The Institute of Labour and Social Studies – ILSS (Instytut Pracy i Spraw Socjalnych) based in Warsaw, Poland, is a scientific research institute. The Institute has been operating for forty years serving not only government administration and policy makers, but also taking active part in academic research works, tutoring and supervising series of publications, especially those valuable in the teaching process. The Institute’s basic research works are accompanied by applied studies, and the requirements of current and strategic social and economic policies. The main forms of activities are: Research activities as: statutory research, State Committee for Scientific Research grants, international projects, seminars, conferences.

International co-operation as: international research projects, bilateral research projects, data base development; Expert reports and consulting as: assignments commissioned by various institutions, activities of public services; Education as post-graduate studies, PhD studies. The research activities of the Institute cover the labour and social policy questions in an interdisciplinary manner. The research directions are adjusted to the current needs of the national socio-economic policy, and comprise such areas as: economy, law, political sciences, sociology, pedagogical sciences. The research covers the topics crucial to currently pursued socio-economic policy and directions of change processes, such as:

- Labour problems (labour market policy, migration for work, human resources management, working time, remuneration and motivation systems, occupational science, labour law).
- Collective labour relations (social partners, collective disputes, employee participation, collective bargaining, collective agreements, collective labour law).
- Social policy (state social policy, social security, social institutions and instruments, family problems and family policy, poverty, social exclusion and countering measures).

Institute research findings are used by the central and local government administration as well as by business entities. The publishing house of the Institute prepares numerous publications (for Polish and international markets) that are useful in the teaching process. The seminars and conferences organized by ILSS are forums for exchanging experiences, ideas, expertise and knowledge on a national and international level. The researchers employed in the Institute are recognized scientists, both in Poland and abroad. Their expertise and experience encourages foreign partners to undertake international research projects with ILSS. As a leader of labour and social studies in Poland, ILSS took part in numerous EU funded research activities under 5th & 6th FP, PHARE, Leonardo da Vinci, etc.

The Institute has actively participated in the processes of accession and integration of Poland into the European Union. In the wake of the accession the research activities focused on:

- Problems of adaptation of Polish law to European legal regulations,
- Influence of EU integration on labour market situation and trends,
- Labour market and social policy and the challenges of Integration,
- European and Polish standards of social security,
- Social exclusion and reintegration.

Poland’s accession into the European Union on 1st of May 2004 does not mark the end of the ILSS activities and struggles in these research areas. On the contrary, we expect new problems to appear and to be identified and dealt with.

If you have any questions regarding activities or research of ILSS, please feel free to contact us. We are eager to undertake any form of international cooperation with institutions and individuals.
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CONTENT LIST AND ABSTRACTS ARE EASY TO FIND AT THE FOLLOWING WEBSITE: HTTP://POLITYKASPOLECZNA.IPISS.COM.PL
For the past few years a group of experts from different EU Member States has been conducting some research initiatives on the individualization of social rights. These research endeavors are carried out within different formal frameworks, e.g. within the SPECIAL Network project (Social Protection in Enlarged Europe), among others. On the one hand, we examine those issues from the theoretical perspective, referring to the individualization of social rights as replacing the derived rights by individual rights, both with regard to family relationships and other personal relationships. On the other hand, we take into account the aspect of implementation, including, among others, documents, programs and objectives within the European Union legal framework, where individualization of social rights is referred to, or where some concrete plans for action were proposed (e.g. the announcement by the European Commission Modernization and Improvement in the field of social protection in the European Union, the open method of co-ordination, and others).

At the same time, it has been observed that European countries either engage in the debate on the individualization of social rights or actually introduce some legal solutions that embrace the tendency towards the individualization of social rights. The legal issues also have an important economic context: economic crisis is predicted either to motivate the introduction of new solutions in this area, or, on the contrary, to sustain and fossilize the status quo.

Another interesting dimension of the individualization of social rights refers to the category of European citizenship and its impact on the development of individual rights.

The 2010 Special Issue of “Polityka Społeczna” discusses the individualization of social rights with respect to rights granted on the basis of either work and economic activity or social citizenship. The problem is posed by the scope and legal nature of rights exercised by the EU citizens in relation to the functional relevance of their being a worker or economically active person.

In order to comprehend and research the context of the development of social rights the second paper focuses on the history of the legal frameworks endorsing the process of the individualization of social rights at the international level. The conceptual scope of individualization is discussed in the light of human rights de lege lata, social rights provided by the ILO Conventions, the Council of Europe and the European Union legislation. The changing background of the process is evoked as EU citizenship allows for the European Court of Justice to re-think a number of rights and subsequently re-define them as individual social rights. The jurisprudence of ECJ has supported the tendency towards the individualization of social rights to a large extent, particularly through insistence that the freedom of movement of the EU citizens entails individual social rights. The Community declarative documents and their vital role in designating individualization as a tool enabling modernization of social policy and ensuring better social protection across the EU is also reflected in the paper.

The question of the scope of individualization of social rights under the European Social Charter, in particular Article 16, is under consideration in the successive paper. The author maintains that support is provided to both individual persons and/or all the family members, which proves that legislator proposed individualized rights available to individual persons. This example illustrates well that the rights guaranteed by the Charter and catalogued as human rights are individualized and protected as universally applicable.

