

## 25 “LAND OF CONFUSION”

### *Social (Fundamental) Rights and the Provisions of the Fundamental Law in Light of the Practice of the Constitutional Court of Hungary*

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#### **Keywords**

Constitutional Court of Hungary, social rights as fundamental rights, right to social security, state goals, social security system of Hungary

#### **Abstract**

Modern welfare democracies developed different approaches to social rights. This paper briefly reviews the different models for the institutionalization of social rights as fundamental rights in modern democracies. In Hungary, the approach to social security has been significantly transformed by the Fundamental Law. For this reason, the paper reviews the approach of the Hungarian constitutional system to the right to social security between 1989 and 2011 and introduces the current position of social rights in the Hungarian legal system. This is done through and assessment of the provisions of the Fundamental Law and the current case-law of the Constitutional Court of Hungary.

#### 25.1 INTRODUCTION

The majority of the Hungarian population is affected by social rights: Hungarians receive lots of social benefits and services during their life. Therefore, social expenditures are high in Hungary, amounting to approximately 6000 billion HUF per annum.<sup>1</sup> The approach to social security has been significantly transformed by the Fundamental Law of Hungary. The entire Hungarian population has been affected by these changes and by the interpretation of the relevant rules (especially by the Constitutional Court), therefore, it is worth taking a look at the new rules. Firstly, I analyze the different interpretations and approaches to social rights. Since the transformation of the Hungarian social security system cannot be understood without a brief excursion to the approach reflected in the Hungarian con-

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1 Marianna Fazekas, 'Előszó', in István Hoffman & Gréta Mattenheimer (eds.), *Nagykommentár a szociális törvényhez*, Wolters Kluwer, Budapest, 2016, p. 13.

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stitutional system between 1989 and 2011, I will touch upon the relevant rules of this period as well.

## 25.2 SOCIAL RIGHTS – APPROACHES AND INTERPRETATIONS

Different approaches to social rights have been developed in modern welfare democracies. One approach states that considering social rights as fundamental rights is a feature of post-socialist states.<sup>2</sup> It is therefore important to first review the main approaches to the interpretation and role of social rights.

### 25.2.1 *Approaches to, and Institutionalization of Social Rights*

A simple assessment of the various definitions and interpretations of social rights could be the subject of an entire monograph. It should be highlighted, that social rights have been re-institutionalized as fundamental rights by the vast majority of modern states.<sup>3</sup> Balázs Krémer noted that modern countries may be considered as welfare states, however their approach to welfare services and the role of the state are relatively different.<sup>4</sup>

There are different models for the institutionalization of social rights as fundamental rights in modern democracies. The first approach is an indirect institutionalization which is based on the institutional protection of fundamental rights. Social rights are normally not defined as fundamental rights by national constitutions, but they are institutionalized through the practice of constitutional courts and supreme courts. In this model social rights are considered to be part of the institutional protection of other fundamental rights which are enumerated by the constitutions. The basic rights from which social rights are derived are first and foremost the right to life and human dignity, the prohibition of discrimination and the right to equal treatment, but other fundamental rights (for example the right to property) may also serve as a basis for social rights. This approach first emerged in the US. Social rights are not defined and regulated by the US Constitution and its amendments; nevertheless, these rights exist. The interpretation of these fundamental rights is based on the practice of the US Supreme Court. This practice is mainly based on the prohibition of discrimination and the concept of social justice developed in the Supreme

2 András Jakab, *Az új Alaptörvény keletkezése és gyakorlati következményei*, HVG-ORAC, Budapest, 2011, pp. 19-22.

3 L. D. M. Davis, 'Socio-Economic Rights', in Michel Rosenfeld & András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, pp. 1021-1023.

4 Balázs Krémer, *Bevezetés a szociálpolitikába*, Napvilág, Budapest, 2009, pp. 103-120.

Court judgments forms the core of social rights guaranteed in the US.<sup>5</sup> Constitutional guarantees of social rights based on this approach are weaker, since these rights are not directly based on a provision of the (national) constitution, but on the practice and interpretation of the constitutional courts and supreme courts. Hence, these rights may be changed without amending the constitution.<sup>6</sup>

The second approach means the institutionalization of social rights as fundamental rights by the constitutions. Social rights are second-generation human rights, as such, the evolution of these rights begun at the end of the 19th century. Firstly, the social security was linked to the equality before the law and to the rule of law. It was suggested by several German scholars that the aforementioned principles should be guaranteed through the vehicle of social security benefits provided by the state. This concept was influenced by the Bismarckian social security reforms in late 19th century Germany.<sup>7</sup> The 'Golden Age' of social rights commenced following World War II, with the development of welfare states. The actionability of these rights defined by the national constitutions is controversial, nevertheless, the obligation of the state to provide welfare services is uncontested.<sup>8</sup> The principle of the social welfare state – supplementing the principles of democracy and the rule of law – is enshrined in the national constitutions of several European countries.<sup>9</sup>

