity of sustainability. However, beyond the strict conditions for early retirement, Article 65 (5) of the pension law continues to regulate the possibility for people living in certain heavily polluted municipalities to take early retirement two years before reaching retirement age, without any financial penalty. This special early retirement condition will be applicable until 2030.

3.2.3. The Romanian private pension pillars

The Romanian private pension system comprises three complementary but different pillars: mandatory private pensions, voluntary private pensions, and occupational private pensions.

The most important, even in terms of proportions, is clearly the compulsory private pension insurance. Based on current data, on 31 December 2022, the seven operating mandatory private pension funds had a total of nearly 8 million members. For comparison, the number of members of the voluntary pension pillar on the same date was 626,612 persons.[34]

A minimum of 50,000 people are required to join the pension fund, with the clarification that the defined number of members must be reached within the first three years of the fund's establishment. Following the introduction of compulsory pension insurance, 14 pension funds started operating in Romania. After the three-year deadline, nine pension funds remained operational, while 7 funds are currently operating. To ensure transparency in the operation of the fund, minimise investment risk, and prevent unilateral dependence, Law No. 411/2004 establishes a precise set of rules on

34 Pensii Private Obligatorii (Pilonul II), no date.

the proportions of the assets in which the fund may invest. A pension fund may invest up to 20% of its subscribed capital in money market instruments of Romanian legal entities or foreign credit institutions authorised in Romania, up to 70% in domestic or EU government securities, and a smaller percentage in other financial instruments as defined by law.

The Romanian compulsory private pension system does not distinguish between open and closed pension funds, and a person who joins the system either compulsorily or voluntarily can be a member of either fund. If the legal conditions are met, the pension fund cannot refuse a membership application.

The contribution to the private pension fund is a deduction from the social security contribution, calculated based on members' gross monthly income, similar to the contribution to the social security fund. The law originally contained only general provisions on the rate of the contribution, which was to be 2% of the basic pension contribution at the start of the scheme in 2008 and then gradually, with an increase of 0.5% per year from 1 January of each subsequent year, to reach 6% in eight years. With the planned increase, the contribution rate was to rise to 6% by 2016, which was not a particularly high percentage by international standards. After the first year, the Romanian government froze the increase in the contribution rate, keeping it at 2%, claiming that the country's severe economic challenges did not allow for the planned increase. In 2011, the contribution rate was increased to 3%; following the originally planned half-percent increase, it reached 5% in 2015. It was followed by a 0.1% increase in 2017 reaching 5.1%. However, from 1 January 2018, the contribution rate was reduced again to 3.75% by Emergency Government Decree No. 82/2017. Under the 2022 amendment to Article 43 of Law 411/2004 on compulsory private pensions, the contribution rate should increase to 4.75% from 1 January 2024, but, given the trends so far, it would not be much of a surprise if this planned increase will not materialise or will be postponed.

The voluntary private pension insurance scheme operates under Law No. 204/2006. According to the law, a voluntary private pension fund is a fund established by a civil law partnership contract under the provisions of the Civil Code and, practically, anyone can join a voluntary private pension fund. The specific amount of the contribution to the pension fund is determined by the trustee in the pension scheme and is paid directly by the member, or, where applicable, the employer, who transfers the amount to the pension fund designated by the employee at the same time as the compulsory social security contribution. However, under the legislation, the contribution payable may not exceed 15% of the gross monthly salary or other income.[35] The first attempt to introduce an occupational pension pillar was the drafting of Law No. 249/2004, but this law was never applied, as it was postponed by Law No. 141/2005 and

35 Some authors argue that the 15% contribution limit is grossly excessive. As the basis of calculation is the same as for contributions to social security or compulsory private pension schemes, if a person wants to take out voluntary pension insurance and choose the maximum contribution rate, he would have to spend almost half of his gross income on pension insurance. Major, 2009, p. 177.

subsequently repealed. The current legislation under which the scheme operates is Law No. 1/2020 on occupational pensions.

According to the legal definition, an occupational pension fund is an organisation with at least 100 participants, established by a company statute per the provisions of the Civil Code and Law No. 1/2020. The employer's contribution is determined by the rules of the pension fund, but the employer may set a differentiated amount of contribution for each of its employees based on length of service, position, or wage entitlement. The participant's contribution may not exceed one-third of gross monthly salary or equivalent income and, together with any other deductions, may not exceed half of net monthly salary or equivalent income. The contribution may be divided between the employee and the employer per the provisions laid down in the scheme and the individual membership document, the vesting clause being part of the pension scheme. The participant shall be the owner of the personal assets in his account under the conditions laid down in the occupational pension scheme. Entitlement to an occupational pension must be acquired at the participant's request under the conditions set out in the scheme and the prospectus, as per the legislation on private pensions. A participant whose personal assets are insufficient to qualify for an occupational pension shall receive, on request, a lump-sum payment or a payment in instalments over a maximum period of five years. Personal assets may be used exclusively to acquire an occupational pension.

The introduction of an occupational pension scheme does not seem to be a success story, at least for now, and it is questionable to what extent it can contribute to the sustainability of the Romanian pension system. Although the legislation came into force in 2020, the first fund offering occupational pension provision started operating in 2022. The provider is the Romanian Commercial Bank (Banca Comercială Română – BCR Pensii).[36]

3.3. Accidental insurance in Romania

The primary legal source of insurance against accidents at work and occupational diseases in Romania is Law No. 346/2002,[37] as amended and republished several times, and Government Decision No. 144/2008, which contains the provisions for its application. Other important pieces of legislation include Law No. 319/2006 on occupational health and safety[38] and Ministerial Decrees No. 450/2006 and 825/2006, laying down the implementing provisions.

As a general rule, the employer is obliged to provide insurance for all his employees from the first day of employment. Since it is the employer's responsibility to organise work properly and safely, it is also, by analogy, the employer who is liable to pay the accident insurance contribution. This contribution comprises 5% of the so-called 'labour insurance contribution', which is a total of 2.25% contribution for

36 Farkaş, 2022.
37 Republished in the Official Gazette of Romania No. 251/2014.
38 Official Gazette of Romania No. 646/2006.

which the employer is liable. The employer is also obliged to register the employee with the institution administering the accident insurance before the start of work, but the employee is insured from the start of work irrespective of the registration.

Article 5 of Law No. 319/2006 defines the accident at work as a 'violent injury to the body, acute poisoning, which occurs in the course of work and which results in incapacity for work, disability or death lasting more than three days'.[39] Meanwhile, occupational disease is defined as 'an impairment of health resulting from the exercise of a profession or occupation and caused by harmful factors specific to the workplace or by overwork'.

The scope of benefits granted in the Romanian system is quite wide. According to Article 18 of Law No. 346/2002, persons insured under the insurance scheme for accidents at work and occupational diseases are entitled to the following benefits and services: medical rehabilitation and recovery of working capacity, vocational rehabilitation and retraining, compensation for temporary incapacity for work, compensation for temporary transfer to another job and compensation for reduced working hours, compensation for loss of integrity, compensation in the event of death, reimbursement of expenses, invalidity pension following an accident at work or occupational disease, and survivor's pension in the event of death as a result of an accident at work or occupational disease.

The organisation, management, coordination, and control of the entire insurance activity for accidents at work and occupational diseases is conducted by the National Public Pension House through its territorial organisations.

3.4. Long term care

In the field of long-term care, Romania has serious shortcomings in both the appropriate legal framework and the appropriate institutional framework. It can be seen in the strategy document for 2023–2030 ('National strategy on long-term care and active ageing for the period 2023-2030"[40]), approved by Government Decision 1492/2022.[41] It is not yet possible to analyse the practical implementation of the strategy, as it was published only in the last days of December 2022, and the implementation of the targets has not even started. Nevertheless, we consider it important to briefly outline the starting point and the objectives of the Romanian strategy for long-term care that will define the next few years.

Among the main systemic problems are the Strategy notes that there are overlaps and inequalities in the social services system, including the long-term care services. Moreover, a consequence of this situation is the massive migration of dependent older people into the disability protection system. The development of long-term and

39 Dominte and Nagoie, 2022, pp. 116–147.

40 Strategia națională privind îngrijirea de lungă durată și îmbătrânirea activă pentru perioada 2023-2030.

41 Official Gazette of Romania No. 1251/2022. The Strategy is also based on the objectives of the previous 'National Strategy for active ageing 2015-2020' document approved by Government Decision 566/2015.

palliative care services has also taken place randomly, in the absence of a general legislative framework to integrate palliative care into the national system health system. Meanwhile, the importance of long-term care is clearly underlined by deteriorating demographic data.

Based on data published by the National Institute of Statistics, the Strategy starts from the statement that Romania must deal with a rapidly ageing population of approximately 3.7 million people aged 65 and over, which represents approximately 19.2% of the population. The share of Romania's older adult population aged 65 and over is expected to increase further to 27.7% by 2050. During the same period, the share of people aged 80 and over is expected to increase from the current level of 4.8% to 8.5%. It is in the context of negative external migration, low birth rates, and rising life expectancy. Ageing and increasing life expectancy are generally accompanied by prolonged periods of frailty and dependency. Obviously, in Romania, there is a significant proportion of elderly people, especially those over 80, who require long-term care services. The problem of ageing is not new. The process of ageing of the population in Romania started decades ago, and this trend has accelerated in the last 20 years, especially when looking at the dependency ratio of the elderly. The median age in Romania has increased from 26.3 years in 1950 to 43.2 years in 2020 and is projected to reach 47.4 years in 2050. The group aged over 80 is projected to increase by 3.7 percentage points, from 4.8% to 8.5% of the total population.[42]

The strategy proposes the overall objective of increasing the number of older people who manage to live independently for as long as possible and improving the access to appropriate long-term care services for dependent older people, ensuring equality of access, resilience, and sustainability of the long-term care system. This general objective can be achieved by realising specific objectives, including strengthening the accountability and management of services for older people, strengthening the continuum of services for older people in Romania and respect for fundamental rights, ensuring sustainable financing and sustainability of the system, improving the quality of services for older people, strengthening and protecting the formal and informal workforce for the long term, and promoting active and dignified social participation of older people.[43]

According to the legal definition of Article 1 (4) of Law No. 17/2000 on social assistance for elderly persons,[44] elderly people having the right to social assistance are those who have reached the statutory retirement age. Moreover, elderly persons must be in one of the following situations: they do not have a family or are not dependent on a person or persons obliged to provide for them, as per the legal provisions in force; have no accommodation and cannot provide for themselves from their own resources; have no income of their own or their income is insufficient to provide the necessary

42 Strategia națională privind îngrijirea de lungă durată și îmbătrânirea activă pentru perioada 2023-2030, pp. 2, 13.
43 Ibid., pp. 25–26.
44 Official Gazette of Romania No. 157/2007.

care; cannot manage on their own or requires specialised care; and cannot provide for their own socio-medical needs given illness or physical or mental condition.[45]

However, many older people in need do not have access to long-term care. It is quite obvious that urgent action is needed to establish an appropriate legislative framework, as the law in force at the moment is unsatisfactory. The Strategy itself indicates that the current regulation must be corrected, and, of course, sufficient funding sources must be allocated. Among the most important drawbacks, also pointed out by the Strategy,[46] is the non-existence of continuity and synergy in covering all dimensions of the concept of long-term care in the legislation governing the social and long-term care system and the healthcare system. There are, meanwhile, overlaps and inequalities in the social services system, including long-term care services. One of the consequences of this situation is the massive migration of dependent older people into the disability care system. The methodology for assessing dependency status and personal care needs currently used is challenging to implement in practice given the lack of specialised staff (social workers and doctors) and the lack of funds to support this activity. Even so, overall, there is an acute shortage of staff in the long-term care domain. This lack of personnel is leading to

> ...the increased risk of burnout, stress and exhaustion is one of the major challenges related to the geriatrics workforce in Romania. Even though many of these effects have been informally reported for long periods of time, the policy responses [failed] to address them properly.[47]

It remains to be seen in the next few years to what extent a successful implementation of the Strategy will be able to address the acute problems faced by the long-term care system in Romania.

4. Closing remarks

The issue of the sustainability of the social system has been an ongoing problem in Romania, without any real solution from the successive waves of reforms since the regime change in 1989. The ageing of the population at an accelerating pace will put Romania in a situation full of challenges that must be managed without any delay.

As described above, Romania defines itself as a social state and, accordingly, makes a firm constitutional promise to provide its citizens with adequate social security and assistance services and benefits. Thus, since the change of regime in 1989, Romania has witnessed a continuous reform effort to make the social system sustainable. The first step was a parametric, then paradigmatic reform of the pension

45 Article 3, Law No. 17/2000 on social assistance for elderly persons.
46 Ibid., p. 25.
47 Ungureanu et al., 2020, p. 29.

system, which seems to be coming to an end with the introduction of the fourth, occupational pension pillar. It remains to be seen what legislation will replace the published but unimplemented state pension law and what changes it will introduce. In parallel with the adjustment of the pension system, a legislative framework has been established to form the basis for other social security benefits, in particular childcare benefits, accidental insurance, healthcare and others.

As a final step, the regulation and redefinition of the field of social assistance have also come to the centre of attention, without any particular successes being achieved in this area so far. In this respect, it would be of the utmost importance to achieve as much as possible of the objectives of the Strategy as outlined above. Meanwhile, we must not forget that the issue of social law and social policy can never be considered only by itself but must be interpreted in connection with the education, health, labour, and even tax policy of the given state. In this context, the need for a coherent, long term planned social policy is unequivocal. In our opinion, it is precisely this long-term planning that is sorely lacking in Romania. The legal uncertainty given the continuous changes in legislation did not only characterise the immediate period following the change of regime 30 years ago but is also a regrettable feature of our days.

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| Chapter 8 |

Serbia: Impact and Consequences of Demographic Challenges on Domestic Social Law and Social Security Systems

Filip BOJIĆ

ABSTRACT

The author gives an overview of the Social Security System in Serbia, with a special focus on demographic challenges, which have an impact on the proper functioning of the domestic social security system. In recent decades, it has been noticeable that the average length of life in the Republic of Serbia has been increasing. Thus, the legislators decided to adopt certain amendments and supplements to the regulations on social insurance to ensure the sustainability of social insurance funds, especially the Republic Pension and Disability Fund. Therefore, the question arises as to whether changes in the law represent the only solution for the sustainability of the social security system. For the stated reason, the author proposes certain de lege ferenda proposals to ensure the further sustainability of the social security system of the Republic of Serbia. Moreover, the paper will assess the compliance of domestic regulations with certain provisions of the Revised European Social Charter, which our country ratified in 2009 and, thereby, assumed a whole series of obligations related to the further development of the social security system.

KEYWORDS

social security law, social security system, demographic challenges, pension and invalidity insurance, social legislation of the Republic of Serbia.

1. Introduction

As is well known, the definition of social security is rarely found in international legal sources, while the social security system itself is most often defined in professional literature as 'a set of all measures that should in certain cases (illness, accident at work, old age, death, birth of a child and unemployment) establish a disturbed balance'.[1] In most cases, it is assumed that social security represents an umbrella concept, that is, the basic goal of the science of social law, which is achieved through various subsystems,

1 Jašarević, 2010, p. 75.

Bojić, F. (2023) 'Serbia: Impact and Consequences of Demographic Challenges on Domestic Social Law and Social Security Systems' in Jakab, N. (ed.) *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 155–178. https://doi.org/10.54171/2023.nj.sotsss_8

such as social insurance systems and social protection systems. Consequently, social security can be a goal that society strives for to ensure decent living conditions and an existential minimum for as many residents as possible, and the aforementioned goal will be achieved by the developed social insurance and social protection system, which will enable individuals to exercise their basic rights and receive appropriate protection in cases of occurrence of a certain social risk. Therefore, the state must create a valid normative framework that will regulate the procedure and conditions for exercising social security rights and providing social protection measures. Without developed legal and sub-legal legislation and a clear constitutional framework, including appropriate measures of supervision over the implementation of the law, ensuring social security for citizens will be a difficult task for every state.

The social security system of the Republic of Serbia comprises the social insurance system, composed of pension and disability insurance, health insurance and unemployment insurance. Moreover, in the Republic of Serbia, there is a special system of social protection, which is an integral part of the social security system. In general, the functioning of the social security system today is subject to numerous different risks, such as demographic, economic, political and institutional risks, and individual risks related to the insured themselves.[2] Bearing in mind that it is necessary to note the connection between demographic challenges and the social security system, the paper will pay the most attention to demographic risks, which have a significant impact on today's social security systems, including the social security system of the Republic of Serbia. Special attention will be focused on the sustainability of pension systems, bearing in mind that these systems face the most challenges. Consequently, the recent amendments to the social legislation adopted to ensure the sustainability of the social security system of the Republic of Serbia will be noted.

2. The place of social law in the legal system

Serbian Social Law represents a relatively new branch of law, which began to develop rapidly after the Second World War in the territory of the Republic of Serbia. However, in the first decades of development, it was mostly related to the area of Labour Law, bearing in mind that only working members of the population were mostly insured in the noted period.[3] However, in the last few decades, the social security system of the Republic of Serbia has rapidly changed, as certain concepts

2 Gillion et al., 2001, p. 12.

3 As Professor Vera Jelčić states, 'social law, in fact some of its parts such as social insurance, was in the beginning of its development related to the employment relationship, i.e., the holders of the rights were exclusively persons in employment, namely persons who were no longer capable due to the occurrence of risks to work, and through work to ensure for themselves and their family members the means necessary for a dignified life. Therefore, it was considered that social law, that is, certain parts of it, represent an extension of the rights that were exercised on the basis of work'. Jelčić, 1988, p. 5.

are accepted that are represented in modern European social security systems. Thus, today social law in Serbia is separate from Labour Law, and special regulations regulate basic rights, which are provided to the insured and other citizens given the realisation of some of the social risks.

The Constitution of the Republic of Serbia from 2006 undisputedly represents the foundation for the construction of the social security system in our law. The Constitution contains several provisions guaranteeing certain social rights. These provisions are foreseen in the second part of the Constitution, which regulates basic human rights and freedoms and guarantees the right to social protection, the right to healthcare, and the right to pension insurance. The right to social protection is guaranteed within a special Article of the Constitution. However, the name of this article seems quite incoherent with its content, and, in addition to the rights realised in the social protection system, rights from social insurance are also guaranteed. The first paragraph posits that

> ...citizens and families who need social assistance in order to overcome social and life difficulties and create conditions for meeting basic life needs, have the right to social protection, the provision of which is based on the principles of social justice, humanism and respect for human dignity.[4]

It is also provided that employees have the right to compensation in case of temporary incapacity for work and the right to compensation in case of temporary unemployment. It is also stated that disabled persons, war veterans and war victims are provided with special protection per the law, and social insurance funds are established per special regulations.[5] Analysing this Article of the Constitution of the Republic of Serbia, it seems that it would be much more appropriate if it was titled social security rather than social protection because, beyond rights from social protection, certain rights from social insurance are also guaranteed.

Article 68 of the Constitution guarantees the right to healthcare and proclaims that everyone, including children, pregnant women, mothers during maternity leave, single parents with children up to the age of seven, and the elderly receive healthcare from public revenues, has the right to protect their physical and mental health if they do not achieve it in another way. It is also envisaged that health insurance, healthcare, and the establishment of health funds will be regulated by law, which was done in 2019, when the current Law on Health Insurance and Law on Healthcare came into force, thereby invalidating the regulations of the same name, adopted in 2005.[6]

Pension insurance is guaranteed by a special Article of the Constitution. There, the constitution maker does not go into details but only states that pension insurance is regulated by law, and the Republic of Serbia takes care of the economic security

4 Constitution of the Republic of Serbia, Article 69 (1).
5 Constitution of the Republic of Serbia, Article 69 (4–5).
6 Constitution of the Republic of Serbia, Article 68.

of pensioners.[7] Some authors justifiably believe that this Article does not contain a guarantee of human rights but looks more like a political proclamation.[8] It seems that it would be more appropriate if that article contained a provision that the Republic of Serbia takes care of the social security of the elderly, not the economic security of pensioners, as this deliberately omits the category of elderly persons who have not secured basic rights from pension insurance and, therefore, do not have the status of a pensioner, that is, a beneficiary of an old-age pension. Moreover, the question arises as to whether that Article also refers to the protection of beneficiaries of disability and survivor pensions, who, according to the interpretations of the largest number of authors, also have the status of pensioners. This article often causes certain doubts in practice. Further, on the occasion of an initiative to start the constitutionality and compliance procedure with the confirmed international treaties of the Law on temporary regulation of the method of pension payments, the Constitutional Court took the position that Article 70 of the Constitution did not determine the content of that right, and the Constitution to citizens guaranteed pension insurance as a form of social insurance, but specific rights from pension insurance are not rights guaranteed by the Constitution but are rights established by law.[9]

Regarding the legal arrangement of social insurance, in the Republic of Serbia, no codification of social legislation has been conducted and, as noted, there are three basic branches of mandatory social insurance, pension and disability insurance, health insurance and unemployment insurance. Pension and disability insurance is regulated by the Law on Pension and Disability Insurance, health insurance is regulated by the Law on Health Insurance, and unemployment insurance is regulated by the Law on Employment and Unemployment Insurance. These three laws form the basis of the social insurance of the Republic of Serbia. Notably, the field of social protection is regulated by a special Law on Social Protection. Beyond the aforementioned regulations, significant legal sources of social law are represented by the Law on Healthcare, the Law on Voluntary Pension Funds and Pension Plans, the Law on Financial Support for Families with Children, the Law on Contributions for Mandatory Social Security, and the Law on the Rights of Veterans, Military Disabled, Civilians war invalids and their family members. Although there were certain announcements in previous years, a special branch of social insurance for work-related injuries has not yet been set aside, and the insured's rights for work-related injuries remain provided within the framework of pension and disability insurance and health insurance.

Beyond the noted sources of law, numerous sub-legal general acts are also of particular importance, which regulate basic rights from social insurance and social

7 Constitution of the Republic of Serbia, Article 70.

8 Andrić, 2017, p. 127.

9 The decision of the Constitutional Court of Serbia on the rejection of the initiative for the initiation of the procedure for the evaluation of the constitutionality and compliance with the confirmed international treaties of the Law on temporary regulation of the method of payment of pensions, No. IUz-531/2014 dated 23 September 2015.

protection rights. These are mainly the rules of the ministry and the Government's decrees, which regulate the legal provisions of basic social rights in more detail. Finally, certain social rights are sometimes guaranteed by collective agreements concluded by the social partners. In most cases, supplementary rights for employees are regulated by them. As Professor Lubarda puts it,

> ...in domestic law, the prevention and protection of employees contribute to the employer's obligation established in several special collective labour agreements to, in addition to the collective insurance of all employees in the event of death, injury at work, occupational disease, [and] reduction or loss of work ability, additionally insure employees who work at workplaces with an increased risk in an increased amount of injuries at work and occupational diseases.[10]

In the noted case, the financial resources are borne by the employer and are determined depending on the level of risk of injury or occupational disease and the working environment.[11] Case law does not represent a significant source of law when it comes to the social law of the Republic of Serbia. In this connection, the Administrative Court is responsible for resolving disputes from social insurance; that is, social protection.

Regarding the international sources of law, which guarantee basic social rights, the Republic of Serbia ratified Convention No. 102 of the ILO on Social Security (minimum standards) and the Revised European Social Charter of the Council of Europe. Other significant sources of social law adopted under the auspices of the Council of Europe, such as the European Social Security Code and the European Convention on Social Security, have not yet been ratified by our country. Further, the convention of the ILO No. 128 (Invalidity, Old Age and Survivors' Benefits Convention) has not been ratified, and the provisions of Recommendation No. 202 on Social Protection Floors have not been implemented.

3. Demonstration of compliance with the European Social Charter

As noted, the Republic of Serbia ratified the Revised European Social Charter in 2009. During the ratification, 29 basic principles of the Charter were accepted, guaranteeing various social and economic rights, which are most often referred to in the literature as the rights of the second generation of human rights. Articles 11 to 17 were ratified, which guaranteed the following social rights: the right to protection of health; the right to social security; the right to social and medical assistance; the right to benefit from social services; the right of persons with disabilities to independence, social

10 Lubarda, 2015, p. 491.
11 Ibid.

integration and participation in the life of the community; the right of the family to social, legal and economic protection and the right of children and young person to social, legal and economic protection. The question arises as to the extent to which domestic regulations on social insurance and social protection accord with the provisions of the Revised European Social Charter, which guarantees basic social rights. Article 11 of the Revised European Social Charter, the right to protection of health, posits that

> With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*: to remove as far as possible the causes of ill-health; to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.[12]

In the Republic of Serbia, the healthcare system is governed by the provisions of the special Law on Healthcare, adopted in 2019. This regulation stipulates that healthcare is an organised and comprehensive activity of society to achieve the highest possible level of preservation and improvement of citizens' health. It is further determined that healthcare includes the implementation of measures and activities for the preservation and improvement of the health of the citizens of the Republic of Serbia, the prevention, suppression and early detection of diseases, injuries and other health disorders and timely, effective and efficient treatment, healthcare and rehabilitation.[13] The healthcare system in Serbia comprises healthcare and higher education institutions that run accredited study programmes for acquiring appropriate knowledge and skills for performing work in the field of healthcare and other legal entities for which a special law provides that they also perform healthcare activities, private practice, healthcare workers and healthcare associates, including the organisation and financing of healthcare.[14] Article 12 of the Revised European Social Charter, which guarantees the right to social security, posits that

> With a view to ensuring the effective exercise of the right to social security, the Parties undertake: to establish or maintain a system of social security; 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; to endeavour to raise progressively the system of social security to a higher level; 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

12 Revised European Social Charter, Article 11.
13 Law on Health Care, Article 2.
14 Law on Health Care, Article 6.

> agreements, in order to ensure: equal treatment with their own nationals of 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 protected may undertake between the territories of the Parties; 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 Parties.

Analysing the aforementioned provision, the Republic of Serbia has partially fulfilled the obligations assumed by the ratification of the Charter, even regarding the right to social security. Undoubtedly, a social security system has been established and maintained in Serbia. However, Serbia has still not ratified the European Social Security Code. It is also an open question as to whether the social security system has been raised to a higher level since the ratification of the Revised European Social Charter in 2009. What is evident is that new regulations have been adopted in the field of health insurance (i.e. healthcare), including certain amendments and additions to regulations on pension and disability insurance. However, a certain percentage of the population is not provided with an appropriate level of social security. Thus, further reforms of the domestic system are necessary to achieve the standard, which is accepted in the majority of European social security systems. Moreover, as the Republic of Serbia has not yet joined the EU, the rules on the coordination of the Social Security System are not applied on its territory. Nevertheless, a large number of bilateral agreements on social insurance have been concluded between the Republic of Serbia and other countries based on which the equal treatment of citizens of other contracting states with the treatment of their own citizens is ensured, in terms of basic rights from social insurance.[15] Although there were certain ideas in the professional public, no multilateral agreement was concluded between the states formed on the territory of the Socialist Federal Republic of Yugoslavia. Accordingly, the obligations from Article 12, which guarantees social security, have largely been fulfilled, but there remains room to raise the social security system of the Republic of Serbia to a higher level.

Article 13 of the Revised European Social Charter guarantees the right to social and medical assistance. It posits that

> With a view to ensuring the effective exercise of the right to social and medical assistance, the 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

15 The Republic of Serbia concluded a total of 33 bilateral agreements with the following countries: Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Montenegro, the Czech Republic, Denmark, Greece, France, the Netherlands, Croatia, Italy, Canada, Quebec, China, Cyprus, the United Kingdom, Libya, Luxembourg, Hungary, North Macedonia, Germany, Norway, Panama, Poland, Romania, Russia, Slovakia, Slovenia, Switzerland, Sweden, Tunisia, and Turkey.

