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Institutional Guarantee of Social Insurance – Modern Trends for Constitutional Reform?

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CONTENT OVERVIEW

LIST OF ABBREVIATIONS

ECJ	European Court of Justice
EFKA	Unified Social Security Fund (= National Social Security Institution)
EKAS	Social Solidarity Benefit
EOPYY	National Health System
ETEAEP	Unified Fund of Subsidiary Insurance and Lump Sum Benefits
IKA	(former) Social Insurance Institution for Dependent Workers
INE-GSEE	Research Institute of the General Confederation of Labour

1. INTRODUCTION

It is generally acknowledged that the term "state care for social insurance" in Article 22 (5) of the Greek Constitution refers to the guarantee of a legally defined institution. However, anyone wonders whether the state guarantee of "social insurance" still exists, or whether it has been limited or cancelled, given the substantial changes that were made to the basic features of this institution, since 1975 - when the constitutional guarantee was initially introduced - until today, especially during the last decade.

In view of the planned constitutional reform, it is worth examining whether this constitutional provision meets the current social and economic requirements or whether it preserves an idealised model rather than a structured institution. That concern is of theoretical and practical significance both for the extent of the relevant state care and for the extent of the citizens' social protection.

At the time the constitutional provision was put into force the national model of the institution was particularly reflected in the legislation of the general employees' insurance organisation (Social Security Institution - IKA), which was based on the principle of proportionality between contributions and benefits, as well as on full employment (dependent or independent). These features and many other initial characteristics of the social insurance institution have now become exceptions. This demonstrates, in a first approach, the need for a more flexible constitutional provision or the reference to a wider institution, for example the Anglo-Saxon concept of "social security", or the mentioning of various social protection measures. However, it could be supported that the Greek Constitution did not impose the legislative reshaping of the institution through any change of the social or economic circumstances. Thus, there may be no reason for a constitutional amendment, but only for a different constitutional interpretation according to the current suggestions of theory, case law and administrative practice.

There is a preliminary query: Does "state care" extend to a social insurance system, as it is established by specific rules and justified by actuarial or econometric studies, or does it only refer to some basic features of the institution of social insurance, the choice of which is a matter of state discretion? The Constitution should not, of course, be an obstacle to social policy, nor should it facilitate social policy in privileged arrangements.

In practice, the latter is often the case. Thus, the legislator usually intervenes trying to restore either proportional equality or social justice, depending on the prevailing policy at the given time. The restoration of social justice, among others, was also targeted during the recent pension reform (2016) in Greece, and the first judicial disputes have already arisen as to its compatibility with the Constitution. These disputes do not so much concern the provision in question (Article 22 § 5 of the Constitution), but other constitutional provisions guaranteeing fundamental rights.

Does that uncertainty, as to the content of the above Article, justify including it in the ongoing public debate on constitutional reform? If so, what reference points are given and in which direction do they point? Could the very existence of the constitutional guarantee be an issue for discussion or merely the scope of this guarantee? In the latter case, would the modern socio-economic circumstances justify the dialogue also for the "insurance" or mainly for the "social" features of the institution?

Moreover, although the Constitution corresponds principally to established and modern national tendencies, it cannot ignore - especially in the era of globalisation and international trade - the effects of international legal instruments and certain foreign jurisdictions.

In the following analysis, the enumeration of national trends is necessarily indicative, as most of the points refer to the recent legislative reform (2016), and so far not enough time has passed to form or verify trends in case law and administrative practice. Basically, the "modern trends" need to be identified, namely those that have recently become evident or that have become particularly intense in the last years of the crisis. On the other hand, the enumeration of international trends, although indicative, results from longer time-periods. For international influences to be identified, transnational negotiations and multilateral consultations will be required, and this may take many years. Even if these influences are described as modern, the corresponding measures to follow are usually implemented with delay.

2. NATIONAL TRENDS

The governmental draft of the 1975 Constitution initially provided for "social security of working people", but the relevant parliamentarian subcommittee selected the wording of state care to be "social insurance of working people". The conditions at that time did not favour either the commitment of the state to a minimum protection nor the extension of coverage to the entire population. The extension of workers' social insurance across the country and the introduction of minimum benefits for certain categories of insured persons were introduced later. The widening of the scope of protection, namely, was selective and had never met the requirements of a system with common principles. One of the basic features of the social insurance institution, the redistribution of income, was downgraded, while another feature, the proportionality between contributions and benefits, was differentiated according to professional activity. Different treatment of insured people depending on their profession and their affiliation to several organisations became common to such a point that a social policy reform with emphasis on social justice, especially regarding pension benefits, became ineluctable (Law 4387/16).