The characteristics of this model may be best illustrated through the German approach and interpretation. This is built on the Bismarckian social model, namely, on the concept of the 'social citizen' and on the institutionalization of the welfare (social security) system.<sup>10</sup> The Bismarckian social model relies on social insurance, offering solid protection for social contribution payments guaranteed under the German constitution and the judgments of the Federal Constitutional Court (*Bundesverfassungsgericht*). The latter protection derives

5 Charles R. Epp, 'Courts and the Rights Revolution', in Kermit L. Hall & Kevin T. McGuire (eds.), *The Judicial Branch (Institutions of the American Democracy)*, Oxford University Press, Oxford, 2005, pp. 350-365.

6 The practice of the US Supreme Court is a vivid example for this phenomenon, transformed several times in the course of the last decades. The interpretation of these rights has changed flexibly. The constitutional background for these transformations was that the principle *stare decisis* could not be applied to judgments of the Supreme Court. Thus, after the social rights (social justice) revolution of the 1960s the accessibility and the constitutional guarantees for welfare benefits and services changed in the 1970s. A good example for this transformation is the *Califano v. Westcott* judgment [443 U.S. 76 (1979)] limiting access to family benefits. Marisa Chappel, *The War on Welfare. Family, Poverty and Politics in Modern America*, University of Pennsylvania Press, Philadelphia, 2010, p. 156.

7 Eberhard Eichenhofer, *Soziale Menschenrechte im Völker-, europäischen und deutschen Recht*, Verlag Mohr Siebeck, Tübingen, 2012, pp. 53-56.

8 Davis 2012, pp. 1025-1026.

9 Article 20(1) of the German Federal Constitution (*Grundgesetz*), Article 1 of the French Constitution (passed in 1958), Article 1(1) of the Spanish constitution (passed in 1978), Article 2 of the Portuguese constitution (passed in 1976).

10 Thomas Meyer & Maren Eichhart, 'Sozialstaat', in Thomas Meyer (ed.), *Theorie der Sozialen Demokratie*. VS Verlag für Sozialwissenschaften, Wiesbaden, 2011, pp. 319-321.

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from the right to property.<sup>11</sup> It is clear, that the constitutional approach to social rights is strongly influenced by the social model of the given country. This will be the subject of the next chapter.

### 25.2.2 *Approach to Social Rights and the Welfare Model Followed by the Country*

As of yet, social law only has a brief history, because it evolved in European countries in the second half of the 19th century. Consequently, its legal dogmatics are still in flux and are strongly impacted by the welfare systems. The main characteristics of these systems will be analyzed in this article. The following overview of the different models is based on the classification of Gøsta Esping-Andersen.<sup>12</sup>

The welfare model of common law countries is considered by Esping-Andersen to be a liberal one. This model is followed primarily by the US and Ireland, but several characteristics of the model may be observed in other common law countries. The state plays a limited role in this model, which is based on self-care. Here, state functions as the 'lender of last resort', intervening only where self-care is not possible and the beneficiary is worth helping.<sup>13</sup> As I mentioned above, social rights are not directly enshrined in the national constitutions or constitutional rules, these rights are derived from the prohibition of discrimination and the equality before law. The right to equal opportunities is gleaned from these two fundamental rights. The 'Third Way' of the British Labor party is based on this approach. In this model, the state operates as the guarantor of equal opportunities: services are provided by the state through which the social opportunities are equalized. Hence, this approach focuses on services and not benefits.<sup>14</sup> Another approach based on the Anglo-American common law (liberal) welfare model is the 'Workfare State'. This approach hinges on the merit of the beneficiary. The Workfare State claims that the work has a priority, and it focuses more on sanctions where the beneficiary who is able to work chooses not to participate in the labor market.<sup>15</sup> The different welfare systems have been impacted

11 Eberhard Eichenhofer & Constanze Janda, *Klausenkurs im Sozialrecht. Ein Fallbuch*, C.F. Müller, Heidelberg, 2014, pp. 5-9.

12 On the aspects of classification see Gøsta Esping-Andersen, 'Towards the Good Society, Once Again?', in Gøsta Esping-Andersen (ed.), *Why We Need a New Welfare State?* Oxford University Press, Oxford, 2002, pp. 13-18.

