Chapter Five: The Principle of Proportionality as a Balancing Concept in Case-Studies of Pension Reforms

The aim of the present chapter is threefold: (a) to examine the legality of public pension reforms in restricting the pensioners' rights in times of financial crisis; (b) to draw conclusions concerning the effect of the financial crisis on the level of judicial protection granted to the pensioners' rights (is their judicial protection decreased in times of sovereign crisis?) and (c) to articulate a common model for the enjoyment of pensioners' rights in times of financial crisis. The common model is contextualised in terms of providing exactly the constitutional principles, standards and rules on dismantling the pensioners' rights in times of financial crisis that the legislature and the policy makers must respect and take into consideration when pension reforms are introduced and the old-age pension benefits are reduced due to lack of public resources.

To address comprehensively the aims of the present chapter, I chose the methodology of the case-study analysis. The case-studies presented contain a real situation and are deliberately chosen as examples of broader phenomena. In this way, the case studies make a contribution to a general knowledge of how to reform legal pension systems in times of financial crisis. One practical advantage of conducting a case study is that there is sure to be some interest in the findings for the reader. Using case studies as examples for reviewing the legality of public pension reforms in times of financial crisis, the reader may better understand how and what should be examined (applied legal provisions, aims pursued, and the principle of proportionality) in cases of pension reforms. So, by analysing the legal problems in this way, the issues may be better conceived by the reader and may help them to draw conclusions about the legality of the reforms. This is because the reader acquires sufficient information to understand problems and issues emerging through pension reforms by reading specific cases. Moreover, in the chosen case-studies the development of the case law is presented and so the development of judicial protection and the role of the financial crisis in this development can be witnessed. Lastly, from the whole case-studies it can be derived a common model that the legislature must respect when pension reforms are introduced. Unlike other disciplines, in law there is not a mathematical or statistic model to underpin our

research on the legality of pension reforms. However, through the methodology of case-studies, it is possible to articulate a common model by inspecting cases that cover a wide spectrum of reforms and draw analogies among the cases themselves. In consequence, a comparative analysis among the case-studies does not relate the cases to abstract theory, but simply enables the drawing of conclusions on how pension reforms must be introduced in order to be legal.

Against this background, chapter five is structured as follows: Section A provides general information on the principle of proportionality, which is a necessary introductory point for the case-studies. The chosen case-studies involve the use of the principle of proportionality as a balancing factor, in order to balance the urgency of pension reforms in times of financial crisis with the need to protect pensioners' rights. This is because the principle of proportionality provides an excellent guidance as to how the public pension reforms should be introduced. It assesses whether the way in which the reforms were adopted results in a proportional balance between the pursued public interests and the pensioners' rights. Next, section B examines the public pension reforms introduced in the period 2010-2012 in three different categories of case-studies: B.I concerns the old-age pension benefits reductions, in which the restriction of the right to property is examined; B.II concerns the reductions in pension benefits of high-income earners, in which the legality of the interference with the principle of equivalence is examined; and B.III refers to age discrimination cases, concerning measures of public pension reforms that caused a discriminatory effect, and so the principle of non-discrimination is examined. Lastly, the present chapter ends in section C with concluding remarks. It provides a thorough, overall view of the legality of pension reforms in times of financial crisis, which derives from all case-studies. In that context, the judicial development on the protection of the pensioners' rights is integrated.

A. The Principle of Proportionality

Justice and legality of legislative measures arise in the form of weighing the various concurring and conflicting elements of a case according to law and the Constitution. This means that the conflicting interests and competing principles are evaluated in such a way so that they find their best possible treatment and so, individuals must obtain the right proportion of

treatment they legally deserve.[683] A balancing or weighing process among different legal interests and object requires specific evaluation of all relevant normative and factual elements of a case in order to subsequently balance each of them.[684] These elements constitute the primary material of the reasoning on justice matters. After discerning the relevant elements of a case, then the legislative and judicative power should weigh them according to values of justice.[685] It is for the national authorities and the courts to accord the best possible treatment of the legal interests in collision by the best possible ordering of the values in interaction which come into play.[686] In this point, the principle of proportionality plays a major role. Legislating of judging are conscious human actions which as such entail the requirement of rationality of the means to the objective pursued.[687] Proportionality is a rule of rational behavior.

The principle of proportionality is a legal method used to review and control the constitutionality of the legislative and administrative measures by the courts. "*References to balancing or proportionality in judicial opinions figure in a context of legal argumentation in order to argue for or against a particular legal outcome, a specific doctrinal position or a more general understanding of the role of law and courts in society"*.[688] In other words, it is based upon the idea of rebalancing the interests made by the legislature and the administrative authorities. In addition, it is a kind of test with various parameters that determined the courts as to the circumstances in which it is permissible to limit rights.

The principle of proportionality requires a balancing test between the need to protect individual constitutional rights and the benefits of the restriction of those rights for the need to protect wider general interests.[689] Through the principle of proportionality the judicative power performs a balancing act whilst reviewing the legislative measures and therefore, it gains an important role in the final ruling of the constitutionality of the re-

683 *Sarmas*, The Fair Balance: Justice as an Equilibrium Setting Exercise, p. 148-149.
684 *Ibid,* p. 125.
685 *Ibid,* p. 140.
686 *Ibid,* p. 150.
687 *Ibid,* p. 133.
688 *Bomhoff*, Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse, p. 21.
689 *Krause*, in: *Eide /Krause / Rosas* (eds.), Economic, Social and Cultural Rights: A Textbook, p. 154.

strictive measures. There are two main schools of thought that influenced the development of this principle: a. the principle of retributive justice (*justitia vindicativa*) and of appropriate distributive justice (*justitia distributiva*) and b. the notion of the liberal state, which holds that the state should restrict itself for the promotion of individual freedoms.[690]

The principle of proportionality has been primarily developed in German jurisprudence concerning the German administrative and constitutional law and from German origins, it has been expanded across Europe as well as across the countries with common law system (i.e. UK, Canada, South Africa, New Zealand) becoming a dominant tool for the judiciary to manage conflict between individual rights and public interests.[691] In German law, the principle of proportionality involves three steps.[692] The first step concerns the question of whether the measure is suitable for the achievement of this legitimate purpose. The second step concerns the necessity of the measure. In that step, it is examined whether the same legitimate purpose could be achieved by other, less restrictive means. The last stage concerns the principle of proportionality in a narrow sense. Not least because of the weak criterion of necessity, proportionality has taken on particular significance in the narrower sense.[693] It concerns the weighing between the need to protect the confidence of the holder of a right and the significance of the general interest.[694]

The ECtHR has developed the "*fair balance test*", in order to review whether the measures of the authorities of the Contracting Parties are compatible with the ECHR.[695] The "*fair balance test*" is inherent in the whole of the Convention.[696] It derives from the concept of democracy and the rule of law, which is a foundational value of democratic societies.[697] The

690 *Schwarze*, European Administrative Law, p. 679.
691 *Stone Sweet / Mathews,* Columbia Journal of Transnational Law 2008, p. 75.
692 *Becker / Hardenberg,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 112-113.
693 *Ibid*, p. 113.
694 BVerfGE 69, 272, 310.
695 For the historical development of the principle of proportionality by the ECtHR see *Rupp-Swienty,* Die Doktrin von der Margin of Appreciation in der Rechtssprechung des Europäischen Gerichtshofs für Menschenrechte, pp. 19-23 and 31-37.
696 *Christoffersen*, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, p. 31.
697 *Ibid*, p. 195, 197.

ECtHR provides that a fair balance should be kept between the general interests of society and the need to protect the human rights guaranteed in the Convention.[698] In this regard, the achievement of a fair balance requires an approach based upon considerations of proportionality. The requirement that there must be a reasonable relation of proportionality between the means employed and the aim sought to be realised is expressed by the notion of a "*fair balance*".[699] This balance is kept when the individual does not bear an excessive and disproportionate burden.[700]

The ECtHR has not specified under which circumstances an individual bears an excessive and disproportionate balance in cases of social benefits reductions. It is ripe for legal consideration whether an excessive balance takes place when a reduction of a social benefit is too high; do the level of reduction does not lead to an excessive burden because of the character of the social security system that is influenced by social and fiscal policy as well as by financial considerations.[701] When applying the fair balance test, the ECtHR concedes a wide margin of appreciation to a state. For example, in *Koufaki and ADEDY v. Greece*, the reduction in the value of pension benefits adopted in response to Greece's economic crisis was held to comply with Article 1 of the First Protocol taking into account the respondent state's wide margin of appreciation.[702] However, the ECtHR has declared in some cases that a fair balance has not been struck, taking a number of factors into account. Delay, unpredictability and inconsistency in the exercise of the state's power to interfere with rights have all been evidence that the measures adopted by the state have led to a disproportionate interference with rights.[703] For example, in *Klein v Austria*, the ECtHR held that the fair balance requirement was not met when a lawyer forfeited his entitlement to an old-age pension, to which he had contributed for

698 ECtHR, *Valkov v. Bulgaria,* Judgment of 25 October 2011, Appl. No. 2033/04 etc., at para. 91.

699 *Harris / O'Boyle / Bates,* Law of the European Convention on Human Rights, p. 14.

700 *Grabenwarter / Pabel*, Europäische Menschenrechtskonvention, p.507.

701 *Schmidt*, Europäische Menschenrechtskonvention und Sozialrecht, p. 97.

702 ECtHR, *Koufaki and ADEDY v. Greece,* Judgment of 7 May 2012, Appl. Nos. 57665/12 etc.

703 I.e. ECtHR, *Klein v Austria,* Judgment of 3 June 2011, Appl. No. 57028/00. See also *Harris / O'Boyle / Bates,* Law of the European Convention on Human Rights, p. 884.

many years, when he lost his right to practice law because of bankruptcy proceedings against him.[704]

As far as the disproportionate burden is concerned, the principle of reasonableness is applied. Namely, if the Court finds that a reasonable balance has been kept by the national authorities then it is considered that the national authorities have acted within their power.[705] An unreasonable balance exists when the right of the individual to derive benefits from the social security system is restricted in such a manner that it results in the impairment of the essence of his or her pension rights,[706] or unreasonableness may be declared, for instance, when the minimum existence's limit has been exceeded.[707]

However, in social policy cases and especially when the ECtHR comes to decide upon reductions in social benefits because of financial difficulties of the state, the Court rarely finds an unreasonableness in the undertaking of the measure. It exercises loose judicial scrutiny by providing a wide margin of appreciation to the states. In that context, the ECtHR provides the Contracting States a wide margin of appreciation concerning the review of the general interest and the balancing process[708] as well as in evaluating the consequences of the restrictive measures.[709] The margin of appreciation provided by the ECtHR to the national authorities takes the

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704 ECtHR, *Klein v Austria,* Judgment of 3 June 2011, Appl. No. 57028/00.

705 *Arai-Takahashi*, The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR, p. 14.

706 ECtHR, *Asmundsson v. Iceland*, Judgment of 12 October 2004, Appl. No. 60669/00, at para. 39; *Wieczorek v. Poland*, Judgment of 08 March 2010, Appl. No. 18176/05, at para. 75.

707 For instance, in the case *Da Conceiçao and Santos v. Portugal*, the ECtHR declared that a total deprivation of entitlement resulting in the impairment of the essence of the right would lead to a disproportionate and excessive burden. See ECtHR, *Da Conceiçao and Santos v. Portugal*, Decision of 08 October 2012, Appl. Nos. 62235/12 etc., at para. 24.

708 ECtHR, *Handyside v. UK*, Judgment of 07 December 1976, Appl. No. 5493/72, at para. 48. In this case, it is formulated at para. 48 that: „*... it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of necessity in this context. Consequently, Article 10 § 32 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislature ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply laws in force*". See also *Schmidt*, Europäische Menschenrechtskonvention und Sozialrecht, p. 91.

709 ECtHR, *Agosi v. UK*, Judgment of 24 October 1986, Appl. No. 9118/80, at para. 52: "*In determining whether a fair balance exists ... the State enjoys a wide mar-*

form of a legal discretion which recognises that the state is better qualified to appreciate the particular situation,[710] given that "*in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the determination of the domestic policy-maker should be given special weight*".[711] Moreover, the Court does not evaluate whether the measures undertaken were the least restrictive measures available.[712] Therefore, the fair balance test provides less effective judicial review, taking into consideration the wide margin of appreciation that the national authorities enjoy. The approach of the ECtHR, that the restrictive measures of the national authorities remain with their discretion unless it is manifestly without a reasonable foundation, leads to the lowest level of judicial scrutiny and the principle of proportionality is thus devalued.

In Greek law, the principle of proportionality is foreseen and guaranteed in Article 25(1) of the Greek Constitution. It sets out the legal framework for constitutional rights' restrictions. It provides that the legislative power may restrain the constitutional rights, having a wide margin of appreciation for discretion and balancing of interest, but it must adopt such laws that are proportional to the aim pursued, that must be of public or social interest. According to the Council of State, the constitutional principle of proportionality demands that the legislative measures should be suitable

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gin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question".

710 *Brownlie*, Principles of Public International Law, p. 575.

711 ECtHR, *Hatton and others v. UK*, Judgment of 08 July 2003, Appl. No. 36022/97, at para. 97; *Valkov v. Bulgaria*, Judgment of 25 October 2011, Appl. Nos. 2033/04 etc., at para. 92.

712 I.e. ECtHR, *Mellacher and others v. Austria*, Judgment of 19 December 1989, Appl. Nos. 10522/83 etc., at para. 55: "*The possible existence of alternative solutions does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way ...*". Exceptionally, the ECtHR introduced in the case *Hentrich v. France*, Judgment of 03 July 1995, Appl. No. 13616/88, at para. 47 the doctrine of the less restrictive alternative:"*the state had other suitable methods art its disposal for discouraging tax evasion ... for instance take legal proceedings to recover unpaid tax and, if necessary, impose tax fines*".

and necessary for the aim pursued.[713] After the revision of the Greek Constitution in 2001, a third dimension was added to Article 25(1), namely, the "*stricto sensu proportionality*" or the balance between benefits and costs. The latter indicates that the more serious a restriction of an individual right is, the more severe the legitimate aim that it pursues should be.[714] Against this background, according to the recent Greek jurisprudence, the constitutional principle of proportionality demands that the legislative measures must be suitable and necessary to achieve the legitimate public and social interest, while at the same time they must not be disproportionate in a narrow sense with the aims pursued.[715]

Under the term of suitability, it is examined whether the respective measures were rationally related to the objectives of the legislature and could, at least on a theoretical level, achieve these objectives.[716] Proportionate lawmaking turns of efficiency on the choice of means, on the adoption of some plan of action that is capable of securing the ends for which one acts.[717] The empirical assumptions refer to the reliability or certainty of knowledge.[718] As a rule, the question of suitability is answered in the affirmative, when the measure may profoundly achieve the legitimate aims pursued except in cases where the legislature does not reflect "*a genuine concern to protect the public interest(s) in a consistent and systematic manner*".[719]

Under the term of necessity, it is examined whether any less restrictive measure was available in order to achieve with the same efficiency the legitimate aims pursued. In order to assess whether there were less restrictive available measures equally able to achieve the aims pursued, it has to

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713 Council of State, Judgment of 18 September 2006, No. 2478/2006; (Plenary Session), Judgment of 04 November 2005, No. 3665/2005; Judgment of 25 February 2002, No. 534/2002.

714 *Chrysogonos*, Civil and Social Rights, p. 91-92.

715 See also Council of State, Judgment of 01 April 2002, No. 1006/2002; Judgment of 19 August 2003, No. 2110/2003; Aeropagus (Plenary Session), Judgment of 08 January 2003, No. 26/2003; Judgment of 20 February 2003, No. 10/2003.

716 Council of State, Judgment of 19 August 2003, No. 2110/2003.

717 *Ekins*, in: *Huscroft / Miller / Webber.* (eds.), Proportionality and the Rule of Law, p. 348.

718 *Klatt / Meister*, The Constitutional Structure of Proportionality, p. 11.

719 CJEU, *Criminal Proceedings v. Piergiorgio Gambelli and others*, C-243/01, Judgment of 06 November 2003, EU:C:2003:597.

be determined whether the domestic legislature had considered possible alternatives.

Lastly, under the term of proportionality in a narrow sense, it is examined whether the legitimate aims were more significant than the detriment to the right of the individual. One way of understanding proportionality analysis in the narrower sense is as imposing a "*rule of weight*" on the process of evaluating competing interests.[720] The element of proportionality in a narrow sense lies on the idea that if the benefits resulting from the restriction of the individual rights outweigh the cost, then the restrictive measure is economically and socially justified.[721] For the outcome of the proportionality sense in a narrow sense two elements play important role: the intensity of interference of the restricted individual right and the severity of the legitimate aim. When the interference is serious and the importance of the legitimate aim is light or moderate, then the restrictive measure is not proportional in a narrow sense and the principle of proportionality is violated. If both are serious then it is assessed in the third step whether the interference of the right is more serious than the importance of the legitimate aim pursued.

B. Case-Studies

The case studies presented are divided into three categories: reductions in old-age pension benefits, reduction in pension benefits of high value, and age discrimination cases. The precise reason for choosing these three different categories of case-studies is that they reflect three different legal norms: the right to property, the right to social insurance and the right to non-discrimination. In this way, these three categories of case-studies cover all important questions concerning the legality of public pension reforms. Namely, that the legislature must introduce pension reforms whilst respecting that the pension benefits are possessions (first category), whilst also respecting the principle of equivalence between the paid contributions and the pension benefits (second category) and also avoiding discriminatory measures (third category). Initially, each case-study identifies the legal problem to be solved. Then, the legal provision applied inherently in the

720 *Schauer*, in: *Huscroft / Miller / Webber* (eds.), Proportionality and the Rule of Law, p. 178.

721 *Klatt / Meister*, The Constitutional Structure of Proportionality, p. 614.

cases is examined. Next, the principle of proportionality is applied in order to balance the pensioners' rights with the need to introduce the specific reforms in times of financial crisis. By doing this I seek to deepen the understanding of the balancing process. Lastly, each case-study ends with problems and points for discussion documenting the results and ideas.

I. Reductions in Old-Age Pension Benefits

1. Reductions in Current Pensioners' Pension Benefits

The old-age pension benefits of the current pensioners were reduced progressively and gradually through a number of legal provisions within the crisis period 2010-2012, as specified in chapter two.[722] In addition, the Greek legislature introduced retrospective reductions in old-age pension benefits, as they were operating before they entered into force in the Official Gazette of the Hellenic Republic.[723]

The reductions in the amount of the old-age pension benefits received by current pensioners' seem to amount to an interference with their possession. This is because pension reductions undermine the initial property status of the current pensioners by limiting the amount of their old-age pension benefits. As a consequence, questionable is whether the right to property is violated. To decipher the answer to this, firstly, it is addressed whether the right to property finds application. Namely, it is examined whether the current pensioners' old-age pension benefits fall under the concept of possession within the meaning of Article 1 of the First Protocol. If so, then, the legality of the restriction on the right to property in times of financial crisis is examined. For this examination, the principle of proportionality is used as a balancing concept. It is analysed whether the

722 I.e. Art. 3(10) and (14), Law No. 3845 of 2010; Art. 38, Law No. 3863 of 2010; Art. 44(11), Law No. 3986 of 2011; Art. 2(14a), Law No. 4002 of 2011; Art. 1(10a), Law No. 4024 of 2011; Art. 1, Law No. 4051 of 2012; Art. 1(B and IA), Law No. 4093 of 2012; Art. 1, Law No. 3343 of 2015.

723 I.e. Law No. 4002 of 2011 was published in the Official Gazette on the 22th August of 2011, while in Article 2(13) and (14), it was stated that the old-age pension benefits would be reduced retrospectively from the 1st August of 2011 onwards. Moreover, the Law No. 4151 of 2013 was published in the Official Gazette on the 29th April of 2013 and adopted the old-age pension benefits reductions from the 1st August 2012 onwards.

restrictive measure fosters a suitable and necessary solution to achieve the aims pursued (as described in chapter four) and whether this solution is proportional in a narrow sense with the aims pursued outweighing the public interests.

a) Application of the Right to Property

As described in chapter three, the right to a welfare benefit can be considered as a "*possession*" for the purposes of Article 1 of the First Protocol, in cases in which the beneficiaries have satisfied the legal conditions for the grant of the welfare benefit.[724] This was also recently ruled by the ECtHR in the case *Koufaki and ADEDY v. Greece.*[725] In that case, the ECtHR stated that the additional bonuses' abolishment (Christmas-, Easter- and holiday bonuses) introduced in Greece for pensioners under 60 years old, and the reductions in these additional bonuses for pensioners aged over 60 years old were considered to fall under the concept of "*possession*" of Article 1 of the First Protocol of the ECHR.

Besides, the Court of Audit in another case found the civil servants' old-age pension benefits to fall under the concept of possession of Article 1 of the First Protocol, on the grounds that they sufficiently acquired pension rights under domestic law.[726] This ruling concerned the L.A.F.K.A-case law (Logariasmos Allilegiis Foreon Koinonikis Asfalisis – Solidaridy Fund of Social Insurance) and constitutes an important step towards the recognition of the broad protection of old-age pension benefits under Article 1 of the First Protocol. The Court of Audit had to make decisions on reductions in the old-age pension benefits. In 1992, the Greek parliament adopted the Law No. 2084 of 1992, which *inter alia* introduced the solidarity fund L.A.F.K.A., with the aim of providing financial support to the social insurance institutions with financial deficits (Art. 67, Law No. 2084 of 1992). Financial sources of L.A.F.K.A. were *inter alia* special contributions of current pensioners' main and supplementary old-age pension benefits (Art. 60, Law No. 2084 of 1992). As a result, the old-age pension

724 ECtHR, *Rasmussen v. Poland*, Judgment of 28 April 2009, Appl. No. 38886/05, at para. 71.

725 ECtHR, *Koufaki and ADEDY v. Greece,* Judgment of 7 May 2012, Appl. Nos. 57665/12 etc.

726 Court of Audit, Judgment of 19 January 2004, No. 27/2004.

benefits of the current pensioners were reduced between 1 and 5 percent. The Court of Audit ruled that the introduction of this special contribution on civil servants' pension constituted a restriction of Article 1 of the First Protocol. Also, in a number of cases relating to unfavourable pension indexation of retired judges[727] and civil servants,[728] the Court of Audit ruled that the entitlement to an increased old-age pension benefit, reflective of the general monetary increases awarded to their colleagues in service, fall under the scope of application of Article 1 of the First Protocol. This is because this entitlement is an acquired right of the already retired judges and civil servants.

