

Ius Comparatum – Global Studies in Comparative Law

Eri Kasagi *Editor*

# Solidarity Across Generations

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Eri Kasagi

Editor

# Solidarity Across Generations

Comparative Law Perspectives

 Springer

*Editor*

Eri Kasagi  
Center for Comparative Labour and Social  
Security Law (COMPTRASEC, UMR  
5114)  
University of Bordeaux  
Bordeaux, France

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# Preface

This book is the outcome of the General Congress of International Academy of Comparative Law, held on July 22–28, 2018, at Kyushu University (Fukuoka, Japan). The congress has tackled numerous important and topical legal questions from a comparative perspective, including that of “solidarity across generations,” a topic that we will discuss in this volume. In the context of aging population, many countries are facing a challenging matter of reconfiguration of different types of solidarity between generations. The comparative and comprehensive analyses of the ways each country tries to answer this question, in combining the solutions of civil, social, and public laws, give us some clues to deal with this complex issue.

This volume includes 13 chapters, based on a general report as well as individual national reports, which were prepared for the abovementioned congress and subsequently updated in 2019. Spanish chapter was submitted afterwards, for publication. Following the general report (first part), the contributions in the second part principally look at solidarity through different pension systems. The third part is composed of the contributions on different types of solidarity, facing the needs of elderly people, particularly that of long-term care. The questionnaire prepared for national reports is included at the end of this book.

It has been a great pleasure and honor for me to work with so many experts in different fields of law, in treating very exciting questions concerning solidarity across generations. As this topic is relatively new and not related directly to classical legal questions, we started our collective work in trying to identify and define legal questions that this topic might cover. This difficult but extremely stimulating work would not have been possible without the continuous collaboration with all the national reporters for almost 2 years from the end of 2017. I would like to express my sincere and profound gratitude to all the colleagues who have participated in the congress as well as in this volume, with whom I strongly hope to have other occasions to work together in the future.

I would like to convey my special thanks to Prof. Katharina Boele-Woelki, Prof. Diego P. Fernández Arroyo, the President and Secretary-General of the International Academy of Comparative Law, for their kind support and encouragements, and also,

for having accepted to include this volume in the honorable *Ius Comparatum* series. Many thanks to Alexandre Senegacniki for his kind help and advices for the organization of our panel at the congress, as well as for this publication. I also would like to express my gratitude to my former colleagues of Kyushu University, Prof. Toshiyuki Kono as well as Prof. Mariko Igimi, for their kind support and advices for this work. Last but not least, I would like to express my sincere gratitude to Abdus Salam Mazumder, Anitha Chellamuthu as well as Anja Trautmann at Springer for their warm encouragement in realizing this book.

Bordeaux, France

Eri Kasagi

# Contents

## Part I General Report

<b>Solidarity Across Generations from the Perspective of Comparative Law: Reconfiguration of Different Types of Solidarity in the Context of an Aging Society . . . . .</b>	<b>3</b>
Eri Kasagi	

## Part II Solidarity Through Pension Systems

<b>Elements of Generational Solidarity in the German Pension System . . . .</b>	<b>37</b>
Constanze Janda	
<b>Beyond the Formal Principle of Intergenerational Sustainability in the Italian Social Security System . . . . .</b>	<b>59</b>
Michele Faioli	
<b>Les réformes des pensions en Belgique au regard du droit à la sécurité sociale et du principe de standstill prévu à l'article 23 de la Constitution belge . . . . .</b>	<b>75</b>
Elisabeth Alofs and Guido Van Limberghen	
<b>La Solidarité Entre Générations Au Sein Du Système De Retraite Français . . . . .</b>	<b>97</b>
Laure Camaji	
<b>Intergenerational Solidarity in the Spanish Social Security System . . . . .</b>	<b>115</b>
Juan Antonio Maldonado Molina	
<b>Le Principe de la Solidarité entre Génération Appliqué au Régime Brésilien de Sécurité Sociale . . . . .</b>	<b>137</b>
Marcelo Leonardo Tavares	
<b>Solidarity Across Generations in the Japanese Public Pension System . . . .</b>	<b>151</b>
Masahiko Ohta	



**Part III Different Types of Solidarity Facing the Needs  
of Elderly People**

<b>Long-Term Elderly Care, Family and Money in Ageing Finland . . . . .</b>	<b>181</b>
Katja Karjalainen and Anna Mäki-Petäjä-Leinonen	
<b>Solidarity Across Generations in England and Wales . . . . .</b>	<b>201</b>
Brian Sloan	
<b>The Elderly and Their Families: The Hungarian Context . . . . .</b>	<b>221</b>
Orsolya Szeibert	
<b>Support, Care and Employment for the Elderly: Examining the Law and Policy in Singapore . . . . .</b>	<b>241</b>
Gary Chan Kok Yew	
<b>From Tradition to Transformation: How to Provide Long-Term Care to the Elderly People in China? . . . . .</b>	<b>265</b>
Tianyu Wang	
<b>Solidarity Between Generations in South Africa: Contemporary Challenges and Prospects . . . . .</b>	<b>279</b>
Chanda Chungu and Evance Kalula	
<b>Questionnaire on Solidarity Across Generations . . . . .</b>	<b>305</b>

**Part I**  
**General Report**

# Solidarity Across Generations from the Perspective of Comparative Law: Reconfiguration of Different Types of Solidarity in the Context of an Aging Society



Eri Kasagi

**Abstract** This work will examine the issue, which is both universal and topical, of solidarity between generations, focusing on forms of financial and material mutual support within family, as well as collective redistribution, realized by state social security systems. In contemporary demographic, social and economic contexts, we are facing new legal questions, as well as rediscovering and reexamining classic issues, in the field of pension law, family law, social law. Ultimately, through these separate legal questions, the respective roles of State (public) solidarity and family (private) solidarity need to be reconsidered and reconfigured. Comparative and comprehensive analyses of the way that different countries answer these contemporary questions about solidarity between generations in civil, social and public law give us some clues to tackle this complex and challenging issue.

## 1 Introduction: Issues and Context

### 1.1 *'Solidarity Across Generations' from the Perspective of Social and Family Law*

This chapter deals with the issue of 'solidarity across generations' from a comparative legal perspective, based on the national reports of 16 countries in different

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We would like to thank Julie Zambau, research engineer at CNRS and director of documentation centre of COMPTRASEC, as well as Tomoyo Sato, undergraduate student of Sophia University, for their precious help in the realization of this work.