> under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want; to apply the provisions referred to in Paragraphs 1, 2 and 3 of this Article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

Analysing the provisions, it seems that the regulations of the Republic of Serbia are largely harmonised with this Article of the Charter. Serbia provides the right to social assistance by the provisions of the Law on Social Protection, while the right to medical assistance is provided by the provisions of the Law on Healthcare. Although this Article indirectly indicates the importance of ratifying the European Convention on Social and Medical Assistance from 1953, Serbia has not yet ratified this Convention, even though it has been a member of the Council of Europe for 20 years. Article 14 on the right to benefit from social welfare services posits that

> With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Parties undertake: to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment; to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

The aforementioned Law on Social Protection of the Republic of Serbia, in addition to the right to various types of material support, realised to ensure the subsistence minimum, and the right to social protection services, defined as activities of providing support and assistance to an individual in the family to improve (i.e. preserve) the quality of life and eliminate or mitigate the risks of unfavourable life circumstances, creates the opportunity to live independently in society.[16] These services include assessment and planning services (assessment of the condition, needs, strengths and risks of the user and other important persons in his environment; assessment of guardians, foster parents and adoptive parents), daily services in the community (daycare, help at home, inn); support services for independent living (supported housing, personal assistance, training for independent living); counselling-therapeutic and social-educational services, and accommodation services (accommodation in

16 Law on Health Care, Article 5.

a relative, foster or other family for adults and the elderly, home accommodation, accommodation in a shelter and other types of accommodation).[17]

Regarding Article 15 of the Revised European Social Charter, the right of persons with disabilities to independence, social integration, and participation in the life of the community, the Law on Professional Rehabilitation and Employment of Persons with Disabilities was adopted in Serbia in 2009. It governs incentives for employment to create conditions for the equal inclusion of persons with disabilities in the labour market, assessment of work abilities, professional rehabilitation, and the obligation to employ persons with disabilities and conditions for establishing and conducting activities of firms for professional rehabilitation and employment of persons with disabilities and other special forms of employment, including other important issues of importance for professional rehabilitation and employment of persons with disabilities.[18] This regulation introduced an affirmative measure into our system; more precisely, the quota system of employment of persons with disabilities, which is based on the obligation for all employers with at least 20 employees to establish a working relationship with a certain number of persons with disabilities.[19] Given this obligation, an employer who employs between 20 and 49 employees will be obliged to employ at least one person with a disability, while an employer who employs more than 50 employees will be obliged to employ at least one more person with a disability, and so on for every next 50 employees.[20] If the employer does not fulfil the stated obligation (i.e. if he does not employ the required number of persons with disabilities), he will be obliged to pay the amount of 50% of the average salary per employee in the Republic of Serbia.[21]

Article 16 of the Charter on the right of the family to social, legal, and economic protection posits the following:

> With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

The Special Law on Financial Support for Families with Children stipulates that financial support for families with children in the Republic of Serbia is granted to improve the conditions for meeting the basic needs of children; harmonise work, parenting, special incentives, and support for parents to achieve the desired number of children; and improve the financial situation of families with children, families with children with developmental disabilities, and families with children without parental care.[22]

17 Law on Health Care, Article 40.
18 Law on Professional Rehabilitation and Employment of Persons with Disabilities, Article 1.
19 Šunderić and Kovačević, 2017, p. 275.
20 Ibid., pp. 275–276.
21 Ibid., p. 276.
22 Law on Financial Support for Families with Children, Article 1.

This Law foresees the following financial benefits provided to families with children: the right to salary payment (i.e. salary payment during maternity leave, leave from work for child care, and leave from work for special child care); the right to other allowances based on the birth and care of a child and special child care intended for mothers who, in the period of 18 months before the birth of the child, earned income based on independent performance of activities or as holders of a family farm; the right to parental allowance, which is provided to the mother for the first, second, third, and fourth child, provided that she is a citizen of the Republic of Serbia and resides in the Republic of Serbia; the right to funds for construction, participation in purchase, or purchase of a family-residential building or apartment based on the birth of a child; the right to child allowance, which can be realised, provided that the total monthly income, minus taxes and contributions, per family member realised in the three months preceding the month in which the request is submitted does not exceed the determined census; and the right to compensation for the costs of staying in a preschool institution for children without parental care, for children with developmental disabilities and children with disabilities, and children receiving financial social assistance. Despite certain legal gaps and certain illogicalities in the text of the Special Law on Financial Support for Families with Children, through the provision of the above-mentioned financial benefits, the main goal of this Law is achieved, which is to improve the financial position of families with children and the increase in the birth rate in the Republic of Serbia. Moreover, it is important to note that with the adoption of this regulation, Serbia has largely fulfilled the obligations assumed by the ratification of Article 16 of the Charter.

Finally, Article 17 establishes the obligation of the Member States of the Council of Europe, which accept this Article, to provide children and young persons with the right to appropriate social, legal, and economic protection. Hence, the special protection of children and young persons is ensured by the provisions of the Family Law and regulations in the field of education. However, regarding social protection of children and young persons, they are unavoidable sources and provisions of the Law on Social Protection, which posits that a child can be a beneficiary of social protection rights or services when his health, safety, and development are threatened given family and other life circumstances—that is, if it is certain that without the support of the Social Protection System, the child cannot reach an optimal level of development, especially if he is without parental care or at risk of losing parental care; if his parent, guardian, or other person who directly takes care of him is unable to take care of him without the support of the Social Protection System, given health reasons, mental illness, intellectual difficulties, or unfavourable socio-economic circumstances; if he has developmental disabilities, and his needs for care and financial security exceed the family's capabilities; if he is in conflict with his parents, guardian and the community and if his behaviour endangers himself and the environment; if he faces challenges from the abuse of alcohol, drugs or other intoxicants; and if there is a risk of becoming a victim of violence, exploitation, or human trafficking.[23]

23 Law on Social Protection, Article 41.

4. Financing

Benefits, which are provided within the social insurance system, are primarily financed from contributions for mandatory social insurance. The Law on Contributions for Mandatory Social Insurance establishes the obligation to pay contributions for pension and disability insurance, health insurance, and unemployment insurance. Contributions are required to be paid by employers, self-employed persons, and farmers. Per the provisions of the Law, the rates at which contributions are calculated and paid are, for mandatory pension and disability insurance, 24%; for mandatory health insurance, 10.3%; and for unemployment insurance, 0.75%. Regarding employee insurance, for mandatory pension and disability insurance, 14% is allocated from the gross salary of employees, while 10% is allocated from the funds of the employer; that is, the other payer of income. For health insurance, contributions are divided evenly, 5.15% each from the gross salary of the employees and the employer's funds, while the contribution for unemployment insurance is paid from the base (i.e. the gross salary of the employee) at a rate of 0.75%.[24]

Beyond contributions, funds for financing social insurance are often provided from the budget of the Republic of Serbia, which is especially the case with pension and disability insurance. Given the numerous social factors that affect the functioning of the social security system, most modern pension systems, whose main source of financing are contributions for mandatory pension and disability insurance, cannot smoothly ensure the payment of benefits without the appropriate intervention of the state, which covers deficit in pension systems. In the fifties of the 20th century, the Federal People's Republic of Yugoslavia (FPR Yugoslavia) spent 11.04% of its national income on social benefits, which do not include only allocations for pensions. Meanwhile, the countries in which the welfare state model was strongly promoted allocated for social benefits: Canada – 7.03%, Denmark – 9%, USA – 4.86%, Finland – 8.87%, Italy – 6, 36%, Netherlands – 8.41%, Great Britain – 11.26%, Switzerland – 4.10%. The FPR Yugoslavia had the largest allocations, but one must consider the large number of war-disabled soldiers and unsecured families of persons who lost their lives during the Second World War.[25] Professor Rakonjac Antić states that

> ...according to the data of the Federal Bureau of Statistics, the share of expenditures for pension disability insurance in the national product was 6.3%, in 1981 it was 6.8%, and in 1991 it increased to a worrying 13.7%, while according to data for 2004, this share increased to 14%.[26]

24 Law on Contributions for Compulsory Social Insurance, Article 44.
25 Lazarević and Vujošević, 1958, p. 22.
26 Antić, 2010, pp. 7 and 148.

Large allocations for the sustainability of pension systems remain observed today in the Netherlands, Italy, Greece, France, Sweden, and Germany, where more than 10% of GDP is allocated to pensions on an annual basis.[27] It is the result of numerous social changes, which affect the sustainability of pension systems. High unemployment rates, demographic changes and the increase in life expectancy are just some of the factors that cause a deficit in funds and require the intervention of the state. Until recently, 14% of GDP was allocated annually to the Republic of Serbia for the sustainability of the pension fund.[28] Most authors believe that the ideal proportion for the sustainability of a country's pension system is four employees who will pay contributions for pension and disability insurance per one pension beneficiary.[29] However, in most modern countries, the number of employees who support the number of existing pensioners is unsustainably small given the policy of full employment from the period of socialism and the possibility of early retirement during the period of the transition process.[30] A similar situation is observed in our country, where there are currently 1.4 insured persons for one pension beneficiary, with a tendency to further shift these proportions.[31] It is one of the main reasons certain budget funds are allocated for the sustainability of the social security system in the Republic of Serbia.

The social protection system is financed exclusively from budget funds, which is determined by the provisions of the Law on Social Protection. It is foreseen that social protection rights and services will be financed from the budget of the Republic of Serbia, namely, the right to cash social assistance, the right to an (increased) allowance for the assistance and care of another person, the right to a special monetary compensation, the right to assistance for training for work, family accommodation services, counselling and training services for foster and adoptive parents, residential accommodation services, housing services with the support of persons with

27 In the Netherlands, 13.6% of GDP is allocated; in Italy, 13.5%; in Greece, 12.7%; in France, 12.2%; in Sweden, 10.3%; and in Germany, 10.3%. The second group includes countries that set aside between 8% and 10% of GDP for the sustainability of pension systems: Spain (9.4%), the United Kingdom (8.9%), Poland (8.5%), New Zealand (8.2%). The third category includes countries that allocate between 3% and 7% – the United States of America (6.6%), Chile (6%), Japan (5.5%), Canada (4.8%), Australia (4. 6%), Argentina (3.6%), Turkey (3.3%). The fourth group includes countries that spend between 1% and 3% of GDP: China (2.6%), Brazil (2.4%), Egypt (2.3%), Tunisia (2.3%), Costa Rica (2.0%) and Singapore (1.4%). In the last group are countries, mostly developing countries, that allocate less than 1% of GDP for the sustainability of pension systems: Kenya (0.4%), Zambia (0.4%), Pakistan (0.3%), Mexico (0.3%) and Nigeria (0.0%). These data are from the 90s of the last century, though recent statistics indicate that there have been no major changes, but allocations for pensions given numerous demographic changes, especially the extension of the average life expectancy, are higher than before. See Arza and Johnson, 2006, pp. 64–65.

28 Antić, 2010, pp. 7 and 148.

29 Popović, 1999, pp. 19–20.

30 Perišić, 2014, p. 27.

31 In the FPR Yugoslavia in the 50s of the 20th century, five employees per pensioner paid contributions for mandatory social insurance. In the 1960s, the difference increased. Thus, that there were six employees for one pensioner. During the 80s, there was a sharp decline: two employees for one pensioner. Stojiljković and Devedžić, 2010, p. 183; Petrović-Stojanović, 2017.

disabilities, accommodation services for victims of human trafficking and the right to one-time assistance in the event of a large number of citizens at risk.[32] The budget of the Republic of Serbia also finances the work of centres for social work, institutions for home placement founded by the Republic of Serbia (i.e. the autonomous province), the Republic Institute for Social Protection, centres for family placement and adoption founded by the Republic of Serbia, institutions for the education of children and youth, the Chamber, and other institutions founded by the Republic of Serbia.[33]

5. Organisation and administration

In the Republic of Serbia, there is no single public service before which social security rights will be exercised. As is the case in Great Britain, social security rights are exercised before several funds are established separately for each branch of social security, as is the most common case in comparative law.[34] Therefore, health insurance rights will be exercised before the Republic Health Insurance Fund, while unemployment insurance rights will be exercised before the National Employment Service. Notably, in the Republic of Serbia, the National Employment Service is not only involved in the implementation of unemployment insurance but also performs tasks related to employment and the education of unemployed persons to make it easier for the unemployed to find suitable employment. In both bodies, the management bodies are the director and the board of directors. The Board of Directors of the Republic Fund for Health Insurance has seven members, four members are elected on the proposal of the Minister, one member is elected on the proposal of representatives of insured employees, one member is elected on the proposal of representative trade unions organised at the level of the Republic of Serbia, one member is elected on the proposal of representatives of insured pensioners and one member is elected on the proposal of the representative of insured farmers.[35] The Management Board of the National Employment Service has seven members, appointed and dismissed by the Government, with four members, including the president, appointed on the proposal of the minister responsible for employment affairs, while three members are appointed on the proposal of the Social and Economic Council of the Republic of Serbia.[36]

Rights from pension and disability insurance are exercised before the Republic Fund for Pension and Disability Insurance. As with the Republic Health Insurance Fund and the National Employment Service, the bodies of the Fund are also the director and the board of directors, which has seven members, appointed and dismissed by the Government of the Republic of Serbia. Four members of the Management Board

32 Law on Social Protection, Article 206 (1).
33 Law on Social Protection, Article 206 (2).
34 Lubarda, 2015, p. 466.
35 Law on Health Insurance, Article 242.
36 Law on Employment and Unemployment Insurance, Article 12 (3).

are appointed on the proposal of the minister responsible for pension and disability insurance and the minister responsible for finance, one member from among the insured is proposed by a representative trade union established at the level of the Republic of Serbia, one member from among employers is proposed by a representative association of employers established at the level of the Republic of Serbia, while one member is appointed from among the beneficiaries of rights, at the proposal of the association of pensioners established at the level of the Republic, which has the largest number of members in the country.[37]

Regarding the actual procedure for exercising rights, rights from pension and disability insurance are exercised from the day the request is submitted, and at the earliest six months before that day. These rights are exercised in the procedure provided for by the law regulating general administrative procedure; more precisely the Law on General Administrative Procedure from 2016.[38] The procedure is initiated at the request of the insured; that is, at the request of a family member, when it comes to exercising the right to a survivor pension.[39] Pursuant to the provisions of the Law on Pension and Disability Insurance, the Republic Fund for Pension and Disability Insurance is obliged to provide professional assistance to insured persons and beneficiaries.[40] It is also important to note that in the procedure for exercising rights from pension and disability insurance in the fund, a two-step process is ensured, and against the first-level decision, an appeal can be filed with the body designated by the fund's general act within 15 days from the date of receipt of the decision.[41] The second instance decision (i.e. the decision of the fund made following an appeal) is final and, against it, an administrative dispute can only be filed within 30 days before the Administrative Court.[42] The same rules apply in the case of violation of rights from health insurance and unemployment insurance and in the case of violation of rights from the social protection system. Thus, the Administrative Court of the Republic of Serbia is overloaded with a huge number of cases from the field of social security, and the idea of introducing special social courts or the possibility of establishing special departments at administrative courts that will be competent only for resolving disputes from social security insurance and social protection disputes should be reaffirmed. Our regulations stipulate that there is no two-tier system in administrative disputes, but the Law on Administrative Disputes stipulates that the Supreme Court of Cassation in a panel of three judges will decide on a request for review of a court decision against a decision of the Administrative Court.[43]

On exercising rights from social protection, certain differences are observed when starting the procedure for exercising rights from social security versus the

37 Law on Pension and Disability Insurance, Article 155.
38 Law on Pension and Disability Insurance, Article 84.
39 Law on Pension and Disability Insurance, Article 88 (1).
40 Law on Pension and Disability Insurance, Article 88 (2).
41 Law on Pension and Disability Insurance, Article 92 and Article 99 (1).
42 Law on Pension and Disability Insurance, Article 103.
43 Law on Administrative Disputes, Article 9.

procedure for exercising rights from social protection. The Law on Social Protection stipulates that the procedure for realising the right to financial social assistance, the right to an allowance for the assistance and care of another person and the right to an increased allowance for the assistance and care of another person is initiated based on a request, but it can also be initiated ex officio. Meanwhile, the procedure for exercising rights from social security, according to the provisions of the current law, can be initiated only based on the request of the insured.[44] According to the provisions of the Law on General Administrative Procedure, 'the procedure is initiated ex officio when it is determined by the regulation or when the authority determines or learns that, given the factual situation, it is necessary to protect the public interest'.[45]

6. Demographic challenges

In the Republic of Serbia and most European countries, an increase in the average life expectancy has been observed in recent decades. According to available statistics, the average life expectancy of a man in Serbia is 70 years, while the average life expectancy of a woman is 75.6 years.[46] The noted changes directly affect the functioning of the social security system of Serbia. Thus, to maintain this system, the legislator often decides to resort to changes in the regulations on social security. Most often, the regulations on pension and disability insurance are amended to ensure the smooth operation of the Republic Fund for Pension and Disability Insurance, which continues to operate on a pay-as-you-go basis.

In the largest number of pension systems, the conditions for exercising the right to social benefits, provided within the pension and disability insurance system, have been tightened in recent decades. In particular, the tightening of the conditions related to the years of life of the insured aims to ensure the sustainability of pension funds given constant demographic changes, as reflected in the constant increase in the life expectancy of beneficiaries of old-age pensions. It is noticeable that in European countries with a high standard of living and a significantly better healthcare system, the conditions for acquiring the right to an old-age pension are constantly being raised to financially maintain the pension funds, which have increasing expenses every year given the increased number of old-age pension beneficiaries. As Professor Yves Jorens claims,

44 Law on Social Protection, Article 95 (1); Law on Pension and Disability Insurance, Article 68 (1).

45 Law on Administrative Procedure, Article 90 (2). It is interesting that certain regulations from the period of the FPR Yugoslavia provided that the Social Insurance Institute could initiate proceedings *ex officio* when the death of the insured occurred as a result of an accident at work to ensure the payment of a survivor pension to the family members of the deceased insured. Cota and Popović, 1958, p. 299.

46 Notably, the average life expectancy has decreased in the previous two years given the COVID-19 pandemic. Before the beginning of the pandemic, the average life expectancy in Serbia for men (women) was 73.1 (78.3) years.

> ...at the beginning of the sixties of the twentieth century, the average duration of human life was 68 years, of which approximately half of that life was spent in a working relationship, but with the beginning of the XXI century, the situation changed drastically, and today the average duration of human life is almost 80 years, so a person spends less than half of his life in a working relationship, approximately 38 years.[47]

The Professor believes we will soon find ourselves in a situation where human life is divided into three almost equal parts: one part of life will be spent in education, another in work, and the third will be spent in retirement.[48] In that study, a problem that will certainly appear in the future is pointed out, which is the excessive number of beneficiaries of old-age pensions due to the extension of the life expectancy of the population, which is primarily the result of better living conditions and the progress of medicine and science.

The EU is particularly facing the global phenomenon of demographic changes in the ageing of the population, and if the currently established growth continues, by 2030, the total percentage of elderly people, between the ages of 65 and 79, will amount to 37% of the entire population in the EU, which will especially affect the sustainability of the pension systems of the Member States.[49] Special studies have been prepared on the topic of demographic ageing of the population and the impact of ageing on existing pension systems. Demographic data also indicate that Europe is ageing much faster than other continents and regions of the world and that, of the 25 countries with the oldest population worldwide, 24 countries are from Europe.[50] However, even among EU countries, there are systemic differences in the approach to the problems of the ageing population, and there is no single concept of protection, especially given that building a system and providing care for the elderly is the responsibility and obligation of each Member State.[51] Despite the developed social security system, there remain people who are not covered by that form of security. Therefore, the integration of the elderly into society is necessary, which requires adequate income in old age such that the elderly can meet different types of needs.

Notably, many EU Member States have decided to gradually equalise the conditions regarding the years of life for male and female insured persons, and the condition for exercising the right to an old-age pension is 65 years of age.[52] Although the

47 Jorens, 2002, p. 10.
48 Ibid.
49 Meenan, 2008, pp. 10–11. The average life expectancy is increasing worldwide. It is predicted that from 2010 to 2030, the number of people over 65 (85) in England will increase by 51% (101%). Blackham, 2016, p. 1.
50 The Republic of Serbia is in a high fourth place. Drča, 2010, p. 42.
51 Ibid., pp. 44 and 47.
52 The age requirement is equal for female and male insured persons in the following EU Member States: Belgium, Czech Republic, Denmark, Finland, Greece, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Slovakia, Slovenia, Spain, Sweden. The data is taken from: OECD, 2021, p. 131.

Convention of the ILO No. 102 on Social Security (minimum standards) stipulates that the prescribed age limit for exercising the right to an old-age pension cannot exceed 65 years, the competent authorities are left with the possibility to set a higher age limit considering the working capacity of older persons in the specific country.[53] In the last few years, some countries, mostly more developed ones, have decided to raise the age limit from 65 to 67 years of life, bearing in mind that in those systems the average life span has been extended and that people in their sixties are in much better health condition than in previous years and can, therefore, generally continue to earn income based on work.[54]

However, for the basic topic of this research, it is vital to determine the perspectives and predictions in the Republic of Serbia regarding the constant increase in the number of elderly people, even though the standard of living, as well as the average length of life, remain significantly lower than in the Member States of the UE.[55] Statistical data show that the population of the Republic of Serbia is among the oldest worldwide. At the time of the 2002 census, the average age of the population was 40.3 years, and approximately 1,250,000 people were over 65 years old. The unfavourable trend continued in the first years of the second decade of the twenty-first century, and according to estimates from 2010, the share of young people under the age of 14 in the total population was 15%, and those over 65 increased to 17%. In that population category, almost every fourth person is over 80 years old, which indicates a progressive ageing of the elderly population.[56]

As stated in the introductory part, with the aim of sustainability of pension systems, there are often changes in the regulations on pension and disability insurance, and in terms of tightening the conditions for exercising the right to an old-age pension. In general, the Law on Pension and Disability Insurance of the Republic of Serbia regulates the rights provided in the event of the realisation of social risks of old age, disability, death of family breadwinner, physical damage, and loss of autonomy. The insured will exercise the right to retirement, which is provided within the framework of the pension and disability insurance system, if he has fulfilled the conditions provided for in this regulation. The stated conditions in most cases refer

53 Social Security (Minimum Standards) Convention No. 102, Article 26 (1 and 2).

54 In Iceland and Norway, based on current regulations, the age of life, as a condition for old-age pension for male and female insured persons is 67 years. It can also be seen that some countries in the region have also decided on this solution, but the age limit will gradually increase to 67 years of age. Thus, the Law on Pension and Disability Insurance of Montenegro stipulates that from 2025 the condition for exercising the right to an old-age pension will be 67 years of age for male insured persons, and, from 2041, the same condition will apply to female insured persons. It is realistic to expect that the conditions will be changed again in the Republic of Serbia in some future amendments and additions to the Law on Pension and Disability Insurance, bearing in mind the problems faced by the Republic Fund for Pension and Disability Insurance when paying pensions. OECD, 2021, p. 131; Montenegro Law on Pension and Disability Insurance, Article 17 (1), and Article 197đ.

55 Radivojević, 2012, p. 66.

56 Ibid.

to years of life and previous insurance experience, for which contributions were paid to the insured. Holders of the right to benefits are mostly insured persons or family members of the deceased insured person when it comes to exercising the right to a survivor pension.

Although the right to social benefits should be exercised without discrimination and under equal conditions, regardless of the personal characteristics of the insured, the theory represents the idea of tolerating discrimination regarding the years of life of women insured when acquiring the right to old-age and survivor pensions for widows.[57] It considers that women spend much time in the house, take care of the family and housework, work with little pay, are often absent from work due to maternity and child care, and accept work in the grey economy much more often than men.[58] Notably, the adopted international standards also tolerate this difference between men and women in terms of years of life for exercising the right to an old-age pension, and Recommendation No. 67 of the ILO also overlooks that the age for exercising the right to an old-age pension for men (women) should not exceed 65 (60) years.[59]

However, in the national system of pension and disability insurance, the legislator decided to equalise the years of the life of men and women when prescribing new conditions for exercising the right to an old-age pension, which was introduced by amendments to the Law on Pension and Disability Insurance from 2014, yielding the conclusion that the European model of life expectancy equalisation is accepted in Serbia. Current legal regulations on pension and disability insurance provide that the right to a full old-age pension will be exercised by an insured person who has reached the age of 65, with a minimum of 15 years of insurance experience or 45 years of insurance experience, regardless of age.[60] The gradual equalisation of conditions began on 1 January 2015, when the requirement for old-age pension increased by 6 months each year and by two months from 2020 to equalise the conditions by 2032, which refer to the years of life of male and female insured persons.[61] Notably, before the adopted amendments to the Law on Pension and Disability Insurance in July 2014, as an alternative condition for exercising the right to a full old-age pension, for many years, the possibility was provided that a male insured person who had completed 40 years of insurance obtains the right to an old-age pension on reaching the age of 60, while more favourable conditions have always been provided for female insured persons, considering the duties that women perform in the household. Thus, the right to an old-age pension could be obtained at the age of 58 and 38 years of insurance experience. That condition has been abolished; today, with similarly set conditions (i.e. 60 years of age and 40 years of previous insurance experience), the insured can only exercise the right to an early old-age

57 Pieters, 2006, p. 48.
58 Servais, 2013, p. 80.
59 Ibid.
60 Law on Pension and Disability Insurance, Article 19.
61 Law on Pension and Disability Insurance, Article 19a.

pension, where a permanent reduction of the pension amount by 0.34% is foreseen for each month before reaching 65 years of age.[62] Therefore, the question arises as to whether the Republic of Serbia can face demographic changes and whether this is the right way for the sustainability of the pension system. Hence, it should be noted that the Republic of Serbia did not accept the three-pillar model of the World Bank, which is accepted in many European countries, although this idea was considered at the beginning of this century, and is foreseen with mandatory pension and disability insurance and the possibility of contracting voluntary pension and disability insurance.

Finally, despite the narrowed competence regarding social policy measures, European officials often raise the question of the sustainability of pension systems and the constant demographic changes taking place in Europe, which represents a special challenge for the community in the coming period. One of the conclusions of the Stockholm European Council on the issue of demographic changes and the sustainability of the pension system and, in this area, the application of the increasingly popular Open Method of Coordination, was proposed, which, however, did not bring satisfactory results.[63] Further, the European Commission, after consultation with the Committee for Social Protection of the European Union and the Committee for Economic Policy, proposed joint goals in the implementation of appropriate pension measures. Thus, it is also mandated to ensure decent basic living standards for the elderly and prevent poverty and social exclusion.[64]

The Committee for Social Protection of the European Union, based on the submitted reports of the Member States of the community, issued a special report, in which the issue of the sustainability of pension systems is addressed, and the Member States previously agreed on 10 common goals for future pension reforms: 1. Sustainability of a more appropriate pension amount; 2. Ensuring intergenerational equity; 3. Maintaining the idea of solidarity within pension systems; 4. Maintaining a balance between rights and obligations; 5. Ensuring that pension systems support equality between men and women; 6. Ensuring transparency and predictability; 7. Ensuring that pension systems are even more flexible in light of constant social changes; 8. Facilitating the adaptability of the labour market; 9. Ensuring the consistency of pension schemes in general pension systems; and 10. Ensuring the sustainability of public finances.[65] However, it seems that those strategies and proposals of the competent authorities of the European Union remain a dead letter and that the open method of coordination does not produce the expected results. Even so, some of the proposed measures should be considered in the Republic of Serbia to ensure the best possible way for the further sustainability of pension systems.

62 Law on Pension and Disability Insurance, Article 70a.
63 Jacob, 2002, pp. 40-41.
64 Ibid.
65 Fuchs, 2002, p. 63.

7. Actions—Amendment of the law

In general, the regulations of the Republic of Serbia governing the social security system can be evaluated positively. As stated in the research, in the last 20 years, new laws have been adopted that regulate rights from social insurance and social protection. It is indisputable that there is room for further improvement of the regulations, and per the standards of the EU, especially the Council of Europe, an organisation of which Serbia has been a Member State for two decades. In this regard, it would be appropriate for the Republic of Serbia to ratify the European Code of Social Security from 1964 and the European Convention on Social and Medical Assistance from 1953 as soon as possible. This would undoubtedly improve the social security system, which is governed by the aforementioned standards.