13 Id. p. 15.

14 Dagmar Schiek, 'Re-Embedding Economic and Social Constitutionalism: Normative Perspectives for the EU', in Dagmar Schiek et al. (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge University Press, Cambridge, 2011, p. 30.

15 Jamie Peck, 'Local Discipline: Making Space for the "Workfare State"', in Paul Edwards & Tony Elger (eds.), *The Global Economy, National States and the Regulation of Labour*, Mansell, London-New York, 1999, pp. 64-72; Marianna Nagy, 'A közszolgáltatás-szervezés intézmény- és elméletitörténete', in Marianna Fazekas

significantly by the Anglo-American (common law) approach in the last decades, and in particular, by the principle of self-care. For example, in the continental and Nordic systems social services are regulated by private law and funded through private resources (e.g. private insurance). This tendency can even be observed in the Hungarian legal system.<sup>16</sup>

The second major approach Esping-Andersen identifies is what he refers to as the conservative approach, a system based on the Bismarckian welfare model. In this model the social welfare system is founded on (mandatory) social insurance, as such, social security is governed by the state and public law. Although solidarity is a crucial principle in these systems, the social welfare is nevertheless based on an insurance system. Here, the constitutional guarantees of social rights are linked to the protection of the right to property. It should be noted that the constitutional notion of property is construed more broadly than the concept of property under private law.<sup>17</sup>

The third model distinguished by Esping-Andersen is the Nordic welfare model. The model may be described on the basis of the Swedish welfare system. It foresees universal services and benefits protected by the national constitutions<sup>18</sup> Principles of insurance and self-care are a part of this model however, they are only supplementary principles. While the system is based universal benefits, the main aim of these services and benefits is to encourage employment.<sup>19</sup>

A specific model has evolved in the Southern European countries. It is characterized by a tension between the applicable provisions and the actual characteristics of the welfare system. This tension developed in the wake of the Italian constitutional rules passed in 1946, and the same problems emerged in Greece, Portugal and Spain. These countries were formerly governed by right-wing authoritarian governments. Their political system was transformed during the 1970s and the basic – and in part, individually enforceable – social rights as fundamental rights were determined by and enshrined in the new constitutions of the Democratic transition.<sup>20</sup> The constitutional rules were based on the Nordic model, yet the economic and social structures were different in the Southern European countries. Traditional – family and small community-based – social care is still prevalent

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(ed.), *Közigazgatási jog. Általános rész II. A közszolgáltatások szervezése*, ELTE Eötvös, Budapest, 2017, pp. 47-48.

16 Balázs Tókey, *Az egészségbiztosítási szerződés*, ELTE Eötvös, Budapest, 2015, pp. 12-16.

17 Ferdinand Kirchhof, 'Finanzwesen der Sozialversicherung', in Josef Isensee & Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band V Rechtsquellen, Organisation, Finanzen*, C. F. Müller, Heidelberg, 2007, pp. 1445-1459.

18 E.g. Article 2(2) of the first part of the Swedish Constitution (The Instrument of Government) states that "[t]he personal, economic and cultural welfare of the individual shall be fundamental aims of public activity. In particular, the public institutions shall secure the right to employment, housing and education, and shall promote social care and social security, as well as favorable conditions for good health."

19 Esping-Andersen 2002, p. 14.

20 Article 47 of the Spanish constitution states that Spanish citizens have the right to housing, and Article 50 ensures the right to old-age pension.

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in these countries, and the Bismarckian model exerts a significant influence. A special feature of the social insurance system of these countries is that the principle of solidarity plays a very important role in the insurance systems, meaning that the social insurance model is of an egalitarian nature.<sup>21</sup> Universal services only play a supplementary role in the actual functioning of systems: for example health care is based on a universal model in Spain.<sup>22</sup>

In a similar vein, a special model emerged in the Eastern and Central European – post-socialist – countries during the democratic transition. After the fall of communist regimes social welfare systems faced major challenges which had to be resolved within a short timeframe. Welfare services and social law had to be renewed at short notice, because the former communist model was based on the provider role of state-owned employers' services and the social insurance financed by the state. These systems were mainly based on the Bismarckian model – which was adopted by these countries before World War II – but several ad hoc solutions were also introduced which were based on different models of welfare services. Following the economic crises of 2008/2009, the welfare model of these countries was strongly influenced by the common law model, especially by the principle of the self-care and the concept of Workfare State.