On the whole, the process of individualization of social rights reacts to the evolving conditions of the functioning of social security schemes which multiply challenges and necessitate reforms. The EU bodies appear to act as norm-setters and balance-seekers consistently refraining from imposing a single direction within the EU legal framework. Consequently, as the author of the subsequent paper confirms, elastic measures are preferred, such as the open method of coordination, which allows for the Member States to implement selectively and set the tempo of the reforms according to their own needs and resources. Objectives are articulated in general terms, albeit they generally fit the strategy of blending security with economic flexibility under the so-called “flexicurity” policy, within which individualization of social rights ought to occupy a central place.
In the further parts of this issue social security legislation of selected Member States is presented in the context of individualization of social rights. Exemplarily, the Finish scheme provides for universal and individualized rights to benefits and services. All the inhabitants are covered by the social protection scheme, independently of contributions or their status as economically active or inactive persons. The decisive role is played by their needs. Nonetheless, not all benefits are individualized in their character: some are provided for a family. In such cases it is the needs and resources of family as a whole that is taken into consideration.

The authors analyzing the scope of individualization in the Finish scheme evaluate its efficacy, adding also that individualization is not a sufficient guarantee of social protection fully supplying the wellbeing and rights of an individual. Those can and ought to be realized also through other available methods. Still, however, it remains clearly emphasized that ideological difference between the derived rights based on the fact of being a family member, a spouse or a child of an insured person and the individualized rights granted to a person as an individual or citizen cannot be eradicated and should not be overlooked. On a related note, they point to a shift in the paradigm towards “familism”, i.e. a growing accentuation of responsibility on the part of family for the wellbeing of an individual, while the role of the state and the role of an individual himself or herself are underplayed.

In Hungary the problem of individualization of social rights has not been explicitly considered as a legal or social issue (as a practical or theoretical problem). As the author proclaims, solutions in line with what is defined as individualization of social rights are introduced as products of legislative actions that do not consciously have as their aim individualization of social rights. The paper focuses on the derived rights and the personal links as well as on the entitlements not issuing from the contributory obligations. The problems presented refer mostly to the derived rights in the pension and health care schemes and unemployment benefits.

In the Bulgarian legislative framework the definition or any specification of the individualization of social rights is notably absent, both in the general sense and with reference to the social security rights. Such rights are usually discussed in legal studies and legal acts as universal human rights. The author undertakes an analysis of social security entitlements in Bulgarian scheme while taking into account the newly introduced pension scheme. She also enlists a number of problems stemming from the application of the derived and individual rights.

In the Polish scheme, which is analyzed in the subsequent paper, there has been no legislative action explicitly addressing the problem of individualization of social rights. Also theoretical considerations and research rarely touched the problem. The right to social security is based on employment (economic activity). In some cases the entitlement depends on personal links, family situation, marriage. Polish scheme is based on both derived and individual rights. The two categories of rights complete each other in order to provide for social protection covering the risks enlisted under the social security legislation. In some cases it seems worthwhile to reconsider replacing the derived rights with individual rights. For instance, individual right to health care benefits for children would improve the adequacy and efficiency of the scheme. Some derived rights could be exercised more freely if the definition of family underwent necessary modifications within the social security legislation.

In the concluding remarks some general conclusions drawn from the material presented by the contributing analysts and researchers have been included. Those call for further theoretical study and implementation research and discussion.

I wish to give my thanks to all the contributors for their devoted research and informed writing included in this special issue of the Polish journal on social policy devoted to the important topic of the individualization of social rights.

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WHAT DO WE MEAN BY “INDIVIDUALISATION OF SOCIAL RIGHTS”?

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INTRODUCTION

Individualisation of social rights is a process of transformation of the Welfare State, which aims to guarantee social rights to the individual. There are at least two different ways for an individual to get access to social rights: through work or through social citizenship.

We have to consider first Welfare States, which are founded on the traditional model of the worker and his family. Individualisation of social rights means equal access to the labor market for women and men and, through work, access to social rights for all insured workers. As a consequence, derived rights, linked to family relationship, granted to the spouse/partner not involved in employment, might be abolished. Emancipation from the family, as an institution, is here at stake.

We also need to consider Welfare States, which rely on work irrelevant if they are founded on the traditional model of the worker and his family or on a more equal model between women and men. Individualisation of social rights means, in this case, disconnection between social security and employment. Social rights are granted to each individual as a citizen independent from labor market position. Recognition of social citizenship for each individual, including children, is at stake.

Both processes are different and the results are not exactly the same. The first process may be interpreted as an adaptation of the Welfare State to the changing of social mores, while the second process means a revolution in the nature of the Welfare State. “Classics” will help us to understand the basic differences between both processes.

FROM THE PATRIARCHAL WELFARE STATE TO A MORE DEMOCRATIC MODEL

Individualisation of social rights takes place in the changing gender balance in line with the increase of female participation in the labor market (Commission 1997). The patriarchal Welfare State, still present in many European Member States, is developing into a more democratic one.

What is the patriarchal Welfare State? It is a Welfare State, in which the married male breadwinner earns a family wage sufficient to meet the subsistence of his dependents, including his wife, who works at home unpaid to care full-time for children and elderly parents, his children and other family members in need. This model is patriarchal, because it puts women financially in a wholly dependent position, which reinforces men’s overwhelming private economic power in the family (Ginsburg 1992). It is built around the concept of family wage and patriarchal division of labor in the family. Derived rights are an essential part of this kind of Welfare State. They guarantee indirect social rights to women and children, who otherwise would be in charge of the male breadwinner/family in case of sickness, maternity, widowhood, etc.

In this framework, feminist researchers fight for a more democratic Welfare State, in which they consider employment as the key to full citizenship. The democratic implications of the right to work cannot be understood without attention to the connection between the public world of work and citizenship and the private world of conjugal relations (Pateman 1989). It is only through participation in the capitalist market, that an individual can gain recognition from other citizens as an equally worthy citizen. Moreover, self-respect and respect as a citizen are achieved in the public world of the employment society. The democratic Welfare State has to guarantee the right to work to all individuals, women and men, and subsequently individualized rights linked to employment.

