Henriett Rab
Assistant Professor, University of Debrecen, Hungary

Can social security enter the door of private law?

It is much debated nowadays whether the system of social security should be operated within the state's exclusive competence or, on the other hand, private equity entering the scene in one form or another would lead up to the establishment of a more effective and more economical system. The appearance of private equity could take place accordingly to several different trains of thought. An already known and, as a matter of fact, highly debated way is the system of private security fund, but I wish to add the option of an employer's pension fund and all those measures that promote self-care; those are better accepted solutions that would also be highly beneficial for the economy.

The starting point is the demand for a state-handled retirement pension fund, which has its roots in both constitutional and historical tradition. Literature devoted to the subject is historically unanimous when stating that social security takes over from the family[1] the function of a solidary body that cares and provides for the aged and the sick, and family is admittedly not only a unit of social organization but also a unit of handling private property.[2] This function has taken several forms throughout history, since examples such as the Contract of Rhodes, the Hungarian historical notion of "fellow miners' chest" (an agreement between 16th century miners and their employers), self-care associations and the basic formation of trade unions all demonstrate the solidarity of the community and the need of help coming from outside the family. Based on historical tradition, the demand for the state playing a role is not questionable. Nor is its necessity, since the promise of providing care to each and every citizen has also been formulated by the constitution, based on the "social contract". The role of the state is, as a basic function of common law, to maintain the system of social security

[1] B. Lenkovics, *A fenntartandó magánjog*, Jog, állam, politika 2011, No. 3, Special Edition 89.
[2] O. Czúcz, *Szociális jog I., Unió Lap-és Könyvkiadó Kereskedelmi Kft.*, Budapest 2003, p. 15.

and to ensure – as per the principle of the right to social security – enough to live on subsistence level. Consequently, the system of social security is, said or unsaid, public property, a system of "state pension", the *raison d'être* of which is guaranteed by the principle of social solidarity and reinforced by constitutional and international legal engagements. In my opinion, however, boundaries need to be established for state involvement, since it cannot be expected from the state to provide, as a duty, a wide range of services to those entitled to social insurance and to maximize the output results of that social security system.

As opposed to that, the appearance of private share can be approached from the side of financing, an obvious example of which is provided by the private pension fund column, but historical examples also show us that the demand for self-care is justified by the inviolability of private property. Those who criticize the idea of private pension fund do not approach it as a possibility of helping out state-operated social insurance. Instead, they point out the profit-oriented nature of private equity, as a global, neoliberal solution. However, the right to own property and the inviolability of property in private law are not necessarily the same thing as the protection of private equity, which I shall discuss later. When describing proprietary rights, Barnabás Lenkovics points out the idea of Adam Smith: "One's work is a property that is the principal sources of one's all other properties, and as such, it is the most sacred and the most inviolable."[3] As opposed to that, and cited in the same work by Barnabás Lenkovics, the following statement by József Hajnóczy, formulated for the programme of constitutionalization aims at showing how useful private property can be in shaping and educating society: "It is commonly known that those who possess their land on their own right, cultivate it better than those who do not possess their own land (…) Everyone knows that the goods of the treasury are handled the worst."[4] When reading these quotations, I felt obliged to contemplate if there might be a connection between – on the one hand – the non-sustainability of social security, the dissatisfaction of the entitled and the reversioners, the crises that accompanies the phenomenon (I mean the fact that those who are entitled to the services are the same as those who accept, participate in and promote avoiding contribution paying, and the fact that we deny the necessity and the significance of social security, and at the same time we expect it to be guaranteed as a fundamental right) and – on the other hand – the fact that the inviolability of property cannot be fully internalized when one is proprietor only in

[3] B. Lenkovics, *op. cit.*; A. Smith, *A nemzetek gazdagsága*, Budapest 1959, p. 172.

[4] B. Lenkovics, *op. cit.*; J. Hajnóczy, *A magyar országgyűlésen javaslandó törvények lényege*, [in:] *Történelmünk a jogalkotás tükrében*, ed. J. Beér, A. Csizmadia, Budapest 1966, p. 617–626.

a public sense and the fact that the state, bound by common law only, can be held responsible only restrictively, relying solely on constitutional, fundamental guarantees. In my opinion, if we consider only the wise historical examples, the answer to that must be yes, supported by both economical and sociological argumentation, namely that the sense of legal insecurity[5] diminishes the willingness to pay contributions and plays a significant role in the emerging of a contribution-avoiding behaviour.[6] The addition of private-law elements to the system of social security can be justified not only by the involvement of private equity, but also by the positive effect of the acknowledgement granted to private property. That is what the principled ideology of the Swedish personal account pension fund is based on – a pattern observed by the legislative bodies for the sake of the transformation of the retirement pension system in Hungary.