### 25.3 SOCIAL RIGHTS IN THE CONSTITUTION OF HUNGARIAN DEMOCRATIC TRANSITION (1989-2010)

As an amendment to the former communist constitution, Act XXXI of 1989 dramatically transformed the chapter on the fundamental rights in the Constitution. A new article was incorporated into that chapter: the article on the right to social security. Although this right was regulated by the Constitution, the article was a short one. Therefore, its interpretation by the Constitutional Court was highly important. I now turn to the constitutional rules governing social rights and the new approach to social security.

#### 25.3.1 *The Constitutional Reform of 1989/90 and the Evolution of Social Law*

In the course of the drafting of the constitution during the 1989/90 democratic transition, the issue of social fundamental rights was a highly controversial one and could not be

21 Esping-Andersen 2002, pp. 18-19; Martin Rhodes, 'Southern European Welfare States: Identity, Problems and Prospects for Reform', in Martin Rhodes (ed.), *Southern European Welfare States. Between Crisis and Reform*, Routledge, London-New York, 1997, pp. 2-8.

22 István Hoffman, 'A területi közszolgáltatások szabályozási modelljei az egészségügyben', in Tamás M. Horváth (ed.), *Kilengések. Közszolgáltatási változások*, Dialóg Campus, Budapest-Pécs, 2013, pp. 199-201.

decided through the codification of the amendment to the constitution. This was owed firstly to the fact that the procedure was strongly impacted by the welfare reform of the former Communist state, especially by the welfare reforms of the late 1960s to 1980s. These reforms brought about universal services for Hungarian citizens. Secondly, the codification of the new constitutional rules was influenced by (West-)German constitutionalism, in accordance with which a wide range of social rights were guaranteed and protected. Therefore, a very specific regulation was passed. First of all, the preamble of the amended Constitution stated that the aim of the newly formed Hungarian Republic is to build a social market economy. The amended Constitution contained two sections which were directly linked to social rights. Article 70/D stipulated the right to (physical and mental) health. Article 70/D(2) foresaw that this right be implemented through the welfare system.

The *sedes materiae* of social fundamental rights was Article 70/E of the amended constitution. Article 70/E(1) provided that

“[c]itizens of the Republic of Hungary have the right to social security; 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.”

Based on the above, the right to social security was defined as a right to welfare services. These services were to be provided in the case of several, constitutionally determined social risks. The beneficiaries of this fundamental right were Hungarian citizens thus, foreigners were not covered by the provision. The right to social security as a right to *services* reinforced by Article 70/E(2), which stated that “[t]he Republic of Hungary shall implement the right to social support through the social security system and the system of social institutions.” Hence, the Constitution provided that the social welfare system shall have a social insurance subsystem.

There were also other Articles of the Constitution related to social rights. It should be highlighted, that Articles 16 and 17 – not as individual rights but as state goals<sup>23</sup> – guarantee the protection of the interests of young people and support for those in need “through a wide range of social measures”. It was important that Article 70/A declared the prohibition of discrimination and the possibility for equal opportunities actions. A crucial element of Hungarian constitutional regulation was the right to life and human dignity, guaranteed by Article 54.

There was a tension inherent in the constitutional rules of the democratic transition. The preamble of the Constitution and Articles 16 and 17 were based on the concept of the social welfare state, on the concept of social rule of law state (*sozialer Rechtsstaat*). At the

23 János Sári, *Alkotmánytan II. Alapjogok*, Osiris, Budapest, 2000, p. 236.

same time, it was clear, that individually enforceable rights could be hardly derived from Article 70/E of the amended Constitution.<sup>24</sup> Therefore, the interpretation of the Constitutional Court was required to define the nature of Hungarian social rights.

### 25.3.2 *The Interpretation of the Constitutional Court*

As I mentioned above, there was a tension within the Constitutional rules that was waiting to be resolved. Early on, the Constitutional Court was faced with this problem. It stated in 1990 that the provision of preamble declaring social market economy cannot be construed to give rise to individually enforceable rights, and Hungary cannot be considered a *sozialer Rechtsstaat*.<sup>25</sup> This judgment was a landmark decision because it was consistently stated by the Constitutional Court, that the principle of social welfare state is not guaranteed by the Constitution. Therefore, this concept cannot be invoked independently. Hence, it was established that the right to social security declared under Article 70/E was not an individually enforceable (actionable) right. The existence of a – functional – state welfare system, including a social insurance system was guaranteed by Article 70/E.<sup>26</sup>

