

Slovenia: From the Protection of Acquired Rights, Legitimate Expectations and the Principle of Solidarity to Financial Sustainability Constrains—What Does the Future Hold?

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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.

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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 property⁴ 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 zavarovanju (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 Fajčič, 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 Act³⁸ 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 society⁵⁰ 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 security⁵¹ 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 Act⁵⁵ 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 safety⁵⁷ 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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