Chapter Three: The Protection of Pensioners' Existing and Future Legal Positions

The right to old-age pension benefits is enshrined in a litany of constitutional and international rights. The aim of chapter three is to explore the protection of this right by outlining the respective legal provisions that address the right to pension entitlements. The role of the Greek Constitution and wider international law in protecting this right becomes even more important in instances where there is a financial crisis, which tends to be a period characterized by reductions in social benefits, affected previously acquired rights of pensioners.

To achieve this aim, the present chapter is structured as follows: Section A addresses the question of which legal provisions (national or international) could potentially protect the right to old-age pension benefits. In this section, it is the protection of the individual from pension reductions that is to the fore. More particular, in section A, it is presented the negative right to property that demands non-interference by the legislature within the private sphere. Next, the principle of legitimate expectations is analysed, which is a core issue as regards to the maintenance of legal positions. Following on from this the right to equality and non-discrimination is analysed that provides for the requirement of equal treatment of all people under the law. Lastly, the right to social security is explored, which sets out the state's obligation not only to legislate and act but also to withhold from interference, which can function as a right in defence against state intervention. From these legal provisions, subjective rights may be provided that are justiciable, so that pensioners can raise legal claims before a court on the basis of public pension reforms. The justiciability of fundamental rights can be defined as "*the possibility for an individual to invoke these rights before a judge, and the judge's power to rule on the basis of the rights invoked*."[411] To assess whether the legislative norm in question may provide a justiciable right, the preconditions of the respective human rights are laid out, which have to be met so that the latter finds

411 *Moizard,* ELLJ 2014, p. 323.

application. Finally, Section B contains the concluding remarks of the present chapter.

A. Legal Provisions Protecting the Right to Old-Age Pension Benefits

I. The Right to Property

The right to property belongs within the spectrum of "*negative*" rights. Negative rights are justiciable and demand the legislature to abstain from any action. This section illustrates, whether the right to property could create claims of enforceability for current and prospective pensioners. In social security law, the right to property has served to ground social security rights claims. The legal implication rests upon the fact that due to unfavourable changes in social legislation the duration of the period of social benefits payments, as well as the actual value of the benefits is reduced.

In this book, as legal basis for old-age pension benefits claim is used Article 1 of the First Protocol of the ECHR.[412] This is on the grounds that this legal provision may provide wider protection for old-age pension benefits claims in comparison to the legal provision foreseen in the Greek Constitution that provides protection of the right to property. While the Greek Constitution protects the right to property and prohibits unlawful property invasion,[413] there is no clear authority in Greek jurisdiction which clarifies whether the protection of social security benefits falls under the constitutional right to property. The Greek jurisprudence dictates that "*property*" as protected by the Constitution may not be social insurance claims.[414] Only recently has the Council of State acknowledged that reductions in already granted old-age pension benefits may fall under the concept of property within the meaning of Article 17 of the Greek Constitution.[415]

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412 See p. 142 ff.

413 According to Article 17 of the Greek Constitution, no one shall be deprived of his/her property, unless this right is exercised at the expense of the public interest. In this case, any deprivation of property must be acquired by law and the owner must be fully compensated.

414 Aeropagus (Plenary Session), Judgment of 17 December 1998, No. 40/1998; Judgment of 12 December 2002, No. 43/2002.

415 Council of State, Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014.

However, on the grounds that from the ECtHR's jurisprudence derives an *"interpretative res judicata"*, the national courts have adopted the jurisprudence of the ECtHR declaring that the claim for old-age pension benefits, as well as for other social benefits, falls under the concept of *"possession"* of Article 1 of the First Protocol.[416] The concept of a possession within the ECHR is an autonomous one and is not dependent on classifications in national law.[417] The ECHR and its First Protocol was ratified by Greece in 1953 by Law No. 2329 of 1953[418] and once again after the restoration of democracy in 1974 by Law No. 53 of 1974.[419] The ECHR, as an international treaty, was ratified by the procedure described in the Constitution and finds direct applicability in Greek law. The ECHR functions only in a supplementary manner to the Greek Constitution, and holds no supremacy over it. This principle of subsidiarity is *inter alia* reflected in Article 53 ECHR, which indicates that the ECHR shall not limit any human rights or fundamental freedoms ensured by domestic law and that it shall not preclude a higher level of protection for such rights.

Article 1 of the First Protocol proscribes that "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by the law and by the general principles of international law. The preceding provisions shall not, however, in any way*

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416 Court of Audit, Judgement Nos. 1617/98; 1562/2005. Exceptionally, the Court of Audit in 1994 ruled that Article 1 of the First Protocol does not find applicability in cases of old-age pension benefits' claims, since its application would contradict to the constitutional provision of the right to property (Art. 17). The main reasons of this narrow interpretation of Article 1 of the First Protocol is the fact that Article 87(2) of the Greek Constitution states that "*judges shall be subject only to the Constitution and the laws*" and thus the jurisprudence of other national or international courts shall not constitute a source of law. Court of Audit, Judgment No. 28/1994.

417 ECtHR*, Beyeler v. Italy*, Judgment of 05 January 2000, Appl. No. 33202/96, at para. 100; *Iatridis v. Greece*, Judgment of 19 October 2000, Appl. No. 31107/96, at para. 54; *Broniowski v. Poland,* Judgment of 28 September 2005, Appl. No. 31443/96, at para. 129; *Anheuser-Busch Inc. v. Portugal*, Judgment of 11 January 2007, Appl. No. 73049/01, at para. 63. The case law of the ECtHR cited in the present work is available in the HUDOC database accessible at the website http://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=.

418 Law No. 2329 of 1953, Official Gazette of the Hellenic Republic 68/A/04.11.1953.

419 Law No. 53 of 1974, Official Gazette of the Hellenic Republic 256/A/20.09.1974.

impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties". Article 1 of the First Protocol is of great importance in the area of social security. Although the ECHR and its Protocols, in general, do not include the right to social security as such, the ECtHR has given a social dimension to the Convention through this article.[420] The ECtHR interpreted the concept of possession that is guaranteed in the above article broadly, and accepted in a number of cases that the social security benefits fall within the scope of application.[421]

1. Protection of Allocated Pension Benefits

Pensioners' rights may be protected through the right to property. The right to property finds application if the already allocated pension benefits fall under the concept of possession. It is thus ripe for legal consideration under which circumstances exactly do social security benefits fall under the concept of possession. Generally, the old-age pension benefits are considered as property once the pensioners have already established (or acquired) rights. Established rights are full, inalienable and incontrovertible rights that offer strong legal protection, when the individual has fulfilled all the requirements necessary for the application of the legal norm that provides the enjoyment of the right in question. The protection of established rights is a protective normative pattern, with origins in civil law, and includes the protection of an owners' rightful possession.[422] However,

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420 *Katrougalos*, Institutions of Social Policy and Protection of Social Rights at International and National Level, p 68. The ECtHR has given social dimension to the Convention also through the prohibition of torture (Art. 3 of the ECHR), the right to a fair trial (Art. 6 ECHR), the right to respect private and family life (Art. 8 of the ECHR) and the prohibition of discrimination in the application of rights (Art: 14 of the ECHR).

421 I.e. ECtHR, *Gaygüsüz v. Austria*, Judgment of 16 September 1996, Appl. No. 17371/90, at para. 41; *Asmundsson v. Iceland,* Judgment of 12 October 2004, Appl. No. 60669/00, at para. 45; *Valkov v. Bulgaria,* Judgment of 25 October 2011, Appl. Nos. 2033/04 etc., at para. 84; *Kohniakina v. Georgia,* Judgment of 19 November 2012, Appl. No. 17767/08, at para. 69.

422 *Rönnmar*, in: *Numhauser-Henning / Rönnmar* (eds.), Normative Patterns and Legal Developments in the Social Dimension of the EU, p. 97.

this pattern is "*silent on how these positions are established and who will be able to achieve these establishments*".[423]

In German law, claims to social benefits are protected by the right to property in the wording of Article 14(1) I of the Grundgesetz (Basic Law) when three conditions are met: 1. the rights derived from public law serve private interests; 2. they serve the purpose of securing a subsistence; and 3. they are based on a contribution on the part of the insured person which can be qualified as being more than "i*nsignificant*".[424] Claims to social assistance are excluded from the protection of property, since such claims rest upon the state's obligation to provide welfare benefits and the criterion of personal contribution does not exist.[425]

According to a general principle of the Greek social insurance law, the right to old-age pension benefits depends on the pension legislation that was in effect at the time of occurrence of the social insurance risk.[426] According to Greek jurisprudence, the social insurance risk takes place when all the substantial and formal prerequisites set out by the pension legislation are met.[427] Therefore, the pensioners may establish full rights when they fulfil all substantial and formal prerequisites. The substantial prerequisites include the *ratione personae*; which is the required contributory period and the reaching of the required age of retirement.[428] The formal prerequisites refer to the essential administrative procedures for a pension entitlement i.e. the application for an old-age pension benefit and the allocation of welfare benefits.[429] Exceptionally, the Council of State held that the claim for an old-age pension benefit that was pending, before the courts or before the administrative authorities, was protected and fell under the favourable pension legislation that was in effect at the time of the

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423 *Christensen*, Scandinavian Studies in Law 2000, p. 290.

424 German Federal Constitutional Court, 53, 257, 290 ff. See also *Becker / Hardenberg,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 109.

425 *Becker / Hardenberg,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 109.

426 The term "*social insurance risk*" is used in Greek law and defines an event after which social insurance benefits may be claimed, such as: sickness, disability, maternity, family, unemployment and old-age.

427 Council of State, Judgment of 18 May 2004, No. 1297/2004; Judgment of 14 July 2006, No. 718/2006; Judgment of 01 June 2009, No. 1817/2009.

428 *Angelopoulou,* EDKA 2010, p. 911.