Individualisation of social rights means a process, in which full-employment has to be implemented, women’s employment rate has to be raised and financial independency of women has to be promoted. As a consequence, women as workers will be granted social rights and derived rights may be abolished. The right to work comes first and it has to be considered as an instrument to achieve Individualisation of social rights. It is part of a policy of emancipation of women, which challenges the traditional family model. In this case, Individualisation of social rights may contribute to modernizing the continental European Welfare State and turning it into a more democratic one without changing its conservative corporatist nature. This is happening in Germany where the splitting of pensions renewed the social insurance model (Kerschen 2005). Developments in Bulgaria and in Hungary, highlighted in this special issue, seem to be part of this trend (see the contributions by Hajdu p. 23 and by Sredkova p. 31).

FROM A SOCIAL CLASS WELFARE STATE TO SOCIAL CITIZENSHIP

Individualisation of social rights may be at the heart of the transformation process. Social citizenship is replacing a social class Welfare State. T.H. Marshall’s theory on citizenship gives us food for thought (Marshall 1950).

For Marshall, the social insurance model, based on work, guarantees a differential status associated with class, function and family and has to be replaced by a single uniform status of citizenship, which will provide the foundation of equality. The instrument used in this process will be the concept of social citizenship.

What did Marshall mean by social citizenship? He divided citizenship into three parts or elements dictated by history: civil, political and social. The civil element is composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, the right to justice (...). By the political element [he means] the right to participate in the exercise of political power, as a member of the body invested with political authority or as an elector of the members of such a body (...). By the social element [he means] the whole range from the right to a modicum of economic welfare and security to the right to share to the full the social heritage and to live the life of a civilized being according to the standards prevailing in the society. The institutions most closely connected with it are the educational system and the social services. It must be noted that Marshall based his theory on the development of citizenship in England, which took place, in its modern form, during the nineteenth century. First civil rights, then political rights. Social rights acquired the same status than the other two elements in citizenship only in the twentieth century.

For Marshall, citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and the duties which the status is endowed. It is also an important ingredient in an integrating process of all individuals into a society and it requires a direct sense of community membership based on loyalty to a civilization, which is common good. Social rights have been integrated in the status of citizenship. Therefore, we speak of “social citizenship”.


Social citizenship is far away from a purely abstract theory of welfare rights. Individuals are identified not as abstract rational agents, but by their membership to a given social order containing “objective” standards. Identity of individuals by reference to “ways of life” is not a universal one, but it is a local and particular one (Barry 1990).

Equality of status is promoted through universal rights. All citizens are endowed with the same rights, irrespective of class, market position, prior earnings, contributions or performance. In this sense, the system is meant to cultivate cross-class solidarity, a solidarity of the nation (Esping-Andersen 1990). Does the principle of universalism only promote an equality of minimal needs? The social-democratic Welfare regime, implemented in the Nordic countries, shows an equality of the highest standards (see the contribution by Kalliomaa-Puha and Faurie on Finland p. 18) and may allow individuals to maintain a livelihood without reliance on the market, which Esping-Andersen calls de-commodification.

In this case, Individualisation of social rights means a process, which removes work as a condition to get full access to social rights and replaces it by citizenship. Social rights are guaranteed to each individual from the cradle to the tomb (Beveridge report 1942). Social citizenship comes first and it has to be considered as an instrument to promote individualized social rights. Nevertheless, full employment will be necessary to fund this type of Welfare State. Social citizenship is a prior element of an emancipation policy, which addresses both the labor market and the traditional family. Individualisation of social rights will change the nature of the Welfare State. Applied on the continental European Welfare State, it will turn a conserva-tive corporatist regime either into a liberal Welfare State, with minimal standards, or into a social democratic one with higher standards. Denmark may perhaps be considered as the model (Kerschen 2005). It is a fusion of liberalism and socialism, of Welfare State and work (Esping-Andersen 1990).

CONCLUSION
As a conclusion, we would like to highlight that the European social model may be analyzed as promoting Individualisation of social rights through work or to social citizenship (see the con-bject-matter of the process of individualisation of social rights is at the center of attention of a group of academic researchers and experts from numerous European countries.7

THE CATEGORIES OF HUMAN RIGHTS DE LEGE LATA
In legal studies, the following categories of human rights have been distinguished: political and citizenship rights, economic, social and cultural rights (Swiątkowski 2006, pp. 2–3). The legal basis for the two former categories was provided by the Convention on the Protection of Human Rights and Fundamental Freedoms, adopted in November 4, 1950. At that point of the development of the idea of human rights it was not yet acknowledged that there is a need to address specifically also the cultural, social and economic security within the framework of Human Rights. Such understanding may have resulted from

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LEGAL ASPECTS OF THE INDIVIDUALISATION OF SOCIAL RIGHTS – AN ANALYSIS ON THE INTERNATIONAL LEVEL

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THE SCOPE OF THE CONCEPT OF INDIVIDUALISATION OF SOCIAL RIGHTS
Assuming that the individualisation of social rights is tantamount to the process whereby the derived rights (les droites dérives) and the rights based on family relations and other personal links (marriage, partnership) are being replaced by the proper, direct and individual rights (les droites propres). It can be attested that both international legislation and the national legislations of the European countries display a fairly advanced level of individualisation. The process of individualisation of social rights needs to be understood as taking place through the modifications in the legal provisions that define the personal scope of social protection, provide the qualifying conditions for the entitlement to benefits as well as rules for their calculation and regulate other essential qualities of those benefits. The su-
the political divide across Europe coupled with the sharp contrasts in economic and social development between different European countries. Furthermore, the demand for the circulation and maturation of the democracy accentuated the political dimension of Human Rights.