Moreover, attention should be paid to redefining social rights as part of some future amendments to the Constitution of the Republic of Serbia, as the existing articles of the Constitution guaranteeing the aforementioned rights are quite imprecise and, therefore, do not represent a suitable basis for the further development of the Social Security System. This refers in particular to Article 69, which guarantees the right to social protection, instead of the right to social security, and Article 70, which is dedicated to pension insurance.

Although there was no space in the paper for a detailed analysis of social insurance regulations, the adoption of the new Law on Health Insurance and the new Law on Healthcare has improved the healthcare system in our law. The same is true with the unemployment insurance system, which is increasingly oriented toward work orientation, instead of orientation toward social security, because, as Professor Šunderic states,

> ...unemployment rights should not demotivate in relation to work and monetary compensation is not permanent, but a time-limited right for the period until a vacancy is offered on the labour market or until conditions are created for the insured to switch to another form of protection.[66]

The unlimited duration of the benefit would lead to a situation where users neglect the obligation to actively seek employment and rely on benefits provided by the state. Moreover, we should persevere in implementing the idea of forming a new branch of social insurance in case of injury at work, as is the case in many Member States of the EU.

The most open questions remain with pension and disability insurance, where, unlike other branches of insurance, conditions are most often changed, that is, tightened, all with the aim of sustainability of pension systems. Therefore, the re-establishment of the second and third degrees of disability, which have not been

66 Šunderić, 2009, p. 160.

foreseen in our regulations since the adoption of the Law on Pension and Disability Insurance in 2003, should be considered. It is also necessary to review the overly strict conditions, especially those related to the previous insurance period of 40 years of service, which are foreseen for exercising the right to an early old-age pension and which prevent many insured persons from exercising this right. Regarding the sustainability of pension systems, instead of constantly tightening the conditions for the old-age pension, the noted report of the Committee for Social Protection of the European Union should be considered to find an alternative model, instead of strictly tightening the conditions for the old-age pension and other benefits, which are provided within the Pension and Disability Insurance System. The appropriate proposals are those related to the sustainability of the appropriate amount of pension, which would ensure an adequate level of social security, ensure intergenerational fairness, maintain the idea of solidarity within the pension system, and maintain a balance between rights and obligations. Bearing in mind that the Republic of Serbia aspires to membership in the EU, it would be good to harmonise the goals related to the sustainability of pension systems, which, as observed in the paper, are quite affected by demographic changes, and, therefore, is necessary to reform them in due course, but by no means to the detriment of the insurer and beneficiary.

8. Closing remarks

Indeed, further reforms of the social security system of the Republic of Serbia are necessary. It is important to continue with changes in the regulations but in such a way that the new regulations benefit the insured; that is, the beneficiaries. It is indisputable that demographic changes have a great impact on modern social security systems, but it is also important not to forget that the purpose of social law is to provide for persons in a state of social risk; that is, in a state of social need and for whom help is necessary. With frequent changes in the regulations, we come to a situation where many insured persons have certain problems when exercising basic rights from social insurance, especially rights from pension and disability insurance, and they cannot be provided with the appropriate minimum of social security through them.

Furthermore, the Republic of Serbia ratified the Revised European Social Charter of the Council of Europe in 2009 and, thereby, assumed obligations related to the improvement of the social security system and the social and healthcare system. Based on the analysis of compliance of our regulations with the provisions of the Charter, it seems that it is still necessary to work on the improvement of domestic regulations on social insurance to provide help through the social security system to all those who need it and when a certain social risk is realised.

Finally, the Republic of Serbia has provided a favourable normative framework regarding the social security system. Beyond the basic laws, which regulate basic rights from social insurance and social protection, special laws were also adopted, such as the Law on Professional Rehabilitation and Employment of Persons with

Disabilities and the Law on Financial Support for Families with Children through which are also accepted obligations arising from the ratification of the Revised European Social Charter. However, it is important to apply the regulations in practice to ensure legal certainty for all insured persons and beneficiaries of rights. The above is an important segment because it would fulfil the goals proclaimed in the Revised European Social Charter, which refers to raising the social security system to a higher level, undoubtedly contributing to helping the Republic of Serbia to join the EU.

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| Chapter 9 |

Slovakia: Seeking New Approaches to the Sustainability of the Social System in the Impact of Demographic Challenges

Marcel DOLOBÁČ

ABSTRACT

This study describes the theoretical perspectives on social security law and its purpose and meaning. It then presents a concrete comparison of the quality of the legal regulation of social security law in Slovakia with the European Social Charter (revised). The main part of the work deals with specific national legislation that responds to the demographic challenges of society. In 2023, a parental pension was introduced into the social security system to ensure the direct involvement of children in the social status of their parents. In the conclusion, the author reflects on the future direction of the protection of social rights in the legislation.

KEYWORDS

social security law, Slovakia, European Social Charter (Revised), parental pension

1. Social security law in the law system of the Slovak republic

Legal scholarship offers several definitions of social security law. Several from college textbooks can be cited. Koldinská sees social security law as a set of legal norms that implement the rights formulated primarily in Articles 30 to 32 of the Charter of Fundamental Rights and Freedoms and respond to legally recognised social situations, which constitutes a system of social protection.[1] Matlák stresses that social security law acts as a separate legal branch but is the subject of pedagogical and scientific approaches, constituting scientific and pedagogical disciplines. He further states that social security law constitutes a set of legal norms regulating social, collective, and individual relations arising in social security and the application or implementation of social policy and social partnership of individual subjects of the social sphere.[2] Galvas and Gregorova consider social security law to be a set of legal norms that regulate the

1 Koldinská, 2022, p. 5.
2 Matlák, 2012, p. 42.

Dolobáč, M. (2023) 'Slovakia: Seeking New Approaches to the Sustainability of the Social System in the Impact of Demographic Challenges' in Jakab, N. (ed.) *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 179–198. https://doi.org/10.54171/2023.nj.sotsss_9

behaviour of subjects in social relations arising in the provision of material security or other assistance to citizens who, given social events accepted by law, need such benefits or assistance.[3] The variations in the definitions do not change the general recognition that social security law is a separate branch of law, with its own content and subject matter. The theoretical definition of any branch of law is always a sketch by which the author draws insight and a strict definition of the essential characteristics of that branch. As long as it is logically justified, it may also be considered correct. There is, thus, no objection to the multiplicity of definitions.

From an etymological perspective, social security law is associated with two basic concepts: social and security. These two words can form the skeleton of the definition of the meaning, purpose, or objective of social security law. The purpose is to create a legal environment to prevent adverse social situations as far as possible and, in the event of a social event, provide legal instruments to remedy the negative situation or eliminate the adverse consequences. Alternatively, it aims to preserve human dignity when a social event occurs. However, social security law is also intended to motivate and provide legal instruments for the integration of individuals into society. Thus, if we are to attach our own definition, let it be simple. Social security law is a system of legal norms designed to ensure human dignity in the face of an adverse social event.

Regarding the integration of social security law into the legal system, one can agree with the views[4] that, by its nature, it is primarily a public law branch, with administrative law being the closest (especially in procedural norms) and similarities can also be found with financial law (the nature of insurance premiums in the social insurance system is similar to the tax system). Meanwhile, many private law elements can also be found in social security law (e.g. private law contracts concluded between the provider and the recipient of certain social or health services). We would add to these considerations that social security law has a special relationship with labour law, with several overlaps. There is a particular correlation in the protection of employees caring for children. The basic code of labour law provides these employees (and other groups) with special care and legal protection (e.g. interruptions at work, maternity leave, and paternity leave), which is supplemented by the financial security provided by the standards of social security law.

2. Constitutional anchorage of social security law

Social security law is characterised by the fragmentation of national legislation. The legislation governing individual social security benefits is based on international obligations (see below) and the constitutional anchoring of social security law. The right to social security and social assistance are constitutional rights. The Constitution of

3 Galvas and Gregorová, 2000, p. 13.
4 Koldinská, 2022, p. 6.

the Slovak Republic[5] states in Article 1 that the Slovak Republic is a democratic state governed by the rule of law, whose economy, as it follows from its Article 55, is based on the principles of a socially and ecologically oriented market economy. These principles are translated into the second title, the fifth section of the Constitution, which regulates economic, social, and cultural rights. We will highlight a few of them as follows:[6]

> Citizens have the right to work. The State shall, to the extent appropriate, provide material security for citizens who, through no fault of their own, are unable to exercise this right.[7] Citizens have the right to adequate material security in old age and in the event of incapacity for work, as well as in the event of the loss of the breadwinner.[8] Adequate material security in old age is provided through a pay-as-you-go pension scheme and a retirement savings scheme. The State encourages voluntary savings for retirement.[9] Once a person has reached the stipulated age of participation in an adequate old-age material security scheme, he or she is entitled to adequate old-age material security. A person who has completed a specified number of years of service after reaching a specified period of participation in the old-age material security scheme may also be covered by the old-age material security scheme.[10] The inability to engage in gainful employment on account of long-term care for a child during the statutory period after the child's birth must not adversely affect adequate material security in old age.[11] Everyone has the right to decide that part of the tax paid or part of the payment made in connection with participation in a scheme of adequate material security in old age shall be given to the person who brought him up and to whom the material security in old age is provided. The exercise of the right under the first sentence shall not adversely affect adequate material security in old age.[12] Everyone in material need has the right to such assistance as is necessary to ensure basic living conditions.[13]

It is characteristic of the social rights referred to in Article 39 that they are exercised within a legal framework. The details for the real fulfilment of constitutional rights are, thus, provided by the network of legal provisions regulating individual entitlements under the social security system.

5 Constitution of the Slovak Republic – Constitutional Act No. 460/1992 Coll., hereinafter referred to as the Constitution.
6 A closer analysis of the individual rights, in particular Article 39(6) of the Constitution, which guarantees the constitutional right to social assistance, and in particular the most recently added Article 39(5) of the Constitution, is set out below.
7 Article 35(3) of the Constitution.
8 Article 39(1) of the Constitution.
9 Article 39(2) of the Constitution.
10 Article 39(3) of the Constitution.
11 Article 39(4) of the Constitution.
12 Article 39(5) of the Constitution.
13 Article 39(6) of the Constitution.

The enshrinement of social rights in the Constitution is standard in all European countries. Relative to the social rights enshrined in the Constitution of the Slovak Republic, it should first be noted that the adoption of the Constitution materially incorporated the Charter of Fundamental Rights and Freedoms into the text of the Constitution. The protection of human rights and fundamental freedoms based on their natural-law understanding has, thus, reached, at least, the level of the current international standard. The text of the constitutional regulation of fundamental rights and freedoms contained in the Charter is comparable, but not identical, to the text of the constitutional regulation of fundamental rights and freedoms contained in Title II of the Constitution.[14] Successive additions to the Constitution have increasingly diverged its text from the Charter of Fundamental Rights and Freedoms. It is particularly true of social rights, which does not, of course, mean the loss or constitutional restriction of the right to social security and social assistance. However, the legislature is clarifying and progressively making these rights more specific in the Constitution.

Reading the text of the Constitution, which enshrines selected social rights, one can rightly get the impression that the content of constitutional social rights is specific, especially if we consider that social rights are exercised to the extent that they are enshrined in the law. By comparison, the Charter of Fundamental Rights and Freedoms states quite generally that citizens have the right to adequate material security in old age and in the event of incapacity for work and the loss of a breadwinner. Anyone in material need has the right to such assistance, which is necessary to ensure basic living conditions.[15] This gives the legislator a fairly wide margin of discretion as to the material and personal scope of the social system in providing for the social events in which natural persons find themselves.

The concretisation of the constitutional text finds a positive response. It increases the degree of legal certainty regarding the protection guaranteed to beneficiaries (specifically in old age) by the Constitution. Even constitutional lawyers have gone further and stated that it cannot be ruled out that the Slovak Constitution will be the first or among the first to introduce a certain regulation, which will then be adopted by other states, with the result that the usual standard of comparative constitutional law will be born in Slovakia.[16] However, over-specification of the text (many times

14 Additionally, originally the Charter of Fundamental Rights and Freedoms was contained in a separate constitutional document, namely the Constitutional Act of the Federal Assembly of the Czechoslovak Federal Republic No. 23/1991 Coll., which introduced the Charter of Fundamental Rights and Freedoms as a constitutional act of the Federal Assembly of the Czech and Slovak Federative Republic. This constitutional document is still valid for the Slovak Republic. From a formal perspective, the Slovak Republic still has a duplicate national constitutional regulation of the institute of fundamental rights and freedoms, contained both directly in the Constitution of the Slovak Republic (Title II) and in the Charter of Fundamental Rights and Freedoms. See Orosz, 2010, pp. 151–152.

15 Article 30(1) and (2) of the Charter.

16 Drgonec, 2012, p. 780. One can agree with the above considerations, but paradoxically they are linked to the specification of a constitutional text that has since been repealed.

given political efforts to enforce what is essentially a statutory regulation) also results in frequent amendments, which results in a loss of legal certainty. An example is the attempt to cap the maximum age for old-age pensions. Until 1 January 2021, Article 39(3) of the Constitution stipulated that the age of entitlement to adequate material security in old age must not exceed 64 years. Further, to promote family and maternity in the State, anyone who has brought up a child is entitled to an appropriate reduction of the maximum age for entitlement to adequate old-age material security. Despite the constitutional enshrinement, the provision in question proved unsustainable and was eventually repealed or amended in the Constitution (more below on parental pension).

3. Categorisation and classification of social security law

Social security law is characterised by an extraordinary multiplicity of legal rules of different legal forces. Despite the fragmented legal framework (see below), social security law can be divided into three main blocks: the insurance system, the state social support system, and the social assistance system.

3.1. Insurance system

The insurance system is the main pillar of social security law, covering most social events. It is a contributory system, meaning that statutory persons such as the employer, the employee, and the state are obliged to pay for insurance that protects the insured person (not necessarily the premium payer) against the negative consequences of a social event. The insurance system can be divided into the health and social insurance systems. The basic legislation enshrining the social insurance system is the Social Insurance Act,[17] which regulates the five subsystems of social insurance: sickness, pension, accident, guarantee, and unemployment insurance.

Beyond the principle of social justice, the social insurance system should also reflect the principle of merit, fulfilling an economic, motivational, and educational function. The meritocracy of the insurance system is not absolute and is balanced quite strongly by the principle of solidarity, which is reflected, for example, in the maximum amount of benefits in the calculation of the amount of the benefit (e.g. also of the old-age pension), where the formulas are set up to favour low-income groups at the expense of higher earners (and, therefore also of contributors).

3.2. State social support system

The state social support system is financed from general tax resources, through benefits paid from the state budget. Unlike the insurance system, no contributions—insurance premiums—are required. Unlike social assistance, the state social

17 Act No. 461/2003 Coll. on Social Insurance, as amended.

assistance system is characterised by equal benefits (security) for all beneficiaries who experience a social event. It is true, however, that certain benefits are subject to income limits or are conditional on the absence of other income (e.g. parental allowance).[18]

The individual benefits of state social support are primarily aimed at creating support for family policy. Examples of benefits from the state social support system include childbirth allowance, allowance for multiple children born at the same time, parental allowance, maintenance allowance, and child care allowance. Without analysing the individual benefits in detail, it can only be reiterated that these benefits are aimed at supporting the family and childcare. Notably, this is not the only objective of State social assistance, as its benefits may also include a funeral allowance. In recent years, state policy to support families has shifted from the state social support system to tax law, with the legislature extending a tax bonus to parents caring for dependent children.

3.3. Social assistance system

The social assistance system is the last safety net, a system designed to protect people in critical existential situations and ensure a minimum level of human dignity. It is a subsidiary system and should only come into play when the recipient of social assistance cannot help himself or herself or is not assisted by other social security systems.

The legislative definition of social service corresponds to the above purpose,[19] which is understood as a professional activity, service activity, other activity, or a set of these activities to prevent an adverse social situation, resolve an adverse social situation, or alleviate an adverse social situation of a natural person, family, or community; preserve, restore, or develop a person's ability to lead an independent life and supporting their integration into society; ensure the necessary conditions for meeting the basic needs of life of a natural person; solve the crisis social situation of a natural person and family; prevent social exclusion of individuals and families; and provide childcare because of a family situation that requires help with childcare.

As it follows from the quoted legislative text, the Social Services Act aims to promote the social inclusion of citizens and meet the social needs of people in unfavourable social situations. Decentralisation is typical of social services. It is right that the legislator transfers part of its responsibility for social policy to higher territorial units and municipalities while creating room for the penetration of private-law elements into the sphere of social services, which means an increase in the flexibility and effectiveness of the assistance provided.

18 Matlák, 2012, p. 45.

19 Article 2 (1) of Act No. 448/2008 Coll. on social services in and on amendment and supplementation of Act No. 455/1991 Coll. on trade business (Trade Licensing Act), as amended.

4. International bases of social security law

The issue of social security is the subject of several international documents and treaties. Among the most relevant are ILO Convention No. 102 concerning Minimum Standards of Social Security, 1952;[20] ILO Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits, 1967;[21] and the International Covenant on Economic, Social and Cultural Rights (UN), 1966. Of the regional international treaties, the most important are the European Social Charter of 1961,[22] the Additional Protocol to the European Social Charter[23] and, the most recent document, the European Social Charter (Revised) of 1996.[24]

The ratification of the revised version of the European Social Charter marks a significant shift in the protection of individual social rights.[25] The President of the Slovak Republic ratified the Charter on 20 March 2009, and the instrument of ratification was deposited with the Depositary of the Charter, the Secretary General of the Council of Europe, on 23 April 2009. As per Article 7(5) of the Constitution of the Slovak Republic, it is an international treaty which takes precedence over laws.

The revised European Social Charter is a kind of European code of social rights. From the whole catalogue of rights, the Revised European Social Charter, in Articles 12 and 13, enshrines the right to social security and social assistance and, in Article 30, recognises the right of everyone to protection against poverty and social exclusion. Thus, to ensure the effective exercise of the right to protection from poverty and social exclusion, the Parties undertake to take measures within the framework of a general and coordinated increase in practices to promote effective access to persons living in a situation of social exclusion or poverty or at risk of such a situation and their families, in particular access to employment, housing, vocational education and training, education, culture, and social and medical assistance. State signatories are also obliged to review these measures to adjust them if necessary.

Additionally, the Slovak Republic has not ratified these provisions of the Charter: Article 13(4) (right to social and medical assistance for nationals of other contracting parties per the obligations under the European Convention on Social and Medical Assistance signed in Paris on 11 December 1953); Article 15(3) (to promote the full

20 Notification of the Federal Ministry of Foreign Affairs No. 461/1991 Coll. on the Negotiation of the Convention on the Minimum Standard of Social Security (No. 102).
21 Notification of the Federal Ministry of Foreign Affairs No. 416/1991 Coll. on the negotiation of the Convention on Invalidity, Old-Age and Survivors' Benefits (No. 128).
22 Ministry of Foreign Affairs of the Slovak Republic Notice No. 329/1998 Coll. on the European Social Charter.
23 Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 330/1998 Coll. on the Additional Protocol to the European Social Charter.
24 Communication of the Ministry of Foreign Affairs of the Slovak Republic No. 273/2009 Coll., European Social Charter (revised).
25 On selected provisions of the revised European Charter; see also Barinková, 2008, pp. 194–202.

social integration of persons with disabilities, in particular through measures, including technical assistance, to overcome communication and mobility barriers and enable them to access transport, housing, cultural activities, and leisure time); Article 18(3) (relax the right to work rules for individuals and groups governing the employment of foreign workers); Article 19(2), (3), (4)(c), (8), (10) and (12) (limitation of the right of migrant workers and their families to protection and assistance); and Article 31(1), (2) and (3) (right to housing).

4.1. Monitoring mechanism for compliance with the Revised European Social Charter

As with other international treaties, the European Social Charter (Revised) creates an international system for monitoring its implementation by States Parties. The monitoring mechanism is not based on the right of individual complaint, as provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms, but has been entrusted to four European monitoring bodies and is based on biennial reports, of which the States Parties are obliged to submit to the Council of Europe. The Slovak Republic last submitted a report at the end of 2021[26] and the European Committee on Social Rights submitted a report in March 2023.[27] Notable, the rights under review were in the field of labour law, not social security law.[28] In 2023, the European Committee on Social Rights will assess compliance with selected articles of the European Social Charter (revised) in the areas of children's rights, family rights, and migrants' rights.

Regarding social security law, the 11th report,[29] submitted on 27/11/2020, concerns the accepted provisions on the thematic group 'Health, social security and social protection'.[30] Conclusions on these provisions have been published in March 2022. Here again, the European Choice for Social Rights has assessed the inadequacy of the legislation in several areas.

Situations of non-conformity 'Health, social security and social protection' include the following: Article 3§2 – Right to safe and healthy working conditions – Safety and health regulations: it has not been established that self-employed and

26 The deadline was 31.12.2021; the report was submitted on 7.2.2022.

27 The function of the European Committee of Social Rights is to rule on the conformity of the situation in States with the European Social Charter. In respect of national reports, it adopts conclusions; in respect of collective complaints, it adopts decisions.

28 The conclusions regarding the Slovak Republic concern 23 situations as follows: – 10 conclusions of conformity: Articles 2§2, 2§3, 2§4, 2§6, 2§7, 4§2, 6§2, 6§3, 21, and 22; – Seven conclusions of non-conformity: Articles 2§5, 4§4, 4§5, 6§4, 26§1, 26§2, and 28. Regarding the other six situations related to Articles 2§1, 4§1, 4§3, 5, 6§1, and 29, the Committee needs further information to examine the situation. The Committee considers that the absence of the information requested amounts to a breach of the reporting obligation entered into by the Slovak Republic under the Revised Charter. See Report of the European Comittee of Social Rights. Conlusion 2022 [Online]. Available at: https://rm.coe.int/conclusions-2022-slovak-republic-e/1680aa9874 (Accessed: 19 July 2023).

29 Ministry of Labour, Social Affairs and Family of the Slovak Republic, 2021.

30 Articles 3, 11, 12, 13, 14, 23 and 30.

domestic workers are protected by occupational health and safety regulations; consultation with employers' and workers' organisations is ensured. Article 11§1 – Right to protection of health – Removal of the causes of ill-health: Insufficient measures have been taken to reduce the number of premature deaths. Article 11§3 – Right to protection of health – Prevention of diseases and accidents: it has not been established that adequate measures were taken to overcome environmental pollution; efficient immunisation and epidemiological monitoring programmes are in place. Article 12§1 – Right to social security – Existence of a social security system: the amount of sickness benefit can be reduced on discriminatory grounds. Article 12§4 – Right to social security – Social security of persons moving between states: it has not been established that the right to maintenance of accruing rights is guaranteed to nationals of all other States Parties. Article 13§1 – Right to social security – Right for every person in need of adequate assistance: the level of social assistance paid to a single person without resources is not adequate. Article 23 – Right of the elderly to social protection: the level of the minimum old age pension is inadequate; the amount of social assistance is inadequate where the person has no other resources.[31]

Although the list of shortcomings seems excessive, the Slovak Republic is not out of the average in this respect. The European Committee on Social Rights' observation of shortcomings in the observance of the Revised European Social Charter is not unique, even in the cases of other countries, and it is not, a priori, a finding of non-observance of fundamental rights and freedoms. The monitoring mechanism is intended to strengthen and improve the protection of human rights, including social rights. In the meantime, the Slovak Republic has adopted several measures within the framework of social policy aimed at eliminating the alleged shortcomings. Examples include the adoption of several laws and regulations on minimum safety and health requirements at work, covering most of the relevant risks (i.e. those related to health protection at work with ionising radiations, carcinogens, biological and chemical agents, asbestos, noise and vibrations), and minimum safety and health requirements for the use of work equipment and the manual handling of loads at work.

The European Social Charter (Revised) is an international convention on human rights and freedoms that takes precedence over the law under the Constitution.[32] The control of compliance with its provisions should, thus, be the task of the control mechanisms established by the Council of Europe and the Constitutional Court of the Slovak Republic.[33] In this context, however, it should be stressed that this is a theoretical starting point. The European Social Charter (Revised) does not have a system of

31 Council of Europe, 2023, p. 67.

32 'International treaties on human rights and fundamental freedoms, international treaties for the implementation of which no law is required, and international treaties which directly create rights or obligations of natural persons or legal entities and which have been ratified and promulgated in the manner prescribed by law shall prevail over laws'.

33 Hereinafter referred to as the 'Constitutional Court'.

individual complaints, and perhaps that is why there is no constitutional case law on its provisions. Ultimately, it means that natural persons and legal entities who bring complaints to the Constitutional Court for breach of fundamental rights are not alleging a breach of the rights enshrined in the European Social Charter (as opposed to the rights enshrined in the Charter of Fundamental Rights and Fundamental Freedoms and the European Convention for the Protection of Human Rights and Fundamental Freedoms). Finally, the Constitutional Court has ruled on the compatibility of laws with the European Social Charter on only two occasions, neither of which it has upheld. Interestingly, in one case, when assessing the compatibility of a social assistance law, the Constitutional Court found a conflict with the Constitution but not with the European Social Charter (more on this below).[34]

5. Demographic challenges

Social security law is specific in that it covers social events that occur to individuals, and legislation must consider the overall social policy, social protection, and challenges of society as a whole. The scope of the provision of social security and social services is historically and economically determined. The social safety net in any given country is determined by political, economic, and, as a direct consequence, legislative conditions. Given the noted social conditions, it is the legislation of social security and social assistance that particularly comes to the forefront of political interest. Speaking of crises, in the long term, one of the greatest challenges is undoubtedly to deal with the demographic crisis, which is defined by low birth rates and an ageing population.

Although the average life expectancy is increasing for men and women, the total number of people living in the Slovak Republic, including migration, is decreasing.[35] The Slovak Republic is, thus, coping with a population decline, a decline in the number of people of working age (who contribute to the social insurance system, especially the pension system), and an increase in the number of people of post-working age (who receive benefits from the social insurance system, especially pensions). This problem is not unique to the Slovak Republic and affects all the countries of the EU to a greater or lesser extent. The answers to these challenges are relatively easy to find regarding support for natality, legislative anchoring of the balance and sustainability of the pension system, and alternative replenishment

34 This was the ruling in the case PL. ÚS 13/09-81. The second case is PL. ÚS 8/2018-59.

35 As of 31 December 2022, the Slovak Republic had 5,428,792 inhabitants. In 2022, there were 52,668 live births and 59,583 deaths in the Slovak Republic. The natural decrease in population was, thus, 6,915 persons. The Slovak Republic gained 995 persons through foreign migration (5,463 persons immigrated and 4,468 persons emigrated). The total loss of population in Slovakia was 5,920 persons. In 2021, the total population decline was 14,558 persons, but this indicator is clearly affected by the COVID-19 epidemic. Source: Statistical Office of the Slovak Republic [Online]. Available at: https://slovak.statistics.sk/ (Accessed: 19 July 2023).

of the working-age population through migration. What is more challenging is to translate these answers into a legislative framework and real practice. They are often the most sensitive political topics. In the following, we will limit our interpretation to relatively recent legislative changes or new legislation by which the legislator is responding to demographic challenges. We will pay particular attention to the pension system.

5.1. Promoting natality

With effect from 1 April 2021, a new benefit, the so-called pregnancy benefit, was introduced into the Social Insurance Act. The pregnancy allowance is to be paid to a pregnant university student or a pregnant secondary school pupil of full age under the conditions set out in the law, and a pregnancy allowance is also introduced in the social security system for police officers and soldiers. The legislator envisages that the pregnancy allowance will have a positive impact on marriage, parenthood, and the family. The purpose of adopting this legislation was to support the financial situation of mothers because of the increased expenses associated with motherhood and to reduce the number of abortions for economic and social reasons. With effect from 1 January 2023, the support for parenthood has been increased by raising child benefits to €50 per month for each dependent child. Meanwhile, the bill aims to reintroduce a one-off increase in child benefits for children entering the first year of primary school for the first time in the amount of €110.