429 *Kremalis,* Right to Social Security, p. 297.

application.[430] Therefore, in the event that the administrative departments or the courts are overburdened, the allocation of the welfare benefits is not a prerequisite for a pensioner's right to claim for benefits.[431]

The ECtHR has declared that in cases in which the state has already adopted legislation that is in force and provides for welfare benefit as of right, that legislation must be regarded as generating pecuniary rights with a proprietary interest falling within the ambit of Article 1 of the First Protocol.[432] Namely, where the entitlement to a welfare benefit is subject to a conditional claim and the claimant concerned fulfils and satisfies the legal conditions laid down in domestic law for the grant of the welfare benefit, then the right to this welfare benefit can be considered to amount to "*possession*" for the purposes of Article 1 of the First Protocol. The court has also ruled that even the entitlement to an increased pension falls under the concept of property.[433]

Therefore, in light of the ECtHR's jurisprudence, the legal positions of the pensioners are protected through the right to peaceful enjoyment of possession in cases relating to pensioners that have already been provided with old-age pension benefits. Therefore, current pensioners would be able to establish a legal basis for an old-age pension benefit claim in national law within the meaning of Article 1 of the First Protocol, on the grounds that they have fulfilled all requirements concerned and satisfy the legal

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430 Council of State, Judgment of 19 January 1998, No. 177/1998; Judgment of 26 April 1999, No. 1453/1999; Judgment of 28 February 2007, No. 579/2007.

431 However, Article 37 of Law No. 3996 of 2011 seems to be contrary to this jurisprudence; it provides that the new pension provisions concerning the stricter requirements for a pension entitlement of parents or siblings of disabled individuals are also applicable to applications for pension benefits that have been submitted before the publication of Law No. 3996 of 2011 and are pending before administrative authorities. For more details see *Morfakidis*, EDKA 2011, p.814.

432 ECtHR, *Gaygüsüz v. Austria*, Judgment of 16 September 1996, Appl. No. 17371/90, at para. 41; *Antonakopoulos and others v. Greece*, Judgment of 14 December 1999, Appl. No. 37098/97; *Supreme Administrative Court and others v. UK,* Decision of 6 July 2005, Appl. Nos 65731/01 etc., at para. 54; *Rasmussen v. Poland*, Judgment of 28 April 2009, Appl. No. 38886/05, at para. 71; *Moskal v. Poland,* Judgment of 15 September 2009, Appl. No. 10373/05, at para. 45; *Apostolakis v. Greece,* Judgment of 22 October 2009, Appl. No. 39574/07; *Valkov v. Bulgaria,* Judgment of 25 October 2011, Appl. No. 2033/04, at para. 84; *Kohniakina v. Georgia,* Judgment of 19 November 2012, Appl. No. 17767/08, at para. 69.

433 ECtHR, *Kuznetsova v. Russia*, Judgment of 07 June 2007, Appl. No. 67579/01, at para. 49.

conditions laid down in domestic law for the grant of old-age pension benefits.

Last but not least, even if pensioners establish that their old-age pension benefits fall under the notion of possession within the meaning of Article 1 of the First Protocol and prove the interference with this right, the right to peaceful enjoyment of one's possessions is subject to limitations and conditions. The limitations and conditions stem from Article 1 of the First Protocol, which allows the Contracting States to restrict the right to peaceful enjoyment of one's possessions on grounds of general interest. This requirement is expressly stated in Article 1, par.1, 2nd sentence ("*in the public interest*") and par. 2 ("*in the general interest or to secure the payment of taxes and other contributions or penalties*").[434] Absence of the element of legitimate aim has as a result the violation of Article 1 of the First Protocol. The requirements of the existence of a general interest and the justification of the interference are laid down in chapter four of the present work.

2. Protection of Pension Benefits to be Allocated in the Future

Another subject of examination is the pre-acquisition period. In contrast to the established rights, which are full rights, there are also future rights. The future rights are pseudo full rights, but they may become full rights in the future when certain requirements are met. Against this background, the question that needs to be addressed is whether, and if so under which circumstances do pensioners who have not established rights but have contributed to the public pension system receive protection during the qualifying period by the right to property, and more particular by Article 1 of the First Protocol. This question concerns particularly the cases in which the required contributory period has been completed, while other requirements, such as the reaching of the statutory pensionable age, have not yet been fulfilled.

In order for pension benefits to be protected by the right to property during the pre-acquisition period (or qualifying period), pensioners should have a protected legal position. In German law, this legal position is the

434 Art. 1(1, sentence 2) of the First Protocol provides that "*No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principle of international law*".

so-called "*Anwartschaft*". The legal term "*Anwartschaft*" has its origins in German civil property law. It is a vested (or deferred) entitlement which can give rise to a future right, if the individual has reasonable expectations. In German pension law, the "*Anwartschaftsrecht*" concerns the vested pension rights or the entitlement to acquire future allocation of pension benefits, if the insured has fulfilled the required pensionable service (5 years) but has not reached the required retirement age yet (Rentenanwartschaften).[435] It concerns a future entitlement to pension benefits that the insured has earned in return for having contributed a specific number of years to the public pension system. The period of expectation that runs until the acquisition of the full right arises is called "*Anwartschaftszeit*". The period of expectation to acquire pension benefits ends once the insured has fulfilled the required minimum pensionable service and reached the required retirement age.[436] However, the beginning of the period of protection of expectations is very difficult to define. One argument could be that the protection begins after the payment of the first contribution to the public pension system, because at this moment the social insurance relationship begins.[437]

In Greek law, the "*Anwartschaftsrecht*" has not been recognised by the Greek legislature or jurisprudence. The Greek jurisprudence does not protect the expectation of the pensioners to acquire future pension benefits.[438] However, part of the Greek academic literature has pontificated that paying contributions for a reasonable period of time must bring into existence actionable expectations protected through the right to property.[439] The notion of what constitutes a "*reasonable period*" that could be given a pecuniary value has not yet been determined. The notion of a reasonable period constitutes an open legal term that is difficult to be defined on a general level. According to the Greek public pension system, as described in chapter two, the prospective pensioners may establish the right to claim for old-age benefits after 15 years of pensionable service. So it may be argued that the pensioners, who have contributed to the system for 15 years, may

435 *Hamisch*, Der Schutz individueller Rechte bei Rentenreformen: Deutschland und Großbritannien im Vergleich, p. 195.
436 *Ibid.*
437 *Ibid.*
438 I.e. Council of State, Judgment of 14 July 2006, No. 718/2006.
439 *Stergiou*, DiDik 2008, p. 845.

establish a protected expectation (*Anwartschaft*) under the concept of possession to acquire future pension entitlement.

The Greek jurisprudence determined the notion of a "*reasonable period*" in cases of retrospective recalls of illegal administrative acts.[440] It holds that before any amendment or recall of a specific administrative act or of an administrative practice, the expectation of a diligent citizen that his or her rights and legal interests established under national law shall be retained should be taken into consideration, and so the administrative act or practice shall not be amended without transitional periods or the provision of compensation. More specifically, the Council of State held that the reasonable period in which the administrative authorities may recall illegal administrative acts that had been carried out in favour of the individual, should be defined according to the circumstances of each case.[441] However, a recall of an illegal administrative act within a period of five years may take place without any further requirements.[442] According to the courts, this administrative law doctrine is derived from Law No. 261 of 1968,[443] as well as the constitutional principle of the rule of law. On this basis, it may be argued that the prospective pensioners, who are due to retire within the following five years, may determine the moment of establishing pension rights under the concept of possession. Therefore, this would mean that the public pension reforms should not be applied to the prospective pensioners that are due to retire within the next five years, as according to the previous pension law.

The legitimate expectations fall under the concept of possession within the meaning of Article 1 of the First Protocol. According to the ECtHR, the notion of possession within the meaning of Article 1 of the First Protocol covers claims in respect of which an applicant can argue that he has at least a '*legitimate expectation*' of a claim arising under national law.[444] The legal term of "*legitimate* expectations" refers to a legal position, in which the individual has not yet acquired an established or full right but

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440 Council of State, Judgment of 31 October 1996, No. 5267/1996; Judgment of 20 June 1997, No. 2403/97; Judgment of 13 May.2008, No. 1501/2008.

441 Council of State, Judgment of 13 May.2008, No. 1501/2008.

442 Namely, the authorities are not obliged to call the individual to a prior hearing.

443 Emergency Law No. 261 of 1968, Official Gazette of the Hellenic Republic 12/A/23.01.1968.

444 ECtHR, *Pressos Compania Naviera SA and others v. Belgium*, Judgment of 20 November 1995, Appl. No. 17849/91, at para. 31.

has reasonable expectations to establish a right in the future. Legitimate expectations may arise in instances where an individual has fulfilled all substantial requirements (contribution of minimum years of service and reaching of retirement age) but the formal prerequisites have not yet been met. The legal norm of legitimate expectations verifies the existence of a protected legal position between the established rights (the insured has fulfilled all substantial and formal prerequisites to be provided with pension benefits) and the "*Anwartschaft*" (the insured has contributed the minimum required period but has not reached the retirement age).[445]

The expectations of the individual which are affected by legal alterations are thus legitimate protected under the right to property, when three requirements are met.[446] First of all, an individual attempting to make a claim for legitimate expectations must demonstrate that there has been a generalised, stable and uniform practice of the administration.[447] Secondly, another requirement which must be met is that of reliance on a legal provision in good faith. The Council of State has ruled that citizens should be legally protected only where they have demonstrated reliance on a favourable legal provision.[448] For example, it would be contrary to the principle of legitimate expectations for a public pension fund to declare an individual as uninsured under the fund, if an individual has paid long-term contributions into a pension fund, in the good faith that he was obliged to pay.[449] Thirdly, a consistent precedence by the national courts must be demonstrated to landing a successful claim for a breach of legitimate expectations. From a recent case law of the ECtHR, the court acknowledged in social insurance law the protection of legitimate expectations of the pensioners from any amendment of welfare benefits that the individual could not have foreseen through Article 1 of the First Protocol, when the claims would have a prospect of success following previous steady case law of the national courts.[450]

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445 The legal norm "*legitimate expectations*" mentioned here should not be confused with the principle of legitimate expectations that is laid down in the next section. This refers to the protection of confidence that the insured showed towards the legislature and the administration.

446 *Dewhurst / Diliagka*, EJSS 2014, pp. 230-232.

447 *Katrougalos,* DiDik 1993, p. 948.

448 Council of State, Judgment of 20 June 1997, No. 2403/97; Judgment of 13 May.2008, No. 1501/2008.

449 Council of State, Judgment Nos. 166/1983 and 2068/1986.

450 ECtHR, *Ichtiaroglou v. Greece*, Decision of 19 June 2008, Appl. No. 12045/06.

The ECtHR confirmed that the expectations of an individual concerning the provision of welfare benefits are legitimate and thus fall under the concept of possession when their expectations are based on the steady case law of the national courts. This case concerned the right of Greek nationals to buy off and classify the period, in which they worked in Turkey and made contributions to the Turkish pension system, as notional insured time. The ECtHR accepted that the expectations of the claimants are protected through the Article 1 of the First Protocol and the right to fair trial (Article 6 ECHR), because of prior stable jurisprudence of the Council of State, which had declared that the Greek national had the right of recognition of the insured time in Turkey. Therefore, the expectations of the pensioners may be potentially protected by the right to property, as long as the above requirements are met.

