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Editor

Solidarity Across Generations

Comparative Law Perspectives

Elements of Generational Solidarity in the German Pension System

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Abstract The article focuses on the legal aspects of intergenerational solidarity in the German statutory pension system. Organised on a pay-as-you-go basis, it relies on a balance of those obliged to pay contributions vs. those who receive benefits. The footing of this system, however, becomes fragile in times of rising life expectancy and declining birth rates: fewer employees will have to finance the pension rights of a growing number of pensioners. These developments do not only lead to lower acceptance of the "intergenerational contract" by the economically active who have to invest a large share of their income in the financing of current pensions while facing the risk of receiving low payments in the future. It also raises questions of intergenerational justice.

Since the 2000s, the German pension system has undergone several reforms to strengthen intergenerational solidarity and sustainability of pensions. Yet the debate is going on. The article outlines elements of solidarity in the calculation of both contributions and benefits and shows the opportunities and limits for further reforms raising from EU law and German constitutional law.

1 Introduction

Germany has been the first country in the world that introduced a statutory pension system. Ever since its coming into force in 1889, the system has undergone a number of reforms in order to adapt its financing and spending to the economical and societal situation.

To a large extent, social security in case of old age is awarded by the obligatory statutory pension insurance. It is complemented by occupational schemes, which cover about 60% of the employees (BMAS 2016, p. 132), and private schemes, which cover 70.4% of all employees (BMAS 2016, p. 153). These additional types

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of provision are voluntary; benefits and contributions are determined by a private-law contract (Becker 2018, p. 66).

Persons who are not members of the social insurance system or whose entitlements in the pension system are below the minimum of subsistence, receive benefits from the tax-financed and means-tested social assistance scheme for those incapable to work or older than pensionable age (Becker 2018, p. 60). This system is different from the assistance for those younger and capable to work insofar as the means testing is more generous for the elderly. Thereby it can be avoided that elderly persons in need will have to spend their whole income and assets before claiming the benefit. Moreover, their adult children will be obliged to pay alimony in few cases only.

1.1 Basic Principles of the German Pension System

The German pension system still reflects its Bismarckian origins. The statutory pension scheme for employees is operated by a public corporation ("Körperschaft des öffentlichen Rechts"). It takes part in the self-governance of the social security bodies. This means that all organs of the corporation are held by employees' and employers' representatives based on parity (Eichenhofer 2019, p. 157; Waltermann 2018, p. 167). The social partners are thus involved in the governance of the pension insurance institutions. The representatives are elected by the insured persons in the so-called "Sozialwahl" (social elections) every 6 years.

1.1.1 Personal Scope

The statutory pension insurance does not cover the whole population, but applies to employees and apprentices only. They are compulsorily insured if their monthly income exceeds a minimum amount of currently 450.00 Euro.[1]

Under certain conditions, self-employed persons are subject to compulsory insurance as well. As a rule, this applies to those who are vulnerable and therefor have a similar need of protection like employees. The Pension Insurance Act (SGB VI[2]) defines this group of self-employed as persons who (a) do not regularly employ an employee and (b) essentially work for one client only. They are referred to as "solo self-employed". Their economic success and the income they generate from their work depend on one single customer, not allowing for adequate private provision for

[1]Persons with earnings below this limit are referred to as "marginal employment" (geringfügige Beschäftigung). They are not included in the obligatory social insurance, because they usually are covered by it for other reasons, be it as family members of their breadwinner, as students or pensioners.

[2]6. Buch Sozialgesetzbuch = Social Insurance Code Part VI.

old age. Hence, their position is comparable to that of an employee; that is why they were included into the compulsory pension insurance (Waltermann 2018, p. 171).

Persons who are older than 16 years and not subject to compulsory insurance may opt for voluntary insurance.

1.1.2 Financing

The statutory scheme is income-based: contributions are levied as a percentage of gross income from work before taxes; currently it amounts to 18.6%. It is borne by employees and employers based on parity. Hence, the financing does not refer to the individual risk, but to economic performance expressed by the level of income (Hebeler 2001, p. 39).

The contribution is levied on income up to the so-called Beitragsbemessungsgrenze, i.e. a contribution assessment ceiling, which is annually determined by the Federal Ministry of Labour and Social Affairs. In 2019, this ceiling was established at a monthly income of 6900 Euro in Western Germany and at 6540 Euro in Eastern Germany.

Self-employed persons must finance their contributions entirely by themselves. This also applies to voluntarily insured persons; however, they can choose between a minimum and a maximum contribution.

For persons receiving sick pay or unemployment benefits and for those who care for a family member in need of care, the respective social security agency—health insurance, unemployment insurance, long-term care insurance—has to pay contributions to the pension insurance. The German Federation pays contributions for persons in voluntary military service or in the state volunteer programme.

The financing is based on a pay-as-you-go-system: current expenditures are financed out of current revenues of the same calendar year. Additionally, the Federation contributes to the pension insurance scheme: in 2018, it granted 44.56 billion Euro,[3] financed out of taxes.

1.1.3 Entitlement Conditions

In order to be entitled to an old-age pension,[4] a person must have reached the pensionable age of 67 years and completed a waiting period of 5 years. In order to fulfil this condition, the insured person has to aggregate months in which he/she has paid contributions on income or has accumulated income points for periods of child

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[3]In comparison, income from contributions reached 235.76 billion Euro in the same year, see https://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/Allgemeines/GrosseTabellen/kennzahlen_finanzen_vermoegen/3_mittelfristige_finanzentwicklung/03_einnahmen_allg_rv.html?cms_submit=Los&cms_resultsPerPage=5&cms_templateQueryString=Bundeszuschuss.

