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Summary

Protection of Property and Social Insurance

A Comparative Analysis on the Basis of the Jurisprudence of the German Federal Constitutional Court and the Hungarian Constitutional Court

1. Social Security Rights as Property Rights

Social security entitlements have long been regarded as a matter of social law that has little to do with the constitutional guarantee of private property. It was the German Federal Constitutional Court that first extended the protection of this constitutional right to pension entitlements in 1980. The Hungarian Constitutional Court followed this example as second in Europe in 1995. It is most probable, that especially the German example motivated the European Court of Human Rights to regard social security benefits as property, which in turn, resulted in similar developments in Austria and Lithuania. The present treatise seeks to explore the real meaning of such an extension of the constitutional protection of property, as well as its doctrinal background. In order to do so, the example of Germany and Hungary is used, not the least because to date both courts have developed an extensive jurisprudence in the relevant field.

The preconditions of regarding a social insurance entitlement as property are formally different in the German and the Hungarian constitutional order. A closer analysis, however, reveals that the decisive considerations are comparable. Already the way of recognising the relevant rights as property shows similarities. In the 1950's, the Federal Constitutional Court considered the application of the right to property to entitlements from the social insurance on the basis of the contribution of the insured. Since then, the question of contribution has dominated the complete relevant jurisprudence. Only later has the Court discussed the function of social insurance rights to secure a degree of freedom for the holder of the right. These functional considerations proved to be the immediate reason of extending the constitutional protection of prop-

erty to the rights in question. A similar path can be tracked in the Hungarian constitutional practice. Early decisions pointed out that social insurance has strong elements of an ordinary insurance contract. According to the Hungarian Constitutional Court, the insurance element was to be found in the fact that the beneficiary has “bought” his entitlement with his financial contribution to the social security system. These early decisions did not mention the constitutional right to property in this context. Only later has the Court recognised that property has a function of securing freedom for the individuals and that this function is also relevant for the social insurance. When the Court extended the constitutional protection of property to entitlements from the social insurance system, it did so by taking these functional considerations strongly into account.

Comparable developments in the jurisprudence of the two courts have first led to differently worded preconditions of applying the guarantee of property to the rights in question. The German Federal Constitutional Court has set up a test containing three criteria. First, there must be a right that is of personal use for the individual and is attached to him in an exclusive manner. Second, this right must be based on a not insubstantial contribution of the insured. Third, the right in question must secure the existence of the bearer of the right. In contrast, the Hungarian Constitutional Court requires a subjective right containing an element of insurance for the purposes of protection of property in the relevant field.

However different the respective criteria may seem, in practice they are filled with a similar content. Inasmuch the criterion of a sufficiently attached subjective right is concerned, this similarity is self-evident. Yet a not insubstantial contribution of the insured in the German practice is interpreted to mean broadly the same as insurance element in Hungary. The German Federal Constitutional Court regards both the payment of insurance fees by the insured and his work as relevant, as long as this work is carried out for some sort of remuneration. The Court does not regard equivalence between the contribution of the insured and the service of the insurance as necessary. It is ready to establish the existence of a not insubstantial contribution by the insured even in those cases, where the entitlement is decisively financed by the state, and therefore rather represents a social transfer. In the field of the pension scheme this goes as far as to include such pension rights inherited from the social security system of the GDR into the constitutional protection of property that have no economic correlation with the previous contribution of the beneficiaries. Further, the Federal Constitutional Court deems

contributions of third persons for the insured as his own contribution. Nevertheless such contributions must be effected specifically to finance such insurance risks that are covered by the relevant service of the insurance. In that sense, the contributions of the employer are to be seen as contribution of the insured, whereas insurance fees paid by one spouse cannot count as contribution of the other spouse. From these it follows that the Federal Constitutional Court regards the contribution of the insured as constituting property because such contribution diminishes the financial means of the insured. The financial loss can be a result of paying insurance fees, and may also follow from the fact that the existence of the insurance is part of the remunerations for the work of the insured without his paying fees. The contribution of the insured is not insubstantial if the diminution of the financial means caused by the obligatory social insurance system is not insubstantial.

The concept of “insurance element” in the Hungarian jurisprudence means nothing more than the fact that the insured invests his labour into the social security system. No equivalence is required between contributions on the one hand and benefits on the other. Different modifications of the social security system before the change of the regime are as irrelevant as present payments of the state budget into the social security funds. Accordingly, for the Hungarian Constitutional Court it is only decisive whether the fruits of the labour of the insured are partly taken by the state in an obligatory social insurance system. A specific economic correlation is not presupposed. There is only one difference compared to the German practice: the Hungarian Court does not consider whether the relevant contributions are effected specifically to finance such insurance risks that are covered by the relevant service of the insurance. In that sense, insurance fees paid by one spouse can count as contribution of the other spouse.