Subsequently, the old-age pension benefits of the current pensioners should be regarded as falling under the concept of possession within the meaning of Article 1 of the First Protocol. This is because the old-age pension benefits have already been defined and granted to current pensioners. The case under consideration is not related to cases where the state has a general obligation to provide old-age pension benefits of an adequate amount and the pensioners have a general expectation of a social benefit. In the case under consideration, the pensioners were already allowed the provision of a welfare benefit of a particular amount. The old-age pension benefits of the current pensioners were asserted under domestic legislation that stood at the time of their retirement. The old-age pension benefits had already been defined and calculated by the administration of the public pension funds, and the current pensioners had already fulfilled and satisfied all the necessary conditions required for a pension entitlement. Therefore, their right to the pension entitlement had already been realised and they had an established legal position creating a proprietary interest falling within the ambit of Article 1 of the First Protocol.

b) Reviewing the Proportionality of Pension Reductions

The right to peaceful enjoyment of the current pensioners' possession may be justified, if the principle of proportionality is fully respected. What is required is that the restrictive measure is adopted and applied according to the principle of proportionality. Namely, the pension reductions must be

727 Court of Audit (Plenary Session), Judgment No. 18/2004.
728 Court of Audit, Judgment of 30 May 2002, No. 674/2002.

suitable and necessary to achieve the aims pursued and there is a proportional balance (in a narrow sense) between the need of the protection of the individual right and the demands of the public interest. In this way, the principle of proportionality provides an excellent legal tool in order to examine the reduction in the old-age pension benefits of the current pensioners. It assesses how the legislature should introduce restrictive measures so that there is a proportional balance between the pursued public interests under the view of the financial and economic crisis and the right to property.

In the following part of this research, it is examined whether the current pensioners' old-age pension benefits reductions were suitable, necessary and proportional in a narrow sense to achieve the legitimate aims of the sustainability of public finances and public pension system, as well as of the proper functioning of the EMU. If the restrictive measure did not satisfy at least one of the three elements of the principle of proportionality, then the restrictive measure in question was not applied according to law. The following assessment is based on the socioeconomic conditions, the suitability and the impacts of the relevant reductions and the existence of less restrictive measures with equivalent effect.

aa) Suitability

The suitability of the measure is the first element that is subjected to the proportionality test. Under the element of suitability, it is examined whether the restrictive measure is reasonably related to the aims pursued and could, at least on a theoretical level, achieve these objectives.

On the one hand, the reduction in the old-age pension benefits of the current pensioners may reasonably achieve the sustainability of public finances as well as the sustainability of the public pension system, and subsequently the proper functioning of the EMU. This is because the old-age pension benefits reductions may reduce public expenditure on pensions and the expenses of the public pension funds. Consequently, the reduction in the public expenditures leads to reduction in the public deficit. The old-age pension benefits reductions of the current pensioners are directly related to the urgent need to balance the expenditures and revenues of the public budget and of the budget of the public pension funds, since the impugned provisions have a strong impact on the macroeconomic balances. Changes in the social insurance budget have an effect on the balance of

the entire public budget, due to the expenses of the social insurance funds being calculated in the expenses of the public budget, irrespective of the fact that the social insurance funds constitute legally independent public bodies.[729] The proper functioning of the EMU could also be reasonably achieved, since the public deficit would be decreased and the low public deficit constitutes one of the targets set for its proper functioning. Indeed, the result of the pension reductions in terms of sustainability of the public pension system show a decreasing trend for the public pension expenditures, which are projected to be reduced by 1.9 percent by the year of 2060.[730]

In that sense, the Constitutional Court of Latvia, deciding on the reductions in the public old-age pension benefits under the framework of its fiscal crisis and its commitment to the European Commission and the IMF, held that the reductions in the old-age pension benefits were suitable on the grounds that they may make it possible to balance the state budget.[731] Similarly, the Council of State ruled in its judicial ruling No. 668/2012[732] that the pension reductions are suitable to combat the crisis, given that it may contribute to a short-term reduction to the public deficit and improve the public finances in the long-run.[733] This judicial ruling concerned the first round of pension reductions that were introduced by Law No. 3845 of 2010 within the framework of the first Financial Facility Agreement accompanied by the first economic structural programme signed on May 2010. As it has been advocated above, in chapter two, the Law No. 3845 of 2010 reduced the Christmas-, Easter- and holiday bonuses for pensioners above the age of 60 years and abolished these additional bonuses for pensioners under the age of 60 years.

However, on the other hand, there is a widespread belief that the continuous fiscal retrenchment may not be a suitable remedy for a mass of debt, since it deteriorates economic growth.[734] The real GDP growth becomes

729 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012.
730 *Simeonidis*, Social Protection and Labour 2016, p. 21.
731 Constitutional Court of Latvia, Judgment of 21 December 2009, No. 2009/43-01,at para. 29.2.
732 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012.
733 *Ibid*.
734 *Deutschmann*, Economic Sociology_The European Electronic Newsletter 2011, p. 19.

lower, because the austerity policies "*contributed to depress aggregate demand growth*".[735] In this regard, the Council of State declared in the judicial ruling concerning the last-round of pension reductions, introduced in 2012 by Law No. 4051 of 2012 and No. 4093 of 2012[736] as well as in 2011 by Law No. 4024 of 2011[737] within the framework of the Second Financial Facility, that the respective restrictive measure proved unsuitable to achieve the improvement of public finances. This is because the same restrictive measure had been undertaken numerous times in the past in order to achieve the same aim, without success as the economic recession of the state continued growing.

Two different arguments can be thus observed in the jurisprudence of the Council of State. At the start of the Greek financial crisis, the court held the measures to reduce the public debt and deficit to be suitable, but two years after the wake of the crisis the same court ruled that the pension reductions were no longer suitable, since they had been used already and had failed to achieve the aims pursued. The argument of the Council of State in its first ruling, and the judicial ruling of the Constitutional Court of Latvia appear to be the more legally correct in their nature. When assessing whether the criterion of suitability has been achieved, it is not assessed whether the aims were previously advanced. The criterion of suitability only requires some degree of effectiveness, in the sense that there is some reliable empirical evidence that supports its ability to achieve the aims pursued.[738] The legislature enjoys thus the benefit of the doubt in this step of suitability determination, since the requirement of achievement of the aim could lead to a paralysis of the legislature.[739] In times of financial and economic crisis, and extremely limited financial resources, the benefit of doubt becomes more important. This is because in times of crisis there is greater empirical uncertainty about the results of the empirical assumptions. The outcome of the suitability test should thus depend on the reliability of the respective empirical assumptions.

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735 *Andini / Cabral,* IZA Policy Paper 2012, p. 5,7.

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

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

738 *Christoffersen,* Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, p. 166.

739 *Gerontas,* EfimDD 2012, p. 722.

On the grounds that the outcome of the suitability test depends on the reliability of the respective empirical assumptions and some degree of effectiveness, for the suitability of the old-age pension benefits reductions to be confirmed, the legislature should define and evaluate the potential decrease in the public expenditures on pensions in GDP percent. The theoretical predictions of empirical evidence should be mentioned either in the text of the law or in its explanatory report. However, the Greek legislature did not empirically support the effectiveness of the restrictive measures, apart from the first round of pension reductions. The legislature specifically referenced the decreasing of the public deficit only in the explanatory report that introduced the first round of pension reductions; while in the other explanatory reports, there was no respective reference. More particularly, in the explanatory report on the Law No. 3845 of 2010, which was adopted within the framework of the First Economic Adjustment Programme for Greece, it was stated that the cuts to the sector wage bill, to pensions and a further increase to Value Added Tax (hereinafter: VAT) would assure a fiscal deficit of 8.1 percent of GPD by 2010; which would be a drop below 3 percent of GDP by 2011 and 11 percent by 2013. The legislature specified thus its expected empirical benefits, holding the pension reductions as a part of a general package of austerity measures. The public deficit reduction in GDP percent was specified with regards not only to the suspending of old-age pension benefits but to the overall general austerity policy and the structural reforms adopted in the context of the economic adjustment programme for Greece. In the other explanatory reports, the legislature merely referenced the general need to reduce the public deficit. For example, in the explanatory report on Law No. 3863 of 2010, it was only stated that the financing of the social insurance funds by the public budget was over 17 billion Euros that corresponded to 7.55 percent of GDP, and that should be reduced. The actual target of the reduction was not mentioned. Yet, a general reference to the economic difficulties of the state and the need to reduce the public deficit does not lead to a transparent exercise of the legislative power, while what is needed is a plausible assessment of the expected benefits.[740]

A plausible assessment of the impact of the respective measures was stated in more detail in the Economic Adjustment Programmes for Greece, and in the MTFS. For example, in the MTFS 2012-2015, the Greek gov-

740 *Becker,* ZVerWiss 2010, p.591.

ernment mentioned that the aim of the measures adopted by the Law No. 3986 of 2011 was the reduction of the general government deficit from 7.5 percent of GDP in 2011 to 2.6 percent of GDP in 2014.[741] One more example lies in the law No. 4051 of 2012, that introduced the old-age pension benefits reductions, as well as reductions to public salaries and to the administrative expenses. In the explanatory report on the Law No. 4051 of 2012, which was adopted in the framework of the Second Financial Facility Agreement between Greece and the Troika, no reference to empirical benefits was made. Yet, the European Commission on the Second Economic Adjustment Programme for Greece described that the programme was anchored on the objective of reaching a primary deficit of 1 percent of GDP in 2012 and a primary surplus of 4.5 percent of GDP in 2014.[742] Lastly, in the explanatory report on the Law No. 4093 of 2012, which was adopted within the framework of the MTFS 2013-2016 as well as of the Second Economic Adjustment Programme for Greece, it was mentioned that the aim of the measures was the primary surplus of the general government, while in the MTFS 2013-2016, it was specified that the aim was the primary surplus of the general government corresponding to 4.5 percent of GDP in 2016.[743]

What is questionable is whether the legislature can prove the suitability of a restrictive measure by providing the relevant empirical evidence in documents that were not issued by the legislature itself. This may be permissible considering the fact that there was a strong interconnection between the First or the Second Economic Adjustment Programme and the MTFS and the laws that adopted the restrictive measures. This is because, as it has been advocated in chapter one, the respective economic adjustment programmes were incorporated by the respective national laws that introduced the restrictive measures. Namely, the plausible empirical assessment in the documents, within the framework of which the laws were adopted, may be held as adequate documents that justify the suitability of the restrictive measures.

741 *Hellenic Republic*(2011a).
742 *EU-COM*(2012a) 94 final.
743 *Hellenic Republic*(2012).

bb) Necessity

The second step of the proportionality test concerns the criterion of necessity. It should thus be examined whether a less restrictive measure was available or at least whether the legislature did consider less restrictive measures to achieve, with the same degree of efficiency, the legitimate aims pursued.

The jurisprudence of the Council of State on the necessity of the old-age pension benefits reductions is not consistent. At the start of the Greek financial crisis, the Council of State declared that the first round of old-age pension benefits reductions is necessary on the grounds that the legislature had also undertaken other measures to decrease the public deficit and not only the reductions in old-age pension benefits.[744] The argument made by the claimants, that the same ends could have been achieved with less restrictive means, was thus not accepted. Similarly, the Council of State supported also that the second round of pension reductions was necessary, because the political aim of reducing the social public expenditures, could not have been achieved by choosing a less restrictive alternative measure since the further financing of the system would burden the rest of the population through further taxation.[745] By taking this approach, the court appeared satisfied from the fact that the pension reductions constituted part of a wider package of measures of economic policy and structural reforms.

However, the fact that the reductions in old-age pension benefits formed a part of a much wider legislative reform does not mean that the second step of proportionality should be left beyond judicial evaluation.[746] The court is still obliged to examine the necessity of the specific measures in question according to Article 25(1) of the Greek Constitution. This was supported by the Council of State concerning a case of reductions in the public salaries and old-age pension benefits of the retired officers and serving members of armed military and security forces that were adopted

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

745 Council of State, Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014. In these cases, the Council of State remained stable to its previous jurisprudence and ruled the proportionality of the pension reductions introduced by Law No. 4024 of 2011 within the framework of the MTFS 2012-2015.

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

in 2012. In this case, the court ruled that the restrictive measures in question could not be justified simply on the grounds that they constituted part of a wider programme of fiscal consolidation, since this was a necessary but not adequate condition.[747] Similarly, the Council of State held that the last round of pension reductions were not necessary, since the legislature did not conduct a well-established study to examine the possibility of less restrictive measures.[748] The court supported that the absence of such an analysis may be justified in exceptional circumstances, such as when there is an imminent threat of an economic collapse of the country and the respective measures are adopted to prevent this threat. According to the court, under these exceptional circumstances, it is sufficient for the legislature to show that a severe threat exists and that there is a need for these specific measures to be adopted for the immediate confrontation of the exceptional situation; on the condition that the measures are not reasonably unsuitable and unnecessary and that there is no profound evidence that the pensioners are overburdened. Nevertheless, according to the same court, in the case of the last round of pension reductions the legislature had the time to conduct a well-established study, given that the insolvency of the state was not as imminent as it was in the beginning of the financial crisis and during the first round of pension reductions. In other words, the fundamental and basic measures of confronting the fiscal crisis had already been designed and undertaken in 2010, when the crisis broke out, and thus the legislature was not justifiable in failing to conduct a well-established analysis on possible alternative solutions because there was lack of time. Along the same line of argument there is also the decision by the Constitutional Court of Latvia, which held that the old-age pension benefits reductions were unnecessary on the grounds that the Cabinet of Ministers and the Saeima (the Latvian parliament) made hasty considerations about whether alternative measures were available.[749]

Although it seems that the jurisprudence of the Council of State has been totally changed in the course of the crisis, the court did not actually alter its jurisprudence by applying the element of necessity differently.

747 Council of State (Plenary Session), Judgment of 13 June 2015, Nos. 2192-2196/2014.

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

749 Constitutional Court of Latvia, Judgment of 21 December 2009, No. 2009/43-01,at para. 30.2.2.

The court changed its prior jurisprudence on pension reductions by interpreting the element of emergency differently within the context of the new economic and financial situation of the state. As a consequence, the level of the severity of the financial crisis led to different outcomes. The court linked the necessity of a restrictive measure with whether the legislative power had the time to conduct a well-established analysis with respect to the pressure derived from the financial crisis, or whether it made superficial and hasty considerations concerning the extent of the reduction of the public deficit. It ruled that when the financial crisis is imminent and severe; the legislature is not obliged to conduct well-established studies before reducing pension benefits. This thesis leads arbitrarily to the conclusion that when there is an imminent financial crisis, no adequate alternative solutions may be carried out.

The Council of State moved away from this line of reasoning in another, more recent case concerning the reductions in lump sum benefits of the public sector adopted by Art. 2(6) of the Law No. 4024 of 2011 and Art. 1(IA.5) of the Law No. 4093 of 2012.[750] The Council of State ruled that the existence of an imminent financial crisis is immaterial as the conduction of actuarial studies is only deemed necessary and essential when the legislature reduced the pension benefits in favour of the sustainability of the public pension fund, whilst the conduction of actuarial studies are not necessary when the national legislature plans to introduce measures of fiscal natur.

Indeed, due to the high economic recession and the emergent pressure by the international creditors, any measure aimed at the decrease of the public deficit in the short term would appear to be carried out in a manner that was not thoroughly considered. For it is simply impossible for the legislature to carry out well-considered and well-analysed alternative solutions under pressure of time, without previous extensive economic and social research. However, the omission of the state in deciding to not search for alternative measures due to a lack of time, or because of the fiscal nature of the respective measures, should not be justified under extreme circumstances of a serious economic and financial crisis and the emergent need for financial support. The legislature was obliged to conduct a well-established analysis on the necessity and the extent of pension reductions before the wake of the financial crisis. According to Article 106(1) of the

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

Greek Constitution, the state shall plan and coordinate economic activity with the aim of safeguarding the economic development of all sectors of the national economy. This article thus obliges the legislature to conduct a specific, well-established and scientific analysis in order to plan the economic activity of the state, regardless of the fact whether the state faces a financial crisis or not. This obligation on the state derives not only from the Greek Constitution but also from Article 126 of the TFEU that demands that "*Member States shall avoid excessive government deficits*" and Article 136 of the TFEU that proscribes budgetary discipline obligations. Therefore, the obligation of the state to search for alternative measures in order to avoid excessive public deficits pre-existed the financial crisis and thus the legislature is not excluded from its obligation to conduct well-established studies.

Against this background, the reductions in the old-age pension benefits of the current pensioners introduced in the first, second and third round of the crisis are not necessary to achieve the aims pursued. This is because the legislature did not consider any less restrictive measures that could achieve the aims pursed with similar efficiency by conducting the necessary scientific research. The legislature should have conducted the appropriate well-established studies and considered alternative and less restrictive solutions before the crisis. The legislature is obliged, even in ordinary times, to carry out a comprehensively considered analysis of such major issues, taking also into consideration the fiscal imbalances on the public pension system and the demographical negative trends that pre-existed the crisis.

cc) Proportionality in a Narrow Sense

The third and last step of the proportionality test concerns the examination of the principle of proportionality in a narrow sense. In our case, the balance between the need to protect the right to peaceful enjoyment of possession of the current pensioners and the urgent need for ensuring the sustainability of the public finances and of the public pension system as well as the proper functioning of the EMU it is examined. In the following research, it is examined whether the importance of the legitimate aims pursued may outweigh the intensity of interference with the right to property. Namely, the proportional relationship is dependent on the proportionality between the way in which the reductions were introduced and the intensity

of the aims pursued. The assessment of the intensity of interference and of the importance of satisfying the legitimate aim is evaluated by a triadic scale with three levels: light, moderate and serious.[751] For instance, in cases of high amounts of reductions, which apply to a large part of population, the element of interference is serious. Therefore, the legitimate aims pursued must be also serious to be able to justify a severe interference with the right to property. This assessment is achieved by examining the particular characteristics of the situation and analysing how they are interrelating with each other.

The assessment of the intensity of interference with the right to peaceful enjoyment of the current pensioners' possession varies depending on the particular circumstances of the case and on the current pensioners' situation. The factors that are related to the severity of the restriction are those such as: the number of the persons affected, the duration of the restrictive measures, the level of the old-age pension reductions as well as the existence or not of counter-balancing benefits.

In the first year of the crisis, the legislature chose to abolish the Christmas, Easter and holiday allowances for all pensioners under the age of 60,[752] while in 2012, these additional bonuses were abolished for all pensioners, who receive old-age pension benefits irrespective of their pension income amount, apart from those who suffer from paraplegia and tetraplegia.[753] This restrictive measure has a broad scope, as it affects almost 90 percent of the population. The reductions of the second and third year of the crisis affected fewer pensioners. More particularly, the old-age pension benefits affected pensioners whose monthly amount of pension income did not exceed the amount of 2,500 Euros[754] or 1,400 Euros[755] or 1,700 Euros[756] or 1,200 Euros[757] or 1,300 Euros [758] or 1,000 Euros[759]. Therefore, it derives that the old-age pension benefits reductions affected all of the current pensioners who were receiving more than 1,000 Euros per month. To assess whether the old-age pension benefits reductions of the second and

751 *Klatt / Meister*, The Constitutional Structure of Proportionality, p. 78.
752 Law 3845 of 2010.
753 Art. 1, Law No. 4093 of 2012.
754 Art. 3(10), Law No. 3845 of 2010.
755 Art. 67, Law No. 3863 of 2010.
756 Art. 44(11), Law No. 3986 of 2011; Art. 2(14), Law No. 4002 of 2011.
757 Art. 1(10a), Law No. 4024 of 2011.
758 Art. 1, Law No. 4051 of 2012.
759 Art. 1(B and IA), Law No. 4093 of 2012.

third year affected an important percentage of the current pensioners, it is necessary to specify the number of the current pensioners imposed into sacrifices as a percentage of the total number of the pensioners that receive old-age pension benefits.

Reports concerning the number of pensioners of all public pension funds are not very comprehensive. A full statistic report for the entire Greek public pension system was first drafted in June 2013 and has since then been prepared on a monthly basis by the Ministry of Employment, Social Insurance and Social Assistance.[760] According to the first report of June 2013 the pensioners receiving old-age pension benefits amounting more than 1,000 Euros per month is 28.20 percent of the total number of pensioners, while according to the report of May 2014, the percentage was increased to 39.84 percent.[761] There is no comprehensive data for the years 2010, 2011 and 2012, when the old-age pension benefits reductions took place. However, taking into consideration the data from 2013 and 2014, it can be derived that the pensioners affected by the reductions correspond *circa* 30 percent of the total number of pensioners. The percentage is less than the half of the majority of the pensioners, but it still indicates the broad character of the measure.

Concerning the duration of the restrictive measure, it should be taken into consideration that the restrictive measure was not transitory. The legislature did not indicate that the reductions were applicable only within a specific period of time, like in the case of Portugal. In the case of Portugal, the Portuguese state reduced the public salaries and the old-age pension benefits only for a temporary period. The Council of State ruled that the first round of pension reductions was proportional, even if the undertaken measure was not temporary, because the aim of this measure was not only to temporarily confront the fiscal crisis but also to improve the public finances in the long run.[762] The criterion of the short duration of the measure's application was taken into consideration by the ECtHR, when the latter court examined the proportionality of public pension reductions introduced by the Portuguese state with the aim of reducing the public

760 *Hellenic Republic*(2013).
761 *Hellenic Republic*(2014a).
762 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 35.

deficit.[763] The ECtHR declared the affirmed proportionality of the aforementioned old-age pension benefits reductions, on the grounds *inter alia* that the restrictive measure was limited in time.[764] The fact that the Greek legislature did not specify whether the reductions have a temporary character indicates the permanency of the restrictive measure. The permanent character of the measure had negative consequences on the pensioners, producing continued and cumulative effects, setting the character of interference as severe.