[4]The Pension Insurance awards benefits in case of incapacity for work and in case of the death of a spouse or parent. These benefits, however, are not considered in this chapter.

raising. Child raising periods, however, are recognised only in the first 3 years after birth of the child.

1.1.4 Calculation of Benefits

The level of benefits reflects the lifetime income from work of the insured person in relation to the income of the current employees. Hence, the pension functions as an income replacement or, in other words, as a quid-pro-quo for a long working life (Köhler-Rama 2019, p. 80; Sodan 2005, p. 565; Hebeler 2001, p. 56). Benefits are paid irrespective of individual need. At the same time, the pension system strives for redistribution, since the mutually supportive group of insured persons (“Solidargemeinschaft”) balances unequal risks at the labour market (Papier 2019, p. 3).

The amount of the pension is dependent on both the height of income on which contributions have been levied and the duration of gainful employment (Waltermann 2018, p. 184). Calculation of pensions follows a point-based system: for every month, in which the insured person earns average income,[5] he/she accumulates one income point (“Entgeltpunkt”). If he/she earns double average income two income points, in case of half the average income 0.5 income points will be accumulated etc. Persons who are not carrying out a professional activity due to child raising gain 3 income points per month if the child is younger than 3 years.

There are deductions for early retirement, which is possible after reaching the age of 65 years.[6] For every month before the fulfilment of the retirement age of 67, the amount of the pension is permanently reduced by the factor 0.003. On the contrary, for each month of later retirement, the pension increases by the factor 1.005.

Furthermore, pensions are “dynamic”. This means that they are annually adjusted to the gross wages of the actively employed persons, the rate of contributions currently paid to the pension insurance (including both statutory pensions and voluntary private schemes) and the so-called “sustainability factor”, which represents the relation between contributors and pensioners (Cf. Schmähl 2015, p. 173 et seq). Hence, pensioners participate in both the increase as well as the decrease of general wealth.

There is a statutory guarantee that the level of pension for a fictitious person who has been actively working for 45 years, always earning exactly average income and paying contributions out of it, must not be lower than 43.0% of the former income[7] (Eichenhofer 2019, p. 175). This so-called “standard pension” amounts to 1,396.35

[5] In 2019, the Federal Ministry of Social Affairs, based on data by the Federal Statistical Office, has set the average gross annual income of all insured persons at 38,901 Euro.

[6] Until 2022 there is a transitional period, because pensionable age is gradually rising from 65 to 67; hence the age for early retirement is gradually rising as well from 63 to 65 years.

[7] From the average earnings social security contributions to health care, long-term care, pension and unemployment insurance as well as the average expenditure for additional private old-age provision are deducted.

Euro in Western Germany and to 1,336.05 Euro in Eastern Germany, referring to the net pension level before taxes. This pension level is not related to a person's last earnings, nor does it allow any forecast of the individual pension amount. The notion of the standard pension model, which is criticised because it does not reflect the career of a typical employee in Germany, must not be confused with the income replacement rate, which is a mere statistical measure.

Pensions are subject to taxation. Furthermore, contributions to health and long-term care insurance are levied.

1.1.5 Other Schemes of Social Protection in Old Age

There are different schemes of protection in old age for different types of economically active persons. This differentiation has historical roots: it stems from the medieval guild system, which provided social security for certain, strictly separated, occupational groups.

There are special pension schemes for farmers and for artists. The pension scheme for farmers is run by a federal public corporation, whereas the pension scheme for artists is administered by a specific department of the statutory work accident insurance, which has its own budget.

Other types of self-employed persons are not covered by mandatory schemes; they will have to conclude private insurance contracts in order to cover the risk of old age. If they fail to do so, they will have to rely on social assistance benefits if their private savings do not suffice to cover their basic needs.

Freelancers (lawyers, doctors, architects etc.) are obligatory members of the "berufsständische Versorgungswerke". These are pension funds established by the professional organisations based on legal provisions of the German Länder (federal states) and organized as public bodies (Eichenhofer 2019, p. 167).

Civil servants are not covered by the statutory pension insurance. Their pensions are tax-financed and represent an integral part of the life-long alimentation. There is a minimum pension of 35.0% of the last income, which prerequisites a minimum of 5 years of work as a civil servant. The general pension amounts to 1.7937% of the pensionable income for each year of seniority, however maximum 71.75% of the last income. The pension is reduced by 3.6% per year of early retirement. The pension schemes for civil servants are administered and financed by the employing entity, i.e. the "Bund" or "Länder" (Eichenhofer 2019, p. 166).

1.2 Prerequisites for Pension Reforms

The pay-as-you-go system refers to the financial aspect of the intergenerational contract. It is based on the assumption that a sufficient number of children—the future contributors—will be born to finance future benefits, presupposing that the number of contributors and beneficiaries remains almost constant (Hebeler 2001,

p. 32). Nevertheless, the fertility rate of German women has been decreasing since the 1970s; at the same time, life expectancy is continuously rising. This touches upon the fundamentals of the pay-as-you-go system twice: The shift in the relation between contributors and beneficiaries does not only lead to a shrinking contribution base, but also increases the expenses due to the longer duration of pension payments (Ruland 2001, p. 3505).

