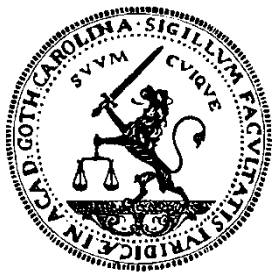

FACULTY OF LAW
Lund University

Rafael Ignacio Numi

The Chilean Old-Age Pension System in Light of International Human Rights Law and the Inter-American Jurisprudence on the Right to Social Security

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Karol Nowak

Term: Spring 2021

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Summary

In the early 1980s, during the darkest years of Pinochet's dictatorship, an apparently innocuous but radical decision was made: to implement an old-age pension system based on individual accounts mandatorily administered by private for-profit entities called 'pension fund administrators' ('AFPs', by its acronym in Castilian[1]), in which the workers' social security regarding old-age pensions was totally dependent on their individual saving capacity during their working life. This was a completely novel system at that time, even at the international level, and part of a package of reforms allegedly directed to refound and modernise the country, deeply transforming the functions of the State and the role of the private sector, and causing a multiplicity of consequences felt until today in all possible areas of society and where, of course, human rights are no exception.

This thesis explores the main features of the Chilean old-age pension system that present human rights implications through an interdisciplinary methodology which primarily integrates the legal and jurisprudential analytical method as its preeminent tools, but that secondarily includes historical, sociological and economic approaches that enrich the discussion and allow the research to reach objective conclusions.

The thesis commences explaining the history of Chilean social security system in general, and the old-age pension system in particular, from their early days at the beginning of the twentieth century to present day, putting special focus on the origins of the current system during the dictatorship to better understand its *raison d'être*. Then, reviews all the pertinent international and regional human rights instruments and documents regarding the right to social security, in order to accurately determine the applicable legal framework. Thirdly, analyses the most important case-law of the Inter-American Court of Human Rights (hereinafter I-ACtHR, Inter-American Court or just 'the Court') on the right to social security. Here the attention is located on the fact that the Court since 2017[2] has begun directly and autonomously addressing violations on economic, social and cultural rights (including the right to social security[3]), unlike

[1] *Administradoras de Fondos de Pensiones*.

[2] *Case of Lagos del Campo v. Peru*, 31 August 2017, I-ACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 340.

[3] *Case of Muelle Flores v. Peru*, 6 March 2019, I-ACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 375.

its previous jurisprudence that addressed ESCE rights indirectly through other related civil and political rights (e.g., right to property, fair trial, etcetera). Subsequently, and immediately after explaining the constitutional and legal regulation of the old-age pension system in Chile, the thesis starts determining which aspects of the system present most human rights implications, with a gender perspective, and using as analytical parameters the main principles of the human right to social security, together with the previously defined legal and jurisprudential framework, and sociological and economic empiric material. This investigation concludes that Chile, through the non-reformation of the current old-age pension system, is violating the basic principles and norms of international human rights law that inspire and delineate the content of the human right to social security, e.g., the principles of universality, solidarity, non-discrimination, equal treatment, integrity, and adequacy, even touching the very right to a decent and dignified life. Finally, the thesis provides a non-exhaustive catalogue of recommendations directed to generate a social security system more in line with international human rights law.

For all the anonymous victims of the system.

Abbreviations

ACHR	American Convention on Human Rights
AFP	Pension Fund Administrators (*Administradoras de Fondos de Pensiones*)
CESCR	Committee on Economic, Social and Cultural Rights
ECLAC	United Nations Economic Commission for Latin America and the Caribbean
ESCE rights	Economic, social, cultural and environmental rights
GDP	Gross Domestic Product
I-ACHR	Inter-American Commission on Human Rights
I-ACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IMF	International Monetary Fund
NGO	Non-governmental Organisation
OAS	Organisation of American States
OECD	Organisation of Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank

Chapter I. Introduction

I.1. Presentation and Importance of the Problem

Chile carries many heavy burdens inherited from the dictatorship that devastated the country between 1973 and 1990, and the old-age pension system is no exception. From its illegitimate and undemocratic origins, to today's broken promises, it has failed to fulfil the main objective demanded to any social security system in the world: to provide decent and dignified pensions that ensure an adequate standard of living for all retirees. Just to illustrate the issue, the country has the highest gross domestic product per capita based on purchasing power parity (PPP) of South America[4], but still 80% of the pensions given on December 2019 were below the country's legal minimum wage (CLP$326.500 by May 2021, equivalent to approximately €381) and 50% of the retirees received less than CLP$202.000 (€236 approximately, only €38 above the country's poverty line)[5].

The genesis of the current system dates back to 1980, and was part of a package of ideological policies and reforms imposed by the dictatorship as part of a political, economic and social program that allegedly had the intention of refounding and modernising Chile. The establishment of a social security system based on the workers' individual capitalisation in personal pension funds accounts managed by private for-profit companies (Pension Fund Administrators, 'AFPs' by its acronym in Castilian[6]) was integral part of a free-market economic approach pursued by the military junta, inspired by the neoliberal ideas of Frederick von Hayek and Milton Friedman, and applied in Chile by the latter's disciples[7]. Ironically, these ideas, rhetorically presented as based on personal freedom, neutrality and modernisation, were

[4] World Bank, 'GDP per capita, PPP (constant 2017 international $) - Chile, Argentina, Uruguay, Paraguay, Bolivia, Peru, Brazil, Ecuador, Colombia, Suriname, Venezuela, RB' https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.KD?locations=CL-AR-UY-PY-BO-PE-BR-EC-CO-SR-VE accessed 16 May 2021.

[5] SOL Foundation, 'Pensiones bajo el Mínimo' (Pensions under the Minimum) Recaredo Gálvez and Marco Kremerman (June 2020) 5. https://fundacionsol.cl/cl_luzit_herramientas/static/wp-content/uploads/2020/06/PBM2020-1.pdf accessed 16 May 2021.

[6] *Administradoras de Fondos de Pensiones.*

[7] Silvia Borzutzky, 'Neoliberalism and Social Security Privatization in Chile' (October 2005). In Governance: An International Journal of Policy, Administration and Institutions, Vol 18, N04, 1.

imposed by a regime that infamously eliminated practically all civil and political freedoms and that systematically violated human rights.

The issue is nowadays located in the eye of the storm, its discussion is frequently found in the political and social forums, and its reform is one of the main demands that social movements have raised in recent years in the country, especially after the social outbreak of October 2019. However, its relevance is by no means limited to the local level. The Chilean model (one of the first in the world to apply a system based so strongly on economic freedom and individualism) has been followed by many countries within and outside the region, and it has even been recommended by international organisations such as the World Bank[8]. Thus the national and international importance of this research, which seeks to use the authority of international human rights law standards as objective parameters to determine the success or failure of the system, and to elucidate how a social security system could be more in harmony with human rights' inspiring principles.

I.2. Aim and Research Questions

The fact that the current social security scheme in Chile is not able to provide dignified and adequate retirement pensions to retirees, places Chile in a position of eventual responsibility for breaching its international commitments, in particular regarding the human right to social security, as it is stressed in international human rights instruments and echoed in the regional jurisprudence. Therefore, the main aim and purpose of this thesis is to, through an analysis of the pertinent international instruments and documents, the constant jurisprudence on the Inter-American Court, empirical studies, and the most authorised doctrine, determine if the current Chilean social security system is contravening the applicable international standards in the matter and, consequently, if Chile is responsible for violating the human right to social security.

Consequently, the main aim of this thesis will be to answer the following research questions:

a) First, what are Chile's main human rights obligations with respect to its old-age pension system? And

[8] Ibid., 2.

b) Second, is Chile breaching those international obligations by not reforming the current system?

I.3. Theoretic Background

This research builds upon a teleological approach inspired by an understanding of human rights as highly authoritative tools that, despite their often lack of coerciveness and commonly vague wording, represent a range of international consensual values and virtually universally accepted principles that in all cases pursue the achievement of social justice and the common good. These principles, which are at the same time moral ends in themselves, often confront with the traditional dynamics of continental civil law (legal culture of which Chile is part of), which places written law (constitutional and legal) as the main source of law and as manifestation of national sovereignty and popular will, without further questioning of whether effective justice, collective well-being and freedom from want are concretised or not. Therefore, our vision is based on the fundamental consideration that moral theory and the principles of social justice and solidarity should pervade and inspire national legal regulations, together with social policies and economic goals, even within the margin of appreciation that States enjoy during the progressive development of social, economic and cultural rights.

Our perspective also considers international human rights law at least at the same hierarchy as constitutional domestic law and, thus, it must be mandatorily contemplated not only for national *lege lata* evaluation, but also for local *lege ferenda* structuration. The theoretical approach applied importantly contemplates the factors of time and space as well. The former, through an emphasis on the appreciation of human rights treaties as instruments that should not remain static, but should evolve hand in hand with societies, with full and constant consideration of the context. The latter, through paying special attention to the regional human rights system's entities and mechanisms, which better comprehend the particular features and needs of the people of Latin America.

I.4. Methodology

The chosen methodology consists of an analytical sequence of four stages. First, a study of the legal and regulatory history of the Chilean social security system, which gives the lector the necessary factual frame to mentally locate the problem and properly understand the main factors that shaped the current regime. This particular part of the investigation is mostly done through the examination of the most authorised works of Chilean labour law historians and journalists that have delved into the controversy, together with international organisations studies (e.g., the United Nations Economic Commission for Latin America and the Caribbean, ECLAC), and official governmental acts, such as the ones issued by the military junta at the discussion of the project that ended up creating the current old-age pensions' system.

Second, a review of the international and regional human rights instruments and documents regarding the human right to social security that are applicable to Chile is undertaken using a formal legal dogmatic approach to law. On one hand, the particular international instruments connected to the matter are examined. For instance, the most important international treaties that include content on the right to social security, the Committee on Economic, Social and Cultural Rights' general comments (hereinafter CESCR, or just 'the Committee'), and the International Labour Organization's documents. On the other, the regional ones, principally the Charter of the Organization of the American States, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador').

Third, the jurisprudence of the Inter-American Court of Human Rights in the area of social security is examined. This part presents special relevance for this research, since the Court has been implementing an innovative and avant-garde interpretation on economic, social and cultural rights from 2017[9], when started directly and autonomously addressing violations on economic, social and cultural rights through an evolutive, systematic and teleological interpretation of Article 26 of the American Convention on Human Rights (hereinafter ACHR, American Convention or just 'the Convention'), which is the only norm about economic, social and cultural rights in the Convention, and which redirects to the Charter of the Organization of

[9] *Case of Lagos del Campo v. Peru* (2017) I-ACtHR (n. 2).

the American States. Therefore, a complete case-law study of the most important characteristics of this novel legal vision of the Court is performed.

Finally, all the aforementioned elements are filtered and contrasted to the national legal regulation of the Chilean pension system, with a gender perspective, in order to define which features of the system contravene the specified international human rights law framework in the topic and, naturally, which modifications to the current system are of essential nature to achieve a model in full compliance with human rights law. In addition to all the previously mentioned historical, legal, jurisprudential and doctrinal elements applied in the investigation, in this part are also included reports and studies of national and international organisations (e.g., the World Bank and national NGOs focused on the issue). Their contribution is essential, since they provide disaggregated numerical data that allow us to reach objective and impartial conclusions.

I.5. Delimitations

As the Committee on Economic, Social and Cultural rights has expressed[10], social security has nine branches: (a) health care, (b) sickness, (c) old-age, (d) unemployment, (e) employment injury, (f) family and child support, (g) maternity, (h) disability, and (i) survivors and orphans. However, this thesis will particularly focus on old-age retirement pensions, since it is this branch nowadays the most controversial within the nation's forum, the one that presents the largest number of human rights' deficiencies, the only one (together with health care) that covers all the workers' population, and the one that manages the biggest amount of funds. Nevertheless, the general concept of social security is commonly used in this research since its legal and regulatory framework encompasses the one of the old-age pension system.

It must be additionally clarified that the human rights' implications of the analysed phaenomenon are several and varied, since the system affects a large number of people in countless ways. Due to temporal and spatial reasons, some of them were lamentably left aside or are only superficially touched upon (e.g., the illegitimate origins of the social security system,

[10] Committee on Economic, Social and Cultural Rights, 'General Comment No. 19: The Right to Social Security (Article 9 of the Covenant)' (2008) UN Doc E/C.12/GC/19 para. 12-21. https://www.refworld.org/docid/47b17b5b39c.html accessed 16 May 2021.

or the adverse effects the system inflicts to certain specific social groups and individuals). The problematic aspects addressed by this research are those we consider most important due to the number of people affected and that best reflect the present-day situation.

I.6. Outline

In order to properly understand a social security system as complex as the Chilean one, it is indispensable to provide at the dawn of the present research a brief reference to the historical-factual aspects that have defined the architecture and principal characteristics of today's dominant structure. This is the aim of Chapter II, which explains the history of the Chilean social security system, from its roots at the beginning of the twentieth century to the current regime, showing the particular historical features that shaped the contemporaneous model. The chronology is divided in four stages: First, the formation stage (1924-1951), marked by the stratified origins of the system, until the first uniformity measures; secondly, the rapid expansion stage (1952-1972), period defined by numerous reforms and by a continuous coverage expansion; (c) then, the early military stage (1973-1980), ranging from the measures adopted after the coup d'état to the imposition of the current system by Pinochet's dictatorship; and, finally, the contemporary stage (1980-2021), dominated by the AFPs' individual capitalisation system.

Chapter III reviews the international legal framework in the matter, in order to clearly establish which instruments determine the human rights obligations applicable in the Chilean case. It first addresses the coverage of the right to social security in the pertinent international human rights instruments ratified by Chile, paying special attention to the International Covenant on Economic, Social and Cultural Rights (ICESCR), and to General Comment No. 19 on the right to social security (Article 9 of the ICESCR) of the CESCR, to which the I-ACtHR frequently resorts. Secondly, focuses on the regional instruments that Chile has ratified, importantly the Charter of the Organization of American States (OAS) and the American Convention on Human Rights (ACHR). Finally, revises the International Labour Organization's conventions connected to the right to social security that Chile has or has not ratified.

Chapter IV analyses the case-law of the Inter-American Court of Human Rights. This is done to establish how adjudicable at the inter-American level are the international obligations acquired by Chile in relation to the human right to social security, in the event of a possible breach of these. This chapter starts with an analysis of the first regional jurisprudence connected to the right to social security, to then delve on the landmark *case of Lagos del Campo v. Peru*[11], first case in which the regional court directly addressed an autonomous violation of economic, social and cultural rights through an evolutive and systematic interpretation of Article 26 of the ACHR. Of particular relevance for this thesis is the examination of the *case of Muelle Flores v. Peru*[12], the first regional case in which the court found a direct violation of the right to social security, using the same interpretative avenues defined in the *case of Lagos del Campo v. Peru*[13] that, as mentioned, opened new gates for the direct justiciability of ESCE rights within the Inter-American Human Rights System.

Chapter V, on its behalf, has the fundamental purpose of answering the second research question. In order to achieve that objective, first, it briefly explains the national constitutional regulation on the right to social security, and the regulatory architecture of the old-age retirement pension system, with the aim of highlighting the system's characteristics that are in the focus of the analysis. Then, it determines the aspects of the system that present most human rights implications, contrasting the system's features to the previously-defined normative and jurisprudential frameworks. This exercise is complemented with disaggregated data from different organisations' studies and the most authorised doctrine. As a guidance, this part is divided according to the specific principles of the human right to social security most connected to the specific violations (e.g., principles of universality, solidarity, non-discrimination, integrity, etcetera).

Chapter VI closes this work presenting the concluding remarks. Fundamentally, presents the natural product of the research: a number of non-exhaustive general recommendations directed to generate a social security system more inspired on the basic principles of international human rights law.

[11] *Case of Lagos del Campo v. Peru* (2017) I-ACtHR (n. 2).
[12] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3).
[13] *Case of Lagos del Campo v. Peru* (2017) I-ACtHR (n. 2).

Chapter II. History of the Chilean Social Security System

II.1. Introduction

The temporal evolution of the Chilean social security system in general, and of the old-age pension system in particular, from their genesis at the beginning of the twentieth century to present day, has always been a complex process of intricate comprehension full of different edges, and deeply marked by the political nuances of each specific moment. With the aim to give the lector a better understanding of the phaenomenon, the next illustration will be divided in four stages according to the main legal framework prevailing in each epoch: (a) The Formation Stage (1924-1951), (b) the Rapid Expansion Stage (1952-1972), (c) the Early Military (1973-1980), and (d) the Contemporary Stage (1980-2021).

II.2. Formation Stage (1924-1951)

Towards the twilight of the nineteenth century Chile starts experiencing massive socio-economic changes. One of the defining factors of the epoch was the countryside-city migration, which saw Santiago, the country's capital, tripling its population from 1854 to 1907[14]. The main flow was constituted by peasants and peons living under profoundly poor conditions in the countryside looking for the supposed benefits and opportunities that an incipient industrial development may provide to them. In that regard, it is important to note that the country's most important economic activity was (and still is) the mining industry. Until the 20's, the saltpetre extraction constituted by far the most important economic inflow to the country. However, after the invention of synthetic saltpetre this industry disappeared in practice, giving way to copper extraction as the main monetary input to the country's GDP to this day, and deeply defining Chile's labour history.

[14] Jorge Rodríguez, 'Evolución de la Población del Gran Santiago: Tendencias, Perspectivas y Consecuencias' (Evolution of the Population of Greater Santiago: Trends, Prospects and Consequences) (December 1993) CELADE/UAHC, 100. https://core.ac.uk/download/pdf/45625924.pdf accessed 16 May 2021.