In the course of time the importance of the latter categories had also been admitted and, in 1961, the European Chart of Social Rights was adopted, together with three Protocols, and the Revised Chart of Social Rights was adopted in 1966. Both documents guarantee the protection of the following categories of social rights:

1) those regulated by the provisions of the individual labour law (e.g. right to work, fair conditions of work, fair payment for work, protected motherhood, right of workers who have families to be treated equally);

2) those provided for by the provisions of the collective labour law (e.g. the right of workers to gather and organize into trade unions, the right to obtain information and consultation in some specific cases, etc.);

3) those provided for by the provisions of social law (e.g. the right to receive medical care, social security rights, social assistance rights, health care entitlements, the right of the disabled persons to live independently and be socially integrated, the right to social protection against poverty and social exclusion, the right to accommodation, etc.).

On the global scale, the protection of the Human Rights is legally guaranteed by: The Universal Declaration of Human Rights adopted in December 10, 1948, International Agreement on Economic, Social and Cultural Rights from December 19, 1966. Additionally, international agreements oblige state authorities to ensure that some other, social and political, rights and freedoms are protected and provided for (Loc. cit.). The European Convention of Human Rights and Fundamental Freedoms from 1950 together with the European Social Charter (from 1961 and 1966) form a legal guarantee that human rights are fully protected across Europe. The two treaties complete each other – the first provides for the protection of well-being and personal freedoms, the latter focuses on social and economic rights (Loc. cit.).

**INDIVIDUALISATION OF SOCIAL RIGHTS IN THE INTERNATIONAL LEGAL ACTS**

The realization of one of the basic social rights, namely the right to social security, is provided for by a number of international and European legal documents.

**International Labour Organization**

The ILO Convention no. 102 on Minimum Standards for Social Security was adopted in 1951 and had the most vital impact on the development of the standards in the area of social security in the 20th century Europe, both at the level of the development of national legislation and in a broader sense of the scope of social security. It covers all the risks formerly included in the scope of international protection. Their classification have become a blueprint for all the subsequent legislation. In the course of next 50 years no new risks have been introduced into the European standards of social security.

The nine parts of the document cover the following benefits: health benefits, sickness benefits, unemployment benefits, allowances in case of work accidents and occupational diseases, family and maternity benefits; invalidity, old age and survivor’s pensions.

In case of every benefit the following elements have been a subject of its legal definition: the subject and scope of protection, personal scope, material scope, qualifying conditions, the amount of benefit and rules for its calculation (in case of benefits in cash); duration, conditions of the suspension. The subsequent European standards in the area of social security are grounded on those elements.

Convention no. 102 defines the personal scope of every benefit using a percentage for a particular entitled group. The provisions of this document regulate the minimum value of a periodically paid benefit for the average entitled person, who is defined as a man having a spouse and two children, or a widow with two children. This value amounts to 40–50% of the former income of the entitled person or the deceased breadwinner. The opinion that the Convention no. 102 represents the first normative document in the area of social security by the ILO seems thus fully legitimate since the requirements for the social benefits are expressed therein not only through legal formulas but also in terms of statistical data and methodology. Furthermore, the document includes a number of vital conclusions for the future development of social security (Uścińska 2005a, pp. 83–84).

The next stage of the development of social security legislation covers the three Conventions and the three Recommendations from the 60-ties. They constitute, on the one hand, a revision of the legal solutions adopted in the interwar period,
while on the other hand they develop the rules articulated in Convention no. 102. The abovementioned legal instruments introduced by the ILO are more complex and they fully regulate the scope of protection required by an occurrence of any risk defined within the area of social security. They establish higher standards.

Family allowances have become a new regulated area, absent from the previous acts. Standards in this area were provided for in Convention no. 102. In case of family allowances the subject of protection, i.e. the social risk covered, is defined as the cost of maintenance of children. The Convention does not explicitly state who is responsible for bearing this cost though some subsequent provisions postulate that the state should provide the entitled persons with the benefits covering this risk. Those benefits should cover periodically paid allowances in cash or in kind (accommodation, clothes, etc.). The amount of those benefits is to be regulated under national legislations though the Convention defines the minimum values of budget spending covering the cost of those benefits (Morawska, Żałewska, Uścińska ed. 2005, pp. 28–29).

Family allowances did not have their standards reformed within the ILO, even though after the 1952, when Convention no. 102 was drafted, the norms for family allowances greatly evolved both at the level of national legislation and of the European law.

Maternity represents another important aspect of social security. It has been covered by the norms included in two Conventions, namely the ILO Convention no. 102 on Minimum Standards in the area of social security from 1952, and the ILO Convention no. 103 adopted in the same year, on social protection of maternity. The most recent provisions on maternity are to be found in the 2000 ILO Convention on the protection of maternity (no. 183, being a revision of the 1952 ILO Convention no. 103) as well as in the Recommendation no. 191 on the protection of maternity, adopted in 2000.

Under the provisions of the ILO Convention no. 183 the issues of the protection of maternity have been thoroughly regulated; a wide personal scope of the protection covers all the employed women while the widely defined material scope provides also for the benefits in cash disbursed during the maternity leave. The amount of such benefits should not be lower than two-thirds of the income formerly earned by the entitled women. The level of social assistance for women not covered by social security schemes or other schemes providing maternity benefits has also been determined. It should amount to at least the level of the benefits mentioned. The minimum duration of the maternity leave has also been set (at the level of 14 weeks).