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E. Kasagi (✉)

CNRS, Centre for Comparative Labour and Social Security Law (COMPTRASEC UMR5114),  
University of Bordeaux, Bordeaux, France  
e-mail: [eri.kasagi@u-bordeaux.fr](mailto:eri.kasagi@u-bordeaux.fr)

regions of the world.<sup>1</sup> This extremely topical subject<sup>2</sup> covers many of the issues and different disciplines of law, in the fields of both public and private law, as well as other fields of social science. Among these various topics, we will study solidarity across different generations in the form of mutual financial and material support or responsibility within families, as well as in the form of collective redistribution carried out by the state. This report will therefore deal primarily with issues concerning state pension systems, family support duties towards elderly people in need, as well as formal and informal long term care of elderly people, from the perspective of social and civil (family) law. As a result, we will not deal with other questions, specifically environmental ones, which could also be discussed in relation to the issue of ‘solidarity across generations’.

## 1.2 *Definitions of “Generation” and Different Types of “Solidarity”*

There are two key concepts in the topic of our discussion, which can have various meanings and which therefore need to be clearly defined before we begin discussing specific issues.

Firstly, we are, of course, aware that ‘solidarity’ is a polysemous term widely discussed from many perspectives, especially in the field of sociology and, historically, in the French academic and political context.<sup>3</sup> In this report, we use a simple and broad definition of ‘solidarity’, already mentioned above: *‘mutual financial and material support or responsibility between individuals as well as in the form of collective redistribution carried out by the state.’* We will not be exploring in detail the concept of solidarity itself. Within this large definition, two types of solidarity

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<sup>1</sup>(In alphabetical order) Belgium, Brazil, Cameroon (Virginie Yanpelda), China, Czech Republic (Ondřej Horák, Jana Boulaouad), Finland, France, Germany, Greece(Helen Rethymiotaki), Hungary, Italy, Japan, Singapore, South Africa, Spain(Gabriel García Cantero), United Kingdom “England and Wales”. Among the authors of these national reports, 12 authors participate to this book (Above indicated are the names of authors who don’t contribute to this book but had edited national reports for the general congress).To edit this first chapter, we have examined all the national reports of above mentioned 16 countries as well as the chapters which had been updated or newly edited (in the case of Spanish law) after the congress. We will try to distinguish these references in mentioning ‘national report’ when we would like to refer to the reports which had been edited at the occasion of congress, and ‘chapter’ when we would like to refer to the updated or newly edited version for this volume. We try to refer to the latter when it is possible. We have also added several elements by ourselves, in that case in directly indicating their sources.

<sup>2</sup>The issues which will be treated in this report are relevant primarily for developed welfare states with an aging population. The issues of environmental law are theoretically important in both developing and developed countries, though the debates on these issues are more or less active in different countries.

<sup>3</sup>About Durkheim’s theory of ‘social solidarity,’ see Durkheim (1893). See also Bourgeois (1926), Spiot (2015), Paugam (2011).

should be distinguished: private solidarity and public solidarity.<sup>4</sup> Private solidarity will be defined as solidarity at work within the family—*family solidarity*.<sup>5</sup> On the whole, private solidarity primarily develops spontaneously, without state intervention. However, it can be made partly mandatory by legal provisions in a form of ‘support duty,’ as we will see later in Sect. 3. Public solidarity will be defined as collective solidarity with state (or local government) intervention, which is organized, and often required by law, for the entire population of the country, as well as a part of the population (workers, persons in need, etc.), sometimes at the regional level. Some scholars use similar concepts, such as ‘social solidarity (*solidarité sociale*)’<sup>6</sup> or ‘collective solidarity (*solidarité collective*).’<sup>7</sup> The typical example of public solidarity is national pension systems, which will be one of our main topics.

The other concept which needs to be defined is ‘generation’. Here again we try to define generation in a broad and flexible way as “*groups of persons which are distinguished or identified by the year of birth.*” The exact definition of generation and how different generations are divided can vary according to context. We also speak of the ‘*present generation*,’ which includes all existing persons, as opposed to the ‘*future generation*,’ which concerns those who are not born.

The difficulty of the issue of solidarity across generations, as we have defined it, is the fact that the legal questions treated as well as perspectives on this issue in different countries can differ dramatically according to the demographic, economic and political contexts. This is why we will first briefly describe the different contexts in which this issue is dealt with and debated in different countries, and then proceed to focus on issues of social and civil law in the following three sections.

### ***1.3 Different Issues in Different Demographic and Economic Contexts***

When considering solidarity across generations, the issues which are actively debated differ largely depending on demographic and economic contexts. Of the 16 countries included in this report, the majority are experiencing a trend of aging and waning populations—although of varying degrees and over different time spans—which present (or could potentially present) issues and conflicts concerning solidarity across generations. In these countries, the burden of supporting the older generation has become increasingly heavy on younger generations, whether in terms of contributions to the states’ redistribution and social benefit schemes, or in terms of care support for the elderly members within a family. Cameroon is almost the only

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<sup>4</sup>Boissard (2014).

<sup>5</sup>Without going into too much detail, there is some controversy about the political usage of this concept, particularly in France and the French academic community. See Minonzio (2004), p. 8.

<sup>6</sup>Lenoir (2011), p. 169. Vigneau (1999), pp. 51–81.

<sup>7</sup>Maisonnasse (2016), Minonzio (2004), pp. 7–19.

country where the demographic situation does not raise this kind of question,<sup>8</sup> and, in fact, the issues of younger generations are a priority in public debates and social policies without causing conflicts with the older generations.

The economic situation can also greatly affect the issues concerning solidarity between different generations. In almost all 16 countries, we can observe a deterioration of (at least) a part of the population's financial situation, especially after the world's financial crisis of 2007, because of economic stagnation. The financial crisis brought about a policy of austerity in many countries, especially in Europe, which led to the reduction of some social benefits, which then further aggravated the situation of these populations. In this context, a growing interest in the role of family as a safety net can be seen in a lot of countries. Family solidarity across generations can be imagined in two directions. Firstly, young adults, who often have more financial difficulties at the beginning of their professional careers, are supported by their parents, who own their place of residence and possibly also have a stable income from pension schemes. Secondly, adult children, when they have a more stable situation, financially support their elderly parents who have few resources and who sometimes need to pay for health care or long term care services (see below).