Support for working parents is also provided through a major amendment to the tax bonus institute effective from 1 January 2023. The monthly amount of the tax bonus is up to € 140 per child under 'ideal conditions' (sufficient income).[36] This amendment aims to ensure support for working parents. However, two brief criticisms are warranted. First, parents on lower incomes cannot successfully claim the full amount of the tax bonus for each child, given the specific nature of this institution. Second, from the perspective of legal theory, some say that tax law legislation should not address social policy because tax law serves a different purpose, and tax collection becomes less transparent. The tax bonus is a much-discussed institution; regarding the first criticism (i.e. that the tax bonus favours better-off earners), it is a matter of political decision, not an a priori error of legislative setting. It is difficult to agree with the second remark that the tax bonus is not intended to interfere with the social policy of the state. The legal system is an interconnected web; dividing the law by branches of law or any legal purism is a matter of academic debate. The law is supposed to serve a rational ordering of social relations, including those relating to family support and motivation through tax schemes seems reasonable. Thus, the child tax bonus is not a new feature; it has only been substantially increased with effect from 2023. Meanwhile, the tax bonus can also be applied to the spouse if she

36 Estimated number of families claiming the tax bonus for 2023 – 26,803, for 2024 – 24,404, for 2025 – 22,256. Quoted from the explanatory memorandum to Act No. 496/2022 Coll. amending the Income Tax Act (Act No. 595/2003 Coll.).

did not earn sufficient income (e.g. from taking parental leave). It is on this point that there is an imbalance, as the tax bonus can only be applied to the spouse, not the cohabiting partner.

One-off support for the birth of a child or multiple births[37] has been in force since 2014, but from 1 May 2023, the benefit of €829.86 is to be extended to a child from a fourth birth. Until the amendment was adopted, the allowance at the amount indicated applied only to children from the first three births and was granted at a significantly lower amount for children from other births. Changes related to the promotion of deeper childcare by parents should not be forgotten. Recently, the Labour Code has been amended to regulate paternity leave, and the sickness insurance regulations (as part of social insurance) have been amended to support the mother's maternity leave. In the context of caring for a newborn child, the right to time off work belongs not only to the woman (mother) but also to the man (father). The legislation in force until 31 October 2022 referred to this leave as parental leave. With effect from 1 November 2022, it is paternity leave. The fact that the woman is on maternity leave does not exclude the man's right to paternity leave. Maternity and paternity leave in connection with the care of a newborn child may be taken concurrently, even if the woman and the man work for the same employer.[38] The employee shall not be entitled to pay or pay in lieu of pay while on paternity leave. These rules were also in force before the adoption of the amendment. There has been a change in the material security of the father during paternity leave. An employee on paternity leave is materially secured by maternity pay. It is a benefit provided by sickness insurance under the conditions laid down by the Social Insurance Act.[39] The child's father is entitled to maternity benefits as a so-called other insured person[40] who takes care of the child and who has been insured for at least 270 days before applying for maternity benefits. The child's father is entitled to maternity allowance within 2 weeks of the maternity allowance being granted, if the child's father is the father of the child until six weeks after the date of birth, and the child's mother's receipt of maternity allowance or parental allowance is not an obstacle to this entitlement. After the expiry of six weeks from the date of childbirth, the father of the child shall be entitled to maternity allowance if the mother is not in receipt of maternity allowance or parental allowance for the same child. The total duration of another insured person's entitlement to maternity pay is 28 weeks from the date of the award of maternity pay (31 weeks if he is single or 37 weeks if he is caring for two or more children at the same time). Another insured person's entitlement to maternity allowance shall cease at the latest when the child reaches the age of three. The essence of the change in the legislation does not, thus, lie in the introduction of paternity leave; paternity leave was also provided for in the

37 Act No. 383/2013 Coll. on childbirth allowance and allowance for multiple children born at the same time and on amendment and supplementation of certain acts, as amended.
38 See Treľová, 2014, pp. 319–331; Žuľová, 2014, pp. 331–343.
39 Act No. 461/2003 Coll. on Social Insurance.
40 Section 49 of the Social Insurance Act.

previous version of the Labour Code.[41] The improvement in the care of the newborn child lies primarily in the simultaneous financial compensation of the father and mother from maternity insurance.

Although the significance of this amendment on demographic development is not as decisive as the above measures, it can nevertheless be included in a package that helps to increase the birth rate. We will dwell for a moment on the entitlement to maternity pay for the father (in the words of the Social Insurance Act, 'another insured person'). In practice, it was quite common for the father to notify his employer that he was taking parental leave to claim maternity pay during that period and be employed by another employer. It was not uncommon for the employee to do the same work, on the same premises, only for another employer, which was, for example, a subsidiary of the original employer. In such cases, the Social Insurance Institution refused to pay maternity benefits over time, which was challenged in court. Finally, the developed case law was established in favour of the Social Insurance Institution's procedure by the Supreme Administrative Court,[42] which stated that the mere fact that the child's father, almost immediately after declaring that he had taken custody of the child, and for this purpose after taking parental leave, was employed in a new job under comparable working conditions, or, in other words, that he had been employed in a new job with comparable working conditions, was not a reason for the child's maternity pay and that the child's father had not been employed in a new job with comparable working conditions. The same working time arrangements suggest the pursuit of an aim other than the creation of conditions for the provision of care for minor children. The Supreme Court further reasoned that the Social Insurance Act, in the relevant provision of Article 49(1), uses the phrase 'another insured person who cares for the child', as interpreted above, not the term 'to provide' care, which is to be distinguished, as it is broader in content and may, therefore, include care for the child by persons other than the child's parents themselves.

We agree with the above conclusions of the Supreme Administrative Court and express our conviction that parental leave and receipt of maternity benefits are intended to serve as a compensatory mechanism for loss of income due to child care and not as a financial supplement to work.

5.2. Parental pension

In Slovakia (as in other countries), there has been a long-standing debate on how to ensure the sustainability of the pension system without reducing pensions or extending the retirement age (which has been happening gradually for more than

41 Directive 2019/1158 emphasises that the existence of rights is judged by content and not by name. Therefore, the introduction of paternity leave, or any other leave where a comparable institution already exists in the national legal order is not necessary. By way of comparison, the amendment to the Labour Code did not introduce the so-called 'nursing leave' under Article 6 of the Directive, as leave to care for a sick family member and a benefit under the Social Insurance Act are already granted under Article 141(1) of the Labour Code.

42 Case No. 6Ssk/23/2021 of 30 November 2021.

a decade). This debate has been in the technical plenary and is a burning political issue. A fundamental change took place from 2023 onwards, when an amendment to the Social Insurance Act[43] introduced the so-called parental pension. The amendment of the legislation on the Social Welfare Act was preceded by an amendment to the Constitution (see above – Chapter 2), and, interestingly, the amendment to the Constitution was made based on an amendment proposed by a group of MPs, when the government's proposal was aimed at changing the justice system without any connection to social rights.

The promoters of the proposal[44] hinged on the belief that the intergenerational solidarity principle should allow children of working age to have part of their contributions or taxes 'earmarked' for their parents. In the view of the proposers, three conditions should be met: (a) a decision by the child expressing a wish to pass on part of the sum in this way to the recipient (in simple terms, the parents), (b) the provision of a retirement pension to the recipient (the parent) of the sum, and (c) the fact that the recipient of the sum in question (the parent) has brought up the child. The drafters of the Constitution themselves assumed that the 'amount' to be transferred directly to the parents would be based on the payment of compulsory social contributions or tax (presumably they meant income tax). Meanwhile, they have constitutionally prohibited the negative impact on other entitlements, namely material security in old age for children who have chosen to pass on part of the amount of levies or taxes to their parents. The explanatory memorandum does not say more.

As already mentioned, the constitutional change has been translated into the parental pension, which complements the pension system as part of the insurance system of the Slovak Republic. The parental pension is an additional pension that seniors can receive alongside the old-age pension, the invalidity pension, and the retirement pension. A recipient of an old-age pension is entitled to a parental pension and is entitled to its payment[45] if he or she is the child's parent (own or adopted child) and the child was insured for a pension (compulsorily as an employee or compulsorily as a self-employed person or voluntarily insured) in the two years preceding the calendar year in question and did not declare that the parent (pensioner) should not be entitled to a parental pension on reaching retirement age.

The entitlement to a parental pension and its payment accrues automatically to the child's parent (including the adoptive parent) (this somewhat contradicts the ideas of the drafters of the constitutional text). Conversely, the surrogate parent of a child who has brought up that child is only entitled to it based on the child's affirmative declaration within the statutory period. Meanwhile, the legislation allows for the child to declare that the parent should not be entitled to a parental pension (opt out). In such

43 Act No. 352/2022 Coll. amending Act No. 461/2003 Coll. on Social Insurance as amended and supplementing certain acts.

44 The explanatory memorandum to their proposal – specifically on parental pensions – is less than one page long.

45 The same applies to the recipient of an invalidity pension payable after retirement age and to the recipient of a retirement pension payable after retirement age.

a case, the child's possibility to declare consent to the entitlement to the parental pension in any subsequent year (reinstatement of the parental pension) is preserved. The automatic vesting of own and adoptive children has been modified given the large number of persons concerned or to ensure administrative enforceability.[46] The social security institution will, therefore, pay it automatically, according to the data in the register of natural persons for the natural parent and the adopter.

If we simplify the calculations of the amount of the parental pension, the monthly parental pension for a person with two children with approximately average earnings (€ 1.211) comes to € 36 per month. For example, for a pension recipient with three children with average earnings, it is € 55 per month. According to statistical estimates, approximately 426 thousand pensioners in Slovakia have two working children, and approximately 181 thousand pensioners have three children, while 48 thousand pensioners in Slovakia have four or more children.[47]

A change as fundamental as the introduction of a parental pension understandably provokes heated debate. On its website, the Ministry of Labour, Social Affairs, and Family, which proposed the change to the Social Insurance Act, stresses that the priority of the Labour Ministry is to eliminate unfairness in the payment of pensions to parents who have brought up their children and have had the amount of their pensions reduced for this period. Assistance in the form of a parental bonus can remove this unfairness and allow working children to contribute to their parents' pension.[48] It is also legitimate to view the prohibition of discrimination in the opposite way. A pertinent question may be asked regarding whether pensioners who have no children or whose children are not economically active, even through no fault of their own (e.g. because they are recipients of a disability pension) are not discriminated against by being excluded from receiving pensions. Other reservations are directed at the sustainability of public finances; the amount of the additional pension benefit is currently not covered by the additional revenue to the Social Insurance Fund, which has been in deficit for the last few years. Lastly, reservations are also directed at the extraordinary administrative burden of the Social Insurance Institution in the payment of the parental pension and the overly paternalistic approach of the State to family relations.[49]

46 Cf. Explanatory memorandum (separate part) to point 8.

47 Retrieved from Rodičovskýbonus.gov.sk [Online]. Available at: www.rodicovskybonus.sk (Accessed: 30 April 2023).

48 Ministry of Labour, Social Affairs and Family of the Slovak Republic, 2022.

49 The debate is being conducted at a political rather than a scientific level. See, for example, Dvořáčková, 2021. Another issue of discrimination may arise in the case of substantial support for the employment of persons with disabilities, found in the Act on Employment Services, which regulates financial incentives for employment and enshrines the so-called false quota system. According to the law, if an employer employs at least 20 employees and if the relevant Labour, Social Affairs, and Family Office keeps citizens with disabilities in the register of job seekers, the employer is obliged to employ citizens with disabilities in a number corresponding to 3.2% of the total number of its employees, whereas a disabled people who, given a long-term adverse health condition, has a low ability to engage in gainful activity of more than 70% shall be counted as three such employees for the purpose of fulfilling the established mandatory proportion of employment of disabled employees. An employer who does not employ the statutory

6. Doctrine of the Constitutional Court on social assistance

The social security system is complex and quite complicated. Thus, in this chapter we take a selective approach to social security issues in the Slovak Republic; there is probably no other approach possible. Hence, we will dwell on a certain specificity of the legislation of the Slovak Republic, which is related to social services that are part of the social security system.

A fairly major reform of social assistance took place with the adoption of the Social Services Act[50] in 2008. The reason for the adoption of this Act was the fact that the previous legislation of Act No. 195/1998 Coll. on social assistance appeared to be insufficient, not guaranteeing sufficient variability and, in particular, accessibility of social services to every natural person who is dependent on it. The legislator has transferred part of its responsibility for social policy to higher territorial units and municipalities, creating space for the penetration of private law elements into the sphere of social services, which ultimately means an increase in the flexibility and efficiency of the assistance provided. It is precisely this unfair transfer of competencies that has been challenged before the Constitutional Court, whereby the legislator's adoption of the Social Services Act has been accused of contradicting the European Social Charter (revised).

The essence of the dispute was based on the fact that, according to the legislation, social services may also be provided by private law entities, such as non-profit organisations, civil associations, commercial companies, or other corporations of a private law nature. However, the legislator subordinates those entities established by a municipality or a higher territorial unit to the term 'public provider'. The access of non-public providers to the provision of social services is subject to specific legal conditions.

The applicants argued that (i) the status of non-profit organisations providing social services is the same irrespective of the person of their founder; (ii) however, one group of non-profit organisations is at a direct disadvantage in access to the possibility to implement those services and receive financial compensation for the implementation of those services, while (iii) that disadvantage is not based on any legitimate reason of overriding public interest. According to the petitioners, such legal regulation contravenes Article 14(2) of the European Social Charter, under which the Slovak

mandatory share of the number of employees with disabilities or meet the replacement obligation by awarding a contract or taking products or services is required to make a mandatory levy on behalf of the Labour Office for each citizen who falls short of meeting the mandatory share. Such an approach accords with EU anti-discrimination law, which is characterised by the fact that its application is not limited to compliance with the prohibition of discriminatory practices but focuses more on positive action to compensate for the handicaps of persons with a view to ensuring formal and material equality.

50 Act No. 448/2008 Coll. on Social Services and on Amendments and Supplements to Act No. 455/1991 Coll. on Trade Enterprise (Trade Licensing Act), as amended.

Republic undertakes to 'encourage the participation of individuals and voluntary or other organisations in the establishment or maintenance of social services'. The same statement applies to the Slovak Republic's commitment to Article 13(3) and (4) of the European Social Charter. Under these provisions, the Slovak Republic undertakes 'to provide that everyone may obtain from the appropriate public or private services such advice or personal assistance as may be required to prevent, remove or alleviate the distress of his person or family'.

The Constitutional Court upheld the motion of a group of Members of Parliament and found the provisions in question to be incompatible with the Constitution; however, it found no conflict with the European Social Charter. Accepting the Government's argumentation, the Constitutional Court stated that the provision of Article 13(2) of the European Social Charter (revised) concerns the obligations of the contracting parties (i.e. the Slovak Republic) regarding persons dependent on social and medical assistance (according to the terminology of the Social Services Act, the so-called 'social services'). The Slovak Republic is not concerned with persons who provide social and medical assistance (according to the terminology of the Social Services Act, so-called social service providers), but with persons who are primarily affected by the disputed provision of the Social Services Act.

In these circumstances, even if one respects the fact that the noted parts of the Social Services Act disadvantage non-public providers of social services, the conclusion that the obligations under Article 14(2) of the European Social Charter (Revised) are not fulfilled based on these provisions of the Social Services Act alone would not correspond to reality because, in the context of its other provisions, it is undoubtedly possible to formulate the conclusion that the Social Services Act (together with other legislation) contributes to fulfilling the obligations arising for the Slovak Republic from this provision of the European Social Charter (Revised). We will stay for a while on the Constitutional Court's decision on the legal regulation of social assistance. In the case under discussion, the Constitutional Court assessed the eligibility of the provision of material hardship benefits on the obligation to carry out a work activity.[51] The appellants, who were a group of Members of Parliament, argued that the right to receive the material hardship allowance was conditional for each adult member of the household on the existence of a legal relationship that gives rise to an entitlement to income from gainful employment of at least 32 hours per month; on participation in the carrying out of smaller municipal services for the municipality, a budget organisation, or a contributory organisation of which the municipality is the founder; or on volunteering or work to prevent an emergency during a declared emergency and in dealing with the consequences of an emergency.

The Constitutional Court did not agree with the petitioners. In its reasoning for the rejection, the Court stated that economic, social, and cultural rights and freedoms

51 The case was filed under PL. ÚS 8/2014, which assessed the compliance of Section 10(3) to (11) of Act No. 417/2013 Coll. on aid in material need and on amendments and supplements to certain acts with Article 1(1), Article 12(1) and (2) and Article 39(2) of the Constitution.

'are second-generation rights, the form and content of which essentially depend on the economic and economic possibilities of the State',[52] and it is essential for them that, pursuant to Article 51(1) of the Constitution, they are not subject to the provisions of Article 51(1) of the ECHR. It is essential that the fundamental rights and freedoms of the EU, as defined in Article 51(1) of the Constitution, may be invoked only within the limits of the laws implementing those provisions (i.e. only to the extent deducible from the quoted constitutional reservation, through which the Constitution undoubtedly provides the legislator with a greater margin of discretion relative to other groups of fundamental rights and freedoms) to determine to what extent, in what quality, and under what conditions it will guarantee them. However, in this regard, the Constitutional Court has already expressed the legal opinion that

> ...the margin of discretion granted by the Constitution to the legislator in adopting these laws cannot be understood in absolute terms; its limits must be sought above all in the constitutional principles and in the requirement to protect other values on which the Constitution is based and which it protects. While these fundamental rights, by their very nature, call for legislation by the State (to give effect to their content), the State must not, however, interfere with the very essence of these rights or affect other rights enshrined in the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms. The Constitutional Court may declare incompatibility in the abstract review of constitutionality only in cases where the legal norm in question does not respect a specific constitutional guarantee of one of the fundamental rights referred to in Article 51(1) of the Constitution (PL. ÚS 11/2013).

The Constitutional Court based its decision on the fact that the right to assistance in material need, which is necessary to ensure the necessities of life pursuant to Article 39 in conjunction with Article 51(1) of the ECHR 1 of the Constitution, must be interpreted as an order for the legal state to provide a realistic possibility for everyone (not only citizens of the Slovak Republic) who finds themselves in a state of material need, as defined by law, to secure assistance to ensure at least the minimum necessities of life, which according to the law on material need means one hot meal a day, necessary clothing, and shelter. However, in the view of the Constitutional Court, it is not contrary to the constitutional injunction expressed in Article 39(2) of the Constitution to require the active participation of persons in the provision of their necessities of life, as long as the activities required are not disproportionate, unreasonable or unnecessarily burdensome. In simple terms, the Constitutional Court accepted the objective of the contested legislation, which was to increase the efficiency and effectiveness of the provision of State funds, to activate citizens in material need and strengthen their motivation to work.

52 PL. ÚS 19/08.

7. Final (extra-legal) considerations

Social security law is unstable and (together with tax law) subject to (social) state policy. This can be seen in the numerous changes in legislation and increases and decreases in individual benefits that make up the social security system in a regular rhythm. This fact will not change; it is not really a criticism (even if it were justified), but rather a statement of fact. However, what the political elites should not resign themselves to when legislating on social security law are the demographic challenges, the population decline, the gradual decrease in fertility, the simultaneous decrease in the working-age population, and the increase in the post-working age population.

In this chapter, we have highlighted recent efforts by the legislature to boost fertility by increasing financial support for pregnant women (pregnancy allowance, increasing maternity pay) and subsequently for families (e.g. tax bonus, increased childbirth allowance). It is up to the judgment of sociologists, economists and, ultimately, statisticians to determine whether this increased financial support is sufficiently attractive for young people to start families. The support should be broader, the state should, beyond directing and fiscal financial incentives, promote the possibility of taking time off work and insist on the prohibition of discrimination on the grounds of childcare in the legal text (most recently, the work-life balance directive has been transposed) and in real practice. Pre-primary childcare should be increased. Ultimately, it is questionable whether this policy will have the desired result and whether the declining birth rate is not a reflection of modern times. However, it takes us out of the legal debate.

The second, and equally important, challenge is to maintain a stable pension system. We do not see the provision of a parental pension as a strategic or fundamental step. From a public policy perspective, the funds withdrawn from the pension funds will have to be replaced or subsidised by other revenues, assumedly by direct funding from the tax levy. The insurance system is no longer self-funding, mainly because of increasing payments for old-age (early retirement and disability) pensions. Again, the debate is not a legal one but rather an economic and political one. Demographic challenges suggest the need for greater personal responsibility for retirement.

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| Chapter 10 |

Slovenia: From the Protection of Acquired Rights, Legitimate Expectations and the Principle of Solidarity to Financial Sustainability Constrains— What Does the Future Hold?

Luka MIŠIČ – Grega STRBAN

ABSTRACT

This chapter, grounded in most relevant Slovenian literature on social security law, provides a general overview of the Slovenian social security system. However, the authors approach the overview from the perspective of long-term sustainability, adding specific topics, such as the potential future interplay between public and private income responsibility, upcoming healthcare and pension reform, and the introduction of new branches of social insurance, to the general overview. Examining the Slovenian Constitution, they address distinct social security (social insurance) schemes, such as the mandatory health insurance, pension and disability, or the developing long-term care insurance scheme, alongside the social assistance scheme, which is in place as a subsidiary safety net aimed at preventing poverty and social exclusion. The authors briefly address other notions in social security, such as social damages and cover the basic elements of social procedural law. Further, they address substantial and formal or organisational aspects of social security or social security administration.

KEYWORDS

social security law, social insurance, social assistance, sustainability, Slovenia

1. Constitutional provisions

In addition to the general provisions of the Slovenian Constitution,[1] such as Article 1, determining Slovenia is a democratic state, or Article 2, according to which Slovenia is a state governed by the rule of law and a social state, several other provisions enshrined within the human rights chapter of the Constitution are relevant in the social security field. Theoretically, they all stem from Article 2, stipulating the social

1 Official Gazette of the RS, No. 33/91-I to 92/21. For an overview of constitutional provisions on labour law, see Strban and Mišič, 2022, pp. 81–85.

Mišič, L., Strban, G. (2023) 'Slovenia: From the Protection of Acquired Rights, Legitimate Expectations and the Principle of Solidarity to Financial Sustainability Constrains—What Does the Future Hold?' in Jakab, N. (ed.) *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 199–220. https://doi.org/10.54171/2023.nj.sotsss_10

state principle (*germ. Sozialstaatsprinzip*) according to which the Slovenian legislator must adopt and dynamically amend legislation that enables adequate realisation of the social needs of the population. The need for dynamic amendment commonly originates in the everchanging social reality, where new phenomena, such as new forms of work and work organisation, economic crises, and rapid societal ageing, reshape the once traditional social needs of the population.

Article 50 stipulates the right to social security, guaranteeing citizens' the right to social security and the right to a pension, under conditions provided by law. According to Article 50(2), the State shall regulate compulsory health, pension, disability, and other social insurance, and shall ensure its proper functioning. According to Article 50(3), special protection in accordance with the law shall be guaranteed to war veterans and victims of war. Several conclusions may be drawn from Article 50, the core social security provision within the Slovenian Constitution.

First, according to the simple meaning, Slovenian citizens alone enjoy the right to social security. However, the provision ought to be interpreted in accordance with international human rights documents and social security conventions.[2] The theological interpretation significantly broadens the scope of the provision. The Slovenian social security system, grounded in the notion of professional, functionally decentralised social insurances as a general rule guarantees coverage to all gainfully employed persons in the territory of Slovenia and their family members.[3] Thus, if the right to social security was limited to Slovenian citizens alone, this would violate the equal treatment principle as stipulated by EU law or by bilateral social security agreements, and would also represent a breach of one's right to private property[4] and, from an international law's perspective, the right to one's peaceful enjoyment of their possessions according to Protocol No. 1 to the European Convention on Human Rights.[5] However, this does not imply that all individuals enjoy equal access to all types of social security benefits. Some continue to depend on the person's legal status, such as the status of a permanent resident or refugee, or their employment status or economic activity.[6]

Second, there exists no closed number (*numerus clausus*) of social insurance branches, according to the Constitution. The Slovenian social insurance system is established with respect to the traditional social risks stipulated in the ILO Convention No. 102, and comprises compulsory health, pension, disability, unemployment, and parental insurance, with the legislator authorised by the Constitution to regulate additional branches, for example, long-term care insurance. The introduction of a new branch of insurance, such as long-term care insurance, does not require a constitutional amendment.[7]

2 Strban and Mišič, 2020a, p. 392.
3 Ibid.
4 Article 33 of the Slovenian Constitution.
5 See, for example, Strban and Mišič, 2020b, pp. 1 et seq.
6 For free movement rights of economically inactive EU citizens, for example, see Mišič, 2020a, pp. 58 et seq.
7 See Strban and Mišič, 2020a, pp. 392–393.

Third, since Article 50(2) stipulates that the State shall ensure the proper functioning of the social insurance schemes, no statutory provision is generally required to establish State obligation concerning (co)financing of individual insurance branches in case of financial losses. However, as such obligations are explicitly mentioned in the Pension and Disability Insurance Act,[8] and not, for example, in the Health Care and Health Insurance Act,[9] it could also be concluded that the legislator, following the broad margin of appreciation in the field of social security, consciously decided to (co)finance the pension and disability, but not the health insurance scheme. The broad margin of appreciation, also enjoyed in the field of taxation, can be derived from Article 50(1). The right to social security is provided under conditions, provided by law. This reflects the legal nature of the positive right to social security, which represents one of the central second-generation human rights.

Fourth, the explicit mention of the right to a pension, which is included in the Slovenian Constitution as a political commitment against the challenges of an ageing society 2004,[10] is controversial. The explicit mention provides the Constitutional Court an indirect mandate to determine the constitutional nature and core of the now constitutional right to a pension. However, it is clear from both legal theory and international social security law, for example, the ILO Convention No. 102, that the right to social security always encompasses the right to a pension, answering to the traditional social risks of old-age, death, and disability. Thus, there is no constitutional right to social security without the constitutionally guaranteed right to a pension. Furthermore, the Slovenian Constitutional Court addressed the constitutional right to an old-age pension long before the amendment of 2004. From this perspective, Article 50(1) creates an unnecessary and false appearance of greater importance of the right to a pension, despite being most challenged by long-term financial sustainability issues, and deviates from an integral understanding of social rights.

Fifth,[11] the Constitution contains no explicit mention of the right to social assistance or the right to minimum subsistence benefits. However, according to Article 34 everyone has the right to personal dignity and safety. The right to personal dignity represents the foundations for one's free personal development and life-plan creation. According to the Slovenian Constitutional Court,[12] the right to personal dignity guarantees to the individual the recognition of his or her value as a human being, from which his or her ability of self-determination is derived. Moreover, the right

8 Zakon o pokojninskem in invalidskem zavarovanju (ZPIZ-2), Official Gazette of the RS, No. 448/22.

9 Zakon o zdravstvenem varstvu in zdravstvenem zavarovnaju (ZZVZZ), Official Gazette of the RS, No. 72/06 to 141/22.

10 Ustavni zakon o spremembi 50. člena Ustave Republike Slovenije (UZ50), Official Gazette of the RS, No. 69/04.

11 This paragraph is also part of the manuscript, on Life and Dignity in Slovenia, to be submitted for publication within an *ad hoc* research project with the Max-Planck-Institute for Social Law and Social Policy.

12 Decision of the Constitutional Court of the Republic of Slovenia, No. U-I-226/95 from 8 July 1991.

guarantees personal rights. According to the court, the name of this set of rights suggests that they are granted to a person as such. Furthermore, the respect for personal rights guarantees the protection of those elements of one's personality which are not protected by other constitutional provisions, such as freedom of conscience, freedom of expression, and those which offer to the individual means for free personal development and a life grounded in their own decisions. As the basic point in the field of social assistance is guaranteeing dignity and equal opportunities for all while preventing poverty and social exclusion, Article 34 is commonly recognised as one of the constitutional cornerstones of the right to social assistance, although, as mentioned, not explicitly part of the constitution itself.[13] Constitutional provisions in the field of social security are marked by the traditional international law divide between social security and social assistance.

