

Introduction

A. Background

The economic growth witnessed by Greece following its entry into the Economic and Monetary Union (hereinafter: EMU), ended in a financial crisis in 2009.¹ The 2008 wide global financial and economic crisis exposed Greece's vulnerabilities, which were determined by national characteristics.² Some of these national characteristics were the fiscal expansion following the accession to the EMU, a lack of resilience in the Greek economy and its banking sector, the accumulation of macroeconomic constant unsustainable fiscal policies partly hidden by unrealistic data, rigid labour and product markets as well as low competitiveness, rising external and internal fiscal debt and low domestic savings rate.³ Another strong national characteristic was a long period of lack or delay of change.⁴ As a result, Greece had to be faced with the threat of potential insolvency and inflicted serious macroeconomic damage on both the domestic and European economy.

In an attempt to contain the crisis, Greece signed financial facility agreements with the Member States of the EMU and the International Monetary Fund (hereinafter: IMF) in May 2010 and March 2012. Within the framework of these agreements, the IMF, in collaboration with the European Union (hereinafter: EU), has advised Greece to implement stringent fiscal and monetary policies in return for financial support. More specifically, in order to meet the conditions of the financial assistance agreements, Greece has had to adopt an economic structural programme that includes *inter alia* the reduction of the public deficit, so as to combat

1 *Hellenic Republic*(2011), p. 2.

2 *Rose / Spiegel*, Pacific Economic Review 2010, p. 341.

3 *EU-COM*(2010) 61 final, p. 9. For a succinct review of the domestic origins of the Greek crisis see: *Featherstone*, JCMS 2011, pp. 195-198; *Kouretas / Vlamis*, Panoeconomicus 2010, pp. 394-397; *Katsimi / Moutos*, EJPE 2010, p. 572.

4 Radaelli argues that inertia, which depicts a long period of lack or delay of change, may produce crisis and abrupt change. See *Radaelli*, in: *Featherstone / Radaelli* (eds.), The Politics of Europeanization, p. 34.

the effects of the shortages that result from disproportionate government spending in comparison to its revenues.

Against this background, with the aim of boosting fiscal soundness, Greece has structured its public pension system in 2010 as well as in 2012 (although the reform of the public pension system had been deliberated for at least a decade prior to these developments). The new public pension reforms were designed to remedy the deficiencies of the Greek public pension system, ensure its sustainability and significantly reduce public expenditure on pension benefits in the long-run.⁵ While these reforms would have led to long-term economic benefits, they proved to be inadequate in and of themselves, as Greece also needed a short-term solution to the public deficit problem. Hence, Greece introduced reductions in the old-age pension benefits payments of the current retirees within the period 2010-2012, contrary to the earlier agreed terms of the pension schemes. Consequently, the financial crisis and its aftermath diverted the policy-strategy towards immediate crisis managements.⁶ The reduction in old-age pension benefits is a socio-economic and fiscal policy measure aimed at reducing in the short-term government spending, and thus provides short-term reduction in the budget deficit. This is largely due to the fact that old-age pension benefits are partly financed by the state (but in regards to public pensions of the civil servants, the state is fully responsible). Additionally, in the event of financial difficulties *vis-a-vis* the pension public funds, the state provides a guaranteed allocation of the pension benefits.

B. The Subject-Matter of the Book

The subject of research in the present work is to assess the legal implications of the reductions in old-age pension benefits for the prospective pensioners, that resulted from the long-term redevelopment of the public pension system, as well as the legal implications of the reductions in the old-age pension benefits of current pensioners, that resulted from the reductions that took place within the period of 2010-2012. I chose the period 2010-2012 because it exemplifies the first reaction to the financial crisis. The public pension reforms introduced in this period invoked interesting

5 IMF(2010a) 10/111, at para. 13.

6 Diamond / Liddle, in: Morel / Palier / Palme (eds.), *Towards a Social Investment Welfare State?*, p. 287.

legal considerations because of the element of urgency which characterised this period. The element of urgency stems from a severe financial crisis and the urgent and unprecedented dire need for external financial support. It creates interesting legal implications, since in case of a severe financial crisis in combination with the urgent need for financial support, human rights, and particularly economic and social rights, might be affected by economic adjustment programmes which require states to undertake urgently retrogressive measures affecting in this way the level of the rights enjoyment.⁷ In times of severe financial crisis, the social resources are limited and an overall restructuring of the public budget is prerequisite for the economic stability.