In the state socialist period – partly because of the full employment guaranteed by the socialist state and partly because of the ideology-driven denial of the existence of poverty<sup>27</sup> – the social insurance system was organized by the government. The first social reforms of the democratic transition focused on the social insurance model. The landmark decisions from the early jurisprudence (1990-1994) of the Constitutional Court were related to these provisions. One of these landmark judgments was Decision No. 26/1993. (IV. 29.) AB, which stated that pensions are purchased services, thus, social rights connected to pensions are directly linked to the protection of the right to property. Although it is a purchased service, the pension system is partly based on the principle of solidarity, therefore, it was not unconstitutional that the growth of higher pensions was smaller. At the same time, the Constitutional Court emphasized that the nominal amount of pensions cannot be decreased.<sup>28</sup> After economic stabilization in 1995 (carried out by the so-called ‘Bokros package’) the Constitutional Court stated that the amount of several other social insurance benefits (e.g. the sick pay) may be decreased by the legislature. Thus, the amount of the benefits was not been guaranteed by paying contribution, but it is a constitutional

24 Gábor Juhász, ‘70/E. § [A szociális biztonsághoz való jog]’, in András Jakab (ed.), *Az Alkotmány kommentárja II.*, Századvég, Budapest, 2009, pp. 2581-2583.

25 Decision No. 772/B/1990. AB, ABH 1991, 519.

26 Decision No. 32/1991. (VI. 6.) AB, ABH 1991, 146.

27 Krémer 2009, pp. 117-129.

28 Sári 2000, pp. 202-204.



requirement, that the amount of the benefit should be proportional to the paid contribution.<sup>29</sup>

The same decision contained important findings on the constitutional guarantees of universal benefits. Before 1990, family allowance and maternity allowance were deemed to be social insurance benefits. The system was transformed by Act XXV of 1990 which transformed the nature of these benefits, which became universal benefits. The reform bill of 1995 changed the system yet again, transforming them into means-tested benefits. The same decision of the Constitutional Court stated that the principle of the rule of law must be observed by these reforms, meaning that an adequate period for preparing for these changes is required. This was to be the longest interval between adoption and entry into force of the law as foreseen under Hungarian private law, 300 days. The next landmark decision on universal benefits was made following the economic crisis of 2008/2009. The judgment found the taxation of family allowance to be unconstitutional, because the relevant regulation was not sufficiently clear amounting to a violation of the principle of the rule of law.<sup>30</sup>

It was clearly stated by the Constitutional Court, that the right to social security gave rise to the requirement of a functional welfare system. Therefore, the constitutional basis for the means-tested benefit was primarily the right to life and human dignity, forming part of the institutional protection of these core fundamental rights.<sup>31</sup> This approach was also applied in Decision No. 42/2000. (XI. 18.) AB. The Constitutional Court declared that the right to housing could not be derived from Article 70/E of the Constitution. However, there is a constitutional requirement that a welfare system should be operated which provides accommodation for homeless people to prevent an immediate threat to life.

The Constitutional Court also resolved the tension within the regulation of the right to social protection. It stated that the main requirement that can be derived from the Constitution is to organize a functional social welfare system including a social insurance system. The social insurance system is protected under the right to property, yet the principle of solidarity should also be applied when carrying out the constitutional control of the legislation. In addition, the regulation of universal and means-tested benefits must comply with principle of rule of law. The basis for means-tested benefits is the institutional protection of the right to life and human dignity, as a constitutional minimum of the welfare system.

This approach was confirmed in the beginning of the 2000s but has been radically transformed by with the entry into force of the new Hungarian constitution, the Fundamental Law.

29 Decision No. 56/1995. (IX. 15.) AB, ABH 1995, 260.

30 Decision No. 127/2009. (XII. 17.) AB, ABH 2009, 1056.

31 Decision No. 32/1998. (VI. 25.) AB, ABH 1998, 251.

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## 25.4 TRANSFORMATION OF THE RIGHT TO SOCIAL SECURITY BY THE FUNDAMENTAL LAW OF HUNGARY

### 25.4.1 *The New Framework of Hungarian Social Policy*

The framework of Hungarian social policy was radically transformed after 2010. However, the roots of this change go back to 2008 and the reforms were greatly influenced by the common law approach to the welfare system. This transformation is particularly conspicuous in the field of means-tested benefits. The principle of merit became acquired an important role, when the labor test of the means-tested benefit was strengthened.<sup>32</sup> It was not only the means-tested benefits that were impacted by the reforms: restrictions emerged in the social insurance system as well. The constitutional framework of this social policy reform was created through the transformation of the relevant provisions of the Fundamental Law, since these reforms would not have been in compliance with the earlier practice of the Constitutional Court.

It is very interesting that as a tool for accelerating social reforms was inserted into the constitution after the publication but before the entry into force of the Fundamental Law: Act LXI of 2011 inserted a new paragraph 3 in Article 70/E of the Constitution. The paragraph set forth that the right to pension is constitutionally guaranteed only for those who have reached the retirement age applicable to them. The new provision also stated that the amount of the pension due to those who have not yet reached the retirement age may be reduced and the pension could be transformed into universal or means-tested social benefits.

