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EUROPE

The Right to Social Security in the Constitutions of the World

Broadening the moral
and legal space for social justice



**The Right to Social Security
in the Constitutions of the World:
Broadening the moral and legal space
for social justice.**

ILO Global Study, Volume 1: Europe

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ILO Global Study, Volume 1: Europe

The Right to Social Security in the Constitutions of Belgium, Bulgaria, Czech Republic, Republic of Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Republic of Latvia, Republic of Lithuania, Netherlands, Republic of Poland, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Ukraine, United Kingdom

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Ellie Palmer is a Professor in the School of Law and Human Rights Centre at the University of Essex where she began her distinguished career as a commercial lawyer. However for the past fifteen years

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She has particular research interests in the development of judicial and extra-judicial mechanisms of accountability for the fair distribution of centrally allocated health and welfare resources; and in the use of international standards to protect socially marginalised and vulnerable adults and children living in poverty, especially in mainland Europe. Since 2009 when her acclaimed monograph *Judicial Review Socio Economic Rights and the Human Rights Act* (Hart 2007) was reprinted in paperback, the theme of austerity has brought new dimensions to her research and teaching; most recently as co-editor of an academic and practitioner text, *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016). She is also currently working on her latest monograph *Welfare Human Rights and States Protection*, based on undergraduate and post-graduate teaching which she led at Essex in the wake of the economic downturn.

Ellie Palmer's commitments to the ideals of social justice extend beyond her academic activities. From 2006-2010 she was a Trustee of the Children's Legal Centre based at Essex. Between 2004 and 2008, she was legal expert on the Commissioning Panel for the ESRC Public Services Program. In 2007, she participated in the Second UK High Level Dialogue on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) convened by Amnesty International-UK. In 2010, she was appointed to an EHRC Expert Advisory Group to review the protection of socio-economic rights in the United Kingdom. Since February 2011, she has been Director of the Essex ESRC funded Project, "Access to Justice in an Age of Austerity: Time for Proportionate Responses." She has also acted as legal consultant to leading UK human rights practitioners and NGO's, including the Democratic Audit, Amnesty UK, British Institute of Human Rights, Interights, Joseph Rowntree Foundation; most recently for the UK Charity Just Fair, in the preparation of a list of issues concerning Article 9 (CESCR) for submission to the UN Committee on Economic Social and Cultural Rights for consideration in October 2014.

PREFACE

The Constitution of the International Labour Organization, adopted in 1919, was the first international document to proclaim that lasting peace and social justice are impossible to establish without “the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision of old age and injury”. In the following hundred years, the majority of the national constitutions have followed suite, recognizing the principle of social justice among their foundational clauses and social security provisions – among the basic rights of their citizens. In the second half of the twentieth century, social security has grown into a cornerstone institution of a modern State and was consecrated as a fundamental human right.

In 2008, the Declaration on Social Justice for a Fair Globalization restated the ILO’s mandate and objectives with respect to the four strategic areas of employment promotion, social protection, social dialogue and rights at work viewed as “inseparable, interrelated and mutually supportive”. The objective of social protection has been broadened to include “the extension of social security to all, including measures to provide basic income to all in need of such protection and adapting its scope and coverage to meet the new needs and uncertainties generated by the rapidity of technological, societal, demographic and economic changes”. In response, the International Labour Conference has adopted the Recommendation concerning National Floors of Social Protection, 2012 (No. 202), which draws the blueprint for setting basic social security guarantee to all in need and building comprehensive social security systems from the floor upwards.

ILO Global Study on the Right to Social Security in the Constitutions of the World: Broadening the moral and legal space for social justice, covering 187 ILO member States, aims to take stock of these developments as reflected in the national constitutions across the continents and to assess the value added by the constitutional guarantees of social security to the advancement of social justice in the twenty-first century. The Global Study, composed of ten volumes, is dedicated to the ILO Future of Work Centenary Initiative and the worldwide celebration in 2019 of the 100th anniversary of the adoption of the ILO Constitution, which was the first to put labour and social rights under the protection of international law. The International Labour Standards Department, which is conducting the ILO Global Study, thanks the authors for their contributions and commitment to strengthening and extending social security worldwide.

CORINNE VARGHA

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FOREWORD

MAKING SOCIAL SECURITY A CONSTITUTIONAL RIGHT¹

From an embryonic institution limited to only a few countries in the wake of the twentieth century, social security developed into one of the main social institutions of today's societies, industrial as well as post-industrial societies. It played a key role in the human quest for greater protection from uncertainty, disease and deprivation shared by all nations and peoples of the world. Even in the most economically developed countries, social security can truly be considered as one of the great achievements of the twentieth century. In industrialized countries, social security systems have gradually covered all those in need of assistance whether through loss of health or income or the need to care for children or dependent persons. From an instrument of social control providing minimum standards of wellbeing to people in dire circumstances, social security has evolved into an instrument for promoting economic development, social cohesion and democracy. It was fused with the core functions of the State to form the "welfare state" as the distinct model of social development, which sustained a general belief in the ability of all countries to meet the pervasive challenge of putting in place a social security system accessible to all.

Social protection has come to be regarded as a productive factor preserving and enhancing the health, productivity and quality of the workforce and creating new employment in the social services sector. By providing replacement income it maintains domestic demand and helps stabilize the economy, particularly in the time of recessions. Where economic and social development are seen as mutually reinforcing processes, social protection systems are considered a societal investment in social and human capital necessary for stable long-term economic growth. The right to social protection was universally recognized as a fundamental human right guaranteeing a secure, healthy and decent standard of living necessary for the realization of a human being. ILO stood at the source of this process. The body of standards it has produced over the years brought into existence the international social security law, which not only gave the firm legal foundation for the human right to social security but filled it with guaranteed minimum standards of protection.

The post-Second World War history showed that human rights, democracy and the rule of law flourished in the societies characterized by high social cohesion and equity striving to eliminate want and deprivation by establishing universal social security systems. In 2001, the International Labour Conference recognized the effectiveness of this combination for growth and development of modern societies. It concluded that social security is an indispensable part of government policy to ensure social cohesion and social peace and prevention of poverty. By promoting solidarity between active and inactive members of society, between rich and poor and between present and future generations, social security

¹ The first study on this subject, which has largely inspired the Global Study undertaken subsequently by the International Labour Organization (ILO), was carried out by the ILO Committee of Experts on the Application of Conventions and Recommendations in *Social Security and the Rule of Law*, Report III (Part 1B), International Labour Conference, 100th Session, 2011.

contributes to human dignity, equity and social justice. It is equally important for political inclusion, empowerment and the more stable development of democratic institutions under the rule of law.

Social rights were integrated into the world order instituted after the Second World War. Their inclusion in the Atlantic Charter of 1941, the Declaration of Philadelphia of 1944, the Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights of 1966 had such an impact that certain provisions on social security and social protection are to be found in practically all national constitutions adopted subsequently.

Constitutions define the way national legal systems are linked to international law and can import social security protections established in it. Constitutional provisions automatically introducing international treaties into the national legal system have the effect of creating duties for the State in relation to social security where such treaties contain social security provisions. As a result of such provisions, national laws denying corresponding social security rights could be declared unconstitutional on the grounds of inconsistency with an international treaty, such as ILO Convention or the International Covenant on Economic, Social and Cultural Rights. State obligations in relation to social security may also be derived indirectly from constitutional provisions attributing the force of law to international treaties, or an authority higher than national law, upon their publication or ratification.

The level of the constitutional commitment to social security and the binding force of the constitutional provisions differ considerably from one country to another. These commitments take the form of either very specific provisions on the functioning of social security schemes or, at the other extreme, general statements defining the approach to be adopted by the State to social welfare. Although several national constitutions do not refer specifically to “social security”, the great majority contain provisions that recognize the need for one or more forms of social protection. The means of social protection most commonly referred to in national constitutions throughout the world include social security, social insurance, social assistance and support, and social services. These means are often provided for in the context of protection against specific social risks or life situations, such as motherhood, fatherhood, childhood or old age, and with respect to specific categories of the population, such as children and young persons, families with children, the elderly and persons with disabilities. Health insurance and the provision of health care are often dealt with separately from protection against other social risks. Other means of protection may include the concepts of income security, minimum income, social pensions and the minimum subsistence level. The blend of these provisions and the level of detail vary greatly, often implying a redistribution of responsibilities between executive, legislative and judicial authorities.

Constitutional guarantees play a very important proactive role in introducing social rights into national legislation and in fostering their implementation. They can control the generation of norms, provide a justification for rules, mechanisms and institutions that already exist, provide guidance in the interpretation of other rules, and influence the organization of public services. They also provide a basis for the protection of rights through institutional mechanisms, primarily through constitutional and supreme courts, thereby holding out the promise of the fulfilment of such rights in future. Where there is an individual right of action before the supreme or constitutional court, individuals are able to participate actively in the realization of their social rights. The increasing role of the courts in giving substance to constitutional protections and preventing any deliberate retrogressive measures emerged as a noticeable trend during the post-crisis period of fiscal consolidation and social austerity in Europe accompanied by the general rollback of acquired social rights. Finally, the Constitution as a legal embodiment of human values attaches to social security rights a strong moral dimension – that of preventing the unjust denial of human dignity together with income.