The Greek case-law has not acknowledged any protection of pensioners in cases of pension reforms. There is no case law of the national courts that protect the pensioners' expectations to acquire old-age pension benefits in the pre-acquisition period, when they have not fulfilled the substantial and formal requirements. According to steady jurisprudence of the Council of State, a legitimate expectation to receive an old-age pension benefit under a previously more favourable pension law is not a possession under Article 1 of the First Protocol.[451]

Therefore, the prospective pensioners may not make a claim of legitimate expectations within the meaning of Article 1 of the First Protocol and the pension benefits to be allocated in the future are not protected by the right to property. According to the Greek jurisprudence, till the establishment of a pension right, the prospective pensioners have a mere hope to receive old-age pension benefits. Hope alone does not fall under the concept of possession within the purposes of Article 1 of the First Protocol. "*The hope, that a long-extinguished property right may be revived, cannot be regarded as a 'possession' within the meaning of Article 1 of the First Protocol, nor can a conditional claim, which has lapsed as a re-*

451 Council of State, Judgment of 11 June 2002, No. 3267/2002; Judgment of 30 June 2005, No. 2118/2005; Judgment of 14 July 2006, No, 718/2006. See also *Angelopoulou,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 175.

sult of the failure to fulfil the condition."[452] This is because Article 1 of the First Protocol does not confer a general right to acquire a welfare benefit[453] and it does not entitle the individual to an old-age pension benefit of a particular amount.[454]

The Greek jurisprudence should, however, be amended. An individual who has fulfilled all substantial requirements for a pension entitlement should have legitimate expectations (protected through the right to property) to acquire pension benefits in the future according to the previous favourable law, while the formal requirements should not be decisive. This system would ensure that the expectations of the individual who opted for a late retirement, and continued working even after they had accomplished the substantial prerequisites, are protected.[455]

II. The Principle of Legitimate Expectations (Protection of Confidence)

The principle of legitimate expectations or protection of confidence (in German law "*Vertrauensschutz*") is a very important principle in pension law. This is because in a public pension system the relationship between the insured and the public pension funds is a long-last relationship. The insured have to contribute for at least 15 years to the public pension system and must reach the age of 67 in order to acquire old-age pension benefits.

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452 ECtHR, *Polacek and Polackova v. Czech Republic*, Decision of 10 July 2002, Appl. No. 38645/97, at para. 62; *Gratzinger and Gratzingerova v. Czech Republic*, Decision of 10 July 2002, Appl. No. 39794/98, at para. 69.

453 I.e. ECtHR, *Vesna Hasani v. Croatia*, Decision of 30 September 2012, Appl. No. 20844/09.

454 I.e. ECtHR, *Aunola v. Finland*, Decision of 06 March 1996, Appl. No. 30517/96; *Vasilyev v. Russia*, Judgment of 10 October 2005, Appl. No. 66543/01, at para. 38.

455 In a different case, the insured who fulfilled all substantial requirements and did not apply for a pension entitlement would be disadvantaged compared to those who chose to exercise their pension rights earlier. This would constitute an infringement of the fundamental right to equality, on the grounds that there would be differential treatment of members of the same group (current pensioners) using solely the criterion of whether the current pensioner applied for the provision of pension benefits or not. The application of pension benefits is not an objective criterion, but rather a chronological one. It does not indicate whether the pensioner is entitled to a pension benefit according to law but it indicates simply the time of submission.

This long period creates an expectation from the insured that they will acquire pension benefits once they have fulfilled the prerequisites. In addition, the period of benefit payments may also be long lasting and therefore an expectation that the current pensioners will continue to receive their benefits is created.

The public pension reforms that were introduced as a first reaction to the Greek financial crisis affected the expectations of the current and prospective pensioners. Pensioners were faced with situations whereby the state had previously made policy decisions, but then adopted different ones in the context of the Greek financial crisis and the consequent terms and conditions set out by the international creditors. Current pensioners were affected, on the grounds that the old-age pension benefits' reductions reduced their pension income. Prospective pensioners were affected, on the grounds that the benefit calculation formula and the qualifying conditions became stricter, which may consequently reduce the length of the period of pension payments, as well as the actual value of the pension. In this sense, the expectations of the pensioners are multifaceted, since they concern the expectation that their already acquired rights are fully respected as well as the continuous existence of a public pension system, based on the expectation in reference to the ability of the public pension system's function.[456]

The principle of legitimate expectations guarantees that established legal relationships will be sustained and will not be unfavourably amended, protecting the citizen against any arbitrary action by public authorities or the state itself.[457] It obliges the state to respect the expectations that the citizens could have developed under a specific legal order. It requires the legislature and the national authorities to exercise their powers over a period of time in such a way that situations and relationships lawfully created under national law are not affected in a manner which could not have been foreseen by a diligent person.[458] In such a way, the principle of legitimate

456 *Hamisch*, Der Schutz individueller Rechte bei Rentenreformen: Deutschland und Großbritannien im Vergleich, p. 155.

457 *Spiliotopoulos*, DtA Special Edition 2003, p. 25.

458 Opinion of Advocate General Cosmas, delivered on 8 June 1995, *Fintan Duff and others v. Minister for Agriculture and Food and Attorney General,* C- 63/93, EU:C:1995:170, at paras. 24 and 25.

expectations refers to the requirement of predictability of law as well as to the avoidance of unexpected amendments.[459]

The principle of the legitimate expectations derives from principle of the rule of law, which guarantees that legal provisions are governed by constancy and good governance. The principle of the rule of law is an unwritten constitutional principle deriving from a number of provisions in the Greek Constitution, i.e. the principle of separation of powers (Article 26); the right to legal protection (Article 20(1)); the examination of constitutionality through the national courts (Articles 87(2) and 93(4)); the principle of the protection and exercise of the fundamental rights (Article 25(1)) etc. The right to dignity (Article 2(1)) as well as the principle of social state (Article 25(4)) function further as a supplement legal basis.[460] The rule of law is also enshrined in Article 3 of the Statute of the Council of Europe[461] and finds expression in a number of Articles of the European Convention on Human Rights,[462] the notion of the principle of legitimate expectations is recognised as general principle of European Law.[463]

The Aeropagus ruled that the principle of legitimate expectations is legally binding and supersedes any national law, since it is a general principle of European Law. Therefore, because of the superior legal rank of the European Law over national law, the principle of legitimate expectation has a superior legal validity. However, Aeropagus did not recognise the principle as constitutional.[464] The Council of State has acknowledged,

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459 *Tsatsos*, Constitutional Law-Part A: Theoretical Fundament, p 388.

460 *Katrougalos*, DiDik 1993, pp. 962-963.

461 Art. 3 of the Statute of the Council of Europe provides that: "*Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms…*".

462 For instance, the principle of the rule of law finds expression in Art. 6 of the ECHR that secures the right to fair trial and precludes any interference by the legislature within the judicial power designed to influence the judicial determination of the dispute. See ECtHR, *Stran Greek Refineries and Andreadis v. Greece*, Judgment of 09 December 1994, Appl. No. 13427/87, at paras. 46 and 49.

463 CJEU*, Mulder and others v. Council of the European Communities and Commission of the European Communities*, C-104/1989, Judgment of 19 May 1992, EU:C:2004:1, at para. 15: "*In general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication. It may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected*".

464 Aeropagus (Plenary Session), Judgment No. 31/2002.

generally, the supplementary function of the principle.[465] Exceptionally, the Council of State recognised only once the principle of legitimate expectations as a constitutional principle.[466] More specifically, the Council of State held that legislation which amends existing relationships declaring the already statute-barred claims of the state as not having been fallen under the statute of limitation before the publication of the law, contradicts the constitutional principle of legitimate expectations. However, it is disputable whether it is a stable jurisprudence, since the court did not decide on a plenary session.

In sum, the principle of legitimate expectations or protection of confidence is mainly conveyed in Greek law via the right to property, when a concrete individual position falls under the scope of the right to property. Therefore, the principle of legitimate expectations is not as a stand-alone legal claim that protects the right to old-age pension benefits. It can be, however, used as a balancing concept of justice or as a guiding measure indicating how the right to old-age pension benefits should be reduced so that the right to property is not violated. For instance, the principle of legitimate expectations may provide protection in cases of retrospective legislative acts.[467] The principle of legitimate expectations may prohibit the retrospective reductions in old-age pension benefits, since this would infridge the confidence that the diligent pensioners showed towards the legislative and administrative authorities.

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465 Council of State, Judgment 13 January 1997, No. 17/1997; Judgment of 20 June 1997, No. 2403/97; Judgment of 13 May.2008, No. 1501/2008.

466 Council of State, Judgment of 20 May 2002, No. 1508/2002.

467 The law is retrospective when it takes effect after its publication in the Official Gazette. The retroactivity is divided into two categories: a. material retroactivity, which means that the retrospective legislative measure is applied to legal situations that have been legislated under prior law but their legal effects have not yet been accomplished; and b. true retroactivity, which means that the legislative measure is applied retrospectively to a legal situation which has already been fully realised.