Moreover, to determine the intensity of interference, the level of the old-age pension benefits reductions should also be taken into consideration. This criterion has been used by the ECtHR, in order to decide on the compatibility of the reductions with Article 1 of the First Protocol. The ECtHR has specified that pensioners do not suffer a disproportionate and excessive burden, at least to some extent, when they are not confronted with an actual decrease in their monthly payments and the level of decrease does not result in divesting the applicants of their only means of subsistence.[765] For example, in the cases *Asmundsson v. Iceland*[766] as well as *Bozic v. Croatia*,[767] the ECtHR found that the total deprivation of the applicant's entitlements leads to a disproportionate and excessive burden. The ECtHR will therefore declare disproportionality when a reduction leads to the total deprivation of the benefit or to the substantial divestment of the benefit. In a similar regard, the ECtHR has decided cases concerning reductions in public pensions and wages in times of financial crisis. More specifically, in the case of *Koufaki and ADEDY v. Greece*, the ECtHR considered that the reduction of the first applicant's salary from 2,435.83 Euros to 1,885.79 Euros was not of such a nature that it risked

763 ECtHR, *Da Conceiçao and Santos v. Portugal*, Decision of 08 October 2012, Appl. Nos. 62235/12 etc., at para. 28.

764 *Ibid.*

765 ECtHR, *Valkov v. Bulgaria,* Judgment of 25 October 2011, Appl. Nos. 2033/04 etc., at para. 97. In the case *Valkov v. Bulgaria*, the ECtHR declared that the applicants, being top earners among more than two million Bulgarian pensioners, could not be regarded as being made to bear an excessive and disproportionate burden as a result of the pension cap.

766 ECtHR, *Asmundsson v. Iceland*, Judgment of 12 October 2004, Appl. No. 60669/00, at para. 45.

767 ECtHR, *Bozic v. Croatia*, Judgment of 29 June 2006, Appl. No. 22457/02.

exposing her to subsistence difficulties incompatible with Article 1 of the First Protocol.[768]

With this regard, if one considers the old-age pension benefits reductions individually, the level the benefits were reduced was low and thus the level of interference is low or moderate. This is the case when we balance the loss of income of an individual position; for example, the case in respect of the reduction in the Christmas, Easter and holiday bonus. However, if we balance the overall losses of income by considering the total and final amount of reductions, the level of benefits was substantially high and thus the interference with the right to property is serious. This aspect was taken into account also by the ECSR, which decided that the separate reductions in old-age pension benefits, individually taken, may be recognised to be compatible with Article 12(3) of the ESC; but in individual cases, the cumulative effects of all these reductions detrimentally affected the standard of living for the pensioners, concerned, resulting in a significant degradation.[769] The Council of State took into consideration the respective decision of the Committee on the accumulative reductions introduced by the Greek legislature and ruled the constitutionality of the abolition and reduction in the additional bonuses of the current pensioners.[770] The court ruled that the Committee decided that only the accumulative reductions violate Article 12(3), while separate reductions are compatible with the charter, on the grounds that the separate reductions do not interfere with the substance of the right. For this reason the reduction and abolishment of the Christmas, Eastern and holiday bonus, examined separately from the other introduced following reductions, is constitutional.

With this in mind, the serious interference with the right to peaceful enjoyment of possession is affirmed on the grounds that the pensioners had their old-age pension benefits continuously reduced, while they were also confronted with increases of regular taxes as well as with the payment of

768 ECtHR, *Koufaki and ADEDY v. Greece*, Decision of 07 May 2013, Appl. Nos 57665/12 etc., at para. 45.

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

770 Council of State, Judgement of 23 March 2015, No. 1031/2015.

new emergent taxes. For example, it should be taken into consideration the emergent tax on buildings powered by electricity,[771] the solidarity tax imposed on those having yearly income more than 12,000 Euros,[772] the fact that the tax free amount was reduced to 5,000 Euros of yearly income for those aged under 65 and 9,000 Euros for those aged over 65.[773] Furthermore, it should be taken into account that there had been a pay freeze of the old-age pension benefits for the years 2010-2014.[774]

The criterion of availability of compensation may also be used as a criterion for the examination of the intensity of the restriction. The ECtHR has assessed that a disproportionate burden was imposed when the applicants were not given the opportunity to claim for compensation.[775] In the context of our case, that jurisprudence means that the reductions in old-age pension benefits could have been rendered proportional, if counter-balancing benefits or compensation had been adopted. The Court of Audit has also previously declared that the introduction of direct counter-balancing financial assistance, to the current pensioners whose property is being restricted, is obligatory for the legislature.[776] Indeed, the criterion of compensation should play an important role in the examination of whether a measure is proportional or not. As counter-balancing financial benefits, the legislature could provide the pensioners with motivation to stay in employment rather than retiring, without using actuarial deductions of the pension income, in order to replace the loss of income as a result of the old-age pension benefits reductions. However, the legislature is not obliged to ensure a reimbursement to the pensioners in form of cash, since this would make little sense and would not have any effect on for the achievement of the reduction in the public deficit in times of economic and financial crisis and when the state is in a bail-out programme.

Therefore, the broad character of the measure, the fact that the interference with the pensioners' right was not limited in time, as well as the fact that the accumulative effect of the old-age pension benefits reductions

771 Art. 53, Law No. 4021/2011.
772 Art. 27, Law No. 3986/2011.
773 Art. 38, Law No. 4024/2010.
774 *IMF*(2010) 10/110.
775 ECtHR, *Stran Greek Refineries and Andreadis v. Greece*, Judgment of 09 December 1994, Appl. No. 13427/87; *Holy Monasteries v. Greece*, Judgment of 09 December 1994, Appl. Nos. 13092/87 etc.
776 Court of Audit, Judgment Nos. 36/2006; 1562/2005; 27/2004.

were adopted within a short period of time all lead to a serious interference with the right to peaceful enjoyment of current pensioners' possession, having negative and crucial consequences on their lives. The lack of counter-balancing financial benefits is not particularly decisive in times of financial and sovereign crisis.

If we balance the reductions in old-age pension benefits individually, the interference to the right to property may be light or moderate. This is because they corresponded to a lower total amount of reduction. To assess whether the interference is light or moderate, other criteria must be taken into consideration. For example, if the pension benefits separately affected a low percentage of pensioners, then the interference is light and if the effects correspond to a large percentage of pensioners, then the interference is moderate.

The next step is to determine whether the importance of the legitimate aims pursued corresponds to the level of seriousness or not. The intensive financial and economic crisis, as well as the urgent need for financial support, constitutes two important driving forces that influence the balancing process of the principle of proportionality in a narrow sense. Conflicting international obligations may not claim primacy over human rights obligations, but they might have an impact on the application of the principle of proportionality, since they define the importance of the goals of the measures that need to be justified as proportional.[777] Namely, these two driving forces result in an intensive external pressure by the international creditors to reduce the public deficit and thus the reduction of the public pension expenditures took place rashly and in the short-term. To determine the severity of the legitimate aims pursued, the financial and economic crisis, the fiscal imbalances of the public pension system as well as the conditionality of the financial facility agreements between Greece and the Troika should be taken into consideration. Epistemic reliabilities, such as statistics, actuarial studies and reports from the Greek Government and the international creditors also play an important role.

As it was mentioned in chapter four of the present work, the Greek financial and economic crisis which emerged late 2009 must be held as exceptional and urgent. First of all, Greece could not find financing through its own resources or in the international markets and this made the crisis

777 *Goldmann,* in: *Bohoslavsky / Cernic* (eds.), Making Sovereign Financing and Human Rights Work, p. 91.

incredibly serious and intensive. Secondly, the public pension expenditures were excessively high, which endangered the sustainability of the public pension system. The public pension expenditures on cash benefits for old-age and survivors' pensions was 11.9 percent of GDP, in 2007, and 14.1 percent, in 2010,[778] while it was projected that spending on pensions would have been increased by 12.5 percent by 2060 under unchanged pension policies.[779] By 2009, a third of total pension expenditures could not be covered by the contributions and had to be covered instead by direct government grants. This was the reason behind much of the government borrowing leading to the financial crisis of 2009.[780] Thirdly, Greece had to face, for the first time in its history, exceptional pressure from its international creditors. The Troika repeatedly demanded public deficit reductions in return for financial support. In the context of the bilateral loan facility agreements signed on May 2010 and March 2012 between Greece and the Member States of the EMU, as well as the financial facility agreements with the IMF, the financial support was conditional upon successful implementation of the economic and financial policies that Greece would be reporting in the memoranda. These policies should aim at a reduction in the public sector expenditures and the improvement of the government's revenue-raising capacity; reforming the pension system and strengthening the fiscal network.[781] For instance, Greece, in conjunction with the international creditors, agreed that the general government deficit should be reduced to 3 percent of GDP by 2014,[782] while public expenditures cuts should be equivalent to 7 percent of GDP.[783] Because of the strong intercorrelation of the public deficit reduction with the reduction in the public pension expenditures, the reduction in the old-age pension benefits constituted an indirect conditionality criterion for the release of the financial assistance by the international creditors. If the fiscal targets for a public deficit reduction were not achieved, the Troika would be allowed to withhold the release of the financial support in instalments, after monitoring the programme in quarterly reviews through updated forecasts and with

778 *EU-COM*(2010) 61 final, p.21.
779 *Ibid*.
780 *Tinios,* KAS 2016, p. 04.
781 *EU-COM*(2010) 61 final, p. 14.
782 *IMF*(2010) 10/110.
783 *EU-COM*(2010) 61 final, p. 14.

respect of quantitative performance criteria.[784] A disapproval of the next release of the financial assistance would have devastating economic consequences for the substance of the state and thus for the whole population.

In light of the above, the two above described factors, namely: the severe financial crisis and the high public pension expenditures in combination with the exceptional pressure for financial support; erodes the principle of proportionality in a narrow sense making the severity of the legitimate aims pursued serious enough to be able to outweigh even the serious interference of the old-age pension benefits reductions. Namely, the risk of the economic collapse of Greece that would result from the disapproval of the international creditors to release the financial support makes the Greek economic and financial crisis a special situation of urgency, which may justify even serious interferences with the right to peaceful enjoyment of one's possession.

However, the element of the urgency of the crisis did not have the same level of intensity in all cases of old-age pension benefit reductions. A distinction should be made between the old-age pension benefits reductions introduced in the first year of the crisis (in 2010) and those introduced in the second (in 2011) and third year of the crisis (in 2012). The severity of the economic and financial crisis was far stronger in the case of the first-year reductions. The first-year reductions were undertaken under the emergent need to avoid the insolvency of the state. Greece has had to face severe fiscal imbalances. The gross government debt reached 115 percent of GDP and the net external debt almost 100 percent of GDP, while the general government deficit was 13.6 percent in 2009.[785] During this foundational reality, Greece had to avoid an imminent economic collapse of the country as well as an exit from the EMU, alongside staying on track with the First Economic Adjustment Programme. The aim of this first round of reductions was therefore not the mere reduction of the public deficit but the "*financial rescue*" of the state itself. In other words, despite the fact that the reduction to the old-age pension benefits was regarded as a measure for the sustainability of the public finances, this measure was not primarily taken because of financial reasons, but for the rescue of the state itself. The state undertook restrictive measures to fulfil its obligation towards its citizens to safeguard its existence, not only to overcome eco-

784 *Ibid,* p. 30.
785 *EU*-COM(2010) 61 final, p. 4; *IMF*(2010) 10/110.

nomic difficulties. The sustainability of the public finances was identified thus as a superior and urgent national interest precipitated by the emergent financial needs of the country and its lack of liquidity. This was made mainly obvious in the explanatory report on the laws that introduced the initial pension reductions. In the explanatory report on the Law 3845 of 2010, the legislature classified the public interest as national interest, using this to certify the importance and emergency of the economic situation of the country. In addition, the Council of State based the constitutionality of the initial pension reductions (reductions in the Christmas, Easter and holiday bonuses) on the overarching nature of public interest because of the urgent and difficult economic situation of the state.[786] In furtherance, an imminent and present exit from the EMU was more intensive in the first year of the crisis, making the legitimate aim of the proper functioning of the EMU rather serious.

As it was mentioned in chapter four, the lack of liquidity of the state and the subsequent need for the proper implementation of the agreements so as to secure the release of the external financial assistance were also repeatedly emphasised in the explanatory reports on all statutes that introduced reductions in the second and third year of the crisis. Indeed, in the second and third year of crisis Greece had to reduce its public deficit to combat the on-going economic recession and secure the further continuance of the financing by the Troika. More particularly, the old-age pension benefits reductions introduced in the second year of the crisis were undertaken for the proper implementation of the MTFS 2012-2015, while the reductions adopted in the third year of the crisis were undertaken for the proper implementation of the MTFS 2013-2016, the Second Economic Adjustment Programme and the Second Memorandum of Understanding signed on March 2012.

However, the level of severity of the legitimate aims was not the same as it was in the first year of the crisis. The Council of State, in its decision about the constitutionality of the last-round of old-age pension benefits undertaken by Law No. 4051 of 2012 and 4093 of 2012 ruled that the public interest was not as intensive as it was in the case of the initial reductions of the Laws No. 3833 of 2010 and 3845 of 2010 which were under-

786 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012. See also *Yannakourou*, in: *Kilpatrick / De Witte* (eds.), Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges, p. 22-23.

taken to avoid the insolvency of the state.[787] Namely, the Council of State ruled that the reductions in the old-age pension benefits introduced in the year of 2012 were unconstitutional, since the fiscal interests of the state were no longer peremptory.

The risk of the state's default was imminent in the year of 2010, while, in the second and third year of the crisis, the economic collapse of the country as well as its exit from the EMU was not so imminent, since a solution for Greece has already been found at a European level as an economic adjustment programme had been put into place. This can be derived from the statement of the Eurogroup dated 21 February 2012, when it committed to provide adequate support to Greece during the life of the programme and beyond, until Greece should regain market access.[788] Therefore, the intensity of the legitimate aim changed during the course of the reductions in old-age pension benefits reductions. In the case of the reductions introduced in the second and third year of the crisis, the mere reason of securing the continuance of the external financing constitutes a less intensive legitimate aim in comparison to the avoidance of the economic collapse of the country in the first year of the crisis, since the latter was rather imminent.

With this in mind, the balance between the urgent need to reduce the public deficit, the sustainability of the public pension system and the proper functioning of the EMU with the reductions undertaken in the beginning of the crisis (the reduction or abolishment of Christmas, Easter and holiday bonuses) is proportional, because the intensity of the legitimate aims pursued was serious enough to outweigh moderate interference with the right to peaceful enjoyment of the current pensioners' possession. The interference is moderate despite of the fact that a large percentage of the pensioners were affected (90 percent of the current pensioners were affected). The interference is moderate because the reductions corresponded to a low amount of reductions concerning a yearly income, as opposed to a reduction of more frequently provided allowance.

Concerning the old-age pension reductions introduced in the second and third year of the crisis, if we take into consideration the overall loss of

787 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2288/2015. See also Council of State (Plenary Session), Judgment of 13 June 2015, Nos. 2192-2196/2014.

788 Eurogroup Statement of the 21st of February 2012. Retrieved November 2014 from http://ec.europa.eu/danmark/documents/alle_emner/okonomisk/greece.pdf.

pension income through the cumulative reductions over the period of the crisis (2010-2012), it becomes apparent that the reductions are not proportionate. The accumulative effect of a number of old-age pension benefits reductions introduced in the second and third year of the crisis should be considered as a serious interference with the right to peaceful enjoyment of possession. This is because they resulted in a higher amount of loss of income and affected a moderate percentage of the pensioners (30 percent of the current pensioners were affected), while the intensity of the legitimate aims pursued was rather moderate, since the financial crisis in its second and third year of existence was not as urgent and imminent as it was in the first year. Therefore, the importance of the legitimate aims pursued was not serious enough to justify the serious interference with the right to peaceful enjoyment of the current pensioners' possession. However, if we take the reductions in pension benefits undertaken in the second and third year of the crisis into consideration individually, the balance may be held as proportional. This is because each pension reduction may lead to low income losses, while the legitimate aims pursued are moderate. For instance the interference with the right to property of the 6 percent reduction of old-age pension benefits amounting to between 1,700.01 Euros and 2,300 Euros[789] is light, since the amount of reduction is low while it affected a low percentage of current pensioners (14,8 percent of the current pensioners were affected).[790]

From the above, it is obvious that for a proper application of the principle of proportionality in a narrow sense, every further reduction in old-age pension benefits requires a further serious explanation that the reductions were proportional to achieve the aims pursued. Therefore, if there is to be further old-age pension benefits reductions affecting an even wider scope of the population, then the crisis should be more present and exceptional.

c) Respecting the Principle of Legitimate Expectations (Protection of Confidence)

Besides the fact that the reductions in current pensioners' old-age pension benefits must be reduced according to the principle of proportionality, the

789 Law No. 4002 of 2011.
790 *Hellenic Republic*(2013).

legislature is obliged also to respect the expectations of the current pensioners that their possession is protected, specifically their already allocated pension benefits. As it was described in the previous section, the current pensioners have acquired pension rights, since their old-age pension benefits, that fall under the concept of property, have been allocated by the administration through lawful administrative acts, providing clear details on the amount of pension payments to be made, according to the pension legislation that was in issue at the time of their retirement.

The essential function of the right to property is also to grant the citizen legal security with regards to goods protected under the right to property and to protect the confidence in property which is shaped by the constitutional law.[791] In this respect, the principle of legitimate expectations (or else the principle of protection of confidence) must take an autonomous shape, in regard to being separate from the property positions in property law.[792]The principle of legitimate expectations requires the striking of a balance between the need to protect the current pensioners' expectations that their old-age pension benefits would not have been reduced and the public interest at stake, which required the existing regulation to be changed.[793]

On the one hand, the pensioners should have planned their economic affairs with the reservation that their pension benefits may be reduced expecting changes in the law. They cannot argue that their reliance on pension legislation is sufficient, since the state has never claimed that pension law will not change. In addition, the principle of legitimate expectations does not provide any absolute right of continuance.[794] The beneficiaries cannot ignore the possibility that the rights which are in the process of being accrued to them may change over the lifetime, with regard to the fact that the right to a pension is strongly dependent on the available financial sources of a state.[795] They should be aware of the fact that the legislature

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791 *Becker / Hardenberg*, in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 106.

792 *Ibid*.

793 *Lazaratos*, DtA Special Edition 2003, pp. 137-138; *Manitakis,* EfimDD 2009, p. 93; Constitutional Court of Latvia, Judgment of 21 December 2009, No. 2009/43-01,at para. 32.

794 *Becker / Hardenberg*, in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 118.

795 *Losanda / Menendez* (eds.), The Key Legal Texts of the European Crises – Treaties, Regulations, Directives, Case Law, pp. 704-705.

is allowed to change the pension system in accordance, for instance, to the economic and demographic challenges.

Furthermore, on the one hand, the pensioners could have predicted that the amount of their benefits is not absolute, since also in the past, already allocated pension benefits have been reduced. In a series of the Council of State's decisions, the court declared that reductions in old-age pension benefits were lawfully applied by the public entities.[796] Moreover, the existence, or absence, of a consistent system of administrative practice precedent must also be examined in that context. A series of administrative and legal practices show various instances of reductions in welfare benefits. In the past, the social legislature and administrative authorities reduced old-age pension benefits that had already been allocated. For instance, according to Article 67 of the Law No. 2084 of 1992, the amount of already granted old-age pension benefits was subject to future changes. Furthermore, under Article 2 of the Law No. 1276 of 1982,[797] all old-age pension benefits of typographers and graphic artists granted before the enforcement of the above legislation were amended according to the new unfavourable legislation.

However, on the other hand, the possibility of a general predictability of social security changes is not adequate and sufficient on its own to justify any reductions in social benefits. There is the need of the pensioners to plan their economic affairs and needs in reliance on the amount of the already allocated pension benefits. Therefore, it is rather essential for the legislature to strike a faire balance.

Next, a further examination of the reasons, that are regarded as grounds of justification.[798] To proceed further in a balance of proportionality, it should be specifically examined whether the expectations of the current pensioners that amendments of their old-age pension benefits' level would

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796 Council of State, Judgment of 22 April 2003, No. 1077/2003; Judgment of 23 May 2005, No. 1580/2005; Judgment of 07 July 2005, No. 2166/2005; Judgment of 13 March 2006, No. 734/2006; Judgment of 08 May 2006, No. 1306/2006; Judgment of 04 July 2006, No. 1967/2006; Judgment of 25 September 2006, No. 2573/2006; Judgment of 27 November 2006, No. 3470/2006; Judgment of 03 July 2007, No. 1931/2007; Judgment of 03 December 2007, No. 3410/2007; Judgment of 20 February 2008, No. 660/2008.

797 Law No. 1276 of 1982, Official Gazette of the Hellenic Republic 100/A/24.08.1982.

798 *Schlenker,* Soziales Rückschrittsverbot und Grundgesetz – Aspekte verfassungsrechtlicher Einwirkung auf die Stabilität sozialer Rechtslagen, p. 208.

not have taken place is outweighed by the need to secure the sustainability of the public finances and the public pension system, as well as to reduce the public expenditures on pensions for the proper functioning of the EMU.

The legitimate aims pursued by the first round of pension reductions in 2010 are of high importance because of the severe and unexpected financial crisis and the urgent need for financial assistance. Therefore, in the first year of the crisis, the severity of the legitimate aims pursued may justify moderate or light interference with the expectations of the current pensioners that their property would not be reduced. The level of consistency and stability in the reductions in payments allocated to current pensioners is crucial in determining whether the interference with the principle of legitimate expectations is light or moderate. In our case, it seems that in the first year of the crisis the interference with the principle of legitimate expectations is light. This is because after the outbreak of the financial and economic crisis and after the agreement of the financial assistance between Greece and its international creditors in 2010, the old-age pension benefits were reduced only once. Therefore, the severe legitimate aims pursed may outweigh the light interference and thus the pension reductions introduced in 2010 are proportional, meaning that the principle of legitimate expectations is respected.