This amendment was the constitutional basis for the social legislation of 2011. The new social legislation entered into force already in 2011, while the Fundamental Law only entered into force on 1 January 2012. Consequently, the application of the approach of Decision No. 26/1993. (IV. 29.) AB and Decision No. 56/1995. (IX. 15.) AB was directly excluded by the amended rules of the (old) Constitution. The amount of several special pensions (*e.g.* the special pensions for soldiers, police officer *etc.*) were thus reduced, and the rehabilitation benefit and the disability pension of those who had not yet reached the retirement age applicable to them were transformed into a special, partly means-tested social benefit: the benefit available to those with altered work ability.

The main elements of the transformation were foreshadowed by these changes: the decreasing role of the social insurance system and the diminishing guarantees of social security. We can conclude that the common law approach greatly influenced the system.

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32 See in detail István Hoffman, 'Az önkormányzati segélyezési rendszer változásai Magyarországon – különös tekintettel a 2015-ös reformokra', *Közjogi Szemle*, 2016/1, pp. 21-23.

#### 25.4.2 *State Goal – Instead of a Fundamental Right: The Transformation of the Fundamental Law's Provisions*

The social security paradigm was transformed by Article XIX of the Fundamental Law, the *sedes materiae* of the constitutional regulation of social rights. The Fundamental Law declares that "Hungary shall strive to provide social security to all of its citizens". Consequently, social security is not a fundamental right, but a state goal. Hungary will only aspire to provide social security, which is not guaranteed by the constitutional rules. The definition of social risks has also been partly amended: a new element in the list is disability. Benefits for persons living with a disability were formerly provided by the state: the common framework for these benefits is Act XXVI of 1998 on the Rights and Equal Opportunities of Persons with Disabilities, and the benefits for children with disabilities are regulated by Act LXXXIV of 1998 on Family Support. Another new risk was maternity, which used to form a part of sickness risks. Hence, the new laws shaped a novel constitutional framework for social security, in particular with the new concept of social rights deemed to be a state goal instead of a fundamental right. As a consequence, the earlier jurisprudence of the Constitutional Court had to be revised, as well. This revision however, was not a full one, because the earlier landmark decisions of the Constitutional Court were not only based on the section on the right to social protection but on other fundamental rights as well, for example on the right to life and human dignity and on the protection of the right to property. Therefore, several elements of the earlier approach could be applied following the entry into force of the Fundamental Law.

A more important transformation was carried out by Article XIX(2). The new provision does not contain rules on the social insurance system. This may be interpreted in two ways: firstly, that the social insurance system was – incorrectly – interpreted by the constitutional regulation as a 'social institution'. The alternative is the Fundamental Law does now guarantee an independent social insurance (sub)system.<sup>33</sup> It is clear that the constitutional rules offer greater leeway to transform the social system, and the former Bismarckian-type social system may also be transformed. Social insurance benefits may be transformed into means-tested (or universal) benefits and the proportionality of annuity and contribution may also be given a different interpretation by the legislature. Although the legislator enjoys great freedom in defining social benefits, the protection of the right to property has remained the final boundary for the legislation. As mentioned above, several social insurance benefits were transformed into partly means-tested benefits, for example the former disability pensions. Similarly, the balance of benefits and paid contributions has been changed significantly due to the reform of Act IV of 1991 on job assistance and

33 Gábor Juhász, 'Államcélok, paradigmaváltás és aktuálpolitikai alkotmányozás. Szociális jogok védelme az Alaptörvényben', *Esély*, 2015/1, pp. 14-15.

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unemployment benefits. The duration of the unemployment benefit was radically curtailed (to 90 days), its maximum amount reduced significantly. Finally, a labor test was also introduced by the reform. Hence, the social insurance nature of this benefit was weakened by these reforms.

The third novelty introduced by the Fundamental Law was the transformation of the framework of the means-tested benefits: Article XIX(3) introduced a commitment-oriented system.<sup>34</sup> This reform was influenced by the common law concept of social welfare system, and in particular by the merit control of social benefits and the concept of the ‘Workfare State’. Article XIX(4) states, that

“Hungary shall contribute to ensuring a life of dignity 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.”