III. Equality and Non-Discrimination

1. The Right to Equality

The right to equality provides an individual the right to equal treatment by the state. It is a negative right forbidding the state from illegitimate intervention. The Greek Constitution foresees in Article 4 a number of equal protection clauses. Two are the most important of them. Article 4(1) proscribes that "*all Greeks are equal before the law*", while Article 4(5) provides that "*Greek citizens contribute without distinction to public charges in proportion to their means*". Aspect of the right to equality and the principle of proportional contribution to public charges is the principle of proportional contribution to the social insurance system. The principle of proportional contribution to the social insurance system indicates that the equal distribution of burdens (and benefits) among the current pensioners means that people claiming or being subject to welfare services should be treated with equality.[468]

Article 4(1) promotes equality among pensioners within a social insurance fund and precludes any equation of different situations or differential treatment of those in same or similar situations.[469] It implies that any equal treatment of different situations, as well as any different treatment of the same or similar situations, is precluded. In other words, situations which are substantially the same should be treated in the same way; whereas situations which are substantially different should be granted a different, but proportional treatment.[470]

The right to equality finds application when the following three prerequisites are fulfilled. Firstly, a difference in treatment must be identified (i.e. different prerequisites for an entitlement to old-age pension benefits). Secondly, the pensioners should be in relevantly similar situations (i.e. different treatment among the prospective pensioners of the same fund). Thirdly, objective criteria and grounds of public interest must be examined.[471] The Greek jurisprudence has classified the following as objective

468 *Galligan,* in: *Coote* (ed.), The Welfare of Citizens: Developing New Social Rights, p. 61.
469 Court of Audi (Plenary Session), Judgment No. 1938/2009.
470 *Stergiou*, EDKA 2012, p. 322.
471 Council of State, Judgment of 10 January 2000, No. 26/2000; *Manitakis,* ToS 1978, p. 441.

criteria: the time of submission for a pension application,[472] the time of recruitment[473] and the time of leaving employement.[474] The grounds of public interest are identified in cases where restrictions on the right to equality pursue a legitimate aim.[475] For instance, the Council of State acknowledged that individuals of the same social insurance funds may be treated differently but only under legitimate grounds of justification[476] and the legislature may not apply Article 4 when the different treatment is essential and necessary by reasons of public interest.[477] For instance, the state may impose financial contributions to the public pension system allowing different treatment when the unequal contribution is related to legitimate purposes[478] and a proportional distribution through proportional rates of reductions may be used as an objective criterion of balancing the protection of the restricted pensioners' right with the need to protect the public interest of the sustainability of public finances and public pension system.[479] Therefore, the existing and future legal positions of the pensioners are protected under the right to equality, only once the above three prerequisites are fulfilled.

Furthermore, the right to equality provides a fundamental principle and rule functioning as a balancing concept of justice,[480] especially in cases of conflict between subjective rights essential for the organisation of a judicial state.[481] As a principle, it has supremacy over any state law.[482] The principle of equality must be understood as "*appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying this clause fully as law must be an activist*

472 Council of State, Judgment No. 2527/88, Judgment of 17 July 2006, No. 707/2006; Judgment of 02 June 2009, No. 527/2009.
473 Court of Audit, Judgment of 30 May 2002, No. 678/2002.
474 Council of State, Judgment of 15 January 2007, No. 127/2007, (Plenary Session), Judgment of 27 November 2008, No. 3487/2008, (Plenary Session), Judgment of 25 June 2010, No. 2199/2010, Judgment of 30 June 2010, No. 2298/2010.
475 *Venizelos,* The Public Interest and the Constitutional Rights' Restrictions, p. 157.
476 Council of State, Judgment of 10 January 2000, No. 26/2000.
477 Aeropagus (Plenary Session), Judgment No. 1808/86; Court of Audit, Judgment No 1938/09.
478 *Dagtoglou*, ToS 1986, p. 427; *Manitakis*, ToS 1978, p. 444; *Theoharopoulou*, The Right to Equality to Public Charges and the Liability of the State, p. 10.
479 *Antoniou*, The Right to Equality Within and Over Law, p. 97.
480 *Von Lewinski,* Öffentlichrechtliche Insolvenz und Staatsbankrott, p. 353.
481 *Antoniou*, The Right to Equality Within and Over Law, p. 91.
482 *Manitakis,* ToS 1978, p. 440.

court, in the sense that it must be prepared to frame and answer questions of political mortality."[483]

The right to equality does not provide the individual a subjective right to a social security benefit.[484] However, the right to equality may provide protection to pensioners' existing and future legal positions, since it plays an important role by reforms of social insurance systems.[485] In social insurance law, the right of equality is of primary importance in the field of shaping social security rights, despite the fact that it does not preclude the legislature from amending the public pension system and the amount of the paid contributions.[486]

Another illustrative example showing the important role of the right to equality in cases of public pension reforms is the pension bill No. 2084 of 1992. The reform of a pension system inevitably introduces differentiations between the individuals that fall under the personal scope of the new pension law and those that continue to fall under the personal scope of a previously more favourable pension law. The Law No. 2084 of 1992 treated differently the prospective pensioners dividing them to the "*old*" and "*new*" employees. "*Old*" were the employees that entered the labour market before the 1st of January 1993 and "*new*" were the ones that entered the labour market after that date. In this way, stricter conditions for a pension entitlement were introduced for the "*new*" employees, while the "*old*" employees could enjoy the more favourable regulations. For example, the retirement age of the "*new*" employees was set at the age of 65 years, while in certain cases the "*old*" employees could retire earlier. Namely, civil servants appointed before the 31th December 1982 that would retire before the 31th December 1997 could retire at the age of 55 years (males) and 53 (females),[487] or women that entered the labour market before the 31th of December 1992 could retire at the age of 60 years.

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483 *Dworkin*, Taking Rights Seriously, p. 147.
484 *Stergiou*, EDKA 2012, p. 322.
485 *Becker / Hardenberg,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, 2010, p. 116.
486 Council of State, Judgment of 23 October 2014, No. 3663/2014, at para. 10.
487 Explanatory Report on Law No. 2084 of 1992 of 31 August 1992, p.1.

2. The Principle of Non-Discrimination

The principle of non-discrimination has to be regarded as being part of the general overarching principle of equality, which in turn encompasses age equality.[488] Of particular importance in cases of public pension reforms, is the age equality and this because the Greek legislature introduced a number of measures that treat differently pensioners of a particular age due to the actual age of the pensioners concerned or due to characteristics associated with the age. For example, the legislature introduced upper age limit which influences the termination of an employment relationship.[489]

At international level, the international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights do not explicitly mention "*age*" as a prohibited ground of discrimination. Besides, the ECHR prohibits in Article 14 discrimination in the enjoyment of Convention rights and entails a general prohibition of discrimination in Article 1 of the Twelve Protocol. The prohibition of discrimination in Article 14 is stipulated in the following terms: "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*". Article 2 of the Twelve Protocol likewise indicated a general, open model of non-discrimination clause: "*The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1*".

Article 14 is expressly to the prohibition of discrimination in the enjoyment of the rights set forth in the Convention.[490] "*Article 14 complements the other substantive provisions of the Conventions and the Protocols. It has not independent existence since it has effect solely in relation to the*

488 *Hack*, Taking Age Equality Seriously: The Example of Mandatory Retirement, p. 78.

489 For more information see p. 181 ff.

490 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 35.

enjoyment of rights and freedoms safeguarded by those provisions. Although the application of article 14 does not necessarily presuppose a breach of those provisions, and to this extent it has an autonomous meaning, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter".[491] This argument leads that Article 14 has an autonomous meaning but accessory scope. The need for an independent right in an effort to strengthen the conventions' protection of non-discrimination, the scope of protection of article 14 is expanded in Article 1 of the Twelfth Protocol.

The principle of non-discrimination on the grounds of age has been expressly manifested as a principle of the European Law in the Employment Equality Directive No. 2000/78/EC. The Employment Equality Directive establishes a general framework for equal treatment in employment and occupation and offers a minimum protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation (Article 1). The directive distinguishes between direct and indirect discrimination (Article 2). One is subject to direct discrimination, when an individual is obviously treated less favourably than another because of the possession or lack of a characteristic, such as age, which the other does not possess.[492] In furtherance, one is subject to indirect discrimination when a provision, criterion or practice seems to be neutral but in fact, it leads to discrimination, as only a small proportion of the population or only a specific group can satisfy the requirement of this provision, criterion or practice.[493] At the same time, the Employment Equality Directive provides that a difference of treatment may be justified when the objective is legitimate and the requirement is proportionate (recital 23, Article 4). In other words, a difference in treatment based in such characteristics basically constitutes discrimination, which is lawful as long as it can be justified within the terms of Article 4. The Employment Equality adopts the possibility of justifying direct discrimination on grounds of age. Article 6 provides a general and open-ended defence of objective justification for direct discrimination on grounds of age. According to Article 6(1) of the Direc-

491 ECtHR, *Rasmussen v. Denmark,* Judgment of 11 January 2006, Appl. Nos. 52562/99 and 52620/99. at para. 29.

492 Article 2(2a) of the Directive 2000/78/EC. See also CJEU, *Seda Kücükdeveci v Swedex GmbH and others*, C-555/07, Judgment of 19 January 2010, EU:C:2010:21, at para. 29.

493 Article 2(2b) of the Directive 2000/78/EC.

tive, which finds application on pensions-related issues of the private sector, are strongly linked with employment and occupation, a different treatment on grounds of age shall not constitute discrimination, if the different treatment is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In addition, Article 6(2) provides that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits does not constitute discrimination on the grounds of age. As a consequence, the wording of Article 6 leads to a loose application of the general principle of non-discrimination on grounds of age, as the "*margin of discretion*" given to the States is extremely wide.

At national level, the principle of non-discrimination on the grounds of age or any other grounds, such as sex, race and religious has not been entrenched in the Greek Constitution. The main statutory instrument that addresses the principle of non-discrimination and particularly the age discrimination is Law No. 3304/2005, which transferred the Directive No. 2000/78/EC in domestic law.[494] However, the principle of non-discrimination on the grounds of age may be derived from Article 4(1) of the Greek Constitution.[495]

In sum, the right to non-discrimination on grounds of age may potentially provide protection to the existing and future legal positions of the pensioners', when the right to non-discrimination finds application, unless the age discrimination is justifiable. The justification of age discrimination may take peculiarities of age-related aspects into concern and include at the same time the applications of general standards of justification, such as the application of a proportionality test.[496] Namely, the discriminatory measure must pursue a legitimate aim and be applied proportionally.

494 The Law No. 3304 of 2005, Official Gazette of the Hellenic Republic 16/A/27.01.2005 transferred the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

495 Council of State, Judgment of 30 April 2013, No. 1706/2013.

496 *Schlachter*, in: *Schlachter* (ed.), The Prohibition of Age Discrimination in Labour Relations, p 39.

IV. The Right to Social Security

Following, I describe the legal provisions that protect the right to old-age pension benefits in terms of social protection. Social protection is perceived here in a broad sense, encompassing social security rights of the pensioners. The social security rights are to be accorded as fundamental rights being in the same level of importance and protection in the legal order as is afforded to civil and political rights.[497] The right to social security includes contributory, non-contributory and combined allowances related to certain risks, such as: sickness, disability, maternity, family, unemployment and old-age.[498] The right to social security is protected under international law (IV.1) as well as under the Greek Constitution (IV.2).