Constitutions embody the right to social security in different ways: some include social security as a constitutional objective of state policy; some impose a duty on the State to realize social rights without establishing a corresponding individual right to claim social security; others confer an individual right to social security thus indirectly acknowledging the duty on the State to fulfil this right. In this continuum from soft to hard constitutional obligations to provide social security, there are States that both grant individual rights and impose duties but qualify the fulfilment of those rights or the imposition of those duties by only requiring the State to progressively realise the right or fulfil the duty. While the variety

of constitutional provisions ensuring social protection continues to increase, there is a noticeable pattern of their convergence around three main approaches: affirming social security as an individual right of a human being; defining the social responsibility of the State in social security provisions; and placing social security among the guiding principles of state policy.

Globally, the latest decades have seen a major trend towards making social security a constitutional right. This trend paved the way to the idea of underpinning the world economy by a global social protection floor made up from the mosaic of the national floors, which was embodied in the ILO Recommendation concerning National Floors of Social Protection, 2012 (No. 202). This instrument opened a new vision of what social justice could mean in a global era, broadening the moral, legal and fiscal space for social protection in the transition to a more sustainable global economy.

The articles included in this volume take stock of some of these developments in the constitutions of the 22 European countries in the context of the rights-based approach to social security. The first volume will soon be followed by the second covering the remaining European constitutions in the perspective of moving from a purely academic perception of constitutional law to using it as a practical instrument for defending the acquired rights. In the period 2017-2019, further collections of national articles on the social security provisions in the constitutions of Latin America and the Caribbean, Africa, Asia and the Pacific will reflect the development of social protection in the constitutional law across all the continents and complete the global picture outlook thus achieved.

ILO Global Study on the Right to Social Security in the Constitutions of the World: Broadening the moral and legal space for social justice, will be composed of ten volumes and dedicated to the worldwide celebration in 2019 of the centenary of the adoption of the ILO Constitution, the first international document placing social protection at the core of social justice.

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HUNGARY

THE RIGHT TO SOCIAL SECURITY IN THE HUNGARIAN FUNDAMENTAL LAW (CONSTITUTION)

Prof. JÓZSEF HAJDÚ¹

1. The constitutional guarantees of social security rights.

1.1. Transition from Constitution to Fundamental Law

The Hungarian Parliament passed Hungary's Fundamental Law² on 18 April 2011.³ The Fundamental Law, which entered into force on 1 January 2012, supersedes the previous constitution (hereinafter: 1989 Constitution), which, in keeping with the requirements of democratic constitutionalism during the 1989-90 regime change, comprehensively amended the first written Constitution of Hungary (Act XX of 1949).⁴

The document – according to the declaration set forth in Article B) – seeks to maintain that Hungary is an independent, democratic state governed by the rule of law, and furthermore – according to Article E) – that Hungary contributes to the creation of European unity, however, in some respects it does not comply with standards of democratic constitutionalism and the basic principles set forth in Article 2 of the Treaty on the European Union (hereinafter: TEU):⁵

- a) An important criterion for a democratic constitution is that everybody living under it can regard it as his/her own. The Fundamental Law basically breaches this requirement. Its lengthy preamble, entitled National Avowal, defines the subjects of the constitution not as the totality of people living under the Hungarian laws, but as the Hungarian ethnic nation. The Fundamental Law defines it as a community, the binding fabric of which is “intellectual and spiritual”, not political, but cultural. The elevation of the “single Hungarian nation” to the status of constitutional subject suggests that the scope of the Fundamental Law somehow extends to the whole of historical Hungary, and certainly to those places where Hungarians are still living today.⁶

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² The drafting of the Fundamental Law took place without following any of the elementary political, professional, scientific and social debates. The Council of Europe's Venice Commission also expressed its concerns related to the document.

³ For the “official” English translation of the Fundamental Law, see: <http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf> (10. 03. 2014).

⁴ For the official English translation of the Opinion, see: http://tasz.hu/files/tasz/imce/2011/opinion_on_hungarian_constitutional_questions_enhu.pdf.

⁵ Balogh Zsolt, Hajas Barnabás: Rights and Freedoms. In: Schanda Balázs, Varga Zs András, Csink Lóránt (szerk.): The basic law of Hungary: A First Commentary (Dublin: Clarus Press, 2012).

⁶ Zoltán Fleck, Gábor Gadó, Gábor Halmai, Szabolcs Hegyi, Gábor Juhász, János Kis, Zsolt Körtvélyesi, Balázs Majtényi, Gábor Attila Tóth: Opinion on the Fundamental Law of Hungary, June 2011.

- b) The decline in the level of protection for fundamental rights is influenced not only by the substantive provisions of the Fundamental Law pertaining to fundamental rights, but also by the weakening of institutional and procedural guarantees that would otherwise be capable of upholding those rights that remain under the Fundamental Law. The most important of these is a change to the review power of the Constitutional Court, making it far less capable than before of performing its tasks related to the protection of fundamental rights (see details later).⁷
- c) The new Fundamental Law regulates some issues which would have to be decided by the governing majority, while it assigns others to laws requiring a two-third majority. This makes it possible for the government (2010-2014 and 2014-2018) enjoying a two-third majority support to write in stone its views on economic and social policy. A subsequent government possessing only a simple majority will not be able to alter these even if it receives a clear mandate from the electorate to do so. In addition, the prescriptions of the Fundamental Law render fiscal policy especially rigid since significant shares of state revenues and expenditures will be impossible to modify in the absence of pertaining two-third statutes. This hinders good governance since it will make it more difficult for subsequent governments to respond to changes in the economy and in the society. The very possibility created by the Fundamental Law to regulate such issues of economic and social policies by means of two-third statutes is incompatible with parliamentarism and the principle of the temporal division of powers.⁸

1.2. The international compatibility of the Fundamental Law

Based on Point f) of Paragraph (2) of Article 24, the Constitutional Court will continue to investigate whether laws breach international agreements. However, the Fundamental Law does not mention who shall initiate procedures of this nature, and also makes no reference to the opportunity for an ex officio review. No mention is made of how harmony should be created if a Hungarian law breaches a generally accepted rule of international law. Where an international agreement is breached by a piece of legislation or constituent provision, the annulment of the latter two is only an option (Point c) of Paragraph (3) of Article 24). This weakens the requirement set out in Paragraph (2) of Article Q, under which Hungarian laws must be in harmony with international law: it would have been more opportune to prescribe categorical annulment of such legislation, naming it as an exception due to a conflict with the EU's founding treaties.⁹

Furthermore, Article E contains only one new rule in comparison to Article 2/A and Paragraph (4) of Article 6 of the 1989 Constitution, namely that the law of the EU may stipulate a generally binding rule of conduct. This requirement, incidentally, also follows from the EU's founding treaties. The rule, however, still says nothing about requesting priority of application.¹⁰

⁷ <http://www.vg.hu/kozelet/tarsadalom/solyom-eddigi-lesulyosabb-kritikaja-jon-a-lex-polt-346427> (12. 04. 2014).

⁸ For example, pensions: the Fundamental Law itself excludes the possibility that a subsequent governing majority create a compulsory funded pension scheme based on capital investment. It is not compatible with the functions of the constitution that the governing majority excludes the application of one of the available public policy solutions in the Fundamental Law without having been empowered by the electorate to do so. In addition, Article 40 of the Fundamental Law assigns the basic rules of the pension system to a cardinal act, which, as mentioned above, requires a two-third majority. In any case, the Fundamental Law makes it possible that the retirement age and other conditions of eligibility as well as the basis for calculating pensions will be modifiable only by a two-third majority.

In addition, Article L of the Fundamental Law specifies that the regulation of family welfare support is also to be subject to two-third statutory regulation. It is clear, however, that the pertaining prescriptions of the Fundamental Law create the possibility that every detailed issue of the family welfare support will only be modifiable subsequently by a two-third majority.

⁹ Jakab András: *Az új Alaptörvény keletkezése és gyakorlati következményei*, HVG Orac, Budapest, 2011.

¹⁰ Zoltán Fleck, Gábor Gadó, Gábor Halmai, Szabolcs Hegyi, Gábor Juhász, János Kis, Zsolt Körtvélyesi, Balázs Majtényi, Gábor Attila Tóth: *Opinion on the Fundamental Law of Hungary*, June 2011. <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf> (18. 03. 2014).