Despite the economic boom that the lucrative mining activity brought with it, there were no major improvements to the quality of life of Chilean workers. On the contrary, their living conditions were severely deteriorated due to population growth, overcrowding, and long working hours, inter alia. The aggregate of all social problems and needs experienced by Chilean workers during these decades was called the 'social question' (*la cuestión social*), and its magnitude helps us understand the fact that Chile, in 1924, became the first country in Latin America to implement a proper and full social security system, which was inspired by the Bismarckian social security system of Germany[15].

Thus, in 1924 the first three social security institutions were created: (a) the Workers' Mandatory Insurance Pension Fund (*Caja del Seguro Obrero Obligatorio*), (b) the Private Employees' Pension Fund (*Caja de Previsión de Empleados Particulares*), and (c) the Public Employees' Pension Fund (*Caja de Empleados Públicos*)[16]. All of them had in common the establishment of a compulsory insurance mechanism to cover risks of disability, illness and old-age; and functioned in general under a Common Fund (CF) or 'pay-as-you-go' (PAYGO) system[17] in which, basically, the pension funds were distributed based on the set of resources accumulated by all contributors. Their administration was semi-public, counting with a tripartite administrative counsel in which representatives of the State, employers and employees participated[18].

The contrast between the different pension funds (*Cajas*) reflected the social features of the epoch. Regarding manual workers, the ones with the lowest salaries were forced to contribute, assuming that they presented higher levels of vulnerability. Additionally, the retirement age was set at sixty-five years old for men and sixty for women, and its financing was tripartite: 1/3 came from the worker salary, 1/2 from the employer and 1/6 from the State. On the other hand, the private employees were forced to contribute to an individual retirement fund, giving them

[15] Luis Hernán Vargas Falbaum, 'Reformas del Sistema de Pensiones en Chile' (Reforms of the Pension System in Chile) (Santiago de Chile, January 2018) Serie Políticas Sociales, Nº 229 (ISSN 1680-8983) Economic Commission for Latin America and the Caribbean (ECLAC) 17. https://www.cepal.org/sites/default/files/publication/files/43223/S1701268_es.pdf accessed 16 May 2021

[16] José Pablo Arellano, 'Políticas Sociales y de Desarrollo: Chile 1924-1984' (Social and Development Policies: Chile 1924-1984) (CIEPLAN, 1988), 72-73. http://www.memoriachilena.gob.cl/archivos2/pdfs/MC0016094.pdf accessed 16 May 2021.

[17] The pay-as-you-go (PAYGO) system consists in a social security scheme in which current retirement benefits of passive workers are financed by contributions of current active workers. It opposes to the Fully Funded, Defined Contribution System (FFDC), in which contributions are invested to finance future benefits.

[18] Ibid., 73.

the right to recover the accumulated funds after turning fifty years old and completing thirty years of service, or obtaining a disability retirement pension. After 1937 they were also granted the right to a household allowance. The financing of these benefits came entirely from the employee and the employer, without contribution from the State, in contrast to the workers' pension fund. Moreover, their contribution quotas were substantially higher than the workers one, they did not have any sickness protection and its system was, in essence, based on personal capitalisation[19].

During these early decades of the Chilean social security system there was a progressive incorporation of the workers to it, reaching two thirds of the workers population by 1950 (with a strong predominance of the Workers Pension Fund, which accounted for 70% of the contributors)[20]. However, the social criteria used in the investment of the funds decreased its monetary output; as the Chilean specialist José Pablo Arellano mentions, 'those deficiencies in the functioning of the capitalisation system and, overall, the desire to enlarge the insufficient coverage of some risks, motivated the presentation to the Congress of some important reform projects in 1941 and 1948'[21]. These projects were finally approved in 1952, marking the beginning of the subsequent stage, which is discussed in following chapter.

II.3. Rapid Expansion Stage (1952-1972)

Before 1952 the Chilean social security system expanded its coverage in a fragmented and stratified manner, through State concessions to specific social categories[22]. Left-wing parties and political groups were flourishing, and actively demanded more social and labour rights to the authorities. In 1952 the military and politician Carlos Ibáñez del Campo became president of the Republic for the second time, and had no choice but to implement important legislation on social security. He created the Superintendence of Social Security, which had the fundamental role of supervising all social security institutions in the country[23]. In addition, two institutions of the utmost importance were born: The Social Security Service (*Servicio de*

[19] Ibid., 73-75.
[20] Alejandra Matus, *Mitos y Verdades de las AFP* (Myths and Truths of the AFPs) (4th Ed., Penguin, 2020) 77.
[21] JP Arellano (n. 16) 78. (personal translation).
[22] LH Vargas Faulbaum (n. 15) 17.
[23] Ibid.

Seguro Social), which had the prominent purpose of unifying the administration of the health, accident, old-age and death insurances, and the National Health Service (*Servicio Nacional de Salud*). In line with the context, the Congress issued new laws modifying the social security regulation of the workers and of the private employees. For the former, a series of new benefits were put in place: survivorship pension, maternity allowance, improvement of disability, old-age and sickness pensions, and the free medical attention that workers enjoyed was expanded to all the members of their household. In the case of private employees, a pension system complementing the individual capitalization fund system that they were subject to was established[24].

In general, these reforms implied an explicit abandonment of most of the individual capitalisation features that the previous system presented, and a direct embrace of the PAYGO system (mainly due to the bad results that the individual capitalisation aspects presented). The election between an individual capitalisation system and a PAYGO one is not trivial, as it relates to the question of the philosophical conceptualisation of the nature and purpose of retirement. For example, the representatives of the workers wanted to be able to retire after a certain amount of years of service, as it was established for private and public employees. However, the executive power imposed the idea that the retirement pension is not grounded on the beginning of a rest period after certain years of labour, but rather on an incapacity for work derived from old-age[25].

Other important aspect of these reforms is the early recognition of women's rights. They were granted the right to retirement at a younger age than men (65 years old for men, 60 for women) and they were exempted of the obligation to register a minimum amount of contributions to demand this right, which only applied to men. This was an open recognition of their double work load, in the sense that 'it was estimated that when a woman is not doing a remunerated job she works at home, a social function that must be accounted for'[26]. It is worth mentioning as well that in that epoch there was no formal separation, like there is today, of the health and pension systems; it was all part of the general Chilean social security system[27]. In the subsequent years following 1952, the social security benefits were gradually expanded. Among

[24] JP Arellano (n. 16) 78.
[25] A Matus (n. 20) 79.
[26] JP Arellano (n. 16) 83.
[27] A Matus (n. 20) 81.

the most important ones included were the establishment of a family allowance for workers in 1953, its extension to all the passive members of the Social Security Service (SSS) in 1957, and a wider and uniformed regime of work accidents protection in 1968[28].

As a PAYGO system, the active workers' contributions were directed to pay the pensions of the passive ones of the same pension fund, and the retirement pensions were calculated as a defined sum, namely a percentage of the last salaries of the worker. However, the system organized after 1952 was highly fragmented, both legally and functionally. There were 35 pension funds (divided by the economic activity of its workers) and 150 different legal regimes[29]. A good example of its atomization were the different regimes regarding the minimum retirement age. For instance,

> '(t)he retirement ages varied according to the pension fund and ranged from 65 years for men and 55 years for women belonging to the Social Security Service, to 55 years for journalists and 50 years for bank workers. (…) Finally, seniority pension benefits were provided to workers with 35 years of service for men and between 25 and 30 years of service for women of the Private Employees Fund, also seeing (sic) requirements of 20 years of service for members of the Armed Forces and journalists, and up to only 15 years for parliamentarians.'[30] (personal translation)

Therefore, since the genesis of the Chilean social security system, the benefits have been highly unequal between different occupational groups. This was a negative consequence of the pressure that political, social and occupational groups put on the government. E.g., for the Armed Forces members the pension was calculated from a percentage of only the last salary of the officer (which rendered the manipulation of the future pension amount extremely simple)[31].

In conclusion, the deficiencies of the system were evident, being the most important one the absurd multiplicity of pension funds and legal regimes in place, and the unequal treatment

[28] JP Arellano (n. 16) 83.
[29] Alberto Arenas de Mesa, 'Historia de la Reforma Previsional Chilena: una Experiencia Exitosa de Política Pública en Democracia' (History of the Chilean Pension Reform: a Successful Experience of Public Policy in Democracy) (2 December 2010) 19. https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---sro-santiago/documents/publication/wcms_178562.pdf Accessed 16 May 2021.
[30] LH Vargas Faulbaum (n.15) 17.
[31] Ibid., 18.

applied to different occupational groups[32]. However, the level of power of these pressure groups was strong enough to stop any kind of comprehensive system reform[33].

II.4. Early Military Stage (1973-1980)

Both democratic governments before the coup d'état[34] were conscious of the deficiencies and flaws of the pension system, and had some proposals for the its reformation on their political programs. These ideas were intended to substantially uniform and eliminate the stratification of the system and the privileges that certain occupational groups held. Nonetheless, as mentioned *supra*, the pressure from the country's main political and social power groups managed to withhold the advancement of those proposals and reforms[35].

After the coup d'état headed by General Augusto Pinochet, the Military Junta started to promulgate administrative decrees with law-hierarchy ('Law-Decrees') that implemented reforms to the social security system; logically without debate or formal opposition of any political party, workers' unions or any other social group, due to the suppression of practically all civil and political rights and of the rule of law during the regime[36]. These reforms were mostly directed at standardising and rationalising the system. However, this period also saw employees and workers (principally the ones pertaining to the middle-class) losing a significant part of their benefits[37].

Among the measures aimed at unifying and rationalising the regimes, of particular note are, firstly, the one implemented between the years 1973 and 1974, when the family allowance amount was matched between employees and manual workers (although reducing the highest of them), and a unified institution to administer those funds was created (the Single Family Allowance Fund, *Fondo Único de Prestaciones Familiares*). Secondly, in 1974, a unified system of unemployment benefits was generated, and the minimum amount of the retirement

[32] A Matus (n. 20) 82.
[33] LH Vargas Faulbaum (n. 15) 20.
[34] Eduardo Frei Montalva, Christian Democratic Party, 1966-1970; and Salvador Allende, Socialist Party, 1970-1973.
[35] LH Vargas Faulbaum (n. 15) 21-23.
[36] Ibid., 24.
[37] A Matus (n. 20) 85 - 86.

pensions was equalled. Thirdly, in 1979, the retirement pensions' readjustment mechanisms and requirements were also unified[38].

The military government, authoritarian and undemocratic as it was, implemented a series of positive measures on social security during its tenure. For example, the social welfare pensions' coverage was extended to social groups that never enjoyed them before - workers with disability conditions older than 18 years old and passive workers older than 65 years old without any other income source -, helping 200.000 people that were previously excluded from the system. In the same line, 550.000 children of low-income families formerly left outside the system started receiving family allowance for the first time[39].

Despite those positive measures, the situation regarding benefits in general looked quite negative. The collective purchasing power decreased 26% percent in the period ranging from 1973 to 1982, in reference to the more stable period between 1969 and 1970[40]. The main reason behind this was that, by wilful intention or severe negligence, and in spite of the enormous price inflation registered during the period and the poor public investment in retirement pensions, the benefits' nominal value amounts were not adequately readjusted[41]. According to Arellano this affected each social and occupational group differently; resulting in the middle-class private employees being the most impaired and, not surprisingly, the Armed and Police Forces being the least affected[42]. Also, there was an important reduction in the percentage of the population covered by social security: from 79% in 1974 to 62% in 1980. The causes of this situation were primarily the increase of the unemployment and informal labour rates, higher rates of social security payments evasion due to reduced government inspection, the loss of workers' bargaining power, the atomization of workers' unions and employment instability[43]. In conclusion, there were all the economic, social and political conditions given for the implementation of the reform that would totally and radically change the Chilean social security system and, therefore, the living conditions of millions of workers until today.

[38] JP Arellano (n. 16) 89.
[39] A Matus (n. 20) 83.
[40] Ibid., 84.
[41] JP Arellano (n. 16) 90; LH Vargas Faulbaum (n. 15) 25.
[42] E.g., despite the enormous inflation and lack of readjustment policies, already in 1979, their purchasing power was higher than in the pre-crisis period of 1969-1970. JP Arellano (16) 91.
[43] JP Arellano (n. 16) 97.

II.5. Contemporary stage (1980-2021)

Chile was the first country in the region to fully substitute its social security system. As it was remarked *supra*, this was only possible due to the complete suppression of practically all formal political opposition. This debate must be contextualised within a frame of reforms adopted by the military government after 1979. This agenda, called 'the Seven Modernisations', had as its main objective to reinforce the country's economic development through financial and trade liberalisation, tax reforms, foreign direct investment, privatisation of State-owned companies, cuts in public spending and fiscal discipline, deregulation and protection of property rights, and a transfer of public responsibilities from the State to the private sector. However, these reforms shook the country's entire foundations, affecting areas as varied as labour relations, social security, health, education, regional decentralization, agriculture and the judicial apparatus[44].

The main architect of the pension system's reform in 1980 was Pinochet's Minister of Labour and Social Security, José Piñera (incidentally, brother of the current president of Chile, Sebastián Piñera), who was a fervent follower of the economic theories of Milton Friedman and the 'School of Chicago'[45]. With the euphemist pretext of 'modernising the State', he was assigned three main tasks: reforming the pension system, institutionalising a new labour relations system (the famous Labour Plan, *Plan Laboral*) and to coordinate the economic and labour branches of the government[46]. As a vehement follower of von Hayek, Piñera affirmed that one of the most important problems that the previous PAYGO system had was that it denied individual citizens the freedom to decide where and how much to save for their retirement pensions[47]. In regard to that line of thinking, it is worth quoting Piñera's own words:

> 'Freedom is a fire that tempers and invites the individual as well as the social body to overcome, and in the old system there was nothing - absolutely nothing - quite like it. All its institutions, all its regimes, all its mechanisms, responded to the terribly impoverishing scheme of monopoly.

[44] LH Vargas Faulbaum (n. 15) 25.
[45] The Chicago School of Economics or 'School of Chicago' is a pro-free market current of economic thought originated in the University of Chicago in the middle of the twentieth century, and historically led by Milton Friedman and George Stigler.
[46] Ibid., 29.
[47] Borzutzky (n. 7) 7.

> Freedom was blasphemy. No one could have the slightest right to choose where to contribute. No one could constitute, even in dreams, a pension institution. Competition was systematically forbidden' (own translation)[48].

One of the major popular myths is that Pinochet's military government had a vigorous tendency towards neoliberal policies. However, that was not the case: until 1979 the military junta was strictly divided between corporatists and neoliberals[49]. The latter group was formed by a group of economists known as the 'Chicago Boys', nickname originated from their postgraduate studies in the University of Chicago, the cradle of Friedman ideas, where many of them obtained economy and business degrees. The corporatists, on the other hand, advocated more for a rationalisation of the system, eliminating all its unnecessary and costly features. Two good examples of the corporatist approach were the derogation, in 1979, of the pension based on years of service, and the elimination of the '*perseguidoras*' (institutions that guaranteed that the retiree would receive a pension equal to the salary of the workers currently employed in their former roles). According to corporatists, both institutions were costly privileges of some power groups in the country[50]. Therefore, Piñera had a hard time convincing Pinochet's Advisory Council that the solution for the Chilean pension conundrum was the complete establishment of an individual capitalisation system, managed entirely by private companies. The main concession that Piñera had to do to achieve the support of the Council members was to leave the Armed and Police Forces' pension systems outside of the reform, which would remain in the old system[51], a situation that persists to this day. Consequently, the flamboyant new system, written in almost absolute secrecy and without any democratic debate, was implemented on the first of May of 1981.

The reform was founded on three basic principles: subsidiarity of the State in the administration of the funds; constraint of the principle of solidarity, as each worker would be individually responsible for their own future pension, eliminating the common fund and; the elimination of the percentage paid by the employer, with the aim to reduce the cost of labour and reduce

[48] José Piñera, 'El Cascabel al Gato' (The Bell to the Cat) (1991) 18. http://www.josepinera.org/zrespaldo/el_cascabel_al_gato.pdf accessed 16 May 2021.
[49] S Borzutzky (n. 7) 7.
[50] S Borzutzky (n. 7) 7.
[51] A Matus (n. 20) 17; LH Vargas Faulbaum (n. 15) 30.

unemployment[52]. Nevertheless, the most striking feature of this substantial reformation was the total elimination of the common fund (CF) or PAYGO system and the instauration of an individual capitalisation system, also called Fully Funded, Defined Contribution System (FFDC)[53]. This new regime, particularly innovative in the world at that time, was based on the individual saving capacity of the workers, who must mandatorily contribute with a portion of their salaries in a Pension Fund Administrator, or AFP, by its acronym in Castilian (*Administradoras de Fondos de Pensiones*). They were designed as private for-profit companies, exclusively focused, as mandated by their founding norms, on the administration of the workers' pension funds, with the aim of eventually delivering the specific benefits to their affiliates after their retirement.

All the workers that began their working life after the reform was put in place had to obligatorily affiliate to one AFP, leaving the workers already contributing in the previous system, by the time of the reform, the chance to choose if they wanted to remain in the old system or move to the new one. Either due to the strong discredit of the old system, the political pressure or the powerful media campaign carried out by the new AFPs with the support of the authorities, the transfer to the new system was massive. In only one year 80% of the workers that had the option to choose were contributing in the new system[54].