1. Several unfavourable endogenous and exogenous factors have in recent years changed the physiognomy of social insurance compared to the institution that our constitutional

drafter had in mind. These factors include the reversal of the demographic pyramid, which disrupted the ratio of insured to pensioners, as well as structural unemployment, which led to a reduction in revenue from social insurance contributions. Thus, a first trend has emerged, namely that the social insurance institution is not constitutionally enshrined in its entirety, but that only the core of the relevant social right is. Indeed, it has been judged that this core comprises neither the 'actuarial legitimation' of benefits, nor the protection of the 'insurance capital' nor the 'legal structure' of the social insurance organisations. The recent, contrary, case-law of the Supreme Administrative Court of Greece (StE), which accepted some limitations on pension cuts by way of a Memorandum Law, was insufficient to guarantee social insurance beyond its core functionality. It merely made the best use of other constitutional requirements, especially the protection of human dignity (Article 2 (1)), the principle of equality (Article 4) and the principles of the welfare state, social solidarity and proportionality (Article 25 (1) and (4)). Once the interdependence of contributions and benefits was not interpreted as being part of "state care", the road of transition from a Bismarckian social protection model to a Beveridgean social protection model could be opened.

2. Following the cuts in reserve funds of the insurance organisations from the Greek state bonds "haircut" (2012), which reversed the actuarial balances, and following the Memoranda of Understanding (2014-2016), which caused horizontal cuts in cash benefits on grounds of 'public interest', it has been called into question whether the state remains a guarantor of the adequacy of benefits and the viability of insurance organisations. The institutional guarantee of the main (public) social insurance, derived from Article 22 (5) of the Constitution, has been substantially reduced, at least to the extent to which it had been foreseen by the editorial legislator of 1975. At that time, even the main insurance contained visibly funded (capitalisation) elements. The state guarantee functioned in terms of tripartite financing, a state subsidy or a deficit coverage in favour of most insurance organisations. Nowadays, where the main insurance has an exclusive pay-as-you-go character supported by state resources, the above guarantee does not have a complementary but a primary role (direct financing), as basic pensions are funded by the state budget. This situation is not significantly altered by the parallel coexistence of an obligatory supplementary insurance, as this would be of a funding nature and start from point zero. Within that framework, considerable capital can be accumulated after many years of insurance, with the possibility of other radical reforms being implemented by then. Thus, the second trend at national level is the transformation from a funding into a pay-as-you-go system of social insurance. The reforming legislator itself entitles Chapter 4 of Law 4387/2016 as "Decapitalisation of the National Social Insurance System". It is quite difficult to halt or reverse this tendency, since the available funds to redistribute income can be used up almost immediately, while the accumulation of insurance funds (public reserves and assets) in a heavily indebted country plagued by unemployment and public debt is a long-term, or even impossible, prospect.

3. Insured persons will experience a progressive, detrimental change in the legal nature of the entitlement to insurance benefits. According to the constitutional protection of social insurance, insured persons have "public rights" to demand from the state and its agencies certain actions or omissions dealing with insurance risks. By specifying these rights, the common legislator balanced and regulated the available socio-economic measures in order to satisfy certain claims for insurance benefits. Ultimately, the prevailing view was that the Constitution did not establish direct claims regarding insurance benefits because the state was unable to respond - with public services and goods - to such demands. Nonetheless, both the institutional guarantee of the social insurance and the mandate of the legislator to issue, under certain requirements, administrative acts for the benefit of insured persons, e.g. to provide pre-defined cash benefits, were clear. In these cases, the legal nature of the right to social insurance was indisputable as a manifestation of the binding competence of public bodies in the field of social rights. Insured persons had a legally defined public right with a sufficient degree of substantive enforceability through extrajudicial and judicial proceedings. Social insurance reforms in the past have shown respect for the established and claimed social insurance rights. Moreover, the state was intent on safeguarding the mature rights, and did so by setting transitional periods of about five years, which mitigated the painful consequences of the reforms.

The situation has changed, especially after the budgetary constraints of the Memorandum Laws were effected (see, for example, Law 3845/2010, Law 3986 and 4024/2011, Law 4047 and 4093/2012, Law 4111 and 4147/2013, Law 4254 and 4281/2014 etc.). These laws treated social insurance more as a public burden than as a social right. In vain, the political discourse pointed to the importance of some compensatory social measures, known as counter-measures. Most of these are of a welfare nature and stipulate insufficient income as a condition for receiving benefits, such as housing allowance and the reduced co-payments for drug purchases for some diseases. The social insurance legislator chooses, more and more often, vague or hard-to-prove notions about the scope of benefits, e.g. calculation of the contributory pension based on the "average monthly earnings throughout the life span" (Article 28 (2a) of Law 4387/2016). Moreover, some benefits now depend on the wide discretion of the social administration, e.g. the determination of the supplementary pension according to "demographic data in the mortality tables and the percentage change in the pensionable earnings of the total number of insured persons" (Article 96 (1) of Law 4387/2016). This positioning facilitates the consideration of the public interest as a "superior rule", which permitted the social administration and the administrative courts to legitimise several cuts in existing insurance benefits, even with retrospective effect. Given these social, economic and political conditions, it is difficult for anyone nowadays to admit a genuine public social insurance right. What seems more realistic is a third trend that now understands social insurance as an essential social policy measure to prevent or tackle poverty among the population, an objective that traditionally belonged to tax-financed social welfare. Already the recent pension reform introduced - among other things - a new

way of calculating social insurance contributions, which are now based on the "real taxable income" (see Article 39 (2) of Law 4387/2016) and abolished both the insurance classifications and the fictitious wages that served the actuarial techniques and the principle of proportionality between contributions and benefits.