The Council of Europe

The ILO Convention no. 102 had a major impact on the basic instrument of the Council of Europe in the area of social security, namely the European Code of Social Security and Protocol to the European Code of Social Security from 1964.

The scope of protection determined in the Code is similar to the scope outlined in the ILO Convention no. 102. In some cases, however, the code extends this scope, especially when the personal scope is considered.

The European Code of Social Security and Protocol to the European Code of Social Security played an important role in the process of harmonization of the national legislations of EU Member States in the field of social security. This is proved by the high number of countries that ratified the Code and the Protocol. The evolution of the national social security schemes has been largely shaped by those documents.

As a consequence of legal dynamism in the national legislations of the Member States of the Council of Europe, and also due to the normative regulations by the ILO, it was decided within the Council of Europe that a new legal instrument should be created in order to account for the changes in the area of social security that had been taking place across Europe. The Project for the Revision of the Code was prepared in cooperation with the International Labour Office and by taking into account the legal heritage of this institution (especially the provisions of the Conventions on Social Insurance introduced after the ILO Convention no. 102 on Minimum Standards for Social Security).

In 1990 the Revised European Code of Social Security was adopted (Uścińska 2005a, pp. 364–365). The Revised Code focused on the needs of the persons covered by the scope of its protection and not only on administering the benefits in case of an occurrence of a social risk covered. In search of an answer to the question whether, and to what extend, the solutions adopted by the Council of Europe (and previously by the ILO) account for the issue of the individualisation of social rights, it is necessary to refer to the evolution of the rules for the coverage and calculation of the benefits included therein.

Part XI, i.e. “Calculation of the periodical payments”, determines the level of benefits in cash paid on regular basis as well as the rules establishing the base for the calculation of various benefits. Additionally, this part of the Revised Code includes a chart with the specific amounts set for the regularly paid benefits. The level of such benefits is higher than standards set in the previous acts.

In contrast with the Convention no. 102 and the 1964 Code, the Chart does not include the notion of an “average entitled person” (a man with a wife and two children). The terms used include “person”, “single beneficiary”, “entitled person with his or her dependants”. In this latter case the level of benefits is heightened.

It follows from the above that the calculation of benefits, including setting minimum standards in the discussed international regulations, underwent deep transformation. Traditionally, it was an average beneficiary who was covered by the scope of the protection. The definition of an average beneficiary (entitled person) differed according to the type of social risk covered. Basically, in case of sickness benefits, unemployment, work accidents and disability it was a man having a wife and two children. In case of old-age pension it was a man with a wife in the retirement age. In case of family pension, it was a woman with two children. In case of maternity benefits, the entitled person was understood to be a pregnant woman.

Such solutions were adopted in both the ILO Convention no. 102 (Minimum Standards) and the European Code of Social Security by the Council of Europe. The documents subsume a legal construction of an “average beneficiary” based on an assumed model of family. Under this model most women and children did not possess individual rights within social security scheme since their rights were derived from the entitlement earned by the (male) breadwinner. This meant that the entitlement provided for by the national schemes to the old-age and invalidity pensions as well as to the unemployment benefits included additional allowances for the dependants (wife and children). In the course of few decades the structure of family experienced a visible alteration as the number of persons living on their own and outside the assumed family structure increased. Changes in the family structure are reflected in the Revised Code of Social Security adopted in 1990. The Revised Code abandons the distinctions within the scope of entitlement that were based on gender, so that there is no definition of an “average beneficiary” being a man – it is now a “person”.

Furthermore, the Revised Code introduces an additional category of entitlement for a “single beneficiary”. There is also a term “beneficiary with dependants” present in the provisions of the Revised Code. In case of protection covering the consequences of an occurrence of social risk of sickness, unemployment, disability, work accidents the term “beneficiary with
to the rights of migrant workers and members of their families; in case of old-age pension – a person with a spouse reaching a defined age; in case of survivor’s pension – a surviving spouse with two children; in case of maternity – a woman with a spouse and two children.

Modifications introduced by the Revised Code resulted partly from the changes in the structure and model of family characterizing the contemporary European societies and partly represent also the trend towards the individualisation of social rights, including a complete abandonment of the category of gender with reference to the persons covered by the social security entitlements.

**European Union – EU Regulations**

Social Policy, including social security, was treated for a long time as a supplement of the economic policy, even though its significance grew together with the economic prosperity. In the area of social protection and social assistance the EU authorities left room for the state authorities to shape their social policy individually, not through a uniform scheme. This refers to such elements as the type of risks covered, the amount of benefits, the personal and material scope of social security benefits. All those components continue to be regulated under the national legislations of EU Member States. Similarly, either the derived or individual entitlements to those benefits are distributed according to the national social security provisions of Member States.

The 1992 Treaty on European Union (Maastricht Treaty) represented an attempt to exceed an integration based solely on economic objectives. Accordingly, in the Preamble to the Treaty the importance of social issues was emphasized. In particular, the relevance of social issues articulated in both the European Social Chart signed in 1961 in Turin and in the Community Charter of Basic Social Rights of Workers adopted in 1989 was affirmed in the said Preamble. The European Citizenship has been introduced (Article 17 of the (EU) Treaty) together with a non-definitive catalogue of rights of the European citizen.

The universal value of the Treaty lies in the acceptance and promotion of the rules constituting a legislative and norm-setting heritage of the International Labour Organization and the Council of Europe together with a clear indication that those rules should find their place within the framework of the Community law. From the point of view of social security the most relevant provisions were included in Article 42, on which the regulations initiating the co-ordination of social security schemes have been based (Uścińska 2009, pp. 331–343).