However, this was not the case in the respective years of 2011 and 2012. As advocated above, the severity of the aims pursed in the second and third year of the financial crisis is moderate. The interference, however, with the principle of legitimate expectations is severe. This is because the legislature continued reducing already granted pension benefits. The old-age pension benefits of the current pensioners were reduced within the period 2011-2012 six more times without prior notification and the current pensioners had to face the insecurity and unpredictability of the law. As a result, the pension legislation on the calculation of the old-age pension benefits was being constantly amended. Also, due to the fact that the duration of the financial crisis was unpredictable, the current pensioners were confronted with the insecurity that their old-age pension benefits may be reduced again in the future. However, the specific administrative acts, upon which the current pensioners' pension benefits were reduced, did not provide that these social benefits were subject to future amendments. Consequently, the current pensioners were not aware of the specific amount that they would acquire in the following months. This unstable situation that resulted from the financial crisis increased the insecurity and

unpredictability of the law and it became difficult for the current pensioners to properly administer and plan their financial affairs. For instance, they were not given the sufficient time and information to start investing in private pension funds. The enacted legislation could have provided adequate time and space for the pensioners to re-organise and prepare their lives for the period of the financial crisis. The confrontation of the financial crisis had been put on a track in the second and third year of the crisis and the financial crisis did not threat the existence of the state itself, while the legislature had the time to conduct actuarial studies and find other structural measures reforming the pension system in order to reduce the public deficit and the deficit of the public pension funds.

Important aspects that could lead up to a light or moderate interference with the protection of the principle of legitimate expectations in the second and third year of the crisis, and thus in the proportionality of the measure, are the predictability and the consistency in the exercise of the legislative power relating to the manner in which the reductions could have been implemented. The principle of proportionality could have been protected and duly respected, while the same aims could have been achieved, if the pension legislation had been put in place that would foresee a yearly reduction in the old-age pension benefits within a specific period of time. Namely, if the legislature had adopted the restrictive measures based on a yearly basis, the interference with the legitimate expectations of the current pensioners would have been light, since their old-age pension benefits would have been provided in a more stable and foreseeable way. By this way the public deficit and the deficit of the public pension funds could have been reduced in the short-term through a yearly reduction of the public expenditures on pensions, while the pension reductions would have been more predictable. Subsequently, the pensioners would have the opportunity to amend their circumstances in time, having the chance to reorganise their affairs and to implement alternative means of arranging their finances.

Therefore, the balance between the need to protect the current pensioners' expectations that their pension benefits would not have been reduced with the need to reduce the public deficit and secure the sustainability of the public pension system as well as the proper functioning of the EMU has be kept respecting the principle of proportionality in the first year of the crisis. This is because in 2010 the pension benefits were reduced only once, while the need to reduce the public deficit was imminent and urgent because of lack of liquidity. However, the principle of proportionality has

not been respected in the second and third year of the crisis because of the cumulative pension reductions. The continuous and unpredictable way of reducing pension benefits constitutes a severe interference with the principle of legitimate expectations, since the need to achieve the grounds of justification could be have achieved by reducing the pension benefits on a yearly basis. In this way, the current pensioners would not have been left uncertain as to the specific amount of old-age pension benefits that they should receive.

d) Respecting the Principle of Equal Contribution to Public Charges

Besides the principle of proportionality and the principle of legitimate expectations, the legislative branch has in principle the discretion to enact laws that impose reductions in old-age pension benefits provided also that the legislature upholds the constitutional principle of equal contribution to public charges. In times of financial and economic crisis, when the stability of the national economy is endangered, each population group, including the pensioners, are obliged to contribute to the confrontation of the crisis. This derives from the principle of equal contribution to public charges guaranteed in Article 4(5) of the Greek Constitution. As advocated in chapter three, Article 4(5) promotes the equal contribution as a general principle. It allows the state to impose to citizens financial contributions in order to stabilise the national economy in favour of the public interest. However, the principle at issue imposes that the Greek citizens are obliged to contribute to public charges, under equal terms, namely in proportion to their means. Namely, it requires that the pension reductions should not lead to an unequal distribution of effort excessively differentiated, and should be equal to the current pensioners' means. Therefore, the legislature is obliged to distribute the contribution to the public charges among the population in an equal way,[799] which means that the participation of all population groups must be equally divided among them.

Ripe for legal consideration is whether the cumulative reductions in the current pensioners' pension benefits contradicts the principle at issue, on the grounds that the group of the current pensioners have suffered a

799 *Antoniou*, The Right to Equality Within and Over Law, p. 77.

greater degree of social sacrifice in favour of the public finances and the social insurance capital than other groups of the population.

The Council of State held that any unequal burden placed on specific categories of pensioners, through excessive reduction in their social insurance welfare benefits contradicts the Greek Constitution.[800] It held that the principle of equal contribution to public charges constitutes a constitutional limit imposed on the legislature when the latter reduces pension benefits and may find application in cases of continuous old-age pension benefits reductions; namely, current pensioners should be subject to the same burdens as all other groups of the population, and should contribute equally to the public charges.[801] For instance, the Greek jurisprudence ruled that the reductions in the public salaries of the judges as well as the military officers and other uniformed groups, contradicted the principle of equal contribution to public charges, on the grounds that in times of continuing economic crisis, it is not permissible for the burden of public charges to be placed continuously on the same category of the population, namely on the public employees.[802] It seems that the Greek court kept the same line of arguments with the Portuguese Constitutional Court, which declared that the suspension of the Christmas allowance and holiday bonuses for employees of the public sector, and for those that receive old-age pension benefits from the public social security system, violated the constitutionally enshrined principle of equality that requires the fair distribution to public charges, because no similar reduction was made to private sector pensioners.[803] However, in that sense, the principle of equal contribution to public charges may become in times of crisis a problematic legal tool for pensioners. The legislature may reduce the benefits of everyone

800 Council of State (Plenary Session), Judgement of 20 February 2012, No. 668/2012. See also *Chrysogonos / Kaidatzis*, EED 2010, p.859. However, the Council of State did not declare any unequal contribution in its first ruling No. 668/2012, since, according to the court, equal burdens were introduced to all groups of the population and not only to pensioners.

801 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 37.

802 Special Court of Article 88(2) of the Greek Constitution, Judgment of 30 December 2013, No. 88/2013; Council of State (Plenary Session), Judgment of 13 June 2015, Nos. 2192-2196/2014.

803 Portuguese Constitutional Court, Judgment of 5 July 2012, No. 353/12. Retrieved February 2016 from http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html.

radically, including the private sector pensioners, without infringing the equality dimension. Yet, in this way, the principle of equal contribution to public charges may not constitute a legal tool for the protection of pensioners.

In order to examine whether the continuous reductions in the current pensioners' pension benefits violates the principle of equal contribution to public charges, it is important, for the legal scope of the issue, to define at first place whether the principle at issue finds application.

Similarly to the principle of equality, the principle of equal contribution to public charges is applied in relevantly analogous situations. The cumulative reductions in the current pensioners' pension benefits may introduce a certain level of differentiation. However, a differential treatment is permitted, as long as it corresponds to a difference in situations,[804] while a differential treatment is not permitted when there is a similarity in situations. Two or more categories are similar when the individuals, who belong in these categories, are under similar conditions.[805] However, the pensioners' conditions are not analogous to the conditions of other groups of the population. The fact that almost all groups of the population are affected by an economic and financial crisis does not mean that they are under the same or similar economic, working and living conditions. For instance, it is likely that those who are self-employed are in a better economic situation than the pensioners, and therefore less affected by the crisis. The self-employed is an economically active group of the population and may have greater chances on finding profitable occupation that may replace their loss of income, while the pensioners suffer a detrimental change to their finances not being able to find occupation besides retirement because of their healthy conditions or the trend of the labour market not to absorb old workers. Another example is that the pensioners are not under analogous situation with the farmers. The latter group does not have a consistent income as the pensioners do. Their earnings depend on weather conditions and the prices of their corps among other factors, which may be low in times of financial crisis. To this come that government subsidies are low when there is lack of public revenues.

In sum, the norm of the principle of equal contribution to public charges cannot be used as legal basis to those seeking legal avenues to

804 *Eichenhofer,* EJSL 2013, p. 171.
805 *Stergiou*, EDKA 2012, p. 327.

bring crisis-related challenges before courts. It is correct that in the context of the pursued economic and fiscal policy, the legislature should allocate the burdens of fiscal adjustment evenly upon all social groups, and avoid manifestly ill-proportionate encumbrance for specific groups. However, applying the principle of equal contribution to public charges in cases where the group of pensioners is compared with other groups of the population is legally ill-grounded. The

2. Reductions in Prospective Pensioners' Pension Benefits

The new pension legislation, as described in chapter two of this book, reduced the payment rates of the old-age pension benefits. The new, stricter eligibility requirements will result in the reduction of the duration of old-age pension benefit payments as well as the overall value of pensioners' future income. One example of the amendment to existing law is the increase to the age of retirement. More specifically, prior to the crisis, the pension age of men working in the private sector was 65 years, and for women it was 60 years. However, if they have completed a contribution record of 10,500 working days they could retire at the age of 58. The pension ages of civil servants and other privileged groups were much lower and diverse. However, after the crisis, Laws Nos. 3863 of 2010 and 3865 of 2010 set the pension age for all groups of the population at 65, and thus the pension age of civil servants was raised to 65 years. The increasing of the retirement age, that was introduced by Law No. 3863/2010 and 3865/2010 and published on the 15th and 20th of July 2010 respectively, is applied to all insured that fulfill all pension requirements after the 1st of January 2011. Subsequently, the increasing of the retirement age is not applied to the insured who have reached the retirement age according to the pension law in issue before the publication of the new pension law as well as to those insured that reached the more favourable retirement age until the 31st of December 2010, introducing in this way a six months transitional period. After two years, Law No. 4093 of 2012 raised the pension age even further for almost the entire economically active population from the age of 65 to the age of 67. The new age limits were adopted on the 12th November of 2012 and came into force after the 1st of January of 2013. Of significant interest is the fact that the two years increase to the age of pension eligibility (from 65 to 67) was legislatively passed with a

transitional period of two months (from the 12th November 2012 to the 31st December 2012).

In the following section, it is examined whether increasing the retirement age constitutes a restrictive measure resulting in reduction of property rights (a); and whether the legislature is obliged to introduce adequate transitional measures in order to protect the prospective pensioners' possession (b). The increasing of the retirement age was taken as an example of public pension adjustments, because it was introduced twice with overly short transitional measures providing subject for consideration.

a) The Increasing of Retirement Age as a Restrictive Measure

The disputed issue is whether the upward adjustment of the statutory retirement age is to be regarded as restrictive measure. On the one hand, the problem that arises by increasing the retirement age is that the prospective pensioners will be provided with old-age pension benefits for a shorter period of time which reduce the cash value of a prospective entitlement.[806] On the other hand, in spite of the fact that the heightening of the pensionable age decreases the duration of the old-age pension benefits and thus their value, the increasing of the retirement age cannot be linked to the right to property. This is because the pension age is not linked directly to the property of the prospective pensioners.

The prospective pensioners could have acquired property rights, if they could claim possession of legitimate expectations. However, as advocated in chapter three, it is unlikely that the prospective pensioners approaching the pension age have protected legitimate expectations to retire according to a previously obtainable and more favourable pension law, despite the fact that they may have contributed to the pension system over a long period. Unlike the case of current pensioners, who have fulfilled all pension requirements and thus have established property rights, the prospective pensioners have not fulfilled the pension requirements according to the pre-existing pension law but have premature legal positions; namely future property positions. The premature legal positions are thus not protected by the right to property. The prospective pensioners have not established pension rights according to the previous pension legislation, since they have

806 *Ruland*, DRV 1997, p. 104 f.

not reached the retirement age according to the pre-existing law before the publication of the new pension law. They do not rely thus on a lawful administrative act but on pension legislation that allowed the prospective pensioners to foresee themselves retiring at a specific age. Namely, their expectation to retire according to the pension legislation that would have been in effect, if the legislature had not adopted another, more unfavourable pension policy, is a mere hope to acquire pension benefits. However, as advocated in chapter three, expectation that is based upon a mere hope does not fall under the concept of possession within the meaning of Article 1 of the First Protocol and thus their future property positions do not deserve legal protection.[807]

Furthermore, the prospective pensioners cannot demonstrate that there is consistent prior case law of the national courts stating that pension bills are not subject to any change. As it has been advocated in chapter three, there is consistent national case law holding that the Greek legislature is allowed to adopt amendments to the substantive prerequisites required for a pension entitlement, or the formula of calculation that is applied to the labour force.[808] The Council of State has ruled that the legislature is allowed to alter the amount of old-age pension benefits in accordance with the conditions of that time[809] and that the legislature is not precluded from adopting measures in accordance with the current financial and social conditions; because if this were not so the result would be the substantial abolishment of the constitutionally guaranteed legislative power and its ability to plan the economic programme of the state.[810] In cases concerning unfavourable indexation of old-age pension benefits, the Council of State has continuously declared that the amendment of pension indexation for the future is not precluded.[811] Therefore, according to the Greek case

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

808 Council of State, Judgment of 01 April 1993, No. 1740/1993, Judgment of 22 November 1999, No. 3739/1999; Judgment of 04 October 2000, No. 3127/2000; Judgment of 28 May 2001, No. 1867/2001, at para. 5.

809 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 34.

810 Council of State, Judgment of 13 October 2014, No. 3410/2014.

811 Council of State, Judgment of 22 November 1999, No. 3739/1999; Judgment of 05 December 2005, No. 4064/2005; Judgment of 14 January 2008, No. 158/2008, Judgment of 21 September 2009, No. 2685/2009.

law the legislature is allowed to alter the pension system i.e. by changing the method of calculating the benefits, or increasing the retirement age.

Illustrative of this approach is the case of an employee of the National Bank of Greece. She was a mother with underage children and would have been entitled to a pension under the previous pension regime after completing the contributory period of 15 years. Instead she would be able to retire after she had met the requirements of the new legislation (on reaching the age of 42 years).[812] The Council of State held that the applicant did not have a legitimate expectation to retire required under the old pension law. The Council of State held that the rise in the retirement age did not abolish any pension right, but only postponed the exercise of the pension right until the individual reached the new retirement age.[813]

Therefore, the prospective pensioners do not actually have a sufficiently legitimate expectation to successfully challenge the increase to the retirement age. The future property positions do not enjoy the protection of the right to property as established property positions do and so we cannot talk of interference with property rights. Subsequently, the reduction in the future property position of the insured does not constitute a restrictive measure.

The more correct thesis seems to be that the increasing of the retirement age is linked to the security function of the pension insurance, since it is more accurately said to be linked to the aim of the old-age pension schemes, which is to determine the age after which means cannot be acquired through work.[814] Indeed, the setting of age limits is constitutive for the question as to which age is commonly regarded as the point in the life-course where personal needs no longer have to be secured by way of a gainful occupation.[815]

The increasing of the retirement age may constitute a restrictive measure only in cases where the future beneficiaries have legitimate expectations, as advocated in chapter three. Namely, the pension value of current property positions is reduced and thus the increasing of the retirement age

812 Law No. 1976 of 1991, Official Gazette of the Hellenic Republic 184/A/4.12.1991.

813 Council of State, Judgment of 14 July 2006, No. 718/2006, at para. 8.

814 *Becker,* LVA Mitt. 2005, p. 238. A different approach has been stated by *Ruland*. See fn. 806.

815 *Becker / Hardenberg*, in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 112.

interferes with the property positions of the prospective pensioners only, when the latter have fulfilled the substantial requirements to a pension entitlement. More particularly, the prospective pensioners have legitimate expectations when they have reached the retirement age according to the pre-existing pension law and have generally fulfilled all requirements for a pension entitlement that was in effect before the publication of the law that amended the retirement age but have not applied and be provided with pension benefits before the publication of the new pension law. This group of prospective pensioners have established legal positions and thus mature expectations. Their expectations to retire according to the law in effect falls under the concept of possession, since their expectations to retire are not based on a mere hope. It concerns a legitimate expectation that fall under the scope of the right to property within the meaning of Article 1 of the First Protocol. Therefore, the expectation of this group of prospective pensioners must be protected by the legislature, because they have accomplished the prerequisites for pension entitlement and consequently they establish sufficient basis in national law, but chose to wok further instead of retiring.

The Greek legislature protected in our case the prospective pensioners' legitimate expectations and thus their property positions. The legislature correctly ruled that the new pension legislation is applied only to those insured who reach the retirement age after the publication of the new pension law. Namely, the new age limits introduced by Laws Nos. 3863 of 2010, 3865 of 2010 and 4093 of 2012 are applicable only to insured who have not reached the retirement age according to the pre-existing pension law until the 1st of January 2011 and the 1st of January 2013, respectively. In this way the insured who have reached the retirement age according to the pre-existing more favourable pension legislation may retire after these dates in accordance to the previous more favourable age limits. So, the insured that chose to work further even though they have fulfilled all pension requirements are protected. This legislative practice is legal and compatible with the constitutional provision of the right to property.

b) Do Prospective Pensioners have Legitimate Expectations that Transitional Measures will be introduced?

As it has been mentioned above, the retirement age was raised rather swiftly to the age of 65 in 2010 by Law No. 3863/2010 and then increased

from 65 to 67 by Law No. 4093/2012 within the transitional period of two months. Questionable is whether the prospective pensioners have a legitimate expectation relating to the manner in which the change was implemented, i.e. that a longer transitional period would have been put in place.[816]

In order to demonstrate that there has been a breach of their legitimate expectations that longer transitional measures would be introduced; the prospective pensioners must again demonstrate that their expectations are legitimate and, more particularly, that they relied on established case law. However, there is consistent previous case-law declaring that the non-introduction of a transitional period is lawful, and that the legislature is not obliged to introduce transitional periods for the protection of pension rights.[817] Thus, the pensioners' expectation will be met by claims that the expectation is a fetter on the wide margin of appreciation of the legislative power, and it is more difficult to recognise as legitimate the expectations of the prospective pensioners on the grounds that there is no specific case law which would appear to insist that some notice or transitional periods may be required in certain cases. In other words, if the expectations of the prospective pensioners to retire according to the pre-existing pension law were legitimate and thus protected under the right to property, then the legislature would be obliged to introduce transitional measures.

However, the consistent case law must be revised. The minority of the Council of State has held that the legislature is obliged to introduce transitional periods, so that individuals have the opportunity to adjust to their new economic situation.[818] This was also supported by the Court of Audit. The latter expressed the view in its advisory opinion for the Pension Bill No. 4093 of 2012 that the absence of transitional periods contradicts the principle of legitimate expectations (or protection of confidence).[819]

The prospective pensioners' expectation to retire under the previous and more favourable pension law should be protected through the introduction of transitional measures. Despite the fact that the expectations of the prospective pensioners are not legitimate, the legislature is still

816 For considerations on the same question see also *Dewhurst / Diliagka*, EJSS 2014, pp. 241-243.

817 I.e. Council of State, Judgment of 17 July 2006, No. 707/2006.

818 Council of State, Judgment No. 2346/1978.

819 Opinion of the Court of Audit on a draft law concerning the pension benefits of the public servants, 4th special sessions of the plenary, 31 October 2012.

obliged, not by the right to property but by the principle of legitimate expectations (or protection of confidence), to amend the retirement age through transitional measures. The main reason for this is that the legislature frequently amends and/or abolishes the existing legal order, while at the same time individuals have organised and planned their economic relationships and needs for the future based on specific legal situations and relationships,[820] but are then forced to reassess their plans in light of the pension reforms. This contradicts to the legal certainty that is derived from the principle of legitimate expectations (or protection of confidence). There has been some support for this in other jurisdictions. For instance, the Constitutional Court of Latvia ruled that the pension reductions did not comply with the principle of legitimate expectations, on the grounds that the legislature did not provide for the introduction of an adequate transitional period, which would have ensured a more reasonable balance between the confidence of the prospective pensioners and the public interest.[821]

In the case under consideration, the Greek legislature introduced too short transitional periods due to reasons of fiscal considerations, despite the fact that in the past the introduction of transitional periods was a legislative practice in cases of pension reforms.[822] The Greek legislature chose to introduce insufficient transitional periods (six and two months) so that a lower percentage of insured would be entitled to old-age benefits. Indeed, the urgent pressure of fiscal imbalances and the unsustainability of the public pension system constitute grounds of justification for insufficient transitional periods. However, the Greek legislature is still obliged to maintain a fair balance between the need to reduce the public deficit and the deficit of the pension funds with the need to guarantee a certain percentage of legal certainty and security to the prospective pensioners. The introduction of transitional periods constitutes a measure to keep a fair balance, while the financial crisis may not be a justification for the legislature not to respect the principle of legitimate expectations. The transitional measures could guarantee the legal certainty and predictability of the law,

820 *Tsatsos*, Constitutional Law-Part A: Theoretical Fundament, p. 231.

821 Constitutional Court of Latvia, Judgment of 21 December 2009, No. 2009/43-01, at para. 32.

822 For more details see *Angelopoulou,* in: *Becker / Pieters / Ross et al.,* (eds.), Security: A General Principle of Social Security Law in Europe, p. 180.

which is an essential characteristic of the principle of legitimate expectations, upholding the authority and the validity of the law.

It appears correct that the more unfavourable the new pension regulations are, the more adequate the transitional periods should be, so that the principle of the legitimate expectations is not excessively affected.[823] The introduction of transitional periods is essential so that the expectations of the prospective pensioners are not affected in a sudden and unexpected way.[824] If the law operates in this way, the prospective pensioners could be provided with the essential period of time to re-arrange their economic affairs to suit the new pension policy. This would allow the prospective pensioners to alter their current positions and prepare for a longer period at work.