Legislation will have to react to these developments in order to ensure long-term financial stability of the scheme as a whole. Since pension insurance is part of a statutory system, it is open for reform. Pensionable age and pension level can be changed by legislation only, requiring a simple majority in parliament and the approval of the “Bundesrat”, i.e. the Federal Council representing the government of the Länder. Certain questions of detail, for example the determination basis for the income ceiling, can be determined by a regulation of the Federal Ministry of Labour and Social Affairs, i.e. an administrative ordinance.

The dynamic “Rentenformel” (pension formula) allows to annually adjust the pension level according to the earnings of the active workforce (Eichenhofer 2019, p. 183). However, if these earnings decrease, this does not lead to a cut in the pension level but rather to a non-increase. To cut pensions would require a change in the pension formula by the parliament. However, there have to be long transition periods, because the entitlement to a (future) pension is regarded as property right (cf. 1.2.2.3), which is protected under the constitution. That is the reason why the raising of the pensionable age in Germany has been stretched over many years.

Any changes in the legal provisions will have to be compatible with both European and Constitutional law.

1.2.1 EU Law

The European Union does not have the competence to harmonise national social security law. According to Art. 153 (1) TFEU it may only support and complement the activities of the member states in the field of—among others—social security and social protection, the combating of social exclusion and the modernisation of social protection systems. Nevertheless, European law has considerable influence on the member states’ social security system even if a genuine European welfare state does not exist.

With the Lisbon Strategy, the EU set itself the goal of becoming the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion by 2010. This objective was supposed to be achieved by a process of policy coordination based on commonly agreed objectives, the Open Method of Coordination OMC (Schulte 2009, p. 52). Initially focused on employment policy, the scope of the OMC soon has been extended to social inclusion policies, pensions, health care and long-term care (Janda 2018, p. 386). In 2008, the separate coordination processes have been included in the “OMC Social Protection and Social Inclusion” (COM(2008) 418 final; cf. Eichenhofer 2014, p. 204). The Commission identified

three major challenges for old age pension systems: the increasing life expectancy, the lowering birth rates and the upcoming retirement of the so-called baby-boomers who were born after 1945 (COM(2010) 365 final). It therefore recommended to link retirement age to life expectancy, to restrict access to early retirement, to close the gender pension gap and to encourage complementary private pension saving (COM (2012) 55 final).

As a consequence of the financial and banking crisis, in "EU 2020", the follow-up to the Lisbon Strategy, the OMC has been integrated into the context of economic, financial and employment policy (COM(2010) 2020 final). In this revised strategy, the European Commission committed itself—among others—to assess of the adequacy and sustainability of social protection and pension systems. Member states are obliged to define and implement measures addressing groups at particular risk of poverty and to fully deploy their social security and pension systems in order to ensure adequate income support. The Commission stressed the need to fiscal consolidation, long-term financial sustainability and structural reforms of all social security schemes.

Taking this as a starting point, the Commission launched a recommendation on necessary reforms in Germany in 2018 (COM(2018) 405 final). Regarding the sustainability of the German pension system, the Commission stated that the labour market participation of older workers would have to be improved, increasing income in old age and reducing the need for precautionary savings. Currently only 16.1% of workers aged 65–69 are working. Even though the current economic situation of the country is rather stable, the Commission expects large increases in pension expenses until 2070. Moreover, the risk of poverty in old age is regarded as above EU average—17.6% compared to 14.7%, one of the reasons being inadequate benefits in the first pillar for low-wage earners, persons with atypical contracts and those with interruptions in their employment histories. Finally, the gender pension gap in the German system is one of the widest in the EU. The Commission proposed Germany to encourage people to work more hours, especially by reducing the high tax wedge for low-wage earners or persons with more than one job as well as to promote a longer working life and higher page growth (COM(2018) 405 final). These recommendations, however, are not binding.

1.2.2 Constitutional Law

The German constitution (Grundgesetz, GG) does not contain binding normative patterns regarding the design of the pension system. Legislative freedom is, however, restricted by fundamental rights.

Social State Principle

Art. 20(1) GG contains the Social State Principle, which obliges the legislator to set rules that assure social security and social justice, to protect the weak and to offer

equal opportunities (Hebeler 2001, p. 87; Sodan 2005, p. 567). Terms like “justice” or “protection of the weak” are rather vague, therefore the Social State Principle does not bear any concrete specifications for the design of the pension system. The Federal Court of Justice has always underlined the legislator’s prerogative and broad discretion. Consequently, the Social State Principle does not constitute a basis for individual rights.

Protection of Human Dignity

Art. 1(1) GG contains the guarantee of human dignity. In conjunction with the Social State principle, this provision demands the safeguarding of the minimum of subsistence for every human being. Hence, social security law must contain provisions and benefits that enable everyone to lead a life at an adequate standard of living. This is the main function of the German social assistance system.

Pension insurance, however, does not refer to the aim of an adequate standard of living, but rather to the maintenance of the standard of living during the employee’s working life (Ruland 2000, p. 748; Kreikebohm 2015, p. 188; Köhler-Rama 2019, p. 80).

Protection of Property Rights

Regarding social insurance, the constitution does protect the expectancy of all contributors to receive an adequate pension level. This has been derived from the protection of property rights in Art. 14(1) GG (BVerfG, Beschluss v. 21.7.2010, 1 BvL 11/06 – 13/06, 1 BvR 2530/05 (juris Rn. 68) mit Bezugnahme auf BVerfGE 53, 257, 289 f.; BVerfGE 97, 271, 283 f.; BVerfGE 69, 272, 300; BVerfGE 92, 365, 405; BVerfGE 97, 271, 284; BVerfGE 100, 1, 32). In an obligatory system, in which employees are forced to spend a certain part of their earnings on contributions for the current pensioner generation, they are hindered to freely use their own financial means. According to German constitutional law doctrine, this constitutes an interference into the freedom of action (Hebeler 2001, p. 92). Yet, this impairment can be justified by the overarching aim of a common provision system for old age.