#### ***1.4 Developed Welfare States or Countries with Limited Social Expenditure***

The issues concerning solidarity across generations can be very different from one country to another depending on the national Social Security systems they have developed. In other words, these issues are discussed very differently in well-established welfare states—which constitute the majority of the countries examined in this report—and in countries with limited social expenditure. The latter category can be divided again into two groups, though this distinction is by no means rigid: developing countries that are currently developing social security systems in the wake of their economic development (China, Cameroon) on the one hand, and countries that clearly promote a liberal ideology by keeping social expenditure and redistribution relatively small (South Africa, Singapore).

For developed welfare states, the previously mentioned issue of the heavy burden on the younger generation is especially controversial for social security systems, notably pay-as-you-go pension systems, which require significant contributions or taxes from younger generations. Social security systems set up in these countries often guarantee elderly people a comfortable income, even compared to that of the younger working generation. This fact—a success, in a sense, of the welfare state—could create serious concerns/doubts for the younger generation about the legitimacy and fairness of existing social institutions, especially in a context where this younger

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<sup>8</sup>The fertility rate in Cameroon is still around 4.63 in 2015, although it has decreased from 6 in 1976. The younger generation (0–24 years old) makes up more than 60% of the nation's population.

generation is not sure they will enjoy the same living standards and economic security when they are older. Furthermore, the classic categorization of elderly people as vulnerable is not necessarily accurate in this context. The inversion of the economic positions of younger and older generations is even more striking when we consider the fact that older people are not always physically vulnerable at retirement age, thanks to the overall improvement of the population's physical health, as well as significantly less arduous working conditions for the contemporary worker.

In countries which favour a liberal ideology, the burden of collective solidarity on the younger generation is marginal, especially as these countries do not have a pay-as-you-go pension system. Therefore, the other issues, as the employment of the elderly population, or the need for long-term care (LTC), which we will discuss in the following paragraph, seem to draw more attentions in these countries.<sup>9</sup>

### ***1.5 Appearance of a New Problem: Long Term Care (LTC)***

Today, almost all those countries with an aging population are facing a new challenge—a growing need for long-term care (henceforth LTC). LTC was, and still is to some extent, invisible because of the presence of informal care, often supplied by female family members. The increasing number of elderly people who are in need of long-term care combined with the increase of female workers has made this problem much more visible and calls for a solution.

This newly revealed problem raises the question of its nature: in other words, do we consider LTC a private matter, or a public one? Certain countries consider LTC to be at least partly a public matter, and introduce state or local initiatives to provide care services or financial aid to elderly people in need of LTC. At the same time, the importance of informal and family carers has never disappeared, even in the countries where state intervention exists. Compensation or support for these informal carers therefore remains an important issue in a lot of countries.

### ***1.6 Three Main Topics of Discussion***

This is the complex and rapidly changing context in which the issues examined in this report are debated. We will attempt to cover the various issues and the different countries' contexts by examining three main topics concerning solidarity across generations from the perspective of comparative law.

Firstly, we will deal with public solidarity, which is actually achieved by mandatory state pension systems. We will also tackle the question of reconciling the

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<sup>9</sup>See the chapter about Singapore in this volume.

interests of the younger and older generations, specifically by analyzing the possibility for the legislative branch to cut existing pension benefits (Sect. 2).

Both the second and third topics concern the role of private (family) solidarity and the relationship between private (family) solidarity and public solidarity. Specifically, one will focus on family duties in civil law to support the needs of elderly family members, as well as the relationship between these civil law duties and social welfare schemes (Sect. 3). The third question concerns the respective roles of public and family support for elderly people who need long term care (LTC). This section will examine public intervention for LTC, as well as the legal measures taken to encourage, support and compensate informal care provided by family members (Sect. 4).

## 2 Solidarity in Pension Systems

In contemporary welfare states, social security systems can play a role of redistribution across generations, normally towards vulnerable generations—the elderly and very young (children). This redistribution takes the shape of pensions, health care and various benefits which are allocated to the elderly or to children. Among these systems of intergenerational and public solidarity organized and enforced by the state, pension systems are central to the national social policy of many countries because of their importance to elderly people, as well as for the large part of contributions and public spending they represent. This section will analyze solidarity across generations operating within state pension systems.

### 2.1 *Different Types of Pensions*

Pension systems can be divided into several types according to different criteria, such as the category (or categories) of people eligible for the system (all residents of the country, employee, self-employed, public servant, general worker, etc.), rule of affiliation (obligatory or voluntary), level of contributions and benefits (universal or proportional to income), administrator (government, social partners, public or private fund), and so on.

In terms of ‘solidarity across generations,’ one criterion is extremely meaningful, much more so than the others listed above. Indeed, pension systems can be divided into two groups according to the financial scheme that these systems use to guarantee the pension benefit: tax-financed pensions or contributive pensions. Contributive pensions can again be divided into two groups. The first is what is called ‘pay-as-you-go’, where pension benefits for the older generation are financed directly by the contributions of the younger, active generation. The second group, pre-funded pensions, sees the individual (and sometimes his employer) contribute to his pension continuously as he works, which he then receives some years later, based on what he



himself (or his employer) has provided to his account. Many countries combine these three financial schemes, in order to either separate different levels of pension (e.g., minimum and tax-based pension, basic pay-as-you-go pension, complementary pre-funded pension<sup>10</sup>), or to provide complementary financing within a same pension system (e.g., introducing tax revenue to a primarily contributive pension system, or providing a certain amount of funding to a primarily pay-as-you-go pension system, etc.).

Among these different financial schemes, the pay-as-you-go scheme probably best illustrates the idea of solidarity across generations,<sup>11</sup> as it means the working generation makes direct contributions in order to immediately finance the older generation's pension benefits. At first glance, this so-called intergenerational 'solidarity' seems to be a one-way contribution from the younger generation to the older, as the working age population receives nothing from the retired population. There is therefore no mutual help between these two generations. However, this system of contribution legally and technically provides a right to a pension benefit for those who contribute once they reach retirement age. And in reality, the working-age population's future pension will be financed by the next generation—the future working-age population. The pay-as-you-go pension scheme thus creates a series of virtual mutual contributions between several—at least three—generations, thanks to the contribution of the working age population, as well as a legal and theoretical right to a future pension.<sup>12</sup>

Inversely, the pre-funded pension scheme excludes the idea of solidarity across generations, as it separates each contributing person's individual pension account. Therefore, in the countries which use a pre-funded financial scheme exclusively, the pension systems do not foster solidarity across different generations as we define in this contribution.<sup>13</sup>

The tax financed pension systems, on the other hand, provide a certain level of solidarity across generations, as taxes are usually paid by the working population. However, the level, as well as the actual content, of this solidarity differs greatly according to the types of taxes which are used to finance the pension benefit. For example, the older generation itself contributes to the pension when the benefits are financed by a tax, such as consumer tax. Whereas with income tax, the contribution made by the older generation is obviously much less significant.