Therefore, the reinforcement of private-law spirit, apart form the question of financing, can be considered as a fundamental demand of society in the case of legal relationships involving social security. This demand features as a fundamental legal guarantee in constitutional and international engagements, insofar as it acknowledges the right to property only in a common-law sense. This, however, justifies the examination of the discrepancy of the private-law and the common-law notion of private property and whether the interpretation of this notion within the framework of social security is only possible in the way it is treated by common law. In order to answer this question, we have to follow to different paths at the same time. We need to examine, on the one hand, the notion of private property as per private law, including its interpretation within the framework of social security and, on the other hand, the boundaries of the right to property as it is understood in common law in the case of social security, acknowledged by the Hungarian Court of Constitution. The point where these two paths lead one into the other is where it becomes feasible to privatize social security, that is: to relocate the boundaries of private law.

Joint elements of private law and property

We shall begin with examining those characteristics of private-law property that are open for interpretation from the point of view of social security. With regards to social security, the accomplishment of negatively interpreted proprietary rights of an absolute structure can seem to be utopian from sev-

[5] The feeling of legal insecurity is caused about the fast changing of law and general reforms. These result in misgivings of the accountability of the state.

[6] A. Simonovits, *Keresetbevallás és nyugdíj – egy elemi modell*, Közgazdasági Szemle 2008, Vol. 15, No. 5, p. 427.

eral points of view, also in the case of refusing the involvement of private equity. This can obviously be explained by the solidary nature of social security. If we, however, examine the character and the function of private law and proprietary rights closely, then several elements come up to justify the rationale of the examination.

When examining the absolute structure of proprietary right, the most comprehensive fundamental private right[7], we come to the conclusion that it is difficult to interpret with regards to social security, since the specificity of this legal relationship of material nature is that towards the licensee, everyone is obliged, and obliged to sufferance first of all. If we try to apply this model to the legal relationship entailed by social security, then the absolute nature of the relationship – provided that we accept its being conceivable in the first place – appears to be directed the other way round, since the state ends up being an obliged party, by way of its own engagements, towards a general subject, those who are entitled to the benefits. Should we point out a single entitled subject and try to formulate what the general obligation towards him is, try to describe his proprietary position or his legal status[8], then we could say the fundamental rights to social benefits, originating from the insurance-principle of those benefits, have to be respected and acknowledged for each and every one; furthermore, material contribution needs to be made in order to ensure those benefits, due to the specificities of the system based on division and distribution. Approaching the matter this way, we can actually point out the material legal bond between licensees (those who are entitled to benefits) towards the system of social security. An objection could be that although the circle of the entitled and the obliged appear as general subjects, there is still a relationship of legal obligation between the parties that is established in the process of creating the insured status, even thought that process is a mandatory one, entailed by employment. Act LXXX of 1997 that declares the ground rules of social security in Hungary calls the legal status of "insured", on the level of principle, a legal status that is mandatory to establish. This rule weakens the bonding nature of the independent legal relationship between the parties, especially since the subjects and the content of the legal relation is defined by law in an abstract way. If we accept the opinion of Károly Szladits on proprietary right that „appears as protection of interests provided to the proprietor, when opposed to everyone else"[9], then all titles

[7] B. Lenkovics, *Dologi jog*, Budapest 2008, p. 53.

[8] I. Andorkó, *A tulajdonjog modelljének vizsgálata és kritikai elemzése*, Jogtudományi Közlöny 2012, Vol. 67, No. 11, p. 461.

[9] K. Szladits, *A magyar magánjog. Általános rész. Szemelyi jog: Grill Károly Könyvkiadóvállalata*, Budapest 1941, p. 243.

within the framework of social security, and even social security itself, as per its characteristics described, can become an individual object of proprietary rights.