A further consequence of these developments is the weakened enforceability of insurance right's, as this presupposes an act of volition by the insured to demand a predetermined administrative action or omission. There is debate about the limited practical significance of recognising a subjective right to social insurance, but not about the questioning of this right. Nonetheless, our Constitution also provides rules and principles that efficiently secure the enforceability of this right. Article 4 (1) of the Constitution is an example, which establishes the equality of all citizens before the law. This also includes proportional equality, namely the unequal treatment of distinctive cases, according to which unjustified horizontal cuts of cash benefits to everyone have been annulled. Another provision, with a significant impact on enhancing the enforceability of the insurance right, is Article 25 (1) of the Constitution, which imposes compliance with the principle of proportionality. It also offers a constitutional basis for declaring as invalid those cuts in (primary and supplementary) pensions, which were carried out without examining the consequences on the living standards of pensioners. Among the fundamental principles of the Unified Social Security System there is an explicit provision for "the social insurance as a right of all Greek citizens" permanently and legally residing in Greece (Article 1 (2) of Law 4387/2016). Although the provision is entitled "social security principles", in this paragraph the legislator refers to the "social insurance of the entire population". It is obviously an error or a confusion that will further complicate our theory and case law. Until the wording of Article 22 (5) of the Constitution is modified, the disconnection of employment from the public social insurance cannot be accepted as a trend at the national level. The existence of a job (dependent or independent) will still be an essential distinctive criterion of differentiation between an insured person and a welfare beneficiary.

Especially in the health sector, there have not been any remarkable socio-political changes since the multiple branches of sickness insurance were replaced by a National Health System, according to Law 1397/1983, which specified Article 21 (3) of the Constitution. In this respect, constitutional "state care" is also aimed at the introduction of unified minimum benefits for the entire population, but with a difference: Article 21 (3) does not include an institutional guarantee, but only a recommendation to the legislator for protecting a public interest (health), leaving him free to define appropriate and affordable means (uniform decentralised services by the NHS).

4. The establishment of a simplified function of the social insurance institution reflects a fourth trend, which has recently been accelerated by legislative (but not constitutional) enactment. Despite the resistance of strong professional groups for more than 40 years, which led to social tensions and various transitional provisions, the legislator regulated two

broadly accepted objectives: The primary and public social insurance of all employed people is submitted to common principles and is administered by a sole insurance organisation. Therefore, not only in terms of content, but also in terms of structure, social insurance corresponds not only to a constitutionally guaranteed institution, but also to a gradually regulated system. This does not take place merely because it is explicitly provided in Article 1 of the recent social insurance reform; it results from the acquisition of the basic features of a system, namely, the predetermined common principles and operational rules. The significance of this upgrading, from a desired "institution" to a convincing "system", is undermined by the fact that the legislator is accustomed to using very optimistic words in preambles and introductory declarations. Therefore, objectives such as income redistribution and the solidarity of generations have been accepted with many reservations. On the other hand, the assumption of a smooth transition from the multiplicity of autonomous and self-governed social insurance schemes into a single (unified) system, in times of economic crisis, appears rather problematic.

Since our case law restricted the operation of main and auxiliary (obligatory) insurance exclusively to public organisations, it was assumed that private supplementary insurance bodies, mutual and pension funds, were not protected by Article 22 (5), but by Article 12 of the Constitution. The second Article provides coverage, outside the social insurance, for non-profit associations based on private agreements. Exceptionally, the Unified Auxiliary Journalism Organization was retained as a private legal entity of social insurance despite the obligatory affiliation to it (Compulsory Law 248/1967). Recently, the pension funds, operating as a substitution of the compulsory auxiliary insurance, have also been subordinated to Article 22 (5) notwithstanding their nature as legal entities of private law (see Article 36 §4 of Law 4052/2012). Compatibility of this latter provision with Article 22 (5) is indicative of an emerging trend towards the inclusion of private (non-profit but compulsory) occupational insurance schemes in the general Greek social insurance system. Gradually, this supplementary institution (the body of pension funds) shall be safeguarded by strict supervisory and operational rules to substitute the underfunded public auxiliary insurance.

5. The vast legislative discretion, which our Constitution provides in enshrining social insurance "as defined by law", had initially been limited by the obligation to respect the recommendations of a previous actuarial study. Under this procedural condition, before any regulation was effected, both the viability of insurance organisations and the adequacy of insurance benefits in terms of reciprocity and solidarity of generations could be ensured. Nevertheless, this essential requirement lost its meaning over time, because it was an obstacle to unequal and privileged arrangements aimed at by several pressure groups. While, originally, actuarial studies were obligatory, having as a penalty the nullity of any amendment in the insurance balances, they were later limited only to the least cases of approval or modification of the entire statute of social insurance contributions or benefits.