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<sup>10</sup>Within the European Union, this three-layer model is considered somewhat standard, even though there are some exceptions, such as the French pension system. See Del-Sol (2014), p. 627.

<sup>11</sup>The French 'Code de la sécurité sociale' has been changed recently to declare that the pay-as-you-go pension schemes is at the center of the social pact which unites generations and the goal of this pay-as-you-go system is to create solidarity across generations (Code de la Sécurité Sociale, L. 112-2-1). See Camaji in this volume.

<sup>12</sup>Kasagi (2020).

<sup>13</sup>We can mention Singapore and South Africa as examples of countries that have this kind of pension system. See Chungu and Kalula in this volume about the solidarity which can nevertheless be identified in the pre-funded pension schemes.

It should also be noted, even though this point will not be examined in this report, that pay-as-you-go pension systems, as well as those financed by tax, very often allow income redistribution between people of a same generation who are contributing to these schemes, in addition to creating solidarity across generations.

## ***2.2 Old Age Pension or Retirement Pension?***

Another important criterion in terms of ‘solidarity between generation’ is the relationship between pension and retirement. In most countries,<sup>14</sup> one of the conditions of eligibility for pension benefits is to have reached a certain age; we speak of ‘pensionable age.’ Furthermore, some countries require people to retire from work before receiving their pension benefit, while other countries do not. This means we make a distinction in theory between retirement pension (pension for those who are a certain age and have also retired from work) and old age pension (pension for those who are simply a certain age). In the past, these two statuses (retirement and old age) were almost synonymous, as people were generally no longer able to work past a certain age. In today’s society, the meaning of ‘old age’ has changed and to have a certain age does not automatically mean that someone is unable to work, as it is more and more frequent for people to work longer, and the distinction between the two has become relevant.

We can analyze this point by asking if it is possible to receive pension benefits as of a certain age, without retiring from work. The answer to this question differs greatly according to the country. In certain countries, it is possible for a worker to receive full pension benefits and continue to work with no time limit.<sup>15</sup> In this case, someone can theoretically be both a pensioner and a full time worker, thus

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<sup>14</sup>Brazil is one of the rare exceptions. See note 17.

<sup>15</sup>Italy (reform of 2009), Brazil, Czech Republic, England and Wales, South Africa. In Japan, tax based universal and basic pension benefits have no restrictions on combining pension benefits and work. For the old age employee’s pension insurance, however, there is a certain restriction as we will see later. In the South African pre-funded pension system, it seems somewhat logical that whether a person who can receive pension benefits continues to work or not stays a private matter.

contributing to the pension system and working at the same time.<sup>16</sup> The pension benefit then covers the risk of ‘old age,’<sup>17</sup> regardless of the income of the person who receives it.

In certain countries, there are restrictions to combining pension benefits and salaries, even after one reaches retirement age. In Japan, when a pensioner works and receives a given amount of money, his pension benefit can be reduced.<sup>18</sup> As explained in detail in the Japanese national report, this adjustment of the pension benefit is controversial. On the one hand, this reduction is justified by the fact that, as we have discussed above, people who have a stable and suitable income have no need for pension benefits no matter what their age. On the other hand, this mechanism discourages older people from working, when the goal is to encourage their employment. Furthermore, the idea of reducing benefits for those who have income is similar to that of the means test, in the sense that the benefits are provided only when there is a real need, and a social security (social insurance) system is normally and theoretically meant to avoid this situation, as benefits are based on contributions.

Finally, some countries<sup>19</sup> do not allow people to work while receiving a pension. In these countries, pension benefits can be considered to be strictly a retirement pensions,<sup>20</sup> which thus cover loss of income related to the old age, and not ‘old age’ itself.

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<sup>16</sup>It should be noted that in this case (and in the case that the pensioner can work and contribute to the pension system under certain restriction, as we will see later) there is the possibility of revising their pension benefits by taking into consideration the contributions made after liquidation must be considered (that is, whether the pension benefit will be increased once the pensioner stops working). In Brazil, according a recent decision of the Supreme Court (in 2016), once pension benefits are liquidated, the worker cannot waive this pension and claim a new, revised pension, which means the amount cannot be revised (increased) even if the pensioner continues to work and contribute to the pension system. The pensioner contributes to the pension system without any personal return by contributing to the pension system as a whole.

<sup>17</sup>One exception is the Brazilian system, which allows those who have contributed for a certain period of time (35 years for men and 30 years for women) to receive pension benefits, irrespective of the retiree’s age. The pensioner can continue working after the liquidation of their pension benefits. Pension benefits are therefore neither defined as ‘retirement pension,’ nor exactly as ‘old age pension’ (at least in today’s context), as one can start receiving pension benefits in one’s 40s. See Shimamura (2015).

<sup>18</sup>See Ohta in the volume for details.

<sup>19</sup>Cameroon, Greece.

<sup>20</sup>The Japanese pension system once required ‘retirement from work’ as one of the conditions for eligibility to benefits. See Shimamura (2015).

## ***2.3 Crisis of the Pension System: How Can Pensioner's Rights be Protected? How Can the Interests of Different Generations be Reconciled?***

### **2.3.1 Context**

An aging population affects pension systems very differently, depending on their financial scheme. While pre-funded pension systems are not affected by demographics, pay-as-you-go pension systems need stable demographic growth to maintain financial balance, as well as keep a pre-established pension fund. As previously explained, this scheme is based on the promise of a future pension to the active and contributing generation, and this promise can only be fulfilled by the existence of a future active and contributing generation. These pay-as-you-go pension systems are faced with a difficult challenge in this new society of aging and low birth-rates, for a simple and obvious reason: there will be fewer and fewer people to contribute to the system, while the number those who receive benefits from it will increase rapidly. In countries where pension systems are already well developed and long-established, the problem is even more serious because the burden on the active generation is much heavier.

What is more, the economic context of growing unemployment and negative GDP growth, which we already mentioned in the introduction, means diminishing revenues for welfare programs, including the pension systems. In particular, austerity measures implemented in European countries after the financial crisis often targeted spending on pensions, which represents a large proportion of government outlays.<sup>21</sup>

Furthermore, due to this economic context, political tensions concerning pension systems are growing. As young adults in many countries find it increasingly difficult to enter the job market, the heavy burden of supporting the older generation's fairly generous pension benefits can cause a feeling of injustice to fester. Not only is their burden heavier than the previous generation's, but they cannot necessarily expect that they will be any better off when they are old.