The appearance of private-law property right within the framework of social security is justified also by the view of Attila Menyhárd, according to whomt the circle of objects of property has changed. He pointed out all different expectancies, and named among them the demands towards social security[10]. We can see that theoreticians of civil law are more permissive when judging social security from the point of view of private law, compared to the strict measures of the Hungarian Court of Constitution with regards to social security that are meant to draw a firm boundary between common-law and private-law protection of property, which I shall discuss later.

Proprietary right in the practice of the Hungarian Court of Constitution

The significance and the necessity of examining the right to property from a constitutional standpoint is best indicated by the fact that in the system of fundamental rights, there is hardly any other fundamental right that would define society to such a high extent as the system of property does. Therefore, it is important to consider, on the one hand, the political and social changes that are going on in the constitutional reality and how the system of property adapts to that and, on the other hand, to what extent and how the state acknowledges, guarantees and protects property.[11]

To provide a definition, we shall say that the right to property is a constitutional fundamental right that protects pecuniary interests from state intervention or any unlawful influence. It is a protective right, a negative sort of order, the content of which is an obligation of refrainment.

The Constitution protects socially bound property in the framework of the right to social safety. The socially bound nature of property is partially manifested in the existence of common property and has a constitutional rationale only up to the point where there is something to be bound. If the content of this fundamental right was filled up by the legislative bodies, referring to social bonds, in a way that would make social bonding entire and complete, then nothing would actually remain of the fundamental right, thus social bonding would not make sense any more, and the measures would do

[10] A. Menyhárd, *Észrevételek az új Polgári Törvénykönyv dologi jogi koncepciójának kiegészítéséhez*, Polgári Jogi Kodifikáció 2002, Vol. 4, No. 5–6, p. 7.

[11] T. Drinóczi, *A tulajdonhoz való jog helye az alapjogi rendszerben*, Jogtudományi Közlöny 2005, Vol. 60, No. 8, p. 339.

no more than conceal unconstitutional deprivation of property.[12] That is why it is crucial to establish the right boundaries for constitutional protection of property.

From the matter of acquired rights, a short way leads to the matter of the right to property and protection of property. Nevertheless, the early decisions of the Court of Constitution avoided treating the constitutional principle of the right to social safety and of the right to property in the context of social security benefits. Constitutional Court Ruling 43/1995 (30/06/1995) was a breakthrough in the matter, and I shall present it in detail later. The practice of the Court of Constitution with regards to the right to property can be divided up to two, significantly different phases. The early practice of the Court of Constitution[13] did not yet make an unambiguous distinction between the material essence of property and proprietary partial titles.[14]

Constitutional Court Ruling 24/1991 (18/05/1991) established, in connection to the end of the socialist regime, that retired people of the time had an acquired right to social safety, of which they cannot be deprived by the constitutional state. (Taken into account that they had been prevented by the regime from accumulating reserves.) "This right of theirs is as much of a personal right as the right to own property." However, the Court of Constitution did not dare to go any further in 1991, the ruling does actually no more than mention the principle of the right to own property, does not add any explanation and does not declare it a right that is applicable in the case of social security benefits. At that time, the Court of Constitution deduced social benefits and social security from § 70/E of the Constitution, that is: from the right to care and provision.

The dividing line between the two phases is the Constitutional Court Ruling 64/1993 (22/12/1993), in which the Court of Constitution treated the constitutional principle of the right to property with regards to the Leasing Law: "According to paragraph (1) of § 13 of the Constitution[15], the right to own property is a fundamental right. The sphere and mode of constitutional protection of property does not necessarily lines of with notions in civil law. Namely because there is no civil-law equivalent for necessary and proportionate restriction and material essence of proprietary right. The additional titles

[12] Constitutional Court Ruling 64/1993 (22/12/1993), dissenting opinion of Dr. Imre Vörös Constitutional Court justice.

[13] Constitutional Court Ruling 17/1997 (30/03/1992).

[14] P. Sonnevend, *A társadalombiztosítási jogosultságok tulajdoni védelme a Német Szövetségi Alkotmánybíróság gyakorlatában*, Magyar Jog 1997, Vol. 44, No. 5, p. 220.