More recently, the obligation to prepare actuarial studies was recognised, and this was in fact done so - as required by Article 22 (5) of the Constitution - at a time when emphasis was placed on the insurance features of the social insurance institution. However, this rational view did not prevail. Later on, the drawing up of economic (rather than actuarial) studies was tolerated. In other words, administrative acts could be accepted as sufficiently documented if they were based on general economic estimates and averages. The accuracy of the statistical calculations of an actuarial study was replaced by the macroscopic assumptions of an economic study. The fundamentals for the sustainability of insurance organisations and hence the adequacy of benefits for the future were severely undermined. Thus, it was not long before the time came when, under the pressure of the fiscal consolidation program (1st Memorandum) also these "economic studies" proved to be inefficient for confronting the extremely adverse budgetary conditions. This unfavourable environment for the social insurance institution was based on the finding that the country's budget deficit and public debt had largely exceeded the projections. Therefore, on the grounds of "serious reasons of public interest" and of "fiscal discipline and stability in the euro zone", the cutting down of the pensioners' benefits without any preceding economic study was accepted. The review was limited to Articles 4 (5) (about equality in public burdens), 2 (1) (about the protection of human dignity) and 25 (4) (about social and national solidarity), which were estimated not to have been violated following the objective to preserve the public interest during that adverse conjuncture.

The need for a preceding study, in general, has been acknowledged by recent court decisions. An economic (or actuarial) study is now required, before any pension benefits are cut down for financial reasons, unless the country's economy collapses and urgent risk-management measures are needed. The absence of any study could normally be considered a breach of the core of the constitutional right to social security, since it inhibits the judicial review of inadequate legislative measures. This latter case law reflects a fifth trend, namely the legislator's obligation to restrict the social insurance institution only after a thorough and scientifically documented study. Although there has not been enough time so far for this trend to be crystallised, the latest case law is so well justified that it can withstand time. This is because it establishes a reasonable and flexible rule that balances both funded and pay-as-you-go insurance schemes while, on the other hand, it introduces an unavoidable exception rule for extremely urgent cases. At the same time, the core of the social insurance right is shielded with the necessary documentation to make judicial and administrative controls more effective.

In view of the eventuality that actuarial studies will again not constitute an essential requirement, but might be replaced by simple economic studies in normal cases or be completely absent in abnormal circumstances, one might wonder if reference should be made in the constitutional provision. An actuarial study would serve the reasoning of an insurance balance, while an economic study would justify social protection measures in general. The Constitution should not impose the preference for an actuarial or economic

study. This would be an excessive limitation for the legislator to specify the state's action in one way or the other.

The institutional guarantee of social insurance moves between two poles: the social one (solidarity) and the insurance one (reciprocity). Although the two characteristics seem to be opposed, they may well coexist in terms of a range that political, economic and social data dictate at a given time. To judge from past coexistence, but also from their impact on the general social protection, there are some trends that cannot be easily changed under the current circumstances.

6. A sixth trend concerns the establishment of a minimum and an upper ceiling regarding insurance benefits for reasons of social or national solidarity. The main public scheme for dependent workers (IKA, EKAS, etc.), exceptionally, provided for minimum pension levels. The establishment of uniform principles for all insured persons has already caused a fundamental change in social policy. From the preferential minimum retirement margins for those who have worked under favourable insurance conditions (e.g. 15 years' insurance period), Greece has moved on to a threshold at a lower level but for all retired people. The new threshold of retirement benefits is dictated by the "need to live in dignity by preserving (to the best possible extent) the previous standard of living". The binding competence of the social administration to pay minimum pensions in a legally defined amount is put under its discretionary judgement that this minimum corresponds to the beneficiary's need for a decent living and participation in social life. The process of defining and controlling minimum thresholds is obvious and straightforward, therefore the adequacy criterion is doubtful. As far as the ceilings are concerned, the legislator has maintained the power of setting a certain level for securing implementation. The horizontal pension cuts, in the Memoranda Laws, aiming at fiscal rationalisation, could not be perpetuated. The upper pension limits, under normal circumstances, must be based on the principles of proportionality, proportionate equality, social justice or solidarity between generations. Social and national solidarity are the citizens' obligations as regulated in Article 25 (4) of the Constitution. This provision includes, inter alia, the citizens' commitment of contributing to the public burdens according to their capacities (Article 4 (5)), which mainly refers to tax obligations.

It would not be excessive today to argue that social insurance contributions should be included in public burdens. With this approach, which corresponds to the "public nature" of common social insurance, to the "mitigation of reciprocity" between contributions and benefits, and to the recent link between the "calculation basis" regarding tax and social insurance contributions, the social character of social insurance is reinforced, but it also reaches its limits, as the obligation to contribute of each insured person differs according to his professional income. Moreover, undeclared work or failure to declare income to avoid insurance contributions constitutes a separate breach of law with additional consequences. Consequently, despite the similarities between contributions and taxes, a division of social insurance into two areas of public law is not welcomed, in such a way that contributions

(together with taxes) would be governed by Article 4 (5), while benefits would be governed by Article 22 (5) of the Constitution. This would call into question the constitutional protection of the social insurance institution.