Furthermore, entitlements to social security benefit are regarded as property rights, if their asset or value is individually attributed to the entitled person, and if it is based on considerable personal contributions of that person and intended to cover her/her means of subsistence (BVerfGE 69, 272, 300; 72, 9, 18; 76, 220, 235). The protection is stronger, the more contributions an insured person already has paid and even higher if the pension is already paid out.

The Federal Constitutional Court has stressed the need to protect the “legitimate expectation” of an individual to receive a pension that is adequate[8] to the individual’s income and the contributions paid out of it (BVerfGE 58, 81; 64, 87; 100, 59; 100, 138; 122, 151).[9] Cuts need to be justified for reasons of public interest and must be adequate—from a general as well as from an individual point of view. The aim to reconstruct public financing would not suffice. From a constitutional law perspective, the reduction of pension entitlements of future pensioners presupposes that they are indispensable to maintain the financing and the capacity of the pension systems as such on a long-term basis (Hebeler 2018, p. 850; BVerfGE 117, 272; 112, 151). This is the case, for example, when cutting benefits due to demographic changes if these changes causally affect the financial stability of the whole pension system. The classification of pension entitlements as property rights is largely due to their financing out of income from work; this distinguishes them significantly from social assistance benefits granted in old age (Hebeler 2001, p. 97; Köhler-Rama 2019, p. 81).

The principle of proportionality—here: the proportional relation of risks and chances of the insurance system—determines the legally allowed extent of cutbacks in pension entitlements (Sodan 2005, p. 563). Hence, one has to question whether the expectation to receive a pension is still effective if an individual’s contributions do not accrue to an adequate pension, or, if today’s obligatory contributions are not reflected by an equivalent level of the individual’s pension.

Furthermore, the principle of protection of confidence—derived from the rule-of-law principle contained in Art. 20(1) GG—demands for long transitional periods (Eichenhofer 2019, p. 77). Short-term and harsh cuts of current pensions would be contrary to this principle (BVerfG, Beschl. v. 13.6.2006 – 1 BvL 9/00, 1 BvL 11/00, 1 BvL 12/00, 1 BvL 5/01, 1 BvL 10/04, juris Rn. 98, 102, 105 f.). Rather, the legislator has to take into account both the legitimate aim to secure the long-term financial stability of the pension system and the legitimate trust of those persons with pension entitlements. The Pension Act (Art. 306 SGB VI) generally prohibits cuts in benefits that are already being paid out.

Equal Treatment Principle

The equal treatment principle, which is laid down in Art. 3(1) GG, may also affect the legitimacy of pension reforms. Due to the long period between paying contributions and receiving benefits, this principle will have to be applied in a long-term perspective (Hebeler 2001, p. 123 et seq). However, there cannot be absolute equality of all generations in the pension system, because the means that are distributed will not be the same throughout all periods (Ruland 2000, p. 751).

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[8]This is called the “principle of equivalence between contribution and benefit”, cf. Ruland (2000), p. 747; Sodan (2005), p. 564.

[9]Note: BVerfGE is the official collection of the Federal Constitutional Court’s decisions.

Treating current and future beneficiaries different, would demand for justification by legitimate goals of common interest. This is particularly the case if a reform imposes a higher burden on certain groups of insured persons compared to others (Hebeler 2001, p. 121). Fiscal reasons alone would not suffice in this context, since this would suggest that current contributors need to show solidarity towards current pensioners, but not vice versa (Sodan 2005, p. 566).

2 Elements of Generational Solidarity in the German Pension System

In the statutory pension insurance for employees, there are several elements to strengthen the solidarity between generations. Recent reforms (Cf. Waltermann 2018, p. 161 et seq) have aimed at tackling the issue of demographic change, such as the gradual rising of the pensionable age from 65 to 67 years, the restriction of early retirement and the awarding of income points for periods of child raising or education.

2.1 What Does the Notion of "Solidarity" Refer to?

Colloquially, "solidarity" refers to a feeling of belonging together, of responsibility for each other, based on common values, the necessity to put one's own interests behind those of others and the willingness to help others in situations of need (Ruland 2000, p. 735 et seq). It is based on voluntariness, sympathy and affection (Schlegel 2008, p. 565).

In legal terms, the notion of solidarity refers to "a social condition in which relations between individuals and the community are characterised equally by the autonomy and responsibility of individuals and by the aspirations and responsibilities of the community." (Zacher 1997, p. 830). The term does not stand for complete equality, but rather for the necessity to counterbalance unequal distribution of chances and wealth among those forming a society (Becker 2018, p. 78) or a distribution of goods by the state or its agents, according to social criteria (Schlegel 2008, p. 568). Compulsory insurance ensures that no one can refrain from solidarity (Schlegel 2008, p. 568). Within the specific context of social security law, solidarity refers to financial redistribution within the community of insured persons (Becker 2018, p. 78). Elements of intergenerational solidarity can therefor occur in both contributions to and benefits from the pension insurance, because solidarity of the current contribution payers is largely based on their expectation that they will receive sufficient benefits once they reach pensionable age (Müller and Burkhardt 1983, p. 74).