The catalyst for this book is the dearth of legal discourse on the legality pension rights' restrictions that have occurred in the context of the current economic and financial crisis. Last but not least, the Greek court, Council of State, which is the Supreme Administrative Court of Greece,⁸ as well as the European Court of Human Rights, ruled a number of interesting rulings on the legality of the old-age pension benefits reductions in times of financial crisis. The presentation and legal assessment of the rich national and international jurisprudence became another key factor that motivated the idea of the present book.

I. Aim of the Book

The main purpose of this book is, firstly, to propose a legal framework in which prospective and current pensioners can raise legal claims in court proceedings with a view to the ongoing pension reforms and reductions in old-age pension benefits. It seeks to take a stand on which rights ought to be recognised in cases of public pension reforms. At this point, I should note that my primary object is the Greek constitutional law, although some

7 *Goldmann*, in: *Bohoslavsky / Cernic* (eds.), *Making Sovereign Financing and Human Rights Work*, p. 83.

8 According to Article 95 of the Greek Constitution, main jurisdiction of the Council of State is the review of final judgments of the ordinary administrative courts. Yet, in certain cases, the Council of State decides in first and last instance, i.e. by virtue of an express constitutional provision (as in cases of downgrading of civil servants) or by virtue of a law issued upon constitutional authorization. Cases of special importance that raise issues of unconstitutionality are reviewed by the plenary session of the Council of State.

of my claims about pensioners' rights may apply also in other legal systems and may extend to the field of international law. Secondly, this book aims to contribute to the legal academic knowledge regarding the role and influence of the financial crisis in the restrictions of pensioners' rights. The rationale of this book is to demonstrate the impact of the financial crisis and the element of conditionality imposed by the international financial assistance. The assessment of this impact upon the enjoyment of pensioners' rights is particularly important, given the fact that the international financial institutions have been a major player in relation to the designing of responses to the crisis and their legal justification. Thirdly, the present work seeks to define which constitutional limits and rules should the legislature and the policy-makers respect when they reform the public pension system in times of an economic and financial crisis in order to assess the proper content and implementation of pensioners' rights. This research is essential and necessary for legal scholars and national constitutional judges who search for answers on the legality and legitimacy of pension reforms and old-age pension benefits reductions in times of financial crisis. In light of this contextual backdrop, the impact of the financial crisis and the financial facility agreements with the international creditors cannot be ignored. In order to achieve the objectives of this book, the following three legal research questions are examined.

II. Legal Research Questions

The main focus of this book is the legality of the public pension reforms and the old-age pension benefits reductions in times of financial and economic crisis. In light of this background, this work addresses three main legal research questions: (1) which legal provisions may protect the pensioners' legal positions in case of public pension reforms and cuts in pension payments?; (2) which aims of the public pension reforms and reductions may be used as "*public interest*" justification in times of financial crisis and to what extent do the financial crisis and the conditional financial assistance determine the legitimacy of the aims, i.e. of meeting the fiscal interests of the state?; (3) which principles, rules and criteria must the legislature take into account when reforming the public pension system and reducing the old-age pension benefits in times of financial crisis?