This reform relegated the role of the State in the system, leaving it as a mere controller and supervisor. Its new role was set to be played through two main institutions: The Superintendence of Pension Fund Administrators (*Superintendencia de Administradoras de Fondos de Pensiones*) and the Social Security Standardisation Institute (*Instituto de Normalización Previsional*, INP). The Superintendence, on one hand, was in charge of supervising the AFPs, controlling their commission structures and regulating the pension funds, among other related tasks[55]. The INP, on the other, lend assistance in the transition from the old to the new system, managing the old system's contributions and transferring them to the new individual retirement accounts of each worker. Additionally, the INP merged the multiple previously existing pension funds into one, for those who desired to remain in the old system. Therefore, became the public institution in charge of paying the pensions of already retired

[52] S. Borzutzky (n. 7) 8.
[53] Ibid., 6. For a definition of the different systems, see *supra* n. 17.
[54] A Matus (n. 20) 111.
[55] LH Vargas Faulbaum (n. 15) 31.

workers, as well as that of those workers who did not want to make the transition, and later retired under the old scheme[56].

The new system, just as the rest of the dictatorship's policies and reforms did in general to the country, shook the very foundations of Chilean social security. While the retirement pension amounts in the old system depended mostly on the salaries' growth rate, in the new system they were tied to the highly unstable financial market, exposing a large proportion of the workers' savings to a high-risk environment and giving unusual power to a small group of economic actors[57]. Even General Pinochet was aware and worried about this situation when the reform was discussed within the Military Junta. The dictator literally expressed:

> 'I do not agree with the problem (sic) that capitals go to the private sector. Actually, I do not disagree with it, but it shocks me, as it seems to me that the businessmen are not yet able to manage 97 million dollars a month. That is what causes me anguish, because every day I see various things happening, and I hope that it does not happen that suddenly someone leaves the country with the 97 million. That is what causes me some concern. (…) Who will manage the money? That makes me allergic, because I also know that there are several gentlemen, who are becoming millionaires in this country, who have sent people (abroad) to study the system because they want to operate in it. I am also aware of that.'[58] (personal translation)

Strikingly, Pinochet was not so far from reality, considering that in 2020 more than 40% of the pension funds (approximately 85 billion dollars) were invested and located in operations abroad[59], and that no Chilean competent authority has duly supervised the businesses that managers, directors and owners of pension fund administrators carry out in other countries, even in tax havens[60]. José Piñera, conspicuously, eventually managed to convince the Military Junta to adopt the new system, which operated practically without any substantial reform until 2008.

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[56] Ibid., 31.
[57] LH Vargas Faulbaum (n. 15) 31.
[58] Official Act of the Military Junta of the Republic of Chile 398-A (1980) 3. http://www.josepinera.org/zrespaldo/acta398_1980_A.pdf accessed 16 May 2021
[59] Mauricio Weibel B., *La Caída de las AFP: Una Historia de Operaciones Ilegales, Fraudes y Paraísos Fiscales* (The Fall of the AFPs: A History of Illegal Operations, Frauds and Tax Havens) (1st ed., Penguin, 2020) 101.
[60] Ibid.

The old-age pension system's reform of that year is an important milestone of Chile's social security recent history, since it was the last important amendment to the system (even if it did not change its nature) and implied a gradual return of the State's role towards the principle of solidarity: a new modality benefiting those workers who made contributions in their individual accounts but whose funds are insufficient to reach a minimum legal amount, or who do not have an account at all, was included, and an institutional reform giving more regulatory powers to public supervisory authorities was implemented. The State, then, acquired a major fiscal compromise in subsidising the retirement pensions of the 60% poorer retirees of the country, together with other expenditures aimed at increasing coverage and social generosity[61]. Therefore, an integrative system was structured between the public and private entities, of primarily a contributory nature, but with non-contributory components, combining instruments and funds from public finances and the individual accounts of each contributor who chooses the Solidarity Pension Plan, to compensate for the insufficient or inexistent balance in their accounts. However, these last reforms have not managed to solve the core problem of the system: even with State support, most retirees in Chile are still receiving retirement pensions below the poverty line (e.g., in December 2019, almost 80% of the retirees in Chile received a retirement pension below that year's minimum wage[62]).

[61] LH Vargas Faulbaum (n. 15) 39.

[62] SOL Foundation, 'Pensiones bajo el Mínimo' (Pensions under the minimum) (n. 5) 16.

Chapter III – International Legal Framework

III.1 Introduction

The present chapter reviews the international human rights instruments that are more pertinent to the matter. The selection is made in consideration of the ratifications that Chile has made of international treaties that establish provisions related to the human right to social security. Special emphasis is given to the ILO conventions, due to their normative density and specificity in the subject. It goes without saying that the ILO, as the UN agency mandated to advance social and economic justice and to establish international labour standards, offers an inescapable perspective on the issue. Importantly, special attention is paid to the soft-law that the Inter-American Court has used when interpreting the provisions of the American Convention of Human Rights and the Charter of the Organization of American States (mainly the CESCR's General Comment No. 19 on the right to social security) and that, for the same reason, has a high degree of incidence in the definition of the applicable content of the right to social security in particular cases and national contexts, as well as in the eventual determination of international responsibility of the Chilean State.

Social security is a multidimensional phaenomenon, and its concept will vary depending on which prism is chosen (economic, social, historical, legal, etcetera). Legally addressed, the concept generally refers to the legal norms and interpretative principles (whether or not they form a unitary and congruent system) which establish directives (rights and duties) for the prevention and solution of risks and social contingencies. Nonetheless, there is no single universal definition of social security. The International Labour Organization (ILO) has conceptualised it as 'the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner'[63]. The CESCR, on its behalf, has explained in its General Comment Nº 19 that the right to social security encompasses, at least, 'the right to access and maintain benefits, whether in cash or in

[63] ILO, 'Facts on Social Security' (2003) 1 https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067588.pdf accessed 16 May 2021.

kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents'[64].

The concept of 'social security' has one of its most identifiable historical expressions in the United States' '*Social Security Act'* of 1935, and it was consequently reflected later on the '*Beveridge Report'* of 1942's United Kingdom[65]. However, its roots remount to 19th century's Europe, a context in which the idea of 'Social State' was elaborated by philosophers, lawyers and sociologists such as Hegel, Lorenz von Stein or Tönnies[66]. Indeed, the first social insurance systems were implemented in nineteenth century's Germany and the Austrian-Hungarian Empire, but rapidly expanded to Northern and Western Europe. However, the first international instrument that afforded considerable international authority to the concept was the Declaration concerning the aims and purposes of the International Labour Organization of 1944 ('Philadelphia Declaration', annexed to the Constitution of the ILO)[67], when the end of the Second World War was imminent and predicting the genesis of a new world order.

III.2. Main International Covenants Protecting the Right to Social Security

The paramount Universal Declaration of Human Rights (UDHR) proclaimed by the United Nations' General Assembly in 1948, despite its non-binding nature, was the instrument which put the human right to social security in the place it merits. As Article 22 reads,

> 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with

[64] CESCR General Comment No. 19 (n. 10) para. 2.
[65] Eberhard Eichenhofer, 'Social Security as a human right: A European Perspective', in Frans Pennings and Gijsbert Vonk (eds), Research Handbook on European Social Security Law (Edward Elgar Publishing, 2015) 5.
[66] Ibid., 5.
[67] ILO, 'Declaration concerning the aims and purposes of the International Labour Organization' (Philadelphia, 1944) Annexed to the Constitution of the ILO, section III (f): 'Article III: The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: (f): the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;' https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms_142941.pdf accessed 16 May 2021.

> the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.'[68]

This provision made clear that the right to social security is indissolubly linked to the membership within a given society and, therefore, it is essential for social inclusion. This stems from the fact that social risks and contingencies will eventually affect the entirety of the country's population and society and, consequently, it is society as a whole which must take responsibility for those contingencies and risks[69]. The precepts of Article 25 of the UDHR are also essential, as they state that

> '(1). Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
>
> (2). Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.'[70]

Articles 22 to 26 of the UDHR enshrine fundamental rights to work, assistance, education, health, housing and, as shown, social security. These Articles offered a crucial inspiration for the consecration of social and economic rights as human rights, which found their cornerstone in 1966, with the proclamation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Its Articles 9 and 10(2) pristinely state that

> 'Article 9. The States Parties to the present Covenant recognize the right to everyone to social security, including social insurance.
>
> Article 10(2). Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

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[68] UNGA Universal Declaration of Human Rights (1948) Article 22.
[69] Iván Obando Camino, 'The Legal Regime About the Fundamental Right to Social Security in Chile: A Critical Analysis from an International Human Rights Law Perspective' (2016) 17(2) Espaço Jurídica Journal of Law (EJJL) 610 https://portalperiodicos.unoesc.edu.br/espacojuridico/article/view/10619/pdf accessed 16 May 2021.
[70] UNGA Universal Declaration of Human Rights (1948) Article 25. https://www.un.org/sites/un2.un.org/files/udhr.pdf accessed 20 May 2021.

The relevance of the aforementioned covenant (that the vast majority of States have ratified all around the world) for the right to social security lies in the fact that it gave legal force and effective mechanisms of protection to economic, social and cultural rights, a characteristic that the non-binding norms and moral principles established in the UDHR did not possess. Furthermore, other specific international covenants of the utmost importance also contemplate norms on social security. Amongst them we find the International Convention on the Elimination of All Forms of Racial Discrimination of 1965[71], the Convention on the Elimination of All Forms of Discrimination Against Women of 1979[72] and the Convention on the Rights of the Child of 1989[73].

Finally, and despite its lack of binding force and soft-law nature, it is inevitable to analyse General Comment No. 19 (2008) of the Committee on Economic, Social and Cultural Rights, which meticulously defines with considerably more clarity the nature of the right to social security, its normative content, key elements, main principles, essential coverage, and the obligations of States parties, amongst other fundamental features. This Comment covers all nine branches of social security, namely (a) health care, (b) sickness, (c) old-age, (d) unemployment,

[71] UNGA International Convention on the Elimination of All Forms of Racial Discrimination (1969) 'Article 5: In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (e) Economic, social and cultural rights, in particular: (iv) The right to public health, medical care, **social security** and social services;' (personal remark). https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx accessed 20 May 2021.

[72] UNGA Convention on the Elimination of All Forms of Discrimination Against Women (1979) 'Article 11(1): States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (e) The right to **social security**, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;' (personal remark) and 'Article 14(2). States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (c) To benefit directly from social security programmes;'. https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx#:~:text=Introduction,twentieth%20country%20had%20ratified%20it accessed 20 May 2021.

[73] UNGA Convention on the Rights of the Child (1990) 'Article 26 (1). States Parties shall recognize for every child the right to benefit from **social security**, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law. (2). The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.' (personal remark). https://www.ohchr.org/en/professionalinterest/pages/crc.aspx accessed 20 May 2021.

(e) employment injury, (f) family and child support, (g) maternity, (h) disability, and (i) survivors and orphans[74]. General Comment No. 19 also enshrines a range of essential social security principles. Amongst them are the principle of solidarity (§3 and §50), integrity and sufficiency (§9 and §22), equality and non-discrimination (§9 and §29), objective universality (§12), subjective universality (§23), protection (§22), participation (§26), internationality (§6), unity or uniformity (§48 and §59 a.), and legal exclusivity (§48)[75].

However, one of the most important advances of General Comment No. 19 is defining the regulatory content of the right to social security together with its key elements[76]. In that sense, the Committee identifies as fundamental key elements of the right to social security the following:

a) *Availability*: This element implies that any social security system, whether public or private, single or mixed scheme, must be available and in proper place to provide the respective assistance for any of the specific social risks and contingencies. The Committee does not demand a specific type of social security system to be applied. However, if the system chosen is of private nature, it must be adequately supervised and audited by the State, and public authorities must take responsibility for it. Additionally, the system must always be established under domestic law and be sustainable, in order to ensure the right to social security for upcoming generations.

b) *Adequacy*: The benefits granted, whether in cash or in kind, must be appropriate to provide an adequate and decent standard of living, with full consideration of the principles of human dignity and non-discrimination. The latter meaning that benefits should not only be focused in satisfying purely biological needs, but decent and dignified living conditions[77]. In the case of contributory schemes, there must be a reasonable relationship between earnings, paid contribution, and the amount of the respective benefit.

[74] CESCR General Comment No. 19 (n. 10) para. 12 – 21.
[75] I Obando Camino (n. 69) 624.
[76] CESCR General Comment No. 19 (n. 10) para. 9 – 28.
[77] E.g., considering that the retirement pension for older persons has an alimentary nature and generally are the only income source and livelihood for retirees.

c) *Accessibility*: This element is divided in different sub-elements:

c.1) *Coverage*: All persons must be covered by the social security system, with no arbitrary discrimination in any ground, and putting special focus on excluded, marginalised and vulnerable groups. To achieve full subjective and objective universality, non-contributory schemes are necessary.

c.2) *Eligibility*: The requirements for the obtainment of benefits must be reasonable, transparent and proportionate. On the other hand, any reduction, suspension, restriction or withdrawal must be provided by law, subject to the due process of law, and based on grounds of reasonability and proportionality.

c.3) *Affordability*: In the case of contributory systems, the contributions must be legally established in advance. Additionally, the contributions must be affordable for all persons and must never impair the realisation of the right to social security or any other human right.

c.4) *Participation and information*: Beneficiaries of social security must be granted the right to participate in the administration of the system. In the same line, individuals must have the right to seek, receive, impart and require to public authorities and responsible entities all the necessary information on social security entitlements in a clear and transparent manner.

c.5) *Physical access*: Benefits must be dispensed in a timely manner, and all beneficiaries must have proper physical access to social security services.

III.3. Legal Instruments Within the Inter-American Human Rights System on the Right to Social Security

The main four legal instruments in the American regional human rights system protecting the right to social security are: (a) the Charter of the Organization of the American States (OAS) of

1948[78], (b) the American Declaration of the Rights and Duties of Man of that same year[79], (c) the American Convention on Human Rights or 'Pact of San José' of 1969 (ACHR)[80], and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador') of 1988[81]. These instruments are of the utmost importance for the effective protection of human rights in the Americas, principally because they fall within the sphere of competence and jurisdiction of the foremost entities responsible for the protection of human rights in the region: The Inter-American Commission on Human Rights (I-ACHR) and the Inter-American Court of Human Rights (I-ACtHR).

The first regional instrument enshrining the human right to social security was the Charter of the Organization of the American States, signed in 1948, months before the UDHR was proclaimed. This treaty, apart from containing a comprehensive spectrum of principles and fundamental rights and freedoms, gave birth and life to the Organization of American States, the preeminent Pan-American inter-States organisation nowadays. First, the Charter contemplates social security and social justice as two basic principles of the Organization of American States in Article 3(j)[82]. Then, in more detail expresses in Articles 45 and 46 that

> 'Article 45. The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:
>
> a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and **economic security**;

[78] OAS Charter of the Organization of American States (Bogotá, 1948). https://www.cidh.oas.org/Basicos/English/Basic22.Charter%20OAS.htm accessed 20 May 2021

[79] OAS American Declaration of the Rights and Duties of Man (Bogotá, 1948). https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf accessed 20 May 2021.

[80] OAS American Convention on Human Rights 'Pact of San José, Costa Rica' (San José, 1969) https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm accessed 20 May 2021.

[81] OAS Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' (San Salvador, 1988) https://www.oas.org/juridico/english/treaties/a-52.html accessed 20 May 2021.

[82] OAS Charter of the Organization of American States (1948) (n. 78) 'Article 3. The American States reaffirm the following principles: j) **Social justice and social security** are bases of lasting peace;' (personal remark).

> b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, **both during his working years and in his old age, or when any circumstance deprives him of the possibility of working**; (…)
>
> h) Development of an **efficient social security policy**;
>
> Article 46. The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, **especially in the labor and social security fields**, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal.'[83] (personal remarks)

In the same conference in which the Charter of the OAS was signed, the world's first international instrument on human rights came into existence: the American Declaration of the Rights and Duties of Man, which in relation to the right to social security stated that

> '(e)very person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.'[84]

Despite being an appealing catalogue of moral principles and having an immense authority and interpretative force, the main problem of the American Declaration is that, just like the UDHR, it does not have binding force on States. The Americas had to wait twenty more years to watch the genesis of the American Convention on Human Rights, backbone of the Inter-American Human Rights System and establisher of the I-ACHR and I-ACtHR, which are the primary overseers of the Convention.

However, the functioning of the Inter-American human rights system also presents some obstacles, notably the lack of universality. Only twenty-four of the thirty-five members of the OAS are active parties to the American Convention, with the remarkable and

[83] OAS, Charter of the Organization of American States (1948) (n. 78) Article 45 and 46.
[84] Article XVI, American Declaration of the Rights and Duties of Man (n. 79).

disappointing exceptions of the United States, Canada and Cuba, inter alia[85]. In stark contrast with the European Human Rights System, a country in the Americas could be part of the ACHR, while not recognizing the jurisdiction of the I-ACtHR. Twenty-one of the Convention's State parties (including all Latin American States) have accepted the compulsory jurisdiction of the Court[86].

The ACHR does not have a detailed regulation of economic, social and cultural rights, being its coverage limited to one particularly broad article (Article 26). However, the Inter-American Court, in its recent jurisprudence and through an extensive teleological interpretation of the norm has determined that it has the competence to adjudicate cases of violations of specific economic, social and cultural rights, such as the right to social security[87]. It is worth citing the clause under comment, which establishes that

> 'Article 26. Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.'[88]

Nonetheless, the most important regional instrument on economic, social and cultural rights is the Additional Protocol to the ACHR Nº 1, or Protocol of San Salvador. It is a paramount instrument for the effective protection and promotion of economic, social and cultural rights in the region but also presents the problem of lacking universalism. Not even half of the American States have ratified the Protocol, including Chile[89]. Even if the austral country, which is the focus of this research, has not ratified the aforementioned Protocol, it is worth citing its main clause on the right to social security, which expresses that

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[85] OAS Ratifications to the ACHR http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm accessed 16 May 2021.
[86] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd Ed., CUP, 2013) 26.
[87] *Case of Lagos del Campo v Peru* (2017) I-ACtHR (n. 2); *Case of Muelle Flores v Peru* (2019) I-ACtHR (n. 3)
[88] Article 26, ACHR (n. 80).
[89] OAS, Ratifications to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' https://www.cidh.oas.org/basicos/Basicos4.htm accessed 16 May 2021.