2.2 Calculation of Contributions

The level of contributions to the pension insurance is set by the Pension Insurance Act. It currently amounts to 18.6%, financed by employers and employees based on parity.

2.2.1 "Contribution Bonus" for Parents

Since the sustainable financing of pensions does not only presuppose sufficient financial means, but is highly depending on the birth and growing of children, there have been claims to privilege parents. Intergenerational solidarity in the pension system does not only comprise the generations of pensions and contributors. Rather one has to include a third generation, those of the future contributors, which means that current employees are not only obliged to financially contribute to the system but also to raise the generation of future employees in order to maintain the secure future prospects of the pension system (Müller and Burkhardt 1983, p. 74; Krüger 1996, p. 644; Hebeler 2001, p. 59). The contribution bonus for parents in the long-term care insurance could function as a model for this.

"Contribution Bonus" for Parents in the Long-Term Care Insurance

Germany has introduced a social insurance against the risk of long-term care in 1995. The system is organised similar to the statutory health care insurance: all persons who are (compulsorily or voluntarily) insured in the health care system are automatically insured in the long-term care insurance. It is financed by contributions on income from work, which rate at 3.05% for those who have children and 3.3% for those who are older than 23 years and do not have children. The higher contribution rate for childless persons is a consequence of a decision of the Federal Constitutional Court (Bundesverfassungsgericht = BVerfG) in 2001. It held that a pay-as-you-go system presupposes a high birth rate to ensure the financial stability. Parents therefore contribute in two ways to the system: by paying contributions and by raising children. If they had to pay the same rate of contributions as persons without children, parents would be disadvantaged because they contribute with both financial means and the raising of children to a social security system that is intended to offer protection in an ageing society (BVerfG, 3.4.2001, 1 BvR 1629/94). At the same time, parents have to abstain from consumption and saving due to the high costs of child-raising (Sodan 2005, p. 566). Furthermore, childless persons do not suffer any disadvantages from their not-raising of children, because for them, care will be provided by professional care services that are financed by the future contributors. Consequently, they have a privileged position, as they contribute less to the system, but can receive full benefits (BVerfG, 3.4.2001, 1 BvR 1629/94).

As a consequence of the BVerfG judgement, an extra 0.25% contribution is levied from all insured persons who are older than 23 years and childless. The age limit reflects the duration of the free health insurance for family members.[10]

This decision has been heavily criticised because—among others—there is obviously no guarantee that the children of the insured persons will be paying contributions in the future. They might die before they reach working age, become civil servants or self-employed or move away from Germany. Furthermore, the contribution bonus for parents might discriminate against persons who do not have children due to medical reasons.[11]

In contrast to the pension insurance, the long-term care insurance does neither recognise times of child raising as insurance periods nor does it contain other factors that would reward parenthood. Thus, the difference in the contribution rate is the only element of solidarity between generations.

Contribution Bonus for Parents in the Pension Insurance?

In its decision on the long-term care insurance, the Federal Constitutional Court held that these principles might be of relevance in other fields of social security as well. This statement found some support: the specific burden of parents has to be compensated in pension insurance likewise by recognising a "generational contribution" (Lenze 2001, p. 280).[12] In order to justify this view, reference is made to the costs of bringing up children. Lower contributions for parents would therefore relieve the burden on the family household (Müller and Burkhardt 1983, p. 76).

In 2006, the Federal Social Court (Bundessozialgericht = BSG) decided that the expenses of parents for the raising of their children do neither require them to be exempted from compulsory insurance nor from paying pension insurance contributions. Membership in the social security system depends solely on the pursuit of gainful employment and not on the ability or willingness to reproduce. Moreover, the discretion in legislation is broad; even the protection of the family in Art. 6 GG does not oblige the legislator to compensate for all financial burdens related to the raising of children. Having children is not only necessary for pension insurance purposes, but for society as a whole; therefore parents can be supported by the state in manifold ways (BSG, 5.7.2006, B 12 KR 20/04 R).[13]

This view has been confirmed in another judgement in 2015, when the BSG held that contributions to the pension system do not have to differ for persons who raised

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[10]Children of an insured person are no longer covered by their parent's insurance if they are older than 23 years unless they are studying or in an apprenticeship.

[11]A constitutional complaint against the contribution malus by a couple that has been childless due to medical reasons, however, has been rejected by the BVerfG, 2.9.2009, 1 BvR 1997/08.

[12]Cf. Müller and Burkhardt (1983), p. 76, even long time before the establishing of the long-term care insurance.

[13]A constitutional complaint directed against this judgement was not accepted for decision, cf. BVerfG, 5.1.2010, 1 BvR 3039/06.

children compared to those who have not. The Court held that a pay-as-you-go-system largely depends on high birth rates, thus the pension insurance has to promote families. However, families are protected adequately in the current system, e.g. by the awarding of income points for periods of child raising or by survivors' pensions. Hence, the constitutional obligation to protect families is safeguarded. Furthermore, it is by no means clear that all children will be contributors in the future, whereas there is a certain probability that children will care for their frail parents. Therefore, the principles of the judgement related to the contribution bonus in the long-term care insurance were not regarded as transferable to the pension insurance (BSG, 30.9.2015, B 12 KR 15/12 R).