In a democratic and social state, as Greece is, where rules are changed and have an impact on individuals' rights, there is a demand, in normal times as well as in times of a financial crisis, that provisions of social insurance are adopted in a stable and foreseeable way protecting so the pensioners' expectations; and thus the legislature may be legitimately expected to entertain the idea of the introduction of transitional periods or reasonable notice.[825] Legal certainty and predictability of law is very important in our modern society, so that citizens are able to rely on the constancy of a legal provision and plan with confidence their economic and social life. In this way, they may develop their personality under the rights granted by domestic law, while the financial crisis should not constitute an obstacle of legal certainty and predictability. Unexpected amendments and insecurity is permissible under the Constitution, but only under certain circumstances, such as in cases of war. However, as explained in chapter four, the Greek financial crisis constitutes an urgent situation which demands certain measures to be taken, such as the increasing of the retirement age for the reduction of the public deficit, but it does not constitute an emergent ground for derogation, thus suspending the Constitution and thus the constitutional principle of legitimate expectations (or protection of confidence).

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823 *Angelopoulou*, EDKA 2010, p. 911.
824 *Chrysogonos*, Civil and Social Rights, p. 565.
825 *Dewhurst / Diliagka*, EJSS 2014, pp. 241-243.

II. Reduction in Old-Age Pension Benefits of High Value

Up to this point, the old-age pension benefits reductions were challenged on the basis of constitutional provisions and principles, such as the right to property and the principle of legitimate expectations (or protection of confidence), which do not fall under the category of social rights. Under this section, the reductions in the old-age pension benefits are analysed on the basis of the social right to pensions.

The Greek legislature reduced the old-age pension benefits in accordance to their last gross pension income. The higher the pension income was, the more it would be reduced. As a result, the pension benefits of high value were reduced more than the pension benefits of low value. The reason for this was to protect the "*low-earnings*" pensioners accomplishing the principle of social solidarity. However, there are strong legal considerations that this legislative practice affects the principle of equivalence, which is a main characteristic of the Greek public pension system, deriving from the right to social insurance. To keep a proportional balance between these two principles is rather challenging. This is because it is difficult to differentiate between these two legal positions and difficult to clearly define their boundaries. Namely, on the one hand, the Greek legislature must protect the "*low-earning pensioners*" but on the other hand, the pension benefits should not be successively reduced to such an extent that the final pension income does not correspond to the level of living conditions that the pensioners were enjoying before retirement. In the following analysis, under B.II.1, it is analysed which legal position is protected in cases of reductions in pension benefits of high value; namely the principle of equivalence as an aspect of the right to social insurance. Then, under B.II.2, it is laid down that the principle of social solidarity is the main ground of justification for the different percentage of reductions in pension benefits. Lastly, under B.II.3, it is defined when the balance between the principle of social solidarity and the principle of equivalence should sway in favour of the one or the other principle. This is addressed by using two case-studies as examples.

1. The Principle of Equivalence as an Aspect of the Right to Social Insurance

The principle of equivalence implies that old-age pension benefits should be salary-related to the paid contributions.[826] Namely, there should be an assured equivalent relationship between the paid contributions and the provided benefits. It indicates that the level of benefits given to pensioners is to be applied unequally, on the basis of differing degrees of participation (through contributions) in the social insurance system. The higher the income or salary is, the higher the paid contributions should be and the higher the granted old-age pension benefits.

The principle of equivalence is a core element of the right to social insurance protected by Article 22(5) of the Greek Constitution.[827] This is because, firstly, the Greek public pension system aims to ensure that the beneficiary enjoys similar living standards before and after retirement.[828] Secondly, in the Greek public pension system, the old-age pension benefits are financed through the contributions of the employees and employers, and not through taxes. The Greek public pension system is built upon a tripartite basis, as explained in chapter two, while it is based on the PAYG system. The current employees finance the old-age pension benefits of the current pensioners according to their salary, while the old-age pension benefits of the current employees will be financed from the contributions of the future employees. Therefore, on the grounds that the pensioners have paid different rate of contributions, it is only just that they are provided with pension benefits equivalent to their paid contributions.

According to the Greek jurisprudence, the principle of equivalence does not, generally, enjoy constitutional consolidation.[829] Exceptionally, prece-

826 Council of State (Plenary Session), Judgment No. 2692/1993.

827 *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; *Angelopoulou,* in: *Becker / Pieters / Ross et* al. (eds.), Security: A General Principle of Social Security Law in Europe, p. 157.

828 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015; see also *Stergiou*, EDKA 2012, p. 323.

829 I.e. Council of State (Plenary Session), Judgment of 27 November 2008, No. 3487/2008; Judgment of 28 September 2009, No. 2948/2009; Judgment of 10 June 2013, No.2266/2013; Judgment of 07 October 2013, No. 3412/2013; Judgment of 24 July 2014, No. 2646/2014..

dent in favour of the high-earning beneficiaries was created in a health care case[830] as well as in the case of the latest reductions of 2012.[831] In the health care case, the Council of State examined the granting of hospital and medical expenses to commercial naval officers. The social insurance fund of the navy covered 80 percent of the hospital and medical expenses of all the high-earning beneficiaries. This percentage is lower than the cover of hospital and medical expenses of the lower classes of naval crew that had proportionally contributed less. The court declared that an infringement of the constitutional principle of equivalence arose, due to the fact that a higher amount of social benefits for the same social risk was being granted to the beneficiaries that had paid less contribution to the fund, in comparison to those beneficiaries of the same fund that had paid higher contributions. In the case of the latest reductions of 2012, the Council of State gave a new dimension to the protection of the principle of equivalence. As advocated in chapter three, the court connected the principle of equivalence with the right to social insurance. The Council of State ruled that the right to social insurance guarantees a certain level of equivalence between the paid contributions and the provided pension benefits and the aim of this aspect of the right to social insurance is to ensure that the beneficiary enjoys similar living standards before and after retirement. Furthermore, the Court of Audit has also acknowledged that the principle of equivalence is a special characteristic of the public pension system.[832] More particular, the court noted that the reductions in the pension benefits of the public servants in 2012 have been introduced without respecting the equivalence between the salary of the public servants, when they were in service, and their final replacement rate, and as a result the characteristic of the pension system had been changed.

In sum, according to recent jurisprudence certain equivalence between the contributions and the old-age pension benefits has to be maintained. The legislature is allowed to reduce the already provided pension benefits, when it is comprehensively provided that in this way equivalent pension income to previous earnings is secured. Ripe for legal consideration is,

830 Council of State, Judgment No. 4837/1997.

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

832 Opinion of the Court of Audit on a draft law concerning the reductions in the pension benefits of the public servants introduced by Law No. 4093 of 2012, 3rd Special Session of the Plenary on 30.10.12.

when an equivalent pension income is secured and to what extent is the legislature allowed to reduce the pension benefits, so that the principle of equivalence is not affected. To keep the equivalent character of the pension benefits, the legislature should guarantee that the final pension income, as resulted after successive reductions, corresponds as far as possible to the level of living conditions that the pensioner was enjoying prior to retirement. In that context, the question of what falls under the term "*as far as possible*" remains open.

2. The Principle of Social Solidarity as a Ground of Justification

The aim of reducing the pension benefits of high value more than the pension benefits of low value is the protection of the "*low-earnings*" pensioners promoting the principle of social solidarity. The principle of social solidarity, besides the principle of equivalence, is another core element of the right to social insurance and the Greek public pension system. The Greek public pension system involves elements of solidarity. Its function was enacted in the 1950's to cover the risk of ageing through cash benefits and services. After the Second World War, key contributor to the Greek pension system became the principle of social solidarity, which can be witnessed through the social security bills No. 1846/1951 and No. 2698/1953[833] concerning the establishment of minimum pension income and No. 4169/1961, according to which farmers were covered through a compulsory scheme funded only through general taxation and not through contributions. Since the restoration of democracy in 1975, the elements of solidarity commanded further an important position in the Greek public pension system, providing a generous funding process and universal coverage. The state guarantees a fixed amount, not equivalent to contributions paid and the pension levels are not dependent on the range of insured persons or on the amount of contributions.[834] Furthermore, private sector employees would not be given lower old-age pension benefits payments,

833 Law No.2698 of 1953, Official Gazette of the Hellenic Republic, 315/A/10.11.1953.

834 *Börsch-Supan / Tinios,* in: *Bryant / Garganas / Tavlas* (eds.), Greece's Economic Performance and Prospects, p. 398.

even in the event that the employer did not make contributions that fully satisfied the legal requirements.[835]

Moreover, the principle of solidarity is an aspect of the principle of social state, which is promoted in Article 25(4) of the Greek Constitution. The latter constitutional provision indicates that *"The State has the right to claim of all citizens to fulfil the duty of social and national solidarity"*. Article 25(4) demands from the legislature to undertake general social policy measures, which promote the solidarity among pensioners and their social protection. Although the principle of social solidarity is an aspect of the principle of social state, its content may not be derived from the principle of social state. This is because the content of the principle of social state is general and vague.[836] The principle is too vague because the domestic courts have refused to engage with the principle over the years and generate jurisprudence. There is no case law that determines when the principle of social state is applied, so the content of the principle of social state cannot be derived from such. The Council of State displays a general prudence towards the principle of social state, and the national courts hesitate to resort to this principle, probably due to its general and ambiguous content.

The content of the principle of social solidarity may be derived from the Greek jurisprudence, since the latter has often resorted to the principle *a contrario* to the principle of equivalence. The Council of State has adjudicated that it is lawful for the legislature to financially burden those that receive the highest old-age pension benefits decreasing the gap between the pension benefits' level among the beneficiaries, in view of repairing social inequalities and elevating those less-advantaged in society, i.e. by setting upper limits on the amount of the old-age pension benefits.[837] In this way, the principle of solidarity indicates that the legislature is allowed, by virtue of the protection of the "*low-earnings*" pensioners to enact more favourable treatment for the economically weak persons that are socially

835 Art. 26(7), Emergency Law No. 1846 of 1951.

836 *Manitakis,* ToS 1993, p. 686.

837 Council of State, Judgment of 28 May 2001, No. 1867/2001; Judgment of 05 December 2005, No. 4064/2005; Judgment of 13 March 2006, No. 707/2006; Judgment of 16 February 2009, No. 527/2009, Judgment of 21 September 2009, No. 2685/2009; Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014.

insured[838] and thus the Greek legislature may maintain the level of the low-income old-age pension benefits at the expense of those that receive high-income old-age pension benefits. This is because the principle of social solidarity has to be understood in the terms of financial redistribution from richer to poorer contributors. Namely, the principle in question indicates that the pension reductions should not lead to an unequal distribution of effort excessively differentiated among the current pensioners and promotes the abolishment of social inequalities that lead to social injustice; as well as the optimum protection of individuals from cases that provoke economic difficulties.[839]

Against this background, the legislature is allowed to enact more favourable treatment for the economically weak of the social insured and has, principally, the discretional power to introduce the necessary legal acts and reduce the pension benefits of high value more than the pension benefits of low value in order to protect the "*low-earnings*" pensioners. This becomes even more intensive in times of financial crisis, when fiscal aims are in the spotlight, and the "*low-earnings*" pensioners are in greater need for financial protection. This is because the financial crisis tends to worsen income distribution,[840] while social security benefits act as an economic buffer during a recession or crisis.[841]

3. Proportional Balance between the Principles of Equivalence and Social Solidarity

The principle of social solidarity is accepted as justifying the differentiation between the reductions adopted in the "*low-earnings*" and "*high-earnings*" pensioners' benefits. Ripe for legal consideration is whether the pensioners' right to derive benefits from the principle of equivalence as an

838 Council of State, Judgment of 13 October 2014, No. 3410/2014.

839 *Stergiou*, The Constitutional Consolidation of the Social Insurance System, pp. 36-37.

840 *UNDP*, Income Inequality and the Condition of Chronic Poverty; 186 Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty Income Inequality and the Condition of Chronic Poverty, p. 186. Retrieved April 2014 from http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Towards%20Human%20Resilience/Towards_SustainingMDGProgress_Ch6.pdf.

841 *ILO*(2001), p. 16.

aspect of the right to social insurance is proportional to the aim pursued by the legislature, namely to the protection of the "*low-earnings*" pensioners.

A proportional balance should be kept between the need to protect the principle of equivalence and the need to promote the principle of social solidarity. In order to assess how a proportional balance may be kept between these two principles, the proportionality test has to be conducted functioning as a balancing concept. The principle of proportionality contains in its notion the principle of equivalence, as it refers indirectly to a system of justice, while the principle of equivalence constitutes a measure of justice.[842] The principle of proportionality indicates that the measure has to be suitable, necessary and proportional in a narrow sense to the aims pursued by the legislature. The restriction of the right to social insurance is constitutional when these three prerequisites have been achieved by the legislature. Otherwise, the measure should be declared as disproportional and thus unconstitutional.

As it has been advocated above, the Greek public pension system is structured and functions on the combination of these two basic mechanisms, the solidarity agreements and an "*insurance relation*" implying the payment of contributions by the employed and the employers. Namely, the Greek public pension system aims solidarity in the society as well as to assure the funding of the system through a structure of correspondence between contributions and benefits. In that sense, the principle of equivalence and the principle of solidarity seem to lie uneasily with each other. On the one hand, the principle of equivalence aims to assure a proportional relationship between the paid contributions and the provided benefits securing to the beneficiary the same living standards before and after retirement. On the other hand, the principle of solidarity aims to decline the gap among the beneficiaries of the old-age pension benefits' level in view of repairing the social inequalities and upgrading the less-advantaged of the society.

The Greek Constitution does not explicitly provide which of these two principles has priority in the Greek public pension system. The latter is dependent on the social policy decided by the successive Greek governments. Generally, the balance between these two principles must sway in favour of the principle of social solidarity. This is because, as explained

842 *Hanau*, Der Grundsatz der Verhältnismäßigkeit als Schranke privater Gestaltungsmacht, p. 98.

above, the principle of solidarity plays a primary role in the Greek public pension system while the role of the principle of equivalence is rather secondary. In addition, as it has been advocated above, the Greek jurisprudence, in most cases, gives priority to the principle of social solidarity. It is thus lawful that the equivalence principle deteriorates in order to promote the principle of social solidarity, and in order to justify the non-equivalence between the high levels of contribution with the lower amount of the old-age pension benefits.

For example, in 2010, the Greek legislature introduced a special solidarity contribution levy on the current pensioners' old-age pension benefits through Law No. 3863 of 2010. The aim of this extra solidarity contribution levy on the current pensioners' old-age benefits over 1,400 Euros was to decline the deficit of the social insurance funds for the sustainability of the public pension funds, since this special contribution flows into a solidarity fund AKAGE (Asfalistiko Kefaleo Allilegiis Geneon – Social Insurance Capital of Generation Solidarity). However, the aim of the process by which the contribution levy was imposed was the protection of the "*low-earnings*" pensioners. It was initially imposed on the primary public pensions amounting more than 1,400 Euros and it was later extended to the supplementary pension benefits.[843] More particularly, pensioners receiving old-age pension benefits between 1,400 Euros and 1,700 Euros contribute 3 percent of their pension; pensioners receiving old-age pension benefits between 1,700.01 Euros and 2,000 Euros contribute 6 percent of their pension; pensioners receiving old-age pension benefits between 2,000.01 Euros and 2,300 Euros contribute 7 percent of their pension income and pensioners receiving old-age pension benefits between 2,300.01 Euros and 2,600 Euros contribute 9 percent of their pension income. Moreover, the legislature introduced a further special contribution levy on the current pensioners' supplementary old-age pension benefits.[844] Pensioners receiving supplementary old-age pension benefits between 300,01 Euros and 350 Euros per month contribute 3 percent of their pension income; pensioners receiving supplementary old-age pension benefits between 350,01 Euros and 400 Euros contribute 4 percent of their pension; pensioners receiving supplementary old-age pension benefits between 400,01 Euros and 450 Euros contribute 5 percent of their pension income,

843 Art. 38(1), Law No. 3863 of 2010, as amended in Art. 44(10), Law No. 3986 of 2011.

844 Article 44(13), Law No. 3986 of 2011.

while those receiving supplementary old-age pension benefits between 450,01 Euros to 500 Euros contribute 6 percent of their pension income.

In this case, a differentiation leading to a greater burden on the shoulders of the "*high-earnings*" pensioners seems to be a suitable measure for the promotion of the duty of social solidarity. This is because the different, progressively imposed percentage of the solidarity contributions protects the "*low-earnings*" pensioners at the expense of those pensioners that receive high pension benefits. The legislature did not impose the special contribution levy on all main and supplementary old-age pension benefits, but only on the main pension benefits amounted more than 1,400 Euros per month and on supplementary pension benefits which amounted to more than 300 Euros per month and according to the last pension income. Moreover, the measure seems to be necessary, on the grounds that the legislature searched for the least restrictive measures. This is because only 20 percent of the pensioners were financially burdened, while 55 to 60 percent of the pensioners benefited from this measure.[845] Lastly, it has to be examined, whether the measure in question is proportional to the aims pursued, in a narrow sense. The interference with the right to social insurance, as understood within the confines of the principle of equivalence, is moderate, because only 20 percent of the pensioners had to contribute to the AKAGE. The aim of the measure was severe, on the grounds that the respective measure did not only aim for the protection of the "*low-earnings*" pensioners, but also aimed to ensure that any money saved would end up in the budget of the public pension funds. Reducing the deficit of the public pension funds is a severe aim in times of financial crisis, as during these times the financing of the funds by the state is limited and endangered. This could result in pension benefits being inadequate to cover pension demands, thus leading to a lower level of protection for the "*low-earnings*" pensioners

Therefore, the respective measure is proportional with the aim of protecting the "*low-earnings*" pensioners, on the grounds that the old-age pension benefits were reduced according to a progressive scale at the expense of the high value pension benefits, while at the same time all pensioners, including those with "*high-earnings*" were able to benefit from the measure. This is because the measure contributed to the sustainability

845 Council of State; Judgment of 23 October 2014, No. 3663/2014, at para. 22; (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

of the system meaning their pension benefits were secured even after being reduced. The pensioners will be in a slightly more favourable position if they are able to receive a reduced benefit, in contrast to the incredibly unpalatable position of having no pension benefit whatsoever.

Yet, the principle of equivalence should not be refuted at all under a defective conveyance of the solidarity principle in practice. The contributory character of the Greek public pension system should not be totally refuted and modified, even when the financial resources are limited and the need to protect the "*low-earnings*" pensioners in times of financial crisis is strong. Completely annulling the principle of equivalence is not lawful, since it constitutes a core element of the right to social insurance. In specific cases, where the element of personal contribution is very strong, the balance must sway in favour of the principle of equivalence. This is the case on the pension benefits reductions in the self-employed insured in the pension fund of OAEE.

In the OAEE case, the personal circumstances of the self-empolyed persons involved were highly relevant. This is because, unlike other public pension funds, self-employed persons were presented with the opportunity to choose the level of contributions they would pay towards their pension. This resulted in a differentiation in the amounts that would then be paid out in pension benefits. On the grounds that there is a strong connection with personal contribution to the OAEE fund, the right to equivalent pension benefits corresponding to the amount of the contributions made to the pension fund of the self-employed as well as to the period of time during which the contributions were paid deserves stronger protection than in the case of the solidarity contribution levy. The more the social insurance rights are given personal relevance by personal contributions on the part of the insured, the less freedom of discretion remains on the part of the legislature.[846]

The ECtHR ruled that the assessment of whether the essence of the right is impaired is dependent on how far the granted benefits are earnings-related. As a rule, the ECtHR held that national legislation which provides welfare benefits generates the right to possession when the individual satisfies all requirements, irrespective of whether the grant of the welfare benefits is dependent on the prior payment of social contributions to a

846 *Becker / Hardenberg*, in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 113.

social insurance fund or not.[847] In this sense, the paid contributions do not play any role in examining whether the social benefits fall under the protection of the Convention. However, the previously paid contributions play a decisive role in the examination of the proportionality of the restrictive measures.[848] In the assessment of the proportionality of the restrictive measure, the impairment or not of the essence of the right depends on the nature of the benefit taken away.[849] For instance, in the cases of *Domalewski* and *Skórkiewicz,* the ECtHR ruled that the deprivation of the applicants' special privileged status was proportional, as the applicants retained all the rights attached to their ordinary pension under the general social insurance system and consequently, the applicants' rights stemming from the contributions paid into the social insurance scheme were not infringed in a manner contrary to Article 1 of the First Protocol.[850] Furthermore, in the *Lazarevic* case, the ECtHR found out that there was no impairment of the applicant's pension rights, since there was no loss of a certain percentage of his pension that was connected with prior paid contributions into the pension scheme.[851] Therefore, according to the ECtHR's jurisprudence, the right to social benefits that are not earnings-related attract weaker protection under the Convention in relation to the right to social benefits that are strongly earnings-related.

Under the framework of the financial crisis and the external pressure that resulted in receipt of financial support the old-age pension benefits of the pensioners insured in the Greek self-employed pension fund O.A.E.E were also reduced.[852] In that case there was some disparity in the way old-age pension benefits reductions affected the OAEE pensioners, depending

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847 ECtHR, *Gaygüsüz v. Austria,* Judgment of 16 September 1996, Appl. No. 17371/90, at para. 41.

848 *Schmidt,* Europäische Menschenrechtskonvention und Sozialrecht, p. 98.

849 ECtHR, *Cichopek and others v. Poland*, Decision of 14 May 2013, Appl. No. 15189/10, at para.137.

850 ECtHR, *Skórkiewicz v. Poland*, Decision of 01 June 1999, Appl. No. 39860/98; *Domalewski v. Poland*, Decision of 15 June 1999, Appl. No. 34610/97.

851 ECtHR, *Lazarevic v. Croatia*, Decision of 04 May 2000Appl. 50115/99.

852 I.e. Law No. 4002 of 2011 reduced by 6 percent the old-age benefits that amounted over 1,700 Euros and by 8 percent the old-age pension benefits that amounted over 2,300 Euros. Moreover, Law No. 4024 of 2011 reduced by 20 percent the old-age benefits that amounted over 1,200 Euros and Law No. 4093 of 2012 reduced also by 20 percent the old-age benefits that amounted to over 3.000 Euro. An overview is presented in *Simeonidis / Diliagka / Tsetoura,* Journal of Social Cohesion and Development 2014, Appendix, Table 1, p.43.

on their contributory history. Calculations conducted found that those who contributed the maximum possible amount throughout their working lives saw their final benefits reduced 29 to 34 percent, while they paid about 200 percent more contributions to the public pension fund than those who contributed the minimum amount legally possible, who saw their final benefits reduced between 13 to 20 percent.[853] For 30 years of service, the insured persons, who paid the maximum contributions, paid 217 percent more contribution while receiving reductions 7.85 times greater to his standard of living. Respectively, for 35 years of service, the insured persons, who paid the maximum contributions, paid 209 percent more contributions and received 5.22 percent greater reductions to his standard of living; finally, for 40 years of service, the insured persons, who paid the maximum contributions, paid 219 percent more contributions than the insured who paid the minimum while receiving 3.37 percent greater reductions to his standard of living.[854]

As a result, there is a great difference between the paid contributions and the received old-age pension benefits. The insured persons of OAEE who had the foresight to contribute the maximum possible amount throughout their working lives saw their benefits being reduced by three up to almost eight times more than the old-age pension benefits of those who paid the minimum amount, and therefore supported the PAYG system less.[855] This practice resulted in a lack of equivalence between the maximum paid contributions and the final reduced granted old-age pension benefits.