1.3. *The relationship between rights and obligations*

The Fundamental Law reshapes the relationship between rights and duties in contrast with the 1989 Constitution. This change will impact on the substantive rules of most of the Hungarian legal system¹¹ and the practice of political institutions, as well. Although fundamental rights and duties (Articles I-XXXI) were included in one chapter, the chapters called “National Avowal”¹² and “Foundation” also contain principles concerning the enjoyment and exercise of rights as well as the fulfillment of duties.¹³

The relationship of rights and duties stated by the Fundamental Law is marked by a peculiar ambiguity. According to certain provisions of the Fundamental Law, and the general picture which they outline, the exercise of certain rights depends on the discharging of duties. As a result, they can no longer be regarded as inalienable individual rights. This ambiguity can be detected in the passage of the National Avowal according to which “individual freedom can only unfold in cooperation with others”. The article cataloguing fundamental rights also bears the title “Freedom and Responsibility”.¹⁴

According to the modern conception, which the 1989 Constitution shares with conceptions of the world’s constitutional democracies, and which has been shaped by Hungarian constitutional review as well, everyone enjoys fundamental rights equally and the state is to protect everyone’s rights equally. According to this conception, inalienable constitutional rights are entitlements which lay the groundwork for the duties of the state (and those of all other agents, as well). “It is the primary duty of the state to protect the inviolable and inalienable rights of human beings”.¹⁵ That is, it is not for the state to decide what it will protect and what it will not. A conception running counter to this manifests itself, however, in a number of passages in which the Fundamental Law makes the exercise of rights expressly dependent on the discharging of duties.¹⁶

Although the subject of rights is the human being, even if their rights are communal (Article I), the new Fundamental Law is in some of its passages anti-individualist. Rights do not necessarily serve to protect the autonomous interests of persons, but rather collective interests (which remain unspecified). In these passages, the new Fundamental Law does not regard entitlements as the limits of collective (state) agency, but rather treats the interests of the collective as the source and at the same time limitation of rights. Thus the new Fundamental Law identifies the foundations of the economy as the freedom of enterprise and value-creating work (see Article M), the pursuit of individual welfare is coupled with duties owed to the collective (see Article O), the article on the freedom of property and inheritance admonishes to the “social responsibilities” of the owner (see Article XIII).¹⁷

¹¹ For example, the chapter on fundamental rights itself contains 18 passages pertaining to the legislation of new acts of Parliament.

¹² The relevance of the “National Avowal” is based on Article R, which prescribes with mandatory force that the interpretation of the provisions of the Fundamental Law is to be in harmony with the National Avowal’s declarations.

¹³ Fleck Zoltán – Gadó Gábor – Halmai Gábor – Hegyi Szabolcs – Juhász Gábor – Kis János – Körtvélyesi Zsolt – Majtényi Balázs – Tóth Gábor Attila: *Vélemény Magyarország Alaptörvényéről*. <http://www.fundamentum.hu/magyarorszag-alaptorvenye-i/cikk/velemenymagyarorszag-alaptorvenyerol> (13. 03. 2014).

¹⁴ Fleck Zoltán – Gadó Gábor – Halmai Gábor – Hegyi Szabolcs – Juhász Gábor – Kis János – Körtvélyesi Zsolt – Majtényi Balázs – Tóth Gábor Attila: *Vélemény Magyarország Alaptörvényéről*. <http://www.fundamentum.hu/magyarorszag-alaptorvenye-i/cikk/velemenymagyarorszag-alaptorvenyerol> (13. 03. 2014).

¹⁵ Az Alkotmány kommentárja, Századvég Kiadó, Budapest, 2009 I-III. kötet.

¹⁶ For example, Article XII declares in one and the same passage everyone’s right to choose one’s employment and profession freely, and their duty to contribute to the welfare of the community by doing work in accordance with one’s abilities and opportunities. This is unacceptable in a liberal democracy. The bearer of an inalienable right is free not only to choose among available opportunities for work, but also to refrain from work. The obligation to work is contrary to freedom. Moreover, since this passage includes a duty, it also empowers an entity (local government, authority) to oversee whether this duty is discharged.

¹⁷ <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf>.

1.4. Right to social security: state goals instead of social rights

The previous Constitution set forth that citizens have the right to social security¹⁸ and they are entitled to the support required to live.¹⁹ The new Fundamental Law, however, identifies social security as a state goal: Hungary shall (only) strive to provide social security to all of its citizens, and the level of assistance is determined not as the extent necessary for subsistence but “statutory subsidies” are provided for (See Article XIX).

At the same time, in connection with the new Fundamental Law it must be noted that it adds to the state goals within the scope of social rights. The state aims to provide every person with decent housing²⁰ and access to public services, which were not included in the previous Constitution (Article XXII).²¹

Here the institutional guarantees of social security must be mentioned by all means. The 1989 Constitution mentioned the social insurance system and the system of social institutions in relation to implementing social security, while the new Fundamental Law talks about a general state pension system and a system of social institutions. Besides the state pension system, the Fundamental Law allows for the “operation of voluntarily established social institutions”²² – which also promotes the livelihood of the elderly. Thus the two-pillar pension system (1st pillar: statutory state pension and 2nd pillar: voluntary pension funds) is stabilized by the Fundamental Law,²³ however the text of the Fundamental Law rules out the reinstatement of the previously eliminated compulsory private pension fund (which was originally the second pillar under the World Bank concept) and there is absolutely no mention of social insurance.²⁴

In summary, pursuant to the provisions of the Fundamental Law, the state has increased freedom in providing social rights. One might venture to say that the prohibition set up by Constitutional Court Decision 43/1995 (VI. 30), according to which the abrupt change of a social insurance service or its downgrading from insurance to assistance qualifies as interference into a fundamental right, no longer exists in this form. The provisions of the Fundamental Law on social rights clearly show that it is possible to interfere into existing rights, to rearrange them and ultimately to transform the social security system. According to the Fundamental Law, the state enjoys a great degree of freedom in the field of social rights, and this may result in social and economic policies which are more flexible and better suited to the requirements. Accordingly, the provisions of the Fundamental Law do not constrain the state in a worse economic situation, and the rules on social security alone will not bankrupt the state merely because they shall be observed under all circumstances. However, the ultimate limit lies not in the regulations on social rights but in realizing human dignity.²⁵

¹⁸ Trócsányi László szerk.: *A mi alkotmányunk*, Complex Kiadó, Budapest, 2006 p. pp. 483-484.

¹⁹ However, for the sake of accuracy it must be mentioned that the provisions of the 1989 Constitution relating to social rights were the subject of debate in the practice of the Constitutional Court, too. [See Constitutional Court Order No. 24/1991 (V. 18.)] The issue under debate was whether these were rights or were formulated only as a state objective. Finally, the practice of the Constitutional Court reinforced the latter position, i.e. that the Constitution’s rules on social rights served only as guidance for the state and no right derived from the Constitution (in spite of being worded as a right), and at best they can be secondary, subjective rights created by legislation. The consideration underlying this opinion was that they shall not be fundamental rights because they depend on the economic performance of the state. If the economic performance declines, there are two options to choose from: 1. either the state does not observe the provisions of the Constitution and thus the Constitution will be devalued, or 2. it observes them and impending state bankruptcy will follow.

²⁰ The Constitutional Court examined the issue within the framework of constitutional interpretation whether the right to housing can be deduced from the Constitution and reached a negative answer, at the same time maintaining that in the case of imminent danger to life the state shall provide dwelling (Constitutional Court Decision No. 42/2000 (XI. 8.).

²¹ Juhász Gábor: *A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben*, *Fundamentum* 2012. évi 1. szám.

²² These are the voluntary and supplementary pension funds.

²³ However, the two-pillar pension system implied by the Fundamental Law is not the same as the two-pillar – statutory social insurance pension and compulsory private pension – model proposed earlier by the World Bank.

²⁴ Juhász Gábor: *A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben*, *Fundamentum* 2012. évi 1. szám. <http://www.fundamentum.hu/sites/default/files/12-1-02.pdf> (14. 03. 2014).

²⁵ http://ejegyzet.hu/obh/Alaptorveny_szabadsag_felelosseg/lecke11_lap2.html.

2. *The scope of the material and personal social security rights guaranteed by the Fundamental Law (Constitution)*

2.1. *Right to work*

The Fundamental Law gives a specific value content to work. In the National Avowal of the Fundamental Law it is expressed that the strength of community and the honour of each person are based on labour, an achievement of the human mind. The fundamental principles include that the economy of Hungary shall be based on work which creates value and freedom of enterprise. Then in the chapter on Freedom and Responsibility, where the right to work is regulated, the task of the state to take measures for creating jobs (so that “every person who is able and willing to work has the opportunity to do so”) appears as a state objective on the one hand, while on the other hand the Fundamental Law states that every person shall be obliged to contribute to the community’s enrichment with his or her work to the best of his or her abilities and potential (Article XII). Thus physical and intellectual work, the possibility of enterprise is of paramount importance in the Fundamental Law.²⁶

However, unlike the 1989 Constitution,^{27, 28} the new Fundamental Law does not proclaim the right to work (which the Constitutional Court has also interpreted as no more than the state’s obligation, not specified in any more detail, to pursue an employment policy), and, thus, the new provisions make it clear that the provision relating to creating work opportunities is only a state goal. A new element, however, is the prescription of an obligation to perform work to the best of the individual’s ability and potential which is rather hard to be defined by a court of law.²⁹

2.2. *Social rights, right to social security*

The Fundamental Law, in keeping with the spirit of the Constitutional Court precedents, treats the creation of social security not as a right, but as a state goal. The wording of Article 70/E of the 1989 Constitution and some of the relevant Constitutional Court decisions, in principle, left open the opportunity for the right to social security to be interpreted as a fundamental right at some time in the future. Constitutional Court Decision 32/1998. (VI. 25.) even went as far as to outline, in abstract terms, the constitutional extent of the right to social security. The new text of the Fundamental Law eliminates the opportunity for interpretations of this kind. The second sentence is virtually a word-for-word repetition of the second half of the first sentence of Article 70/E of 1989 Constitution, but while this clearly only lists examples of those entitled to receive assistance, the new text can be interpreted as an exhaustive list of the entitled groups, from which it can be concluded, for example, that the state only needs to concern itself with creating social security for the groups included in the list (and not people unemployed through “their own fault”, for example). Another change is reflected in the fact that the assistance to be provided is no longer of the extent “necessary for subsistence”, but just the extent “determined by law”.