As regards the function of property to secure the existence of the proprietor, we experience a similar interpretation by both courts. The German Constitutional Court derives this precondition of the protection from the function of property, to secure a sphere of freedom in the area of pecuniary rights and by this guarantee for the proprietor the possibility to conduct his life on his own responsibility. An entitlement secures the existence of the bearer of the right if its abolition or limitation affects this function of property. It is far from obvious when exactly this precondition is fulfilled. There are two concurring interpretations. One option is that a substantial reduction of the wealth of the insured is sufficient. The other option would presuppose that the abolition or limitation of the right in question endangers the material subsis-

tence of the person affected. In contrast, the Hungarian Constitutional Court regards property as the foundation of individual freedom and asks whether social insurance rights fulfill the same function. At the same time, it emphasises that the system of social insurance provides economic and social security. With this, the Hungarian Constitutional Court also opens ground for two different interpretations. Accordingly, securing freedom might mean securing a minimum of material subsistence or securing the actual wealth of the insured. The only difference between the German and the Hungarian practice is that the German Federal Constitutional Court utilises the function of property to secure the existence as a real precondition of the protection, whereas the Hungarian Constitutional Court stipulates this function of all social insurance entitlements without any further investigation. Notwithstanding this the analyses of the German practice show that this criterion is nothing else but a *de minimis* rule that excludes less important entitlements from the protection.

2. Possible Limitations

Both the German and the Hungarian constitutional practice distinguish between two sorts of intervention into the right of property, namely expropriation on the one hand and other limitations of property on the other. In Germany, these other limitations are qualified as definition of the content and limits of property. The distinction between the two categories is carried out, however, on the basis of different criteria in Germany and in Hungary. Under the German Grundgesetz abstract and general limitations of property are qualified as definition of the content and limits of property, whereas specific and individual limitations may qualify as expropriation. The Hungarian Constitutional Court deems the intensity of the limitation to be decisive and declares such limitations as expropriation that reach a certain – undefined – threshold. That has far-reaching theoretical consequences. Under the German Constitution reform laws generally transforming certain areas can not qualify as expropriation even if such reforms also abolish subjective rights. In Hungary, however, a substantial modification of complete areas may theoretically be regarded as expropriation, depending on to what an extent subjective rights are affected.

Notwithstanding this difference in the doctrinal framework both courts refrain from qualifying limitations of the benefits of the social insurance system as expropriation. Accordingly, the German Federal Constitutional Court applies the standards relevant to the definition of the con-

tent and limits of property, and the Hungarian Constitutional Court applies the test pertinent to limitations of property other than expropriation. In Germany, this means the application of the principles of proportionality and of the protection of legitimate expectations. The Federal Constitutional Court promises an enhanced protection for the part of the entitlements acquired by the insured with his own contribution. Yet this promise does not result in an absolute or even higher protection for the core of the entitlements. First, no doctrinal foundation may be found for such an enhanced protection. Second, the jurisprudence is far from coherent if the application of the enhanced protection is concerned. As a result, the principle of proportionality is the decisive test in most cases, whereas the Court barely examines whether the limitation was appropriate and less intrusive means were available. A closer look at the results of the application of the principle of proportionality in these cases reveals that the Court mostly considers the legitimate expectations of the insured. Even where these expectations are not mentioned, the examination follows a similar pattern as in cases involving the principle of the protection of legitimate expectations in the sense that the Court compares the relevant public interest and the weight of the actual harm to the individual.

The Hungarian Constitutional Court does not integrate the principle of the protection of legitimate expectations into the standards of the protection of property. The sole test is the one of proportionality: the court compares public interest and individual harm. The main focus is, nevertheless, on the individual. It is decisive for the court how serious the limitation of the rights of the individuals is.

3. Protection of Property as Protection of Legitimate Expectations

The preconditions of granting the protection of property to social insurance rights developed by the courts do not fit into the general doctrine of the constitutional right. The strongest argument for this follows from the unity of the concept of property. Should other “traditional” property rights have to fulfill the same criteria they could not be protected by the constitutional right to property. Further, the criteria may not be deducted from the function of the constitutional guarantee of property. The requirement of a contribution of the insured could possibly be a result of the task of the right to property to preserve the distribution of wealth produced by the market. In that sense, this criterion could be the bridge between the sphere of the market forces and the sphere created and regulated by the state. However, such understanding

of the criterion of a contribution by the insured would presuppose equivalence between the contributions and the benefits, and this is not the case. The criterion relating to securing the existence of the insured cannot be deducted from the constitutional concept of property precisely because it is nothing more than a means to exclude less important entitlements from the protection.

The tests used to assess limitations of the relevant rights lead to less doctrinal difficulties. Only in Hungary may the applicability of the rules pertaining to expropriation cause problems. If namely reform laws in the field of social insurance may qualify as expropriation, then this qualification automatically means the unconstitutionality of such laws, since complete compensation necessitated by the expropriation is mostly impossible in this area. The Hungarian Constitutional Court will probably have to resolve this problem with a certain judicial self-restraint.

The possibility of limitations of the social insurance rights deserves attention, however, for another reason. The test applied under the right to property is practically identical with the one under the principle of the protection of legitimate expectations. This inevitably raises the question about the sense of the extension of the protection of property. That question is underlined by the fact that already the preconditions of the protection reflect considerations relating to the legitimacy of the expectations of the insured. The contribution of the insured in Germany and the insurance element in Hungary both express the fact that the financial means of the insured have been diminished by the obligatory social insurance system. They do not presuppose any economic correlation between contributions and benefits. Protecting the rights of the insured means under these circumstances forcing the state to keep its promise it made in the laws on social insurance, the promise of providing benefits. This is hardly more than protecting the expectations of the insured that the legal situation will not change. With this the constitutional guarantee of property is transformed into the protection of legitimate expectations in the relevant field. Politically, such a protection might be reasonable. Yet it overburdens the constitutional protection to property and provides little practical benefit in return.