2.2.2 Sustainability Reserve

Another measure to ensure intergenerational solidarity by safeguarding stable contribution rates in the future, is the so called sustainability reserve (Nachhaltigkeitsrücklage). The statutory pension insurance institutions are obliged to establish this reserve, Art. 216 SGB VI, which consists of the operating resources (excluding the administrative capital) and reserves of the pension insurance institutions. Any surplus of current contributions over current pensions is transferred to this fund. It shall be used to cover future deficits that might arise due to cyclical fluctuation and thus leading to a situation that the statutory contribution rate is not sufficient to cover the expenses of the pension insurance institutions. Therefore, it is accounting for the solvency of the pension system as a whole, at least at short notice (Hebeler 2018, p. 850). The sustainability reserve fund shall amount to at least 0.2 times, maximum to 1.5 times the monthly expenses of the pension insurance, cf. Art. 158(1) SGB VI.

The sustainability reserve is administrated by the German pension insurance, which is obliged to invest the financial means in a manner that excludes the possibility of loss of those means, ensuring adequate returns and guarantees sufficient liquidity. All investments with a maturity, notice period or remaining term of up to 12 months are considered as liquid. More detailed regulations regarding the administration of the "sustainability reserve" are regulated by the German Pension Insurance's directorate.

2.2.3 Contribution Ceiling

As a rule, the contribution rate has to be calculated as to cover all necessary expenses of the pension insurance in the following year. The contributions have to raise if the sustainability reserve is expected to cover less than 0.2 of the pension insurance's average expenditure, they have to decrease if the sustainability reserve is higher than 1.5 of the expenditure, Art. 158 SGB VI.

In order to prevent an unlimited increase of the contribution rate, a contribution ceiling has been introduced in 2019. According to the new Art. 287 SGB VI, an

exception to the rule of congruence between income and expenses is due, when the contribution rate would have to exceed 20%. If this is the case, the statutory ceiling of 20% comes into force. At the same time, a minimum contribution rate of 16.8% has been set up.

In order to finance the gap, the federal government will provide an additional annual subsidy of 500 million Euros from tax revenues, Art. 287a SGB VI. These provisions will expire in 2025. They have been criticized due to high costs involved and for its missing long-term perspective to solve the financial problems of the pension insurance (Ruland 2019, p. 198 et seq). In order to discuss the long-term development, an expert commission “Verlässlicher Generationenvertrag” (“Reliable Generation Contract”) has been set up in 2018; in March 2020, it has submitted proposals for the future development of the pension system after the year 2025. Among others, the commission recommended to maintain the contribution ceiling. At present, the retirement age should not be raised further, as the increase from 65 to 67 is still ongoing. The pension insurance reserve should be increased; private and occupational pension provisions shall be further promoted. Hence, the commission’s proposals remain firmly rooted in the existing system and will not bring about impulses for fundamental reforms.

2.3 Elements of Generational Solidarity in the Calculation of Pensions

The legitimacy of the pension insurance system is increasingly being questioned—not only in respect of rising contributions but also due to fears that the pension level will not suffice to lead a life beyond the poverty line. The principle of equivalence between contributions and benefits[14] seems weakened. Moreover, it is foreseeable that persons receiving the statutory minimum wage will receive a pension below the poverty line, thus being dependent on social assistance benefits in old age. Ever since the 1950s, the rules regarding the calculation of pensions have been under reform in order to ensure financial stability of the pension system and its sustainability for future generations.

The Bismarckian system did not address the whole population, but focused on the social protection of the blue-collar workforce.[15] In the funded system, pensions were due at the age of 70 years after a minimum of 30 contributory years; average life expectancy at that time, however, was about 45 years only. Hence, take up-rates were rather low in the early years and questions of intergenerational solidarity did not occur (Schlegel 2008, p. 566).

[14]Equivalence does not have to be secured individually each insured person, but rather regarding the pension system as such, Hebeler (2001), p. 17; Eichenhofer (2019), p. 155.

[15]At that time, the pension system had been limited to blue collar-workers; white collar-workers were included in 1911 only.

2.3.1 1950s: Pay-as-you-go and Indexation of Pensions

This changed in the age of the German "Wirtschaftswunder" during the 1950s, which lead to an overall increase of income of the economically active. Since pensions consisted of a lump sum with a low earnings-related supplement only, pensioners faced an increasing risk of poverty. Social policy therefore addressed the aim that pensions should no longer function as a mere supplement to other forms of income, but should offer a basis for decent living. The 1957 pension reform lead to a shift from capitalisation to a pay-as-you-go scheme, which is based on the generational contract, i.e. the financing by the currently active generation (Ruland 2001, p. 3505; Schmähl 2015, p. 177). One of the underlying assumptions was that people would always have children, not anticipating birth control and changing social attitudes that lead to a severe decline of the birth rates from the 1960s. Pensions were now based on insurance years and the individual contributions. Another important aspect of the 1957 reform was the indexation ("Dynamisierung") of pensions, which means that the benefits were adapted to the development of the gross income of all insured persons during the last 3 years. Thus, pensioners shall be able to participate in general prosperity. With this reform, pensions became a benefit that allowed to keep one's standard of living during the work life even after retirement: The standard pension offered a replacement rate of 60% of the average income.