7. The reciprocity between contributions and benefits in social insurance has never been complete and substantial, nor has it been constitutionally guaranteed. The requirements for covering operational expenses and for maintaining some reserves necessitated that the revenue from contributions was to be higher than the cost of benefits. The basis for calculating contributions had always been wider than the basis for calculating benefits, to meet the above requirements. Insured persons have been aware of this and they continued to pay the contributions due, even if they did not expect to fulfil the entitlement conditions to get a corresponding benefit. One thing was certain, namely that anyone who would be able to prove real, notional or optional insurance periods, would be entitled to an insurance benefit of a time and amount freely determined by the legislator or the authorised regulatory administration. Despite this uncertainty and the missing reciprocity between contributions and benefits, employed persons felt rather safe, either because they had accrued specific insurance expectations or because their insurance rights had matured over time, free from the insolvency risk of insurance companies, which promised a full and substantive reciprocity between contributions and benefits.

Conditions have radically changed in recent years. The exact concept of a "contributory pension", which was based on an actuarial or economic study, for a while gave ground to the more general notion of a "proportional pension" (Article 1 (3) of Law 3863/2010), and reappeared later – with a different content – as a "contributory part of the pension" (see Article 2 (3) and 8 of Law 4385/2016). Under the pressure of capital saving, an unavoidable mismatch between contributions and benefits has been imposed, e.g. regarding the self-financed lump-sum benefits, which – formally as well as substantively – should have a purely contributory character.

Hence, there is, though with a slight instability, a seventh trend to be noted, namely that social insurance does not involve any reciprocity between contributions and benefits. That is exactly what the Greek legislator wanted to highlight by choosing the term "proportional pension" instead of "contributory pension". He aimed to determine freely the amount and the extent of the benefits depending on the financial soundness of the insurance organisations and the sustainability of the respective insurance capital. Today, the terminology of the "contributory pension" may have been partially restored, but it now means - together with the national pension – the safeguarding of a "decent standard of living as close as possible to that of the insured person during his working life". An incremental percentage scale in the contributory pension may be foreseen, depending on the insured periods and the replacement rate (Article 8 (4) of Law 4385/2016), but the legislative purpose (of the possible replacement of income during working life) is not met.

The legislative wording is so general that the contributory pension seems not to be calculated according to a legal provision, but based on a declaration of principles (sociopolitical intentions). Following the previous case law, the origin of the insurance resources played an important role for the justification of reciprocity. If the funding mainly came from employers' and employees' contributions, namely from a part of the salary, reciprocity was justified. This was not the case if funding was effected through so-called social contributions, namely from third parts. With the abolition of social contributions, one would expect the reciprocity between contributions and benefits to be strengthened, so that the standard of living of retired persons would not decline significantly. The reform legislator, however, preferred to keep a distance from the concept of reciprocity and simply granted higher benefits to those who had accumulated longer insurance periods, with a maximum of 42 years. Subsequently, the replacement rate in relation to previous earnings, which forms the contributory pension, was not increased, but fixed at 2%.

8. Excluding the recent legislative reforms, which - under the pressure of international creditors - had a violent and horizontal character of cost saving, an eighth trend to be noted is that Greece has almost always witnessed a mild but continuous progress in terms of social insurance and the rights deriving from it. The progressive development regarded two aspects: the gradual unification of the entitlement conditions for insurance benefits, and the administrative unification of similar organisations. Restrictions on the granting and the extent of benefits should not affect the established rights and claims. The reform laws often provided, without clear justification, time differentiations regarding the continuation of preexisting social insurance rights. Thus, various categories of insured/retired persons were created (before 1983, between 1983 and 1992, since 01/01/1993, since 12/05/2016, since 01/01/2017 etc.) in an effort by the legislator to distribute demographic and economic risks among active citizens and retired persons. This effort, although rightly orientated, did not correctly observe the time criterion (for an equitable distribution of sacrifices), which should have been extended to all taxpayers rather than to limited categories of pensioners. The time criterion is objective when it takes into consideration demographic data, employment by age group, and other indicators that ensure the intended solidarity between the generations. There is, however, the remarkable tradition in Greece, that before every major insurance reform, a social or at least public debate must take place, following the European (rather ambitious) goals for adequate, safe and sustainable pensions.

All the above trends concern the first pillar of insurance protection, namely the public, compulsory and primary insurance. In the second pillar, i.e. in the occupational insurance (private, non-profit-making and voluntary insurance), a blurry image is being created. This decline seems to be temporary and has not led to a national trend. It expresses a dilatory social policy, contrary to the recent declaration of the highest employers' associations and the workers' confederation, based on outdated case law that had, in the institutional guarantee of Art. 22 (5) of the Constitution, comprised only bodies governed by public law. Nevertheless, it is interesting to note that views which give emphasis to the management

advantages of the third pillar, namely of private, profit-seeking insurance, are gaining support. According to those views, the state's concern to provide social insurance does not constitute an exclusive competence of the state, but may also be manifested by other means, such as strict state supervision of the insurance companies involved. The term "state care" under Article 22 (5) of the Constitution has consciously remained unclear, so that it can be provide by way of appropriate benefits or services and through the most efficient organisations. It does, indeed, constitute a more neutral wording than the terms "specific care" or "specific measures" in Article 21 (2) of the Constitution. It remains to be clarified whether state care will also include the strict (quality-assured) state supervision of the private institutions providing social protection.