The 1989 Constitution mentioned the social insurance system and the system of social institutions in relation to implementing social security,³⁰ while the new Fundamental Law talks about a general (statutory) state pension system and a system of social institutions.

Therefore, social insurance itself has been completely removed from among the means of creating social security, and only the system of social institutions and measures remains in the text. These provisions aim to ensure that there are no constitutional barriers to introducing measures to make benefits dependent

²⁶ Jakab András: *Az új Alaptörvény keletkezése és gyakorlati következményei* (Budapest: HVG-Orac, 2011). Schanda Balázs, Balogh Zsolt (szerk.): *Alkotmányjog – Alapjogok*, (PPKE JÁK: Budapest, 2011).

²⁷ József Hajdú: *Labour Law in Hungary*, Wolters Kluwer, 2011. pp. 58-59.

²⁸ Trócsányi László szerk.: *A mi alkotmányunk*, Complex Kiadó, Budapest, 2006 p. pp. 461-464.

²⁹ Balogh Zsolt, Hajas Barnabás: *Rights and Freedoms*. In: Schanda Balázs, Varga Zs András, Csink Lóránt (szerk.): *The basic law of Hungary: A First Commentary* (Dublin: Clarus Press, 2012).

³⁰ Trócsányi László szerk.: *A mi alkotmányunk*, Complex Kiadó, Budapest, 2006 p. pp. 483-484.

on the performance of work or other activity regarded as socially beneficial, in keeping with the new social-policy approach.³¹

The text rules out the reinstatement of the compulsory private pension funds regime, with the aim of this being to make it impossible, due to a conflict with the Fundamental Law, to re-introduce this previously tried social-policy solution, which is rejected by the present government.³²

The Article XIX of the Fundamental Law deals with the protection of elderly. It states that Hungary shall contribute to ensuring the livelihood for the elderly by maintaining a general state pension system based on social solidarity and by allowing for the operation of voluntarily established social institutions. In addition to the general provisions there is a special rule which states that the conditions of entitlement to state pension may be laid down in an Act with regard to the requirement for stronger protection for women.

The theoretical starting point is that pensions prior to retirement age cannot be claimed as of 2012 onwards. The only permanently existing, systematic exception has been the award of old-age pension regardless of any age criteria for women with an eligibility period of at least 40 years, which was introduced in 2011. Eligibility period refers to a narrower category than the generally applied term of service time in the pension insurance system, as only the enabling period of performing gainful activity and the disbursement period of child raising benefits are accepted under this term. As a further criterion, the exact time of enabling period of performing gainful activity within the at least 40 years of eligibility period may not be less than 32 years. The new retirement alternative is a reward for women who had worked all their active lives and had mostly raised children as well. This provision is against the Paragraph (3) of Article XV of the Fundamental Law, which states that “women and men shall have equal rights”. It seems that the special old-age pension for women with 40 years of eligibility period is discriminatory, but the Paragraph (5) of the same Article – which was inserted into the Fundamental Law as an amendment in 2013³³ –, underlines that by means of separate measures, Hungary shall protect families, children, women, the elderly and persons living with disabilities. This can be regarded as an affirmative action to protect working women.

In addition to the state pension system, the Fundamental Law mentions the system of social institutions. As regards pensions, this surely means elderly annuity³⁴ for those who have no entitlements, and in a wider sense also the operation of a system of social institutions on the basis of the “principle of need” included in the text of the Fundamental Law.

During the analysis of the provisions of the Fundamental Law relating to social rights, the question arose whether Paragraph (4) of Article XVI, that is the command that adult children shall be obliged to look after their parents if they are in need, also belongs to this circle. However, looking after elderly parents is a moral command. It shall definitely be observed as a moral obligation, but it is not directly related to the task of the state to establish and to operate a system of social institutions.³⁵

2.3. *Right to health and to a healthy environment*

According to the Fundamental Law, the right to health means the right to physical and mental health. The 1989 Constitution – using the terminology of the UN International Covenant on Economic, Social and Cultural Rights – talked about “the right to the highest possible level of physical and mental health”.^{36,37} According to the Fundamental Law, every person shall have the right to health. The 1989 Constitution identified the institutions of labour safety and health care, the organization of medical care and the

³¹ Juhász Gábor: A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben, *Fundamentum* 2012. évi 1. szám.

³² Schanda Balázs, Balogh Zsolt (szerk.): *Alkotmányjog – Alapjogok*, PPKE JÁK, Budapest, 2011.

³³ Amended by Article 21(1)f) of the Fourth Amendment to the Fundamental Law (25 March 2013).

³⁴ This is a social assistance type benefit regulated by Act III of 1993 on Social Assistance.

³⁵ Jakab András: *Az új Alaptörvény keletkezése és gyakorlati következményei*, HVG-Orac, Budapest, 2011.

³⁶ Kardos Gábor: *Az egészséghez való jog dilemmái*, <http://egk.tatk.elte.hu> (05. 03. 2014).

³⁷ <http://mentropia.2722.hu/uj3/cikkolvas.php?menu=1&cikk=59&tipus=1> (18. 14. 2014).

opportunities for regular physical activity, as well as the protection of the urban and natural environment as the institutional guarantees for implementing this right. The Fundamental Law, besides retaining these, promotes the exercise of this right by ensuring that agriculture remains free from any genetically modified organism, by providing access to healthy food and drinking water and by supporting sports. This means that the Fundamental Law has expanded the institutional guarantees in line with modern challenges”.³⁸

In the practice of the Constitutional Court the right to health did not qualify as a fundamental right but – similarly to the right to social security – as a constitutional right from which several legislative obligations arose for the implementation of this right. With regard to the right to health, the Fundamental Law does not change this “dogmatic classification”.³⁹

Environmental protection is mentioned in relation to the right to health, but the Fundamental Law also contains a specific clause on environmental protection. The right to a healthy environment appears as a fundamental right in the practice of the Constitutional Court. Its specific feature is that no subjective rights are provided (as its subject is “everybody”, “mankind”) but it is basically the institutional obligation of the state to implement this right.⁴⁰

2.4. Property right

Under certain conditions, specific public law entitlements also come under the protection of property. The extension of the fundamental right protection of property to social insurance services and their entitlements fits in with the conception which the Constitutional Court holds on the function of property. The constitutional protection of public law entitlements is reasoned in the following way: “The protection of property is related to one’s own assets or value-creating work in the field of social insurance, too. Therefore, the greater protection of insurance services paid for through one’s own contributions is distinguished from the smaller protection of assistance-type benefits. The protection of property may extend as long as the service has the same function as the material assets would have, from which it also follows that this attribute cannot be ceased. However, exact correlation between one’s own contributions and the service is excluded by the manner of operation of social insurance (non-capitalized assets) and by the element of solidarity incorporated in it, as well as by the risk borne by the contribution payer in the long run.” To put it simply, if the state interferes in questions of property through compulsory withdrawal, claim protected by property protection arises against the state on the other side. This simplified formula holds in the field of social insurance – apart from pensions – for certain services of health insurance. This means property protection in social insurance. Although the insurance element has a role in these cases, this role is not exclusive as certain survivors’ benefits (e.g. widow(er)’s pension) are also included in the protection. In these cases the property protection of social insurance claims is related to the general function of property, to ensuring the material (financial) bases of individual autonomy.⁴¹

In sum, the provisions of the Fundamental Law pertaining to social rights result in no dramatic change with respect to the protection of these rights, mainly because under the 1989 Constitution the Constitutional Court did not recognise the fundamental-right status of social provisions. Some of the provisions of the Fundamental Law (Articles XII, XIX and XX), reflecting the spirit of the Constitutional Court’s judicial practice to date, make this even clearer than the previous text.⁴²

³⁸ Balogh Zsolt, Hajas Barnabás: Rights and Freedoms. In: Schanda Balázs, Varga Zs András, Csink Lóránt (szerk.): The basic law of Hungary: A First Commentary, Dublin: Clarus Press, 2012.

³⁹ Juhász Gábor: A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben, *Fundamentum* 2012. évi 1. szám. <http://www.fundamentum.hu/sites/default/files/12-1-02.pdf> (14. 03. 2014).

⁴⁰ http://ejegyzet.hu/obh/Alaptorveny_szabadsag_felelosseg/lecke10_lap1.html (12. 04. 2014).

⁴¹ Jakab András: Az új Alaptörvény keletkezése és gyakorlati következményei (Budapest: HVG-Orac, 2011). Schanda Balázs, Balogh Zsolt (szerk.): Alkotmányjog – Alapjogok (PPKE JÁK: Budapest, 2011).

⁴² <http://www.fundamentum.hu/tarsadalmi-igazsagossag/cikk/gazdasagi-es-szocialis-jogok-vedelme-az-alkotmanyban-es-az-alaptorvenyben> (27. 04. 2014).