The first research question focuses on the manner in which the pensioners' rights are legally protected by the Greek Constitution as well as inter-

national law. It concentrates on the issue which legal rights and principles may potentially protect the pensioners' legal positions and which are the protected legal positions.⁹ The recent Greek public pension reforms have economically affected the individuals that expect to receive pension rights and those that have already established and exercised their pension rights. Against this background, I analyse the potential interference with the existing and future positions of the pensioners. The examination of these two legal positions takes place in relation to specific legal provisions. In particular, as legal provisions are examined: a. the right to property, which is provided by Article 1 of the First Protocol of the European Convention on Human Rights (hereinafter: ECHR) and more specifically, I examine whether the acquired pension benefit and the expectations to future pension benefits fall within the concept of property as was interpreted by the jurisprudence of the Greek courts as well as the European Court of Human Rights (hereinafter: ECtHR); b. the principle of legitimate expectations (or protection of confidence); c. the right to equality and non-discrimination; as well as d. the social rights of the protection of old-age and social insurance.

Assuming that a *prima facie* legal claim can be made, on the basis of one or more of the legal provisions discussed above, the next issue that arises is the grounds of justification of the public pension reforms and pension reductions. The second research question focuses on whether the public pension reforms are in pursuit of a legitimate aim(s). The present book analyses the aims provided by the explanatory reports on the laws that introduced the reforms. In particular, aims of the measures were the fiscal interests of the state, the sustainability of the public pension system and the proper functioning of the EMU.

In relation to these aims pursued, the second research question revolves around the role of the financial crisis and the financial facility agreements in the legitimacy of these aims. In the assessment of the legitimacy of the aims, crucial roles have played the severe financial crisis and its subsequent conditional financial assistance agreements with the Member States of the EMU and the IMF. Prior to the current

9 A legal position in the continental law means the ability of an individual to make a legal claim or seek judicial enforcement of a right. In common law, this term is similar to the common law concept of standing or *locus standi*, see Garner, Black's Law Dictionary, p. 1026, 1536.

crisis, the general reduction in social benefits and pension benefits had been a subject of concern to Greek jurisprudence and Greek legal literature. However, in more recent times, these issues have taken on more significance given that this crisis is the most severe crisis that Greece has faced in its modern history. Both factors have started playing a crucial role in the framework of judicial review and in the new developments in the recent jurisprudence, concerning the legitimacy of the aims pursued.¹⁰

Accepting that the aims pursued are legitimate grounds of public policy, the third research question concerns which common principles and rules must the national legislature take into consideration when pensioners' rights are restricted. Certain rules are placed on the manner in which reforms are made to a pension system and reductions in the already granted pension benefits. The national legislature is not totally free to enforce these changes, but the Constitution set the limits and the framework within which the legislature must act in cases of socio-political decisions.¹¹ The principle of proportionality sets these rules and criteria and may be used as a legal tool and guidance for the examination of whether an interference with an individual right is undertaken within the framework of the Greek Constitution. In the process of carrying out this assessment, the fiscal crisis and the external pressures for the re-arrangement of fiscal policy in return for financial support, influence the way in which the legislature must adopt the public pension reforms compatibly to the principle of proportionality. The respect of the latter principle has to be assessed, taking into consideration the notion of the urgent need for reduction in the public deficit and the external financial support. Both factors influence the way that the legislature introduced pension reductions, to the extent that they underlie the notion of urgency, i.e. the urgent need for external financial support to avoid potential solvency of the state. It seems that in cases of urgent financial needs and the obligation to address the demands of commitment to international creditors, the crisis may amount to a state of urgency. This situation, indisputably, exerts stronger pressure on the national legislature in regards to the fulfilment and respect of the above mentioned principle. In cases of exceptional and imminent crisis, the principle of pro-

10 *Angelopoulou*, EDKA 2010, p. 915.