2.3.2 1970s: Promotion of Early Retirement

The economic crisis 1970s lead to a massive increase of unemployment rates. Social policy, however, did not follow a sustainable strategy, but rather focused on elder persons leaving the labour market by allowing early retirement without any cuts in benefits, which has been heavily criticised for its consequences regarding the financing of the pension system (Ruland 2000, p. 745).[16] Hence, the unemployment risk had partially been transferred to the pension insurance. At the same time, indexation of pensions has been curtailed, periods of education were limited, contribution rates raised, and conditions for invalidity pensions restricted.[17]

It became evident, that with the decreasing birth rates and rising unemployment the expenditure would have to be financed by fewer workers, while at the same time the number of recipients increased. Thus, the basis of the intergenerational contract, which—in technical terms—does not fulfil the criteria of a contract because it is not

[16]The possibility of early retirement at the age of 63–65 without any adjustments in pension amounts had been introduced with the 1972 reform for persons who had completed 35 contributory years and at the age of 60 for persons with disabilities who would not find employment, be it for health reasons or due to the situation on the labour market. Moreover, it was rather simple to gain an invalidity pension.

[17]For an overview of the 1970s and 1980s reforms cf. Kreikebohm (2015), p. 182 et seq.

concluded on a voluntary basis and cannot be terminated (Hebeler 2001, p. 58), has been questioned.

2.3.3 1990s: Reunification, New Pension Formula, Shift to Revenue-Oriented Spending Policy

With the 1992 reform, the pension-formula has been adapted in order to avoid that the contribution rate might amount up to 36–41% in 2030 (Ruland 2001, p. 3506). Pensions are now indexed to the average net income of the insured persons, taking into account that the rising financial burden of taxes and social security contributions had lowered their disposable means significantly. Pensions should therefore no longer increase when taxes and contributions increased as well. Besides, the opportunities to early retirement without cuts have been gradually removed, pensionable age raised from 60 and 63 years to 65 years (Kreikebohm 2015, p. 182).

The reform has passed the Parliament on November 9th 1989—just a few hours before the fall of the Berlin wall. This unexpected event has had severe consequences for the public pension system, for during the early 1990s, the pension entitlements of the persons formerly insured in the GDR social security scheme had been transferred into the West German system, based on fictitious contributions for a career with the average income of all insured persons. This had to be financed with the means of the pension insurance itself, since policy refused to raise taxes. This intensified the financial burden on the pension scheme (Kreikebohm 2015, p. 182). Still, the system was rather generous, offering an income replacement rate of 63.9% after 40 insurance years and 71.9% after 45 years. Retirement age was raised to 65 years, offering exceptions at 63 years for a small group of long persons with more than 35 insured years. In case of early retirement, the pension is permanently reduced by 3.6% per year.

At the end of the 1990s, the government prepared another reform, which was intended to equally spread the burden among contribution payers and beneficiaries. The so-called demographic factor had been developed, relating the "current pension value" (= the result of indexation) not only to net income, but also to the life expectancy of those aged 65 years and older (Ruland 2001, p. 3506). After the elections in 1998, the new government suspended this concept.

2.3.4 2000s: Three-Pillar-Model and Sustainability Factor

In 2001, the new government developed a reform that brought about system shift by setting incentives for private and occupational schemes. The stability of the contribution rate became one of the most important aims of the pension system, which forced to abstain from the former goal of maintaining the living standard during work life.

Indexation has been changed, once more, now relating to a "modified gross income", which referred to the average gross income of the workforce reduced by

the contribution rate to the statutory pension insurance (including employer and employee contribution) and the proportion of their income spent on private pension schemes (“Altersvorsorgefaktor”). Hence, pensions increase lower, either if the contribution to the statutory system is raised or if the insured persons invest a greater proportion of their income to private pension arrangements. This principle takes into account that high contributions for retirement arrangements lower the household income that is available for consumption.

Since then, the pension level amounted to 70.7% for the standard pensioner with 45 contributory years at average income in 2020 and to 64.3% in 2030 (Kreikebohm 2015, p. 183). In order to foster private provision, tax subsidies have been introduced, which amount to 154.00 Euro per year plus 185.00 Euro per child per year, maximum 2100 Euro per year. The full tax subsidy is paid only if a person invests at least 4% of his/her income in a private pension arrangement. Besides, occupational arrangements have been fostered: employees have the right to transfer up to 4% of their income in entitlements for occupational pension (Ruland 2001, p. 3510), thus, however, lowering their contributory basis for the statutory scheme.

In 2004, the demographic factor has been re-introduced, now called sustainability factor (“Nachhaltigkeitsfaktor”). Ever since then, pensions are indexed according to the modified gross income and the so-called pensioner-quote referring to the share of pensioners compared to the number of contribution-payers. Hence, the more pensioners, the lower the birth rate and the higher the unemployment rate, the lower the yearly increase of pensions (Sodan 2005, p. 562; Kreikebohm 2015, p. 185). Moreover, the standard pension level has been further reduced to 46% in 2020 and to 43% in 2030—a massive cutback! The maintenance the former standard of living can only be achieved with a combination of statutory, private and occupational schemes; statutory pension offers a mere basic security (Lenze 2019, p. 266).

These measures shall lower the financial burden for the contributors in the pay-as-you-go system. If the contributions shall not raise beyond a certain rate, it is indispensable in terms of intergenerational solidarity that current pensioners contribute to it. Hence, if indexation leads to a lower rise of the current pension amount, it is not regarded as inequitable (Ruland 2000, p. 753).

2.3.5 2010s: Longer Working Life and Minimum Pensions?

In 2007 already, the pensionable age has been raised to 67, which will be gradually introduced from 2012 to 2029. The transition period had to be long in order to conform to the principle of protection of confidence and the rule of law.