> 'Article 9. Right to social security. (1) Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents. (2) In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.'[90]

All countries in the Americas have ratified at least one human rights instrument at the international or regional level containing the right to social security. As it was previously mentioned, Chile has not ratified the Protocol of San Salvador, but it is part to the ACHR and recognises the compulsory jurisdiction of the Inter-American Court of Human Rights. Therefore, and according to the Court's own case-law and its interpretation of ACHR's Article 26 (see Chapter IV), it is possible to assert that the human right to social security has full force and direct justiciability within the country's jurisdiction and before the I-ACtHR.

III.4. The ILO Documents Related to the Right to Social Security

As stated *supra*, the ILO is the UN agency mandated to advance in social and economic justice and to set international labour standards. Therefore, and letting alone its protracted history and accumulated experience in the area, reviewing its documents on the right to social security, even if Chile has not ratified a large part of them, is essential in nature. As the organisation has pointed out in its cardinal Declaration on Fundamental Principles and Rights at Work and its Follow-Up[91], when States freely join the organisation, they endorse its principles and rights, and they compromise to undertake all the necessary steps towards the attainment of all ILO's objectives, always considering their resources availability and specific circumstances. In addition, all members of the organisation, even if they have not ratified a particular Convention, have the obligation (stemming from the very fact of being an ILO member) to respect, promote

[90] OAS, 'Protocol of San Salvador' (n. 81).
[91] ILO, 'Declaration on Fundamental Principles and Rights at Work and its Follow-Up' (Geneva, 1998). https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf accessed 16 May 2021.

and realise the rights guaranteed in the Conventions considered fundamental by the organisation[92]. Logically, both the 1919's Constitution of the ILO and the 1944's Declaration of Philadelphia, which restated the aims and purposes of the organisation and was annexed to its Constitution, must be considered fundamental instruments applicable to all ILO members. Chile, in particular, is one of the founding members of the organisation, and by May 2021 it has ratified sixty-three ILO conventions, of which forty-nine are in force[93]. Considering the aforementioned, the Declaration of Philadelphia, fundamental instrument of the organisation, regarding the right to social security states that

> 'III. The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve:
> (…)
> (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
> (g) adequate protection for the life and health of workers in all occupations;
> (h) provision for child welfare and maternity protection;
> (i) the provision of adequate nutrition, housing and facilities for recreation and culture;
> (j) the assurance of equality of educational and vocational opportunity.'[94]

Disappointingly, Chile has not ratified the flagship convention (which covers all nine branches of social security[95]) on the topic: the ILO convention Nº 102 of 1952[96], or many of the other

[92] Ibid., para. 1 and 2: 'THE INTERNATIONAL LABOUR CONFERENCE 1. Recalls: (a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances; (b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization. 2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation'.

[93] ILO, Information on Chile https://www.ilo.org/santiago/pa%C3%ADses/chile/lang--es/index.htm accessed 16 May 2021.

[94] ILO, Declaration of Philadelphia (n. 67) Article III.

[95] Medical care, sickness benefits, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit.

[96] ILO, Convention Nº 102, Social Security (Minimum Standards) Convention (Geneva, 1952). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C102:NO accessed 16 May 2021.

related conventions of the organisation, such as the Equality of Treatment (Social Security) Convention Nº 118 of 1962, the Invalidity, Old-Age and Survivors' Benefits Convention Nº 128 of 1967, the Medical Care and Sickness Benefits Convention Nº 130 of 1969, the Maintenance of Social Security Rights Convention Nº 157 of 1982 and the Employment Promotion and Protection against Unemployment Convention Nº 168 of 1988.

Nevertheless, the country did ratify a number of ILO conventions during the last century that have influenced and affected in different levels the domestic legislation on the right to social security, establishing certain minimum normative levels[97]. Among the ratified ILO conventions that have had a considerable effect on the topic are: the Workmen's Compensation (Agriculture) Convention Nº 12 of 1921 (ratified in 1925), the Equality of Treatment (Accident Compensation) Convention Nº 19 of 1925 (ratified in 1931), the Sickness Insurance Conventions Nº 24 and 25 (Industry and Agriculture, respectively) of 1927 (ratified in 1931), the Old-Age Insurance Conventions Nº 35 and 36 (Industry and Agriculture, respectively) of 1933 (ratified in 1935), the Invalidity Insurance Conventions Nº 37 and 38 (Industry and Agriculture, respectively) of 1933 (ratified in 1935), the Maternity Protection Convention Nº 103 of 1952 (ratified in 1994), the Employment Injury Benefits Convention Nº 121 of 1964 (ratified in 1999), the Occupational Health Services Convention Nº 161 of 1985 (ratified in 1999), and the Promotional Framework for Occupational Safety and Health Convention Nº 187 of 2006 (ratified in 2011)[98].

Finally, as the UN agency specifically mandated to set international labour standards, the ILO has issued a number of Recommendations, Resolutions and Declarations on the right to social security that have assisted on the respect, protection, promotion and realisation of this right. Amongst them we could cite the Social Protection Floors Recommendation Nº 202 of 2012[99], the Resolution and Conclusions concerning social security of the 89th International Labour

[97] I Obando Camino (n. 69) 622.
[98] ILO, Ratifications for Chile. https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102588 accessed 16 May 2021.
[99] ILO, Recommendation Nº 202, Social Protection Floors Recommendation (Geneva, 2012) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3065524 accessed 16 May 2021.

Conference of 2001[100], the ILO Declaration on Social Justice for a Fair Globalisation of 2008[101], and the Global Jobs Pact of 2009[102]. They all have contributed to reaffirm the right to social security as a basic human right and have more or less influenced national policies on social protection and security in many countries, including Chile[103].

[100] ILO, 'Social Security for All: The Strategy of the International Labour Organization. Resolution and conclusions concerning the recurrent discussion on social protection (social security), adopted at the 100th Session of the International Labour Conference' (Geneva, 2011) https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_secsoc_30892.pdf accessed 16 May 2021.
[101] ILO, 'Declaration on Social Justice for a Fair Globalization. adopted by the International Labour Conference at its Ninety-seventh Session' (Geneva, 2008) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf accessed 16 May 2021.
[102] ILO, 'Recovering From the Crisis: A Global Jobs Pact, adopted by the International Labour Conference at its Ninety-eighth Session' (Geneva, 2009) https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_115076.pdf accessed 16 May 2021.
[103] I Obando Camino (n. 69) 622.

Chapter IV – The Inter-American Court of Human Rights' Jurisprudence on the Right to Social Security

IV.1. Introduction

This chapter studies the jurisprudence of the Inter-American Court of Human Rights on the right to social security, dividing its related case-law trajectory into three groups. First, the early jurisprudence of the I-ACtHR on the right to social security. This was a period marked by a timid and gradual adjudication of cases related to economic, social and cultural rights. At this stage, the few allegations related to the right to social security in which the Court found human rights' violations were based on connections to civil and political rights (e.g., right to property, fair trial, inter alia), since the Court avoided entering into an autonomous and independent analysis of ESCE rights, especially due to evidentiary difficulties and the level of proof required to determine a breach on ESCE rights' progressive development. Second, this chapter delves on the landmark *case of Lagos del Campo v. Peru*, historical case in which the Court for the first time directly addressed a violation of an ESCE right through an evolutive and systematic interpretation of Article 26 of the American Convention. The progressive development's evidentiary problem was not present in this case (nor in the following cases in which the Court has resorted to this type of interpretation), due to the fact that the Court determined the particular ESCE rights' obligations of immediate nature that were not fulfilled by the States. Even if this case was not particularly connected to the right to social security (the Court found a violation on the right to job security), it is thoroughly assessed in this work due to the interpretative relevance that presents for the regional justiciability of the right to social security. Finally, this chapter examines the *case of Muelle Flores v. Peru*, which was the first Inter-American case in which the I-ACtHR determined a direct violation on the right to social security following the same interpretative path outlined in the *Lagos del Campo v. Peru case*, thus initiating a new era for the regional protection of the right.

The protection of economic and social rights within the Inter-American Human Rights System has been historically scarce; before 2008, the I-A Court only addressed three cases directly related to ESCE rights, out of a total of one hundred and five cases[104]. Apart from political reasons, one explanation to this phenomenon could be the short wording without further detail that the American Convention employs when referring to social, economic and cultural rights. As stated *supra*, the ACHR protects them in its Article 26, explicitly referring their protection to the Charter of the OAS. The purpose of this bare statement was not to neglect the existence and full validity of economic, social and cultural rights, but to make a point on the 'degree of visibility' that they should enjoy, since they require different and specific means of protection[105].

As obvious as it may sound, the American Convention was not designed as a regional instrument focused on civil and political rights exclusively but, as its very name suggests, on 'human rights' in general, recognising their indivisibility and interdependence. In that sense, a good way of understanding the spirit and purpose of Article 26 is revising the preparatory works of the Convention. According to these works, there was a clear interest of States parties (and particularly of Chile) to assign a direct reference to ESCE rights, and to give them mandatory nature in its compliance and application[106], so as to create effective mechanisms of promotion and protection[107], and to grant economic, social and cultural rights the maximum protection compatible with the peculiar conditions found in most of the American States[108]. In addition, the enactment of a specific protocol on economic, social and cultural rights in the region (the Protocol of San Salvador) led to configure an increasingly confusing normative landscape.

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[104] Clara María Mira González and Milton Andrés Rojas Betancur, 'La Protección de los Derechos Sociales en el Sistema Interamericano de Derechos Humanos' (Protection of Social Rights in the Inter-American Human Rights System) (2010) 9(18) Opinión Jurídica Journal, University of Medellín, 50. http://www.scielo.org.co/pdf/ojum/v9n18/v9n18a03.pdf accessed 16 May 2021.

[105] Carlos Rafael Urquilla Bonilla, 'El derecho a la seguridad social: Una aproximación desde la perspectiva de género' (The right to Social Security: A Gender Perspective Approach) IIDH, 2008, 238 – 239. https://www.corteidh.or.cr/tablas/a22094.pdf accessed 16 May 2021.

[106] Special Inter-American Conference on Human Rights (San José, Costa Rica, November 7-22, 1969). Minutes and Documents. Observations of the Government of Chile to the Draft of the American Convention on Human Rights, 42-43. http://www.oas.org/es/cidh/docs/enlaces/Conferencia%20Interamericana.pdf accessed 16 May 2021.

[107] Special Inter-American Conference on Human Rights (n. 106) Intervention of the Delegate of the Government of Chile in the debate about the Draft of the Inter-American Convention on Human Rights, during the Fourteenth Session of the "I" Commission, 268.

[108] Special Inter-American Conference on Human Rights (n. 106) Observations and Amendments of the Government of Brazil to the Draft of the Inter-American Convention on Human Rights, 125.

Before the landmark case of *Lagos del Campo v. Peru*[109], which was the first case in the Inter-American System dealing with a direct violation of Article 26 (and, therefore, the first to address ESCE rights autonomously), the Inter-American Court had been protecting ESCE rights in general, and the right to social security in particular, through the connection to other related civil and political rights enshrined in the American Convention. Such were the cases of the rights to life, to personal integrity and liberty, to property (under the figure of 'acquired rights', '*derechos adquiridos'*), to equal treatment and no discrimination, and the right to equality before the law[110].

IV.2. Jurisprudence Connected to the Right to Social Security Before the *Case of Lagos del Campo v. Peru*[111]

The case of *the Five Pensioners (Cinco Pensionistas) v. Peru*[112] (2003) was the first regional case directly related to the right to social security, although only tangentially through the connection to other rights. The case comprised five Peruvian retirees (*pensionistas*) who worked in the public administration, specifically in the Superintendence of Banks and Insurances (*Superintendencia de Bancos y Seguros*, SBS hereafter), for more than twenty years, and later retired under the labour regime applied to the public activity. During their service in 1981, a Decree-Law ('*Decreto-Ley'*, executive power's decrees with legal hierarchy) establishing that the workers of the institution would be transferred to the normative scheme of the private activities, unless they explicitly manifested otherwise, was enacted.

The five retirees explicitly manifested their intention to remain in the public system (Decree-Law Nº 20.530), which had a preferable pension levelling, as the State recognized the right to a pension that could be progressively levelled in accordance with the remuneration of the active public servants of the respective categories who occupy the same or similar function to that

[109] *Case of Lagos del Campo v. Peru* (2017) I-ACtHR (n. 2).
[110] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 20.
[111] *Case of Lagos del Campo v. Peru* (2017) I-ACtHR (n. 2).
[112] *Case of the 'Five Pensioners' v. Peru*, 28 February 2003, I-ACtHR, Merits, Reparations and Costs, Series C No. 98.

performed by the pensioners at the time they stopped working for the SBS[113]. Nevertheless, in 1992, without previous notice or any kind of explanation, the SBS suspended the pension payments to one of them and reduced in 78% the retirement pension amounts of the other four affected workers[114]. After that, a series of litigation instances started, ending up in the Inter-American Court of Human Rights.

The first part of the Court's ruling was based on an analytical connection between the right to property and the right to pension. The latter was considered an 'acquired right' incorporated into the victims' assets. In other words, an immaterial property protected by the ACHR[115]. Therefore, the Court found that Peru, having arbitrarily changed the amounts of the pensions that the alleged victims were receiving, and not having complied with the judgements issued by the judicial power after conceding the victims' petitions, violated the right to property enshrined in Article 21 of the American Convention[116]. In addition to the ones just mentioned, the Court found that there was a violation of Article 25 of the American Convention (Right to Judicial Protection) based on the fact that the domestic rulings conferring protection to the victims were not properly enforced[117].

Interestingly, in this case the applicants also alleged a violation of Article 26 of the ACHR (progressive development of economic, social and cultural rights). The approach taken by the Inter-American Commission on Human Rights and the representatives of the victims and their kinship was that, when the State reduced the amount of the victims' retirement pensions, it was breaching the obligation of no-regression in the progressive development economic, social and cultural rights stressed by Article 26 of the Convention[118]. Nonetheless, the Inter-American Court determined that there was no violation of this norm, since the progressive development on ESCE rights should be measured based on the increasing coverage of ESCE rights in general, and of social security in particular, on the whole of the population taking into account the imperatives of social equity, and not based on the particular circumstances of a very limited group of retirees, that not necessarily represent the overall panorama[119]. The dichotomies

[113] Ibid., para. 88(d).
[114] Ibid., para. 88(e).
[115] Ibid., para. 102 – 103.
[116] Ibid., para. 121.
[117] Ibid., para. 41.
[118] Ibid., para 146. The existence of the right to social security was not at stake, mainly because it was constitutionally recognised, and also under Peruvian domestic law.
[119] Ibid., para. 147 – 148.

between the collective and the individual, and the progressive and immediate dimensions of economic and social rights (including the right to social security) have been an important part of the Court's rationale when determining States' obligations on the topic, as it will be further explained *infra*.

Also against Peru, and following the same line of *the Five Pensioners Case*, the next regional case regarding the right to social security before the I-ACtHR was the case of *Acevedo Buendía et al. v. Peru* of 2009[120]. The case also concerned a group of workers (273 members of the Association of Discharged and Retired Persons of the General Comptroller's Office of the Republic of Peru) protected under the old regime applicable to the public activity, in which they had the right to choose to remain in. This system was based on the Decree-Law Nº 20.530, which established that retirement pensions could be progressively levelled in accordance to the specific salary afforded to the current worker performing the same or similar function to the one they were conducting the day of their retirement. However, in 1992 Decree-Law Nº 25.597 was published, unilaterally and without any previous notification, curtailing the victims' right to continue receiving a pension levelling in accordance with Decree-Law Nº 20.530[121].

Even if the victims obtained favourable judgements at the domestic level, the Peruvian State never returned the full amount of the unlawfully retained monetary difference between 1993 and 2002. The decision was notoriously similar to *the Five Pensioners* case: The Court determined a violation of Article 21 (right to property) based on the illegal reduction of the retirement pensions and the lack of restitution of the unlawfully retained amounts[122], a violation of Article 25 (right to judicial protection) derived from the lack of execution of judicial sentences[123], and no violation of Article 26 (economic, social and cultural rights' progressive development), as the Court esteemed that the focus of the analysis was not over any general measure or policy adopted by the State that prevented the progressive development of the right to social security in Peru, but rather a State's failure to comply with the payment ordered by its judicial bodies[124].

[120] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*, 1 July 2009, I-ACtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 198.
[121] Ibid., para. 43.
[122] Ibid., para. 84 – 91.
[123] Ibid., para. 69 – 79.
[124] Ibid., para. 106.

The last case connected to the right to social security before the sharp jurisprudential turn of the *Lagos del Campo v. Peru case* was the *Ángel Alberto Duque v. Colombia case* of 2016[125]. This case concerned the victim's exclusion from the possibility of obtaining a survivorship pension following the death of his partner, primarily based on the fact that they were a same-sex couple. Even if the right to social security was of central importance in this case, its direct infraction was not alleged by the applicants or independently by the Court through the principle of *iura novit curia*. However, the Court concluded that the Colombian State, while restricting the access to survivorship pensions based on sexual orientation grounds and without giving any further objective and reasonable justification was acting discriminatorily and, consequently, breaching the rights to equal treatment, equal protection before the law, and freedom from discrimination (Articles 1.1 and 24 of the American Convention)[126].