It is within this demographic, economic and political context that many countries with pay-as-you-go pension systems have tried to, or are trying to, cut pension benefits.

Before going into a detailed discussion on this topic, it is worth pointing out that there are several ways of reducing pension benefits: raising the pension age, extending the minimum contribution period, limiting the price or wage indexation of benefits (thus giving rise to the reduction of the real value of benefits), imposing social contributions or taxes on pension benefits, reducing the value of points when the amount of pension benefit is calculated by multiplying the number of acquired

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<sup>21</sup>The following 2013 OECD report indicates this is a general trend of OECD countries. See the 'editorial' of the report "Pension at a glance 2013 OECD and G20 indicators", <http://www.oecd.org/pensions/pensionsataglance.htm>.

points by the value of a point, etc. While each country chooses one or several options according to different aspects of their pension system (financial or demographic situation, existing conditions of pension benefit, etc.), these different ways of reducing pension benefit may have different effects and consequences beside simply cutting pension spending. Thus, for example, the first and second cited options above effect only the pension benefits of those who have not yet started receiving them. The second option (extension of the minimum contribution period) will increase the population having zero pension benefits and most likely depending on social assistance in their old age. The third option (limiting the automatic indexation of benefits), the fourth (imposing tax or social contribution on pension benefits) and the fifth (reducing the value of points) have the specificity of being able to reduce, in theory, not only future pension benefits, but the pension benefits of those who have already liquidated their pension benefits.

### 2.3.2 Reducing Benefits in Pay-As-You-Go Pension Systems

What is most interesting here is whether the cuts to pay-as-you-go pension benefits<sup>22</sup> are limited. Since all of the above-mentioned changes used to cut pension benefits can be carried out by legislation in almost every country examined in this report, the question is what limitations—legally binding, and therefore effective, or not—to this legislative power exist: supranational regulations, national constitutions, national legislations, political obstacles, etc.

In several countries, constitutional rights, or principles written into their constitutions, are considered to limit the lawmaker's ability to cut pension benefits by legal reform.<sup>23</sup>

Firstly, in some countries, judges have deemed the entitlement to a future pension equivalent to property right, and therefore protected by constitutional<sup>24</sup> or

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<sup>22</sup>As pension cuts are not a crucial question in pre-funded pension systems, we will discuss pay-as-you-go pension systems only. However, we can quickly think on this question for pre-funded pension systems. In pre-funded pension systems, one acquires pension benefits by contributing and accumulating premiums. The individual pension account being separate, it is logical that pension benefits cannot be easily reduced once they are acquired (In South Africa, as explained in national report, pension benefits are considered to be intangible by legal provisions).

<sup>23</sup>This can be partly rephrased as a question of the judges' ability to control lawmakers' discretion concerning social rights through constitutional and fundamental rights or principles of constitutional value. This question is treated in the following article, which examines the decisions of some European countries in the context of the financial crisis: Roman (2014).

<sup>24</sup>Finland, Germany. In Japan, though there is no judicial decision on this topic, certain legal scholars support the protection of entitlement to pension benefit as a property.

supra-national norms.<sup>25</sup> In Finland,<sup>26</sup> for example, this protection is based on the idea that the right to a pension is earned while working, which means that pension benefits are earned income even though they are paid later. They are considered to be a part of a worker's compensation,<sup>27</sup> thus benefit from constitutional protection as a property right.<sup>28</sup> Protection as a property right is often related to the fact that the right to a pension is obtained on the basis of contribution. Thus, in Finland, the protection in question is recognized only for the contributive pension scheme and not for the national minimum pension given to those who do not have the right to the contributive pension. In Germany, the importance of contribution in terms of constitutional protection of pension rights is more controversial.<sup>29</sup> However, the decision of the Federal Constitutional Court is that a protection of 'legitimate expectation'<sup>30</sup> is necessary and would ensure that individuals receive a pension that is fair in relation to their contribution.

We can observe that in those countries which adopted (at least partly) a pay-as-you-go system, contribution and benefits are considered to be strongly related, despite, as mentioned above, this relation remaining more or less abstract in this financial scheme. Concerning the protection of pension rights, the distinction between different stages of pension (during the contribution period, after pensionable age, and after liquidation, etc.) could also affect the possibility and degree of protection,<sup>31</sup> although this point was not often discussed in the national reports. It would be interesting to look at this matter in more depth, from a comparative perspective, in relation to the theoretical basis of the protection of pensions rights as a property right.

Secondly, some countries have specific social rights written into their constitution, whereby any legislation covering pension cuts can be controlled by judges, thus providing another limitation other than property rights protection. We would like to mention the case of Belgium in particular. The art. 23 of their constitution describes a right to social security benefits.<sup>32</sup> While it is accepted that the benefits acquired through this right change according to time, social change and the financial means of

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<sup>25</sup>See Civ.2è 17 avril 2008, n°07-12144 which refers to the Art 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (the decision considers that the decrease of a point value in complementary pension does not represent an unjustified infringement of this article).

<sup>26</sup>According Finnish national report.

<sup>27</sup>PeVL 9/1999 vp, s. 2/I, PeVL 60/2002 vp, s. 2/I.

<sup>28</sup>Section 15 of the Finnish Constitution.

<sup>29</sup>See Janda in this volume for details. As the chapter shows, the equal treatment principle can also affect the legitimacy of pension reforms.

<sup>30</sup>Though we cannot explore this in detail, the protection of the 'expectation' of pension rights might and should be distinguished from the protection of pension rights. The principle of legal security can be discussed in relation to this point, as Camaji in this volume examines in detail.

<sup>31</sup>This question is discussed in Camaji and Ota in this volume.

<sup>32</sup>Art. 23 of the Belgian Constitution. The article guarantees, first of all, a right to have a standard of life respecting human dignity (para.1), which should be specified by economic, social and cultural

the government, this article is interpreted as a ‘standstill’ obligation for lawmakers. A ‘standstill’ obligation means an obligation to keep social benefits at their status quo, especially those which existed at the time this article was implemented (1994). Unlike the previously discussed protection as a property right, the protection provided by the standstill obligation is not related to the contributive nature of the social benefits in question. Standstill obligation does not imply, however, an obligation to preserve social benefits. Small reductions, as well as modifications of practical aspects of benefits, are possible. Also, the reduction of one benefit can be compensated by other measures.