At the same time, in certain places (e.g. Article XIX, Paragraphs 3 and 4), the wording contains new mandates and restrictions in line with current policies with which the constitution-maker attempts to prevent the new direction taken by social-policy measures from being declared unconstitutional and seeks to classify the solutions brushed aside by the current government as unconstitutional in the future.⁴³

3. The constitutional regulations' impact on the content of social security rights in the domestic legal system

3.1. Characteristics of the Hungariansocial security system

According to the practice, there are five main branches of social security system⁴⁴ in Hungary. Pensions and health services are still classified as social insurance, even though the term social insurance wasn't mentioned in the Fundamental Law. The other three statutory branches are the unemployment insurance, the family support system and the social assistance system which are out of the scope of social insurance.

In Hungary all persons who are gainfully employed and those of equivalent status are insured against all social insurance risks. These persons include those in paid employment (including those in public administration), the self-employed (including members of co-operative societies), numerous groups of persons of equivalent status, persons receiving income subsidy, jobseeker benefit and job-seeker aid.

Everyone is automatically affiliated to a social insurance scheme as soon as he/she begins to work in Hungary and is not exempted from being compulsorily insured. Employers pay social tax (not contribution⁴⁵) and employees pay social insurance (health and pension) contributions.⁴⁶ Economically inactive uninsured persons residing in Hungary may voluntarily pay a lump-sum amount in order to be covered against healthcare risks.

As a main rule, employers register their employees and self-employed persons register themselves with the competent local office of the taxation and finance office and/or the competent social insurance organisations, as necessary.

Anyone who voluntarily subscribes to the social security system can sign an agreement with the competent social security institution.⁴⁷

Foreign EU and EEA nationals who are employed by Hungarian companies are required to contribute to the scheme and are eligible to receive benefits on the same basis as Hungarian nationals.

Social security status of third country citizens: the Hungarian activity of third country citizens will continue to be exempt from social security contribution (employee part) and social tax liabilities (employer part) if their Hungarian activity does not exceed two years. In case of Hungarian assignments, the legislation provides the two-year exemption period so that social security insurance liability (employee and employer part) should only arise from 1 January 2015. Furthermore, the individual can continue to be exempt from social security contributions (employee part) even if his/her Hungarian activity exceeds two years if the following conditions are met:

- the extension of the Hungarian activity is a result of an unforeseen reason at the time of the beginning of the activity, and
- the reason for the extension of the Hungarian activity arises after one year of the start date of the Hungarian activity, and

⁴³ Zoltán Fleck, Gábor Gadó, Gábor Halmai, Szabolcs Hegyi, Gábor Juhász, János Kis, Zsolt Körtvélyesi, Balázs Majtényi, Gábor Attila Tóth: Opinion on the Fundamental Law of Hungary, June 2011. <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf> (18. 03. 2014)

⁴⁴ The Hungarian social security system offers protection against sickness, maternity, old-age, changed working capacity, survivorship, children's education and unemployment.

⁴⁵ Since 01. January. 2012.

⁴⁶ The current (2014) individual contributions for the basic benefits package are set at 18.5% (10% for pension and 8.5% for health care) of gross earnings, and employer social tax is 27% of the insured person's gross earnings.

⁴⁷ Hajdú József – Homicskó Árpád: Bevezetés a társadalombiztosítási jogba, Patrocinium Kiadó, Budapest pp. 60-61.

- the individual notifies the National Tax and Customs Administration within eight days after the extension of the Hungarian activities.

This possible exemption does not affect the social tax liability (employers' obligation), i.e. if the Hungarian activity of the third country citizen exceeds two years, social tax liability should arise from the first day of the Hungarian activity (retrospectively).

Foreign nationals working in Hungary for wholly foreign-owned companies, and the representatives and staff of diplomatic missions are not eligible for the scheme and need to make their own private insurance arrangements.

The management, organisation and administration of the Hungarian social insurance system are centralised, whereas services concerning social benefits are decentralised.⁴⁸

3.2. Material scope

a) Pension insurance (old-age pension and survivors' pension)

Mandatory pension insurance was comprehensively reformed in 1997. The act on the social insurance pension entered into force on 1 January 1998. Originally, the system consisted of two pillars. The reformed first pillar has remained mandatory state pension scheme that is publicly managed and financed on a pay-as-you-go basis. Until November 2010, the compulsory private pension scheme was regarded as the second pillar of the system. The vast majority of insured persons' contribution was paid in the form of membership fee into the compulsory private (old-age) pension funds that agreed to award either lump-sum payment or monthly pension-type allowance under certain terms of the membership agreement.

The statutory pension insurance (1st pillar) covers the following benefits: a) old-age pension; b) advanced pension for women with at least 40 years of employment; c) survivors' pensions; and d) accident related survivors' pensions.

The major change in the Hungarian (old-age) pension insurance system affecting nearly 3 million insured people was that according to the relevant Act, as from 3 November 2010, membership in the second pillar pension (compulsory private pension) has no longer been compulsory. Until 1 March 2011 the Act offered free choice for those compulsorily insured in the 1st and 2nd pillar of the pension system either to remain in the 1st pillar or to stay exclusively in the 2nd pillar on a voluntary basis. In this latter case, the persons remaining only in the 2nd pillar will not acquire any further rights under the 1st pillar after taking the decision, but the rights that they have acquired before will not be lost.⁴⁹ As a consequence, the mandatory pension system remained dominantly public.⁵⁰ The Hungarian Fundamental Law established a new two-pillar pension system, based on compulsory social insurance system (governed by PAYG principle) on the one hand and voluntary private savings (funded system) on the other hand.⁵¹

The other significant change has been taken related to disability pension. Originally, disability pension was incorporated in the social insurance pension act. The first reform of disability pension was introduced in 2008. As a second phase of the changes, the disability benefits' system was reformed with Act CXCI of 2011 on the 'Benefits for persons with changed working capacity and amendments of certain acts', which entered into force on 1st January 2012. As from 1 January 2012 the invalidity pension scheme has been completely closed and consequently from this date new invalidity pensions and accident-related invalidity pensions (pensions for accident at work or occupational diseases), rehabilitation annuities, regular social

⁴⁸ https://www.inps.it/docallegati/Mig/Doc/social_security_on_the_move/eng/project_deliverables/country_report_hungary.pdf (21. 03. 2014).

⁴⁹ The rest of the second pillar became voluntary from 3 November 2010, fully funded and run by several authorised and independent private pension funds which are supervised by the Hungarian Financial Supervisory Authority (recently by the Hungarian National Bank).

⁵⁰ The Hungarian 1st pillar pension system is a mandatory, uniform, defined-benefit pay-as-you-go system with an earnings-related public pension combined with a minimum pension. The minimum pension, which is worth HUF 28 500 per month (around 12% of average earnings). The amount has remained unchanged since 2009.

⁵¹ József Hajdú: Hungarian pension system in transition, *Studia Iuridica Caroliensia*, Budapest, 2011 pp. 34-52.

annuities for persons with ill-health, temporary invalidity annuities and health damage annuities for miners cannot be awarded. The new benefits substituting the invalidity pensions aim at the reintegration of persons with changed working capacity to the labour market and are focused on rehabilitation.⁵² The new system of invalidity insurance offers two types of benefits by virtue of the health status and the remaining working capacity of the person claiming the benefit.⁵³ The complex rehabilitation procedure aims at the revision of entitlements based on the working capacity of those persons who were in receipt of any benefit on the basis of damaged health until 31 December 2011.⁵⁴

b) Health insurance (benefits in cash and in kind)

There is only one type of compulsory health insurance system in Hungary. The law on compulsory health insurance provides for the wide range of benefits in kind and cash which are covered by the Health Insurance Fund. The Ministry of Human Resources is responsible for health insurance and the health sector. The Ministry monitors the activities of all insurance providers, the privately managed health insurance funds as well as of the providers of healthcare services in respect of healthcare benefit. The Ministry also investigates complaints relating to the procedures the health insurance agencies follow. The National Health Insurance Fund (NHIF) operates via its Budapest headquarters and the devolved NHIF offices in the country's 19 counties.

The law determines the legal status guaranteeing ipso facto compulsory insurance coverage. Employers are obliged to declare their employees and pay social tax for them to the competent tax authority, which transmits the data relating to their insurance rights to the competent county-level health insurance funds. Healthcare services can be received from specified healthcare providers, including private providers contracted with the National Health Insurance Fund. The main services of health insurance are as follows:

- a) *Medical treatment.* Everyone who is covered for healthcare is entitled to receive all the care their state of health requires. As a main rule, medical care is free of charge in Hungary. If the treatment is not prescribed by a physician or is not provided through the normal hospital system or if he/she chooses a doctor other than the one allocated by the healthcare system, fees imposed by the care provider will be paid by the patient. The individual might also pay only a certain part of the costs of medicines and medical appliances.
- b) *Medicine.* Medicines administered in hospital are free of charge. Otherwise, the NHIF covers part or all of the cost when the medicine prescribed is on the social insurance assistance scheme list.⁵⁵
- c) *Dental treatment.*
- d) *Medical appliances.*⁵⁶

⁵² The basic aim of the new disability benefits from one part is to guarantee incomes for those persons who are not able to work because of their state of health. From the other part the aim of the rehabilitation is to reintegrate persons with changed working capacity to the labour market, to prepare them for employment in a suitable work place and to ensure such employments concerning their working capacity.