It is questionable how the legislature may strike a proportional balance between these principles, and which certain criteria should be used so that both the low-income pensioners and the pensioners that contributed the maximum amount are proportionally protected. The correct thesis appears to be that the legislature should use the amount of the prior paid contributions as a criterion, in order to reduce the old-age pension benefits of the OAEE' pensioners and maintain a proportional balance.

With this regard, although the respective measure seems to be suitable to achieve the aim pursued, namely the protection of the "*low*-earnings" pensioners, it is not the least mild measure and thus necessary. The legisla-

853 *Simeonidis / Diliagka / Tsetoura,* Journal of Social Cohesion and Development 2014, p.36.
854 *Ibid,* pp. 32-33.
855 *Ibid,* p. 40.

ture could have maintained a proportional balance between the principle of equivalence and the principle of social solidarity, by decreasing the old-age pension benefits of the pensioners who contributed the maximum amount on the basis of the previously paid pension contributions, and by decreasing the old-age pension benefits of the pensioners that contributed the minimum amount on the basis of their last gross pension income. In this way the measure would be, on the one hand, in favor of the less-advantaged (low-earnings pensioners) allowing for the fulfillment of the social goals of the social insurance institution combined with the application of the social solidarity principle and on the other hand, it would provide the OAEE insured who chose to pay the maximum level of contribution an amount that is able to secure them satisfying living conditions; reflective of those which the individual was enjoying prior to the period of retirement.

Therefore, the protection of the "*low-earnings*" pensioners through different percentages of reductions in old-age pension benefits between pensioners who paid the maximum contribution and those who paid the minimum appears not to be proportional, since it is not necessary for the protection of the "*low-earnings*" pensioners as a milder alternative solution could be in place. The balance required by the principle of proportionality was unsettled because the pensioners who contributed the maximum had to face such higher reductions that in the end the equivalent character of the public pension system was modified, while this could have been avoided through the application of contribution-related criteria, as explained above. As a consequence, the second element of the principle of proportionality, the element of necessity, was not respected, and the way the old-age pension benefits of the OAEE pensioners were reduced is not proportional and therefore unconstitutional.

III. Age Discrimination Cases

Age discrimination is, generally, prohibited and can be justified, when a specific legislation exception or defence is invoked. Direct discrimination based on the nature of the concept of age is mostly more acceptable than other forms of direct discrimination, such as discrimination on grounds of gender, since "*age is not by its nature a suspect ground and age-based dif-*

ferentiation, age-limits and age-related measures are widespread in law and in social and employment legislation".[856]

Age-based differentiation and age-limits have been introduced by the Greek legislature when the latter reformed the public pension system and reduced the pension benefits after the financial crisis treating differently individuals based on the criterion of age. In the following research, two examples are analysed and examined: the mandatory retirement for public employees above the age of 55 and the abolition of Christmas, Easter and holiday bonuses for pensioners below the age of 60. To address whether these two reforms constitute lawful age discrimination or not, it is examined whether the different treatment is proportional to the aims pursued.

Accurately, the Advocate General Mazak noted in the *Age Concern England* case that "*age is fluid as criterion and for this reason it is difficult to draw a line when age limit is justified and when not"*.[857] The stages followed for examining the justification and thus legality of the above two case studies are similar. Firstly, it is examined which legal norms are applied. In the first case, the right to non-discrimination guaranteed under the Employment Equality Directive No. 2000/78/EC and the Greek law that transferred the directive in the national law is applied. The right to equality guaranteed under the Greek Constitution as well as the principle of non-discrimination guaranteed under Article 14 of the ECHR could also have been applied, since they govern the same factual situation. However, on the grounds that they constitute general principles governing general matters (*lex generalis*), application in this case should find a law that governs a specific subject matter (*lex specialis*), namely the Employment Equality Directive, since the latter is specifically for employment matters. In the second case, the right to equality guaranteed in the Greek Constitution and the right to non-discrimination guaranteed under the ECHR is applied. The Employment Equality Directive does not find application in this case, because it does not concern active public or private workers, but pensioners. Therefore, the reduction of pensioners' additional allowances does not fall under the scope of the directive. Secondly, the aims pursued by the restrictive measures are laid down. Lastly, emphasising the factual circumstance of each case-study, I examine the restrictive measure under

856 Opinion of Advocate General Mazak, delivered on 23 September 2008, *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform,* C- 388/2007, EU:C:2008:518, at para. 74.

857 *Ibid*.

the aspect of the principle of proportionality. More specifically, it is examined whether the measures are suitable, necessary and proportional in a narrow sense to the aims pursued.

1. Mandatory „Pre-Retirement" Reserve Scheme

The Greek legislature introduced in 2011 a mandatory "*pre-retirement reserve scheme*". More particularly, all civil servants (with some exceptions)[858] were automatically dismissed once they had reached the age of 55 if they had fulfilled 35 years of service before the 31st December of 2013; once dismissed these civil servants were placed in a pre-retirement reserve scheme.[859] This means that their positions were annulled and the respective civil servants received 60 percent of their basic salary, minus all allowances. Any income earned from other professional activity in the private sector was deducted. Once they fulfilled the requirement for a full pension, they received old-age pension benefits. The suspension period was counted as a pension contribution period. This unique case of pre-retirement reserve scheme constitutes a method of enforcing mandatory retirement. The relevant legislation forced the civil servants to retire involuntary by use of age-based public policies. Ripe for consideration is whether this manner of dismissal, based on the criterion of age, constitutes justified direct age discrimination.

First of all, prior to any justification analysis, it has to be examined which legal norm finds application. In cases of mandatory retirement, the age limits constitute a condition that regulates the employment relationship as to when the employee has reached a certain chronological age the employment relationship is automatically terminated.[860] Therefore, the Employment Equality Directive No. 2000/78 must find application. The mandatory retirement falls under the scope of this directive, since according to article 3 of the Directive, the latter is applicable to all persons re-

858 I.e. teachers, doctors etc.

859 Article 33(1), Law No. 4024/2011. The measure in question has been declared unconstitutional by the Council of State. See Council of State (Plenary Session), Judgment of 18 January 2013, No. 3354/2013. The court held that the measure in question is contradictory to Article 103 of the Greek Constitution which promotes the proper functioning of public administration and to the constitutional principle of equality.

860 *Hack*, Taking Age Equality Seriously, p. 208.

garding the public as well as the private sector in relation to employment and working conditions, including dismissals. In addition, Article 4 of the Law No. 3304/2005, which transferred the Employment Equality Directive in domestic law, regulates that age discrimination provisions apply to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, access to all types of vocational training and working conditions (including dismissals and pay). Therefore, the respective case-study falls within the *ratione materiae* of the Employment Equality Directive.

Furthermore, besides the fact that the mandatory retirement is related to employment issues, it is necessary to identify that the respective measure constitutes direct age discrimination. In our case study, this is the case, on the grounds that the mandatory retirement provision of the Greek legislature operated through a difference in treatment based directly on the grounds of age. It tied the termination of the employment relationship directly to the criterion of age, namely to the age of 55. This constitutes less favourable treatment. Those civil servants whose employment contract terminates automatically upon reaching the age of 55 years are treated in a less favourable manner, on the grounds of age, than the younger civil servants are.

In the following, the key question is whether this direct age discrimination may be justified according to the Employment Equality Directive. The latter allows for the justification of direct age discrimination in the rubric of Article 6. The demarcation of valid from invalid differentiations based on age – that is justified from unjustified differentiations – is carried out by using the proportionality principle as a measurement tool.[861] In essence, Article 6 of the directive entails a proportionality analysis, because it demonstrates that the different treatment based on grounds of age must be objectively and reasonably justified by a legitimate aim, which is a characteristic of the principle of proportionality.[862]

With this in regard, the next step is to identify the existence of a legitimate aim that underlies the measure in question. The Employment Equality Directive does not indicate an exact delineation or definition of what constitutes a legitimate aim. The aims that are considered legitimate in the sense of Article 6 have in common that they are social policy objectives

861 *Ibid*, p. 88.
862 *Ibid*, p. 176.

such as those related to employment policy, the situation in the labour market or vocational training.[863] The CJEU has ruled in the past that the involuntary removal of an employee from the labour market, once he or she has reached the statutory retirement age, has been seen as a legitimate and proportionate measure achieving employment policies, such as the recruitment of new workers by means of better distribution of work between the generations, as well as the protection of public health.[864] However, in our case the aim of the relevant measure was not the replacement of older public servants with new ones, since their positions were annulled after they had been transferred to the mandatory pre-retirement reserve scheme. Therefore, the enacting age-discriminatory policy did not enforce the renewal of labour force, refraining from demeaning performance, and combating unemployment.

The aim of measure in question was the reduction of the general government employment.[865] In the explanatory report on the Law No. 4024 of 2011, the Greek legislature stated that the pre-retirement suspension of work aimed at a reduction to public expenditures and the shrinking of the public sector. According to the legislature, these aims could be achieved through a 40 percent reduction of the public salaries of those civil servants that were placed in the pre-retirement reserve scheme, as well as through the annulment of their positions. The pre-retirement reserve scheme was established under specific fiscal conditions, under which the country observed its commitments to lender-partners to reduce public expenditure, while the major benefit of this measure was that it may achieve this aim without causing upheaval in the lives of the personnel working in the public administration and the broader public sector.[866]

The aim of financial stability of public finances and the reduction in the public expenditures is not explicitly mentioned as a ground of justification for age discrimination neither in Article 6 of the Employment Equality Directive nor in Article 11 of the Law No. 3304/2005. However, the lists of

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863 *Ibid*, p. 178.

864 I.e. CJEU, *Palacios de la Villa v. Cortefiel Servicios SA*, Judgment of 16 October 2007, C-411/2005, EU: C: 2007:604; *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of 05 March 2009, C-388/2007, EU: C: 2009:128; *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Judgment of 12 January 2010, C-341/2008, EU:C: 2010:4.

865 *IMF*(2012), p. 7.

866 *ILO*(2013), p. 109.

these articles are not exhaustive. In principle, budgetary considerations can influence the nature or extent of the undertaken measure.[867] Advocate General Bot argued that "*a discriminatory measure may be maintained even if it pursues new aims, in the light of developments in social, economic, demographic and budgetary conditions*".[868] Therefore, it has to be ascertained that the Employment Equality Directive does not preclude the Member States of EU from taking account of budgetary considerations. In our case, the severe fiscal conditions in the Greek economy, as well as its obligation to reduce the public expenditures in the short-term in return for financial support, legitimise the aim of the legislature to introduce direct age discrimination in order to reduce the public expenditures.

However, the fact that the direct age discrimination pursues a legitimate aim cannot justify on its own the sweeping use of age distinctions. The factor of the severe financial crisis and the emergent need for financial assistance may not always function as the only crucial factor that justifies discriminatory measures. The crucial factor is whether the discriminatory measure is compatible with the justification requirements in respect of the principle of proportionality. In cases of direct age discrimination, the legislature is required to establish a high standard of proof of the legality of the discriminatory measure. The legislature is namely obliged to respect the boundaries set by the principle of proportionality, which means that the legislature is obliged to use objective and proportional criteria in order to achieve the intended aims and at the same time to ensure the equal treatment of the civil servants.[869] The principle of proportionality clearly states that in addition to the existence of an objectively justified legitimate aim, the undertaken measure of achieving that aim must be suitable, necessary (in the sense that no other non-discriminatory or less discriminatory measure could achieve the same aim) and proportional in a narrow sense with the aims pursued.

Therefore, first of all, part of the proportionality assessment is that the measure has to be suitable to achieve the identified aims. This means it

867 CJEU, *Gerhard Fuchs* (C-159/10) *and Peter Köhler* (C-160/10) *v. Land Hessen*, Judgment of 21 July 2011, EU: C:2011:508, at paras. 73and 74.

868 Opinion of Advocate General Bot, delivered on 03 September 2009, C-341/2008, EU:C:2009:513, at para. 49.

869 Council of State, Judgment of 15 December 2005, No. 4237/2005; Judgment of 14 September 2010, No. 2747/2010; Judgment of 08 September 2011, No. 2597/2011; Judgment of 13 October 2011, No. 3226/2011.

has to be rationally linked to the achievement of the previously identified legitimate aim. In general, the CJEU stated that as regards the determination of the measures that are capable of achieving the legitimate aim, the Member States enjoy a broad discretion.[870]

The respective legislative measure proved not to be suitable to achieve the reduction of the public expenditures of the general government and shrink the public sector. The crucial element when someone examines the suitability of a measure is the relation of the respective measure to the effects of the measure under consideration.[871] The mere generalisation concerning the capacity of a specific measure is not enough to show that the aim of that measure is capable of justifying derogation from the prohibition of age discrimination, but plausible studies are necessary.[872] The legislature did not specify advantages of the measure in question in mathematical terms. Not to mention that, in practice, only about 1,000 civil servants were placed in the pre-retirement reserve.[873] The public expenditures were thus not reduced as much as expected. In addition, using a mandatory retirement age as an instrument in times of demographic changes is not a suitable measure to lead to a long-term sustainable overall economy. This is because the latter can be achieved with a sustainable social insurance system that has a strong foundation for a sustainable economy, due to the strong inter-correlation between these two fields. However, the measure in question burdened financially the public pension funds, since most of those that fell within the scope of the law opted for early retirement.[874] In view of the current financial situation; i.e. the demographical changes and the high deficit of the public pension funds, the mandatory retirement did not guarantee a sustainable public pension system and it is in the public interest to keep civil servants on rather that reducing personnel. The fact that the legislature considered only the reduction of public expenditures, which nevertheless was not achieved in an effective mat-

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870 CJEU, *Gerhard Fuchs* (C-159/10) *and Peter Köhler* (C-160/10) *v. Land Hessen*, Judgment of 21 July 2011, EU: C:2011:508, at para. 61; *Palacios de la Villa v. Cortefiel Servicios SA*, Judgment of 16 October 2007, C-411/2005, EU: C: 2007:604, at para. 68.

871 *McColgan*, Discrimination, Equality and the Law, p. 123.

872 CJEU, *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of 05 March 2009, C-388/2007, EU:C: 2009:128, at para. 51.

873 *Yannakourou,* Irish Employment Law Journal 2014, p. 37.

874 *Ibid*.

ter, resulted in the financial difficulties of the public pension system being disregarded. However, according to the economic perspective of age discrimination, the legislature must influence retirement habits by increasing the age at which a person will be entitled to a full pension, and not indirectly force the employees into early retirement.[875]

Furthermore, the measure in question must be necessary to the identified legitimate aim. The necessity analysis in essence means that it should be examined whether alternatives to an absolute age limit are available. In our case, the respective measure was not necessary to achieve the aims pursued, on the grounds that the chronological criterion was not on its own the less discriminatory measure to ensure the reduction of public expenditures. The legislature could have used less-discriminatory measures that would reduce the public expenditures and shrink the public sector by promoting a better functioning of the public administration. Reducing public spending may be achieved by a multitude of measures. What is objectionable about the mandatory retirement is that it treats the individuals differently with respect to chronological criteria, as opposed to a more complete assessment of individual characteristics.[876] An individual assessment of the civil servants' performance might likewise contribute to reducing the public deficit. Namely, the legislature could have placed the civil servants in the pre-retirement reserve according to civil servants' qualifications, capacities and performance. In this way the dismissal criteria would reflect to a greater extent the functional and organisational administration needs. Along this lines of argument, the Council of State ruled that the criteria chosen by the legislature to place the civil servants in the pre-retirement reserve scheme should have also been related with the functional and organisational needs of the public administration, on the grounds that the legislature is obliged by the Constitution to ensure an organised and effective public administration, so that the public services are provided to the citizens in the framework of a social state.[877] The criterion of age shows a failing of the obligation of the legislature to ensure a proper and effective public administration, as promoted by the Greek Constitution. The classification according to the chronological criterion is inaccurate, as

875 *Schlachter*, in: *Schlachter* (ed.), The Prohibition of Age Discrimination in Labour Relations, pp. 12-13.

876 *Wedeking*, Canadian Journal of Philosophy 1990, p. 328.

877 Council of State (Plenary Session), Judgment of 18 January 2013, No. 3354/2013; (Plenary Session), Judgment of 18 December 2014, No. 4602/2014.

on its own it is not capable of providing a rational correlation between advancing age and declining job performance. The respective measure precluded the proper and effective functioning of the public administration, since experienced and skilled staff had been forced to retire.[878]

Ultimately, in the final stage of the proportionality test it has to be examined whether the effects of the chosen measure are disproportionate or excessive in relation to the interests affected. Here, the competing interests have to be balanced again with each other. Predominately, the interests that have to be weighed against each other are the interests of the employees and the interests of the state.[879] It is a balancing act between the employees' interest not to be discriminated against on the grounds of age due to compulsory retirement and the reduction of the public expenditures.

On the one hand, the urgency of reducing the public expenditures and in particularly the pressure of achieving this aim constitutes a strong argument on overweighing the civil servants' right not to be discriminated against on the grounds of age. This is because in a different case the state may face problems of liquidity due to the denial of further instalments of financial assistance by the international creditors. However, in times of financial crisis, the particular attention must be paid to the participation of older workers in the labour force, so that the unemployment rate is not increased as well as to disincentives for early retirement. Increasing the unemployment rate is disproportional to the reduction of public expenditures and the state's economic well-being. Besides the promotion of employment, the promotion of early retirement may also not contribute to the reductions of public expenditures, on the grounds that the public pension expenditures will then be raised. With this regard, although the aim of reducing the public expenditures is *per se* in times of financial crisis a severe aim that could justify severe interference, in this case-study the measure in question did not reduce the public expenditures to a great extent while it increased the public pension expenditures, since it promoted early retirement at the age of 55. Therefore, the aim pursued is not severe but rather low or moderate. At least, there was not reference of reliable research finding and data available showing that the measure will have positive effects on the sustainability of the public pension fund.

878 *Yannakourou,* Irish Employment Law Journal 2014, p. 37.
879 *Hack*, Taking Age Equality Seriously, p. 181.

On the other hand, the civil servants are strongly affected by the age limit in terms of their right to non-discrimination. The interference with their right to non-discrimination is severe. First of all, this is because operating with the absolute mandatory retirement at the age of 55 that is considerably below the internationally applicable minimum standards is a measure that is very punitive for the individual civil servant. To discriminate merely on the basis that the older civil servants have reached a particular chronological age results in the diminishing of individuality and human dignity.[880] The older civil servants themselves may not participate in the economic, cultural and social life, while keeping older workers in the labour force properly promotes diversity in the workforce, which is an aim recognised in recital 25 of the Employment Equality Directive. Besides, the mandatory retirement age does not contribute to the realising of the older workers' quality of life of the workers concerned, in accordance with the concerns of the EU legislature set out in recitals 8, 9, and 11 in the Employment Equality Directive.[881]

Secondly, the interference with the right to non-discrimination is severe on the grounds that it interfered with the civil servants' self-fulfilment related to their expectation in continuing their working life. The CJEU has stressed that the prohibition of discrimination on the grounds of age must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the EU.[882]

In the Greek Constitution, the right of civil servants to work beyond pensionable age, which is the age that the employee is entitled to receive pension, does not find constitutional consolidation and thus the Greek Constitution allows for introducing enforced retirement. Namely, according to Article 103(4), the civil servants may be dismissed when they reach the pensionable age. However, in the respective case, the Greek legislature did not force the civil servants to retire once they have reached the pensionable age, but once they were close to this age. Namely, the respective legislation introduced a maximum age limit to terminate the employment

880 *Manfredi / Vickers.* Industrial Law Journal 2009, p. 344.

881 CJEU, *Gerhard Fuchs* (C-159/10) *and Peter Köhler* (C-160/10) *v. Land Hessen*, Judgment of 21 July 2011, EU: C:2011:508, at para. 63.

882 CJEU, *Gerhard Fuchs* (C-159/10) *and Peter Köhler* (C-160/10) *v. Land Hessen*, Judgment of 21 July 2011, EU: C:2011:508, at para. 61; *Palacios de la Villa v. Cortefiel Servicios SA*, Judgment of 16 October 2007, C-411/2005, EU: C: 2007:604, at para. 62.

relationship, while this defined maximum age limit differed from the pensionable age. In this sense, the expectation of civil servants to continue working has also been unexpected removed. The civil servants did not expect to retire in the age of 55, since this age limit was not the pensionable age of the public servants, even before the introductions of the new pension reforms of Laws Nos. 3865/2010 and 4093/2012.[883]

Therefore, taking into consideration the aforementioned, the mandatory retirement age of 55 is not proportional in a narrow sense, on the grounds that the aim pursued was moderate while the interference with the right to non-discrimination was severe. Therefore, the urgency of reducing the public deficit cannot be overweighed up against the right of the civil servants not to be discriminated based on the grounds of age. The measure in question is unconstitutional because it is not suitable, necessary and proportional in narrow sense to the aim pursed.

2. Abolition of Bonuses for Pensioners Below the Age of 60

The Greek legislature abolished for pensioners aged less than 60 years old the Christmas, Easter and holidays bonuses through the Article 3(10) and (14) of Law No. 3845 of 2010.[884] In this case-study, it can be witnessed a distinction on the grounds of age, namely a distinction between the pensioners above and below the age of 60. To proceed on the examination whether this distinction constitutes lawful age discrimination or not, firstly, it has to be clarified which legal norm finds application.