IV.3. The Landmark *Case of Lagos del Campo v. Peru*[127] and its Jurisprudential Repercussions

The landmark *Lagos del Campo v. Peru case* of 2017 was the first case in which a direct violation of Article 26 was determined by the I-A Court, creating a completely new paradigm regarding economic, social and cultural rights within the Americas' regional human rights system. In this case the Court did not declare Peru liable for a direct violation of the right to social security, but addressed the topic tangentially through the determination that the right to 'job security' (Article 26) was violated. Mr. Lagos del Campo, apart from a worker, was the president of the Electoral Committee of the Industrial Community of his workplace. The 'Industrial Communities' were a *sui generis* system for industrial and labour promotion, in which the workers participated in the company's ownership, management and profits. These entities were governed by a different legal regime from that of the workers' unions, but shared the purpose of representing the workers' sectoral interests vis-à-vis the employer[128].

[125] *Case of Duque v. Colombia*, 26 February 2016, I-ACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 310.
[126] Ibid., para. 124.
[127] *Lagos del Campo v. Peru* (2017) I-ACtHR (n. 2)
[128] Ibid., para. 45.

The Industrial Communities were administered by the General Assembly, an organisation composed by all the workers and the Community Council, which was the executive body of the Industrial Community. The workers also participated in the company's management by appointing representatives to the company's Board, where they would share seats with directors appointed by the company's shareholders[129]. The workers had the right to elect their representatives for the Council and the Board, a process that was held and organised by the Electoral Committee, of which Mr. Lagos del Campo was the president[130]. In 1989, and in his tenure as president of the Electoral Committee, he denounced fraud and irregularities in the call for elections, in regard to the Board and the Council, directly before the Ministry of Industry, and publicly through an interview in a journal. The infraction consisted, specifically, in the members of the Electoral Committee appointed by the employers calling for elections without the participation of the workers' representatives[131]. Mostly because of the interview given, he was accused by his employers of 'work misconduct', and later dismissed from the company based on that consideration[132]. He appealed to the domestic judicial system, but all his complaints were rejected and, consequently, sought protection in the Inter-American Human Rights System.

The Court found that the Peruvian State committed violations on the freedom of expression and thought (Article 13), right to fair trial (Article 8), freedom of association (Article 16), right to access to justice (Articles 8 and 25) and on domestic legal effects (Articles 1.1 and 2) but, of particular interest to this research, the Court found a direct violation of Article 26, ACHR, for the first time, specifically of the right to job security, opening a new era in the region for the autonomous protection of economic, social and cultural rights.

The Court started its rationale highlighting the interdependence and indivisibility between civil and political and ESCE rights, in the sense that between them there is no hierarchy and that all human rights should be enforceable before the competent authorities[133]. Subsequently, the Court references the Charter of the OAS (as Article 26, ACHR, establishes), when expressing that 'work is a right and a social duty' that should be performed with 'fair wages, employment

[129] Ibid., para. 42.
[130] Ibid., para. 43.
[131] Ibid., para. 48 – 50.
[132] Ibid., para. 52 – 55.
[133] Ibid., para. 141.

opportunities, and acceptable working conditions for all'[134]. Right after stating these considerations, the Court cited its own Advisory Opinion OC-10/89, which indicated that

> '[…] The member States of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus, the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.'[135]

The relevance of the latter is that, through a systemic interpretation, the Court declared that a non-binding instrument, such as the American Declaration of the Rights and Duties of Man, needs to be necessarily considered for a correct interpretation of the Charter of the OAS. As the same Court states in this judgement

> '(…) Article XIV of the American Declaration stipulates that: "[e]very person has the **right to work**, under proper conditions, and to follow his vocation freely." This provision is relevant to define the scope of Article 26, because "the American Declaration constitutes, as applicable and in relation to the OAS Charter, a **source of international obligations**." Furthermore, Article 29(d) of the American Convention expressly establishes that "no provision of this Convention shall be interpreted as: […] (d) excluding or limiting the effect

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[134] Ibid., para. 143, which refers to articles 45(b)(c), 46 and 34(g) of the OAS Charter.
'Article 45: The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:
(b) **Work is a right and a social duty**, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working; (c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws;
Article 34: The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals:
(g) **Fair wages, employment opportunities, and acceptable working conditions for all**;' (personal remark).
[135] *Case of Lagos del Campo v. Peru* (2017) I-ACtHR (n. 2) para. 143, which cites: I-ACtHR, Advisory Opinion OC-10/89 (14 July 1989) 'Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights', Series A No. 10, para. 43. http://www.worldcourts.com/iacthr/eng/decisions/1989.07.14_American_Declaration.pdf accessed 20 May 2021.

that the American Declaration of the Rights and Duties of Man and other international acts of the same nature have."'[136] (personal remark)

Through a similar interpretative process the Court determined later the existence of the right to job security, resourcing to other non-binding instrument as interpretative tools, such as the CESCR's General Comment Nº 18 on the right to work[137]. The Court then established that, due to the arbitrary dismissal the victim not only lost his job, but also his benefits stemming from social security, even impacting his personal and family life[138]. Therefore, the Court finally concludes that the Peruvian State failed to protect the victim's right to job security and, consequently, violated Article 26 of the Convention[139].

It could be thought that through this type of interpretation the Court its exceeding its competence, extending it over international instruments outside its jurisdiction. However, the same Court has stressed that, when using the sources, principles and criteria of the international *corpus iuris* to address ESCE rights, it is predominantly affording specific content to the scope of the rights protected by the Convention, interpreting them in conformity with the Convention's Article 29 guidelines ('Restrictions Regarding Interpretation', as the norm prevents that no provision of the ACHR shall be interpreted as excluding or limiting the enjoyment of the rights established in the American Declaration or in any other international act of the same nature), and actualizing them in conformity with systematic, teleological and evolutive interpretations of the OAS Charter's rights which, as illustrated *supra*, Article 26 of the ACHR allows to resort to[140].

After the *Lagos del Campo v. Peru case*, the Court started implementing the same type of interpretation, departing from Article 26, in a series of cases regarding the right to work (*case of Dismissed Employees of Petroperú et al. v. Peru* of 2017[141], and *case of San Miguel Sosa et*

[136] *Case of Lagos del Campo v. Peru* (2017) I-ACtHR (n. 2) para. 144.
[137] Ibid., para. 147, referring to: Committee on Economic, Social and Cultural Rights, 'General Comment No. 18: The Right to Work (Art. 6 of the Covenant) (2006) UN Doc E/C.12/GC/18. https://www.refworld.org/docid/4415453b4.html accessed 20 May 2021.
[138] Ibid., para. 151 – 152.
[139] Ibid., para. 153 – 154.
[140] *Case of Poblete Vilches et al. v. Chile*, 8 March 2018, I-ACtHR, Merits, Reparations and Costs, Series C No. 349, para. 103; *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 6.
[141] *Case of Dismissed Employees of Petroperú et al. v. Peru*, 23 November 2017, I-ACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 344.

al. v. Venezuela of 2018[142]), and also the right to health (*case of Poblete Vilches v. Chile* of 2018[143], and *case of Cuscul Pivaral et al. v. Guatemala* of 2018[144]). Recently, the first regional case in which the I-A Court directly and autonomously derived the right to social security as a human right protected by Article 26, ACHR, occurred: the *Muelle Flores v. Peru case* (2019)[145]. This milestone case, subsequently addressed in this work, is of fundamental importance for the current and future protection of the human right to social security within the Inter-American human rights system and, therefore, for this research itself.

IV.4. The *Case of Muelle Flores v. Peru*[146] and its Consequences for the Regional Protection of the Right to Social Security

First of all, it must be remarked that the Peruvian State interposed a preliminary objection of *ratione materiae* in relation to the direct justiciability of Convention's Article 26. In that sense Peru highlighted, inter alia, that the protected list of rights extended only until Article 25; that to add more rights was not within the jurisdiction of the Court, but of States; and that the justiciability of ESCE rights should not be done through the direct application of Article 26 since it does not establish a catalogue of rights, but merely enshrined the States' commitment to progressively and non-regressively develop OAS Charter's ESCE rights[147]. The Court, not surprisingly at that height, reiterated what its constant jurisprudence was saying since the *case of Lagos del Campo v. Peru*. In effect, in the preliminary objection's decision quoted a part of the *Cuscul Pivaral v. Guatemala case* (direct justiciability of the right to health), which pristinely condenses the current rationale and analytical process of the Court, and how it determines its jurisdictional scope:

[142] *Case of San Miguel Sosa et al. v. Venezuela*, 8 February 2018, I-ACtHR, Merits, Reparations and Costs, Series C No. 348.
[143] *Case of Poblete Vilches et al. v. Chile* (n. 140).
[144] *Case of Cuscul Pivaral et al. v. Guatemala*, 23 August 2018, I-ACtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 359.
[145] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3).
[146] Ibid.
[147] Ibid., para. 30.

> 'Article 26 of the Convention protects the rights derived from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. The scope of such rights should be understood in relation to the other articles of the American Convention and they are therefore subject to the general obligations contained in Articles 1(1) and 2 of the Convention and may be supervised by this Court in the terms of Articles 62 and 63 of this instrument. This conclusion is based not only on formal issues, but results from the interdependence and indivisibility of civil and political rights and economic, social, cultural and environmental rights, as well as their compatibility with the object and purpose of the Convention, which is the protection of the fundamental rights of human beings. In each specific case requiring an analysis of ESCER, it will be necessary to determine if a human right protected by Article 26 of the American Convention is explicitly or implicitly derived from the OAS Charter, as well as the scope of that protection.'[148]

The case concerns the allegations made by Mr. Muelle Flores, a civil engineer who worked for a formerly State-owned mining company from 1981 to 1990 displaying different positions until his retirement (being the last one 'Assistant General Manager'). As he worked more than 15 years for the State, he had the right to be benefited by the Decree-Law Nº 20.530 (the same law implied in the aforementioned cases of *the Five Pensioners* and *Acevedo Buendía*), which afforded to have the pension amount equalized or adjusted with the wages of public servants performing a similar function[149], a privilege that obviously not all retirees enjoyed. He retired in 1990 and started immediately benefiting from that scheme. However, less than a year later the company communicated Mr. Muelle Flores that the Decree-Law Nº 20.530 will be suspended to him since, although a State-owned mining company, it was governed by private law and therefore their workers should be considered appertaining to the private sector labour regime (the company was finally privatised in 1994). Mr. Muelle Flores filed and participated in a number of legal actions seeking to be reinstated in the pension system of the Decree-Law Nº 20.530 and to be compensated for the monetary loses provoked by his suspension, obtaining favourable judgements in practically every judicial instance. However, the sentences were never effectively executed and enforced by the Peruvian authorities, which led him to resort to the regional human rights system.

[148] Ibid., para. 36.
[149] Ibid., para. 47.

As mentioned *supra*, this was the first case where the Court addressed the right to social security as an autonomous and directly justiciable right. The case is also relevant for the development of the regional case-law because it established and reinforced the existing standards in relation to old-age persons with a disability condition[150] (the applicant suffered from severe hearing impairment as a result of total loss of hearing in one ear approximately fifteen years before the regional judgement, as well as reduced hearing in the other). The Court followed the same interpretative path that *Lagos del Campo v. Peru* pointed, noting that in the Charter of the OAS there is sufficient degree of specificity of the right to social security to determine its existence, implicit recognition and protection by Article 26 of the ACHR[151].

Then, the Court proceeded to determine the content of the right to social security. To this purpose the Court turned to the respective norms of the international *corpus iuris* on the right to social security, as it has been doing in its recent ESCE jurisprudence[152], such as international covenants, regional instruments, and ILO treaties and other documents. Importantly, and in spite of its soft-law character, the I-A Court extensively resourced to the CESCR's General Comment Nº 19 to clarify the minimum standards applicable in the particular case (see Chapter III). This exercise was allowed by the norms on interpretation of Article 29l, ACHR, and the Vienna Convention on the Law of Treaties (1969), which in its Article 31, paragraph 3, authorises to take into account when interpreting international treaties the 'relevant agreements regarding the interpretation of a treaty or the application of its provisions or relevant rules of international law that States have expressed on treaty matters, which are some of the methods related to an **evolving vision of the Treaty'**[153] (personal remark).

After having defined the applicable legal framework, the Court started determining the effects on the right to social security in the particular case in question. When doing so, it declared important statements on the Courts' conception of the right to social security that must be underscored. For example, pointed out that States have to undertake their obligations of protection with an 'exceptional due diligence' due to the 'alimentary' character of the right to old-age retirement pension, considered substitutive of the regular salary, and also because of its

[150] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 2.
[151] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) para. 173.
[152] *Case of Poblete Vilches v. Chile* (2018) I-ACtHR (n. 140) para. 103. *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 6.
[153] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) para. 176.

essential importance for the life of older persons who, as Mr. Muelle Flores, commonly find themselves under tough situations of vulnerability and that often see their pension amounts as the only income that they receive for the provision of their subsistence needs[154].

The Court shallowly addressed a complex topic (very common in the region) as well strongly related to ESCE rights: the privatisation of public and semi-public institutions that provide services within the sphere of States' human rights obligations. As it is widely known, privatisation of social services institutions per se is not forbidden by the American Convention. However, the Court recalled that privatisation does not relieve States from their human rights obligations, as it may have negative effects on the workers' human rights. This is the reason why when transferring institutions from the public to the private sector States have to implement a special due diligence in safeguarding the rights of the workers that may be impaired due to a negligent transfer[155] (for example, properly informing the effects on the workers' old-age retirement pensions that the privatisation will bring).

After all the explained legal analysis, the Court found Peru liable of breaching the obligation to adopt safeguards to prevent the negative effects of privatisation, to adequately inform Mr. Muelle Flores of the effects of the aforementioned process in his retirement pension, to establish clearly which institution would be responsible for the payment after the privatisation, and the obligation to comply with and to execute the domestic judgements[156]. It must be noticed that all of those obligations regarding the right to social security are of immediate justiciability and enforceability, and are independent from the progressive development of ESCE rights in general. Finally, and through the principle of *iura novit curia* (since none of the representatives alleged a violation of these rights) the Court determined that Articles 5(1) (Right to Humane Treatment) and 11(1) (Right to Privacy) of the Convention were also breached, due to the fact that the lack of financial support for decades to Mr. Muelle Flores undermined his very human dignity (considering the aforementioned basic and essential nature of the right to social security). Therefore, the intense and excessively prolonged financial hardship that the State of Peru produced to the victim, who was under more than one situation of vulnerability, affected his mental integrity and human dignity[157]. In this same case, the Court also found Peru liable of

[154] Ibid., 197.
[155] Ibid., para. 196.
[156] Ibid., para. 202.
[157] Ibid., para. 204-207.

breaching Mr. Muelle Flores' rights to judicial guarantees (Article 8(1)), judicial protection (Article 25), right to property (Article 21). However, the examination of those particular violations does not present major utility for this research.

Through an analysis of the judgement, the rationale and the efforts undertaken by the Court in this case, it is noticed that the *Muelle Flores v. Peru case* is not only a landmark case because the Court for the first time autonomously addressed the right to social security through an interpretation of Article 26 of the American Convention. There are other special differentiating aspects from previous judgements that deserve to be highlighted[158]. Firstly, the Court intends to outline the right to social security in light of Article 45 of the Charter of the OAS, the American Declaration and all the other international instruments applicable to the topic (see Chapter III). The Court stresses that

> '(…) this is a right that seeks to protect the individual from future contingencies that, should they occur, would have harmful consequences for that person; therefore, measures must be taken to protect them. In this particular case, the right to social security aims to protect an individual from situations that will arise **when they reach a certain age and are physically or mentally unable to obtain the necessary means of subsistence for an adequate standard of living**, which may, in turn, deprive them of their ability to fully exercise all their other rights. This aspect also concerns one of the constituent elements of the right, because social security must be implemented in a way that guarantees conditions that ensure life, health and a decent economic status.'[159] (personal remark)

Although the venture of the Court to delineate the purposes and aims of the right to social security is deeply valuable, its conception of considering that within the essence of the right lays the necessity of protecting individuals from an inability or incapacity condition that will unavoidably occur cannot be left unnoticed. In other words, the right is perceived leaning more to a social insurance mechanism activated in case of inability or incapacity to continue producing due to old-age, than to the beginning of a jubilation: a period of just rest and joy at the twilight of life, and that all workers should enjoy regardless of their level of productivity.

[158] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 30 - 32.
[159] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) para. 183.

A second differentiating and innovative aspect of this judgement from the previous ones regarding the right to social security (previous cases alleging violations of Article 26 were rejected based on this next consideration[160]) is that the *case of Muelle Flores v. Peru* refers to immediately enforceable social security obligations of States, and not the ones of progressive nature[161]. It is widely known that from economic, social and cultural rights emerge obligations of progressive nature, such as to advance as rapidly and efficiently as possible towards the full realization of ESCE rights, non-regressively (as a general rule), and by any appropriate means at disposal, although subject to resources' availability[162]. For example, the Court precisely in the *case of the Five Pensioners v. Peru*[163] rejected the allegations on Article 26's violation reasoning that individual cases are not representative of the national development level of a particular ESCE right. However, in the *Muelle Flores case* the Court for the first time defines some immediately demandable obligations to the State regarding the right to social security, such as affording to the respective individuals (a) the access to a pension after certain age in a functioning social security system administered or, in the case of private entities, supervised and audited by the State, (b) the provision of benefits in amount in duration that permit an adequate standard of life without discrimination, or (c) the facilitation of effective complaint mechanisms that guarantee the access to justice and to an effective judicial protection[164].