1. The Right to Social Security under International Law

The right to social security draws its rules from a number of international treaties and instruments, which allow for the protection of the right to social security and require the state to establish a social security scheme that is accessible to everyone as well as to maintain its sustainability and promote the level of protection.[499] Certain international treaties provide that each Contracting State must ensure their residents have access to a social security scheme. Such instruments are the Universal Declaration of Human Rights (hereinafter: UDHR) of 1948, the International Covenant of Economic, Social and Cultural rights (hereinafter: ICESCR) of the United Nations (hereinafter: UN) of 1966, the European Social Charter (hereinafter: ESC) of 1961, and the European Code of Social Security (hereinafter: ECSS) of 1964. Moreover, the international minimum standards of Convention No. 102 of the International Labour Organization (hereinafter: ILO) as well as the Invalidity, Old-Age and Survivor's Benefits of ILO Convention No. 128,[500] which were adopted by the ILO and the Council

497 *O'Connell,* Vindicating Socio-Economic Rights: International Standards and Comparative Experiences, p. 179.

498 ESC: Committee of Independent Experts, Council of Europe Publishing 1996, Conclusions XIII-4, p. 35. Retrieved September 2014 from http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/XIII4_en.pdf.

499 *Eichenhofer,* Soziale Menschenrechte im Völker,- europäischen und deutschen Recht, p. 136.

500 The ILO Convention No. 128 has not been ratified by the Greek Parliament.

of Europe, also fall under this category. Some of the treaties have introduced individual, as well as collective, mechanisms and procedures to ensure that the right to social insurance is correctly implemented at a national level.

a) The International Treaties (A Normative Description)

aa) Universal Declaration of Human Rights

Article 22 of the UDHR states that "*Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.*" The UDHR clearly promotes the right to social security and consequently the right to social insurance, whilst nonetheless making it dependent upon the financial disposal of the state. Article 22 UDHR constitutes a general principle of international law[501] and forms a recommendation for the Contracting States to protect the right to social security.[502]

bb) International Covenant of Economic, Social and Cultural Rights

The ICESCR of the UN of 1966 states in Article 9 that "*The State Parties to the present Covenant recognise the right of everyone to social security, including social insurance.*" Greece accessed the ICESCR in 1985 and ratified it by Law No. 1532 of 1985.[503] Article 9 of the ICESCR develops the right to social security recognising further the right to social insurance. It requires the Contracting States to provide their citizens with social insurance protection against the risks of old-age, maternity, disability, unemployment, sickness etc. Different to the UDHR, the ICESCR is legally

501 *Brownlie*, Principles of Public International Law, p. 559.
502 *Stergiou*, The Constitutional Consolidation of the Social Insurance System, p. 308.
503 Law No. 1532 of 1985, Official Gazette of the Hellenic Republic 45/A/19.03.1985.

binding and thus the states that have signed and ratified it are obliged to implement the Covenant and disapply any contradictory domestic law.

According to Article 16, the Contracting States are obliged to submit regular reports, within two years after ratifying the Covenant and thereafter every five years, on how they have implemented the rights protected by the ICESCR as well as which measures they have undertaken to make progress in achieving the implementation of ICESCR. In addition to the compulsory report of the Contracting States, the Optional Protocol (GA resolution A/RES/63/117), adopted on the 10th of December 2008, introduced an extra procedure for individual complaints. However, Greece has not signed and ratified this Optional Protocol yet. Besides the compulsory and optional reports, a Committee on Economic, Social and Cultural Rights (hereinafter: CESCR) has been established under the Economic and Social Council Resolution 1985/17 of 28 May 1985. The main task of the CESCR is the monitoring of the implementation of the ICESCR by the Contracting States as well as the interpretation of the provisions of the Covenant known as general comments.

Regarding the effects of the austerity measures on economic, social and cultural rights, the CESCR stated that the respect of the right to social security takes priority in law and policy, and that a lack of financial resources cannot serve as a general excuse for the non-fulfilment of the Covenant's obligations.[504] The Committee pointed out that the realisation of the right to social security should not be neglected, despite the financial implications that it causes for the state[505] and that "*State Parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to social security is taken into account in their lending policies, credit agreement and other international measures*".[506] The CESCR's statement can, however, not be enforced at national level, on the grounds that its statements do not constitute a legally binding instruments but to recommendations to the contracting states.

504 *UN*(2008), at para. 3.
505 *Ibid,* at para. 40.
506 *Ibid*, at para. 58.

cc) European Social Charter

The ESC of 1962 guarantees in Article 12 the right to social security. More specifically, it provides that "*With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake: 1. to establish or maintain a system of social security; 2. to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention No. 102 Concerning Minimum Standards of Social Security; 3. to endeavour to raise progressively the system of social security to a higher level; 4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure: a. equal treatment with their own national of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties; b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties*."

Greece signed the ESC in 1961 and ratified it two decades later by Law No. 1462 of 1984.[507] It is thus legally binding and creates objective obligations on Greece. Article 12 of the ESC guarantees the right to social security to all individuals living in the territory of the Contracting Parties. Article 12 refers only to the right to social insurance, since the right to social assistance is explicitly guaranteed in Article 13 of the ESC.

Article 12(2) of the ESC provides that the Contracting Parties are obliged to maintain a level of social insurance protection that is at least equal to the minimum level of protection required for the ratification of the ILO Convention No. 102, concerning the minimum standards of social security. This, consequently, results in the ESC being more specific regarding the minimum level of social insurance that the State Parties are obliged to maintain and guarantee in comparison to Article 9 of the ICESCR which is more general.

507 Law No. 1462 of 1984, Official Gazette of the Hellenic Republic 90/A/16.06.1984.

The ESC of 1961 establishes a supervisory mechanism through the European Committee of Social Rights (hereinafter: ECSR). The ECSR adopts conclusions after examining whether the Contracting States' social legislation stays in conformity with the Charter by taking into consideration the regular reports submitted by the Contracting States. In cases where the ECSR concludes that a Contracting State does not comply with the ESC, then the Committee of Ministers may address a recommendation to that State. Apart from the reporting procedure through the Contracting States, the ECSR may take decisions through the system of collective complaints, which was introduced by the Additional Protocol of 1995. The latter was signed and ratified by Greece in 1998 by Law No. 2595 of 1998[508] and provides that the national trade unions and employers' organisation are entitled to submit complaints to the ECSR, when they believe that the Contracting State concerned violates the ESC.

dd) European Code of Social Security

As well as the ESC, the ECSS is also one of the legal instruments of the Council of Europe. Its aim is to set the minimum standards in the social security field. It obliges the Contracting Parties, in a sense, to provide their residents with at least the minimum social standards. Greece signed the ECSS in 1977 and ratified all parts of the ECSS in 1981 by Law No. 1136 of 1981,[509] except from Parts IV and VII relating to unemployment and family benefits respectively.

Part V concerns the minimum requirements for old-age pension benefits. More specifically, Article 26 provides that the prescribed age shall not exceed 65 years, or shall not exceed an age whereby the number of residents having attained that age is less than 10 percent of the number of residents under that age. Furthermore, Article 29 provides that the qualifying period shall be 30 years of contribution or employment, or 20 years of residence, while the minimum period of contributions shall be 15 years. Moreover, the minimum replacement ratio for a man with a dependent wife may be at least 40 percent of the average wage of a skilled adult man-

508 Law No. 2595 of 1998, Official Gazette of the Hellenic Republic 63/A/24.03.1998.

509 Law No. 1136 of 1981, Official Gazette of the Hellenic Republic 61/A/13.03.1981.

ual male employee. The total amount of the percentage shall be indicated according to the previous earnings of the beneficiary when the latter has completed at least 30 years of contribution or employment or 20 years of residence (Article 29). The amount of old-age benefits shall be reviewed in accordance with any substantial changes in the cost of living (Article 65).

The Contracting States are obliged to report to the Secretary General of the Council of Europe regarding the adopted national legislation and the steps undertaken to comply with the minimum standards established in the ECSS. Next, the reports are sent to the ILO Committee of Experts on the Application of Conventions and Recommendations and afterwards they are forwarded to the Committee of Ministers of the Council of Europe and to the Committee of Experts on Social Security. The Committee of Ministers decides whether the Contracting State has fulfilled its obligations. In case of non-compliance with the ECSS, no direct sanctions are imposed, only a political debate ensues.

The Resolution of the year 2012 on the application of the ECSS states that the Committee of Ministers requires the Greek government to undertake the necessary actuarial studies, "*drawing a line alerting the government to conditions which might lead to the possible violation of the minimum international social security standards…*"[510] Moreover, the Committee of Ministers pointed out that the reduction of many social security benefits creates the risks of undermining the application of all accepted parts of the ECSS, and that the Greek government must reduce the benefit in an effective and just way, namely: " …

- the cuts in benefits, like their costs, shall be borne collectively, shared equitably among the members of society in a manner which avoids hardship to persons of small means and takes into account the economic situation of the country and of the classes of persons protected (Art. 70 par. 1 of the ECSS)

- the cuts in benefits shall not result from the unilateral withdrawal of the State or of employers from the financing of benefits, thus leaving the employees protected to bear more than 50 % of the total of the financial

510 *Committee of Ministers*, Resolution CM/ResCSS (2012)8 on the application of the European Code of Social Security and its Protocol by Greece (Period from 1st July of 2010 to 30th June of 2011). Retrieved September 2014 from https://wcd.coe.int/ViewDoc.jsp?id=1970639&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

resources allocated to the protection of employees and their families (Art. 70 par. 2 of the ECSS)

In addition, the Resolution of the year 2013, the Committee of Ministers invited the Government of Greece: *"...b.... to urgently assess past and future social austerity measures in relation to one of the main objectives of the Code, which is the prevention of poverty..."*[511]

ee) ILO Convention No. 102

The ILO Convention No. 102 functions as a guide to the construction of the national social security systems and thus the national rules may be assessed in compliance with the international norms during legislative process.[512] Greece signed and ratified the ILO Social Security (Minimum Standards) Convention No. 102 in 1955 by Law No. 3251 of 1955.[513] The ILO Convention No. 102 establishes the principles needed to secure the supply of resources and ensure the international labour social security minimum standards that should be reached by the Contracting States. There are two main principles emphasised in the ILO Convention No. 102: the principle of financial solidarity and the principle of state responsibility.[514] The principle of financial solidarity indicates that contributions or taxes of benefits shall be collected in a way to "… *avoid hardship to persons of small means*".[515] The principle of general responsibility of the State requires that the state shall take measures to ensure the provision of the benefits.[516] This implies that the state must supervise the administrative social security institutions, ensure a balance between the resources

511 *Ibid.*

512 *Dijkhoff*, in: *Becker / Pennings / Dijkhoff* (eds.), International Standard-Setting and Innovations in Social Security – The Cases of Czech Republic and Estonia, 2013, p. 67.