3. INTERNATIONAL TRENDS

Traditional or innovative foreign trends, as well as good practices at the international level, can have a positive impact on the understanding and the effectiveness of social insurance. They contribute to its modernisation, facilitate intra-Community movement of employed persons and enable active participation in international organisations. It follows an indicative reference to some international trends that are likely to affect the structure and the function of the Greek social insurance system over time, because they provide long-lasting international experience and consensus from more countries with a variety of political, economic and social data.

1. The search for new (alternative) resources to finance social insurance is internationally manifested through several trends and practices in the effort of governments to reduce – as much as possible – labour costs without endangering the viability and sufficiency of the insurance benefits. Examples include, for instance, "insurance" contributions connected to the performance of machines (e.g. modern technology), the charging of revenues connected to the ownership of assets (e.g. real estate), added tax on products causing insurance risks (e.g., tobacco), the exploitation of means of profit-making (e.g. underwater resources), the fight against undeclared work (e.g. co-operation of insurance and tax collection bodies), the deduction of a percentage (e.g. from income tax) for the reinforcement of social insurance, etc.

2. The role of social insurance is changing. From the collection of contributions to ensure a replacement of employees' loss of earnings, Greece is progressively moving towards compulsory saving for granting a minimum basic pension to citizens. At the same time, a trend is developing for the establishment of personalised social services instead of the - usually insufficient - cash benefits. For instance, specific state-financed programs are being promoted for the support of old people living in poverty conditions. Social workers and other related professions are taking on a special role at the interface of social insurance and

social welfare, while means-tested "social insurance" benefits rather complicate these boundaries. Furthermore, social services aim to prevent social insurance risks, and with the use of new know-how, the social insurance administration will become more accessible to the insured.

3. The continuous decrease of the working population means that each generation will be entitled to lower pensions, or will have to retire later, or both. To cope with the economic burden of an aging population, a variety of social insurance trends can be identified, such as the replacement of defined benefit schemes by defined contribution schemes, the downgrading of early retirement pensions, incentives to keep older workers in employment by way of active aging programs, the introduction of notional capitalisation systems, the integration of refugees into productive sectors, etc. In view of the difficulties in tackling the demographic problem, and due to the emergence of complex forms of social protection, it is believed that social security should not be considered as an instrument but as an objective. According to this doctrine, the social security systems may include several social policy programs aimed at covering insurance risks and social risks which are caused by the economic crisis. For instance, International Convention No. 102/1952 (International Labour Organization) laid down minimum social security standards for all national protection schemes, whether they be characterised by contributory benefits (social insurance) or non-contributory benefits (social welfare, social compensation, etc.). Furthermore, pursuant to the European Social Charter of 18 October 1961 (of the Council of Europe) the Contracting Parties seek to safeguard the "effective exercise of the right to social security" through a system that ensures a "satisfactory level" of benefits (Art. 12). It is obvious that such a generally formulated objective of social security in this multilateral international instrument aims at making accession attractive for as many states as possible. On a national level, it would not have the same legal significance.

4. What is also important is the continuing trend towards collaboration between public and private bodies or, respectively, towards a coexistence between public and private social protection features. Thus, more efficient private management of the accumulated capital is promoted, which - under maturity conditions - can reasonably complement the guaranteed basic pensions of the public social security system. This is needed in Greece, as the contributory part of the basic pension will, for a long time, merely effectuate insufficient benefits. Moreover, the larger companies and the social partners, in cooperation with private insurance and investment companies, are developing pan-European and cross-border schemes to diminish the losses of the public pension cuts. The international trend under consideration is expressed in a variety of forms, e.g. through the outsourcing of competences, the creation of state-controlled mutual funds, tax relief for occupational pension funds, possibilities to opt-out from obligatory public insurance, etc. The new unified framework for the function and supervision of insurance activities in the European Union also contributes to the constructive co-operation between public and private insurance bodies. With the specific reinforcement of consumer protection, the insolvency risk in the

insurance sector is minimised, if not nullified. Nonetheless, social security still retains its mandatory character, as established in 1939 at the Second Labour Conference of American States, as it stipulates advantages with regard to income distribution, solidarity between the generations, the ensuring of minimum limits, etc. At the same time, the productive dialogue on alternative forms of social protection in the welfare state will continue so that, through its modernisation, it can better respond to current social needs without the direct support of private initiatives that would be exposed to business risks.

5. There was initially a discussion at the European level about facilitating the free movement of "workers" and insured persons, since it constitutes one of the prerequisites for the single market and European integration. However, the question arose quickly as to whether the concept of workers should be defined according to national legal orders or whether a wider European concept should be created to accelerate the accomplishment of the above objectives. The European Court of Justice has supported the second opinion, considering that the term "workers" generally refers to "employed persons". Namely, according to ECJ case law, the concept of “worker” in the European Union texts acquires a meaning depending on the material scope of application of the respective provisions. In social insurance matters, it should be interpreted as widely as possible, in order not to hinder the free movement of self-employed or retired persons. The meaning of dependency and the origin of income can be relevant at the national, but not at the European level. This version, which obviously influenced the extension of the personal scope of Article 22 (5) of the Greek Constitution, has finally been illustrated in the primary Community law. According to Article 48 of the Consolidated Treaty on the Functioning of the European Union and Article 1 of EC Regulation 883/2004, the free movement principle has been established for both "employed" and "self-employed" persons, as far as the maintenance of social security rights is concerned.