The third differentiating aspect of this judgement (as judge Ferrer Mac-Gregor, president of the Court at the time of the sentence, expressed in his own separate reasoned vote[165]) is that it gave an integral and comprehensive panorama of all the particular violations occurring in this case. In the previous cases of *the Five Pensioners* and *Acevedo Buendía* the Court was able to find problematic aspects and human rights violations related to the right to social security, but departing from the right to property (Article 21). This is, certainly, an important feature of any contributory social security system, but it is far from encompassing all its magnitude. As judge Ferrer clearly exposed, 'although the right to social security does include monetary or financial aspects (pensions), it also encompasses benefits relating to certain services that beneficiaries

[160] *Case of the 'Five Pensioners' v. Peru* (2003) I-ACtHR (n. 112) para. 147 – 148.
[161] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) para. 190 - 192.
[162] Ibid., para. 190.
[163] Supra note. 160.
[164] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) para. 192.
[165] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) Separate Opinion of Judge Eduardo Ferrer Mac Gregor Poisot, para. 32.

can access –for example, preventive or emergency medical services –that are **clearly unrelated to the sphere of the protection of private property'**[166] (personal remark).

As it has been demonstrated, the relevance of the *case of Muelle Flores v. Peru* is enormous, and its consequential effects have been manifestly felt in the latest regional case regarding the right to social security: the *case of ANCEJUB-SUNAT v. Peru*[167]. The case echoed the same analysis made in *Muelle Flores v. Peru*, but presented the innovative addition of connecting more resolutely the right to social security to the concept of human dignity and to other connected rights, such as the right to a decent life and to personal integrity[168]. The Court, as in the *case of Muelle Flores v. Peru*, underlined that one of the fundamental elements of the right to social security is its relationship to the safeguarding of other economic, social and cultural rights, especially for older persons, who often see this income as their only livelihood[169]. However, the Court then aggregated that, consequently, the failure in the accomplishment of the right to social security would possibly entail anguish, insecurity and uncertainty for this specific social group, depriving them of the proper development of their quality of life and personal integrity[170]. The Court then continued arguing that the right to life is violated not only when life itself is deprived arbitrarily, but also when States do not ensure the conditions that allow a decent and dignified existence, for example, creating the minimum living conditions compatible with the dignity of the human being[171]. Therefore, when States, by action or omission, do not guarantee the adequate access to old-age pensions that are sufficient to provide those minimum conditions, are violating the right to life and the very principle of human dignity.

[166] Ibid.
[167] *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, 21 November 2019, I-ACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 394.
[168] Ibid., para. 184 – 191.
[169] Ibid., para. 184.
[170] Ibid., para. 185.
[171] Ibid., para. 186.

Chapter V. The Current Chilean Old-Age Pension System in Light of International and Regional Human Rights Law

V.1. Introduction

This chapter answers the second research question of this thesis, namely, whether Chile is failing to comply with its international human rights obligations on the right to social security by adopting and not reforming the current old-age pension system. In order to do this, it first briefly illustrates the constitutional, legal and regulatory structure of the system. Then, the legal and jurisprudential framework defined in Chapters III and IV is contrasted to certain problematic features of the system under analysis, which is complemented with economic and sociological data, and is structured according to the fundamental principles that inspire the human right to social security.

V.2. The Constitutional Framework on Social Security

The genesis of the current Chilean Constitution dates back to 1980 and, just as the social security system reform (replaced virtually the same year of the Constitution's enactment), was designed by Pinochet's Military Junta and close advisors, lacking any democratic guarantee and formal political debate[172]. Nonetheless, its Chapter III comprehends a thorough catalogue

[172] In the case of the Constitution, a plebiscite was held in 1980 to consult the public if they desired a new Constitution or not, in which the option of the constitutional replacement won. However, factors such as the lack of electoral roll and surveillance, the closure of parliament for more than seven years, not allowing the opposition to perform a proper political campaign and propaganda, inter alia, suggest that the plebiscite was one of the biggest frauds of Chilean recent history. Source: Claudio Fuentes, 'A 40 Años del Plebiscito de Pinochet' (40 Years After Pinochet's Plebiscite) (CIPER Chile, 8 August 2020) https://www.ciperchile.cl/2020/08/08/a-40-anos-del-plebiscito-de-pinochet/ accessed 16 May 2021.

of constitutional rights and duties, including the right to social security[173], which is expressed as follows:

> 'Article 19. The Constitution guarantees all persons:
> (Nº) 18. The right to social security.
> The laws governing the exercise of this right shall be of qualified quorum.
> State action will be directed to ensure the access of all inhabitants to uniform basic benefits, whether they are granted through public or private institutions. The law may establish compulsory contributions.
> The state shall supervise the proper exercise of the right to social security;'[174]

The reduced and limited nature of this precept is inextricably linked to the principle of the subsidiary role of the State that the constituents wanted to impregnate the Constitution with. This principle implies that the subsidiary State (as opposed to the welfare state) can only participate in economic activities when private actors cannot carry them out, or when State participation is required based on criteria of national interest. Furthermore, the State may only undertake economic activities with prior authorization of a qualified quorum law (which means a quorum of the absolute majority of deputies and senators in office). This principle handcuffs the State and hinders its performance when it comes to take over the basic needs that it has the responsibility to guarantee, such as education, health, housing, social security, water, etcetera.

Unlike the preceding constitution of 1925, the current constitutional precept on social security does not indicate neither what the right consists of, nor which are the risks and social contingencies covered by this right. In other words, the constitutional text is absolutely silent on the degree of objective universality. Furthermore, any political decision on the matter is handed over to the legislator, who must be the one who determines the risks and social contingencies covered, as well as the basic principles that the social security system will

[173] The extension and protection of each right are clearly influenced by the political ideas of the regime. E.g., the right to property (Article 19, Nº 24) enjoys a considerable extension and a direct constitutional mechanism of protection, while the right to social security (Article 19, Nº 18) is vaguely defined and lacks a constitutional protective mechanism.

[174] Political Constitution of the Republic of Chile (1980) Article 19 Nº 18. Original Version in Castilian: https://www.bcn.cl/leychile/navegar?idNorma=242302 English translation obtained accessed 16 May 2021. English Version Obtained From: https://www.constituteproject.org/constitution/Chile_2015.pdf?lang=en accessed 16 May 2021.

endorse. However, the legislator finds nowadays clear prescriptions and guidelines from international human rights law, so no longer has a clean slate in the matter[175].

As the constitutional precept establishes, any modification to the social security regulation at the legal level requires a quorum correspondent to the majority of deputies and senators in office (qualified quorum law), which renders particularly laborious to implement any substantive modification. However, even more rigid is the reform of the social security regime of the Armed and Police Forces which, according to Article 105 of the Constitution, requires a quorum of 4/7 of deputies and senators in office to be changed or modified. Then, the own Constitution points out that to modify the precept of Article 19 Nº 18 a quorum of 2/3 of deputies and senators in office is required. In a nutshell, the modification or amendment of the constitutional and legal regulation regarding the right to social security in Chile is nearly locked.

V.3. Domestic Legal Regulation of the Old-Age Pension System

The concept of social security comprehends at least nine different coverage branches[176]. However, and as furtherly explained in Chapter I, this research will only focus in the old-age retirement pension branch, which is economically and quantitatively the most important in the country. The current legal regime for old-age pensions was established by the decree-law Nº 3.500 of 1980, creating an eminently private management system, to which a solidarity component was added in 2008 by virtue of law Nº 20.255 (see Chapter II).

The regime is based on the individual capitalisation of the beneficiaries, who must obligatorily contribute a share of their salary to one of the Pension Fund Administrators ('AFPs', by its acronym in Castilian), in an essentially private and prominently individualistic social security model, which is defined by the doctrine as Fully Funded, Defined Contribution Systems (FFDC)[177]. As expressed *supra* (see Chapter II), the AFPs are limited companies (*sociedades anónimas*) and private for-profit corporations, whose exclusive purpose is to administer their affiliates' pension funds, and to grant them the range of benefits established by law[178]. The

[175] I Obando Camino (69) 623.
[176] CESCR General Comment No. 19 (n. 10) para. 12 – 21.
[177] S Borzutzky (n. 7) 6.
[178] Decree-Law 3.500, Article 23 https://www.bcn.cl/leychile/navegar?idNorma=7147 accessed 16 May 2021.

worker's pension fund comprehends an independent and different patrimony from the administrator's wealth, and the AFP does not have property rights over them[179]. Before 2008, there was absolute freedom to choose one of the different AFPs that the pensions market offered. However, after that year, and with the aim to boost the competition within the market, the law authorised private insurance companies to constitute AFPs, and established that the AFP offering the lower commissions of the market will have assigned the affiliation of the new workers entering the system through public tender[180].

The Decree-Law Nº 3.500 establishes different pension modalities to receive the benefits after the retirement[181]:

a) *Programmed Retirement*[182]: It is the most common modality. It is the type of pension that the AFP pays to the retiree from their individual capitalisation account. The pension amount is calculated and adjusted each year based on the accounts' balance, profitability of the funds, life expectancy of the affiliate and of their beneficiaries, and the current calculation rate of the programmed retirement[183].

b) *Immediate Life Annuity*[184]: Is the pension modality that the affiliate contracts with a life insurance company, acquiring the latter the obligation to pay a monthly income to the retiree from the moment of retirement to their death, and to the affiliate's beneficiaries after. Under this modality the AFP transfers the pension funds to an insurance company. Therefore, and in contrast with the programmed retirement modality, the worker is not the owner of the already contributed funds,

[179] Ibid., Article 33.
[180] I Obando Camino (n. 69) 638.
[181] Ibid., Article 62.
[182] Ibid., Article 65.
[183] The calculation rate of the programmed retirement is a technical measure added to the calculation of the retirement pension amount. Generally, it includes the historical profitability of the particular investment fund in the last ten years and the interest rate. Source: AFPs Association, 'Retiro Programado: Elementos que Determinan el Monto de las Pensiones' (Programmed Retirement: Elements That Determine the Pensions' Amount) (Serie de Estudios, Nº 21, January 2002) 2 – 3. https://www.aafp.cl/wp-content/uploads/2019/12/Retiro-Programado-Elementos-que-Determinan-El-Monto-de-las-Pensiones.pdf accessed 16 May 2021.
[184] Decree-Law 3.500 (n. 178) Article 62.

who only acquires the right to receive the accorded benefits after their retirement[185].

c) *Temporary Annuity with Differed Life Annuity*[186]: It is the modality in which an insurance company starts paying a life annuity (monthly income) from a future date, while keeping the affiliate enough funds in their AFP's individual capitalisation account to cover the term between the retirement and the eventual date in which the life annuity will begin.

d) *Immediate Life Annuity with Programmed Retirement*[187]: In this modality, the affiliate simultaneously contracts an immediate life annuity and a programmed retirement pension, dividing the available funds of their AFP's individual capitalisation account. In this case, the pension will correspond to the sum of the amounts received by each of the modalities.

The retirement age is sixty-five for men and sixty for woman, and the current percentage of the salary destined to the retirement pension consists in a 10% of the monthly taxable income. However, to this amount must be added the mandatory commission that workers must pay to the fund administrators, which varies according to each AFP, but that fluctuates between 0.5% and 2% of the monthly taxable income. It must be underscored that employers are not required to contribute in any way to the old-age retirement pension scheme in favour of their hired workers. They only have the obligation to pay the disability and survivorship insurance to the AFPs, which is an amount that ascends to 1,94% of the worker's salary by May 2021[188]. This sole contribution of the employer in favour of their employees constitutes a blink of solidarity within a system almost entirely alien to it. Each pension fund administrator must offer at least four different 'types' of investment funds in order of risk: B, C, D and E, the latter being the

[185] Superintendencia de Pensiones (Superintendence of Pensions), Information Regarding Pensions' Modalities https://www.spensiones.cl/portal/institucional/594/w3-article-3581.html#:~:text=Renta%20Vitalicia%20Inmediata%3A,a%20sus%20beneficiarios%20de%20pensi%C3%B3n. accessed 16 May 2021.
[186] Decree-Law 3.500 (n. 178) Article 64.
[187] Ibid., Article 62 bis.
[188] Superintendencia de Pensiones (Superintendence of Pensions), Information Regarding the Disability and Survivorship Insurance https://www.spensiones.cl/portal/institucional/594/w3-propertyvalue-9917.html#:~:text=Importante%3A%20La%20nueva%20tasa%20vigente,vigente%20desde%20abril%20de%202021. accessed 16 May 2021.

safest. AFPs affiliates have the option to choose in which of them to invest, even having the option to pick more than one, dividing their funds between different funds. The fund A is not mandatory, since it is the riskiest[189]. Either way, in practice all AFPs have it. Nonetheless, the law establishes that men older than fifty-five, and women older than fifty, are prohibited from investing their funds in fund A, openly recognising the risks that this distinct fund entails.

V.4. Main Human Rights Implications of the Chilean Old-Age Pension System

V.4.1. Universality and Solidarity

Social Security must protect all people from all risks and social contingencies, without discrimination, safeguarding them from each of the states of need that may appear[190]. From this simple statement, it is possible to extract one of the main principles of the right to social security: the principle of universality. From the very sentence the two components of the principle of universality are extracted. On one hand, *subjective universality*, which means that social security must cover all persons, with special focus on the most disadvantaged, excluded and marginalised groups, without discrimination, limitation or distinction on any ground. In order to achieve subjective universality, the CESCR has stated that non-contributory schemes are necessary[191]. In other words, it is impossible for workers to individually sustain with their own contributions a personal economic protection for all risks and social contingencies (therefore, the strong connection of this principle to the principle of solidarity and with the concept of redistributive justice). It is worth recalling that subjective universality it is contemplated as well in the very wording of the right to social security in the Chilean

[189] Decree-Law 3.500 (n. 178) Article 23, section 2.
[190] Ricardo Hormazábal S., 'El Sistema de AFP Chileno: Una Visión Crítica' (The Chilean AFP System: A Critical View) (2007) *Estado, Gobierno y Gestión Pública* (9) 123. https://ultimadecada.uchile.cl/index.php/REGP/article/view/24555/25914 accessed 16 May 2021.
[191] CESCR General Comment No. 19 (n. 10) para. 23: 'All persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups, without discrimination on any of the grounds prohibited under article 2, paragraph 2, of the Covenant. In order to ensure universal coverage, non-contributory schemes will be necessary'.

constitution[192]. On the other hand, *objective universality* refers to the concrete risks and contingencies, and seeks that any social security system provides coverage for each of the nine social security branches, namely (1) health care, (2) sickness, (3) old-age, (4) unemployment, (5) employment injury, (6) family and child support, (7) maternity, (8) disability, and (9) survivors and orphans[193].

The principle of universality, as expressed *supra*, is deeply linked to the *principle of solidarity*. This principle, on its behalf, implies that the achievement of the right to social security for all it is an endeavour of society as a whole, departing from the fact that the less economically favoured sectors of the population cannot overcome all states of need in isolation. Therefore, being part of a cohesive society, and the moral duty to mutually assist each other in the face of adversity, acquire a remarkable relevance that cannot be ignored, rendering essential to distribute the economic effects of social contingencies and risks among the greater number of people possible[194]. Additionally, it cannot be disregarded that social security, through its redistributive character plays a fundamental role in poverty reduction and promoting social inclusion (e.g., through non-contributory schemes)[195]. It is worth remembering that the determinations made by the CESCR in its General Comment No. 19 are not trivial since, as the Court has expressed in its constant jurisprudence on economic, social and cultural rights[196], they are directly justiciable and applicable norms when determining the scope of protection of the right to social security (see chapter IV).

Principles of universality and solidarity demand to focus more on an end or aim (a minimum enjoyment of this human right) than in a specific mean to achieve the expected result. As the CESCR has pointed out, the measures that are used to provide social security benefits cannot be defined narrowly[197], and contributory or insurance-based systems of individualistic nature are expressly contemplated and allowed by General Comment No. 19[198]. This is one of the

[192] Political Constitution of the Republic of Chile (n. 174) Article 19. The Constitution guarantees all persons: Nº 18. The right to social security. (…) State action will be directed to ensure the access of **all inhabitants** to uniform basic benefits, whether are granted through public or private institutions. (…)' (personal remark).
[193] CESCR General Comment No. 19 (n. 10) para. 12-21.
[194] R Hormazábal S (n. 190) 124.
[195] CESCR General Comment No. 19 (n. 10) para. 3 and 50.
[196] *Case of Lagos del Campo v. Peru* (2017) I-ACtHR (n. 2) para. 153 – 154; *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) para. 173.
[197] CESCR General Comment No. 19 (n. 10) para. 4.
[198] Ibid., para. 4(a) and para. 9.

reasons why important international institutions like the World Bank[199] and the ILO[200] have proposed a 'multi-pillar' model since decades ago. The concept of 'multi-pillar model' is also the label that the Chilean government adopted to refer to the 'new' system's architecture originated after the 2008's reform, probably in part due to some international pressure on the matter[201]. This reform, undertaken by Michelle Bachelet's government (incidentally, the current United Nations High Commissioner for Human Rights), brought many novelties in relation to the solidarity and universality components, which are currently forming part of the Chilean social security system. The main improvement was the creation of the 'solidarity pension system' aimed at covering the poorest 60% of the elderly population. Its central components are the Basic Solidarity Pension and the the Solidarity Pension Contribution.

The Basic Solidarity Pension, on one hand, it is aimed at assisting persons generally excluded from the social security system, through a non-contributory scheme financed by the State's fiscal patrimony, and administered by the Social Security Institute (*Instituto de Previsión Social*, IPS), which was set as the continuation of the Social Security Standardisation Institute (*Instituto de Normalización Previsional*, INP – see Chapter II), acquiring that new name in virtue of the 2008's reform. In order to qualify for the Basic Solidarity Pension the following requirements must be met: (a) Not be entitled to a pension under any scheme, (b) be over 65 years old, (c) be part of a family group belonging to the poorest 60% of the population, and (d) prove residence in the national territory for at least 20 years, either continuous or discontinuous, of which four must be within the last five years immediately prior to the application for the benefit[202].