[15] We can find the same in article XIII of the New Fundamental Law, so we can transform the earlier practice in this question.

of proprietary right cannot be identified with the material essence of the right to property that is protected by constitution. Therefore, the sphere of property protection as per Constitution cannot be identified with the protection of property as it is treated – abstractly – by civil law. The essence of property that is protected as a fundamental right is to be considered together with the prevailing (constitutional) common-law and private-law restrictions. The sphere of constitutional protection of property is always concrete: it depends on the object, the subject and the function of property and the mode of the restriction. The Constitution provides fundamental protection to proprietary right as to the traditional, material basis of the individual's autonomy to act. Constitutional protection needs to follow the changing role of property in society in a way that permits it to provide the same protection. Therefore, when it comes to the protection of individual autonomy, fundamental protection of property extends to pecuniary rights that take over the former such role of property and to the titles based on common law (such as demands for social security benefits). On the other hand, however, the social bonds of property make it constitutionally possible to significantly restrict the proprietor' autonomy. The mode of constitutional protection is determined by the specificity of property that does not characterize any other fundamental right: regarding its constitutionally protected status, it is usually replaceable." What characterizes constitutional protection of property is that it is basically legal protection that everyone is entitled to. "The right to property is a fundamental right that ensures – in a constitutional and functional sense – personal autonomy directly and indirectly."[16]

The Court of Constitution also stated in the ruling of 64/1993 (22/12/1993) that simultaneously to the extension of the sphere of protection, the social bonds of property make it constitutionally possible to significantly restrict the proprietor' autonomy. It has become a constitutional question to decide in which cases is the proprietor expected to suffer restriction from public authority with no recompense provided and when he can demand indemnification. Constitutional judgement concerning state involvement focused on judging the proportionateness of aim and means, public interest and restriction on property; this became the actual space of evaluation by the Court of Constitution. For restriction, according to paragraph (2) of §13[17], „public interest" in sufficient. It is the duty of the legislative body to determine public interest. The Court of Constitution does not examine the necessity of the legislative body's decision-making, only the justification

[16] T. Drinóczi, *op. cit.*, p. 339.

[17] We can find the same in article XIX of the New Fundamental Law.

of that body referring to public interest. In addition, it examines whether the solution that serves "public interest" infringes any other constitutional right. For the proportionateess of restriction, however, the practice of the Court of Constitution has offered numerous criteria.

Despite the fact the constitutional right to own property was outlined by ruling 64/1993 (22/12/1993) of the Court of Constitution, according to the practice of the Court of Constitution at the time[18], the right to property was not yet applicable to social security benefits as they did not qualify as proprietary, but as social demands. In those cases, where the insurance element was not involved (for benefits one is entitled to on a social principle), the constitutional background was provided by the principle of the legal state and legal safety.

The change in the practice of the Court of Constitution – deduced from the protective function of the right to property – was brought about by ruling 43/1995 (30/06/1995), when the differentiation was made between benefits due on a social and on an insurance basis, within the system of mixed retirement pension. "The principle of functionality also includes that social security replaces safety based on one's own wealth, and that the collateral for demands of social insurance cannot be absorbed by law."[19] For the same reason of treating the possible change in social services, the Court of Constitution stated in ruling 43/1995 (30/06/1995) that "this framework provided for the examination of proportionateness gives us a tool that takes into account the specificities of the legal relationship entailed by social security, by which tool we are able to measure the aim of the change against the means when we examine if those changes are constitutional." A constitutional category thus became sensible to "public interest" that was supposed to justify the decrease in services, to the functionality and subsistence of the whole system of social security and to the difficulties of self-maintenance that the state faces due to reasons both exterior and routed in social security. Even in the context of social security, the protection of property maintains its connection to one's own wealth and value-creating work. That is why we make the difference between the more comprehensive protection of "insurance" services paid for by one's own contribution and the less comprehensive protection of provisions due as allowance. The protection of property can extend just as far as the service fulfils the same function as material assets would; consequently, this feature cannot disappear. However, the exact matching between one's contribution

[18] 64/1993 (22/12/1993) of the Court of Constitution, 772/B/1990/5 of the Court of Constitution.

[19] T. Drinóczi, *op. cit.*, p. 340.

and the service is excluded by the very way social security functions (wealth with no equities), by the incorporated element of solidarity and by the risk that the contributor carries on a long term.

To some up, the extension of constitutional protection of property is always dependant on the subject, the object and the function of property and also on the mode of restriction.[20] The responsibility of the state in connection to social rights resides in providing care or benefits for a sufficient length of time, and therefore creates acknowledged acquired titles (property)[21] by maintaining the reliability of the care system.