The material scope of the regulations on the co-ordination of social security schemes in Europe covers all the benefits qualified as social security benefits by the 1952 ILO Convention no. 102 (Minimum Standards) as well as all those that fall under the definition of social security included in the said Convention.

**EU Citizenship and the individualisation of social rights**

The European Union Citizenship covers individual persons who are citizens of EU Member States. Its character, however, is auxiliary since its legal role does not replace but merely supplements that of the state citizenship. EU citizenship is thus itself based on the derived rights since it does not function outside the priority of the Member State citizenship. Under the Article 17 of the Treaty on the European Union (TUE) (currently Article 20 of the Treaty on the Functioning of the European Union – TFEU), EU citizens enjoy rights and have duties as provided for by the Treaty.

Under the Article 18 of the TUE (Article 21 of the TFEU) the freedom of movement and the freedom to reside within the territory of a chosen Member State is subsidiary with reference to the rights of migrant workers and members of their families (freedom of movement, freedom of economic activity and free flow of capital and services). The scope of those rights was defined by the European Court of Justice in its recent rulings, including Case C-192/05 Tas–Hagen, in which ECJ interprets Article 18 (1) of the Maastricht Treaty (TUE) thus outlining the future interpretative direction of the development of the individual rights of EU citizens.

Article 18 thus needs to be understood as contradicting the national provisions that refuse to grant benefits to war victims on the basis of the fact that the claimant did not reside within the territory of the relevant Member State at the moment of claiming the benefit. The continuation of this trajectory, to some extend, is to be found in the ECJ judgment in Case C-499/06 Nerkowska. The Court stated that Article 18 (1) of the Treaty (TEU) requires an interpretation contradicting the national provisions that refuse to grant the benefits to the war victims on the grounds of the fact that the claimants reside within the territory of another Member State at the moment of the benefit being paid to them.

Both judgments postulate a broad interpretation of the personal scope of the provisions of Article 18 (1) of the Treaty on European Union and of the benefit scheme aimed at fulfilling the duty of a Member State to provide compensation to the civil victims of military conflicts and repressions. At the current stage of the development of Community law, such benefits are excluded from the material scope of the Article 18 (1) of the TEU. However, the Court stated that the freedom of movement guaranteed under the legal framework of Community law prohibits to discriminate within the framework of national legislation against persons who decided to take advantage of this freedom. Consequently, the provisions of national legislation that put such persons in a less advantageous position than the persons residing within the territory of a relevant Member State are not to be treated as producing a purely internal affair since they directly infringe the Community principle of the freedom of movement as provided for in Article 18 (1) of the Treaty (TEU). The freedom of movement, therefore, constitutes within the jurisprudence of the European Court of Justice a realization of the individual rights possessed by all EU citizens (C-406/04 de Cuypet).

In its judgment in case C-499/06 Nerkowska the ECJ ruled that the Polish Act on procuring aid for war veterans and disabled war victims and members of their families (from 1971) is an example of such infringement. By placing a requirement of the place of residence as a qualifying condition for the entitlement to invalidity pension for the civil victims of military conflicts and war repressions, the Act may effectively discourage Polish citizens from taking advantage of their rights of a EU citizen securing their freedom of movement and residence within the Community. Furthermore, the Court added that such provisions may take place in national legislation only in case of a objectively justifiable common good, without a reference to the citizenship of the parties and should be proportionate to the national interest that they serve (the ECJ judgment in case de Cuypet, and also in Tas–Hagen, Tas).

The judgments by the European Court of Justice cited above definitely contradict the legal doctrine that the provisions of the Article 16 (1) of the Treaty (TEU) are not applicable outside the situations regulated by the material scope of the provisions on co-ordination. In question here is the eviction of the schemes providing benefits for war victims outside the material scope of the Co-ordination Regulations (Article 4 (4) of the (EC) Regulation 1408/71) (Uścińska ed. 2005). Such line of legal reasoning represented by the cited ECJ judgments may in near future lead to the situation whereby the special non-contributory benefits covered by the co-ordination provisions will no longer be paid solely within the territory of a Member State but will be transferred across the EU on the basis of the Treaty and EU citizenship (Jorens, Hajdu 2008). This line of reasoning furthers the individualisation of social rights of EU citizens taking advantage
of their right to free movement across the EU. It thus becomes evident that at the turn of the centuries the European Court of Justice extracts from the provisions of the Treaty a number of rights interpreted as individual social rights. Correspondingly, the jurisprudence of the ECJ to a great extent fuels the process of individualisation of social rights of EU citizens moving within the Community.

Community Charts as declaratory documents

The Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989, is to a significant degree modeled on the European Social Chart by the Council of Europe from 1961. Still, however, the former document contains a number of novel legal developments in the field of social rights. First of all, its legal quality as such is new in the sense that it imposes concrete obligations on the signatories – Member States – the implementation of which must take place both de jure – within the national legislative framework – and de facto – i.e. in practice. The Community Charter has a declaratory character.

Another relevant EU document is known as the Charter of Fundamental Rights and is legalizing the matters of guaranteeing the implementation of Human Rights. Significantly, the Preamble to the document invokes the entirety of the legal heritage of Community law – aquis communautaire – as well as legislation by the Council of Europe, including the Convention of Human Rights from 1950 and the European Social Charts. Even more importantly, the Preamble refers to the ECJ case-law, as well as to the jurisprudence by European Court of Human Rights. This emphasis on the close relationship between the Community law, Human Rights Courts and the Council of Europe accentuates the universal character of Human Rights, endorsed regardless of which institution is formalizing their legal certification.