[199] Robert Holzmann and Richard Hinz, 'Old Age Income Support in the 21st century: An International Perspective on Pension Systems and Reform' (Washington DC, 2005) World Bank, 93. https://openknowledge.worldbank.org/bitstream/handle/10986/7336/32672.pdf?sequence=1&isAllowed=y accessed 16 May 2021.

[200] ILO, 'Social Security Pensions: Development and Reform' (Geneva, 2000) Edited by Colin Gillion, John Turner, Clive Bailey, and Denis Latulippe, 27. https://www.social-protection.org/gimi/RessourcePDF.action?id=7768 accessed 16 May 2021.

[201] OHCHR, Compilación de Observaciones Finales del Comité de Derechos Económicos, Sociales y Culturales sobre países de América Latina y el Caribe (1989-2004) (Compilation of Concluding Observations of the Committee on Economic, Social and Cultural Rights on Latin American and Caribbean Countries (1989-2004)) (November 2004) 64, 65. https://www.refworld.org/docid/4d8b25002.html accessed 16 May 2021.

[202] Law 20.255, Article 3 https://www.bcn.cl/leychile/navegar?idNorma=269892 accessed 16 May 2021.

The Solidarity Pension Contribution, on the other hand, it is the second benefit incorporated by the reform, and functions through the modality of a monthly monetary benefit that aims to complete the retirement pensions' amount when they are below a certain level determined by law, named the 'Maximum Pension with Solidarity Contribution' (*Pensión Máxima con Aporte Solidario*, PMAS)[203]. To qualify for the benefit, the person must be entitled to a retirement pension under the Pension Fund Administrators' scheme (decree-law Nº 3.500 of 1980), and must as well meet the aforementioned requirements (b), (c) and (d) of the Basic Solidarity Pension[204]. Therefore, an integrative system is structured between the contributory and non-contributory components, and between the public and private sectors, combining instruments and funds from public finances with the individual accounts of each contributor opting for the benefit to compensate for their insufficient balance[205].

The reform also developed specific instruments and improvements for certain vulnerable groups that lacked adequate and integral social security coverage and protection. A specific group on which the reform put special focus was women. Their retirement pension amounts were, and still are, negatively affected mainly by two types of factors. First, the labour market structure, which implies lower working rates and salaries, more job interruptions, vertical and horizontal labour segregation and discrimination, higher presence on informal and temporary work, elevated unemployment rates, etcetera. Second, features of the system's structuration itself, like the individual capitalisation scheme or the application of life expectancy rates to define the pension amount[206]. In average, women live longer than men in Chile, and that difference in life expectancy has been incorporated by the AFPs in their calculation tables. Therefore, a woman with a capitalisation amount equal to that of a man, will receive a lower pension. In order to illustrate the stark difference, by the year of the reform 33% of Chilean men that were going to retire that year would receive a pension of less than 40% of their last salary, while in the case of women that figure rose to 65%[207]. Letting alone the fact that at that time 2/3 of the female workforce was engaged in unpaid domestic work[208]. Even if the reform

[203] Ibid., Articles 9 to 15.
[204] Ibid., article 9.
[205] LH Vargas Faulbaum (n. 15) 42.
[206] ECLAC, 'La Reforma Previsional de Chile: Un Avance en la Garantía de la Autonomía Económica de las Mujeres' (Chile's Pension Reform: An Advancement in Guaranteeing Women's Economic Autonomy) (October 2012) Observatorio de Igualdad de Género de América Latina y el Caribe, 4. https://oig.cepal.org/sites/default/files/analisis_reforma_previsonal_de_chile2.pdf accessed 16 May 2021.
[207] Ibid., 3.
[208] Ibid., 4.

did not address the structural flaws of the system, it intended to tackle redistributive injustices affecting both formally employed women and domestic unpaid female workers through a range of benefits. Amongst the preeminent reforms was the creation of a bonus for live born or adopted child for women, complementing women's capitalisation accounts to compensate for the time in which they did not contribute by staying at home raising their children. Also, the division of the accumulated balance in the individual capitalization account in the event of divorce or annulment, and the establishment of the Basic Solidarity Pension and the Solidarity Pension Contribution (which in percentage favored women more due to their lower level of contributions), increased the pension coverage and partly reduced pension gaps with respect to men[209].

The reform also included improvements for young and independent workers. For the former, a state subsidy was created to promote youth employment and hiring, to tend towards a greater formalisation of juvenile work, and to increase the coverage and pension funds of this segment of workers; and for the latter, they were included into the household allowance (a benefit that previously only formally employed workers enjoyed) and into the Social Insurance against Work Accidents Risks and Occupational Diseases (*Seguro Social contra Riesgos de Accidentes del Trabajo y Enfermedades Profesionales*). Additionally, the reform established the obligation to contribute in the individual capitalization accounts system for independent and self-employed workers[210].

As it has been explained, the 2008's reform introduced important modifications to the system that remain practically unaltered to this day. However, it is difficult to affirm that it fixed the structural flaws of the system's architecture, or that it made the national social security system finally comply with the international standards on universality and social solidarity. As It was mentioned *supra*, the label of 'multi-pillar' model was introduced with this reform. However, this largely seems like an attempt to fictitiously give more relevance to the system's solidarity component, trying to equate the role of the non-contributory to the contributory scheme. In effect, the 2008's reform maintains and actually validates the structure of the system introduced by the dictatorship in 1980, which has a core and preeminent pillar over all the others: the worker's individual saving capacity. It is illogical to state that both pillars have the same

[209] Ibid.
[210] LH Vargas Faulbaum (n. 15) 42.

hierarchy when the solidarity one is only activated when the personal saving capacity (mandatory contributory pillar) of the worker it is partial or inexistent[211]. Although the CESCR[212], the ILO[213] and the I-ACtHR[214] have stressed that there is no single required model of social security system and that contributory systems are not prohibited, it is not less true that these same entities have highlighted the essentiality of social security and non-contributory schemes for the prevention of social exclusion and poverty, and for the promotion of social inclusion and integration[215]. A model in which its solidarity façade only arises when the personal capacity to accumulate capital of the individual is low or null (together with a number of other conditions and legal requirements), and in which each individual is the principal responsible for its own social security protection, severely stimulates exclusion and competitiveness, and does not seem to meet the international requirements of solidarity, social integration and subjective universality.

The situation of women, once more, clearly illustrates the defects of the individual capitalisation system, incapable of addressing redistributive justice issues. Since retirement pensions in the current system are a reflection of the earned salaries during working life, the pensions will mirror existing inequities and gender gaps. Additionally, the retirement age is five years less for women than men, which naturally causes a much lower density of contributions within the feminine gender. It is worth remembering that the AFPs use life expectancy rates to calculate the retirement pension amounts (which consider five more years of life for women)[216], spreading the mathematical division of funds to be delivered over a greater time range, impairing even more women's pensions. Also, to qualify for the solidarity component's benefits

[211] Pablo Arellano Ortiz, 'Marco de Análisis del Sistema de Pensiones Chileno Después de la Reforma de 2008' (Analysis Framework of the Chilean Pensions System After the 2008's Reform) (2012) 19(2) Revista de Derecho de la Universidad Católica del Norte, 28. https://revistaderecho.ucn.cl/index.php/revista-derecho/article/view/1969/1595 accessed 16 May 2021.

[212] CESCR General Comment No. 19 (n. 10) para. 4.

[213] ILO Conventions Nº 35 and 36 (Geneva, 1933) Old-Age Insurance (Industry and Agriculture, respectively), Common Article 10:
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C035 accessed 16 May 2021.
https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C036 accessed 16 May 2021.

[214] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) para. 196.

[215] CESCR General Comment No 19, para. 4; ILO, 'Social Security: A New Consensus' (Geneva, 2001) 1 – 2 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_209311.pdf accessed 16 May 2021; *Case of Muelle Flores v- Peru* (2019) I-ACtHR (n. 3) para. 204 – 207.

[216] Association of AFPs of Chile, '¿Cómo se calcula el monto de las pensiones?' (How is the amount of pensions calculated?) https://www.aafp.cl/calculo-pensiones/ accessed 16 May 2021.

(namely, the Basic Solidarity Pension and the Solidarity Pension Contribution) the applicants must appertain to the 60% poorest 'households' of the country. That form of determination of the benefit subtracts economic autonomy to women, since their access to the benefit will be generally conditioned by the bond to a male partner who will probably have a higher salary, affecting women's access to the solidarity component's benefits.

It has been shown that the reform has not been able to solve neither the structural deficiencies of the system, nor the deeply embedded structural problems rooted in the Chilean labour culture (labour segregation, gender-based discrimination, women's higher unemployment rates, more presence in informal, temporary and unpaid domestic jobs, etcetera), making Chile eventually liable of breaching its international duties[217]. For example, in 2019 the average old-age retirement pension amount for men was CLP$346,797 (approximately €404), while for women was CLP$216,005 (approximately €251) [218]. In a country where the minimum wage (by May 2021) is situated in CPL$326,500 (€380), the situation is worrying at least. Furthermore, considering that in Chile the poverty line is approximately CLP$170,000 (approximately €198), and that more the half of female retirees receive less than CLP$149,194 (approximately €173)[219], it is possible to assert that the Chilean social security system has not been able to grant to the big majority of retired female workers the very minimum conditions for an adequate and dignified standard of living, putting Chile in a situation of eventual non-compliance with its international obligations in the matter.

V.4.2. Non-discrimination and Equal Treatment

The principle of non-discrimination and equal treatment is certainly linked to the principles of universality and solidarity, as it has been demonstrated in relation to women. However, it deserves a closer look on some particular aspects, since it is a principle that pervades all

[217] It is worth remembering that Chile is State party of the Convention on the Elimination of All Forms of Discrimination Against Women, which expressly refers to the right to social security:
'Article 11. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (e) The right to **social security**, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;' (personal remark).
[218] SOL Foundation, 'Pensiones Bajo el Mínimo' (Pensions Under the Minimum) (n. 5) 8 – 10.
[219] Ibid., 8 – 9.

international human rights law transversally. Non-discrimination is included in the very definition of the social security's scope in General Comment No. 19[220], which dedicates a specific part to clarify some aspects of it[221]. Amongst the most relevant features, the Committee stresses that States parties have the obligation to guarantee the right to social security without discrimination, in law or in fact, whether direct or indirect, on any ground, with special attention to the equal enjoyment of the right between men and women[222]. Additionally, expresses that

> 'States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular women, the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, people with disabilities, older persons, children and adult dependents, domestic workers, homeworkers, minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees.'[223]

Nevertheless, one of the most important considerations made by the Committee it is the assertion that the obligations to guarantee that the right to social security will be exercised without discrimination of any kind, and of ensuring equality of rights between men and women, are of immediate nature[224] and, therefore, are instantaneously justiciable and demandable before State authorities[225]. As it was pointed out in chapter IV, the Inter-American Court of Human Rights has echoed this precept together with other General Comments of the Committee[226] and the entire *corpus iuris* of international and regional human rights law pertinent to the topic through a systematic and evolutive interpretations to address direct and autonomous violations

[220] CESCR General Comment No. 19 (n. 10) para 2: 'The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, **without discrimination** in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents' (personal remark).
[221] Ibid., para. 29 – 31.
[222] Ibid., para. 29.
[223] Ibid., para. 31.
[224] Ibid., para. 40.
[225] The other immediate obligation mentioned in the General Comment No. 19 is the obligation to take steps towards the full realisation of the right. However, the enumeration is merely illustrative, and not exhaustive, leaving the gate open for a future determination of other immediate obligations in the matter.
[226] Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) (1990) E/1991/23 https://www.refworld.org/pdfid/4538838e10.pdf accessed 16 May 2021.

of the right to social security by the States parties of the American Convention[227]. This must be contrasted with the obligations of progressive nature, which have a much higher level of proof, and which the Court has been reluctant to address, and to determine their non-compliance by the States parties[228].

Immigrants' right to social security in Chile is also another controversial aspect that deserves to be analysed in this section. The constitutional text assures the right to social security to 'all inhabitants' of the Republic. However, this does not happen in reality. The social security field is lamentably another example of the multiple discriminations that immigrants suffer in practically all contexts. One of the core principles of the human right to social security is the principle of internationalism. By virtue of this principle, social protection to the individual must be granted regardless of the State in which they are residing and of their nationality, by the sole consideration of being a human being in state of need[229]. The principle of internationalism has been largely addressed by the ILO documents, starting with the Philadelphia Declaration of 1944, which early called for the 'extension of social security measures to provide a basic income to **all in need of such protection**'[230] (personal remark). As pointed out *supra* (see Chapter III), Chile has not signed the ILO Convention Nº 102, considered to be the flagship convention on social security[231]. However, it did ratify ILO Conventions Nº 35 and 36 on old-age insurance in industry and agriculture, respectively[232]. Both conventions (considered 'mirror' conventions, since their content is practically the same, but applicable to different groups of workers) establish in their common article 12 that

> '1. Foreign employed persons shall be liable to insurance and to the payment of contributions under the same conditions as nationals.

[227] *Case of Muelle Flores v. Peru* (2019) I-ACtHR (n. 3) para. 190; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru* (2019) I-ACtHR (n. 167) para. 173.
[228] *Case of the 'Five Pensioners' v. Peru* (2003) I-ACtHR (n. 112) para. 147 – 148.
[229] R Hormazábal S (n. 190) 125.
[230] ILO, 'Declaration concerning the aims and purposes of the International Labour Organization' (Philadelphia, 1944) Annex to the Constitution of the ILO, section III (f). https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms_142941.pdf accessed 16 May 2021.
[231] ILO, Convention Nº 102, Social Security (Minimum Standards) Convention (n. 96).
[232] ILO Conventions Nº 35 and 36, Old-Age Insurance (Industry and Agriculture, respectively) (n. 213).

2. Foreign insured persons and their dependants shall be entitled under the same conditions as nationals to the benefits derived from the contributions credited to their account.'[233]

Consequently, the aim of the internationalism principle is to provide equal protection to all workers in state of need, regardless of their nationality and specific residence in a particular place. However, the Chilean social security system presents certain deficiencies that allow us to assert that international normativity is not being fully accomplished. In first place, one of the requirements to qualify for the Basic Solidarity Pension and the Solidarity Pension Contribution is to prove residence in Chilean territory for at least 20 years[234]. In practice, this condition absolutely denies access to the benefits to any immigrant, considering that it is possible to acquire the Chilean citizenship after five years of residence in the country. In simple words, due to the level of requirements, no immigrant in Chile has a proper access to the solidarity component of the social security system. In addition, if they leave the country, they cannot take the funds from their individual capitalisation accounts with themselves or transfer them to a foreign social security system (which is ironic considering that one of the notorious aspects of the system is that the workers are proprietaries of their funds), only having the option of returning to the country to retire when they turn sixty or sixty-five years old, depending on the gender of the worker[235]. Therefore, it is correct to affirm that the Chilean social security system has failed to meet the international standards of internationalism, universality and solidarity, and the international treaties that has ratified regarding social security of immigrant workers.

After having analysed the precarious and unequal social protection that some of the most affected groups receive in Chile, corresponds to do the striking contrast with one of the most (if not the most) privileged groups in the country in relation to social security benefits: The Armed and Police Forces. As it was aforementioned (see Chapter II), the Military Junta imposed in 1981 a new social security system of individual capitalisation accounts, where the workers would have to mandatorily contribute 10% of their wages in privately-run for-profit corporations called pension fund administrators. Paradoxically, the Armed Forces did not want to take the risks that the imposition of a system of individual accounts could bring for their own sector. The result was, AFPs and individual accounts for regular workers, and a proper common

[233] Ibid., Article 12.
[234] Law 20.255 (n. 202) Articles 3(c) and 9.
[235] A Matus (n. 20) 182.

fund-social security system for the Armed and Police Forces[236]. This implies that their complete legal regulation is different, and that the quantity and quality of the benefits they receive are undeniably superior to the rest of Chilean society.

The institution in charge of the social security of the the Armed Forces' members is the National Defence Social Security Fund (*Caja de Previsión de la Defensa Nacional*, CAPREDENA). This is an autonomous institution, with its own assets and legal personality under the supervision of the Ministry of National Defence. On the other hand, the Police Forces' social security is in hands of the Chilean Police Social Security Directorate (*Dirección de Previsión de Carabineros de Chile*, DIPRECA), which is a decentralized body, also with its own assets and legal personality, dependent on the Ministry of Interior and Public Security. This system, in contrast to that of the AFPs, counts with a universal non-contributory component. Furthermore, the public contribution from the State's treasury involves 90% of the total fund destined to cover social security benefits for the Armed and Police Forces. Strikingly, this amount ascends to roughly 1% of the total GDP of the Nation[237].

Their audit and supervision is also different. While the Armed and Police Forces retirement pensions are inspected and supervised by their respective sectorial ministries, virtually the entirety of the other retirement pensions in the country, both of the AFPs' individual capitalisation system and within the solidarity component, are inspected and controlled by the Social Security Superintendence. This parallel and privileged legal regulation it is also vigorously protected at the constitutional level. While any general legal reform on the matter requires the approval of the majority of the parliamentarians in office ('qualified quorum law'), the modification of the legal statute of the Armed and Police Forces in matters of social security demands the strict quorum of 4/7 of all parliamentarians in office, which impressively is the same quorum required for constitutional amendments[238].