Court of Constitution ruling 43/1995 (30/06/1995) also stated that "since the ruling majority of people is not "senf-pensioned", and the social and economic safety of those people is – by their inactive age – not created by their own material assets, since they are set and willing to invest a certain part of the result of their work in social security, therefore the services of that social security should fulfil the duty of guaranteeing the safety of wealth, as it is narrowly understood in civil law. And should his assets be absorbed by law for that purpose, then law should provide safety comparable to property." Thus the state collectivizes typical proprietor's behaviour in connection to social security.[22]

Consequently, in the case of all those social security services where the insurance element is involved, the constitutionality of the decrease or cessation of services can be judged according to the guidelines on the protection of property; that becomes the measure for constitutionality. For the sake of public interest, it is by all means necessary to establish that this very public interest can be served in no other way and the restriction is inevitable.[23]

With regards to care provided by social security, this means that restriction is possible only if sufficient and proportionate recompense is offered, as the proportionate character of restriction is discussed in Constitutional Court ruling 56/1995 (15/09/1995) when the protection of property is interpreted. The ruling takes a stand further beyond what has been stated in previous rulings. „It is not a requirement by constitution to exactly match the services of social security to the payment of contribution, due to the mixed character of the system. Since in social security, both the principle of the insurance element ("purchased right") and the principle of solidarity are applied, the constitutionality of social security cannot be judged only by the quantitative relationship between the paid contribution and the recompense received.

[20] T. Drinóczi, *op. cit.*, p. 341.

[21] J. Kis, *Alkotmánybíráskodás a mérlegen (III. rész)*, Fundamentum 2000, Vol. 4, No. 1, p. 43.

[22] T. Drinóczi, *op. cit.*, p. 344.

[23] 479/B/1993 of the Court of Constitution.

Expectancies and services of social security cannot, however, be significantly and disproportionately changed without touching on the recompense if that change would entail the infringement of proprietary position protected by constitution. The functionality and sustainability of social security and the augmenting difficulties that the states is coping with in the background undoubtedly fall into the category of "public interest" that can be the ground for constitutional restriction on property. The mode and extent of modification regulated by the given provisions of law (removing from insurance by 75% the guarantee of the so-called "sickness benefit right") already infringes the protection of property that is declared a fundamental constitutional right by § 13 of the Constitution, and therefore it is unconstitutional." The Court of Constitution also refers to the notion of "grievance beyond the half", used in civil law, that can be the measure for the constitutionality of the restriction when rights are withdrawn. By that, the Court of Constitution returned in a way to the basics in connection with the right to property, to the origins when it has not yet set up the boundaries between constitutional and civil-law protection of property.

When examining the right to property, as we can see, the Court of Constitution considers not only property as it is understood in civil law, but also rights to assets and licences, as well as titles and expectancies based in common law that can replace property in assuring one's personal autonomy.[24] Therefore, it might happen that the protection of property is extended to an activity that actually generates regular income.[25]

In ruling 5/1998 (1/03/1998), the Court of Constitution makes a statement that is, in my opinion, highly disputable under the present economical circumstances: „The establishment of the system of private retirement pension fund, related to social security, is meant to widen the circle of possibilities of individual responsibility and self-care. The insured have the opportunity to pay a given part of their retirement pension contribution to mandatory private pension accounts. In connection to that, it might be justified in their case to modify the quantitative regulations of retirement benefits available through social security pension fund. The reduction of the amount of the widow's pension can be justified by the recompense offered by the services of private pension to private pension account holders. Therefore, in the case when a licence-holder (a person who has acquired certain rights) is also a private pension account holder, the modification of the amount in the widow's pension is compensated by the service that

[24] 17/1992 (30/03/1992) of the Court of Constitution.

[25] T. Drinóczi, *op. cit.*, p. 343.

the private pension fund offers, provided that the insured manages to acquire the licence to care and benefits of the private pension fund before he reaches retiring age. In the case of an insured who might be a potential acquirer of rights as to the private pension fund, absorption of property (contributions that have been paid so far) is constitutionally justifiable, referring to public interest. However, a different sort of judgement is applied to a person who is either insured or has acquired retirement benefits on his own right and to his spouse who has not acquired such benefits and cannot be expected to do so, given her age. After the decease of the licence-holder, such a spouse might face serious existential difficulties due to the reduction in question in the amount of the pension. Based on that, the Court of Constitution declares that the provision on the reduction of the amount of widow's pension, with regards to a person who is either insured or has acquired retirement benefits on his own right and whose spouse has not acquired such benefits and cannot be expected to do so, given her age, is not constitutionally justifiable by public interest; it is a disproportionate absorption of property and therefore unconstitutional."