It is doubtful whether the problem of adequate and sustainable pensions can be solved satisfactorily through adhesion to the above-mentioned international trends. It is, furthermore, difficult for some of them to influence a constitutionally established institutional guarantee. However, in view of the broad legislative power (given by Article 22 (5) of the Constitution), these trends facilitate an extensive interpretation of the constitutional provision – following the current developments – and they have the potential to make the Greek social insurance more efficient.

4. THE "INSTITUTIONAL GUARANTEE" IN THE LIGHT OF NATIONAL AND INTERNATIONAL TRENDS

Notwithstanding some disputes concerning the 1952 Constitution, as well as in the early years of the 1975 Constitution, a functional approach to the interpretation of the

Constitution prevailed. That is, more emphasis was placed on the contributory and redistributive mission of the social insurance institution, irrespective of the organisational form of the public or non-profit private entities that served it. This version allows occupational and mutual funds, as well as special social insurance accounts, to be included in the institutional guarantee. To avoid the exposure of social insurance entities to entrepreneurial risks, Greek case law has changed in favour of the organic interpretation criterion and frequently invoked the public interest to eliminate the private bodies from the institutional guarantee. Both special accounts and mutual funds had been characterised as "private supplementary insurance entities" shortly before the occupational insurance funds were introduced (Article 37 et seq., Law 3029/2002), obviously being of the same legal nature. Very recently, it seems that the functional criterion is reemerging, since legal entities of private law are now comprised in the institutional guarantee. It has been judged that a private non-profit insurance entity which is governed by the provisions of occupational pension funds and operates as a substitute of social insurance is not covered by Article 12 (1), but by Article 22 (5) of the Constitution, namely by the institutional guarantee. Consequently, Greece has already accepted the modern international trend that does not restrict the institution of social insurance exclusively to public organisations. The advantages of the social protection schemes combining pay-as-you-go and funding elements are evident. Solidarity between the insured and the retired is promoted and security reserves are created, when the first pillar (public support for income redistribution) and the second pillar (private coverage for capitalisation) develop in coordination with each other. In parallel, the current thorough supervision of insurance companies (under the EU Solvency II Directive) creates sufficient guarantees for a complementary and coordinated operation between life insurance companies and the auxiliary social insurance bodies.

The constitutionally acknowledged institution of "social insurance", as it has often been specified in various legislative acts, has never reflected enough consistency, nor clear delimitation from relevant social protection programs. This resulted also from the multiplicity of social policy bodies that served it. An important step towards institutional clarity has been accomplished recently. All citizens, under certain conditions, can request welfare benefits from the National Social Solidarity System and all employed persons are covered by the National Social Insurance System (EFKA), which operates under unified rules (Article 1 (2) and 3 of Law 4387/16). Now the distinction between social insurance (where financial benefits predominate) and social welfare (where social services predominate) is clearer. The Greek Constitution certainly does not raise the status of social welfare to the level of a guaranteed institution. Only a few measures that promote welfare objectives, such as the protection of the family, health, housing, etc., are enumerated (Article 21 of the Constitution). Until recently, the charge placed on social insurance to follow welfare purposes, such as the granting of minimum pensions without a means test, overturned the balance of the insurance equilibrium and resulted in growing deficits. The international creditors were perhaps not conscious of this particularity and characterised the Greek social

insurance as being very expensive, comparing it with that of other countries, where welfare benefits are usually generated through a distinct institution and are calculated in terms of a separate budget line of social expenditure.

The predefined social insurance risks do not comprise the needs stemming from poverty, in principle, even if they include indicators of deprivation. The key features of insurance risks are statutory provision of the benefits to be granted, the uncertainty of risk contingency and the future occurrence of risks. A social need that may be caused by the behaviour of the insured person cannot constitute an insurance risk. Nonetheless, the constitutional institution that tackles – at least partially – poverty, seeking to maintain a person's previous standard of living, is no other than social insurance. On top of that, the same institution, by granting benefits to replace earning losses, contributes also to the prevention of poverty in the case of incapacity to work. Social solidarity that expresses itself in the social insurance institution helps to reduce poverty, but it does not suffice to turn poverty into a risk covered by social insurance. Nevertheless, since the Greek social insurance has been deprived of its funding features and of the reciprocity between contributions and benefits, the conditions for covering not only the insurance risks but also social needs, such as poverty, seem to be fulfilled. For the time being, the limited resources prevent such a widening of the institutional guarantee. It cannot, though, be excluded in a medium-term legislative perspective. Even the private insurance industry has become interested in filling this gap, especially with regard to the so-called "new poverty", by providing insurance coverage for the payment of loan obligations in case of death or incapacity to work.