This provision has a clear message. Firstly, it states that the main goal of the pension system is to ensure a life of dignity for the elderly. Thus, pensions for the non-elderly (e.g. the widow’s pension and orphans’ benefits) are not guaranteed under the constitution. These benefits are interpreted as pensions based on a compulsory social insurance system guided by the traditional Bismarckian approach.<sup>35</sup> As mentioned above, this was the constitutional basis for the transformation of benefits for persons with altered work ability into a partly means-tested, partly health insurance-type benefit.

It is an important element of the regulation that the pension system is defined by the Fundamental Law as a general state pension system based on social solidarity. Hence, the opportunity to maintain a mandatory private pension system is excluded (practically prohibited) by the Fundamental Law. Solidarity as a central element of the pension system is crucial: it is a limitation of the applicability of the protection of the right to property, because pensions are not merely purchased services, but solidarity benefits as well. The incomes of the pension system have been transformed on the basis of this regulation: the role of taxes – instead of contributions (which are partly covered by the protection of the right to property) – has been strengthened.<sup>36</sup> Only the ‘operation of voluntarily established social institutions’ is allowed under the new regulation, as such, private insurance may have an important role as supplementary system.

Article XIX(4) of the Fundamental Law introduced a new preferential rule. It reads: “[a]n Act may lay down the conditions for entitlement to state pension also with regard to the requirement for stronger protection for women.” This provision was the constitu-

34 Id. pp. 15-16.

35 Raimund Waltermann, *Sozialrecht*, C. F. Müller, Heidelberg, 2011, pp. 173-175.

36 Juhász 2015, pp. 16-17.

tional basis for the special pension women with more than 40-year pension entitlement are eligible for (regulated in detail by the Act on the Social Insurance Pension).

There are other fundamental rights and state goals which regulate social fundamental rights. Articles XVII and XVIII (guaranteeing the right to work and the rights of the child) and Article XX (on the right to health) are important elements of the new constitutional approach. The Fundamental Law contains the prohibition of discrimination and the right to property is also strongly protected fundamental right. It is an important element of the regulation that according to Article XVI(4) “[a]dult children shall be obliged to take care of their parents if they are in need”. This rule is based on the common law concept of the self-care, and it could be the basis for the reduction of state provided benefits and services.

The transformed social policy of Hungary was mapped by the regulations of the Fundamental Law: social security became a state goal – instead of a fundamental right. The constitutional guarantees of the social insurance system have been weakened by the new rules and the merit principle was introduced besides the means-tested benefits. We may conclude that the Bismarckian elements of the Hungarian social welfare system have been weakened, because the new model was strongly influenced by the common law (liberal) welfare concept. But the short constitutional provisions were not always sufficiently clear, and the potential for different interpretations to evolve on the basis of the new rules existed.

#### 25.4.3 *The Interpretation of the Transformed Social Rights: The Landmark Decisions of the Constitutional Court*

Because of the short constitutional provisions and the possibility of different interpretations given to social rights, the Constitutional Court played an important role. The landmark decisions were partly based on the new competence of the Constitutional Court, on the ‘genuine’ constitutional complaint which could be submitted by the party who could substantiate the violation of his or her individual rights. In several cases the procedure was initiated by courts or by the ombudsman.

The first landmark decision was Decision No. 40/2012. (XII. 6.) AB, which was initiated by the ombudsman. The decision stated that social security is a state goal and not a fundamental right. Hence, actions could not be based on this right. While those parts of the motion which were based on Article XIX were dismissed, Section 7(4) of the Act on the benefits of persons with altered work ability was annulled. The annulment was based on the violation of the prohibition of discrimination (Article XV of the Fundamental Law) and on the infringement of the principle of the rule of law [Article B(1)]. Although the

Constitutional Court partly applied the erstwhile dogmatics, it was a major change that the Court did not establish the violation of human dignity.<sup>37</sup>

This approach was followed by Decision No. 23/2013. (IX. 25.) AB as well. The decision expressly stated that there is only one constitutionally guaranteed social benefit, the pension of persons who have reached the retirement age applicable to them. The definition of other social benefits belongs under the competence of the legislator and – partly – the Government. It was confirmed that social legislation should comply with the principle of the rule of law. Thus, the transformation of earlier special pensions for people who have not yet reached the retirement age applicable to them (*e.g.* soldiers' and police officers' pensions) was declared to comply with the Fundamental Law.

It seemed, that the Constitutional Court followed the Anglo-American (common law) model in its interpretation of social law. However, there were exceptions. The decision of the Curia to authenticate the documentation of a planned referendum on the preferential pension for men who have more than 40 years pension entitlement was annulled by Decision No. 28/2015. (IX. 24.) AB. The resolution was based on that idea that the preferential pension for the women defined under Article XIX(4) is a constitutionally guaranteed right, as such, it cannot be the subject of a referendum. Hence, the interpretation of a social right as a state goal has been partly transformed, because the fundamental right nature of the social rights was (partly) recognized by the Constitutional Court.