513 Law No. 3251 of 1955, Official Gazette of the Hellenic Republic 140/A/02.06.1951.

514 *Dijkhoff*, International Social Security Standards in the European Union – The Cases of the Czech Republic and Estonia, pp. 34-35.

515 Art. 71(1) of the ILO Convention No. 102.

516 Art. 71(3) of the ILO Convention No. 102. The later article provides that the state "*shall accept general responsibility for the due provision of the benefits provided*".

and benefits whilst making sure that actuarial studies and calculations are made periodically.[517]

The international labour social security minimum standards are indicated in Articles 25 to 30 in combination with Articles 65 to 67. They present the minimum objectives concerning the percentage of the covered population, the level of minimum benefits in old-age as well as the requirements for an old-age pension entitlement. By and large, Convention No. 102 proscribes the same level of minimum benefits in old-age, and the same requirements for an old-age pension entitlement; the provisions of which have been described above. The ILO Constitution deepens the relationship between the flexibility of the minimum social standards and the special economic conditions of the Contracting State (Art. 19 (3)).

Three supervisory mechanisms have been established in the ILO Convention.[518] First of all, a provision for regular supervision is established (Art. 22 of the ILO Convention). Each Contracting State is obliged to regularly report the measures it has adopted to implement the Convention. The national reports are examined by the Committee of Experts on the Application of Conventions and Recommendations. The latter then submits an annual report to the International Labour Conference. The Committee on the Application of Standards, if it believes it to be necessary, recommends the Contracting State to take essential corrective steps. Secondly, the representation procedure is established (Art. 24 of the ILO Constitution). Representatives of employers' or workers' associations may present reports to the ILO Governing Body reports, setting out any concerns that the Contracting State involved is in violation of the Convention. Thirdly, the complaint procedure is established (Art. 26 of the ILO Constitution). Namely, a Contracting State or the Governing Body may address complaints against another Contracting State. However, none of the aforementioned mechanisms impose sanctions on the Contracting State. Only the Governing Body, according to Article 33 of the ILO Constitution, "*... may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith*".

After the outbreak of the global financial and economic crisis in late 2007, the ILO highlighted the impact that the financial and economic cri-

517 *Dijkhoff*, International Social Security Standards in the European Union – The Cases of the Czech Republic and Estonia, p. 35.

518 A special procedure for violations of freedom of association is also established.

sis had on the international social minimum standards in social security.[519] The ILO stated that austerity measures are actually disincentive to economic growth and thereby hamper progressive realisation of economic and social rights.[520] The ILO argues that fiscal austerity has failed to achieve its initial aim, namely the reduction of fiscal deficit. More specifically, its analysis showed that fiscal austerity only reduces debt on a short-term basis, whilst in the long run debt levels begin to rise again due to lower public investment, which in turn has devastating consequences on productivity and employment.[521]

In the report on the ILO High Level Mission to Greece, initiated by the GSEE, the ILO supervisory bodies concluded that the impact of pension reform on poverty levels, as well as the sustainability of the social security system in the light of the wage and employment policies, could not be specified, since data relating to these questions is not available at the level of the actuarial authority or the Ministry of Labour and Social Security.[522] The Minister of Labour and Social Security supported that the pension replacement rate has not fallen below the level set by the ILO Convention No. 102, since minimum pensions as well as other benefits granted to vulnerable groups of pensioners have not been affected, while medium-income pensioners with pension up to 1,000 Euros per month have either not been affected by the cuts in main pensions or their income has undergone only a slight reduction not exceeding five percent.[523] In addition, the ILO reported that the Greek government must *inter alia "... (4) Determine the most rapid scenarios for undoing certain austerity measures and returning disproportionately cut benefits to the socially acceptable level..."*[524]

b) The Right to Social Security as an Objective Right in International Law

The aforementioned international treaties require form the Contracting States to provide their citizens with social protection against the risks of

519 *ILO*(2011) ILC.100/VI.
520 *ILO*(2012).
521 *ILO*(2012), p.69.
522 *ILO*(2011a), at para. 323.
523 *ILO*(2013) ILC.102/III(1A), p. 765.
524 *ILO*(2014), p. 518.

age and to maintain a level of social protection that is at least equal to the minimum international standards of social security. On the one hand, at international level, the right to social security belongs within the spectrum of "*positive rights*" and contain programmatic instructions insurance because of the vague and general normative contents that they contain.[525] They oblige the state to take positive action and give the state a margin of appreciation regarding the construction and extent of the protection. In addition, the aforementioned international treaties promote the progressive improvement of the social security schemes, and thus the public pension system. Progressive realisation can be seen in positive terms in light of anticipating ever-increasing possibilities as well as in negative terms as some kind of delay on the full enjoyment of each individual of his or her rights.[526] Namely, the pensioners should enjoy the right to progressive improvement of the public pension system through the provision of better and more adequate pension benefits. More specifically, Article 12(3) of the ESC provides that social security should be progressively brought up to a higher level and Article 2 of the ICESCR "*promises*" the progressive realisation of economic, social and cultural rights. The latter provision indicates that the ICESCR defines specific and immediate obligation for the Contracting States to progressive realisation of the rights guaranteed in the Covenant.[527] However, the aforementioned international treaties cannot be included to the injunction of the legislature to the continuous progressively promotion of the social security schemes. This is because the social policy of each Contracting State is strongly inter-connected with the available financial resources of the state. For example, the sustainability of public finances demands in cases of financial crisis a sort of retrogression of the public pension system, by reducing the amount of the pension benefits, or the increasing of the retirement age and the years of service. The ECSR examining separately each case on the basis of evidence given by the Contracting Parties has considered that, principally, due to the close link between economic and social rights, the consolidation of public finances, in

525 *De Wet*, The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model for South Africa, p.1.

526 *Johnstone / Amundadottir*, International Journal of Human Rights and Constitutional Studies 2013, p. 12.

527 *Ibid.*

order to ensure the sustainability of the social security system, is not necessarily incompatible with Article 12(3).[528]

The Committee of Economic, Social and Cultural Rights has noted that "*... the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective... which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.*"[529] While it seems that the Committee has taken some steps to prohibit retrogressive measures, the conception of retrogressive measure remains murky, since the Committee did not attempt to define when such a measure might be permissible in terms of concrete examples.[530]

On the other hand, although the aforementioned international treaties belong to the spectrum of positive rights and provide the Contracting States a wide spectrum to act, the Contracting States are obliged to provide a certain level of social protection that corresponds to the detailed minimum standards of social security. This is because the aforementioned international treaties (except from the UDHR) constitute legally binding international treaties. The Contracting States are obliged to respect them, once they have signed and ratified the treaties according to national law. The Greek legislature ratified the aforementioned international treaties, as required by the constitutionally established procedure described in Article 28 of the Greek Constitution. According to this constitutional provision, the international treaties prevail over any contrary domestic law post rati-

528 *Samuel,* Fundamental Social Rights – Case Law of the European Social Charter, p. 292; *Eichenhofer,* Soziale Menschenrechte im Völker,- europäischen und deutschen Recht, p. 135.

529 *CESCR*(1990), at para. 9.

530 *Nolan / Lusiani, / Courtis*, in *Nolan* (ed.), Economic and Social Rights after the Global Financial Crisis, p 121.

fication,[531] apart from the Constitution, which enjoys superiority above any ratified international treaty.[532] In this sense, public administrative bodies and thus both judicative and executive power are obliged to set aside domestic measures and legislation that contradict ratified international treaties and the Greek state is obliged to reform its public pension system in conformity with the aforementioned international provisions. Therefore, the aforementioned international minimum standards of social security must be respected in the reform process taking place in Greece. The pensioners (either prospective or current) may theoretically use as legal basis the right to social security before the courts and demand from the state the minimum requirements for old-age pension benefits, as regulated in the ECSS and ILO Convention No. 102 as well as the progressive improvement of the public pension system.

The problem of the aforementioned international treaties lies in their inability to be enforced. Although some of the aforementioned international treaties have introduced individual, as well as collective, mechanisms and procedures to ensure that the right to social security is correctly implemented at a national level, in reality, they are a tool of political pressure and are not able to guarantee their enforcement.[533] It is disputable thus whether the pensioners' claim may be successful. In practice, the national courts decide whether a provision provides justiciable rights.[534]

More particularly, a series of Greek collective complaints challenged, before the Committee, the pension reductions undertaken by the Greek state after the crisis. The Committee decided that successive pension reductions were not compatible with the ESC, on the basis of the right to social insurance guaranteed in Article 12(3) that promotes the progressive improvement of the right to social security because of the accumulative reduction; while separately the pension reduction were held as compatible to

531 Art. 28(1) provides that: "*The generally accepted rules of international law and international treaties, as from their ratification by statute and from their coming into force under the conditions of each of them, shall constitute an integral part of Greek domestic law and shall prevail over any contrary statutory provision*".

532 *Venizelos*, Lessons of Constitutional Law, pp. 146-148.

533 *Schneider*, Die Justiziabilität wirtschaftlicher, sozialer und kultureller Menschenrechte, p. 49.

534 *Gomez Heredero*, in: *Pennings* (ed.), International Social Security Standards: Current Views and Interpretation Matters, p.59.

the ESC.[535] However, the Greek courts did not declare that the administrative acts which perpetrate accumulative pension reductions in current pensioners' old-age pension benefits that were introduced after the publication of the above decisions of the Committee, are contrary to Article 12(3).[536]

Therefore, although the Greek courts are obliged to apply Article 12(3) of the ESC directly in domestic law, they failed to do so. The Greek courts, although they do recognise the international treaties' prevalence over domestic law, yet tend to consider them as non-self-executing treaties.[537] The phrase "*non-self-executing treaties*" means that the obligations and duties introduced by the treaties are not legally binding until the introduction of respective legislative measures.[538] As a result, the right to social insurance at international level may not constitute a legal basis for the prospective and current pensioners and provide enforceable rights to prospective and current pensioners so that the latter may claim pension benefits of a specific form or amount or that the state shall abstain from any action that lead to retrogression of the public pension system. Last but not least, it may not provide them with a material, constitutional right on which to found a claim to progressive improvement of the public pension system, i.e. by claiming for less stringent requirements to an old-age pension benefit entitlement or for the stability of the level of the already legislatively vested old-age pension benefits.