In this case-study, the Employment Equality Directive does not find application. This is because the age distinction does not concern public or private workers but pensioners. Distinctions among pensioners do not fall under the scope of the directive, since they do not relate to employment

883 The aim of reducing the public expenditures could have been balanced in this sense also with the right of the civil servants to exercise their right to work by applying as legal norm the constitutional right to work guaranteed in Article 22 of the Greek Constitution. However, since the sole application of the right to work would go beyond the age discrimination, this balance is not weighed up here.

884 Although this provision was amended in Law No. 4093 of 2012, which abolished the additional bonuses for all pensioners, the provisions of Article 3(10) and (14) of Law No. 3845 of 2010 are still of significant interest because of the special age differentiation that they introduced.

issues. For this reason, the legal norm should be found on the constitutional level or in the ECHR. On the constitutional level, there is no explicit protection against age discrimination or discrimination based on other grounds than age. However, Greece has manifested the general principle of equality in Article 4 of the Greek Constitution, which entails the right to non-discrimination. Furthermore, in this case-study the Article 14 of the ECHR and its supplement provision in Article 1 of the Twelfth Protocol of the ECHR find also application since both provisions set out a general prohibition on discrimination. Indeed, they do not refer expressly to the prohibition of discrimination on the grounds of age, but the non-exhaustive list leads to the approach that the prohibition of age discrimination is also included.[885] Besides, clearly the focus of this protocol is on human rights in the public sphere and not on relations between private parties.[886]

Therefore, the constitutional right to equality of Article 4(1) of the Greek Constitution as well the principle of non-discrimination guaranteed in the ECHR may be used as legal basis in this case. Article 14 of the ECHR finds application when differential treatment of persons is identified and the pensioners are in analogous or relevantly similar situations.[887] So, in order to evaluate whether these legal provisions find application, it must first be established that different treatment has taken place, that it is based on a certain badge of differentiation. The assessment of comparable or relevantly similar situations is a value judgment.[888] Certainly, the criteria on the basis of which similarities or dissimilarities are considered to exist and the corresponding badge of difference focus attention appropriately on the goals of equality provisions and the varying degrees of individual interests in being free from discrimination on basis of theses badges.[889] In this case-study, the measure in question introduced a direct different treatment among the current pensioners by using as criterion the chronological age, in order to abolish a pension benefit. It treated obvious-

885 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 38.

886 *Ibid.*

887 ECtHR, *National Union of Belgian Police v. Belgium*, Judgment of 27.10.1975, Appl. No. 4464/70, at para. 44. For a statement of the analytical approach that includes the analogous situation conditions see ECtHR, *Thlimmenos v. Greece*, Judgment of 06.04.2000, Appl. No. 34369/97, at para. 44.

888 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 128.

889 I*bid.*

ly less favourably the pensioners who were less than the age of 60 than the pensioners who were above the age of 60.

If the required difference is established, it should then be examined whether relevantly similar situations or (highly) relevantly different situations exist. Two or more categories are similar when the individuals, who belong in these categories, are under similar conditions.[890] The current pensioners are under similar conditions as they belong to the same group of the population and moreover, they have to face similar financial problems imposed by the financial crisis, namely the reductions imposed on their old-age pension benefits. Therefore, one could argue (albeit with reservation),[891] that the relevant current pensioners are in relatively similar situations. Hence, the constitutional right to equality and the principle of non-discrimination of Article 14 ECHR find application and may provide a legal remedy to current pensioners.

Next, it has to be examined whether this different treatment has objective and reasonable justification.[892] Such objective and reasonable justification exists if the difference of treatment pursues a legitimate aim and if there is a relationship of proportionality between the means employed and the aim sought to be realised. Namely, Article 4 of the Greek Constitution and Article 14 of the ECHR are violated when relevantly similar situations are treated differently while there is no objective and proportional justification.

The measure in question was seen by the Greek legislature to be a crucial solution to dealing with the increasingly costly public-financed social insurance system. In addition, the Council of State ruled that this measure pursued further the legitimate aim of providing the "*older*" pensioners more protection than the "*younger*" pensioners.[893] Generally, a legitimate aim can almost always be found and argued for, since governments can always claim good intentions and noble aims and the assessment of whether

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890 *Stergiou*, EDKA 2012, p. 327.

891 This is because some pensioners may be in a different and/or better financial situation than the others and vice versa. See also the judgment of the Council of Audit (Plenary Session) No. 1938/2009 which declared that individuals insured in different pension funds do not fall under the same category.

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

893 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 40; (Plenary Session), Judgment of 02 April 2012, Nos. 1283-1286/2012, at para. 34.

the aims pursued is legitimate only focuses on the aim in isolation.[894] Therefore, both aims seem to be legitimate.

In a further step, the public interests involved in the legitimate aims pursued should be weighed up against the private interest in the enjoyment of the right not to be discriminated against on the grounds of age. In order to assess the fit and harshness of the measure in question, it should be evaluate whether the differential treatment based on age was proportionally by reasons of public interest.[895] Namely, age distinction must be carried out within the limits of the principle of proportionality, since the legislature is not allowed to arbitrarily apply obviously unequal treatment. The principle of proportionality is essential to ensuring the boundary between the state's discretion to act, and the right of the individual not to be discriminated against.[896] In that context, following, it is examined whether the abolition of additional bonuses for pensioners aged below 60 years old is a proportional measure to the aims pursued, namely whether it is a suitable, necessary and proportional in a narrow sense measure to the aim of contributing to the sustainability of the public pension system and the protection of "*older*" pensioners.

First of all, the measure in question is suitable for ensuring attainment of the objectives pursued, since it genuinely reflects a concern to attain it in a consistent and systematic manner.[897] In any case, it does not call for assessment of whether the measure taken function conductive towards the attainment of that aim or whether the measure taken functions to the detriment of certain groups in society.[898] The discriminatory measure may reduce the public expenditures on pensions and thus deficit of the public pension funds ensuring in this way the sustainability of the system. It may diminish the deficit of the public pension funds, on the grounds that it achieved the reduction of the number of pensioners entitled to these pen-

894 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 43.

895 Council of State, Judgment of 10 January 2000, No. 26/2000.

896 *Ellis,* in: *Ellis* (ed.), The Principle of Proportionality in the Laws of Europe, p. 179.

897 In that context see also CJEU, *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Judgment of 12 January 2010, C-341/2008, EU:C: 2010:4, at para. 53.

898 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 43.

sion benefits as well as it provided disincentives for early retirement.[899] Moreover, the respective measure is suitable to protect the "*older*" pensioners, on the grounds that the additional allowances for pensioners above the age of 60 were not affected.

Secondly, the chosen objective criterion for differentiation became a necessary legislative parameter. This is because the respective measure affected only a small part of the current pensioners and thus it can be regarded as the least discriminatory measure. According to the data of the Ministry of Employment, Social Insurance and Social Assistance, pensioners under the age of 60 constitute 15 percent of the total number of pensioners.[900]

Finally, the respective discriminatory measure appears to be proportional in a narrow sense with the aims pursued. In the context of the element of proportionality in a narrow sense, it is examined whether the importance of the legitimate aims pursued may outweigh the intensity of interference with the right of non-discrimination. Namely, the proportional relationship is dependent on the proportionality between the way in which the distinction based on the criterion of age was introduced and the intensity of the aim pursued. As advocated above, on the one hand, the intensity of the aim to reduce the public deficit and the deficit of the public pension funds was severe in the first year of the crisis, when the measure in question was introduced. On the other hand, the interference with the right to non-discrimination was moderate or light. In particular, application of this national legislation led to a situation in which all pensioners who have reached the age of 60, without distinction, could not receive additional bonuses, whatever their financial situation is. This classification based on age is reflective of some difference, having a fair and substantial relation to the aim of the legislation to reduce the deficit of the public pension funds and at the same time to provide more social protection to the "*older*" pensioners, so that all pensioners shall be treated alike.[901] The criterion of 60 concedes the idea that pensioners above the age of 60 may need more financial assistance than the pensioners aged below 60 years old. This is because "*younger*" pensioners have a greater chance than "*older*" pension-

899 Council of State (Plenary Session), Judgement of 20 February 2012, No. 668/2012, at para. 40.

900 *Hellenic Republic,* Ministry of Employment, Social Insurance and Social Assistance 2015.

901 See also *Abramson*, Missouri Law Review 1977, p. 39.

ers of finding an alternative occupation besides retirement, and this may replace their loss of income in spite of the fact that the pension benefits are reduced in case of employment in parallel with retirement. In this way, the "*younger*" pensioners may not suffer as detrimental a change to their finances as those who are "*older*". Therefore, the discriminatory legislation of abolishing the additional bonuses for pensioners aged less than 60 years old shall be declared as proportional and thus exceptionally allowed by reasons of public interest.[902]

C. Outcomes of the Case-Studies

The selected case-studies, that have been examined above, allowed conclusions to be drawn concerning the effect of the financial crisis on the development and level of judicial protection granted to the pensioners' rights; the importance of the right to social insurance that was emphasised after the crisis; and the criteria and principles that the legislature must take into consideration so that the pension reforms introduced in times of financial crisis are compatible with the principle of proportionality. The latter principle was used as a legal guidance as to how the public pension reforms are to be assessed. Following, these three outcomes are separately analysed.

I. The Decisive Role of the Financial Crisis on Judicial Development

De lege lata it may be ascertained that several of the public pension reforms and mainly the pension reductions, if viewed in light of the financial crisis and following a rigorous proportionality analysis, may be held as justified. This finding implies that an urgent economic and financial crisis plays a decisive role in the balancing process. Namely, the restrictive mea-

902 The minority opinion of the Council of State ruled that the criterion of age is discriminatory, since it does not define that pensioners over the age of 60 have increased needs of financial assistance in Christmans, Easter and holiday periods. According to the same opinion, the criteria that the legislature must take into consideration is not the criterion of age but the years of service and the amount of the paid contributions, on the grounds that actually these two criteria reflect the pensioners' contribution to the social insurance system. See Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 41.

sures may be deemed proportional in times of extreme financial crisis, while the same measures could have been deemed disproportional and thus unjustifiable in ordinary times. This is because the more important and pressing the social policies concerned are, the more necessary and inevitable is the retrenchment.[903] Therefore, the more intensive a crisis is, the more serious is the importance of the legitimate aims pursued that could overweigh and thus justify even severe interference with the pensioners' rights. *De lege ferenda* even in times of financial crisis it should be held as arbitrary to interfere with pensioners' rights, when certain requirements are met. The jurisprudence of the Council of State is an illustrative example of when the courts should show some reluctance to the decision of the legislature to interfere with pensioners' rights and when not, since it offered interesting and divergent rulings on this legal issue.

In the first ruling of the Council of State,[904] which concerned the pension reductions introduced in the first year of the crisis (in the year of 2010), the court operated weighing between the emergent need of reducing the public debt with the pensioners' property rights and declared the constitutionality of the pension reductions. The Council of State, in plenary session, demonstrated a wide reluctance to review the constitutionality of the first emergency measures undertaken within the framework of the first economic adjustment programme. It argued that the reductions in the pension benefits are constitutional because of the exceptional fiscal circumstances that the state had to face. The court held that the aim of the measures was not merely the fiscal consolidation of the state but the urgent need to tackle the difficult economic situation of the state and avoid its bankruptcy. Namely, because of the imminent character of the crisis the legislature was not obliged to evaluate the consequences of the measures on the pensioners' level of income as well as to limit the measures in time. In this way, the Greek jurisprudence took thus into account the new realities, declaring for the first time the confrontation of the crisis as a crucial factor in the balancing process.

The second wave of judicial rulings appeared in 2014. The Council of State remained stable to its previous jurisprudence and ruled the proportionality of the pension reductions introduced in the second year of the cri-

903 *Hay*, Journal of Social Policy 1998, p. 528.

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

sis.[905] Similarly to its first judicial rulings concerning crisis-related pension reductions, the Council of State supported in the judicial rulings, which concerned the pension reductions introduced in the second year of the crisis (in the year of 2011), that the respective reductions were proportional, on the grounds that they pursued legitimate grounds of public interest and constituted part of a wider economic and structural programme for the fiscal consolidation of the state.

In contrast to the aforementioned judicial rulings, there was the ruling of the Council of State concerning the last round of pension reductions introduced in the third year of the crisis (in the year of 2012).[906] The court shifted its jurisprudence and gave more value to the non-emergency of the Greek financial crisis than the national authorities did, arriving at the conclusion that the pension reductions could not be justified. The main argument of the court was that the economic and financial circumstances were different in relation to the situation of the public finances at the time of the publication of the previous jurisprudence. Therefore, the court reassessed the severity of the aims pursued and the elements of the principle of proportionality under the newly economic circumstances. More specifically, the court ruled that generally, the state is allowed to reduce current pension benefits in times of exceptional and severe fiscal crisis as it may emerge that 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. Yet, the court argued that in the third year of the crisis the imminent threat of an economic collapse of the state was lacking and there was not an urgent need to immediately confront a sovereign crisis searching for international financial assistance, since an economic adjustment programme had already been put in truck and thus the initial basic measures of confronting the crisis had already been designed and undertaken. Subsequently, according to the court, the legislature had the time to conduct a well-established analysis that would ascertain and prove whether the measures were compatible with the Greek Constitution.

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

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

Against this background, the first judicial reasoning was based on the state of emergency doctrine.[907] The existence of such a severe financial crisis may be recognised by the judicative power that is giving weight to its existence, when it balances between the restrictive measures and the protection of rights.[908] In the aftermath of the crisis, restrictive measures in the field of pensions were also essential, due to the ongoing recession and Greece's need to reduce the public deficit and debt in return for financial support. However, in the third year of the crisis, the financial crisis was not extreme and was no longer so urgent that it threatened the sovereignty of the state, as was the case in the beginning of the crisis. This is because in the aftermath of the crisis, an economic adjustment programme had been put into place. The Greek state, as a bail-out country, could receive financial assistance to solve its high public debt problem, in return for undertaking the necessary measures to reduce its public deficit.

The shift in the Council of State's jurisprudence shows that the element of urgency is actually the key factor which influences the process of balancing, and consequently the level of judicial protection towards the pensioners. The judicial protection towards the pensioners does not depend on whether the state has to face a financial crisis, since it is often a phenomenon that the state faces economic difficulties due to high public debt, but it depends on the level of severity of a financial crisis. An effective judicial protection takes place when the financial crisis in not very severe and the state has already found other means of financing, such as borrowing from the ESM and the IMF. In that case, there is not an urgent need to reduce the public deficit and debt and therefore, the legislature is not allowed to restrict further the pensioners' rights, on the grounds that the state had the time to adopt other less restrictive measures that could achieve the same goals in the long-term.

Against this background, a financial crisis may not justify *per se* restrictions on pensioners' rights, but only when the element of urgency exists. Under the term "*urgency*" falls a financial crisis that is exceptional, imminent and able to put at stake the substance of the state leading the latter to its economic collapse. In addition, the emergent need for financial support by international creditors and the international pressure for reduction of the public deficit played the same decisive role besides an urgent financial

907 *Yannakourou,* in: *Kilpatrick / De Witte* (eds.), Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges, p. 22.

908 *King*, Social Rights and Welfare Reform in Times of Economic Crisis, p. 5.

crisis rendering the financial crisis to a situation of urgency. The element of urgency plays a decisive role in the balancing process undertaken through the element of proportionality. It upgrades the importance of the legitimate aims pursued (sustainability of public finances and public pension system) to the level of seriousness. As a result, the serious legitimate aims of public interest become able to outweigh even severe interference with fundamental human rights protected under national law. For instance, the urgent financial crisis of the year of 2010 upgraded merely fiscal interests of the state and the effort to overcome the high public deficit and the deficit of the public pension system to a national interest and as a consequence justified the restriction on the pensioners' right to old-age pension benefits imposed by the first pension reductions, in order to avoid the bankruptcy of the state. However, the same crucial factors may not upgrade the legitimate aim of public interest to the level of seriousness when a financial crisis is not urgent and the solvency of the state is not in imminent danger. Therefore, the economic and financial crisis, as well as the external pressure to decrease the public deficit in return for conditional financial support, played a central role in the review of the constitutionality of the restrictive measures that were undertaken in the beginning of the crisis; whereas both factors play a less important role on the constitutionality of the restrictive measures undertaken in the aftermath of the crisis.

Besides the element of urgency, another important element is the cumulative reductions in the current pensioners' benefits introduced during the crisis. The Greek courts did not examine the constitutionality of cumulative pension reductions, but only the constitutionality of each reduction separately. This happened because of procedural reasons, on the grounds that each time the claimants brought the reductions separately before the courts and not the reductions introduced by the legislature through all laws. Yet, it is important to also analyse this element. Namely, not only the urgency of a financial crisis, but also the continuous implementation of the same restrictive measure must play a crucial role in the balancing process and erode the principle of proportionality. The effort to overcome an urgent crisis may not erect insurmountable obstacles, when the legislature had been continuously introducing the same restrictive measure. The continuous introduction of the same measure shows the lack of suitability of the measure in question. Accordingly, the continuous pension reductions are unsuitable and thus not proportional. In addition, when the legislature introduces continuous pension reductions, then the interference with the pensioners' rights becomes more severe. The more severe the interference

is the more urgent, severe, present and exceptional the financial crisis should be, in order to outweigh the severe interference. This is because stronger arguments are needed in order to outweigh severe interference with pensioners' rights. However, the financial crisis did not become more severe in its third year, but the legislature continued reducing the pension benefits. For this reason, the balance between the legitimate aims pursued and the protection of pensioners' rights must be held as disproportional and thus unconstitutional, concerning the reduction introduced in the third year of the crisis.

Moreover, another interesting outcome is that the level of urgency of the financial crisis influenced also the level of judicial review. Generally, the judicative power may be more inclined to exercise restraint in judicial review concerning restrictive measures undertaken by the legislature as a democratically elected body, in order to avoid violating the principle of popular sovereignty as well as the principle of the separation of powers. This tendency becomes more intensive and extensive in cases of an urgent financial and economic crisis, when the courts take preference to exercising judicial self-restraint, rather than a more activist approach to judicial review.[909]

The Council of State proceeded to perform a marginal judicial review in the first judicial ruling No. 668/2012, merely accepting the aims as legitimate and proportional without examining deeply the proportionality of the measure. This is because declaring the measures that had been undertaken by the legislature, in order to overcome the crisis, unconstitutional would have serious economic and political implications at that time, which were heightened by the emergent need for financial assistance. Indeed, the court did not examine whether the old-age pension benefits reductions constituted the most suitable and the least restrictive measure, arguing instead that the restrictive measures constituted restructuring consolidation measures as well as part of a social insurance reform, which is part of a wider economic adjustment of the state in return for financial support through bilateral loans from the Member States of the EMU and from the IMF. In this way, the court opted for self-restrained judicial review. Yet, the fact that the legislature also adopted other restrictive measures to achieve the same aims does not release the court from the obligation to examine, comprehensively, the suitability and the necessity of the measures,

909 *Ktistaki,* EDKA 2012, p. 500.

as these are essential steps for the declaration of the legal implementation of the principle of proportionality. Obviously, due to the lack of technical knowledge and management experience in the developments of social policy issues, the court chose to avoid exercising judicial activism at the outset of the crisis, being deeply involved in a case with great budgetary and political implications. Similarly, the ECtHR exercised also a restraint judicial review in a case concerning the pension reductions introduced by the Greek legislature in the first year of the crisis.[910] The ECtHR accepted that in the area of pension legislation Greece enjoys a wide margin of appreciation and took into consideration the decision of the Council of State No. 668/2012.

On the contrary, the lack of the element of urgency led to active judicial review. In the ruling No. 2287/2015, the Council of State exercised an activist review by enquiring deep into the nature of the public interest choice which was under challenge.[911] Namely, the court gave in this ruling a greater dimension to the fiscal consolidation of the social insurance funds than the fiscal consolidation of the public finances, as it did in the ruling No. 668/2012. The court held it to be inadequate that the legislature chose to only consider the need for "*fiscal consolidation"*, while the mere reference to the "*adverse financial situation"* of the social insurance funds as the main reason for the problem was held as too vague, as the legislature referred to all social insurance funds. The court ruled that the respective measures were adopted under the revised view of the new pension system, where the state is not obliged to participate in the financing of the funds, so that the individuals are exclusively responsible for the sustainability of the funds, which is to be achieved mainly and exclusively by the mathematical actuarial relationship between benefits and contributions. Furthermore, the court applied the principle of proportionality more comprehensively than in the ruling No. 668/2012. More specifically, it ruled that the legislature should have evaluated the factors that provoked the problem of the sustainability of the social insurance funds (especially the devaluation of the funds' assets through the PSI of the Law No. 4050/2012[912] as well as the continuing recession and the following high unemployment rate), in

910 ECtHR, *Koufaki and ADEDY v. Greece*, Decision of 07 May 2013, Appl. Nos. 57665/12 etc.

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

912 Law No. 4050 of 2012, Official Gazette of the Hellenic Republic 36/A/23.02.2012.

order to evaluate the suitability of the respective measures. Besides, it held that the legislature should have also comprehensively evaluated their necessity by searching for alternative measures and comparing the benefits and costs of such in relation to the pursued public interests (fiscal consolidation, sustainability of public social insurance funds and guarantee of adequate living conditions). However, in order to avoid any fiscal imbalances which may result from the unconstitutionality of the pension reductions, the Council of State ruled that its judgment would work retrospectively as well as prospectively only for the current claimants. Pensioners other than the claimants must thus bring an action before the administrative courts, so that the reductions imposed on their pension benefits can also be judged as unconstitutional. In this way, the court kept a proper balance between an active and more restraint judicial review. The court, on the one hand, did not refrain from declaring the unconstitutionality of the reductions since it felt that the government had not pursued legitimate aims and the measures in question were not proportional to the aims pursued; and on the other hand, the judicial decision would not possibly have any great consequences on the on-going political and economic developments.