⁵³ 1. the person is entitled to rehabilitation benefit if he/she can be rehabilitated. Rehabilitation benefit may be provided for the period required for rehabilitation, within the limit of 3 years from the start of the benefit.

2. a person with changed working capacity is entitled to disability benefit if rehabilitation is not recommended; or he/she cannot be rehabilitated, or the person reaches the retirement age within five years.

⁵⁴ <http://www.onyf.hu/hu/> (12. 04. 2014).

⁵⁵ The rules relating to drug approval are fixed by ministerial decree:

a) standard aid: 80%, 55%, 25%;

b) increased and maximum aid is dependent upon a NHIF decision.

Some medicines in the maximum aid category have been taken off the list for full reimbursement.

⁵⁶ <http://www.oep.hu> (14. 03. 2014).

c) *Unemployment insurance*

The Hungarian unemployment scheme is compulsory and insurance-based. Both employers (in form of social tax) and employees (in form of special contribution) are paying to the system. There are both active and passive labour market measures to promote employment and to provide for the job seekers.⁵⁷ Placement services are open to every resident including EEA nationals irrespective of the insurance relationship. The Ministry for National Economy is responsible for the unemployment insurance system. The institutional structure of the Hungarian employment policy system can be divided into two main types: 1. self-governing bodies⁵⁸ on the one hand, and 2. administrative bodies⁵⁹ on the other.⁶⁰

d) *Family support system*

The Ministry of Human Resources is responsible for family benefits. The family support system is a universal system, meaning that every citizen who meets the entitlement criteria is entitled. Every citizen who has a child up to a certain age may be entitled to various family support benefits. The family support benefits are operated and administered partly by the Hungarian State Treasury and partly the National Health Insurance Fund.⁶¹

e) *Social assistance system (means tested benefits)*

The local governments are the main actors of the management of the social assistance system. Various social assistance benefits are granted by the local governments. The Ministry of Human Resources is responsible for the supervision. The wide range of social assistance benefits covers various contingencies and plays a crucial role for those who do not have enough resources to live on.⁶²

4. Threats to social security rights in times of economic crisis

4.1. Political, financial and economic situation

When the global financial crisis hit in 2008, Hungary was already in a precarious economic situation in spite of the previous socialist Government having introduced major austerity measures between 2006 and 2008. The restrictions and cuts, however, resulted in stagnating economic growth, which dropped further because of the spiralling global financial crisis. Already 80% at the end of 2010, the debt ratio increased by 15 percentage points between 2006 and 2011, primarily due to the economic downturn and the weakening of the Hungarian currency, the forint.⁶³ The Ministry of Economy announced that the debt was 77,035.4 million euros at the end of the second quarter of 2012, equivalent to 77.7% of GDP and 79.2% of GDP in 2013.⁶⁴

⁵⁷ József Hajdú: Social protection of the unemployed, Pólay Elemér Alapítvány, Szeged, 2013. pp. 215-234.

⁵⁸ The self-governing bodies are the National Conciliation Council, the Governing Body of the Labour Market Fund, and the Regional Labour Councils.

⁵⁹ The Public Employment Service is the administrative body responsible for the supervision of the employment system. It consists of the National Labour Office, the Regional Labour Centres, the local offices of the Regional Labour Centres and the Regional Labour Force Development and Training Centres.

⁶⁰ <http://www.afsz.hu/> (24. 04. 2014).

⁶¹ <http://www.allamkinestar.gov.hu/> (14. 03. 2014).

⁶² <http://www.nefmi.gov.hu/main.php> (14. 03. 2014).

⁶³ Ibid., "Fiscal consolidation measures already in parliament." Available at: <http://www.kormany.hu/en/ministry-for-national-economy/news/fiscal-consolidation-measures-already-in-parliament> (23. 04. 2014).

⁶⁴ Ministry for National Economy, "Hungary excels in general government debt reduction," 7 November 2012. Available at: <http://www.kormany.hu/en/ministry-for-national-economy/news/hungary-excels-in-general-government-debt-reduction> (23. 04. 2014).

However, these measures did not prevent a flood of international speculation which threatened to collapse the country's economic and financial system. Immediate support from the International Monetary Fund⁶⁵ and the European Central Bank allowed Hungary to avert the worst economic scenarios. Nevertheless, the crisis underscored several weak points in the Hungarian system which could no longer be ignored, which include:

- an extremely high exposure to foreign currency debt (mainly in the private sector);
- high levels of external debt financing;
- low level of employment combined with a high rate of long-term unemployment and activity rate;
- low average monthly wages compared to the productivity level;
- premature consumerism generated by the banks offering low interest rate credits denominated mainly in Swiss francs, which led to very high level of the households' indebtedness.⁶⁶

Unemployment in Hungary rose very rapidly after the political change in 1989, but reduced to 7.8% by 2008 (with a very low activity rate of 56.7%). As a result of the recent economic crisis, the unemployment rate rose to 10% by 2009, 11.2% by 2010, 11.6 by 2011, 11.7 by 2012, 11.8 by first quarter of 2013 and continuously decreased since the 2nd quarter of 2013 and reached 8.3 by the first quarter of 2014.⁶⁷ Hungary's GDP dropped by 13% from 2008 to 2009, but rose again in 2010 and 2011 and slightly dropped again in 2012. Since 1st quarter of 2013 the GDP is continuously increased again. In the 1st quarter of 2014 the GDP is 3.5%.⁶⁸ More than 50,000 jobs were lost from 2008 to 2011, and an additional 90,000 jobs were transferred from full time to part time jobs. Most of the jobs were lost in the for-profit sector and most of the job creation occurred in the NGO sector.⁶⁹

As an effect of the crisis, the number of registered unemployed persons with elementary education rose by 18% and the number of those who have no secondary level education rose by 41%. The crisis also affected those groups who have fixed term contracts. Long-term unemployment rose⁷⁰ steadily, and approached 3.6% by 2008. This rate rose also during the crisis to 4.2% in 2009 and to 5.5% in 2010.⁷¹

As a precondition for a new IMF loan and to avoid the EU's excessive deficit procedure in October 2012, the Fidesz Government (2010-2014) approved new austerity measures, which hit the majority of enterprises (banks, public service providers, and telecom companies in particular). The Hungarian population is also directly affected by increased taxes on financial transfers and fringe benefits, since these measures worsen the situation of the domestic economy, which was already in recession. The package aimed at cutting next year's budget deficit represents 1.2% of the GDP.⁷²

⁶⁵ IMF, "Dealing with households debt," *World Economic Outlook*, April 2012, Ch. 3. Available at: <http://www.imf.org/external/pubs/ft/weo/2012/01/pdf/c3.pdf> (24. 04. 2014).

⁶⁶ OECD Economic Surveys: HUNGARY, March 2012. Available at: <http://www.oecd.org/eco/49852285.pdf> (24. 04. 2014).

⁶⁷ <http://www.ksh.hu> (12. 04. 2014).

⁶⁸ <http://www.ksh.hu> (13. 04. 2014).

⁶⁹ NB.: In the first quarter of 2014, Hungary jobless rate fell to 8.3 percent from 8.6 percent in the previous period and 11.8 percent a year earlier. In the first three months of 2014, the number of unemployed people was 370 thousand, 139 thousand fewer than in the same period of 2013. Each of the seven statistical regions was characterized by decreasing unemployment.

⁷⁰ The increase of long-term unemployment has several underlying reasons: the economic structure inherited from the socialist era, the regime change, global recession, demographic processes and the government's policies all had a role in it.

⁷¹ Luca Koltai: 'Work instead of social benefit? Public works in Hungary' Peer Review on "Activation measures in times of crisis: the role of public works" 2014 ec.europa.eu/social/BlobServlet?docId=10515...en (25. 04. 2014).

⁷² The GDP share of social expenditure in Hungary was below the European average and it is more than it was in 2011.

4.2. National Social Inclusion Strategy (NSIS)

As an antecedent, on 30 November 2011 the Hungarian Government adopted a 10-year National Social Inclusion Strategy (NSIS) accompanied by a short-term action plan⁷³ for the period 2012–2014.⁷⁴

The comprehensive targets of the NSIS are as follows in harmony with the poverty reduction goals of the Europe 2020 Strategy:

- Reduction of the rate of individuals living in poverty and social exclusion, with special regard to the Roma population.
- Prevention of regeneration of poverty and social exclusion.
- Improvement of equal access to social and economic welfare, reinforcement of social cohesion.

One of the main priorities of this Strategy was a fierce fight for employment. In this strategy poverty is considered mainly as the individual's own responsibility, even by those who would otherwise subscribe to the idea of helping the poor.

Despite the praiseworthy goals of the adopted NSIS, a moderated result has been accomplished up to now. According to the figures from the Hungarian Central Statistical Office (HCSO), 42.2% of the Hungarian society is characterized by material deprivation and 23.1% by severe material deprivation.⁷⁵ This means that almost two-thirds of the society cannot go on vacation, 24.7% struggle with arrears, 2,860,000 cannot eat meat dishes every other day, and 1,154,000 cannot afford heating.⁷⁶

It is also clear from the HCSO analysis⁷⁷ that young adults face above average risk of poverty and that poverty risk decreases with age. Those aged 17 years are the most vulnerable. In 2010 only 20.3% of this group were poor, one year later already 23% were poor. The relative position of the elderly is better because pension benefits are regular and predictable. Many pensioners, however, do feel poverty as the average monthly net pension in 2012 is HUF 93,615 (about EURO 312).⁷⁸

One of the main problems of integrating NSIS into the society is that the Hungarian civil society, including trade unions, NGOs are very weak today. Regrettably, solidarity among the most vulnerable groups of Hungarian society has not strengthened.