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535 ECSR, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, Decision of 22 April 2013, Complaint No. 76/2012; *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*, Decision of 22 April 2013, Complaint No. 77/2012; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P) v. Greece*, Decision of 22 April 2013, Complaint No. 78/2012; *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*, Decision of 22 April 2013, Complaint No. 79/2012; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece*, Decision of 22 April 2013, Complaint No. 80/2012.

536 I.e. Council of State (Plenary Session), Judgment of 17 March 2016, No. 734/2016.

537 Council of State, Judgment of 20 March 1995, No. 1158/1995; Judgment No. 2398/1992. The Council of State ruled that the minimum standards set in the ECSS cannot be applied directly in domestic law without prior specification by the national legislature.

538 *Katrougalos*, Institutions of Social Policy and Protection of Social Rights at International and National Level, p. 40.

2. The Right to Social Security under the Greek Constitution

The Greek Constitution plays an important role in the structure and design of the Greek social security system. Greece is a social state and its social policy has a constitutional foundation. Alongside this, the Constitution obliges the state to undertake the appropriate measures for the social protection of the elderly. The right to social security is protected in the Constitution by both Article 21(3) which promotes the right to social assistance and is thus applied in social assistance cases, and Article 22(5) which promotes the right to social insurance and is thus applied only in social insurance cases with a certain contributory character.

a) The Constitutional Provisions

aa) The Right to Protection of Old-Age

The protection of the elderly is promoted by Article 21(3) of the Greek Constitution. The Greek Constitution allows for a number of social rights in Article 21(3). These include *inter alia*, the right to the protection of family, marriage, motherhood and childhood, the right to the protection of the vulnerable population, such as families with many children, windows and orphans, the old-aged, the young and the disabled; as well as the right to the provision of housing. Article 21(3) states that "*The State shall care for the health of citizens and shall adopt special measures for the protection of youth, old-age, disability and for the relief of the needy.*" From this constitutional provision, it derives that the state is obliged to provide social assistance, in form of benefits in cash or kind, in case of occurrence of the social risk of old-age.

Article 21(3) is a programmatic provision for the state and does not provide a justiciable right. Namely, the elderly may not raise before the court the Article 21(3) as legal basis, in order to claim specific social benefits for the protection of old-age. However, Article 21(3) may provide the elderly with the right to demand the state to guarantee their minimum existence. In this sense, the Article 21(3) protects the right to social assistance. The legislature is prohibited to deprive the individuals from the social benefits it has already provided through prior administrative specification, when this would endanger the minimum decent life and would not allow

them to lead a decent life and participate actively in public, social and cultural life.[539]

Last but not least, Article 21(3) may not be used as legal remedy by current or prospective pensioners but only by uninsured elderly, despite of the fact that the latter constitutional provision obliges the state to protect *inter alia* the old-age. This is because Article 21(3) does not find application in social insurance cases, but only in social assistance cases. The social insurance cases have a contributory character which is characteristic of the Greek public pension system. The Greek public pension system as an institution is protected by Article 22(5) of the Greek Constitution. Therefore, in cases of benefits with contributory character, the Article 22(5), described below, must find application.

bb) The Right to Social Insurance – Article 22(5)

The wording "*social security*" is not referred to in the text of the Constitution like as in the international treaties. Article 22(5) of the Greek Constitution guarantees the right to social insurance. It obliges the state to undertake the appropriate measures for the protection of the social insurance of the working population. Aim of establishing a social insurance scheme constitutes the protection of the working population from a number of social insurance risks, such as sickness, disability and old-age, since these risks may result in the individuals' suffering a lower standard of living conditions.[540]

The phrase "*working population*" distinguishes the Article 22(5) from Article 21(3). Article 22(5) refers only to the individuals that are economically active and have paid contributions to the social insurance system via their employment, while Article 21(3) protects the elderly that have not contributed to the public pension system or have not contributed the minimum service required for a pension entitlement.[541]

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539 *Tsatsos*, Constitutional Law-Part C: Fundamental Rights, p. 207.

540 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

541 Exceptionally the Special Highest Court (AED) of Article 100 of the Greek Constitution ruled that civil servants are excluded from the personal scope of this constitutional provision, since it considered their benefits as an effect of their service for the state. See Special Highest Court, No. 16/1983.

Article 22(5) acknowledges the constitutional guarantee of social insurance as an institution.[542] It guarantees the existence of a public pension system that protects the social risk of old-age that is accessible to everyone. Core elements of the Greek public pension system as an institution are its universality, its public and obligatory character, the protection of social insurance capital, the promotion of social insurance, the principle of social solidarity, the principle of equivalence between contributions and benefits as well as the state's participation and guarantee in the financing of the institution.[543] Against this background, the Constitution guarantees the existence of a social insurance scheme that should cover the social insurance security of the whole working population taking into consideration the protection of the social insurance capital, while the national legislature has the responsibility to establish and reform the social insurance system, in accordance to the changing social and economic conditions.

b) The Right to Social Security as an Objective Right

Article 22(5) and Article 21(3) are constitutional provisions mainly of programmatic nature since they provide general policies and guidelines to the legislature for the protection of the elderly.[544] The legislative power is obliged to design and implement the vague content of these constitutional provisions adopting the necessary laws. In this sense, the abstract notion of both articles gives a wide margin of appreciation to the legislature on the legal measures that should be undertaken for the social protection of the uninsured elderly (Article 21(3)) and the working population (Article 22(5)). Namely, the Greek Constitution provides a wide appreciation to

542 *Kremalis*, in: *Ruland / Von Maydell / Papier* (eds.), Verfassung, Theorie und Praxis des Sozialstaats, p. 442; C*ontiades*, Constitutional Consolidation and the Fundamental Organisation of the Social Insurance System, p. 380.

543 *Chrysogonos / Kaidatzis,* EED 2010, p.869; *Angelopoulou,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 157; *Chrysogonos,* Civil and Social Rights, pp. 561, 568; *Contiades*, Constitutional Consolidation and the Fundamental Organisation of the Social Insurance System, p. 385; *Stergiou*, The Constitutional Consolidation of the Social Insurance System, p. 359.

544 Court of Audit (Plenary Session), Judgment No. 2457/2012. See also *Kremalis,* The Individual Right to Social Assistance, p.158; *Manesis*, Constitutional Law, p. 154.

the state to form their pension policy legislating the kind and the extent of the social insurance protection, i.e. by altering the method for calculating benefits and contributions or the eligibility conditions for a pension entitlement or reducing the amount of the already provided old-age pension benefits or establishing more favourable prerequisites to pension benefits for a specific group of the population. The legislature is, however, obliged by the Constitution to retain the compulsory character of the system, namely the social insurance obligation, whereby the contributions must be compulsorily paid either by the employee or employer. In addition, social insurance should be provided only by the state or by public entities.

The aim of a wide margin of appreciation, that the state enjoys through the aforementioned constitutional provisions, is the prospects, opportunity and flexibility for social protection to be adapted in the standing changing demographic and socio-economic situation of the state. A concrete and predetermined notion of the right to social security with reference to the aims and design of social policy is not acceptable in a democratic society, on the grounds that the enactment of social security benefits depends on the public resources[545] and thus over time it is possible that in a democratic process diverse perspective and priorities are set.[546] Otherwise, the financial capacities of the state would be set in danger.

Therefore, both articles provide an abstract notion of the right to social security and general guidelines to the legislature to establish a social insurance and social assistance scheme. As a result, the Article 21(3) and Article 22(5) may not provide the individuals with the right to claim for specific social benefits from the state and thus they do not provide with a subjective right in that sense. The content of both articles must be made first concrete and be realised through domestic laws.

c) The Right to Social Security as a Subjective Right

The aim of this part of the research is to analyse the possibility of regarding the right to social security as a subjective right, namely as an enforce-

545 C*ontiades*, Constitutional Consolidation and the Fundamental Organisation of the Social Insurance System, p. 128; *Stergiou*, The Constitutional Consolidation of the Social Insurance System, p. 101.

546 *Hamisch*, Der Schutz individueller Rechte bei Rentenreformen: Deutschland und Großbritannien im Vergleich, p. 242.

able right that pensioners may bring before the courts. Enforceability or justiciability of economic and social rights means the extent to which an alleged violation of an economic or social subjective right invoked in a particular case is suitable for judicial review at the domestic level.[547]

As it has been mentioned above, the right to social insurance may not be a useful legal tool to protect future legal positions of pensioners, on the grounds that the enactment of pension benefits depends on the financial resources of the state. However, in some cases, constitutional rights, like the constitutional right to social insurance, are binding upon the legislature irrespective of the economic situation of the state.[548] Under exceptional circumstances the right to social insurance may thus become a subjective right and provide a defensive justiciable right for pensioners.

The pensioners may use the right to social insurance as a legal basis to claim before the courts for the provision of pension benefits, when the legislative authority has already realised and concretely confirmed the content of Article 22(5). The right to social insurance should find application and protect existing legal positions of current pensioners, in cases where old-age pension benefits have already been allocated. In this case, the notion of social protection of the old-age is not general or vague as clear legal standards have been developed. The right to social insurance stops functioning as a programmatic and declaratory provision, but has constitutional value and may be invoked by the claimants as a legal basis on which to claim the unconstitutionality of their old-age pension benefits' reductions.[549]

This approach has been recently adopted by the Council of State. The Council of State gave a new dimension to the right to social insurance in its rulings concerning the last-round of old-age pension benefits reductions introduced by Law No. 4051 of 2012 and Law No. 4093 of 2012[550] as well as in its rulings concerning the reductions in old-age pension benefits

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547 *Coomans*, Justiciability of Economic and Social Rights: Experiences from Domestic Systems, p. 4.

548 See for example the ruling of the Constitutional Court of Latvia, which used as legal basis the right to social insurance to declare the unconstitutionality of the old-age benefits reductions imposed within the framework of the financial facility agreement with IMF and other international creditors. Constitutional Court of Latvia, Judgment of 21 December 2009, No. 2009/43-01, at para. 24.