The social assistance scheme, which may also be derived from Article 2 and Article 50 of the Constitution, whenever understood in a broader sense beyond the notion of social insurance, comprises various measures that are designed to tackle various social problems of individuals, families and groups of the population, who for different reasons are facing hardships that deny them the ability to actively participate in the society and are deprived of the ability to meet their social needs and exercise their fundamental human rights.[14] However, as the basic minimum income for a single economically non-active individual, used when calculating the (general) monetary social assistance, amounted to 421.89 EUR net in 2022, it is difficult to imagine how this amount can effectively prevent poverty and social exclusion and enable the beneficiary to actively partake in the social life.

In addition to Article 2 and Article 50, under national legislation, social assistance is considered to fall within the wider notion of social security. Considering the systemic placement of the right to social assistance, even Article 34 of the Constitution (personal dignity and security) is not as important as Article 7 and Article 58 of the Labour and Social Courts Act.[15] Article 58 defines a social dispute as a legal dispute concerning rights, obligations and legal benefits of natural, legal and other persons if they can be holders of rights and obligations derived from the social security system for which the social courts are competent. This is the only provision in which the statutory legislation refers to the social security system. The social courts' competences are stipulated in Article 7 of the Labour and Social Courts Act, which include, among others, social assistance benefits.[16]

Interestingly, the Slovenian Constitution does not explicitly mention the right to health. However, the right to health may be derived from Article 51, according to which everyone has the right to healthcare under conditions provided by law. According to Article 51(2), the rights to health care from public funds shall be provided by

13 See Kresal, Kresal Šoltes and Strban, 2016, p. 214.
14 Ibid.
15 Zakon o delovnih in socialnih sodiščih (ZDSS-1), Official Gazette of the RS, No. 2/04 to 196/21.
16 See Mišič and Strban, 2019, p. 166.

law. The majority of rights to healthcare that are provided from public funds, are claimed within and funded by the mandatory health insurance scheme, operated by the Health Insurance Institute of Slovenia. Some rights are funded by the State budget. Interestingly, the grammatically interpreted personal scope of application regarding Article 50 (the right to social security) comprises Slovenian citizens, whereas the right to health care is, under conditions provided by law, available to everyone. From this perspective, the personal scope of coverage concerning the right to social security is also broadened by the right to health care, at least in respect of mandatory health insurance from Article 50(2).

In addition to Articles 50 and 51, the Slovenian Constitution includes several other social and constitutional rights, that share a link with the right to social security. Article 52 stipulates rights of disabled persons, whereas, according to Article 53(3) the State shall protect the family, motherhood, fatherhood, children and young people and shall create the necessary conditions for such protection. Articles 52 and 53 represent legal grounds in addition to the general article on the right to social security, for the introduction of disability-specific social security benefits, paid from different social security schemes, as well as the introduction of family benefits. Furthermore, the Slovenian Constitutional Court has developed extensive case-law concerning proprietary protection of social rights.[17] As aforementioned, Article 33 of the Slovenian Constitution guarantees the right to private property. However, this is not the only mention of this right in the Constitution. According to the first paragraph of Article 67 on property, the manner in which property is acquired and enjoyed shall be established by law so as to ensure its economic, social, and environmental function. Its social function is exercised through the Slovenian social security system, grounded in the redistribution of social insurance carriers' funds, and the redistribution of societal wealth, concerning tax-funded social assistance rights. Interestingly, Article 33 is part of the chapter on human rights and basic freedoms, whereas Article 67 belongs to the chapter on economic and social relations. Both articles are also relevant from the sustainability viewpoint. Article 33 should limit disproportionate interference with one's possessions, for example, in times of a recession triggering a decrease in pension rights or the imposition of additional public duties, whereas Article 67 explicitly refers to the environmental function of property.

2. Organisation and administration

The Slovenian social security system is grounded in the notion of a Bismarckian, employment-based social insurance scheme, linking one's economic activity to their obligation of insurance. Since employees and self-employed persons are compulsorily insured in all social insurance branches, that is, health, pension and disability, unemployment, and parental protection insurance, all regulated by separate pieces of

17 See Strban and Mišič, 2020b, pp. 12–14.

legislation, the link between social security law, an independent branch of public law, and labour law is clearly visible. Social insurance is insurance against the occurrence of a social risk of one's temporary or long-term loss of earnings.[18] Traditional social risks, such as unemployment, sickness, old-age, also covered by the Slovenian social insurance system, lead to a loss or reduction of one's salary or wage obtained from employment or other income, or obtained from self-employment.[19] However, in some subsystems, such as the mandatory health insurance scheme, coverage is almost universal and the notion of economic activity transgressed. Additionally, social security law shares an important link with administrative law, more precisely, administrative procedure, since social rights and obligations are claimed and administered within the said procedure.

2.1. Functional and territorial decentralisation

The Slovenian social insurance system, grounded in Article 50(2) of the Constitution, is organised as a functionally decentralised system in which the State relinquished part of its competences in the field of social security to specialised legal entities governed by public law, such as the Health Insurance Institute of Slovenia (HIIS) or the Pension and Disability Institute in Slovenia, which enjoy legal, administrative, organisational and financial autonomy to a certain degree in respect of both the legislative and executive branch of government. However, the State has to (co)finance the social insurance scheme either on grounds of statutory legislation or the Constitution itself, whereas the unemployment insurance scheme is almost exclusively financed by the general State budget owing to low social security contributions in the field, despite being exercised not by the Ministry of Labour, Family, Social Affairs and Equal Opportunities, such as the parental protection insurance scheme, but by the State-independent Employment Services of Slovenia. Owing to the insurance-based approach of the Constitution towards the Slovenian social security system, any substitution of an insurance-based social security scheme with a universal or, for example, private income protection scheme, would generally require a constitutional amendment, despite the legislator enjoying, to use the terminology of international human right law, a broad margin of appreciation in the field of social protection.

Generally, specialised legal entities are governed by representative and executive bodies comprising social partners' representatives and representatives of the State in varying numbers, depending on the insurance institution. The inclusion of such State representatives that act in the mere capacity of a public sector employer and that of the land's supreme political authority can be deemed legitimate whenever the State has a clear and substantive, that is, statutory-based obligation with regard to co-financing the primarily contribution-funded scheme. The number of votes these representatives have in governing bodies reflects its obligations towards the scheme.[20]

18 Bubnov, Škoberne and Strban, 2010, p. 91.
19 Strban and Mišič, 2022, p. 82.
20 Mišič and Strban, 2019, p. 168.

Regarding territorial decentralisation, all social insurance carriers and work centres, competent in the field of social assistance, family benefits, and parental protection insurance, conduct their activities dispersed throughout the territory of Slovenia. This is particularly important regarding social assistance benefits and social care services, since social security officers and services providers are better aware of the socio-economic environment in which they operate.

For example, a recent discussion occurred regarding transforming the manner in which HIIS is managed. Currently, the social insurance carrier is operated by the general assembly comprising 25 insured persons' and 20 employers' representatives. According to the proposal, the number of members of the assembly would decrease significantly, however, the insured person would continue to hold majority. Nevertheless, with the proposed legislation, they would be appointed by the Slovenian Economic and Social Council, a tripartite social dialogue body, and no longer by individual representative groups of civil society. Additionally, a three-person board of directors would establish a two-tier system of governance. In 2021, the government proposed the introduction of a managing board in which the executive branch would have a majority, and additionally, the competent ministry would be able to hold a veto against any of the decisions made. The amendment from 2021 may be considered unconstitutional as it undermined the fundamental idea of social insurance, that is, the principle of mutuality and self-administration (*germ. Selbstverwaltung*), according to which the rights and obligations within the insurance scheme are determined both by the general legislator and the community of insured persons as the primary funders of the scheme and central holders of rights. Had the amendment been enacted, it would have moved the system away from the notion of social insurance, as explicitly stipulated in Article 50(2) of the Slovenian Constitution, and closer to the system of a State-organised and State-executed national health service. Additionally, a recent debate occurred on reorganising the health care system in a manner that introduces several social insurance carriers, instead of a single one, which would supposedly act as market competitors, thus contributing to the long-term financial sustainability of public health care by means of lowering the costs of provided services, drugs, and medical equipment. However, in a country with less than two million insured persons, it is somewhat pointless to discuss regarding effective, market-based competition of several social insurance carriers. Furthermore, it is for this exact reason why all insured persons, regardless of their employment-status, for example, employees, self-employed persons, civil servants, public officials, are mandatorily insured with the same social insurance carrier, each one in their own branch of social insurance.

2.2. Devolution

The Slovenian system of social security, including both social insurance and social assistance schemes, is grounded in the notion of functional decentralisation and deconcentration (i.e. territorial decentralisation) with no visible elements of devolution, that is, a transfer of powers from the central to lower levels of government, such as regions. In cases where one may claim the presence of such elements, strictly speaking, no

transfer of powers from the State to the municipalities as sub-units in the State structure has occurred, since it is mostly municipalities exercising their original powers or competences, for example, when introducing additional municipal social assistance schemes or social subsidies. Some tasks, such as those in the field of social care services, primary health care, drug-supply, reserved for the municipalities as single units of local self-government should be considered as mere obligations imposed on the municipalities as State extensions, not as autonomous holders of State-like powers. The primary reason why the social security system lacks elements of devolution, possibly lies in the fact that Slovenia is a rather small country, both in terms of area (20,273 square kilometres) and the size of its population (approximately only 2 million or more inhabitants). The transfer of competences to lower organisational structures, such as regions or municipalities, would not necessarily improve the overall effectiveness of the system. Contrarily, such transfer would most likely only result in additional administrative costs. Similar reasoning underlies the aforementioned uniform structure of all branches of social insurance, with one insurance company established for each branch, covering all insured persons regardless of the type of employment.[21]

2.3. Functional centralisation and the social relationship

Unlike social security, when understood narrowly in relation to the traditional social risks such as disability, old-age, sickness, and unemployment, the social assistance scheme, aimed at preventing poverty and social exclusion, is functionally centralised, with the competent ministry exercising its executive authority over social work centres as its specialised and territorially decentralised units that decide on the provision of benefits. Similar to other European countries, this results from the fact that social assistance, unlike social insurance benefits, are financed from general taxation, within a one-sided social relationship between the government and the beneficiary. There exists no direct identity between payer and recipient, as in a two-sided legal relationship of mutual exchange, such as buying or selling goods, letting or renting property.

In this respect, social insurance benefits, which are provided within a two-sided social insurance relationship with mutual rights and obligations possessed by the insured person acting as the beneficiary and the social insurance carrier, for example, the HIIS, theoretically enjoy a stronger level of protection. Therefore, unlike claim rights concerning social assistance benefits, claim rights of insured persons cannot be subject to legal discretion of public officers, as they follow the insurance principle of reciprocity, and may also enjoy proprietary protection. As they are financed from wages, they are proportionate to one's active income, are commonly exportable (protection of acquired rights) and are also safeguarded during the course of acquisition, that is, as one's legitimate expectations.[22] Sustainability issues in social security mostly relate to social insurance, contribution-funded benefits, and even

21 Ibid., pp. 176–177.

22 For the protection of vested rights and the rights in the course of acquisition see Strban, 2016, pp. 252–253.

cash-benefits. However, they may have an important impact on benefits provided in kind, such as health care, as well as tax-funded social services, such as in the field of long-term-care, and personal assistance. What distinguishes contributory and non-contributory benefits in this respect is the fact that the contributory benefits generally enjoy a higher level of protection, as they are directly linked to individual's personal income and its amount, which makes the tightening of conditions attached to these rights subject to a more stringent, possibly even constitutional, review.

2.4. Provision of benefits and judicial protection

All social security benefits are provided within a social administrative procedure, a special type of administrative procedure in which its general rules are applied subsidiarily, whenever no specific rules are found within the *lex specialis* social security legislation, for example, the Health Care and Health Insurance Act, the Pension and Disability Insurance Act. One of the most common characteristics of these special procedures is the fact that an appeal does not, as a general rule, suspend the enforcement of a social administrative decision.[23]

In Slovenia, judicial procedures are commonly regulated by separate procedural acts. The jurisdiction, organisation and composition of specialised social (and labour) courts is determined by the Labour and Social Courts Act.[24] Social courts are competent in the fields of pension and disability, health, unemployment, and parental care insurance, in the field of family benefits and in the field of social assistance. Further, the courts are competent in legal disputes concerning compensatory claims concerning insured persons or beneficiaries, or social security institutions. When the independent long-term care insurance branch is established, they will acquire additional competencies.

In relation to the most pressing challenges of ageing societies, the constitutional review concerning future amendments and the enforcement of the human right to social security certainly appears more important than ordinary judicial review. From this perspective, it is important that the right to social security, protected by Article 50 of the Slovenian Constitution, can, alongside several other social (human) rights, be enforced before the Constitutional Court. Following the exhaustion of domestic legal remedies, a motion can be filed before the European Court of Human Rights, whenever any social right protected by the Council of Europe can be merged with a breach of a Convention right.

3. Social security and sustainability

Globally, population ageing is expected to increase the costs of social security over the next few decades, with regional variations present in terms of scale, timing, and

23 Kresal, Kresal Šoltes and Strban, 2016, p. 233.
24 Ibid., p. 240.

impact.[25] This mostly relates to long-term, income-dependent cash benefits such as (old-age) pensions, social services, or in-kind social insurance benefits provided in respect of sickness and long-term care. EU-14 countries are expected to overtake the dependency threshold, a critical point in the cross-section of the age distribution of the population beyond which tax revenue from direct taxation can no longer sustain the planned level of transfer to retirees,[26] well before the year 2100, owing to, for example when compared with the United States of America, more generous pension systems and older societies with higher dependency-ratios.[27] On median projections, Asian countries will reach the age structure comparable to the OECD countries by the year 2050, such as Southeast Asian countries or China, which are projected to reach Australian and North American levels of age-dependency within the next 30 years.[28] From a sustainability viewpoint, similar issues concerning social security can be observed across Europe, including Slovenia. They mostly relate to the financing and management of public health care schemes, pension insurance schemes, and long-term care, areas most affected by the challenges of ageing societies. In 2023, Slovenia had a population of approximately over two million (2.110.547). The average age amounted to 43,9 years, whereas 21,3% of the population was older than 65 years and 63,6% were aged between 15 and 64 years. The average life expectancy for men was 77,63 years, whereas the birth rate reached 1,64 (18.984 births and 23.261 deaths in the previous year).[29] Clearly, Slovenia has been experiencing a negative population growth for the past two to three decades, with the foreseen social protection expenditure increasing steadily in future decades.[30] The overall expenses reached approximately 10 billion EUR in 2023, with approximately 4.5 and 4 billion spent on old-age benefits and health care. Approximately under 1 billion was spent on family and children, three quarters of a billion were spent on unemployment, whereas approximately 600 million was spent on death and invalidity benefits each, generally from the pension and disability insurance scheme.[31]

The following paragraphs highlight some of the measures that can ensure the long-term (financial) sustainability of the individual social insurance schemes, however, significantly transform the legal nature of the (constitutional or human) right to social security.

3.1. Pension (and disability) insurance

Pension expenditure is projected to grow by 1.2% of GDP by 2030, and by 3.2% of GDP by 2040, reaching a total of 14.3%. A decline is expected only after 2050, when

25 International Social Security Association, 2019, p. 23.
26 Heer, Polito and Wickens, 2020, p. 1.
27 Ibid., p. 2.
28 Chomik and Piggot, 2015, p. 200.
29 See Statistical Office of the Republic of Slovenia, no date-a.
30 Kajzer and Fajić, 2016, pp. 2, 9.
31 See Statistical Office of the Republic of Slovenia, no date-b.

the pension expenditure should peak at approximately 15,6% of GDP.[32] According to the Slovenian Institute of Macroeconomic Analysis and Development, the impact of ageing on government expenditure is the strongest in the field of pensions, which also account for the largest share of age-related public expenditure. This is a consequence of early retirement, made possible in the past under the then applicable pension legislation. Additionally, the number of retired persons should surpass the number of insured persons in approximately 15 to 20 years.[33]

Under current legislation, the right to an old-age pension can be claimed after 65 years of age and a 15-year insurance period (29,5% calculation percentage; 40 years of insurance for the full 63,5% calculation percentage) or 60 years of age and 40 years of pension period without purchase, a special type of insured period generally composed of active years of insurance. If a person remains in insurance after reaching the retirement conditions, their calculation percentage increases by 1,36% every year, with no upper limit, while they also enjoy an additional bonus bumping the increase in the calculation percentage up to 1,5% on an annual basis for the next three years of prolonged insurance. Interestingly, the calculation percentages for men and women were equalised only recently.

Conversely, early retirement, made possible after 60 years of age and 40 years of pension period, leads to permanent negative indexation of 0,3% per month for every month before reaching 65 years of age. Thus, a person, who retires prematurely, may experience a 15% reduction in the level of their calculation percentage.[34] Clearly, the legislator introduced such measures to keep as many elderly people as possible insured, to ensure the long-term financial sustainability of the pension insurance scheme. Similarly, partial retirement is possible either in cases of an insured person leaving the labour market in-part or, conversely, returning to the labour market in-part after first retiring fully, with their pension rights now partially suspended. Work after retirement, unless on grounds of civil law contracts, is not possible or, more precisely, affects the amount of one's old-age or another pension benefit. Nevertheless, once highly skilled professionals, now retired persons, such as doctors, engineers or university professors, commonly conclude civil law contracts on a regular basis or enter into high-value contracts without registering as self-employed persons. There is no clear obligation to do so, however, this would affect the amount of their old-age pension. Furthermore, retired persons who continue to possess highly marketable skills often covertly run their businesses without actually registering as managers or managing partners, a role *de iure* assumed by others, for example their economically active family members. Additionally, persons who had reached the retirement conditions, however, remained fully economically active, are eligible to receive a part (30% in the first three years, and 20% afterwards) of their old-age pension in advance, as if they had retired. The somewhat controversial measure, designed to

32 Kajzer and Fajić, 2016, p. 9.
33 Ibid.
34 See Articles 26 et seq. ZPIZ-2.

keep elderly persons insured full-time, is in fact available for highly skilled workers, such as doctors, judges, university professors, who can, despite reaching retirement conditions, effortlessly remain economically active, mostly owing to factors such as their professional reputation, sought after skills, and healthy work environment. Contrarily, blue-collar workers tend to retire early, although this has a significant impact on the amount of their early retirement pension and, in effect, on their socio-economic position in old age, commonly marked by a risk of poverty and social exclusion. The average Slovenian old-age pension for February 2023, amounted to 861,25 EUR net.[35]

Another manner in which the legislator has limited public expenditure in the field of pensions is the regulation of a limited calculation, but unlimited contributory base. High earners, such as all other insured persons, contribute to the scheme with their entire salary, while their cash benefits are calculated considering a maximum calculation base. According to Article 36 ZPIZ-2, determining the manner in which the principle of vertical solidarity, that is, solidarity of high-earners with low-earners within the pension and disability insurance scheme, functions, the minimum pension base, from which pension and disability benefits are calculated, is set at the 76,5% of the average annual wage. The maximum pension base equals 306% of the average yearly wage or is four times higher than the minimum base. Special rules continue to apply to self-employed persons, who are able to benefit from a limited contributory base, and inflate their operating costs to reduce the annual profits from which taxes and social security contributions are paid.

Interestingly, the years of salaried employment which constitute the pension base, remain limited. According to Article 30 ZPIZ-2, most favourable 24 consecutive years of insurance are considered when forming one's calculation base.

Legislative measures that would ensure the long-term financial sustainability of the pension and disability insurance scheme are evident but politically difficult to implement. They may also be constitutionally questionable whenever they introduce disproportionate obligations or disproportionately limit the current scope of pension rights. For example, the legislator could gradually raise the retirement age from 65 to 67 years, which is already the general age condition in some European Union Member States, such as Italy. However, to pass the proportionality test, any increase in the retirement age as a general rule has to follow the increase in the overall life expectancy and be implemented within appropriate transitional periods that safeguard one's legitimate expectations concerning their old-age-related rights and obligations. Additionally, raising the retirement age would be meaningless if the labour market would not facilitate the increase of elderly economically active persons, while simultaneously limiting employment opportunities for junior workers. A few years ago,[36] the Slovenian Parliament introduced new grounds for dismissal, leading to less favourable and unjustified unequal treatment of workers on grounds of (old) age with a fictitious aim of enabling labour-market access for junior workers. However,

35 Pension and Disability Insurance Institute of Slovenia, no date.
36 For the following paragraph also see Strban and Mišič, 2022, pp. 84–85.

it is more likely that the true aim of the never enacted legislative amendment was a further flexibilisation of the Slovenian labour market. Despite being bound by the International Labour Organization Convention No. 158 concerning the termination of employment at the initiative of the employer and the European Social Charter, the legislator introduced a new cause of dismissal by which an employer could one-sidedly terminate an employment contract if the worker fulfilled old-age retirement criteria. No genuine reason for dismissal such as a business reason, either on side of the employee or the employer had to be established according to the legislative amendment. The Slovenian Constitutional Court first suspended the use of the said amendment of the ZDR-1 and later reached a well-expected substantive decision in the case proposed by the trade unions on grounds of unlawful age discrimination.[37] The amendment that was introduced by emergency (anti)coronavirus legislation supposedly followed the legitimate or public interest aim of securing employers' existence during the COVID-19 pandemic. However, from this perspective, the traditional business reason should have sufficed. Furthermore, the amendment was supposed to have enabled enhanced employment of junior workers instead of the elderly, who as a general rule already enjoyed an appropriate level of social protection in old age, although this legitimate aim of the labour market appears more or less unrelated with the general aims of emergency (anti)coronavirus legislation. Nevertheless, in cases of such dismissals, employment of younger persons was not made mandatory by law, making the amendment inadequate in following the said legitimate aim. As the Employment Relations Act[38] already regulates the common business reason for dismissal, the part of the amendment relating to the legitimate aim of keeping businesses afloat during and after the health crisis, is to be considered not inadequate but unnecessary. From this perspective, both measures failed the proportionality test before being subject to its final step, the balancing of individual rights or constitutionally safeguarded values.[39] Interestingly, the Constitutional Court did not examine the substance of the matter at all, rather grounded its decision solely in the fact that the legislator had breached its international labour law obligations.[40]

Furthermore, the legislator could increase the once higher contributory obligations of employers without lowering the contribution rate for employees. However, this would significantly spike wage expenditure in the public sector, while private sector employers would most likely shift the additional costs upon the employee by lowering their gross wages. According to Article 8 of the Social Security Contributions Act,[41] insured persons contributory obligations within the pension and disability

37 The final decision that annulled the amendment of the ERA and the Public Employees Act (Official Gazette of the RS, 63/07 to 202/21), containing the same provision as the ERA, was reached in November 2021, after the chapter had been initially submitted for publication. See Decision of the Constitutional Court of the RS, No. U-I-16/21, U-I-27/21 from November 11 2021.
38 Zakon o delovnih razmerjih (ZDR-1), Official Gazette of the RS, No. 21/13 to 54/22.
39 See also Bagari and Strban, 2021, pp. 9 et seq.
40 For a full case analysis see Hude, 2022, pp. 381 et seq.
41 Zakon o prispevkih za socialno varnost (ZPSV), Official Gazette of the RS, No. 5/96 to 26/14.

insurance scheme amount to 15,50% of their gross salary, whereas employers pay only 8,85%. This is a result of the 1996 amendment to the ZPSV,[42] which has lowered employers' contributory obligations from 12,85% to the said 8,85%. Nevertheless, it appears politically more acceptable for the State to co-finance the insurance scheme by means of general taxation, maybe even with the introduction of social earmarked taxes currently not present in the Slovenian tax system, than to pose new contributory obligations upon the economy.

Other measures include, the prolongation of the most favourable consecutive years of insurance which are considered when forming one's calculation base from 24 years to one's entire period of economic activity, or the introduction of a mandatory additional pension insurance scheme. However, both potential measures have important legal, even constitutional drawbacks.

The prolongation of the considered insurance period would follow the insurance principle of reciprocity, as the amount of pension benefits would become proportionate to the 'taxable' income obtained throughout one's period of economic activity. Moreover, pension benefits are designed to provide the beneficiary with a proportionate way of life, concerning both his needs and wants or wishes, in relation to the way of life sustained during their period of work. Contrarily, expensive tastes should be met through private insurance and investment schemes. However, the prolongation of the considered insurance period could have a significantly negative socio-economic impact on people, who experience slower career progression, more interruptions in their periods of employment or frequently work part-time only. Mostly, these apply to women as insured persons, who require positive measures that ensure their equality and the equality of their economic opportunities.

The introduction of a mandatory additional pension insurance scheme is even more problematic. It is true that the legislator enjoys a wide margin of discretion in the field of social security and that it can combine a public insurance scheme with a private one. However, in doing so it must always consider the constitutional core of the right to social security from Article 50 of the Slovenian Constitution, which lies in the permanent provision of a public income protection scheme, established, and exercised in accordance with the principles of vertical and horizontal solidarity. From this viewpoint, private insurance schemes that are linked to public ones can only be intended to provide an additional level of income protection, for example in old-age, and not to reduce the scope of social insurance rights and associated cash-benefits. A major legislative shift from public to private responsibility for income protection in old-age would generally interfere with the constitutionally protected core of the right to social security as well as the explicitly mentioned right to (old-age) pension, making such amendment unconstitutional. Furthermore, such regulation would interfere with one's property rights by requiring saving or investing in private insurance schemes, while the State would have to guarantee a minimum insured return

42 Zakon o spremembah in dopolnitvah zakona o prispevkih za socialno varnost (ZPSV-B), Official Gazette of the RS, No. 34/96.

on investment for all mandatorily insured persons, now both within the first and second pension pillar. Under current legislation, additional pension insurance, granting the right to an additional old-age pension, is voluntary, with the premiums paid either by the employer and/or by the insured person. This strongly regulated form of private saving and investment is supported by tax reliefs. A monthly premium of approximately 200 EUR will lead to an approximately 600 EUR in tax return or income tax reduction, making this form of insurance best suited to above-average earners. Additional pension insurance is mandatory only for persons performing hazardous work, who thus retire early. However, this type of additional pension insurance, forms part of the first, not the second pension pillar, and is referred to as occupational insurance, a special type of private insurance that offers an occupational pension as form of a 'bridging' pension benefit for the beneficiary from the moment of their early retirement up until they meet the general retirement conditions.

Additionally, any reform in the field of old age has to be approached coherently, encompassing different areas of life and the associated legislation, for example housing. Historically, homeownership represented a *de facto* pension pillar of its own and continues to be the most important and common form of saving or investment for private income protection in old-age. Currently, 92,1% apartments in Slovenia are owned by natural persons. However, the statistics do not reveal how many natural persons own several apartments, with 36.400 apartments built between 2011 and 2021.[43] In 2021, real-estate prices grew by almost 17%.[44] According to Deloitte Property Index, buyers in Slovenia have to put aside approximately 8 to 10 gross annual salaries to purchase a new apartment, which amounts to approximately 190.000 to 235.000 EUR and is the overall country average, with real-estate prices significantly higher in Ljubljana, the governmentally, economically and culturally centralised capital. Comparatively, in Denmark, Portugal, Belgium and Norway, citizens need to put aside from 4 to 6 gross annual salaries only.[45] In April 2022, several leading Slovenian banks sparked their interest rates on mortgage loans, with rates on some 30-year, fixed mortgages climbing to as high as 3%, with rents in Ljubljana growing by 10%, in Maribor by 11% and in Celje, the third largest city, by 5% from 2021 to 2022.[46] Persons younger than 35 years earn a below-average net wage, whereas persons older than 64 years, who commonly also own real-estate, earn more than 1,5 times the average. Economically active persons aged from 15 to 24 years earn an average of 878 EUR net, persons aged from 25 to 34 years earn an average of 1.080 EUR net, while only persons aged from 35 to 44 years almost reach the Slovenian average.[47] If effective saving is only possible after 35 or 44 years of age – also in respect to second and third pillar pension plans – economically active persons have around 35 to 45 years to accumulate approximately 190.000 to 235.000 EUR (with no market growth considered), implying

43 Miklič, 2022.
44 Zavec, 2022.
45 Linhart et al., 2022.
46 Ibid.
47 Seljak, 2021.

they have to accumulate approximately 350 and 560 EUR net monthly, on a roughly 1.300 EUR net salary, that is before costs and after they are able to secure a loan. Owing to the ever-increasing role of down payments the monthly costs should be lower, however, in this respect, persons ought to save approximately 38.000 to 50.000 EUR in the years leading up to average buying age, in a period when their salaries are commonly significantly lower than the average salary. If those generations are unable to buy real-estate, their average pension benefits will as a general rule not cover their living costs in old-age owing to payment of rents and will have to rely on tax-funded income support. In this respect, special attention will have to be afforded by the government to the challenges of decent and affordable housing, the cornerstone of every developed social State and a necessary element to consider in almost any major social security reform.