In Italy, the constitution has two articles concerning workers’ social rights, which also describes the right to pension benefits.<sup>33</sup> According to a recent Constitutional Court ruling,<sup>34</sup> the discretionary power of the lawmaker to modify pension income of individuals must meet the constitutional limit of the *rationality* and *proportionality* principles, derived from these two articles.<sup>35</sup> In a court decision in 2015, a reform which stopped automatic adjustment for those who receive a pension exceeding a certain amount<sup>36</sup> was considered to be unconstitutional.<sup>37</sup>

In other countries, the various descriptions of social rights or, more broadly, welfare state principles in their constitution have been referred to in order to limit the discretionary power of lawmakers. In Greece, the reaction to financial crisis led to an attempt to cut pension benefits in 2012. These cuts were judged to be against primary constitutional rights and principles, such as: the ‘obligation of the State to respect and protect the value of human beings’;<sup>38</sup> ‘contribution by citizens without distinction to public charges in proportion to their means’;<sup>39</sup> ‘rights of human beings. . . . and the principle of welfare state rule of law. . . .’<sup>40</sup> and ‘the duty of citizens to social and national solidarity.’<sup>41</sup> particularly because there was no sufficient justification to go through with them.

What these countries have in common in terms of constitutional protection for pension benefits is that they do not guarantee the inviolability of pension benefits

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rights through laws and administrative rules (para.2), including a right to work, a right to social security, a right to protection of health, a right to decent accommodation, etc. (para.3).

<sup>33</sup>Art. 36(1), as well as Art. 38(2).

<sup>34</sup>Judgement no. 70 of 2015 on April 30, 2015.

<sup>35</sup>Art. 36, para. 1 (Workers have the right to a remuneration commensurate to the quantity and quality of their work and in any case such as to ensure them and their families a free and dignified existence) and Art. 38 para. 2 (Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment) of the Italian Constitution.

<sup>36</sup>The 2011 reform stopped the automatic adjustment (indexation) of pensions over 14,000 euros per month.

<sup>37</sup>About this decision, see Bergonzini (2016), p. 177.

<sup>38</sup>Art. 2, paragraph 1 of the Greek Constitution.

<sup>39</sup>Art. 4, para. 5 of the Greek Constitution.

<sup>40</sup>Art. 25, para. 1 of the Greek Constitution.

<sup>41</sup>Art. 25, para. 4 of the Greek Constitution.

even when they are liquidated, as we have already briefly discussed with the Belgian ‘standstill’ obligation. On the contrary, the general tendency of the judges in almost all the countries that we examined is to allow the lawmakers a great deal of leeway when it comes to legislation on social rights, including pension rights. In these countries (Greece, Belgium,<sup>42</sup> Italy,<sup>43</sup> Germany, France), the decision to cut pension benefits can be justified by the economy, the national budget, the financial sustainability of the pension system, extraordinary circumstances, etc., as long as the pension cut is proportional to the chosen justification. It is worth mentioning that in France, equity across generations has been brought up as one of the justifications for pension cuts.<sup>44</sup>

In addition to these substantial justifications, the judges often require procedural and supplementary efforts to justify pension cuts. For example, they can ask for an adequate explanation of justification from the government.<sup>45</sup> German courts have also instructed that pension cuts be implemented gradually, over a long period.<sup>46</sup>

To summarize, two common ideas emerge about the role of judges concerning pension cuts. Firstly, lawmakers have a wide scope for decisions concerning the legal provisions which guarantee social rights. Secondly, the financial stability or sustainability of the pension system is often considered sufficient justification for pension cuts.

### 2.3.3 The Legislative and Political Limitations of Pension Cuts

In the countries where the constitutional protection of the right to pension benefits has not been recognized (or not yet discussed) by judicial ruling, there are attempts at limiting pension cuts by means of legislative or political promises.<sup>47</sup> Japanese law is

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<sup>42</sup>According to the Belgian Constitutional Council and the Conseil d’État, standstill obligation is violated only when the reduction of benefits is significant. Conseil d’État 23 septembre 2011, nr. 215.309,20, Conseil d’État 6 décembre 2011, nr. 216. 702, nr. 33. See Alofs and Van Limberghen in this volume for the detail.

<sup>43</sup>Judgment No. 223 of 2012. According to this decision, the government can adopt exceptional measures in a serious financial crisis to reconcile (1) the need to stabilize the budgetary situation and (2) the need to guarantee services and rights for individuals according to the constitutionally entrenched principles of equality.

<sup>44</sup>CE, 26 mars 2010, n°323201. See Chap. 5 of this volume. In Japan, while there is no judicial decision on this point, the government raises the argument of intergenerational justice to justify pension cuts. See page 37 of the Japanese national report.

<sup>45</sup>See the Greek and Italian cases cited above.

<sup>46</sup>According to the decisions of the German Federal Constitutional Court, this adjustment period can protect the legitimate expectation that we have mentioned above.

<sup>47</sup>In England, what is called the ‘triple lock’ principle was a political promise of the coalition government formed in 2010, which ensured that state pensions would increase by the highest of the increase in earnings, the increase in prices (as measured by the Consumer Price Index) and 2.5%. This principle recently provoked a controversy. See Chap. 10 of this volume and Crawford et al. (2016).



an interesting case. It not only introduces the automatic adjustment of the indexation rate of pensions according to the demographic situation (i.e. substantial reduction of the amount of the pension), but it also sets a limit for this pension cut by fixing the minimum replacement rate (50%<sup>48</sup>) for the amount of a model pension<sup>49</sup> and by requiring the government to take measures to ensure this limit.

### 2.3.4 Different Perspectives on the Question of Pension Cuts

The question of pension cuts and their limits can be discussed from different perspectives. The judicial decisions that we have examined seem, overall, to have treated this question from a perspective of balancing two important requirements—the protection of individual rights, as well as financial and budgetary sustainability of pension systems. These requirements, individual and collective respectively, are closely tied to each other, in the sense that the financial balance, or, in other words, the sustainability,<sup>50</sup> of the pension system is the basis of an individual’s pension right.<sup>51</sup> This connection between collective and individual interests of different generations is a unique aspect of solidarity across generations as it is organized by pay-as-you-go pension systems. From this point of view, even if the individual right to pension benefits is protected as a property right, this protection cannot be of the same nature as the traditional individual property right, since the collective interest of sustainability can never be neglected.