The Charter of Fundamental Rights systematizes a wide range of fundamental rights.14 Chapter IV on “Solidarity” settles diverse social and economic aspects. A legal analysis of the provisions of the Chart demonstrates (Uścińska 2005a, pp. 532–533) that it sanctions and confirms, within the area of social rights and social security, including the right to social and economic protection of family, the legacy of the priorly adopted EU Regulations, Community law, Council of Europe and the International Labour Organization. It does not generate a new catalogue of rights in this sphere. It fosters the right to social protection and its individualisation.

The documents of international law analyzed here supply a legal background for national social security legislations providing entitlements to social benefits and individual social rights. An important role is played by the legal perception represented by the ECJ case-law promoting an ever-expanding interpretation of social rights issuing from EU citizenship. This is confirmed by the legislatorial changes in the countries such as Poland, which modified their national provisions after the recent ECJ judgments.17

THE PROBLEMS OF THE INDIVIDUALISATION OF SOCIAL RIGHTS IN THE LEGAL ACTS OF THE EUROPEAN UNION

The documents on modernization of social protection schemes

In 1997 the European Commission prepared a communication entitled Modernization and improvement of social protection in the European Union.18 The document refers to the process of modernization of social protection schemes, including suggestions for the future solutions to be adopted on the European level. It is also reminded that each Member State is sovereign and responsible for the administering and financing of its social protection schemes, or rather its social policy.

The European Union is obliged under the Treaties to furnish regulations authorizing the co-ordination of social security schemes. This serves the purpose of ensuring the freedom of movement across the Community as a right of every EU citizen. The document takes also account of the fact that the EU provides for the possibility of exchanging information and opinions between Member States as well as for cooperation and mutual aid in case of problems and challenges faced by the contemporary social security schemes.

The factors influencing the trajectories of the transmutations in the field of social security are also discussed in the said communication. The changing nature of employment, the ageing of the population in Europe, the new gender balance, the need to reform the co-ordination of national social security schemes are all highlighted by the Commission. According to the authors of the document, the factor of the new gender balance requires a shift towards gradual individualisation of social rights within social security schemes. This provision imposes an obligation to individualize social rights in the field of social protection.

The notion of individualisation of social rights involves the repeal of the derived (derivative) rights which connect social protection of an individual to his/her specific family situation, and their replacement by direct individual rights. The justification invoked by the document in question amounts to the following: the trend of increased female participation in employment will continue during the years to come and will make a valuable contribution to countering an impact of the ageing workforce. The former legal framework of the derived rights based on personal links played in the past an important social and economic role, mostly by securing social protection against poverty, especially for unemployed women who have taken responsibility for housework and child and elder care at home.

The analysis of the functioning of this framework in the context of the new gender balance, however, uncovers a number of pressing dilemmas, such as:

– the problem of insecurity of the entitled beneficiaries of derived rights constructed on the dependency on another person insured under the regulatory framework of social security scheme. In case of the disintegration of family structure or relationship the derived entitlement is lost. It is also frequently underlined that the derived rights are granted only to spouses and children while disregarding other models of family and forms of co-habitation;

– the problem of disincentives to enter the labour market. The guarantee of social rights based on derived entitlements may discourage from undertaking economic activity or promoting employment outside legal framework, especially when individual social rights based on employment are not provided for. The income from such employment is qualified as a contribution to household income;

– the problem of social justice as regards pension scheme. The derived rights are granted regardless of the individual contribution to the scheme. Persons receiving the survivor’s pension benefit from the contributions paid by the insured persons on account of his or her own pension. This may lead to situations whereby the amount of pension based on derived rights is calculated as much higher than when based on individual contributions. This refers primarily to cases in which the breadwinner’s income was relatively high, so that the survivor’s pension is of corollatively high amount (Kerschen 2005, pp. 33–38).

The problems signaled by the Commission indicate the need of the gradual individualisation of social rights, which may be seen as a part of broader tendency towards greater autonomy of the entitled individuals. This latter process goes beyond the modified gender balance and also concerns the relation between parents and children in the light of evolving family patterns and structures. The documents pinpoints the need to encourage participation in employment, especially with reference to the beneficiaries of derived rights.
Furthermore, flexible forms of employment should be valued and promoted, particularly with reference to women, while the scope of individual rights based on such employment ought to be legalized under the regulatory framework of national social protection schemes.

The European Strategy of Employment\(^{23}\) adopted in 1997 contains provisions on the equal status of men and women, the realization of which conditions a further increase in the level of participation of women in employment in EU Member States. The specifications of the European Strategy of Employment may thus be read as voicing support for individualizing social entitlements. What is more, specific areas in need of reform are enlisted in the document in question. Those include: health care entitlements, unemployment benefits, pension schemes (especially survivor’s pensions). There is a concession, however, that in case of pension entitlements individualisation of rights must be accompanied by a thorough analysis of probable consequences in order not to leave individuals unable to work without social protection. European Commission suggested that the following systemic solution could be feasible: basic old-age pension for every person as a universal right not linked with career history supplemented by a pension calculated on the basis of employment. It was emphasized that this method should be treated as a straight and narrow way since in national pension schemes of EU Member States an opposite direction is currently preferred: a clear link between contributions paid through employment and the amount of pension. It follows from the above considerations that any gaps or periods of inactivity in career history require scrutiny with reference to their impact on pension entitlements. Moreover, any studies on individualisation of social rights must take into account a variety of approaches to the issue of individualisation present in different EU Member States (Kerschen 2005).