549 *Ibid.*

550 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2288/2015.

introduced by Law. No. 4024 of 2011.[551] Although in the case of the first-round of pension reductions the Council of State examined old-age pension benefits reductions on the basis of Article 1 of the First Protocol,[552] the same court applied, in its more recent jurisprudence, the social right to a pension deriving from the constitutional right to social insurance, as a legal basis in order to legally constrain successive post-crisis actions by the state. More particularly, the Council of State ruled that the constitutional right to social insurance guarantees that when the social insurance risk takes place (i.e. old-age) the individual has the right to claim from the public pension fund benefits that are able to secure satisfying living conditions, similar to the living conditions that the individual was enjoying prior to retirement, although the granted benefits are not required to correspond exactly to the amount of the paid contributions, nor to fully cover the loss of income. The court held that on the one hand, in times of financial crisis, Article 22(5) does not preclude the legislature from reducing current pension benefits, when the state is justifiably unable to provide adequate financing to the social insurance funds, and that it is not able to ensure their sustainability through other means (amendment of pension retirement requirements, more effective management of their assets, imposition of new special social contributions, increasing of the contributions). However, on the other hand, the court ruled that even under exceptional circumstances, the legislature may not freely reduce the social insurance benefits without limitation. Namely, the pension reductions must not violate the constitutional core of the right to social insurance. The core of the right to social insurance was defined by the court so that the pension reductions must not be so high that the pensioners cannot enjoy a dignified life, in the sense that the pensioners' physical sustenance, (nutrition, clothing, accommodation, basic household goods, heating, medical care) as well as their participation in their social life are ensured in a way that is closely reflective of the life that the pensioners were enjoying prior to their retirement.[553]

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551 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2289-2290/2015.

552 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012.

553 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015. At para. 7 of Judgment No. 2287/2015, the Council of State ci-

The court thus defined that the core of the right to social insurance is equal to the level of minimum-existence, as the latter was defined by the Federal German Constitutional Court. Indeed, the German Federal Constitutional Court in two recent cases provided a progressive interpretation of how the level of minimum existence should be defined.[554] The court ruled in both judgments that the social assistance benefits must secure the physical and socio-cultural minimum required for human existence. The first case concerns the unemployment benefits (Hartz IV benefits)[555], while the second case concerns the amount of cash benefits provided to asylum seekers.[556] The court dealt with the legal question whether these two social assistance schemes are compatible with the Basic Law (Grundgesetz). In both cases, the constitutional court ruled that these social assistance benefits schemes are not compatible with the fundamental right to the guarantee of a subsistence minimum that is in line with human dignity (Article 1.1 of the Basic Law) in conjunction with the principle of the social welfare state (Article 20.1 of the Basic Law), because they do not cover the level of minimum existence. The latter derives from the above fundamental rights, which ensure to each person in need of assistance the material prerequisites which are indispensable for his or her physical existence and for a minimum of participation in social, cultural and political life.

The Council of State is thus willing to apply the right to social insurance as the foundation of a legal claim if the legislature has drafted detailed provisions, even if this may have considerable financial implica-

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ted the judgment of the Federal German Constitutional Court of 09.02.2010,- 1 BvL 1/09-,-1 BvL 3/09-,-1 BvL 4/09-, Rn. 135).

554 BVerfG, 1 BvL 1/09, Judgment of 09 February 2010 (Hartz IV). English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209_1bvl000109en.html (Retrieved August 2016); BVerfG, 1 BvL 10/10, Judgment of 18 July 2012 (Asylum seekers benefits). English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bvl001010en.html (Retrieved August 2016).

555 With effect from the 1st January 2005 the second book of the German code of social law (SGB II) guarantees basic provisions for employable persons and the persons living with them in a joint household. These benefits secure one's livelihood and benefits for accommodation and heating.

556 The Asylum Seekers Benefits Act, starting from the 1st November 1993, aims to provide its beneficiaries that do not have any assets of their own, existential benefits.

tions. This approach of the court promotes the importance and practical use of the social right to old-age pension benefits, which was disregarded in the past. The right to social insurance starts functioning as a subjective right being applied when the state deprives the individuals of the social benefits it has already provided through prior administrative specification. The justiciability of social rights is largely dependent on the existence of legislation that relates to the implementation of particular rights. Indeed, when ordinary law has already been implemented providing precise pension requirements and old-age pension benefits, even if the right to pension is of programmatic nature, the legislative measure which represents a backward step may be prohibited.[557] In this way, the legislature's freedom to shape legislation is limited.

The Council of State ruled that the state is not precluded from reducing the level of social protection that has already been established, but it is not entitled to refuse the enactment of the right to social insurance, if the level of the old-age pension benefits that has already been granted does not cover a certain minimum existence of the pensioners. In this sense, the core content of the right to social insurance that should be guaranteed under all circumstances is the level of minimum existence.

However, the core of the right to social insurance cannot be defined in accordance to the level of minimum sustenance. This is because the above case law of the Council of State concerned pension benefits and not social assistance benefits. In social insurance cases the contributory element is at hand and the right to social insurance may guarantee that the pensioners enjoy similar income with the one they had in average over their working life. This is poignant in pension issues where the pensioners have paid different levels of contributions and thus it would be not compatible with the right to social insurance to argue that all the old-age benefits may be diminished up to the same level of minimum existence, without taking into consideration the fact that different level of contributions have been paid. The function of the right to social insurance does not prevent a decline in the standard of living but excludes the aim of guaranteeing a secured minimum income. This is achieved through social assistance benefits. Besides, the Federal German Constitutional Court defined the level of minimum existence in social assistance cases and not in social insurance cases, where the element of equivalence prevails. Both judgments of the German

557 *Fabre,* Social Rights under the Constitution, p. 42.

Court can be situated in the context of the human right to social assistance and not to social insurance, on the grounds that both cases refer to social assistance benefits and not to pension benefits.

According to the theory of "*relative social acquis*", the legislature may reduce the achieved level of protection, but it may not introduce legal provisions that would lead to the revocation of the relevant right's substance.[558] Ripe for legal consideration is how the substance of the right is defined. Thesis of this book is that the minimum core of the right to social insurance is defined by the core elements of the social insurance institution. This means that the core element of the right to social insurance is abolished when one or more of the aforementioned core elements of the social insurance as an institution is/are defuted and totally disregarded. For example, core element of the right to social insurance is the principle of equivalence between the paid contributions and the received pension benefits. If, after successive reductions, the pension benefits have been reduced to such an extent that the final pension income does not correspond to the living conditions that the pensioner was enjoying before retirement, then the core of the right would be abolished. In this instance the core of the right to social insurance may be used as a subjective, justiciable right. This may happen, irrespective of whether the successive reductions amount to lower or higher level than the level of minimum existence. Therefore, the level of minimum-existence shall not play any role in defining the core element of the right to social insurance.

Last but not least, the Council of State recognised that Article 21(3) of the Greek Constitution in combination with the right to dignity protects further the minimum existence of the pensioners.[559] The court ruled that old-age constitutes a social risk that, according to Article 21 of the Greek Constitution, obliges the state to provide social protection to the elderly with the aim to ensure their minimum existence within the framework of Article 2 of the Greek Constitution, irrespective of whether contributions have been paid to the pension system or not. Again it is poignant to argue that pensioners, who have contributed the minimum required years of ser-

558 *Tsatsos*, Constitutional Law – Part C: Fundamental Rights, p. 207. For more information about the thesis of the Greek literature on the theory of "*relative social acquis*" see *Angelopoulou,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 152.

559 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015, at para. 7.

vice, may claim a guarantee of their minimum existence. In cases of low-income pensioners whose pension income does not cover their minimum sustenance, pensioners may use Article 22(5) to claim that their pension income has been diminished to the point where their current living conditions are not comparable to what they were enjoying prior to retirement. The protection from poverty and the provision of a minimum level of dignity in the life of elderly would need to be assured by the social assistance system guaranteed in Article 21(3). Article 21(3) may only be raised in cases of insufficient amount of income of the elderly, who have not contributed the required minimum years to the public pension system in order to acquire pension benefits (uninsured elderly). In these cases, Article 21(3) could provide a subjective right to the uninsured elderly claiming the guarantee of their minimum existence. What can be thus claimed is only the provision of social assistance benefits that covers the minimum existence through the adoption of a more adequate social assistance scheme.

B. Concluding Remarks

This chapter dealt with the question if and to what extent are the pensioners' legal position protected through legal provisions. It concluded that the future legal positions of the pensioners are not protected from any legal norm. This is because no legal norm has been found to be applied, in cases that the pensioners have not established rights. It is apparent that the right to social insurance theoretically protects the future legal position of the individuals to acquire pension benefits, but this right is recognised mainly as an objective right by the international and constitutional law, in the sense that the legislature is obliged to take positive action and ensure a progressive improvement of the social security system.

On the contrary, the protection of existing legal positions in pension law is achieved from constitutional provisions that may become enforceable if the pensioners challenge their rights' restrictions before the courts. The present chapter concluded that holder of the so-called established (or acquired) rights are in a situation which provides stronger protection than that of an insured who is still forming his contributory career or is waiting to achieve the pensionable age. The right to property, the principle of legitimate expectations, the right to equality and the right to social insurance may become enforceable in cases that the pensioners have established legal positions. The right to property provides legal protection, in cases re-

lating to pensioners that have already-acquired old-age pension benefits, having fulfilled all substantial and formal requirements concerned and satisfied the legal conditions laid down in domestic law for the grant of old-age pension benefits as well as to pensioners that have legitimate expectations based on the case law of the national courts to acquire old-age pension benefits. The expectations of the pensioners that are not mature and thus legitimate do not fall under the concept of possession within the meaning of Article 1 of the First Protocol. Therefore, the right to property is not applicable and unlikely to be of assistance to the prospective pensioners' case. This is because the scope of Article 1 of the First Protocol does not include expectations that are based upon a mere hope that the individual will retire at a certain age; it only includes expectations that are held as legitimate. Furthermore, the right to equality and the principle of legitimate expectations may potentially protect the pensioners' legal positions, when certain requirements are met, described above. Lastly, the right to social insurance may protect pensioners' established rights, in cases that legislative measures would endanger the level of living conditions that the pensioners were enjoying prior to retirement.