Regarding the benefits received in practice, the dissimilarities are notoriously prominent. The average pension amount that a member of the Armed Forces receives is 4.3 times higher than

[236] SOL Foundation, 'Pensiones por la Fuerza: Resultados del Sistema de Pensiones de las Fuerzas Armadas y de Orden' (Pensions by Force: Results of the Pension System of the Armed and Police Forces) Recaredo Gálvez and Marco Kremerman (June 2020) 5. https://fundacionsol.cl/cl_luzit_herramientas/static/wp-content/uploads/2020/06/PPF2020-2.pdf accessed 16 May 2021.
[237] I Obando Camino (n. 69) 631.
[238] Political Constitution of the Republic of Chile (n. 174) Article 105, section 1º.

that received on average by an AFP affiliate, 5 times for retired Police members, and 9 times greater in the case of the officers of the Armed Forces[239]. On top of that, members of the Armed Forces qualify for a 'full' pension after 30 years of service, and have the right to retire and to obtain a decent pension with a minimum of 20 years of service[240]. In other words, any member of the Chilean Armed Forces could retire before the age of 50 with an old-age-pension more than 4 times higher than that of a normal worker who has to wait until age 65 to retire. It is clear that these unreasonable differences do not meet the international standards on the matter in relation to the principle of equal treatment. As the CESCR highlighted, '(t)he right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to **equal enjoyment of adequate protection from social risks and contingencies**'[241] (personal remark). The situation in question it is also connected to the obligation to protect, since this obligation requires State parties to the ICESCR to prevent third parties from interfering in any way with the enjoyment of the right to social security, whether they are individuals, groups, corporations, agents acting under public authority, or any other entity[242]. This includes adopting any necessary and proportionate measure to restrain third parties from denying equal access to social security[243]. The existence of such an evidently privileged social group, both in regulation and at the benefits' level, crates a threatening panorama against the rule of law and the principles of non-discrimination and equal treatment that should govern any democratic society, putting Chile in a situation of non-compliance with its internationally acquired obligations.

V.4.3. Integrity and Adequacy

Integrity is one of the fundamental principles of the human right social security, and it is based on the idea that any social security system must grant all the necessary benefits designed to satisfy each and every contemplated state of need. In addition, the amounts of the benefits must be sufficient and appropriate to satisfactorily cover those necessities, and appropriate to its

[239] SOL Foundation, 'Pensiones por la Fuerza: Resultados del Sistema de Pensiones de las Fuerzas Armadas y de Orden' (Pensions by Force: Results of the Pension System of the Armed and Police Forces) (n. 236) 3.
[240] Ibid.
[241] CESCR General Comment No. 19 (n. 10) para. 9.
[242] Ibid., para. 45.
[243] Ibid.

nature[244]. This idea was also embraced by General Comment No. 19: First, in general terms stressing that the content of the right to social security includes the right to equal enjoyment of *adequate* protection from social risks and contingencies[245]. Then, addresses the issue with more detail in the section regarding the adequacy element. Here the Committee clearly expresses that any benefit must be adequate both in amount and duration to afford everyone an adequate standard of living, with full respect for the crosscutting principles of human dignity and non-discrimination[246]. A paramount consideration is also added in this section: in contributory systems (such as the Chilean one) there should be a 'reasonable relationship between earnings, paid contributions, and the amount of relevant benefit'[247].

In this regard, it has to be primarily remembered that the architecture of the current Chilean social security system assimilates more to a system of individual saving accounts ran by private for-profit companies who invest these funds in the volatile international financial market than to a full-fledged uniform social security system. This situation per se goes against international standards, since, as the Committee accurately expressed[248], social security should be treated as a social good, and not as a mere instrument of economic of financial policy.

The functioning of the system also presents an important problem: it subjects the adequacy of future pensions to the highly unstable and fickle international financial market. For example, at the 2008's international subprime crisis the riskiest fund (fund A) lost more than 40% of the workers' funds[249]. Effectively, the adoption of systems primarily dependent on individual contributions placed on the international financial market may have devastating effects on the workers' funds, especially for the workers that are about to retire, despite all the safeguards that the legislator and the supervisory administration could apply. Therefore, the pension fund administrators' system provides a highly indeterminate benefit scheme, since there is no mathematical equivalence or, using the Committee's words, reasonable relationship between the workers' contributions and the future pensions that the institutions would grant[250]. In other

[244] R Hormazábal S (n. 190) 124.
[245] CESCR General Comment No. 19 (n. 10) para. 9.
[246] Ibid., para 22.
[247] Ibid.
[248] Ibid., para 10.
[249] Cooperativa News, 'Ahorros Previsionales Sufrieron una Fuerte Caída en 2008' (Pension Savings Suffered a Sharp Drop in 2008) 12 January 2009 https://www.cooperativa.cl/noticias/pais/ahorros-previsionales-sufrieron-una-fuerte-caida-en-2008/2009-01-12/121337.html accessed 17 May 2021.
[250] I Obando Camino (n. 69) 641.

words, the system has defined contributions, but uncertain benefits, which manifestly violates the international standards defined in General Comment No. 19 and, furthermore, the very principle of human dignity. As the Inter-American Court of Human Rights recently confirmed (see Chapter IV), the uncertainty on the enjoyment of the right to social security entails anguish and insecurity about the future, because an eventual deprivation or restriction of the main source of income of a human being inherently results in an unacceptable deterioration of their quality of life and personal integrity[251].

Nevertheless, the central point of most of the discussion about old-age pensions anywhere turns on whether the particular social security system is capable of providing to all current and future retirees a dignified minimum essential level of benefits that will sustain them above the poverty line and enable them to access an adequate standard of living. This is one of the minimum core obligations regarding the right to social security of State parties to the ICESCR and includes, at least, essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education[252]. This obligation it is also enshrined in ILO Conventions 35 and 36, of which Chile is a State party[253]. And it is precisely this aspect that is most problematic. According to SOL Foundation, in December 2019, 80% of the retirement pensions were below the legal minimum wage (CLP$326.500 by May 2021, equivalent to approximately €381)[254], and 50% of the retirees received less than CLP$202.000 (€236 approximately, amount only €38 above the country's poverty line)[255].

The previously given information must be contrasted with the fact that, according to the World Bank[256], Chile is the South American country with the highest gross domestic product per capita based on purchasing power parity (PPP), and it is regularly situated as one of the richest and most developed countries of the region. Consequently, there is no reasonable justification (regarding the amount of resources available and means at disposal) to excuse the non-

[251] *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru* (2019) I-ACtHR (n. 167) para. 185.
[252] CESCR General Comment No. 19 (n. 10) para. 59 (a).
[253] ILO Conventions Nº 35 and 36 (n. 213) Article 19: 'The rate of pension shall be an amount which, together with any means of the claimant in excess of the means exempted, is at least sufficient to cover the essential needs of the pensioner'.
[254] SOL Foundation, 'Pensiones Bajo el Mínimo' (Pensions Under the Minimum) (n. 5) 5.
[255] Ibid.
[256] World Bank, 'GDP per capita, PPP (constant 2017 international $) - Chile, Argentina, Uruguay, Paraguay, Bolivia, Peru, Brazil, Ecuador, Colombia, Suriname, Venezuela, RB' (n. 4).

fulfilment of the obligation to provide a minimum level of benefit coverage that affords a decent, dignified and adequate standard of living for retirees. This is a minimum core obligation of the human right to social security and must be realised by the State as a matter of top priority. Furthermore, Chile is not taking the necessary steps towards this goal and it is even showing traces of retrogression, since the reality of the new pensioners is even more critical: 50% of the 127.000 people who retired during 2019 only managed to self-finance (through their own savings and the AFPs' profitability, without State support) a retirement pension less than CLP$49.000 (approximately €57)[257].

Considering that the obligations to take steps towards the full realisation of ESCE rights, the obligation of non-retrogression, and the minimum core obligations are of immediate nature and justiciability, it is possible to assert that the Chilean State is visibly violating its international obligations, putting it in a position of eventual justiciability before the Inter-American Court of Human Rights. And this goes way beyond the pure content of the right to social security, since this right plays an essential role in the realisation of many other economic, social and cultural rights, especially for older people. Moreover, for this particular vulnerable group, social security constitutes the main avenue to achieve the full enjoyment of a decent and dignified life[258], because in most cases old-age retirement pensions will constitute their main source of financial resources to cover their primary and elementary needs as human beings and, accordingly, unlawfully restricting and violating their right to properly access and enjoy an adequate social security system in line with the principles of international human rights law will doubtlessly impair their personal integrity, quality of life and very human dignity.

[257] SOL Foundation, 'Pensiones Bajo el Mínimo' (Pensions Under the Minimum) (n. 5) 5.
[258] *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru* (2019) I-ACtHR (n. 167) para. 185.

Chapter VI. Conclusions and Recommendations

The main objective of this thesis is to determine, in the first place, which is the international human rights law normativity on social security applicable to the Chilean case and, consequently, if the current social security system in Chile regarding old-age pensions is in line with those regional and international human rights law standards, especially considering the latest Inter-American jurisprudential advances and, logically, if the Chilean State could be held liable of breaching its international obligations, particularly at the regional level. In order to define this, a brief description of the history of the system in Chile was fundamental to understand its roots and undemocratic origins. Then, a schematization of the international and regional normative framework, and an analysis of the recent and most important case-law of the Inter-American Court of Human Rights regarding the human right to social security were essential to define the normative scope of the right and Chile's eventual justiciability in the matter. Finally, it was necessary to contrast the national regulation with the previously defined standards. For this purpose, an examination of the national structure of the system was done, from the constitutional level to its main legal and administrative features. Having described the principal characteristics of the system's architecture, the main flaws and deficits of the Chilean social security system in light of regional and international human rights law were identified, using as a structural guidance the most relevant principles and norms of the human right to social security.

The issue is far for simple, and it is analysable through a wide range of prisms. By virtue of the formal legal and jurisprudential methodological analysis applied in this research, we were able to identify a significant number of breaches of the international obligations acquired by Chile in this topic. In general terms, paramount non-compliances to human rights' international and regional standards were substantially recognised in the domains of subjective universality, social solidarity, non-discrimination and equal treatment, internationalism, integrity, and adequacy, touching the very principle of human dignity and the right to a dignified and decent life. The determination of these violations is not a trivial exercise, since many of them are considered of immediate nature (e.g., non-discrimination and equal treatment, the obligation to

take steps towards the full realisation of the right, non-retrogression, minimum core obligations, etcetera) and, therefore, are directly justiciable by the Inter-American Court of Human Rights, just as it has been doing so in its avant-garde jurisprudence on ESCE rights since 2017.

If the objective determination of which aspects contravene international human rights law it is already a difficult operation, much more complex it is to establish what are the required solutions, or what are the changes that the system demands in order to be in full compliance with Chile's international obligations. One essential first step would be to refocus the discussion using a human rights-based approach, positioning social security as a social good that plays a fundamental role in poverty reduction and social inclusion, and not as a mere instrument of economic or financial policy[259]. Patently, social security policies have to do with a solidarity vision of society, favouring a redistributive approach in which all society must take responsibility for social risks and contingencies. However, this is emphatically denied by the supporters of the Chilean AFP system, who conceive the pension system as just another profitable business in which those who have more purchasing power can acquire the best products, and those who better manage it can obtain the highest revenues[260]. For the achievement of a system that fully complies with human rights law, it is crucial to implement an approach that focus much more on the well-being of people than on the well-being of financial markets.

Naturally, when speaking of greater respect for human rights, a bigger State's intervention and control comes into the discussion, for example, through a public pension funds administrator. But is this really an appropriate solution? What is certain is that international human rights law does not require any specific vehicle or avenue to achieve social security goals. Measures to provide the right to social security cannot be defined narrowly[261] and, in this sense, both contributory and non-contributory schemes, and private and public mechanisms, are all allowed by international law. Additionally, a public AFP would difficultly improve retirees' pensions in a short period of time. However, would likely help move towards the necessary paradigm shift, since a public non-profit institution would certainly have a major focus on solving social states of need rather than on maximising its profitability at any cost, which largely ends up in the pockets of the private actors who own the pension market. In any case, it must be recalled

[259] CESCR General Comment No. 19 (n. 10) para. 3 and 10.
[260] R Hormazábal S (n. 190) 123.
[261] CESCR General Comment No. 19 (n. 10) para. 4.

that States will always retain the responsibility of the system's administration, and of ensuring that any private actor or other third party will never obstruct the development of an equal, adequate, accessible and affordable social security. This could be done, for instance, through the establishment of a proper legal and regulatory framework that guarantees independent monitoring, genuine public participation, and effective penalties for non-compliance[262].

Probably one of the most controversial aspects to solve due to its substantial ideological content, it is the dichotomy of individual capitalisation versus common fund (or PAYGO system), individualism versus collectivism. Under human rights law, this appreciation follows a similar logic as the private-versus-public conundrum: States have a broad margin of appreciation for a particular scheme's election, as long as the right to social security is guaranteed and protected in all its content, or at least in its minimum core obligations. However, we consider that the common fund system's rationale leans more towards the principles of international human rights law than the individual capitalisation one, because the apparent mentality behind the individual system is the following: 'If I am able to save and invest well (in a good fund), I will have a good pension after retirement; if not, I will have an insufficient pension and will inevitably have to resort to State subsidies'. The types of contracts offered by the pension market promote this way of thinking, brutally clashing against the principles of subjective universalism and social solidarity. With this statement, we do not intend to suggest the elimination of all signs of individual capitalisation, which should always remain as a personal and free option for any worker, but rather to recommend that, in order to achieve a system better founded on human rights, that its main pillar be one based on a common fund oriented to the common good and inspired by the principle of solidarity, which is essential to fully cover all states of need that may arise within a society, especially for the most excluded, vulnerable and marginalised sectors of the population, who will hardly be able to successfully face all the risks and social contingencies of their lives individually.

Another pivot aspect that the current system is inexplicably lacking is the employers' contribution to their employees' old-age retirement pensions, as it is the general rule in most countries of the world, with the exception of a handful of nations where Chile is disappointingly included[263]. Indeed, nowadays employers are legally excluded from any contribution related to

[262] Ibid., para. 46.
[263] R Hormazábal S (n. 190) 135.

the financing of individual accounts for old-age pensions, in total disregard of the principle of social solidarity. Employers' contribution exists in Chile since 1960 for other branches of social security (like unemployment and employment injuries), without the economy and the unemployment rates having suffered further deterioration due to these causes. All the opposite, it seems to have been a positive development factor[264]. Therefore, a progressive application of an employers' contribution to the old-age pension funds does not seem like a wild or frantic idea.

An element often left aside in the political forum, and that should probably be the first to be paid attention to, is the participation of the active and passive workers in the system. In Chile, this element is practically absent, with the minuscule exception of the Commission of Users of the Pension System (*Comisión de Usuarios del Sistema de Pensiones*) which it is constituted by a representative of the workers, one of the pensioners, one of the public institutions, one of the private entities of the pension system (AFPs), and an academic, who will preside[265]. The function of the Commission it is to inform the Under-secretariat of Social Security and other sectorial public institutions about the evaluations that its constituents carry out on the operation of the pension system, and to propose educational and dissemination strategies[266]. In practice, the work of this commission renders irrelevant, since it does not have any decision-making power over any type of policy, and all the evaluations, proposals and strategies they present can be absolutely disregarded by the competent authorities and by any stakeholder.

The lack of social interlocutors' participation clearly contravenes the international obligations acquired by Chile, especially Article 10, paragraph 4, of ILO conventions Nº 35 and 36 (mirror conventions), which express that '(r)epresentatives of the insured persons shall participate in the management of insurance institutions under conditions to be determined by national laws or regulations, which may likewise decide as to the participation of representatives of employers and of the public authorities'[267]. The CESCR, in the same line, stated that '(b)eneficiaries of social security schemes must be able to participate in the administration of the social security

[264] Ibid.
[265] Law 20.255 (n. 202) Article 43, section 1.
[266] Ibid., Article 43 section 2.
[267] ILO Conventions Nº 35 and 36 (n. 213) Common Article 10(4).

system'[268], and the ILO has also contributed during the last decades to strengthen this idea[269]. Therefore, the participation with an effective role of social interlocutors and beneficiaries of the system in the development of policies, through bipartite (workers and employers) and tripartite (the former plus the government) bodies, is an indispensable requirement to overcome the current human rights' deficits of the system.

Finally, and as mentioned *supra* (see Chapter V), the obligation to ensure the access to social security on a non-discriminatory basis, especially for disadvantaged and marginalised individuals and groups, is a minimum core obligation of immediate nature and justiciability that cannot be postponed. On that account, the swift elimination of all traces of discriminatory and unequal treatment in the social security sphere renders not only an urgent legal requirement, but an imperative social and moral demand. In Chapter V the inadequacies of the system were mostly illustrated through the analysis of the violations of the human right to social security suffered by women and non-national workers. Nevertheless, for a social security system to be in full compliance with international and regional human rights law, equal protection must be completely afforded to all active and passive workers regardless of their nationality, gender, sexual orientation, ethnicity, mental or physical abilities or disabilities, socio-economic group, creed, or any other discrimination ground. In the same line, the elimination of the special treatment and benefits that certain privileged groups enjoy is crucial. In particular, the Armed and Police Forces' prerogatives, which constantly remind us of the spurious dictatorial and undemocratic origins of a defective system whose necessary and urgent reformation is increasingly becoming more evident with each passing day.

[268] CESCR General Comment No. 19 (n. 10) para. 26.

[269] ILO, 'Social Security: A New Consensus' (Geneva, 2001) (n. 215) para 4: 'All systems should conform to certain basic principles. In particular, benefits should be secure and non-discriminatory; schemes should be managed in a sound and transparent manner, with administrative costs as low as practicable and a **strong role for the social partners**' (personal remark).

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