4.3. Public works program: a new-old workfare model

Public works have been used as a remedy for long-term unemployment since 1991 in Hungary. However, their role remained limited until 2000, when – as part of a workfare reform – the task of organising such projects was handed over to local municipalities, with around 90% of wage costs covered by a central government subsidy. Eligibility rules for unemployment assistance were tightened and recipients were obliged to participate in public works for at least 30 days a year. However, public workers

⁷³ Short-term funding for the implementation of the Strategy up to 2014 will be supplied from the operational programmes concerned of the New Széchenyi Plan.

⁷⁴ Government of Hungary, *Hungarian National Social Inclusion Strategy*, Budapest, 30 November 2011. Available at: <http://romagov.kormany.hu/hungarian-national-social-inclusion-strategy-document> (24. 04. 2014).

⁷⁵ In Hungary nearly 30% of the population, i.e. 3 million people live in poverty or social exclusion according to the EU indicators. Among them around 500,000 to 600,000 are Roma. Poverty rate is approximately 70% among the Roma [...] Their employment rate is under 30% [...] As regards education, primary school completion is above 80% among the Roma, but secondary school completion is only 20%. Significant territorial disparities and housing segregation also hit the Roma disproportionately.

⁷⁶ HCSO, First Release, # 174, 15 November 2012. Available at: <http://www.ksh.hu/docs/eng/xftp/gyor/gde/egde21209.pdf> (24. 04. 2014). HCSO, First Release, #119, 31 July 2012. Available at: <http://www.ksh.hu/docs/eng/xftp/gyor/mun/emun21206.pdf> (25. 04. 2014).

⁷⁷ HCSO, Statisztikai Tükör: A társadalmi kirekesztődés nemzetközi összehasonlítására szolgáló indikátorok 2011 (Statistical Reflection: Laeken indicators, vol.6. no.72 (21 September 2012). Available at: <http://www.ksh.hu/docs/hun/xftp/idoszaki/laekindikator/laekindikator11.pdf> (26. 04. 2014).

⁷⁸ Ibid., Average provision of recipients of pensions, benefits, annuities and other provisions, January 2000–. Available at: http://www.ksh.hu/docs/eng/xstadat/xstadat_annual/i_fsp008.html (05. 05. 2014).

have a worse labour market profile than job seekers in general. Elderly people and undereducated groups are over-represented among them.⁷⁹

The income sources of poor people already reflect public work programs started under the previous Socialist government (2006-2010). The “Road to Work” program was based on the motto that the minimum living standards of the poor should not be maintained from public assistance, but from work.

A first public work program of the Fidesz government was introduced in 2009 and reformed in 2011. It has risen to the level of ideology: “we are building a society of work.” Accurate data, however, is very difficult to obtain, as though it was being concealed. It is a fact that the public work program which started with a budget of HUF 30 billion (EURO 100 million) now stands at HUF 180 billion (EURO 600 million).⁸⁰

In some regions of Hungary, indeed in many countries of Central and Eastern Europe, there are cases of unemployment that are multi-generational. It has become a serious social problem over the last 20 years of the welfare approach. Therefore, since taking office in 2010, the Fidesz Government has aimed to get Hungary’s unemployed back to work. A central part of the Government’s program of “Renewal” has been about reducing the huge welfare roles, reaching those who have been out of work for so long time.

The idea behind the program is to counter unemployment by offering local, public work opportunities and a wage to the unemployed instead of welfare checks. The program pays more than welfare, so there is some incentive in the system to choose public work over welfare. But the key is to guide the long-term unemployed back to some kind of productive work – and work habits, like getting up at a certain time, showing up at a workplace, talking to others during the day, but most importantly, feeling responsible and needed again.

One key measure is the system of incentives established by the Széll Kálmán Plan (in March 2011), the support of investments by micro-, small and medium-sized enterprises aimed at job creation as well as the start of the public work programme. Thereby from 2012 a new type of public employment system was introduced by which the state organizes temporary employment schemes for people who cannot profit from their physical and mental skills but are eager and able to work. Therefore – instead of welfare benefits – via the public employment system they can receive much higher wages.

The new public work programme (since 2012) basically aims to introduce a principle which focuses on the work – centered attitude of the economy, society and the state, and which can help boost employment rate, which is currently considered low compared to the EU. The system, which complements the social welfare system based on welfare considerations, better motivates people to seek a job and it will utilize existing support schemes.⁸¹ Via communal work projects large numbers of people can be offered employment in order to achieve goals which provide added value. The programme supports personalized communal work, by which public work employees create added value – in individual work phases, as part of a supply chain – for which demand from the central administration can be secured.⁸²

In fact, Hungary’s level of employment statistically climbed back at pre-crisis level⁸³ but this state was achieved via public work programs and an ever higher number of Hungarians working abroad.⁸⁴

⁷⁹ Luca Koltai: ‘Work instead of social benefit? Public works in Hungary’ Peer Review on “Activation measures in times of crisis: the role of public works” 2014 ec.europa.eu/social/BlobServlet?docId=10515...en.

⁸⁰ <http://budapestbeacon.com/public-policy/on-poverty-in-hungary-and-the-formation-of-a-penalistic-state/>.

⁸¹ One example is the channelling of EU funds to public employment programmes (including communal work) and investing available resources in self-sustaining projects.

⁸² <http://www.kormany.hu/download/6/67/90000/Employment%20and%20labour%20market%20conditions%20are%20favourable%20in%20Hungary.pdf> (27. 04. 2014).

⁸³ There were 4.053 million people employed in Hungary in the December 2013-February 2014 period, the Central Statistical Office (KSH) has reported on Friday. The employment rate in the 1574 age group rose to a new ten-year high (53.2%), whereas the unemployment rate dropped further to 8.6%. The favourable set of figures is no surprise in light of the fact that as a result of the winter public work scheme there were 165,000 more fostered workers in January than in the same month of 2013.

⁸⁴ The numbers of those working abroad are also rising. There are about 100,000 of them currently.

Employment remains under pre-crisis levels in the private sector,⁸⁵ although corporates have not just cut their headcount, but also reduced working hours in order to avoid layoffs.⁸⁶

The spectacular improvement of labour market readings, unfortunately, does not reflect a rapid amelioration of Hungary's economic health, rather the impact of the winter public works. Season jobs, public work schemes generally wind down in the winter season, pushing employment figures lower and the rate of unemployment higher. In the previous years the unemployment rate usually jumped to 11-12% towards year-end. The government, however, had no intention to see a similar leap, therefore introduced the winter season in public work schemes for the Nov13 2013-Apr14 2014 period, with the goal of hiring 200,000 unemployed. As a result, instead of the 20,000-30,000 fostered workers hired in the previous years in 2013 there are 200,000 of them. As a result, in January 2014 alone, there were 165,000 more of them than in the same month of 2013.⁸⁷

The public work program has its critics, of course. It has been maligned as some kind of forced labour or "harsh" workfare. It is true that the jobs do not pay high wages and the work is often menial labour. But the point of the program is to break the cycle of long-term welfare dependency and restore some sense of self-esteem. The basic stake is which is better: collecting a welfare check or getting paid for doing work.⁸⁸

5. *Assessment of the future of social security rights in light of the Fundamental Law (Constitution)*

Pursuant to the Constitution of the Republic, "citizens of the Republic of Hungary have the right to social security". The new Fundamental Law states that "Hungary shall strive to provide social security to all of its citizens". This notion derives from the "liberal concept of minimal state".

The Constitution of the Republic insisted on fundamental rights – among them social rights – being unconditional and unrestrictable; whereas the new Fundamental Law creates a new order: the exercise (the possibility of the exercise) of fundamental rights must be deserved.⁸⁹

The new Fundamental Law parallels human rights with the – unspecified – obligations, and in some cases (particularly in the field of the so-called social rights) makes the assurance of constitutional rights the duty of the state only if the citizens fulfil certain obligations to be designated by the law or by the authorities in return. This contradicts the customary definition of human rights, making it relative what the state had to do – or should have done – so far unconditionally and without reservations. This is a significant change because in this way the new Fundamental Law differs not only from the fundamental rights, human rights dogmatics of most "democratic" states but is also against the international norms which – in principle – constitute part of the effective law in Hungary today.⁹⁰

The Fundamental Law contains a new, previously unknown element, too. As concerns the social system, the following provision is included in the Fundamental Law: The nature and extent of social measures may be determined by law in accordance with the usefulness to the community of the beneficiary's activity. Thus merit as a condition is included besides need, which represents a significant difference from the previously known principle of solidarity, and which at the same time provides a constitutional basis for the introduction of public work.

⁸⁵ The National Bank of Hungary (MNB) sees the rate of unemployment around 10% both in 2013 and 2014, because the rising labour supply cannot be taken up by the market.

⁸⁶ http://www.bbj.hu/economy/public-work-programs-jobs-abroad-drive-down-unemployment_69816.