3.2. Mandatory health insurance

In the next 20 years, health care expenditure is projected to grow by 1% of GDP, reaching a total of 6,8% of GDP by 2040 and a total of 6,9% of GDP by 2050.[48] The growth in health care expenditure, triggered by the extending life expectancy and advances in medical science, will require that the legislator finds additional sources or new ways of financing, such as socially earmarked taxes from tobacco, alcohol, sweet drinks (VAT and other duties).[49] However, it should not be overlooked that compulsory health insurance is primarily financed by social security contributions from compulsorily insured persons and their employers within a functionally decentralised system of social security and that the obligation of State co-financing from general taxation, which may theoretically interfere with the principle of self-administration in its purest form, can only be derived from the provisions of the Slovenian Constitution by means of broad grammatical and theological interpretation and not from the Health Care and Health Insurance Act itself. Nevertheless, the constitutional principle of adapting the legislation to the everchanging conditions in society[50] will require the legislator to be active in the field of mandatory health insurance to prevent a disproportionate reduction in cash and in-kind benefits, concerning either the scope of coverage or the quality of the provided services, that could interfere with the constitutionally protected core of the right to social security[51] and the right to health care from public funds from Article 50(2) of the Constitution. Contrarily, the legislator should actively develop the public health sector and the services provided therein, alongside other stakeholders in the field, such as the HIIS, the Ministry of Health and representative bodies of the medical profession.

Recently, one of the coalition parties submitted a legislative proposal that would abolish the supplementary health insurance scheme, following a 30% increase (from

48 Kajzer and Fajić, 2016, p. 9.
49 See, for example, Spiegel et al., 2015, pp. 12, 16.
50 Strban, 2013, pp. 361–365 or Strban, 2016, p. 251.
51 Article 50 of the Constitution.

approximately 35 to 40 EUR) in the insurance premium by one of the three supplementary insurance providers that occurred in early April 2023. Prior to spring of 2023, the last attempt at abolishing this special type of *de lege* voluntary but *de facto* mandatory private health insurance scheme dates back to 2020, when the failed health care reform brought down the then acting government.[52]

The need for this type of insurance stems from the fact that the Slovenian mandatory health insurance does not cover all of the provided services, drugs, medical devices, in full but in part, making co-payments an integral part of the health care system. To avoid out-of-pocket co-payments all mandatorily insured persons may conclude a private health insurance for co-payments, available under equal conditions, regardless of their age, gender or health. The insurance provider has to prescribe a same premium for all clients and has a duty to conclude contract with any mandatorily insured person. Until April 2023, the insurance premium was set at approximately 35 EUR monthly with all insurance providers, as it is difficult to differentiate the price of a statutorily prescribed insurance product which cannot be provided, at least directly, as part of a broader private insurance package with a given insurance company. The negative financial effects of the insurance group structure (e.g. the insurance company offering this insurance product the longest has the riskiest insurance group structure owing to its age structure) are prevented by the equalisation scheme. A significant controversial issue of supplementary health insurance is the fact that its insurance premium, although relatively low (as mentioned, until the recent increase to approximately 35 EUR monthly or 400 EUR annually), is the same for all compulsorily insured persons, irrespective of their income or socio-economic situation, except for monetary social assistance recipients whose supplementary insurance costs, if concluded, may be covered by the State. As in 2020, the proposal, if passed in the Parliament, will abolish the supplementary health insurance only. The system of co-payments as such will remain in place, calling for the introduction of a new type of (a) a social security contribution, (b) socially earmarked tax, (c) or, what is most likely even if most unorthodox, an income-sensitive public duty paid from one's disposable income that will secure additional sources of financing.

The interplay between public and private health insurance or public and private income protection in times of occurred sickness and injury will be crucial in the future to ensure the long-term financial sustainability of public healthcare and health insurance, particularly occupation-based social insurance schemes developed approximately 150 years ago. The interdependence between public and private insurance, whenever prescribed by law, may reduce public expenditure in a given field of social security, whereas importantly limiting the disposable income of compulsorily insured persons, particularly those who have to conclude such insurances on behalf of their dependent family members as well. Moreover, it may lead to unequal access to public healthcare, particularly on grounds of one's socio-economic position, while being overall more suited to the better-informed insured persons, particularly when

52 See Mišič, 2020b, pp. 47 et seq.

deciding on a premium-dependent insurance package, not simply concluding a supplementary or other type of health insurance that is unified, provided separately and under the same conditions for all mandatorily insured persons by the force of law.

Similar challenges, concerning a high level of information, the possibility of out-of-pocket (in-advance) payment or co-payment of healthcare, are posed by the commonly debated possibility of claiming treatment obtained with private healthcare providers in Slovenia at the expense of the mandatory health insurance scheme in a purely domestic setting, as is currently possible in a cross-border setting between different EU Member States on grounds of the Directive 2022/24/EU of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare.[53] Depending on the prices of healthcare in the Member States, the reimbursement can be either full or partial. If partial reimbursements for healthcare obtained with private providers in Slovenia were made possible, this would generally reduce public healthcare expenditure, increase price competitiveness and in the first step reduce the waiting periods within the public healthcare system. However, in the long-run, such healthcare reform could create a two-tire healthcare system, with the semi-private one benefiting the well-off mandatorily insured persons most by offering them timely access, a higher quality of benefits, whereas the exodus of doctors and concessionaires from the public health network could bring about its demise. A decrease in public providers would generally increase the waiting periods, with a – from a risk viewpoint – deteriorating community of mandatorily insured persons would again increase the costs of public healthcare expenditure.

3.3. Long-term care

As late as in 2023, no uniform long-term care scheme had been established in Slovenia. Cash benefits, as well as in-kind long-term care benefits, such as non-acute medical care, social care services, domestic care services and others, continue to be dispersed throughout the Slovenian social insurance, social assistance and family benefits scheme, making the regulation confusing and not transparent for the beneficiaries or various service providers, from care homes for the elderly and day care centres, to hospitals and private at home care providers.[54] In 2021, the long awaited Long-Term Care Act[55] was passed. However, it never entered into force as its enactment was postponed until 2024 and 2025 with respect to some of its provisions with an almost immediate amendment proposed by the newly elected government from 2022.[56] The Act, passed hurriedly and with limited participation of stakeholders and the professional public, was recognised as inapplicable soon after its promulgation owing to a number of nomothetical and other legislative and administrative drawbacks. Importantly, it

53 Official Journal of the European Union, L 88/45 from 4 April 2011.

54 For a systematic overview of long-term care in Slovenia see, for example, Strban, 2018, pp. 421 et seq.

55 Zakon o dolgotrajni oskrbi (ZDOsk), Official Gazette of the RS, No. 196/21.

56 The Act Amending the Long-Term Care Act, Zakon o spremembah zakona o dolgotrajni oskrbi (ZDOsk-A), Official Gazette of the RS, No. 263/22.

introduced a uniform long-term care scheme without introducing a new social insurance branch. This daunting task was delegated by the force of law to a later parliament composition. At the time it was already clear that the coalition which passed the Long-Term Care Act, will not be re-elected. This allowed the 2021 Parliament composition to pass the law while not having to accept the obligation of setting up a long-term care insurance scheme or provide a source of sustainable public funding for the future.

Nevertheless, considering the constitutional principle of adapting the legislation to the everchanging conditions in society, the introduction of a uniform long-term care scheme in Slovenia appears necessary. The fragmentation of the current rules on long-term care benefits and the heteronomous ways of their financing with important financial participation by the beneficiary commonly required with respect to social and domestic care services could make the scheme administratively, financially, and legally unsustainable in the face of the growing number of the elderly population requiring such care. This could have an irreversible impact on their constitutional right to social security, as well as other rights such as the right to personal dignity and safety[57] as well as their private autonomy and personal rights protected by Article 35 of the Slovenian Constitution as such. According to the broad margin of appreciation in the field of social security, enjoyed by the legislator, the scheme does not have to be established in the form of a social insurance scheme. However, this would follow the well-established constitutional tradition in the field of social protection. If the introduction of a uniform long-term care insurance scheme would lower the public expenditure in some fields of social security, for example, in the field of health care, it would generally lead to an overall increase. Thus, the question of combining public and private insurance schemes becomes relevant considering long-term financial sustainability demands of the general State budget as well as specific budgets of specific social insurance carriers, bringing forward the already discussed issues of economic inaccessibility or unequal access to social security benefits, particularly in-kind benefits provided by care homes for the elderly and day care centres.

4. Conclusion

The cost of social security in Slovenia is rising, particularly in respect of pension, health care, and long-term care public expenditure, whereas the social needs of the population are transforming owing to societal ageing and new ways of living, for example, new living arrangements, enhanced mobility of people, new market products and services. Additionally, new forms of work and work organisation, new methods of earning passive income, as well as other phenomena may lead to the erosion of the traditional contribution base, further limiting the available resources for organising, executing, and financing public income protection schemes stemming from Article 50 of the Slovenian Constitution. Considering the evident financial

57 Article 34 of the Slovenian Constitution.

sustainability challenges, it is surprising that in 2021, the government proposed the introduction of a (anti)social cap on contributory obligations or, more precisely, proposed an upwards limited contribution base. This would benefit high-earners most as they would pass the contributory threshold of approximately 6.000 EUR gross and obtain a contribution-free part of their salary. Furthermore, they would no longer be affected by the limited calculation base within the pension and disability insurance scheme since the two thresholds almost coincide with each other in net amounts.[58] The proposed amendment, countering the principle of vertical solidarity, was never passed.[59] Even if the government or the competent ministries and, even more so, the legislator have to dynamically adapt social security legislation in accordance with the everchanging social reality, which also includes the demands of the labour market and the economy, they ought to adhere to the basic principles of social security, such as the principles of mutuality, vertical, and horizontal solidarity, also supported by the case law of the Slovenian Constitutional Court. Similarly, they ought to adhere to the rule of law (*germ. Rechtsstaatsprinzip*) as well as the social State principle, while considering other constitutional rights, such as the right to private property, personal dignity and safety. These and other constitutional safeguards as well as international legal standards limit the broad margin of appreciation enjoyed by the parliament in the field of social security.

58 As mentioned, the maximum calculation base, from which pension benefits are calculated, amounts to four times the minimum base, set at 76,5% of the average monthly wage of the previous calendar year. See Article 36 ZPIZ-2. In 2021, when the regulation was proposed, the threshold would amount to approximately 5.800 EUR gross in respect to the average monthly salary in 2020.

59 See Mišič, 2021, pp. 79 et seq.

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Chapter 11

Comparative Analysis of the Sustainability of the Social Security Systems in Central Europe

Nóra JAKAB

ABSTRACT

This chapter presents a comparative analysis of the country chapters along the following themes: social security and social protection, the dogmatic issues of social law. This is followed by an analysis of the constitutional arrangements, since, in addition to the arguments for and against the inclusion of social rights in the constitution, it is a question of a choice of values: whether to accept the 'message' of social rights, namely that the individual, the citizen, (also) has duties towards the community, the state. The starting point for the preparation of this book is an examination of compliance with the relevant articles of the (Revised) European Social Charter. This document is the most prominent of all Central European countries in this respect. The subsections on sustainability and current regulatory issues have made it possible to present the information gathered in three separate subsections: good practices, sustainability issues and country-specific regulations.

KEYWORDS

social security and social protection, dogmatic of social law, level of the protection in the constitution, sustainability, best practices

1. Introduction

This chapter presents a comparative analysis of the country chapters along the following themes. It is important to highlight how Central-European authors write and think about social security and social protection. We will then summarise the dogmatic issues of social law in the countries studied. This summary is followed by an analysis of the constitutional arrangements, as, beyond the arguments for and against the inclusion of social rights in the constitution, it is a question of a choice of values: whether to accept the 'message' of social rights that the individual or citizen (also) has duties towards the community or state. Therefore, it is fundamentally a values debate, an ideological debate, to which it is never possible to give a clear-cut answer or provide the truth. It seems to be accepted in the literature that debates on the need to include social rights in the constitution are primarily political rather

Jakab, N. (2023) 'Comparative Analysis of the Sustainability of the Social Security Systems in Central Europe' in Jakab, N. (ed.) *Sustainability of the Social Security System: Demographic Challenges and Answers in Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 221–254. https://doi.org/10.54171/2023.nj.sotsss_11

than legal, that the choice between different alternatives is primarily a matter of political decision, and that social philosophies, ideologies and value choices in this regard have (or should have) their place in the constitutional process rather than in the constitution. The starting point for the preparation of this book was an examination of compliance with the relevant articles of the (Revised) European Social Charter. This document was considered to be the most prominent of all Central-European countries in this respect. The subsections on sustainability and current regulatory issues have made it possible to present the information gathered in three separate subsections: good practices, sustainability issues, and country-specific regulations.

2. Social security and social protection

Social security is a quality of human life that can be understood in the context of well-being. It is the right of those whose quality of life is generally regarded as acceptable to all. In the world of social rights, the right to social security should not be mentioned for moral reasons, as long as the degree of social security is not also a constitutional guarantee of a secure human existence (well-being).[1] Meanwhile, the declaration of social rights or some form of regulation of social rights is a faithful reflection of the values and vision of humanity and the role of a particular state. Moreover, it is, generally, linked to prevailing political views and, of course, to the more narrowly defined conceptions of constitutional law.

The definition of social security is rarely found in international legal sources, while the social security system itself is most often defined in professional literature as 'a set of all measures that should in certain cases (illness, accident at work, old age, death, birth of a child and unemployment) establish a disturbed balance'. In most cases, social security represents an umbrella concept—that is, the basic goal of the science of social law—which is achieved through various subsystems, such as social insurance systems and social protection systems. Consequently, social security can be a goal that society strives for to ensure decent living conditions and an existential minimum for as many residents as possible. The aforementioned goal will be achieved by the developed social insurance and social protection system, which will enable individuals to exercise their basic rights and receive appropriate protection in cases of occurrence of a certain social risk. Therefore, the state must create a valid normative framework that will regulate the procedure and conditions for exercising social security rights and providing social protection measures. Without developed legal and sub-legal legislation and a clear constitutional framework and appropriate measures of supervision over the implementation of the law, ensuring social security for citizens will be a challenging task for every state.[2]

1 Takács, 2011, p. 79.
2 Bojić, 2023.

Ravnić wonders what social security would encompass—individual subjective rights or something broader—while analysing German law, according to which social benefits and services include only those recognised by the public authorities responsible for public social benefits and services. Namely, social law regulated by state public law norms establishes a relationship between the individual and the state, where individuals are granted benefits and services regulated by public authorities. According to Ravnić, social content regulated by a contract, on a voluntary basis, unilaterally by a charitable institution, or even compulsorily determined by public authorities would be part of the content of social protection law as a gender concept comprising different forms of insurance and assistance for individuals and, to a lesser extent, for groups. Social protection in this sense is only part of social law and by no means represents its sole task. However, Ravnić clearly emphasises that the concept of social security has displaced the concept of social protection, and social security, seen as a system, encompasses social areas based on insured risks, social needs, and other insured cases, overlapping with the concept of social law or the right to social security. Objectively, social law is a set of norms, regulations, and rules that regulate legal and social relationships. Subjectively, it is a set of powers conferred by law to individuals and less frequently to groups to demand certain social benefits (provision or action) in a state of social need, if they meet certain conditions.[3]

One of the greatest Croatian labour law theorists, Nikola Tintić, criticised the ambiguity of the attribute 'social' and its usage in various meanings of the term. The term 'social' is seen as the totality of protective legislation *in favorem* workers; the limitation of the employer's contractual dictate, particularly regarding vulnerable groups of workers (minor workers and women); a system of social assistance and protection in the broadest sense regarding members of society in a state of social need; provisions elevated in such cases to the level of specific social rights of individuals. Moreover, he clearly stated that social law and social security in different periods of history, social, political, and economic systems are based on different conditions, social relations, interests, possibilities, goals, and concepts. For such reflections on social law by Tintić, social policies become a significant instrument because, unlike static social law or social security law, they reflect a more dynamic nature and the ability to adapt to different social challenges, needs, and, ultimately, different programmes of political elites.[4]

Legal scholarship offers several definitions of social security law. Several from college textbooks can be cited. Koldinsky sees social security law as a set of legal norms that implement the rights formulated primarily in Articles 30 to 32 of the Charter of Fundamental Rights and Freedoms and respond to legally recognised social situations and constitute a system of social protection. Matlák stresses that social security law acts as a separate legal branch but is the subject of both pedagogical and scientific approaches and constitutes a scientific and pedagogical discipline.

3 Vinković, 2023.
4 Vinković, 2023.

He further states that social security law constitutes a set of legal norms regulating social, collective, and individual relations arising in social security and the application or implementation of social policy and social partnership of individual subjects of the social sphere. Galvas and Gregorova consider social security law to be a set of legal norms that regulate the behaviour of subjects in social relations arising in the provision of material security or other assistance to citizens who, as a result of social events accepted by law, need such benefits or assistance.[5]

Vieriu explains that social security is not only an activity, a concern of states but also a set of legal rules governing this activity, the protective measures, their specifics, and their beneficiaries. The legal rules governing social relations make up the branch of law known as social law. Just as labour law has separated from its parent discipline (civil law), social law has also separated from labour law to become an autonomous discipline and a new branch of law.[6]

3. Dogmatic of social law

Regarding the integration of social security law into the legal system, one can agree with the views that by its nature it is primarily a public law branch, with administrative law being the closest (especially in procedural norms), and similarities can also be found with financial law (the nature of insurance premiums in the social insurance system is similar to the tax system). Meanwhile, many private law elements can also be found in social security law (e.g. private law contracts concluded between the provider and the recipient of certain social or health services). Moreover, social security law has a special relationship with labour law, with several overlaps. There is a particular correlation in the protection of employees caring for children. The basic code of labour law provides these employees (and other groups) with special care and legal protection (e.g. interruptions at work, maternity leave, and paternity leave), which is supplemented by the financial security provided by the standards of social security law.[7]

In the Czech Republic social security law comprises insurance and provision subsystems. Insurance comprises pension, sickness, and health insurance. The unemployed are covered by the state employment policy, but it is not an insurance system. Support for families with dependent children is provided through state-funded state social assistance. The last part of social security law is social assistance, which comprises material needs assistance, social services, and benefits for persons with disabilities. Relatively recently, the regulation of substitute maintenance has come into force, whereby the State takes over the payment of part of the alimonies owed by

5 Dolobáč, 2023.
6 Vieriu, 2016, p. 113.
7 Dolobáč, 2023.

the child's parent. This system includes protection against all risks as calculated in international conventions binding the Czech Republic.[8]

In Slovenia, the social security system is grounded in the notion of a Bismarckian, employment-based social insurance scheme, linking one's economic activity to their obligation of insurance. As employees and self-employed persons are compulsorily insured in all social insurance branches, (i.e. health, pension and disability, unemployment, and parental protection insurance), all regulated by separate pieces of legislation, the link between social security law, an independent branch of public law, and labour law is clearly visible. Social insurance is insurance against the occurrence of a social risk of one's temporary or long-term loss of earnings. Traditional social risks, such as unemployment, sickness, and old age, covered by the Slovenian social insurance system, lead to a loss or reduction of one's salary or wage obtained from employment or other income obtained from self-employment. However, in some subsystems, such as the mandatory health insurance scheme, coverage is almost universal and the notion of economic activity transgressed. Additionally, social security law shares an important link with administrative law, more precisely, administrative procedure, as social rights and obligations are claimed and administered within the said procedure.[9]

The literature emphasises that social law occurs in Poland as an area of research and didactics. However, it is questionable whether social law constitutes a separate scientific discipline (e.g. this is the fact in Germany). This is partly caused in Poland by the lack of a legal definition of social law.

> (...) practical, social, didactic and research considerations argue for the separateness of social law, for the recognition of its own research problems, which require the creation of its own theory. However, regardless of the further development of scientific concepts, it is possible today to treat social law as a separate field for research purposes, especially interdisciplinary research and teaching needs. It is to be hoped that further scientific endeavours will contribute to the identification of the identity of social law and its unquestionable recognition as an independent scientific discipline.

The way of defining social law and delimiting its research space is not uniform, and there is no shortage of highly different concepts. According to I. Sierpowska, this state of affairs is partly due to the lack of a legal definition of social law (in the rich literature dealing with social-legal issues, systemic studies are not common); one can even get the impression that 'the doctrine is reserved in defining social law, delimiting its object, scope and research methods'. There is little doubt in Polish legal science that labour law is outside the scope of social law. According to J. Jończyk, the proposal to combine labour law with social security institutions under the common name

8 Štefko, 2023.
9 Mišič and Strban, 2023.

of 'social law' has not been accepted in science. Meanwhile, the literature assumes 'social security law focuses on the problem of benefit systems and the methods (techniques) and social risks attributed to them, which allows, it seems, to treat it as a component of social law'. Seeking an answer to the question of how social law differs from social security law reveals that 'social law more broadly than social security law exposes the state's concern for the social existence of citizens, which is also noted by researchers who do not advocate the separation of social law'.[10] The definitions in the Romanian literature are quite uniform, highlighting the same characteristics, and thus actually fit into the internationally accepted definition and characterisation of social law. For example, social law is interpreted as 'all the legal rules governing social security relations' or

> ...a set of cash and in-kind benefits provided to protect income in the event of social risks; a system of protection against loss of income or a system of rules ensuring solidarity with people facing loss of income from work or costs to prevent social risks

by Romanian authors.
Notably, the emphasis on the autonomous nature of social law is not as strong as in the case of labour law; however, social law as an autonomous field of law remains a clear leitmotif in the explanations of the concepts provided by Romanian scholars. The best example of this kind of approach is the very simple yet clear and traditional definition by Professor Athanasiu, who considers that social law is an autonomous branch of the legal system, made up of all the legal rules governing social security and social assistance relations.[11]

Serbian social law represents a relatively new branch of law, which began to develop rapidly after the Second World War in the territory of the Republic of Serbia. Even so, in the first decades of development, it was mostly related to the area of Labour Law, only working members of the population were mostly insured in this period. Nevertheless, in the last few decades, the social security system of the Republic of Serbia has rapidly changed, as certain concepts are accepted that are represented in modern European social security systems. Thus, today social law in Serbia is separate from Labour Law, and special regulations regulate basic rights, which are provided to the insured and other citizens given the realisation of some of the social risks.[12]

In Slovakia, social security law is a separate branch of law, with its own content and subject matter. The theoretical definition of any branch of law is always a sketch by which the author draws insight and a strict definition of the essential characteristics of that branch. As long as it is logically justified, it may also be considered

10 Barański, 2023.
11 Vallasek, 2023.
12 Bojić, 2023.

correct. There is, thus, no objection to the multiplicity of definitions.[13] In Croatia, we refer to Ravnić's interpretation of the objective and subjective sense of social law at the beginning of this chapter. In Hungary, social law is a separate branch of law, and the Hungarian social system is mixed, with both insurance and benefit elements present and the insurance elements predominating. Accordingly, benefits provided by social law institutions can be broadly grouped into three broad systems: social security benefits, family benefits and other benefits for families with children, and benefits provided by the social administration system. However, this division is not set in stone, and the dynamic nature of social law is constantly changing. Further, this system may change as the catalogue of protected values expands or contracts.[14]

4. Level of protection in the constitution

Modern constitutions have overwhelmingly taken the view that there is a need for some level and type of regulation of social rights in general. The exercise of classical freedoms and social (existential) security are parts of human quality that are mutually dependent. In society, as a moral community, solidarity must be expressed in some form. The modern state must protect the individual against social impossibility. Truly, the extent of social rights depends on the capacity of the state to deliver, but this should not mean that constitutions do not enshrine some realistic system of support for the vulnerable. Indeed, where the line is drawn between economic policy decisions and constitutional decisions depends on the constitutionalisation of social rights and the quality of the regulation. If the provision of the necessary means of subsistence follows directly from the constitution (human dignity), whether to provide the necessary means of subsistence to the citizen is not an economic policy decision but a matter of fundamental rights.[15]

In the Czech Republic the constitutional frame of the State's duties to protect its citizens and other natural persons against social risks, such as unemployment, lack of healthcare, disability to work, ageing, and poverty, is not laid down in Act No. 1/1993 Collection (hereinafter 'the Constitution'). Rather, it is outlined in Articles 26, 30, 31, and 32 of the Charter of Fundamental Rights and Freedoms (hereinafter 'Charter'), which was declared as an appendix of the statute No. 23/1991 Collection. Although the protection against social risks is set forth in the Charter, it does not enjoy the absolute highest effect of laws within the Constitution. Article 9 of the Constitution establishes another tier of law, determining a fundamental immutable rule. It prescribes that the 'fundamental requirements of Czech *democratic* state bound by law cannot be changed even through amendments'. The words 'welfare state' are, however, absent in Article 9. Furthermore, the Charter's level of granted constitutional protection

13 Dolobáč, 2023.
14 Tóth and Mélypataki, 2023.
15 Téglási, 2019, p. 337.

to social security is reduced through two elements. First, according to the Charter, every natural person who is not a citizen of the Czech Republic is entitled to a limited number of rights (e.g. benefits in case of poverty and healthcare). The second restriction is the possibility of claiming the constitutional granted protection only within the frame of secondary Czech legislation (note Article 41 (I) of the Charter). The Constitutional Court justified this latter restriction because of the character of social rights. The Court reasoned that the State's obligations from social rights are expensive because they, in principle, demand long-term financial support from the State (*status positivus*). As the economy is naturally unstable, and the State's revenue from taxes and other payments is unpredictable, the range of social protection is better regulated through secondary legislation. Hence, there is, thus far, neither a guarantee contained in the Charter nor another constitutional law nor an obstacle derived or developed by the Constitutional Court to change current social security. Nevertheless, the provisions contained in the Charter are not completely without legal impact. They form constitutional ideas on the Czech legal system; the State itself, its administrative agencies, and courts are bound to follow and implement these ideas in their actions and decisions. According to the Court, mandatory requirements arising from the guarantee of social rights are usually of a long-term (permanent) financial support nature, thus requiring certain actions from the state. There is an obligation on the state to act (performance rights in the narrower sense). However, the state's revenues in the form of taxes and insurance premiums are entirely dependent on the performance of the national economy, which is a volatile factor in the long term. Thus, regulation via 'ordinary' laws is preferred for better legislation adaptability to the possibilities of the Czech economy and changing views of society.[16]

In Slovenia social security stems from Article 2 of the Constitution, stipulating the so-called social state principle, and Article 50, which stipulates the right to social security, guaranteeing citizens' the right to social security and the right to a pension, under conditions provided by law. The social insurance system is established regarding the traditional social risks stipulated in the ILO Convention No. 102, which comprises compulsory health, pension, disability, unemployment, and parental insurance, with the legislator authorised by the Constitution to regulate additional branches (e.g. long-term care insurance). The introduction of a new branch of insurance, like long-term care insurance, for example, does not require a Constitutional amendment. The Constitution contains no explicit mention of the right to social assistance or the right to minimum subsistence benefits. However, according to Article 34, everyone has the right to personal dignity and safety. Article 34 is commonly recognised as one of the constitutional cornerstones of the right to social assistance, even if, as mentioned, it is not explicitly part of the Constitution. Social assistance is considered to fall, as mentioned, within the wider notion of social security. Article 58 defines a social dispute as a legal dispute concerning rights, obligations, and legal benefits of natural, legal and other persons if they can be holders of rights and obligations derived from

16 Štefko, 2023.

the social security system for which the social courts are competent. It is the only provision in which the statutory legislation refers to the social security system. The social courts' competences are stipulated in Article 7 of the Labour and Social Courts Act, which includes social assistance benefits. Article 51, according to which everyone has the right to healthcare under conditions provided by law.[17]

In Poland, Article 68(1) of the Polish Constitution shows that it is necessary to derive the individual's subjective right to health protection, and the objective order for public authorities to take such measures as are essential for the due protection and realisation of this right. A subjective right is the citizen's right to equal access to publicly funded healthcare services,[18] which has a guaranteed character, and the right of children, pregnant women, disabled persons, and the elderly to healthcare.[19] According to Article 67(1) of the Polish Constitution 'a citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age'. Article 67 of the Polish Constitution also statutes a subjective public right to social assistance within a narrow scope. According to Article 69 of the Polish Constitution 'public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication'.[20] The State, in its social and economic policy, shall consider the good of the family. Article 72 describes the protection of children's rights.[21] Article 1 of the Romanian Constitution declares that

> 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.