11 *Becker*, ZVerWiss 2010, p. 589.

portionality may not be used to “*hinder restrictions of rights but to clothe restrictive measures with extra legitimation*”.¹²

III. Methodology

The main methodology adopted in this book is an analysis of the academic discourse. In addition, it was relied on desk research of legislation, the explanatory reports on the laws, the discussions in the parliamentary committees and the *ex-ante* evaluation of the pension legislation as well as reports and finding of international sources, i.e. memoranda of understanding. To analyse the subjects in question, a scientific method is followed which involves three steps: recognition of the problem, assumptions, examination of the assumptions and results. The recognition of the problem is achieved by describing both the background of the public pension reforms as well the actual pension reforms undertaken. The assumptions are achieved by describing the academic literature and national, as well as international, jurisprudence in order to determine potential legal provisions that may protect pensioners' rights. The examination of the assumptions and results is achieved through an analysis of diverse case-studies, which have been selected to define legal principles with wide applicability. Namely, the selected case-studies offer a detailed illustration of legal issues of wider interest by taking as examples the reduction in old-age pension benefits and age discrimination cases and drawing analogies among the case-studies themselves. They were deliberately chosen as examples of broader phenomena, in order to make a contribution to a comprehensive understanding of the legality of the pension reforms and reductions in times of financial crisis, when there is lack of public finances.

Greece represents the only country for the analysis of the legality of the pension reforms and reductions. The case of Greece may illustrate how damaging effects the repayment of sovereign debt can have on state resources to provide economic and social rights.¹³ This is because Greece is not only a country which is strongly affected by the financial crisis, but it is more importantly, one of the first Member States of the EMU in which

12 *Contiades / Fotiadou.*, in: *Contiades* (ed.), *Constitutions in the Global Financial Crisis*, p. 33.

13 *Cernic*, in: *Bohoslavsky / Cernic* (eds.), *Making Sovereign Financing and Human Rights Work*, p. 144.

its debt repayment, and consequently the restructuring of its public pension expenditures is dependent on the conditionality of the financial facility assistance imposed by the Member States of the EMU and the IMF. However, whilst this book takes Greece as an example of old-age pension benefits reductions, it goes beyond the particular case of Greece, in that it uses the analysis of the pension reforms and reductions in old-age pension benefits adopted in Greek legislation, in order to develop more general legal concepts and arguments that could be used in similar cases by the jurisprudence and legal literature of other European countries that are forced due to the crisis and the conditional financial support to restrict the provision of the old-age pension benefits.

IV. Progression of the Argument

This work is divided in five main chapters. In the first chapter, I give a short account of the background regarding the normative and factual internal and external influences that necessitated pension reforms prior to the Greek economic and financial crisis. To the normative factors belong the international guidelines on pension reforms, the EMU as well as the Open Method of Co-Ordination (hereinafter: OMC). The factual factors concern the financial imbalances in the Greek public pension system, the negative demographic changes in Greece as well as the need for globalisation. Moreover, the first chapter illustrates the tipping points of the Greek public pension reforms of the period 2010-2012. The tipping points were the Greek financial and economic crisis of the late of 2009 and the new form of conditionality imposed in the framework of the financial facility agreements with the international creditors. This chapter clearly shows that, despite the serious socio-economic factors which predated the crisis, the efforts of successive Greek governments made to implement ground-breaking pension reforms and major reductions in old-age pension benefits prior to the crisis were unsuccessful. However, the financial crisis became “*the last drop that spilled the cup*” and forced successive Greek governments to introduce pension cutbacks and structural pension reforms. While this work focuses on an academic legal analysis of some of the issues surrounding the pension reforms and old-age pension benefit reductions, the division between the factors predated the crisis with the tipping points of the reforms, which were introduced after the crisis, is particularly important. This division is particularly important in gaining an understanding of

the necessity and urgency of the redesign of the Greek public pension system as well as in showing the strong influence of the crisis and the external financial support on the need to restructure the public expenditures on pensions, which play a major role upon the constitutionality of pension reforms.