The institutional guarantee, under Article 22 (5) of the Constitution, appears rather outdated. The main social insurance is missing two of the common key features; namely, a partial replacement of income losses and a reasonable coping with unexpected costs. The national pension is not necessarily linked to employment, while the contributory part of the pension is not dependent on the contribution capacity of the insured. According to a conservative opinion, the constitutional text cannot be changed whenever the legislator adds or removes basic features from social insurance. It is sufficient that the institutional guarantee can be interpreted in such a way as to serve the current socio-economic conditions. Besides, this has been done so far regarding the interpretation of the term "workers", which has been extended to cover also the providers of independent services. The current dilemma is whether Article 22 (5) of the Constitution should comprise an enlarged institutional guarantee, e.g. social security, or introduce a neutral concept, e.g. social protection, or cease to be an institutional guarantee and protect specific social insurance elements, e.g. the conditions for contributions and benefits. The first alternative seems to be justified, i.e. the introduction of an institutional guarantee for social security, so that the constitutional mandate to the legislator acquires a certain modern framework. This framework, however, must have the flexibility to accommodate any model deemed appropriate by the national legislator (not necessarily the Anglo-Saxonian) which corresponds better to the specific terminology (social security). By itself, the designation of a

social right as an 'institutional guarantee' is a conquest in relation to the European social acquis. Thus, the state's concern for a generic "social protection" or for indicative "social security measures" would constitute a step back that would make Greece more isolated from the European family.

The search for new resources to finance social security should not be stopped in a period of economic crisis but instead be intensified. The tripartite financing of the main pension (state, employers, insured persons), established by Law 2084/1992, proved to be an insufficient source of income. As much as the finding of new sources of funding has been the concern of research institutes (e.g. INE-GSEE) and many scientific and policy debates in the dialogue preceding the latest insurance reform, Law 4387/16 in Article 56 (1) does not foresee a new resource, and the expected expansion of the state guarantee through additional financial support for the institution with new resources has not been effected. The Constitution's institutional guarantee does not limit, nor define, the origin of social security funds, as long as they do not hamper economic growth or healthy competition by violating other constitutional guarantees. For example, the imposition of a supplementary insurance contribution on businesses that pollute the environment or produce addictive gambling games is socially legitimate and could be imposed for reasons of general social or public interest.

5. CONCLUDING REMARKS

The institutional guarantee of social security has undergone significant changes since its establishment (1975), so that its adaptation to modern national and international trends is imperative in view of the planned constitutional reform. This provides a unique opportunity for Greece to highlight and correct identified deficiencies. The following conclusions attempt to answer the concerns reported in our Introduction.

The "state care for the social security of workers" has been broadened in terms of personal and material scope, today protecting almost the entire population (even the non-worker) and covering, to a large extent, all three subsystems of social security, namely the national social security, the national health system and the national social solidarity system provided by welfare authorities. This systematisation does not appear to refer to the constitutional mandate for the legislator to regulate the institution of social security (Article 22 (5) of the Constitution). Obviously, it goes beyond that, without it being simply a broad interpretation of this provision. However, Article 1 of Law 4387/2016 expresses a clear legislative intention to establish in Greece a Unified Social Security System governed by fundamental principles. According to the predominant opinion, "social security" does constitute the subject of a constitutionally established institutional guarantee; however, as this institution has not matured yet, the legislator has manifested the intention to view it as a single system with

the three basic elements of social policy, namely social security, health insurance and welfare (solidarity).

The constitutional guarantee of Article 22 (5) of the Constitution, supported by other constitutional rules and principles, forms a social protection grid capable of preserving both the sustainability of the entities serving the institution, as well as the adequacy of the social rights. If the two desired opposite goals (sustainability and adequacy) are served, even with a set of constitutional provisions, there is no need in the on-going public discussion for a review of the technical issue of the binding nature of Article 22 (5) of the Constitution. A relative uncertainty will remain (as far as the frame of the institutional guarantee is concerned), because it yields more flexibility to legislative initiatives. This is also the reason why social security has not succeeded in being codified in Greece, despite the persistence of our theory. The current status will continue to be accepted as sufficient as long as uncertainties do not lead to a breach of the Constitution, for instance through the introduction of preferential arrangements.

Contrary to international trends, the Greek legislator is neither fully aware of the value of prevention in order to avoid insurance risks, nor of the potential to save costs through the provision of social services rather than of cash benefits. The gradual replacement of monetary insurance benefits by services requires time-consuming infrastructural organisation and executive training. But it takes high-performance investment (in horizontal and vertical solidarity) to simplify procedures and provide immediate services to insured persons.

Addressing the adverse effects of demographic change on social security, namely those linked to the inversion of the demographic pyramid, is an extremely complex and growing problem that no social policy legislation has been able to solve so far. In addition to population ageing, low birth rates (natural equilibrium) and the outflow of labour to other countries (migration equilibrium) aggravate the phenomenon. As long as the factors aggravating the demographic problem are not addressed, there can be no substantial discussion on the solidarity of generations, nor on the sustainability and adequacy of pension benefits.

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