However, how should we understand the term 'social state' in this constitutional framework? In his work, professor Ion Deleanu considers that the meaning of this concept, often paired with the concept of the rule of law, is straightforward: it does mean the involvement of the state in the social and economic sphere. Despite declaring Romania a social state by the first Article of the Constitution, only a few other articles deal specifically with the issue of social security, and we must say that, in fact, they do that only tangentially.[22]

The Constitution of the Republic of Serbia from 2006 undisputedly represents the foundation for the construction of the social security system in our law. The Constitution contains several provisions guaranteeing certain social rights. These

17 Mišič and Strban, 2023.
18 Article 68(2) of the Polish Constitution.
19 Article 68(3) of the Polish Constitution.
20 Article 71(1) of the Polish Constitution.
21 Barański, 2023.
22 Vallasek, 2023.

provisions are foreseen in the second part of the Constitution, which regulates basic human rights and freedoms and guarantees the right to social protection, the right to healthcare, and the right to pension insurance. The right to social protection is guaranteed within a special Article of the Constitution. However, the name of this article seems quite incoherent with its content, and, in addition to the rights realised in the social protection system, rights from social insurance are also guaranteed. The first paragraph posits that

> ...citizens and families who need social assistance in order to overcome social and life difficulties and create conditions for meeting basic life needs, have the right to social protection, the provision of which is based on the principles of social justice, humanism and respect for human dignity.

It is also provided that employees have the right to compensation in case of temporary incapacity for work and the right to compensation in case of temporary unemployment. It is also stated that disabled persons, war veterans and war victims are provided with special protection per the law, and social insurance funds are established per special regulations.[23] Analysing this Article of the Constitution of the Republic of Serbia, it seems that it would be much more appropriate if it was titled social security rather than social protection because, beyond rights from social protection, certain rights from social insurance are also guaranteed. Article 68 of the Constitution guarantees the right to healthcare and proclaims that everyone, including children, pregnant women, mothers during maternity leave, single parents with children up to the age of seven, and the elderly receive healthcare from public revenues, has the right to protect their physical and mental health if they do not achieve it in another way.

Pension insurance is guaranteed by a special Article of the Constitution. There, the constitution maker does not go into details but only states that pension insurance is regulated by law and that the Republic of Serbia takes care of the economic security of pensioners. This article often creates certain doubts in practice. When one initiative started the procedure of constitutionality and compliance with the confirmed international treaties of the Law on temporary regulation of the pension payment method, the Constitutional Court took the position that Article 70 of the Constitution did not determine the content of that right and that the Constitution to citizens guaranteed pension insurance, as a form of social insurance, but specific rights from pension insurance are not rights guaranteed by the Constitution but are rights established by law.[24]

The Constitution of the Slovak Republic states in Article 1 that the Slovak Republic is a democratic state governed by the rule of law, whose economy, as per Article 55, is based on the principles of a socially and ecologically oriented market economy. Regarding the social rights enshrined in the Constitution of the Slovak Republic, it should first be noted that the adoption of the Constitution materially incorporated the

23 Constitution of the Republic of Serbia, Article 69 (4–5).
24 Bojić, 2023.

Charter of Fundamental Rights and Freedoms into the text of the Constitution. The protection of human rights and fundamental freedoms based on their natural-law understanding has, thus, reached, at least, the level of the current international standard. The text of the constitutional regulation of fundamental rights and freedoms contained in the Charter is comparable, but not identical, to the text of the constitutional regulation of fundamental rights and freedoms contained in Title II of the Constitution.[25]

Croatia is defined *inter alia* as a social state in Article 1 of the Constitution. In Article 3, social justice is elevated to one of the highest values of the constitutional order and the foundation for interpreting the Constitution. Constitutional experts highlight that the Croatian Constitution maker, by constitutionalising the concept of a welfare state, has placed the Constitution of the Republic of Croatia in the group of socially sensitive European constitutions, obliging the legislator to care for the general social welfare and the development of social rights. The Croatian social welfare system undoubtedly belongs to the Bismarck model of the social state, but it has also inherited the system of social assistance and social welfare from the socialist era of the former Yugoslavia. Ravnić argues that, pursuant to the Croatian Constitution, social law comprises social security and social insurance, as Article 57 specifies that the right of employees and their family members to social security and social insurance shall be regulated by law and collective agreements, while Article 58 guarantees that the state shall ensure the right to assistance for weak, infirm, or other persons unable to meet their basic subsistence needs, given their unemployment or incapacity for work. This article also mentions that the state shall devote special care to the protection of persons with disabilities, Croatian war veterans, disabled Croatian war veterans, and the widows, parents and children of fallen Croatian war veterans. The Constitution guarantees everyone the right to healthcare in conformity with the law, which stipulates that the family shall enjoy the special protection of the state (with marriage defined as a union between a man and a woman), and emphasises state protection of maternity, children, and the youth, by creating social, cultural, educational, material and other conditions that promote the realisation of the right to a dignified life.[26]

In Hungary, the Fundamental Law of Hungary, which entered into force on 1 January 2012, significantly amended the fundamental right to social rights. The current Fundamental Law has lowered the level of protection of social security by not providing social security but only seeking it. Thus, it defined the establishment of a social security system as a state objective: 'Hungary shall endeavour to provide social security for all its citizens'. As the Constitutional Court stated in a 2012 decision, 'Article XIX of the Fundamental Law on Social Security does not provide for rights, but rather for obligations and objectives of the state'. The legislation in force before 2012 contained a stronger state role. It should be noted that the Fundamental Law is also characterised by the fact that it sets out other state objectives as aspirations;

25 Dolobáč, 2023.
26 Vinković, 2023.

for example, it only seeks to ensure decent housing. In a decision, the Constitutional Court considered that, when drafting the above new concept of the Fundamental Law, it was necessary to reduce the previous entitlements because of 'sustainable economic development and the gradually deteriorating demographic situation' and 'changed economic circumstances'. The positive economic changes in the period that has elapsed have not yet prompted the legislator to amend the Fundamental Law, and the reasoning of the Constitutional Court is, thus, questionable. [27]

5. Compliance with the provisions of the European Social charter

As A. Binaś notes, guaranteeing the rights under the European Social Charter admittedly requires increased spending from the state budget. However, in the long term, this outlay can be compensated for economic growth, improvement of citizens' quality of life, activation of groups at risk of exclusion or disadvantage in the labour market, and increased confidence in government.[28] Although the European Social Rights Committee performs control over compliance with the Charter, the Committee's interpretation of the Charter's provisions does not constitute an authentic interpretation of the treaty, as this can only be done by the Charter states parties (the Committee's assessment is only a guideline for the interpretation of the Charter's provisions and has no binding force in this regard).[29]

The Czech Republic is bound by Articles 11 (1, 2, 3), 12 (1, 2, 3, 4), 13 (1, 2, 3, 4), 14 (1 and 2), 15 (2), 16, and 17 of the European Social Charter. The Czech Republic publishes reports on its policies, in which it is stated that the Czech Republic fulfils all its obligations. Such a statement can be found in those reports regularly from 2000 onwards. Granted, those statements are somewhat misleading. In its recent conclusions, the European Committee of Social Rights found that the Czech Republic is in non-conformity with Articles 11 (1, 2, 3), 12 (1), 13 (1), and 14 (1). Regarding the other six situations related to, among others, Articles 12 (4) and 13 (1), the Committee mentioned that it needs further information to examine the situation. The Czech Republic has been subject to several complaints. The Committee considered that the situation in the Czech Republic was not in conformity with the European Social Charter as the minimum level of old age and unemployment insurance benefits fell below 40% of the Eurostat median equivalised income. A long-standing problem is the obligation of foreigners to take out commercial health insurance, which not only does not provide the same coverage as public health insurance but is also significantly more expensive. Another major problem is the virtually non-existent regulation of social housing and the very poor state housing policy.[30]

27 Tóth and Mélypataki, 2023.
28 Binaś, 2022, p. 73.
29 Ibid.
30 Štefko, 2023.

One of the most important measures in the implementation of the European Social Charter in Poland was also the formation of the Children's Ombudsman, which upholds children's rights as defined in the Constitution of the Republic of Poland, the Convention on the Rights of the Child and other laws, respecting the responsibilities, rights and duties of parents. In matters of children, the Children's Ombudsman cooperates with the Ombudsman (the latter is generally responsible for protecting the rights of citizens, including social rights). Poland is constantly working to improve the living standards and protection of its citizens' social rights per the assumptions outlined in the European Social Charter. The implementation of the European Social Charter in Poland took place in stages through the introduction of various laws and changes in the legal system. Amendments were made, for example, to the Act of 28 November 2003 on family benefits, the Act of 17 December 1998 on pensions from the Social Insurance Fund, or the Act of 15 April 2011 on medical activity. Unfortunately, in Poland, as the above analysis has shown, the state of observance of social rights still does not partially correspond to the standards established by the Council of Europe. Meanwhile, the cyclical negative assessment of the European Committee of Social Rights regarding Poland's realisation of social rights may indicate the low effectiveness of the mechanism for monitoring compliance with the European Social Charter.[31]

In Romania, a closer look at Articles 34, 47, 49 and 50 of the Romanian Constitution leads to the conclusion that their provisions reflect the spirit of the European Social Charter. Although the constitutional articles do not contain the full range of rights listed in Articles 11–17 of the Charter, they do outline its general framework. Based on the conclusions of the European Committee of Social Rights 2021 concerning Romania, thematic group 'health, social security, and social protection', Romania was facing conclusions of conformity regarding Article 12 (2) and Article 13 (3) and conclusions of non-conformity for Article 11 (1 and 3), Article 12 (1, 3, 4) and Article 13 (1). Regarding the situation of Article 11 (2), the Committee mentioned that it needed further information to examine the situation. Meanwhile, the conclusions of the European Committee of Social Rights concerning Romania from 2020 on the thematic group of 'employment, training, and equal opportunities' also mention the non-conformity of Article 15 (1 and 2). Finally, the 2019 Conclusions on the thematic group 'children, families, and migrants' show non-conformity regarding Article 16 and Article 17 (2) and the need for further information for Article 17 (1. In conclusion, although Romania has ratified most of the articles relevant to our study, it still faces compliance problems in most of them, even though it has made significant progress in the years since its adoption.[32]

The Republic of Serbia ratified the Revised European Social Charter in 2009. During the ratification, 29 basic principles of the Charter were accepted, which guarantee various social and economic rights, most often referred to in the literature

31 Barański, 2023.
32 Vallasek, 2023.

as the rights of the second generation of human rights. Articles 11 to 17 were also ratified.

The Slovak Republic has not ratified the following provisions of the Charter: Article 13(4) (right to social and medical assistance for nationals of other contracting parties per the obligations under the European Convention on Social and Medical Assistance signed in Paris on 11 December 1953); Article 15(3) (to promote the full social integration of persons with disabilities, in particular through measures, including technical assistance, to overcome communication and mobility barriers and enable them to access transport, housing, cultural activities, and leisure time); Article 18(3) (relax the right to work rules for individuals and groups governing the employment of foreign workers); Article 19(2), (3), (4)(c), (8), (10) and (12) (limitation of the right of migrant workers and their families to protection and assistance); and Article 31(1), (2) and (3) (right to housing). As regards social security law, the 11th report, which was submitted on 27 November 2020, concerns the accepted provisions of the thematic group 'health, social security and social protection' (Articles 3, 11, 12, 13, 14, 23, and 30). Conclusions on these provisions have been published in March 2022. Here again, the European Choice for Social Rights has assessed the inadequacy of the legislation in several areas. Although the list of shortcomings seems excessive, the Slovak Republic is not out of the average in this respect. The European Committee on Social Rights' observation of shortcomings in the observance of the Revised European Social Charter is not unique, even in the cases of other countries, and it is not, a priori, a finding of non-observance of fundamental rights and freedoms. The monitoring mechanism is intended to strengthen and improve the protection of human rights, including social rights. In the meantime, the Slovak Republic has adopted several measures within the framework of social policy aimed at eliminating the alleged shortcomings. Examples include the adoption of several laws and regulations on minimum safety and health requirements at work, covering most of the relevant risks (i.e. those related to health protection at work with ionising radiations, carcinogens, biological and chemical agents, asbestos, noise and vibrations), and minimum safety and health requirements for the use of work equipment and the manual handling of loads at work.[33]

Croatia ratified the European Social Charter of the Council of Europe as a kind of counterpart to the European Convention on Human Rights and Fundamental Freedoms in the field of economic and social rights. In this context, it should be regarded as a country that, in its political, economic, and democratic post-transitional development as an EU Member State, follows a similar evolutionary path and faces similar challenges as its Central-European counterparts. Croatia ratified the following articles that are important for this discussion: Article 11 – The right to protection of health; Article 12 – The right to social security; Article 13 – The right to social and medical assistance; Article 14 – The right to benefit from social welfare services; Article 15 – The right of persons with disabilities to independence, social integration, and participation in the life of the community; Article 16 – The right of the family

33 Dolobáč, 2023.

to social, legal, and economic protection; and Article 17 – The right of children and young persons to social, legal, and economic protection. Notably, pursuant to Article 20 of the Charter, which regulates the obligations of the contracting parties, it is expressis verbis stated that states have the option to undertake from the à la carte system at least five out of the following seven Articles (1, 5, 6, 12, 13, 16, and 19). By ratifying the Additional Protocol Providing for a System of Collective Complaints, Croatia became one of the 16 contracting parties that recognise the quasi-judicial role of the European Committee of Social Rights in the process of deciding on submitted collective complaints. However, it has not allowed the submission of such complaints by national non-governmental organisations through a separate declaration *per se*. Moreover, although Croatia ratified the 1961 European Social Charter and signed the revised European Social Charter of 1996, it has not yet ratified the revised version, placing itself among the smaller number of Member States still bound by the original text of the Charter.[34]

In Slovenia, the European Committee of Social Rights' conclusions regarding the benefits were the following: 'The Committee concludes that the situation in Slovenia is not in conformity with Article 12§1 of the Charter on the ground that the duration of unemployment benefit for the insurance period of 10 months to five years it too short'. Regarding Article 23, the decision remains pending. The Committee also requires additional information regarding Article 3 (2 and 3) and Article 11 (3). Three conclusions on non-conformity were reached regarding Article 3 (4), Article 12 (1), and Article 12 (4).[35]

Hungary has accepted all provisions from the noted group, except Article 12 (2 and 3) and Articles 23 and 30. The reference period was from 1 January 2016 to 31 December 2019. The conclusions regarding Hungary concern 10 situations: One conclusion of conformity: Article 3 (1); and six conclusions of non-conformity: Article 3 (2 and 3), Article 11 (1), Article 12 (1), Article 13 (1), and Article 14 (1). On the other three situations regarding Article 11 (2 and 3) and Article 14 (2), the Committee needs further information to examine the situation. The Committee considers that the absence of the information requested amounts to a breach of the reporting obligation entered into by Hungary under the Revised Charter.[36]

6. Best practices

In the Czech Republic, regarding the interest in the social integration of handicapped persons, principal attention concentrates on their employment and all measures enhancing such employment, particularly their working rehabilitation. Instruments used in the framework of state employment policy for the promotion

34 Vinković, 2023.
35 European Committee of Social Rights, 2022a, pp. 27–28.
36 European Committee of Social Rights, 2022b.

of the employment of the handicapped comprise economic incentives or administrative measures. A strong instrument is the possibility for an employer who employs people with disabilities to significantly reduce their income tax base. The tax rate of employers employing more than 50% handicapped from the total number of their employees is further reduced. Every employer who employs more than 25 employees must employ people with disabilities. The obligatory quota is 4% of handicapped employees of the total number of employees. Beyond employment of handicapped persons, employers may satisfy this obligation by purchasing products or services from special institutions employing more than 50% handicapped by commissioning certain production programmes to relevant organisations or buying products from sheltered workshops operated by citizen cooperatives or owned by the state, a church, or a religious assembly or by placing orders with the subjects or buying products or services from self-employed persons with a physical handicap. Another way to fulfil the obligation of employing handicapped persons is paying 2.5 times the average monthly wage within the national economy to the state budget for each person with a physical handicap who should be employed. The individual variants may be combined. However, should the employer not comply with the imposed obligation through one of these three forms, he would be sanctioned by a fine. Current trends explicitly prefer that the handicapped should live in a family environment that provides better possibilities for their social integration. Act No. 108/2006 Coll., on social services, regulates social care services provided to people with a certain level of dependency. According to this Act, a person shall be considered dependent on the assistance of another physical person according to four degrees (slight, medium-strong, strong and total dependence) and their health status, as examined by a physician of the district social security administration, which narrowly collaborates with the Labour Office of the Czech Republic and decides on the degree of dependency for the care allowance. Social care services are provided as stay-in, ambulatory, or field services. There are several types of social care services, defined by the Social Services Act. For example, social care services help persons arrange for their physical and mental self-sufficiency to enable them to integrate with the common social life to the maximum possible extent and, when their health condition excludes such a possibility, to arrange for them a dignified environment and treatment.[37] State administration of state social support benefits is exercised by the Labour Office of the Czech Republic. The Ministry of Labour and Social Affairs is authorised by law to perform inspections. Social assistance, similarly to state social support, as a system of non-contributory benefits, is administrated by the Labour Office of the Czech Republic. All non-contributory benefits were entrusted to the Labour Office of the Czech Republic for efficiency and better control and to combat the misuse of benefits, especially social assistance benefits.[38]

37 Štefko, 2023.
38 Štefko, 2023.

In Serbia, regarding Article 15 of the Revised European Social Charter on the right of persons with disabilities to independence, social integration, and participation in the life of the community, the Law on Professional Rehabilitation and Employment of Persons with Disabilities was adopted in 2009. It governs incentives for employment to create conditions for the equal inclusion of persons with disabilities in the labour market, assessment of work abilities, professional rehabilitation, and the obligation to employ persons with disabilities and conditions for establishing and conducting activities of firms for professional rehabilitation and employment of persons with disabilities and other special forms of employment, including other important issues of importance for professional rehabilitation and employment of persons with disabilities. This regulation introduced an affirmative measure into our system; more precisely, the quota system of employment of persons with disabilities, which is based on the obligation for all employers with at least 20 employees to establish a working relationship with a certain number of persons with disabilities. Given this obligation, an employer who employs between 20 and 49 employees will be obliged to employ at least one person with a disability, while an employer who employs more than 50 employees will be obliged to employ at least one more person with a disability, and so on for every next 50 employees. If the employer does not fulfil the stated obligation (i.e. if he does not employ the required number of persons with disabilities), he will be obliged to pay the amount of 50% of the average salary per employee in the Republic of Serbia. In Serbia, it seems that the adoption of the new Law on Health Insurance and the new Law on Healthcare has improved the healthcare system in their law. The same is true with the unemployment insurance system, which is increasingly oriented towards work orientation instead of social security because, as Professor Šunderic states,

> ...unemployment rights should not demotivate in relation to work and monetary compensation is not permanent, but a time-limited right for the period until a vacancy is offered on the labour market or until conditions are created for the insured to switch to another form of protection.

The unlimited duration of the benefit would lead to a situation where users neglect the obligation to actively seek employment and rely on benefits provided by the state.[39]

Regarding the deinstitutionalisation measures highlighted by the Committee, in Croatia, the Social Welfare Act of 1997 laid the foundation for non-governmental organisations and private individuals to register and open family homes (under certain conditions) for the accommodation of beneficiaries, primarily from the social welfare system. However, today, such a system of family homes and foster care has expanded to include persons with disabilities and other protected categories, mainly supplementing insufficient public capacities and infrastructure. The

39 Bojić, 2023.

role of personal assistants will be regulated by the Personal Assistance Act, which is expected to enter into force on 1 July 2023. Hence, the role of personal assistants, who assist persons with disabilities in their daily lives, would be regulated by law and funded by the state budget, rather than primarily relying on programme and project funds financed by the EU.[40]

In Poland, the Social Insurance Institution received awards for 11 projects submitted for the ISSA Good Practice Awards. The award ceremony occurred on 2 May 2022 at the ISSA Regional Social Security Forum in Tallinn. The projects that received certificates with special mention include 1) automated granting of benefits to families in Poland, 2) digitisation of ZUS documentation (efficient access to electronic documents using innovative solutions), 3) enabling customers self-service data confirmations on the ZUS Electronic Services Platform (automation of the process to issue certificates required by other institutions), 4) implementation of e-visit in ZUS, 5) ZUS statistical portal as a platform for universal data sharing, 6) Anti-Crisis Shield, 7) handling of the Polish Tourist Voucher, 8) increasing efficiency and improving the quality of external customer service by identifying and developing competencies of ZUS employees, 9) optimisation of the process of granting reliefs and remissions through specialised counsellors, and 10) transformation of the Department for Employee Affairs into the Human Resources Management Department.[41]

In Slovakia, substantial support for the employment of persons with disabilities is found in the Act on Employment Services, which regulates financial incentives for employment and enshrines the so-called false quota system. According to the law, if an employer employs at least 20 employees and if the relevant Labour, Social Affairs, and Family Office keeps citizens with disabilities in the register of job seekers, the employer is obliged to employ citizens with disabilities in a number corresponding to 3.2% of the total number of its employees, whereas a disabled people who, given a long-term adverse health condition, has a low ability to engage in gainful activity of more than 70% shall be counted as three such employees for the purpose of fulfilling the established mandatory proportion of employment of disabled employees. An employer who does not employ the statutory mandatory share of the number of employees with disabilities or meet the replacement obligation by awarding a contract or taking products or services is required to make a mandatory levy on behalf of the Labour Office for each citizen who falls short of meeting the mandatory share. Such an approach accords with EU anti-discrimination law, which is characterised by the fact that its application is not limited to compliance with the prohibition of discriminatory practices but focuses more on positive action to compensate for the handicaps of persons to ensure formal and material equality.[42]

40 Vinković, 2023.
41 International Social Security Association, 2022.
42 Dolobáč, 2023.

7. (Un)Sustainability issues

Social security law is specific in that it covers social events that occur to individuals, and legislation must consider the overall social policy, social protection, and challenges of society as a whole. The scope of the provision of social security and social services is historically and economically determined. The social safety net in any given country is determined by political, economic, and, as a direct consequence, legislative conditions. Given the noted social conditions, it is the legislation of social security and social assistance that particularly comes to the forefront of political interest. Speaking of crises, in the long term, one of the greatest challenges is undoubtedly to deal with the demographic crisis, which is defined by low birth rates and an ageing population.[43]

Given the numerous social factors that affect the functioning of the social security system, most modern pension systems, whose main source of financing are contributions for mandatory pension and disability insurance, cannot smoothly ensure the payment of benefits without the appropriate intervention of the state, which covers deficit in pension systems. In the fifties of the 20th century, the Federal People's Republic of Yugoslavia (FPR Yugoslavia) spent 11.04% of its national income on social benefits, which do not include only allocations for pensions. In the Netherlands, 13.6% of GDP is allocated; in Italy, 13.5%; in Greece, 12.7%; in France, 12.2%; in Sweden, 10.3%; and in Germany, 10.3%. The second group includes countries that set aside between 8% and 10% of GDP for the sustainability of pension systems: Spain (9.4%), the United Kingdom (8.9%), Poland (8.5%), and New Zealand (8.2%). The third category includes countries that allocate between 3% and 7% – the United States of America (6.6%), Chile (6%), Japan (5.5%), Canada (4.8%), Australia (4. 6%), Argentina (3.6%), Turkey (3.3%). The fourth group includes countries that spend between 1% and 3% of GDP: China (2.6%), Brazil (2.4%), Egypt (2.3%), Tunisia (2.3%), Costa Rica (2.0%) and Singapore (1.4%). In the last group are countries, mostly developing countries, that allocate less than 1% of GDP for the sustainability of pension systems: Kenya (0.4%), Zambia (0.4%), Pakistan (0.3%), Mexico (0.3%) and Nigeria (0.0%). These data are from the 90s of the last century, though recent statistics indicate that there have been no major changes, but allocations for pensions given numerous demographic changes, especially the extension of the average life expectancy, are higher than before. Most authors believe that the ideal proportion for the sustainability of a country's pension system is four employees who will pay contributions for pension and disability insurance per one pension beneficiary.[44]

Regarding the sustainability of pension systems, instead of constantly tightening the conditions for the old-age pension, the noted report of the Committee for Social Protection of the European Union should be considered to find an alternative

43 Dolobáč, 2023.
44 Bojić, 2023.

model, instead of strictly tightening the conditions for the old-age pension and other benefits, which are provided within the Pension and Disability Insurance System. The appropriate proposals are those related to the sustainability of the appropriate amount of pension, which would ensure an adequate level of social security, ensure intergenerational fairness, maintain the idea of solidarity within the pension system, and maintain a balance between rights and obligations.[45]

In the Czech Republic, in March 2023, the president signed an amendment that diminished the valorisation of old-age pensions. This piece of legislation was published under No. 71/2003 Coll. and came into force on 20 March 2023. In the Czech Republic, there is a pluralistic system of health insurance companies, which, however, shows serious distortions given its still relatively short-lived existence. This fact can be traced to the markedly servicing trend in both countries. Indeed, the long-term trend in the public health insurance market is clearly towards merging health insurance companies. However, the question is whether it is appropriate to intervene politically and, if so, to what extent, to hasten the merger of two or more health insurance companies. For greater financial stability of social insurance, it is necessary to consider unifying the collection of public health insurance premiums with social security premiums and contributions to state employment policy. Hence, considerable administrative costs associated with the operation of these systems can be saved. Recently, the practice has continued that when a problem arises, a separate solution is adopted, regardless of the existing legislation (e.g. substitute maintenance). The idea that sick, elderly, or immobile beneficiaries can successfully defend their rights on their own is further weakened by the complexity of the legislation. The *de lege ferenda* idea aims to unify administrative decision-making and remedies in all sectors of social insurance and social security by introducing a two-stage administrative procedure and non-independent administrative tribunals as a second administrative instance body deciding on appeals against decisions of the Czech Social Security Administration and the Social Security Administration. Citizens' participation in decision-making on social security benefits should be strengthened, not only for insurance benefits.[46]

45 Bojić, 2023. The Committee for Social Protection of the European Union, based on the submitted reports of the Member States of the community, issued a special report in which the issue of the sustainability of pension systems is addressed, and the Member States previously agreed on 10 common goals for future pension reforms: 1. Sustainability of a more appropriate pension amount; 2. Ensuring intergenerational equity; 3. Maintaining the idea of solidarity within pension systems; 4. Maintaining a balance between rights and obligations; 5. Ensuring that pension systems support equality between men and women; 6. Ensuring transparency and predictability; 7. Ensuring that pension systems are even more flexible in light of constant social changes; 8. Facilitating the adaptability of the labour market; 9. Ensuring the consistency of pension schemes in general pension systems; and 10. Ensuring the sustainability of public finances.