⁸⁷ http://www.portfolio.hu/en/economy/public_works_shore_up_hungarys_employment_figures.27568.html.

⁸⁸ On poverty in Hungary and the formation of a penalistic state by Éva Nagy. <http://budapestbeacon.com/public-policy/on-poverty-in-hungary-and-the-formation-of-a-penalistic-state/> (March 27, 2014).

⁸⁹ Tamás Gáspár Miklós: Az új alkotmány történelmi jelentősége. http://nol.hu/belfold/20110329-az_uj_alkotmany_tortenelmi_jelentosege-1024881 (20. 03. 2014).

⁹⁰ It is important to point out that in the past years there was no textual difference between the Constitution of the Republic and the international, and within this the European, "legal texts" on fundamental rights.

Thus the new Fundamental Law makes all the social benefits conditional on the criterion of “usefulness to the community”. This is problematic because in accordance with the Fundamental Law employment is no longer the obligation of the state, whereas working is the citizens’ obligation rather than their right. Based on this, the Fundamental Law makes a moral and legal distinction between persons who produce exchange value (capital holders and employees) and “unproductive” persons who are excluded from production (unemployed persons, pensioners, students, members of the precariat – that is persons who work irregularly, need assistance from time to time and live from one day to the other (sick persons, disabled persons, seasonal workers, persons doing domestic work, etc.). This approach may foreshadow a new form of discrimination.⁹¹

This is what the preamble says about the social system: “We hold that we have a general duty to help the vulnerable and the poor”. Earlier the 1989 Constitution of the Republic established social rights and state obligations: “Citizens of the Republic of Hungary have the right to social security;⁹² they are entitled to the support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own.” The Fundamental Law, however, states a state aim only: “Hungary shall strive to provide social security to all of its citizens. Every Hungarian citizen shall be entitled to statutory subsidies for maternity, illness, disability, widowhood, orphanage and unemployment not caused by his or her own actions.” From the Fundamental Law itself no state obligation ensues, the state is free to decide whether it will undertake statutory obligations for certain disadvantaged situations, and if so, what kind. While the 1989 Constitution stated: “The Republic of Hungary shall implement the right to social support through the social insurance system and the system of social institutions”,⁹³ according to the Fundamental Law: “Hungary shall implement social security for the persons listed in Paragraph (1) and other people in need through a system of social institutions and measures.” Thus social insurance, that is the system built on the institutional relationship between contributions and benefits, which gives rise to enforceable rights in return for contributions, has been removed from the Fundamental Law.

The outcome of this change could cause a fundamental modification in the Hungarian social security system. Basically, social insurance is the state guarantee for receiving healthcare services and pension in return for the contributions paid. The basic principle of the system is proportionality: who earns more, pays more – for example – into the pension fund and will receive a higher pension.⁹⁴ However, the system can operate only if politics does not interfere basically into the use and distribution of the contributions paid. Moreover, social insurance is the compulsory common risk of the insured, which was based on the principle of solidarity and not on the principle of equivalence or merit.⁹⁵

In the new system the state can decide freely what to use the contributions for (it is absolutely true for the social tax which is paid by employers). Earlier the employers paid the social insurance contributions into separate social insurance funds (pension and health insurance funds) for each of their employees. In the central budget this money – in principle – could not be used for any other purposes. The current government changed the employers’ contribution into social tax, which has to be paid into the central budget.⁹⁶ It is important to note that it is not only the name which has changed. The government is free to dispose over the collected tax, it is not obliged to spend it on employees’ social benefits. Naturally, it can be used for that purpose, too.

⁹¹ Juhász Gábor: A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben, *Fundamentum* 2012. évi 1. szám. <http://www.fundamentum.hu/sites/default/files/12-1-02.pdf> (14. 03. 2014).

⁹² A great achievement of 20th-century Europe was the establishment of the social system, which provided security and, based on this, dignity to those persons – the elderly, children, sick people, the disabled and the unemployed – who were unable to provide for their own living. In this way they were not dependent on their wage-earning family members.

⁹³ Trócsányi László szerk.: *A mi alkotmányunk*, Complex Kiadó, Budapest, 2006 p. pp. 483-484.

⁹⁴ Czucz Ottó – Hajdú József – Pogány Magdolna: *Szociális Jog II*. Unio Kiadó, Budapest, 2005 pp. 152-165.

⁹⁵ <http://nyugdijonline.hu> (15. 04. 2014).

⁹⁶ Dr. Török Györgyi: Társadalombiztosítási járulék helyett szociális hozzájárulási adó. <http://www.munkajog.hu/szaklap/hr-munkajog/2012-9/tarsadalombiztositasi-jarulek-helyett-szocialis-hozzajarulasi-ado> (17. 04. 2014).

In addition, the Fundamental Law states: “Every person shall be responsible for him or herself, and shall be obliged to contribute to the performance of state and community tasks to the best of his or her abilities and potential.” This provision encourage the supplementary private pension savings.⁹⁷ The problem is that the majority of Hungarian population has no private savings because the extent of deductions to be used for social expenditure did not decrease.

Furthermore, the 1989 Constitution stated: “Everyone has the right to equal compensation for equal work, without any discrimination whatsoever”, and also that “all persons who work have the right to an income that corresponds to the amount and quality of work they carry out”.⁹⁸ The new Fundamental Law makes no mention of compensation whatsoever, it only states that: “every employee shall have the right to working conditions which respect his or her health, safety and dignity.”

Finally, I would like to deal with the institutional guarantees of the Fundamental law. Regarding the institutional guarantees, the most spectacular change in the field of state organisation seems to be that the examination of individual complaints became the characteristic of the Constitutional Court instead of the posterior law review. According to the Fundamental Law, not only unconstitutional laws but also unconstitutional jurisdiction can be reviewed in the competence of constitutional complaint. Necessarily, the importance of abstract posterior law review decreases and *actio popularis* terminates.⁹⁹

The Fundamental Law has created a clear hierarchy in the interpretation of the content of human rights. Consequently, the requirements of human rights will emerge in ordinary judiciary. As the Constitutional Court reviews the constitutionality of the particular decisions, judges, if they do not want their decisions annulled, will consider the aspects of human rights. Furthermore, these requirements will also turn up in the administration, as administrative decisions are reviewed by courts. Accordingly, the mechanism of constitutional protection seems to strengthen. However, there are some shades making lawyers less optimistic. Namely, in 2010 the Parliament, referring to a “state of economic crisis”, amended the Fundamental Law and the Act on the Constitutional Court in order to restrict the constitutional review of financial laws.¹⁰⁰ This is a key issue for protecting social rights, because they are significantly dependent on financial circumstances. In a theoretical aspect, this regulation is controversial; it infringes formal constitutionality: without judicial review there is no guarantee that the regulations of the Constitution on financial issues prevail in practice.^{101, 102}

Brief summary

The new Hungarian Fundamental Law, in keeping with the spirit of the Constitutional Court decisions, treats social security not as a right, but as a state goal. The second sentence of the Paragraph (1) of Article XIX is virtually a word-by-word repetition of the second phrase of Article 70/E of 1989 Constitution, but while this clearly only lists examples of those entitled to receive assistance, the new text can be interpreted as an exhaustive list of the entitled persons, from which it can be concluded, for example, that the state only needs to concern itself with creating social security protection for the persons included in the list¹⁰³ (and not people unemployed through their own fault, for example). Another

⁹⁷ <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf>.

⁹⁸ Trócsányi László szerk.: *A mi alkotmányunk*, Complex Kiadó, Budapest, 2006 p. pp. 483-484.

⁹⁹ Lóránt Csink– Balázs Schanda: *The Constitutional Court*. In: *The Basic Law of Hungary – A First Commentary*. Clarus, Dublin, 2012. p. 162.

¹⁰⁰ <http://www.ugyvedvilag.hu/rovatok/publikaciok/tarsadalmi-felelosseg-es-a-tulajdonhoz-valo-jog> (25. 04. 2014).

¹⁰¹ Although Paragraph (4) of Article 37 of the Fundamental Law states that the restriction terminates when the state debt goes under the 50% of the GDP, regarding the state of the finances, it is unlikely to happen in the near future.

¹⁰² Lóránt Csink: *Human rights in the sense of the new basic law* p. 5-6. http://www.ajk.elte.hu/file/annales_2012_06_Csink.pdf (26. 04. 2014).

¹⁰³ Every Hungarian citizen shall be entitled to assistance in the case of maternity, illness, disability, handicap, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act.

change is reflected in the fact that the assistance to be provided is no longer of the extent “necessary for subsistence”, but just the extent “determined by law”.

Furthermore, the word of social insurance has been completely removed from among the means of social security, and only the system of social institutions and measures remained in the text. The Fundamental Law contains regulations which aim to restore balance by reducing social security, public welfare and public services. These provisions aim to ensure that there are no constitutional barriers to introduction measures to make benefits dependent on the performance of work or other activity regarded as socially beneficial, in keeping with the new social-policy approach.

The text rules out the reinstatement of the compulsory private pension funds pillar, with the aim of this being to make it impossible, due to a conflict with the Fundamental Law. According to the new provision of the Fundamental Law the livelihood for the elderly persons will be provided by a two-pillars pension system: 1) a general state pension system based on social solidarity and 2) by allowing for the operation of voluntarily established social institutions.