In its rulings No. 2287-2287/2015 the Council of State acted thus in a legitimate manner and followed the correct course of action by not acting with restraint in cases of old-age pension benefits' reductions. The judicative power is obliged to exercise an objective review. If the judiciary does not exercise an objective review, implementing the law properly, then it has failed in its duty. The idea that a judge is not in a competent position to indicate, what the most appropriate and necessary restrictive measure may be, violates the core element of democracy which involves that the judiciary is custodians of law, even if the measure is a social policy measure. Of course, the court should take into consideration in the balancing process the element of a severe financial crisis, but the existence of a financial crisis (either severe or not) should not be a burden on the judicative power to examine properly, whether the pension reductions were suitable and necessary to reduce the public deficit and debt. The judicative power is obliged to take into consideration that the same measure had been undertaken also in the past, and whether the legislature examined less restrictive measures. Applying the rule that courts should not interfere with social policy choices would mean that the social rights would be left

without an effective remedy.[913] The depth of judicial involvement should depend upon the seriousness of the limitation of a right in the case at hand; the more serious a limitation, the more intense the review engaged by the courts should be.[914]

Last but not least, the financial crisis and the external pressure in return for financial assistance did not influence the development of judicial protection in cases of specific professions. The Greek courts provided a wide judicial protection to the special category of military officers, members of security groups and judges, even in times of financial crisis, on the grounds that these categories of professions enjoy specific peculiarities not recurring in other categories of public employees.[915] In these cases, the courts did not use the right to property or the right to social insurance as legal grounds, but instead focused only on the special characteristics of the respective professions, and their argument was based on a totally different legal basis. More particularly, the Council of State ruled that the pension reductions of the military in general and the members of the security corps, introduced through Law No. 4093 of 2012, were unconstitutional because the legislature did not keep a proportional balance between the principle of special salary conditions and the fiscal interests of the state.[916] According to the court, the legislature illegally relied exclusively upon a purely mathematical measure, namely the average reduction in public spending on pensions, ignoring altogether the importance of the constitutional function of the military and armed forces. According to the court, the legislature did not take into account the specific circumstances of their mission, the impact of the disputed cuts on their living standards and the possibility to adopt less restrictive measures that would have an equivalent effect, as provided by the principle of special salary conditions. The court stated that the armed forces must enjoy special treatment, which derives from a number of constitutional provisions, such as from the fact that the commander in chief on the nation's armed forces is the President of Republic (Art. 45), from the fact that they are deprived of the right to strike

913 *Poulou*, German Law Journal 2014, p. 1171.

914 *Rivers*, Cambridge Law Journal 2006, p. 177.

915 Special Court of Article 99 of the Greek Constitution, Judgment of 30 December 2013, No. 88/2013; Council of State (Plenary Session), Judgment of 17 January 2014, No. 2192/2014.

916 Council of State (Plenary Session), Judgment of 17 January 2014, No. 2192/2014.

(Art. 23(2)) and they are not allowed to manifest favour for any political party (Art. 29(3)). From these provisions, it was argued by the court that the core competences of the armed forces fall within the state's authority and cannot in principle be delegated to private operators. In order to successfully fulfill their mission, the armed forces and the police are militarily structured, subject to strict chain of command, while their operatives are military personnel, placed under a specific authoritative status. Their official and non-official obligations justify numerous special human rights restrictions that apply for ordinary citizens, such as the absolute prohibitions of Articles 23(2) and 29(3) of the Greek Constitution mentioned above. Therefore, to counterbalance aforementioned circumstances, members of armed and security forces must enjoy special salary conditions. The principle of the special salary conditions and thus the principle of special old-age pension benefits conditions reflect an institutional guarantee, which seeks to ensure the effective fulfillment of their mission. The principle of the special salary conditions asserts that wages policies must be made with consideration of certain factors: such as the specific circumstances, the occupational hazards, the echelon and the prevention of corruption.[917]

In addition, the Special Court of Article 88(2) of the Greek Constitution decided that the reductions in public salaries of the judges are unconstitutional and its ruling was based on the following reasoning.[918] The court particularly ruled that pension or salaries reductions in the judiciary is contrary to the constitution because it posed a challenge to the judiciary's independence, whilst the judiciary is one of the three powers besides the executive and legislative power, whose independence is guaranteed in the Constitution. Reducing the public salaries of the third independent power without reducing at the same time and to the same extent the salaries of the other two powers is contrary to the separation of powers and the independency of the judicial power, which is guaranteed by high level of public salaries.

In light of this, it is not a convincing and reasonable statement that cutting old-age pension benefits of the judiciary and the military officers or

917 In so complying with the plenary session of the Council of State's ruling, the legislature abolished the provisions that reduced the monthly payments of the military and security corps foreseen in Law No. 4093 of 2012 through Art. 86(1), Law 4307 of 2014, Official Gazette of the Hellenic Republic 246/A/15.11.2014.

918 Special Court of Article 88(2) of the Greek Constitution, Judgment of 30 December 2013, No. 88/2013.

security crops is contrary to the constitution because of the special characteristics of each category. It is legally ill-grounded to protect the pensioners' right by not using the right to property or the right to social insurance in national restrictive social policies as a legal basis, but applying the principle of separation of powers or the right to fair trial or diverse constitutional provisions respecting the limitations on their rights. This might help to draw an unexpected conclusion that the judges did not rule objectively in their decisions. Objectivity in judicial review requires self-discipline, which means that the courts must refrain from imposing their own preferences about what the law should be and bear the responsibility to adhere to the meaning of the law, the facts of the case and deliver a logical conclusion.[919]

II. Enhancing the Right to Social Insurance

Before the financial crisis, social rights have been mainly used in a programmatic nature, while constitutional norms other than the right to social insurance are applied in order to oblige the state to perform concrete tasks in terms of the implementation of the right to a pension. In practice, property rights have served to ground social security rights claims, when the pensioners seek to challenge the state's responses affecting their right to a pension. The right to social insurance has only been of limited use to those seeking to advance social rights claims. This is because the right to social insurance as a positive social right is incapable of underpinning constitutional regimes, since it actually provides for affirmative action and does not provide the pensioners with the ability to claim pension benefits of a specific amount. However, this approach disregards the proper enforcement of the social right to old-age pension benefits.

After the financial crisis, a subjective dimension to the right to social insurance became absolutely essential, because of the continuous reductions in social insurance benefits. The social insurance benefits, such as the old-age pension benefits, are the obvious victims, triggered by the crisis, since they are directly dependent on economic resources of the state. The legislature chose to use fiscal consolidation measures several times to aim for the reduction in old-age pension benefits and therefore, their pro-

919 *Smith*, Judicial Review in an Objective Legal System, pp. 244-245.

tection was urgently needed. The jurisprudence of the Council of State offers interesting points to the subjective dimension of the right to social insurance.

While the Council of State, in its first judicial ruling No. 668/2012, applied the right to property as legal basis to pensioners seeking legal avenues to bring crisis-related challenges, the same court held that even if the pension system, in which individual has contributed mandatorily, give rise to acquired rights, the pensioners' rights should be protected not only along the lines of property protection but also from the right to social insurance.[920] This is a huge offer in the importance of the judicial protection provided by the social rights. Empirical research supports that those countries with constitutionally entrenched socio-economic rights and strong powers of judicial review have been shown to devote more on their national wealth towards the realisation of socio-economic rights; in contrast, countries lacking judicial review experienced lower levels of spending on social programs.[921]

The Council of State used the right to social insurance as a foundation for claims in cases of pension reductions that were introduced in the second and third year of the financial crisis.[922] The court refrained from applying the the right to social insurance in first instance cases of pension benefits reductions. The right to social insurance was therefore only applied by the court in cases of successive pension reductions. Profoundly, the court regarded that the extensive and continuous reductions interfered with the core of the right to social insurance. Departing from its lines of argument, the Council of State defined the content of the right to social insurance and its core as the following: on the one hand, the Council of State ruled that the old-age pension benefits should not correspond precisely to the amount of contributions paid, nor to recover the full loss of income. On the other hand, the Council of State ruled that this aspect of the right to social insurance is to protect the pensioners' right to receive pension benefits that depend upon an amount able to secure adequate living standards "*as far as possible*" closely to the income the pensioners were enjoying

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920 Council of State, Judgment of 10 June 2015, Nos. 2287-2290/2015.

921 *O' Connell*, Vindicating Socio-Economic Rights: International Standards and Comparative Experiences, p. 7.

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

prior to retirement, while the level of minimum existence was set as the red line.

Correctly, the court ruled that the amount of pension benefits should not correspond to the total amount of pension contributions, since the latter occurs mostly in cases of private insurance, where the idea is that every insured person has a hypothetical, individual account in which the contribution will accrue. In the Greek public pension system, the balance between the contributions and the benefits is not the same as in private insurance. The amount of benefits and the amount of contributions may not be equal, given that they form part of a solidarity benefit system, which itself exists within a PAYG system. In addition, correctly the court ruled that the right to social insurance indicates that the old-age pension benefits should be of an amount that corresponds to the living conditions that the individual was enjoying whilst working. The Greek public pension system has a contributory character and its aim is to guarantee that the pensioners enjoy similar living standards to that which the individual was enjoying prior to retirement.

However, the Council of State was not very concrete on what falls under the meaning "*as far as possible*". This is because it is actually the legislature that holds the competence to define this. The judicative power is not competent to define how the equivalence between the paid contributions and the final pension benefits should be shaped. The judicative power is competent to define the core element of the right to social insurance; namely, to define when the old-age pension benefits no longer correspond to the living standards that the individual was enjoying before retirement. The Council of State failed defining the core element of the right to social insurance, while it ruled only the principle of minimum existence as a limitation on the legislature.[923]

The element of the principle of minimum existence does not belong as an element to the substance of the right to social insurance. This is be-

923 Similarly, the Council of State used the principle of minimum existence as a minimum line for pension reductions in the first ruling concerning pension reduction. It decalred that the reductions were proportional, on the grounds that the reduction and/or abolishment of the bonuses allowances did not lead to the total deprivation of the right to pension, because the Article 2 of the Greek Constitution, which guarantees the right to human dignity is not violated. The right to human dignity was not violated, since the claimants did not prove that these reductions would endanger their life or human dignity. See Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 35.

cause the reduction in all pension benefits to the same level disregards the fundamental contributory character of the system. The right to social benefits cannot be easily impaired in cases of pension reductions when there is a strong connection with personal earnings. Namely, the thesis that the pension benefits may be reduced to such an extent as long as they cover the pensioners' minimum existence contradicts the principle of equivalence, since not all pensioners have paid the same amount of contributions to the public pension system. The principle of the minimum existence must be applicable only in social assistance cases when the individuals have not paid any contributions to the social assistance system rather than in social insurance cases, where a certain level of equivalence must be respected.

Furthermore, the right to minimum existence may not to be taken into consideration in the balancing process of the principle of proportionality. Namely, it is not legally correct to rule that old-age pension benefits reductions are proportional, when the granted amount of benefits guarantees a level of minimum existence. This is because any untouchable core, such as the right to minimum existence, can hardly be assessed, when the constitutionality of pension reductions is examined using the legal tool of the principle of proportionality.[924] The latter principle outweighs different legally protected interests and the right to minimum existence should not be assessed as a protected interest because of its absolute character.[925] Besides, this approach is not helpful in addressing the legal position of those pensioners who have not reached the minimum existence threshold but suffer, however, disproportional losses of income and well-being through the crisis.[926]

A more accurate thesis would be that in cases of continuous pension reductions the right to social insurance as a social right to old-age pension benefits should be used as legal norm in order to legally constrain successive post-crisis actions and provide a subjective, enforceable right on the part of the state, when it becomes apparent that there is an absence of the element of equivalence. This is because the principle of equivalence is a core element of the constitutional right to social insurance. The principle of equivalence guarantees proportionality between the granted old-age

924 *Becker / Hardenberg*, in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 114-115.

925 *Ibid.*

926 *Bilchitz*, IJCL 2014, p. 710, 732.

pension benefits and the paid contributions. This means that the legislature must reduce the old-age pension benefits to such an extent that the final amount still corresponds to the pre-retirement living conditions of the pensioners.

What is ripe for legal consideration is when exactly the amount of pension benefits received corresponds to the pre-retirement living conditions. This is a matter of examination in accordance with the facts of the case at hand. The core of the right to social insurance should be defined *a posteriori* according to the circumstances of each case and not *a priori* by shaping general rules based upon assumptions and predictions. In other words, a general principle on when the principle of equivalence does not exist should be defined by the judicative power from the particular scenario at issue, based upon actual observation or upon empirical experiences and tailored to the known facts each time.

For example, the right to social insurance may be applied in the case of the self-employed of OAEE, where the principle of equivalence was disregarded. This is a special case, since there was a great divergence among the amount of paid contributions. The OAEE-insured could choose between paying the maximum contributing pattern (199,200 Euros accrued contributions) or the minimum contributing pattern (91,118 Euros accrued contributions).[927] On the grounds that this difference existed among the paid contributions, the old-age pension benefits of the OAEE-pensioners should have been reduced proportionally to their paid contributions. However, after successive reductions, the group of pensioners that paid the maximum contributions rates had their pension benefits reduced eight times more than the group of pensioners who paid the minimum contribution rates. For this reason the right to social insurance should be applied in this case, because the principle of equivalence had been disregarded.

With this in regard, the right to social insurance should also be applied in cases where other core elements of the right are infringed, such as the principle of the protection of social insurance in favour of the future generations. Namely, the judicative power should apply the right to social insurance when the sustainability of the social insurance system is infringed; for instance, when generous old-age pension benefits are provided. Again,

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927 This amount of accrued contributions could be achieved for both cases (maximum and minimum contributing pattern) after 40 years of service. See *Simeonidis / Diliagka / Tsetoura*, Journal of Social Cohesion and Development 2014, p. 34.

the criteria for whether the sustainability of the pension system is infringed because of generous benefits provisions are to be examined by the courts *a posteriori* according to the data of the respective public pension funds.

III. Limits on the Interference with Pensioner's Rights

From the case-studies it can be derived that generally, in the area of pensions, states must enjoy a broad scope of discretion and therefore may legitimately yet unfavourably change the public pension system by reducing the amount of pension benefits normally payable to the qualifying population. This is in the interests of the improvement of the efficiency of the public pension system, including the social insurance system, and the adaptation of the public finances to new economic challenges, especially in cases of severe financial crises. Therefore, it may emerge that the states may justifiably restrict the pensioners' rights, in times of exceptional and severe fiscal crisis and in front of the danger of states' insolvency. This is because, in times of severe financial crisis, it may emerge that the state may not be able to provide adequate financing to the public pension system and ensure in this way its sustainability through other means. However, despite the fact that the states are justified to restrict the pensioners' rights, the legislature is not *per se* freely allowed to do so. The mere fact of restriction on pensioner's rights designed to ameliorate existing financial imbalances and the sustainability of public finances may not give rise to presumption of a justified restriction.

When a court examines an issue of justice, a solution should be found which is compatible with the overall framework of rules and principles that are proper to the legal order in which the court operates.[928] Although this doctrine seems to be too simplistic, in reality, proportionality issues raise many difficulties, since there are many compelling interests which interact demanding fair treatment or balance; on the one hand the private pensioners' interests that their pension benefits are not reduced and on the other hand, the public interest to avoid the collapse of the sustainability of the public pension system and control of public expenses by the state, in order to ensure sustainable public finances, sustainable public pension

928 *Sarmas*, The Fair Balance: Justice as an Equilibrium Setting Exercise, p. 140.

funds and the proper functioning of the EMU. Ripe for legal consideration is how a proportional balance may be kept between these compelling interests. Specifically, this is a question of what proportion of pension reductions, and to what numbers of pensioners, is proper and correct in order to save the state, the public pension system and the EMU whilst simultaneously avoiding a violation of the pensioners' rights to property or social insurance and equality? There are no easy answers to this question and this is indeed the main reason why proportionality issues on pensioners' rights were decided by the Council of State with a narrow majority.

The case-studies that have been analysed in the present chapter allowed for the drawing some answers and suggestions as to the paths which the pensioner' rights might be best protected in cases of public pension reforms in times of financial crisis. The conclusion is that there are previously utilized general and abstract pre-defined criteria which indicate when a proportional balance is achieved. More particularly, the present chapter concluded that in this balancing process, the legislature must respect some common rules and paths, which may appear to be decisive on the proportionality of the public pension reforms to the aims pursued. Namely, the pension benefits must affect as far as possible the lowest percentage of pensioners; the legislature must not introduce the same restrictive measures when the public finances and the finances of the public pension funds have not been improved at all or as much as expected; the pension reductions must be applied in a foreseeable way, the pension benefits must be reduced when it is comprehensively provided that it is only in this way that sustainability and equivalent pension income to previous earnings can be secured; and lastly the reductions are applied in a non-discriminatory manner.

Firstly and more specifically, it complies with the requirements of the principle of proportionality, when the pension reductions affect the lowest possible percentage of pensioners. This is because the interference in this case is not severe and may be outweighed by the highly important aim of ensuring the sustainability of the public finances and the public pension system in times of a severe financial crisis.

Secondly, the practice of the legislature to reduce the pension benefits on a continuous basis contradicts the principle of proportionality. This is because repeatedly having to apply the same measure in a continuous manner suggests the aim of that measure has not been met. Therefore, this proves that the respective measures were not suitable to achieve the aims pursued. Of course the element of suitability does not demand the achieve-

ment of the aims pursued, but when the same measures have been previously applied, without achieving the expected results, it appears counter-intuitive to apply the same measures again in the future to try to obtain the results they failed to achieve in the past. In the Greek case, despite the cumulative pension reductions, the public finances remained unsustainable, while the public pension system's sustainability was not ensured. This is due to the fact that the Greek legislature did not conduct well-established actuarial studies that stated if or how the state can contribute to the sustainability of the public finances and the public pensions funds,[929] showing to what extent and in which chronological period the pension benefits have to be reduced in order to achieve the aims pursued, and evaluating specifically the economic situation of each of the funds. In addition, the cumulative reductions did not contribute to the achievement of the aims pursued because they created a legal uncertainty, which resulted in many individuals opting for early retirement.[930] As a result, the public pension system was further financially burdened, due to the increased numbers of early old-age pension benefits applications. The cumulative reductions in the pension benefits of current pensioners should be permissible only when the financial crisis becomes more urgent and severe, and thus the exceptional financial realities require quick policy responses. In these cases, the severe interference with the pensioners' rights which resulted from the cumulative reductions may be outweighed by the aims pursued which became severe because of the exceptional circumstances. In sum, when the exceptional financial realities do not require quick policy responses, then pension reductions are proportional and thus constitutional, only when specific and well-established scientific research on the level of reduction has been conducted.

In addition, the cumulative reductions contradict the principle of legitimate expectations (or principle of protection of confidence). Respecting the principle of legitimate expectations also plays a decisive role for the proportionality of a measure. The latter principle promotes a certain legal certainty, so that pensioners are able to rearrange their finances and have the necessary time to find ways of replacing their loss of income. It indicates that the pension reductions may be proportional only when the legis-

929 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015, at para. 24.

930 See for example *Hellenic Republic*(2015a), p. 9. It is stated that the pensioners of IKA were increased at 49 percent in March of 2015.

lature ensures the predictability of the reductions through the introduction of a foreseeable rate reduction within a specific period of time (i.e. pension reductions on a yearly basis).

Furthermore, the legislature must reduce the pension benefits in accordance to the principle of equivalence. This may be the most challenging in comparison to the aforementioned rules. The legislature must balance the principle of equivalence as an aspect of the right to social insurance with the legitimate aim of protecting the "*low-earnings*" pensioners. On the one hand, the legislature should protect the "*low-earnings*" pensioners, which have mainly paid few and low value contributions. This is indicated by the principle of social solidarity, which promotes a certain financial redistribution among the pensioners. On the other hand, the contributory character of the system should not be refuted at all. The final amount of pension benefits should correspond to the living conditions that the individual was enjoying before retirement. This challenge can be confronted by reducing the old-age pension benefits of those pensioners who contributed the maximum amount on the basis of the previous granted pension contributions, and those pension benefits of the pensioners that contributed the minimum, on the basis of their last gross pension income. From a different perspective, ccontinuous reductions in pension benefits, which affect the equivalence between benefits and contributions, may undermine the credibility of the pension promises. This is because contributing to the public pension system divorced from any expectations of receiving an equivalent pension income after retirement. This could prove to be a disincentive to work more than the minimum contributory period and incite people to pay only the minimum contributing pattern to the public pension system. Introducing, however, a system that works in a way of respecting the principle of equivalence, the sustainability of the public pension system can be further ensured.

Last but not least, the old-age pension benefits reductions should not be applied in a discriminatory way. The legislature must reduce the old-age pension benefits using the criterion of age under specific conditions. For a high standard of proof of the legality of the discriminatory measures to be established, first of all, the different treatment must aim the reduction of the public deficit and the public pension funds and the ensuring of the financial assistance from the international creditors, because of urgent need for financial liquidity. Secondly, the criterion must be proportional to the aims pursued, namely the discriminatory measure must be fair and the least restrictive measure that could protect the social insurance capital's

sustainability and reduce the public pension expenditures. The proportionality of using age as criterion should be assessed according to the special characteristic of each case-study. For example, the measure of reducing to a greater extent the "*younger pensioners*" benefits that the "*older pensioners'* benefits cannot be defined *a priori* whether it constitutes a discriminatory measure when pension benefits are reduced more for those that retired earlier than the pension benefits of those that retired later. On the one hand, this measure ensures a proper and sustainable functioning of the public pension system, since it provides a disincentive for early retirement to the future pensioners. However, on the other hand, the individuals that opted for early retirement legally exercised an individual choice which was provided to them by the legislature. The ex-post punishment of early retirement may be held as discriminatory and thus disproportional, if the criterion of age is close to the pensionable age of retirement. The main conclusion is that there are not in advance general and abstract pre-defined criteria which indicate when a proportional balance is achieved in cases of age discrimination cases. Using this approach, differential treatment would amount to direct age discrimination, if it resulted in exacerbated and perpetuated inequality *a posteriori* according to the individual circumstances and characteristics of each case.

In the end, it should be noted that the aforementioned rules indicating when the principle of proportionality is respected can be derogated from only when the Constitution is suspended. In a different case, there is no reason for the legislature to not comply with them.