46 One of the key questions that has been repeatedly raised in the Czech Republic in this context is a change in the structure of the organisation of this insurance. In fact, two options are conceivable. In a Bismarckian system, both a single insurance carrier and a plurality of health insurance companies are possible. Each of these options has its advantages. If the plurality model guarantees the possibility of free choice and competition, which should result in

In Slovenia, the explicit mention of the right to a pension, which found its way into the text of the Slovenian Constitution as a political commitment against the challenges of an ageing society in 2004, is controversial. In Slovenia, there has been a recent debate on reorganising the healthcare system to introduce several social insurance carriers, instead of a single one, which would supposedly act as market competitors, thus contributing to the long-term financial sustainability of public healthcare by lowering the costs of provided services, drugs, and medical equipment. Indeed, in a country with less than two million insured persons, it is somewhat pointless to talk about an effective, market-based competition of several social insurance carriers. Furthermore, it is for this exact reason all insured persons, regardless of their employment status (e.g. employees, self-employed persons, civil servants, and public officials are mandatorily insured with the same social insurance carrier), each one in their branch of social insurance. Mišič and Strban also note that regarding the most pressing challenges of ageing societies, however, the constitutional review concerning future amendments and the enforcement of the human right to social security certainly seems more important than ordinary judicial review. From this perspective, it is important that the right to social security, protected by Article 50 of the Slovenian Constitution, can, alongside several other social (human) rights, be enforced before the Constitutional Court. Following the exhaustion of domestic legal remedies, a motion can be filed before the European Court of Human Rights whenever any social right protected by the Council of Europe can be merged with a breach of a Convention right.[47]

In Slovenia, several measures have been taken towards the sustainability of the pension system: a person who retires prematurely may experience a 15% reduction in the level of their calculation percentage, limitation of public expenditure in the field of pensions is the regulation of a limited calculation but unlimited contributory base, and the years of salaried employment, which make up the pension base are still limited. According to Article 30 ZPIZ-2,[48] the most favourable 24 consecutive years of insurance are considered when forming one's calculation base. In this regard a major legislative shift from public to private responsibility for income protection in old-age would generally interfere with the constitutionally protected core of the right to social security and the explicitly mentioned right to an (old-age) pension, making such amendment unconstitutional. Furthermore, such regulation would interfere with one's property rights by requiring one to save or invest in private insurance schemes, while the state must guarantee a minimum insured return on investment for all mandatorily insured persons, now both within the first and second pension pillar. The interplay between public and private health insurance or public and private income protection at the time the sickness and injury occurred will be

an improvement in the quality of services for the insured and the healthcare provider, then theoretically significantly lower costs of the system and easier control by the insured and the state speak in favour of the existence of a single carrier. Štefko, 2023.

47 Mišič and Strban, 2023.

48 Pension and Disability Insurance Act.

crucial in the future to ensure the long-term financial sustainability of public healthcare and health insurance, especially occupation-based social insurance schemes developed approximately 150 years ago. The interdependence between public and private insurance, whenever prescribed by law, may reduce public expenditure in a given field of social security, while still importantly limiting the disposable income of compulsorily insured persons, especially those who must conclude such insurance on behalf of their dependent family members. It may, thus, lead to unequal access to public healthcare, especially on grounds of one's socio-economic position while being overall more suited to the better-informed insured persons, especially when deciding on a premium-dependent insurance package, not simply concluding a supplementary or other health insurance type that is unified, provided separately, and under the same conditions for all mandatorily insured persons by the force of law.[49]

The most critical factors contributing to demographic ageing in Poland are falling fertility rates and increasing life expectancy. Moreover, a factor affecting the demographic ageing of the population in Poland is the ageing of the vintages of the post-war baby boomers. It is also worth signalling the low labour force participation of older age groups, which consequently means that the number of pensioners in Poland is higher than the demographic situation would indicate. All such phenomena undoubtedly pose a challenge to Poland's social security and healthcare systems. In 2013–2017, as a result of the pension reform, the process of gradually increasing and equalising the universal retirement age for both sexes to the ceiling of 67 years was underway in Poland. The method used to raise the retirement age slowly meant that the indicated retirement age limit was to be reached by men in 2020 and women in 2040. The introduced changes in the retirement age affected the legal regulation of other social benefits:

they increased the age that determines the status of an unemployed person and, thus, enlarged the population potentially eligible for unemployment benefits. They extended the period for collecting pre-retirement benefits, periodic capital pensions, bridging pensions, teacher's compensation benefits, and nursing benefits for the care of a disabled child. They raised the age at which a permanent benefit due to age-related inability to work can be obtained from social assistance.[50]

In Romania, the basic aim of all the laws on the state pension pillar that have been drafted up to now was to tighten the conditions for pension eligibility and introduce and apply a points-based calculation of pensions, which can now be considered the most successful step of the Romanian pension reform. This Romanian public pension system is complemented by parallel social security schemes for certain state-recognised churches and lawyers. In the field of long-term care, Romania has serious shortcomings in terms of both the appropriate legal framework and the appropriate institutional framework. This can be seen in the strategy document for 2023–2030,[51]

49 Mišič and Strban, 2023.
50 Barański, 2023.
51 National strategy on long-term care and active ageing for the period 2023–2030.

approved by Government Decision 1492/2022. It is not yet possible to analyse the practical implementation of the strategy, as it was published only in the last days of December 2022, and the implementation of the targets has not even started. The Strategy itself indicates that the current regulation must be corrected, and of course, sufficient funding sources must be allocated. Among the most important drawbacks, also noted by the Strategy, is the non-existence of continuity and synergy in covering all dimensions of the concept of long-term care in the legislation governing the social care system, the long-term care system, and the healthcare system. Meanwhile, there are overlaps and inequalities in the social services system, including long-term care services. One of the consequences of this situation is the massive migration of dependent older people into the disability care system. The methodology for assessing dependency status and personal care needs currently used is challenging to implement in practice given the lack of specialised staff (social workers and doctors) and the lack of funds to support this activity. However, overall we can whiteness an acute shortage of staff in the long-term care domain. This lack of personnel is leading to

> ...the increased risk of burnout, stress and exhaustion is one of the major challenges related to the geriatrics workforce in Romania. Even though many of these effects have been informally reported for long periods of time, the policy responses lacked to address them properly.[52]

The Federal People's Republic of Yugoslavia had the largest allocations from the public expenditure on the pension system, but one must consider the large number of war-disabled soldiers and unsecured families of persons who lost their lives during the Second World War. Professor Rakonjac Antić states that

> ...according to the data of the Federal Bureau of Statistics, the share of expenditures for pension disability insurance in the national product was 6.3%, in 1981 it was 6.8%, and in 1991 it increased to a worrying 13.7%, while according to data for 2004, this share increased to 14%.

High unemployment rates, demographic changes, and the increase in life expectancy are just some of the factors that cause a deficit in funds and require the intervention of the state. Statistics show that until recently, 14% of GDP was allocated annually to the Republic of Serbia for the sustainability of the pension fund. However, in the Serbian national system of pension and disability insurance, the legislator decided to equalise the years of the life of men and women when prescribing new conditions for exercising the right to an old-age pension, which was introduced by amendments to the Law on Pension and Disability Insurance from 2014, yielding the conclusion that the European model of life expectancy equalisation is accepted in Serbia. Current legal regulations on pension and disability insurance provide that the right to a full

52 Vallasek, 2023.

old-age pension will be exercised by an insured person who has reached the age of 65, with a minimum of 15 years of insurance experience or 45 years of insurance experience, regardless of age. Today, with similarly set conditions (i.e. 60 years of age and 40 years of previous insurance experience), the insured can only exercise the right to an early old-age pension, where a permanent reduction of the pension amount by 0.34% is foreseen for each month before reaching 65 years of age. Therefore, the question arises as to whether the Republic of Serbia can face demographic changes and whether this is the right way for the sustainability of the pension system. Hence, it should be noted that the Republic of Serbia did not accept the three-pillar model of the World Bank, which is accepted in many European countries, although this idea was considered at the beginning of this century, and is foreseen with mandatory pension and disability insurance and the possibility of contracting voluntary pension and disability insurance. In most modern countries, the number of employees who support the number of existing pensioners is unsustainably small given the policy of full employment from the period of socialism and the possibility of early retirement during the period of the transition process. A similar situation is observed in Serbia, where there are currently 1.4 insured persons for one pension beneficiary, with a tendency to further shift these proportions. This situation is one of the main reasons certain budget funds are allocated for the sustainability of the social security system in the Republic of Serbia.[53]

In Slovakia, recent efforts were highlighted by the legislature to boost fertility by increasing financial support for pregnant women (pregnancy allowance, increasing maternity pay) and subsequently for families (e.g. tax bonus, increased childbirth allowance). It is up to the judgment of sociologists, economists and, ultimately, statisticians to determine whether this increased financial support is sufficiently attractive for young people to start families. The support should be broader, the state should, in addition to direct and fiscal financial incentives, promote the possibility of taking time off work and insist on the prohibition of discrimination on the grounds of childcare in the legal text (most recently, the work-life balance directive has been transposed) and in real practice. Pre-primary childcare should be increased.[54]

In Croatia, for a system that rests dominantly on intergenerational solidarity regarding pension insurance (by which current pensions are provided exclusively by the work of currently employed people and transfers from the state budget), with an unfavourable ratio of actively employed persons or insured persons, where the number of pensioners (which amounts to almost 1:1) does not offer hope for optimism, Bismarck's model of social security (with undoubted Beveridge elements) posits a collapse.[55]

In Hungary, the sustainability of the pension system is also a key issue in light of the recent increase in the number of people aged 65 and over in Hungary from 16.6% to 19.9%. The EU average increase was about 3%. Beyond the number of retired

53 Bojić, 2023.
54 Dolobáč, 2023.
55 Vinković, 2023.

people, the replacement rate and the income conditions underpinning the pension are important considerations for pensions. If we analyse income relations in more detail, we can see that a significant part of the workforce is registered as minimum wage earners. Some of the workers employed on the minimum wage receive wages above the minimum wage 'in the black'; thus, neither the insured nor employer pays contributions or taxes on this part of their income. It is also the case that an amount higher than the minimum wage is the worker's official income, and the excess is received 'in the black' (e.g. in the health sector, this is also the case for healthcare gratuities, the acceptance and provision of which will be a criminal offence under the new law that will enter into force from 2021. However, in practice this institution continues to operate and is a major problem for the healthcare system). This may mean that these large numbers of minimum wage workers will subsequently only be entitled to a basic pension. It is also a problem because it will preserve a certain income situation that will lead to the phenomenon of poverty in old age. This can be argued in light of the fact that the minimum total pension that can be received in Hungary is 28,500 gross. Ft. The amount of this pension has remained unchanged for about 15 years, which could be a problem in the current economic situation, as the Hungarian economy is struggling with high inflation. The Ministry of Human Resources published the Healthy Hungary 2021–2027 Sector Strategy for Health in January 2021. The measures outlined in the strategy are increasingly shifting towards centralisation. Some elements, such as the reform of the on-call doctor system, the plan to change the boundaries of general practitioner districts, and the adoption of uneconomic practices are in preparation, are already in place. There are also plans to set up a national primary care professional centre. In the context of the transformation of chronic care, the strategy notes that, given Hungary's demographic situation and morbidity, a more economically efficient care system can make a greater contribution to improving population health indicators, which supports demographic and competitiveness objectives.[56]

8. Country-specific issues

In the Czech Republic on the last day of 2022, came into force to primarily make a vivid mark, following the Czech communistic past in the previous century. The Act has condemned the communist era of Czechoslovakia and reduced the retirement pensions of communist leaders by CZK 300 for each year in office. Symbolically, Act 455/2022 Coll. was passed by the Parliament in which the Communistic Party has not even one Member. The reduction of the old-age pension hinges on the period spent in high office before November 1989 and will be reflected for the first time in the March 2024 instalment of the old-age pension. If someone becomes entitled to the old-age pension only after that date, the percentage will be calculated first and then

56 Tóth and Mélypataki, 2023.

an adequate reduction will be made. The reduction will not be made for people currently on disability pensions. The reduction will only be considered when the former official applies for a retirement pension. Reduction of pensions was chosen because high communist officials had received a retirement pension, which was often above average.[57]

In Slovenia, according to the first paragraph of Article 67 of the Constitution on property, how property is acquired and enjoyed shall be established by law to ensure its economic, social, and environmental function. Its social function is of course exercised first and foremost through the Slovenian social security system, grounded in the redistribution of social insurance carriers' funds and the redistribution of societal wealth, concerning tax-funded social assistance rights. Interestingly, Article 33 is part of the chapter on human rights and basic freedoms, while Article 67 belongs to the chapter on economic and social relations. Both articles are also relevant from the sustainability perspective. Article 33 should limit disproportionate interference with one's possessions (e.g. in times of a recession triggering a decrease of pension rights or the imposition of additional public duties), while Article 67 explicitly refers to the environmental function of property. There has, for example, been a recent talk of changing how the Health Insurance Institute of Slovenia is managed. Currently, the social insurance carrier is operated by the general assembly comprising 25 insured person and 20 employer representatives. According to the proposal, the number of members of the assembly would decrease significantly; however, the insured person would still hold the majority. Nevertheless, with the proposed legislation, they would be appointed by the Slovenian Economic and Social Council, a tripartite social dialogue body, and no longer by individual representative groups of civil society. Additionally, a three-person board of directors would establish a two-tier system of governance. In 2021, the government proposed the introduction of a managing board in which the executive branch would have a majority, but the competent ministry would also hold a veto against any of the decisions made. The amendment from 2021 may be considered unconstitutional, as it undermined the fundamental idea of social insurance (i.e. the principle of mutuality and the principle of self-administration) (germ. Selbstverwaltung), according to which the rights and obligations within the insurance scheme are determined by the general legislator and the community of insured persons as primary funders of the scheme and as central holders of rights. The amendment, if it had been enacted, would have moved the system away from the notion of social insurance, as explicitly stipulated in Article 50 (2) of the Slovenian Constitution, closer to the system of a state-organised and state-executed national health service.[58]

Regarding lowering the costs of health insurance, there have been numerous cases of Croatian economic emigrants who arrived from Ireland in Croatia on extended weekends by using low-cost airlines, underwent medical examinations, and

57 Štefko, 2023.
58 Mišič and Strban, 2023.

consumed public health services. Meanwhile, they also visited their relatives, spent money to get their hair and nails done, and paid for other services, spending way less money than if they had paid for the same healthcare services or partially participated in these services in Ireland. The recent amendments to the Mandatory Health Insurance Act, which came into effect on 1 April 2023, aim to address such absurd situations. Pursuant to these amendments, insured persons who are not registered as unemployed individuals with the Croatian Employment Service (and are not entitled to mandatory health insurance based on some other basis but have regulated mandatory health insurance status) must personally report to the Employment Service every three months to verify the circumstances in which their insured person status is based. Otherwise, they will be deregistered from mandatory health insurance *ex officio*. It seems these legislative changes are neither a response to public outrage and the absurdity of the situation nor a reduction of rights for economic emigrants who have emigrated from Croatia and who were once intentionally or unintentionally provided with a certain level of health insurance in their homeland. They are a necessary consequence of the lack of responsibility towards spending (public) money and inadequate interconnection of national records, which could prevent obvious abuse.[59]

A few years ago, the Slovenian Parliament introduced new grounds for dismissal, leading to less favourable and unjustified unequal treatment of workers on grounds of (old) age, with a fictitious aim of enabling labour-market access for junior workers. However, it is more likely that the true aim of the never-enacted legislative amendment was a further flexibilisation of the Slovenian labour market. Even if bound by the ILO Convention No. 158 concerning the termination of employment at the initiative of the employer and the European Social Charter, the legislator introduced a new cause of dismissal by which an employer could one-sidedly terminate an employment contract if the worker fulfilled old-age retirement criteria. No genuine reason for dismissal, either on the side of the employee or the employer (e.g. a business reason) had to be established according to the legislative amendment. Interestingly, the Constitutional Court did not investigate the substance of the matter at all but grounded its decision solely in the fact that the legislator breached its international labour law obligations.[60]

In 2021, the long-awaited Long-Term Care Act was passed in Slovenia; however, it never entered into force, as its enactment was postponed until 2024 and 2025 given the almost immediate amendment of some of its provisions by the newly elected government in 2022. Considering the constitutional principle of adapting the legislation to the everchanging conditions in society, the introduction of a uniform long-term care scheme in Slovenia seems necessary. The fragmentation of the current rules on long-term care benefits and the heteronomous ways of their financing with important financial participation by the beneficiary commonly required, regarding social and domestic care services, could make the scheme administratively, financially, and

59 Vinković, 2023.
60 Mišič and Strban, 2023.

legally unsustainable in the face of the growing number of the elderly population requiring such care. This situation could have an irreversible impact on their constitutional right to social security and other rights like the right to personal dignity and safety (Article 34) and their private autonomy and personal rights protected by Article 35 of the Slovenian Constitution. According to the broad margin of appreciation in the field of social security enjoyed by the legislator, the scheme does not have to be established in the form of a social insurance scheme. This would, however, follow the well-established and, after all, constitutional tradition in the field of social protection. If, however, the introduction of a uniform long-term care insurance scheme would lower the public expenditure in some fields of social security (e.g. in the field of healthcare) it would generally lead to an overall increase. Thus, the question of combining public and private insurance schemes becomes relevant in light of long-term financial sustainability demands of the general state budget and specific budgets of specific social insurance carriers, bringing forward the already discussed issues of economic inaccessibility or unequal access to social security benefits, especially benefits in kind provided by care homes for the elderly and daycare centres.[61]

Perhaps one of the most striking characteristics of health insurance is that, unlike pension insurance, for example, it is only partially insurance-based. While the cash benefits of health insurance are only available against actual contributions, the solidarity principle is much stronger for health benefits. Another important feature of Romanian health insurance is that it does not cover all health services, only those listed by the law. The law sets out the rights and obligations of the parties. Insured persons are entitled to a basic package of services under the terms of the Law on health insurance reform. The concrete rights and the content of the basic service package are determined by the multiannual framework contract published in the form of a Government Decision. Insured persons are entitled to the services of the legal basic package from the first day of illness. According to the legal definition contained in Article 219 of the Law on health insurance reform, social health insurance is the main system of financing the healthcare of the population, ensuring access to a package of basic services for the insured. It is compulsory and quasi-universal, covering virtually the entire population of the country. Meanwhile, according to Article 219 (4), it may operate in various special situations, along with other forms of health insurance. They are, of course, not compulsory and may be offered voluntarily by insurance bodies authorised by law. Thus, health insurance in Romania can be compulsory or voluntary, the voluntary insurance complementing the compulsory basic one. The purpose of private, voluntary health insurance is to finance access to a higher level or, where applicable, a wider range of health services. However, as a general rule, voluntary insurance does not cover the risk of occupational accidents and occupational diseases. According to the law, any Romanian citizen, foreign citizen, or stateless person who is a member of the compulsory health insurance system is entitled to private health insurance. Article 349 of the law defines two forms of voluntary private

61 Mišič and Strban, 2023.

insurance: the voluntary complementary health insurance to pay the reimbursement fee from the voluntary insurance and the voluntary supplementary health insurance, which may be applied for the full or partial reimbursement of the costs of the health services not included in the basic health package, the choice of a certain healthcare provider or doctor, the reimbursement of the costs of an additional expert opinion, the reimbursement of accommodation costs required for medical treatments, or the reimbursement of the costs of other medical services specified in the contract.[62]

In Romania, the second major wave of pension reform of the public pension pillar seemed to have come to an end in 2010, with the entry into force of Law 263/2010. However, from 2015 onwards, we have witnessed a process of regression, with new, in our opinion, fundamentally ill-considered and harmful provisions being introduced into several elements of the pension system, which was designed to be sustainable. It abolished the universality of the public pension system by introducing separate legislation for military, police, and law enforcement personnel and reintroducing the so-called 'special pensions' for certain professional categories, such as prosecutors, judges, members of parliament and senators, and local government officials. The impact of this process and the direction that this process will take remain uncertain, and, unfortunately, the issue of the medium- and long-term sustainable development of the pension system has become a political battleground, the fierce but empty discussions often shifting attention from the more pressing issues of obtaining and maintaining a sustainable pension system. From year 2008 onwards, the mandatory public pension pillar was complemented by a mandatory private pension pillar and an optional private pension pillar, creating a three-pillar mixed-funded pension system. This system was supplemented by a fourth pillar quite recently, by introducing an occupational pension scheme regulated by Law No. 1/2020.[63] In Serbia as Professor Lubarda puts it,

> ...in domestic law, to the prevention and protection of employees contributes the employer's obligation established in several special collective labour agreements to, in addition to the collective insurance of all employees in the event of death, injury at work, occupational disease, reduction or loss of work ability, additionally insure employees who work at workplaces with an increased risk in an increased amount of injuries at work and occupational diseases.

In the aforementioned case, the financial resources are borne by the employer and are determined per the level of risk of injury or occupational disease and the working environment. The most open questions remain with pension and disability insurance, where, unlike other branches of insurance, conditions are most often changed (i.e. tightened) for the sustainability of pension systems. Therefore, it should be

62 Vallasek, 2023.
63 Vallasek, 2023.

considered, the re-establishment of the second and third degrees of disability, which have not been foreseen in our regulations since the adoption of the Law on Pension and Disability Insurance in 2003, should be considered. It is also necessary to review the overly strict conditions, especially those related to the previous insurance period of 40 years of service, which are foreseen for exercising the right to an early old-age pension and which prevent many insured persons from exercising this right.[64]

The Slovakian parental pension is an additional pension that seniors can receive alongside the old-age pension, the invalidity pension and the retirement pension. A recipient of an old-age pension is entitled to a parental pension and is entitled to its payment, if he or she is the child's parent (own or adopted child) and the child was insured for a pension (compulsorily as an employee or compulsorily as a self-employed person or voluntarily insured) in the two years preceding the calendar year in question and did not declare that the parent (pensioner) should not be entitled to a parental pension on reaching retirement age.

The entitlement to a parental pension and its payment accrues automatically to the child's parent (including the adoptive parent) (this somewhat contradicts the ideas of the drafters of the constitutional text). Conversely, the surrogate parent of a child who has brought up that child is only entitled to it based on the child's affirmative declaration within the statutory period. Meanwhile, the legislation allows for the child to declare that the parent should not be entitled to a parental pension (opt out). In such a case, the child's possibility to declare consent to the entitlement to the parental pension in any subsequent year (reinstatement of the parental pension) is preserved. The automatic vesting of own and adoptive children has been modified given the large number of persons concerned or to ensure administrative enforceability. The social security institution will, therefore, pay it automatically, according to the data in the register of natural persons for the natural parent and the adopter.[65]

In Poland, the size of the pension depends on two basic parameters: the sum of contributions accumulated in the insured's account (possibly supplemented by initial capital) and life expectancy (the general rule for determining the monthly pension amount is to divide the sum of indexed contributions by life expectancy). Therefore, lowering the retirement age will significantly impact the monthly pension in the future, as it will reduce the number of accumulated contributions given increasing life expectancy. It means an increase in the number of people in the future who will become entitled to a guaranteed payment of the lowest pension, financed from the state budget. The possible positive effects of current family policies, yielding an increase in the fertility rate, cannot change trends, and their mitigating effects will not appear in the labour market until 20 years from now at the earliest. Meanwhile, the demographic changes facing Poland are so significant that even a renewed increase in the retirement age cannot halt the decline in the number of working-age people. In none of the considered variants of forecasts does the Polish pension system reach

64 Bojić, 2023.
65 Dolobáč, 2023.

total capacity in the 2060 perspective. The restoration of the previous retirement age has, therefore, worsened the system's dependency ratio and the financial prospects of the pension fund.[66]

In Hungary, another aspect that we must consider for pensions is the European Union's strategy, which embraces the idea of active ageing. Ageing policy should not just be about the level of pension provision we are thinking about, whether at the Member State or EU level, but also about developing strategies and implementing programmes that specifically promote active ageing. This includes legal measures to allow and promote employment during retirement. In the Hungarian social policy system, this includes the public interest pensioners' cooperative, which aims to keep retired persons in the labour market and reintegrate them into the labour market. However, for the sustainability of the pension system, we must also talk about the implementation of the Women 40 programme. As noted, it means that if a woman has 40 years of qualifying service, she is entitled to a pension regardless of her age, and if she has 32 years of earnings-tested service out of these 40 years, she is entitled to a full pension regardless of her age. The introduction of this pension could result in a significant proportion of women disappearing from the labour market. Meanwhile, it is necessary to consider that women who retire under the Women in 40 scheme can expect, on average, lower pension amounts than if they claim pension benefits at retirement age. There was also a political initiative to allow men to retire after 40 years of service, but the referendum initiative was annulled by the Constitutional Court because a state referendum cannot be held on matters covered by the Budget Law.[67]

9. Closing remarks

The country reports on sustainability issues allowed the information gathered to be presented in three separate sub-chapters: good practices, sustainability issues, and country-specific regulations. The lessons learned can be summarised as follows. Most good practices have been related to the employment and rehabilitation of people with disabilities, which undoubtedly has a positive impact on the sustainability of the social security system. The social security system would be largely steered towards sustainability by the development and implementation of long-term care rules. We have paid special attention to this in the country chapters, but beyond the Slovenian and Romanian examples, no progress has been made in the region so far.

The Czech proposal is to ensure the greater financial stability of social insurance. It is necessary to consider unifying the collection of public health insurance premiums with social security premiums and contributions to state employment policy. Thus, considerable administrative costs associated with the operation of these systems can be saved. The idea *de lege ferenda* is also to unify administrative decision-making

66 Barański, 2023.
67 Tóth and Mélypataki, 2023.

and remedies in all sectors of social insurance and social security by introducing a two-stage administrative procedure, by introducing non-independent administrative tribunals as a second administrative instance body deciding on appeals against decisions.

According to the Slovenian proposal, the constitutional review concerning future amendments and the enforcement of the human right to social security certainly seems more important than ordinary judicial review. From this perspective, it is important that the right to social security, protected by Article 50 of the Slovenian Constitution, can, alongside several other social (human) rights, be enforced before the Constitutional Court. Following the exhaustion of domestic legal remedies, a motion can be filed before the European Court of Human Rights whenever any social right protected by the Council of Europe can be merged with a breach of a Convention right. Furthermore, the interplay between public and private health insurance or public and private income protection at the time the sickness and injury occurred will be crucial in the future to ensure the long-term financial sustainability of public healthcare and health insurance, especially occupation-based social insurance schemes developed approximately 150 years ago.

Several measures have been taken towards the sustainability of the pension system: a person who retires prematurely may experience a 15% reduction in the level of their calculation percentage, limitation of public expenditure in the field of pensions is the regulation of a limited calculation but unlimited contributory base, and the years of salaried employment, which make up the pension base are still limited. Moreover, the process of gradually increasing and equalising the universal retirement age for both sexes tightens the conditions for pension eligibility and introduces and applies a points-based calculation of pensions.

In most modern countries the number of employees who support the number of existing pensioners is unsustainably small given the policy of full employment from the period of socialism and the possibility of early retirement during the period of the transition process. This dependency ratio can be improved by boosting fertility and increasing financial support for pregnant women (pregnancy allowance, increasing maternity pay) and families (tax bonus, increased childbirth allowance, etc.).

We would like to stress that the sense of vulnerability could be overcome by strengthening economic resilience. There will be no well-functioning social system without a well-functioning economy. The challenge is combining the economic and social aspects in a balanced manner. In this dilemma, how to finance social security is crucial. The public expenditure spent on social protection is high; therefore, in times of demographic challenges, be it migration or an ageing society, it is crucial to find sustainable ways of financing social. In this book, we have tried to provide some solutions to the great challenges our region faces.

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