The Constitutional Court changed its approach to some degree in Decision No. 21/2018. (XI. 14.) AB. The justification is very interesting, because the main approach has not changed: social rights are still interpreted as a state goal and not as fundamental rights. But the logic of the decision is very similar to the approach characteristic of the judgments of the social justice revolution decided by the US Supreme Court. The state goal nature of the right to social security is confirmed, but the Constitutional Court set the proportionality of reforms as a constitutional requirement. This requirement was based on the principle of the rule of law and on the rules of international law.

Decision No. 30/2017. (XI. 14.) AB was based on the principle of the rule of law. An important element of the reasoning<sup>38</sup> was the restriction on the applicability of Article XIX(3) of the Fundamental Law. Accordingly, only such conditions may be regulated by acts of Parliament which are linked to social benefits and have social characteristics. Similarly, the prohibition of discrimination (Article XV) was applied in the decision.

The Constitutional Court's approach to the constitutionality of the means-tested benefits and to social care was originally based on its earlier jurisprudence, but it has been transformed in part after 2012. Although the right to human dignity was not referenced

37 Andrea Szatmári, 'A szociális biztonsághoz való jog az Alaptörvényben az Alkotmánybíróság értelmezése szerint', *Közjogi Szemle*, 2018/1, pp. 65-66.

38 Decision No. 30/2017. (XI. 14.) AB, Reasoning [29]-[30].

in the reasoning of Decision 40/2012. (XII. 6.) AB and Decision No. 38/2012. (XI. 14.) AB, the Constitutional Court stated that the right to human dignity is violated in case the legislator prescribes the mandatory use of social care services and benefits. This decision was based on the common law approach to social services, which states, that the use of these services is primarily voluntary. The new approach reflecting the priority of self-care was interpreted by Decision No. 27/2013. (X. 9.) AB. The obligation of adult children to support their parents was found to be compatible with the Fundamental Law. However, a constitutional requirement was introduced, namely, that the alimony obligations towards minor children may not be jeopardized by this obligation.<sup>39</sup> Hence, the Constitutional Court originally followed the common law approach, yet this approach has partly changed. After the 7th Amendment of the Fundamental Law a new petty offense (misdemeanor) was introduced by an Act of Parliament which prohibited living in public spaces, practically banning homelessness. Homeless people were forced to use the social care system. Decision No. 19/2019. (VI. 18.) AB stated that this regulation is compatible with the Fundamental Law, because of the changes made to the constitution with the 7th Amendment. It merely established the constitutional requirement that the sanction be used only in case the care was actually provided for homeless people. The decision was highly controversial. Although the 7th Amendment has a rule prohibiting residing in a public space, but there were dissenting opinions<sup>40</sup> which emphasized that the forced use of services is not really compatible with the right to human dignity, according to the approach established in Decision No. 38/2012. (XI. 14.) AB. The new decision follows a different, paternalistic view of social rights, formerly not applied by the Constitutional Court. It does not comply with the main models governing the use of social services in modern welfare states.

## 25.5 CONCLUDING THOUGHTS

The Fundamental Law entered into force following the transformation of social policy after 2010. The Bismarckian nature of the Hungarian welfare system was weakened and a special model was introduced which is heavily relies on the common law welfare approach. This approach has been mainly endorsed by the decisions of the Constitutional Court. The decisions were not based on the right to social security, but on other fundamental

39 The decision was not unanimous. Elemér Balogh and Miklós Lévay wrote dissenting opinions. They stated that the right to human dignity is violated by the definition of the fee discount based solely on the resources of the provider of the social care institution. István Stumpf stated in his dissenting opinion that the guarantees for the fee discount are not regulated, therefore, it violates the principle of the rule of law. It was underlined by László Kiss, that the principles defined in the Decision No. 32/1998. (VI. 25.) AB were applicable.

40 Decision No. 19/2019. (VI. 18.) AB, dissenting opinions by Ágnes Czine, Ildikó Hörcherné Marosi, Balázs Schanda and Péter Szalay.

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rights, because the right to social security was interpreted by the Constitutional Court as a state goal, which could not be directly invoked. Although the majority of the Constitutional Court's decisions were based on this liberal approach of self-care and regulatory freedom of the legislator, there are some curious decisions, as well. These decisions – in particular, the one on the referendum on the preferential pension system for men and on the misdemeanor of the homelessness – follows another approach. These differences are difficult to explain, the reasons for them seem to be extrajudicial.