In my opinion, the question of constitutionality is raised by for example the fact that private pension fund membership – since it was "only" an element of self-care – is less protected if we consider social security retirement benefits.

Comparison, results

The differentiation between private law and common law can be carried out regarding the elements in a legal relationship. We can examine the subject of the relationship that is, according to the standpoint of the general legal sciences, the state on one side (in common law) or (in private law) the subject of the private sphere. Common-law regulation contains coercive measures, while in the area of private law, disposivity prevails. Common law serves public interest, whereas private law serves private interest. The essence of legal relation in common law is submission, whereas in private law, the parties are typically juxtaposed. However, these differences do not group into a general rule, since for example, the state can be the subject of private law and relations when one of the parties is submitted to the other do appear, in labour law for example. András Jakab goes as far as declaring that it is unnecessary to draw a dividing line between common law and private law. According to him, "no criteria can be found for this division that would be acceptable on

the basis of theoretical jurisprudence."[26] What is more: the division is irrelevant from the point of view of positive jurisprudence[27].

If we accept that there is no unambiguous notion of "common law" or "private law", the involvement of private law in social security becomes easier to propose and to discuss. Literature dedicated to the subject is unanimous in affirming that proprietary right is not a subject of private law exclusively. On the contrary, it is acknowledged by common law (constitutional law)[28], and this does not exclude the traversability of legal relations. The position of the state can be further relativized by accepting it as the subject of private law, although the juxtaposed position cannot be real in the case of a legal relation that ensures social solidarity and serves public interest. If the intention to approach social security to private law turns into practice via the transformation of legal regulation, then the abstract legal protection of proprietary right as acknowledged by civil law could also come true. This would be one step further than the Hungarian Court of Constitution guaranteeing the principle of the right to property, where property is of a common-law nature, the result of which is that the basic right designated as a specificity of the insured legal status[29] becomes a title actually protectable and actionable in a lawsuit. The acknowledgement of a legal status relativized to such an extent (although it would surely produce positive results too, since the willingness to pay contributions would probably increase significantly) has the risk that the benefits protected by law would overcome the social solidarity adopted by the state from the family. This theoretical risk can be removed the most easily by the fact that in the case of social security, there is not one party in the legal relationship that would be authorized to institutionalize bonding-like involvement that goes beyond the present fundamental legal engagement in duty.

As we have seen, the inviolability of private law and also of private property and the involvement of state stemming from social solidarity and common property are notions, roles and demands that can well go one along the other. As Károly Szladits put it: "The relations of private economy and family life are also interwoven by rules of common law. The extent to which these life circumstances fall under the reign of common-low or private law regulations varies according to the different stages of human culture and is closely linked to forms of social economy and family life."[30] Consequently, what matters is to find the

[26] A. Jakab, *Közjog, magánjog, polgári jog – A dogmatikatörténet próteuszai és az új Ptk. tervezete*, Állam-és Jogtudomány 2007, Vol. 48, No. 1, p. 21.

[27] A. Jakab, *op. cit.*, p. 26.

[28] Moreover Criminal Law protects it.

[29] O. Czúcz, *op. cit.*, p. 33.

[30] K. Szladits, *A magyar magánjog. Grill Károly Könyvkiadóvállalata*, Budapest 1941, p. 23.

proportions, which is influenced by a number of factors. I am going to seek an answer to that in what follows, by way of indicating some issues.

First of all, the involvement of private sphere in social security, if we do not aim at privatizing the system of care and provision, can be tracked down within the framework of self-care, since the responsibility we take for our property is a measure of our identification with it. The other sign of self-care getting stronger is to be found outside private law and is defined by theoretical jurisprudence as the theory of expectation, which refers to the demands formulated by the members of society towards the state as a constitutional and legislative constraint. Therefore, we need to examine in connection to self-care if it is sufficient for the sustainable operation of social security on nowadays' level.