This dichotomy is particularly interesting in the context of Italy, where an article which calls for a balanced budget has recently been added to their constitution (Art. 81). The recent court decision (No.70 of 2015), discussed above, pointed out that (even though this decision was made before Art. 81 was introduced) lawmakers could adjust pensions *in consideration of the available economic resources*. The Court emphasized the fact that the economic reasons which could be given as justification had not be adequately clarified.<sup>52</sup> Spain also introduced a new article (Art. 135) in its Constitution, in 2011, pronouncing a principle of budgetary stability, the application of which includes the social security administration. This Spanish Constitutional reform was an important contextual factor of the pension system reform which opened the possibility of automatic adjustment of pension level according to demographic development.<sup>53</sup>

Though it is not clearly discussed in the different decisions that we examined, this also raises the question of the weight of different legislative decisions at different moments in time. Pension cuts decided by lawmakers today can, after all, be

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<sup>48</sup>This rate was fixed at 62% in 2014.

<sup>49</sup>The total pension of a male worker who has worked for 40 years for the average male worker’s salary.

<sup>50</sup>See Janda in this volume about for details on the concept of ‘sustainability’.

<sup>51</sup>See particularly Camaji and Ohta in this volume.

<sup>52</sup>See Bergonzini (2016).

<sup>53</sup>For more details, see Maldonado Molina in this volume.

considered to be a withdrawal from promises made by lawmakers in the past<sup>54</sup> (which, in a way, can be said of all the changes in legal institutions). The trend of judicial decisions we discussed in this section means, from this point of view, that the judges primarily respect the considerations and decisions of today's lawmakers, who consider the current financial and demographic situation that require changes to what had been decided by lawmakers in the past. As we have seen, judges often require that the justification for change be thoroughly explained by lawmakers, without examining themselves the changes of the financial and demographic situations, as well as the sustainability of the pension system.

### 3 Family Solidarity and Public Solidarity<sup>55</sup>

In these third and fourth sections, we will tackle solidarity across generations within the family, as well as the relationship between this family solidarity and collective solidarity, which is organized and made obligatory by the state through various institutions (what we have called 'public solidarity' in this report).

Almost all the national reports talk of the importance of inter-generational solidarity, whether in the form of financial and material support or in the form of care within the family, between three different generations—grandparents, adult children and grandchildren. Solidarity across generations within the family can be divided into several types of solidarity, and in the following two sections (3, 4) we will focus on two of these. Firstly, solidarity in the form of financial support towards a person in need, made mandatory often by provisions in civil and family law on support duties between family members. Secondly, solidarity beyond legal duties, notably in the form of 'care' for a person in need of LTC. For both of these types of solidarity within the family, we will analyze the relationship between private (family) and public (collective) solidarity.

These two types of family solidarity must be clearly distinguished, especially from a legal point of view, because financial support between family members is, as we have mentioned, for a long time and in almost all countries, partly considered to be legal obligation in family law. The 'care' within the family, on the other hand, has been until very recently largely invisible, and then often ignored or very marginally taken in consideration by family law. It should also be noted that from a legal point of view, 'care' might not be considered suitable to integrate in the framework of legal obligation, which implies compulsory execution under certain circumstances.<sup>56</sup>

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<sup>54</sup>Ota (2000), p. 120.

<sup>55</sup>For both Sects. 3 and 4, see Sayn (2006).

<sup>56</sup>Yamawaki (1997) p. 78.

### ***3.1 Support Duties Between Adult Members of a Family and Welfare Benefits***

#### **3.1.1 Different Types of Support Obligations**

Among the different legal support duties between family members, the duty of parents to support their minor children holds a privileged position in all countries. The protection of children is a value shared internationally, as is demonstrated by the UN convention on the Rights of the Child.<sup>57</sup> The maintenance obligations between spouses also exist in most countries. However, support and maintenance duties between other family members are prescribed (or not prescribed) by family law provisions in ways which vary from one country to another. In this section, we will concentrate on support duties of adult children towards their aged parents in need.<sup>58</sup>

In many countries, there are laws describing the support duties between family adult members, including those of adult children towards their aged parents.<sup>59</sup> However, very often these laws have conditions, such as, first of all, in almost every country where adult family members have an obligation to support other adult family members, the person claiming support (ex. aged parent) must be unable to support himself/herself (need of support). The person from whom the support is claimed (the adult child) must also be able to support the claimant (capacity of support). The nature, as well as the level, of these obligations between adult family members are often clearly differentiated from the obligations of parents towards their minor children, as well as obligations between spouses.<sup>60</sup>

In addition to the conditions of need and capacity for support, many countries also require a condition of minimum reciprocity of support between family members, to recognize support duties between adult family members. This third condition is usually discussed in the context of support duties of adult children towards aged parents. This means, more specifically, that adult children can deny support when their parents have seriously neglected their own duties towards their minor

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<sup>57</sup>See Art. 7 of the UN Convention on the Rights of the Child.

<sup>58</sup>Even though other relatives can also play a very important role in supporting elderly people who are in need.

<sup>59</sup>Germany, Cameroon, Belgium, Spain, Czech Republic, Singapore, Hungary, Brazil, Japan, South Africa, Italy. However, the effectiveness of these obligations should be carefully examined, as adults are often reluctant to ask for the support of their family when this support is not volunteered. See the Belgium report on this point.

<sup>60</sup>We can see a typical example in Japan where doctrine and case law clearly distinguish two types of support duties by giving them different names and definitions. Concerning obligations of parents toward minor children, as well as obligations between married persons, the provider must assure the claimant the same standards of living as their own (so called obligation to maintain) without any other condition than family relation. For other types of relations, support duty is less demanding, the provider should help only when the claimant is in need and the provider can afford to do so (so called obligation to help).

children.<sup>61</sup> The reciprocity of support is especially emphasized in this child-parent relationship,<sup>62</sup> probably, and at least partly, because of the essential nature of support obligations of parents towards minor children. In Belgian law, the loss of parental authority is considered to be the only factor of ‘unworthiness’ of support,<sup>63</sup> thus distinguishing the child-parent relationship from other types of family relationships.

Among the European countries included in this contribution, Hungarian law, unlike the law in other countries, features in the constitution (Basic Law) an article which prescribes the support duties of adult children towards parents (Art. XVI). Hungarian law is also unique in that it requires *absence of fault* of the support claimant in general for a person of legal age to claim support from relatives,<sup>64</sup> therefore requiring a sort of ‘worthiness’ to claim family support.

On the other hand, there are some countries where support duties towards adult family members does not exist.<sup>65</sup> In these countries, adult children are never obliged or enforced to support their parents even when they are in need. However, it should be said that in these countries, as we can see in Greece and in Finland in particular, even though the law does not specifically state this obligation of support, financial support from children towards their aged parent is in fact widespread.

