

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 1997¹ 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 Constitution²

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 prejudice 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 method⁵³ 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 degeneration 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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