Economists give an unambiguous answer to this question when they point out, as the reason for the non-willingness to pay contributions, the defects of the system of social security, the lack of legal safety and the fact that people no longer believe in social security to provide them with the safety they find desirable. The right to social safety guarantees to citizens not only care and assistance, but also touches the obligation of self-care and the individual's responsibility for himself.

A number of economic analyses point also out that the non-willingness to pay contributions in itself does not mean that self-care has replaced social security, because the non-paid contributions are typically not spared. Instead, people in their active age spend those savings. Self care is a representation of two phenomena joint: saving and taking responsibility for ourselves.

The state's taking responsibility is – in my opinion – also manifested in providing the necessary circumstances for self-care and in the encouragement of that. Communal re-division and the role of the state is tangible not in replacing but in completing individual responsibility.[31] This statement is in line with two other ones formulated in article XIX of the Hungarian Fundamental Law, namely that the state "endeavours" to assure the right to social safety and "supports" the licensed.

From the point of view of private law, the question appears like this: the basis for further increase in the willingness for self-care is private property and the dispositional authority related. In the case of social security, these constitute an objective that is opposed to the fact that the state takes over some of the function of this very self-care in order to validate social solidarity. In order to dissolve the problem, it is fundamental to dissolve the tension between the increase of self-care that means giving society a private character and the privatization of the system of care and assistance, globalization.

[31] B. Lenkovics, *op. cit.*, p. 91.

In my opinion, self-care can be encouraged without the privatization of the system of assistance, by way of rethinking the responsibility of the state. As Barnabás Lenkovics aptly points out, the human ideal of private law is "the good master", "the person who cares and takes responsibility for himself"[32], which is in complete harmony with the expectances concerning the subjects, the licensee of social security. This new human ideal of the Civil Code is formulated by Tamás Lábady as "a self-conscious, autonomous person who bravely takes risks, who is able to attend his matters as an adult and who does not need to be supported by the state on each and every side and even less to be guarded by it."[33] The attitude of the licensees towards social security is, however, not the same as the notion of the "good master" in civil law, since from the standpoint of the licensee, self-care is not an acknowledged expectation, and it is associated to private property and the demand for common-law guarantees. Barnabás Lekovics calls this type of person the globalization human ideal of civil law who "is not part of global mass production processes organized independently of him as a single smallholder subject, but as a unit of human resource that can be replaced by another one any time. In order to avoid that, this person is willing to work for less than what his work is actually worth and, to be able to consume more, pawns his assets and his workforce against bank loan. (...) A prodigal, hedonist person. (...) a future with no prospects."[34] The examination of the subjects of social security leads up to the formulation of the same problems, since the non-willingness to pay contributions, and the lack of self-care, of taking responsibility and of faith in state care results, from the point of view of social security, in the same insecure image of the future. Consequently, we need to endeavour to involve private-law elements when and as it is possible so that self-care becomes reality, in harmony with the demand for private property and the situation of social security and the guarantee of social solidarity can also be attained. If we take this approach, turning social security into (somewhat) private seems to be a far cry from the involvement of private equity by privatization and gives way to the creation and maintenance of a sustainable system of social security with future prospects. Barnabás Lenkovics describes this human ideal of sustainable private law "as a person acting for himself and his family, caring by himself for his assets needed for subsistence; a person who enters in a contact with the members of his community that is not base on selfishness, but on mutually beneficial cooperation."[35]

[32] *Ibidem*, p. 91.

[33] T. Lábady, *Alkotmányjogi hatások a készülő Ptk. szabályaira*, Polgári Jogi Kodifikáció 2000, Vol. 2, No. 2, p. 15.

[34] B. Lenkovics, *op. cit.*, p. 91.

[35] *Ibidem*, p. 94.

Abstrakt

Obecnie trwa debata na temat czy system opieki społecznej powinien leżeć wyłącznie w kompetencjach państwa czy udział kapitału prywatnego (private equity) doprowadziłby do powstania bardziej efektywnego i oszczędnego systemu. W konsekwencji, system opieki społecznej jest własnością społeczną, sytemem „emerytury państwowej", którego racja bytu jest zagwarantowana przez zasadę solidarności społecznej i poparta przez konstytucję i prawo międzynarodowe.

Słowa kluczowe: prawo cywilne, prawo prywatne, system opieki społecznej, prawo socjalne