With today’s trend of aging populations, longevity, and the rapid increase of the cost of nursing homes, support duties towards elderly family members will surely become an important and controversial issue.<sup>66</sup>

### 3.1.2 Reinforcing Support Duties in the Context of an Aging Society

An interesting trend has emerged in some Asian countries, which tend to have relatively little social spending. They reinforce the support duties of adult children towards aged parents by promoting traditional family values.

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<sup>61</sup>In Hungarian law, the claimant of support should not be ‘unworthy’ of maintenance. When it comes to adult children’s obligations toward parents, if the parent fulfilled his or her obligation to maintain and care for the child and to provide for his or her upbringing, the child cannot allege unworthiness except in the case where there is proof of extreme misconduct of the parent against the child. Section 4: 194 (2) and (3) of the Hungarian Civil Code. In French family law, according art. 207 of the Civil Code, the judge can ‘*supprimer ou diminuer* (eliminate or reduce)’ support obligations, in cases where the claimant has not fulfilled his own obligations (a typical example of this is a parent who had not cared for his child). Bénabent (2016), p. 498.

<sup>62</sup>In German doctrine, support obligations between parents and children are considered to be based on a relationship of reciprocity across different generations. This reciprocity can therefore limit, as well as justify the support obligations. Hilbig-Lugani (2013), p. 763.

<sup>63</sup>Cour de Cassation, 6 mai 1987, 5796.

<sup>64</sup>Section 4:194 (1) of the Hungarian Civil Code. Belgian law excludes support obligations between adult family members only when the condition of the person in need has been caused *deliberately*.

<sup>65</sup>Finland, England, Greece.

<sup>66</sup>See the following report published in France on the initiative of the French Sénat: Étude de législation comparée n° 189 - octobre 2008 – L’obligation alimentaire envers les ascendants.

In 1995, after much debate and controversy, a law was passed in Singapore called the ‘Maintenance of Parents Act,’<sup>67</sup> which prescribes the maintenance obligations of adult children towards their vulnerable and elderly parents. According to this law, any Singaporean resident of 60 years old or more, and who is unable to support himself/herself adequately, is entitled to claim support from their children, either as a lump-sum payment or as a monthly allowance. This entitlement to support, however, is denied to parents who neglected or abused their children, which condition is justified by the ‘principle of reciprocity of care.’<sup>68</sup> This law must be examined separately from the support obligations that we have observed previously in other countries, because it was introduced specifically as a response to the problem of an aging society. Moreover, the context of the law’s creation is further complicated by the fact that Singapore has a meager collective or public mechanism for supporting people in need, including the elderly,<sup>69</sup> and civil law has no regulation about support duties between adult family members. This law is sometimes explained as reflecting the Confucian idea of reciprocity in child rearing and caring for aged parents, which is deeply rooted in Singaporean society. However, these ‘Asian family values’, including filial piety and respect for elders, may be weakened in contemporary Singaporean society as they come into conflict with industrialization and Westernization, at least from the lawmaker’s point of view. Actually, this transformation of social norms—or, at any rate, a fear of this transformation—was a significant factor of this legislation.<sup>70</sup> Singapore has also recently introduced a ‘proximity housing grant’ to encourage their citizens to live close to their family. This grant is attributed to those who buy a resale flat to live with or close to their parents or children.<sup>71</sup>

More recently in China, the General Provisions of the Civil Law (implemented October 1, 2017) stipulates for the first time the obligation of adult children to support their aged parents.<sup>72</sup> This reform is part of a general tendency in China to reinforce the values of family and family solidarity, also in the context of an aging society, which is also exemplified by another law requiring children to care for their aged parents (‘Law about protection of the interest and the rights of aged persons’). We will discuss this trend in more detail in Sect. 4.

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<sup>67</sup>See the following website: <https://sso.agc.gov.sg/Act/MPA1995>.

<sup>68</sup>See the Singaporean national report.

<sup>69</sup>Except the Public Assistance Scheme.

<sup>70</sup>Lee (1995), p. 671.

<sup>71</sup>This grant is a part of a comprehensive public housing program, common in Singapore. See for example Phang and Helble (2016), pp. 174–209.

<sup>72</sup>Here again, the abandonment of the minor child by the parents by blood breaks the legal relationship of family and therefore exempts the child from the obligation to support the parents.

## 3.2 *Family Support Duties and Social Minimum Benefit*

### 3.2.1 **Principle of Subsidiarity and Family Support Duties**

Since solidarity between family members provides a guarantee for a basic standard of living for those who are in need, part of public solidarity, typically the state's social minimum benefit, can play a similar role. Historically, the social minimum benefit was introduced and developed to complement and replace family solidarity, thus relieving, at least partly, the burden of financially supporting family members.<sup>73</sup> This is why the question of the relationship and balance between these two support systems—family (private) solidarity and public solidarity—should be examined carefully<sup>74</sup> and especially in the contemporary context.

More specifically, in those countries where adult family members have a duty to support each other, and where social minimum benefit (social assistance) is based on the subsidiarity principle and accompanied by a means test (which is almost always the case), the question of coordination and adjustment between family solidarity and collective solidarity is raised. We can distinguish different circumstances which could impact this issue. Firstly, the least problematic circumstance is when the person who has support duties fulfills these duties voluntarily. In this case, social minimum benefits are attributed when the applicant is still in need, even with the support of family. The question becomes more complicated when the applicant or recipient of minimum benefits has a family member who can take on support duties, but does not do so voluntarily. In this case, there are two main situations in which applying the principle of subsidiarity can be especially problematic: *a priori* through the means test, or through the retrospective recovery of social benefit costs.

First of all, it is worth asking whether the support of family members should be seen as a potential resource of the person in need, in the context of the means test for social minimum benefits.<sup>75</sup> In other words, when someone has a family member who has an obligation to support him, is capable of doing so, but does not actually fulfill this obligation, should the person in need be none the less considered eligible for social minimum benefits, or should he or she first of all resort to his family members' support? The question truly seeks to clarify how the law about social minimum benefits should position the family members support duties, which are of a civil and family law nature.<sup>76</sup> It becomes clear that there are different ways of responding to this question.

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<sup>73</sup>Minonzio (2004), pp. 7–19.

<sup>74</sup>Maisonasse (2013), p. 747.

<sup>75</sup>When the resources of the applicant is appreciated by unit of household and not individually, support duty is actually imposed on all persons in a same household, even those who do not have support duty according to Civil Law. See Sayn (2005), p. 16. We observe a similar situation in Japan.

<sup>76</sup>Sayn (2005), p. 11.