It is possible to receive pension benefits while continuing to work. There are no deductions from the pension if the person has reached pensionable age. However, before reaching the pensionable age, strict income ceilings used to apply until 2017: No deductions were due if the income did not exceed 450.00 Euro per month. A part-time pension (Teilrente) was awarded at a level of 1/3, 1/2 or 2/3 of a full pension. Depending on the level of pension, there were different income ceilings, which had been applied very strictly. If a pensioner has, for example, received a 2/3 pension,

but exceeded the income ceiling by just 1 Cent, he would automatically downgrade to a 1/2 pension. This has been recognised as a disincentive for working in the pensionable age, therefore in 2017 the so-called "Flexi-Pension" has been introduced in order to foster the transition from work to pension (Eichenhofer 2019, p. 180). After the reform, there are no deductions from the pension for income up to 6300 Euro per year. Income above this ceiling is deducted from the pension, though not in full but at a rate of 40%.[18]

Even though the danger of old age poverty has increased after the recent reforms (Schmähl 2015, p. 193), Germany has not introduced a minimum pension. Pensions that do not suffice to cover the minimum of subsistence, can be augmented by social assistance benefits. In 2019, a minimum standard pension level of 48% has been established in the Pension Insurance Act. The provision will expire in 2025; it is closely linked to the contribution ceiling of 20% that has been introduced with the same act.

The introduction of a minimum pension is currently under debate for all persons with long contributory periods of minimum 35 years whose pensions remain under the social assistance level. However, it has been questioned whether it is the task of the pension system to subsidise the negative outcomes of low wages on the employment market. Besides, one has to take into account possible free rider effects if minimum pensions are paid to formerly part-time workers in the same amount as for full-time workers (Kreikebohm 2015, p. 190). From a legal point of view, the proposal raises the question of equal treatment: how should one justify different levels of pensions—subsidised and not subsidised—for the same group of persons: employees paying contributions upon their income from work? The risk of poverty does not suffice as a justification, because it is addressed by the social assistance scheme. Rather, the principle of equivalence between contribution and benefit would be undermined (Papier 2019, p. 6). However, there is no constitutional obligation to stick to this principle.

3 Conclusions

Pay-as-you-go-systems are based on the assumption that children are born and thus a sufficient number of contributors will grow up at any time. Its continuance relies on the wealth and the willingness of future generations (Müller and Burkhardt 1983, p. 74; Hebeler 2018, p. 849). The inclination to pay contributions for the pension insurance will decrease when today's employees face the fear that their own pension entitlements will be (significantly) lower than those of today's pensioners (Krüger 1996, p. 643). In order to maintain the acceptance of the system as such, the legislator will have to safeguard that the underlying principles of the statutory

[18] http://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/Allgemeines/FAQ/gesetzesaenderungen/flexirente/01_faq_liste_hinzuverdienstgrenzen.html.

pension scheme still correspond to reality (Schlegel 2008, p. 569; cf. also Hebeler 2001, p. 32).

The German pension insurance act does not allow for cuts in current pensions of those who already receive these benefits, cf. Art. 306 SGB VI. Hence, only future pensioners will have to carry the financial burden of adverse developments (Cirsovius 2011, p. 1). Recent reforms have led to a rise of contributions as well as the pensionable age and a massive lowering of the guaranteed standard pension level for those currently economically active. The younger generation has to pay more, but will receive less. Due to the continuingly low birth rates, the problem will intensify in the future. These developments raise questions of justice, especially if the average pension level only slightly exceeds the level of social assistance benefits, thus questioning whether pension insurance is still capable to reflect lifetime earnings.

This discussion came up again in the recent election campaigns: most of the eligible voters in Germany are older than 55 years, so the political parties are suspect to not sufficiently protect the interests of the younger generation and/or those with low incomes (Cf. Hebeler 2001, p. 27). This impression has been confirmed by the recent increase of benefits for current pensioners, e.g. the doubling of income points for child raising periods that have been completed before 1992 or the new rules on early retirement without deductions at the age of 63 after 35 insured years (Kreikebohm 2015, p. 186 et seq). Pension policy seems fixed to present, to the detriment of future generations, hence promoting intergenerational injustice (Kahl 2014, p. 18).

One could argue that, over the past decades, social insurance became an insurance against the risk of remaining childless, with the childless not paying contributions to insure that risk (Lenze 2019, p. 271). The costs of financing pensions are socialised, if childless persons and parents pay the same contribution rate; the costs of child-raising, however, are privatised, which leads to intragenerational redistribution between those who have children and those who do not (Seiler 2016, p. 645) and might trigger conflicts between these groups (Krüger 1996, p. 644). One solution could be to exempt the share of income that represents the minimum of subsistence for all family members—including children—not only from taxes, but also from social security contributions (Lenze 2019, p. 271). However, this could be only one element for making the pension system sustainable. Regarding the fear of poverty in old age, one has to bear in mind that the German pension system is not intended to prevent poverty; low earnings lead to low pension amounts (Papier 2019, p. 2). A rise in wages would therefore be crucial in order to accumulate more income points. Prolonging work-life is essential as well:[19] social insurance is supposed to cover financial loss due to the materialisation of a social risk. Within the last decades, however, old age rather became a "risque heureux".

[19]Many member states have increased pensionable age in recent years and established disincentives for early retirement (Eichenhofer 2014, p. 206).

It is inevitable to equally share the burdens of solidarity—and not just its advantages (Ruland 2000, p. 749). Otherwise, the basis of the "generational contract" will erode.

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