The pension reductions and structural pension reforms undertaken after the financial crisis are described in the second chapter. The second chapter provides a detailed overview of the legal framework of the reformed Greek statutory pension system as well as a description of the specific reductions in old-age pension benefits which have been undertaken progressively by the Greek parliament since the beginning of the crisis within the period 2010-2012. The changes in the Greek public pension system are presented step-by-step along with the tipping points of the reforms presented in the previous chapter. Namely, chapter two presents the reforms with regard to the legislative arguments mentioned in the explanatory reports on the relevant legislation, the memoranda of understanding and the economic adjustment programmes for Greece. Through this systematic and founded presentation of the reforms and pension reductions, this chapter, firstly, seeks to detail the provisions that recognise the interference with the old-age pension benefits of the public pillar. This is essential as a legal basis for the third chapter, which examines potential protection of the pensioners' legal positions against this interference. Secondly, the second chapter attempts to indicate further the strong influence of the financial crisis and the conditional financial assistance with the pension reforms. In this way, the second chapter shows that the seriousness of the financial crisis and the subsequent need for financial assistance acted as the major stimuli for cuts in public pension expenditure. The examination of the main stimuli for the public pension reforms and reductions in pension benefits is necessary for the legal analysis of the fourth chapter, which analyses whether the reforms are in pursuit of legitimate aim(s). The more close the link between the relevant reforms and the tipping points, the more likely it is the aims of the reforms to be classified as legitimate.

The third, fourth and fifth chapters focus on the compatibility of the public pension reforms and reductions in old-age pension benefits with the Greek Constitution and international law. Aim of the following three parts is to assess the legality of the public pension reforms in times of financial crisis. The assessment is achieved using as balancing concept the principle of proportionality. In a balancing process using the principle of proportionality, the restricted pensioners' rights and the general interests are bal-

anced. The examination of such compatibility starts in the third chapter; it follows in the fourth chapter and ends up in the fifth chapter. The restricted pensioners' rights are described in chapter three and the pursued general interests are mentioned in chapter four, whilst the balancing process takes place in chapter five using case-studies as examples.

In the third chapter, an attempt is made to establish whether any legal provisions may potentially provide protection to the existing and future positions of the pensioners. Namely, it examines whether any legal right or principle could provide pensioners with justiciable rights. This is because the proportionality test is fruitful only when there is a pre-existing understanding of the content of the affected rights and the weight to be accorded to them.¹⁴ The legal provisions examined is the right to property, the principle of legitimate expectations (or protection of confidence) and the right to equality and non-discrimination as well as the social rights guaranteed under domestic constitutional and international law. The examination of the constitutional right to dignity¹⁵, which could potentially protect the level of minimum existence of the pensioners, is not included as a legal provision in the book. This is because, at least up until the time of this book, no studies have been conducted which prove that the public pension reforms and reductions in the old-age pension benefits may lead to endanger the minimum existence. Even after successive reductions in pension benefits, the level of pension benefits remained above the average of the main pension benefits provided by the compulsory social insurance scheme for employees.¹⁶ The inadequacy of the pension benefits may concern only individual cases, which do not fall under the scope of this book.

The fourth chapter examines whether potential restrictions of the legal provisions, discussed in chapter three, can be justified in the context of the financial crisis. The fourth chapter deals with the role of the financial crisis and the conditional financial assistance in the legitimacy of the aims pursued by the legislature in order to reform the pension system and reduce the pension benefits.

14 Bilchitz, IJCL 2014, p. 737.

15 Article 2(1) of the Greek Constitution defines that "*Respect and protection of the value of the human being constitute the primary obligations of the State*".

16 Council of State, Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014. All judgments of the Greek Courts cited in this work are available in the Nomos database accessible at the following website: <https://lawdb.intrasoftnet.com/>.

The fifth and last chapter of this book examines the legality of specific cases of public pension reforms that have interfered with specific legal provisions. The cases under examination are divided into three main groups: a. reductions in old-age pension benefits; b. cases of progressive reductions in pension benefits of high amount; and c. age discrimination cases. In each case, this chapter addresses the question, whether, in times of economic and financial crisis, the aims pursued by the legislature can constitute overriding aims that are able to outweigh the restricted legal provisions.