### The Open Method of Co-ordination (OMC)

The proposals for the modernization of social protection became after 1999 realized through a substantial legislative effort. The most important instrument of the reform – the open method of co-ordination (OMC) – was adopted in 2000.\(^{20}\) The open method as a means of governance integrates a number of efforts within the EU and operates through convergence and harmonization – it rests on soft law mechanisms such as guidelines, indicators, benchmarking and sharing of best practice. Synchronization through the OMC first targeted pension schemes, then health care and long-term care of the elderly.\(^{21}\) The open method of co-ordination is based on rules outlined in the source documents.\(^{22}\)

When analyzing the objectives and the means devised for their realization in particular areas, there is no direct individualisation of social rights involved. However, at various points there are provisions indirectly supporting or promoting personalization of social entitlements.

Accordingly, in the area of old-age pensions, the provisions on securing social protection against poverty and living standard enabling active social integration for every elderly person can be interpreted in this manner (Common Objective no. 1).

Further on, there are clauses stipulating the access for every citizen to such old-age pension arrangements, both private and public, that would enable accumulation for the future benefits sufficient for the maintenance of the hitherto enjoyed standard of living after the retreat from employment (Common Objective no. 2).

It needs to be added that also the provisions postulating verification of the national regulatory frameworks of the pension schemes with reference to the equal status of men and women provided under the Community law also point towards social rights being individualized (Common Objective no. 10).\(^{23}\)

The question whether the OMC serves the purpose of the individualisation of social rights in the area of health care and long-term care (Kerschen 2005) needs to be answered positively since it indirectly supports changes towards such a direction. A good example is provided by the provision that the right to health care should be a considered as a universal right granted to every citizen. In this respect it refers to Article 32 and Article 33 of the Chart of Fundamental Rights. Also the provisions on access to high quality health care based on the principles of universality, solidarity and equality may be interpreted as a step towards individualizing social entitlements in the field of health care.

Member States cooperating under the OMC did not, however, integrated the discussed areas. There is also no agreement so far that would postulate individualisation of social rights as a common objective. Nonetheless, it can be stated that the realization of the principle of equal treatment of men and women within old-age pension schemes and similar tendencies within health care and long-term care schemes is symptomatic of gradual individualisation of social rights. It needs to be remembered that the OMC allows Member States to freely decide on means for achieving common goals. Consequently, the question to what extent the individualisation of social rights is taking place can be answered after a close examination of national legislations of EU Member States.\(^{24}\)

### Current efforts and plans for the future

According to the European Commission current legal framework constitutes a disincentive for women entering the labour market and discourages their increased participation in employment. As a consequence, the harmful situation within pension schemes further deteriorates while now and again other branches of social security are also negatively influenced. This refers not only to the entitlement to benefits in kind or in cash, but also to their amount, duration of payment, etc. (MISSOC 2008).

It is difficult to establish one direction that would be perfect for all EU Member States. Still, however, the increased participation of women in employment means that especially in the area of social security individual social rights will continue to grow in importance and this process in inevitable. Other social factors will also fuel the process, in particular the legalization of civil partnerships.

The issue of the direction and methodology of the individualisation of social rights needs to be considered from the perspective of job mobility and efforts to increase the rate of legal employment. The Commission of European Communities published a communication Mobility, an instrument for more and better jobs: The European Job Mobility Action Plan (2007–2010).\(^{25}\) The document underscores the necessity for workers to be more mobile, both with regard to changing professions and place of work, including the change of the region or the country of residence in search of employment. It is necessary to procure skills and knowledge enabling quick and frequent change of work and a dynamic career history. This is a key aim of the adopted model of flexibility\(^{26}\) – a concept aimed at helping people to deal with the prospect of frequent change of job in the context of rapid economic changes.

It is emphasized that there are still numerous barriers for the workers’ mobility. Apart from insecurity about potential benefits from mobility, workers face a number of obstacles. Those include administrative and legal hindrances, the cost and availability of accommodation, the employment of their spouse, the (lack of) possibility to transfer pension entitlements, language barriers, the problems with recognition of qualifications in a different Member State.

The Communication discusses solution to be adopted in the domains that should enhance the mobility of workers across the EU, i.e. an improvement in current legislation and administrative
practice, political support for mobility on every level of administration, expanding the scale of EURES (The European Job Mobility Portal) and increasing social awareness of the profits stemming from job mobility. In order to be effective, the efforts to accomplish the postulated aims should promote the right to freedom of movement within the Community for all EU citizens as well as the individualisation of social rights.

1 They were gathered within the framework of the Special programme, currently they cooperate within other international initiatives.
2 Adopted in France in 1789, the Declaration of the Rights of Man and of the Citizen is perceived as the most vital achievement of the French Revolution. It had a decisive impact on the development of human rights on the European continent. The rights included in the Declaration, especially the right to hold individual property, to freedom of conscience and religion, and the political rights of the freedom of expression were formative for the drawing of the similar provisions in the future constitutions. See: (Kuźniar 2004, p. 24).
3 In case of the benefits in kind, relevant provisions provide for the rules specifying the level of participation by the entitled persons in partially covering the cost of such benefits.
4 For those benefits the rules applicable in case of disagreement have been provided for, e.g. in case of a legal quarrel due to the refusal to grant a benefit. In case of some benefits some additional rules have been introduced to secure higher standards in some particular areas.
5 In fact, the Convention specifies that the sum of the family allowances and the benefit paid during the period of social protection should be equal (against the level of the formerly earned income) to the level of the percentage of the former income specified by the Chart enclosed in the part X of the Convention no. 102 for an average person entitled to a given benefit or a person fulfilling the same range of obligations as the average entitled person.
6 Those include the Convention no. 121 adopted in 1964 and covering the risk of work accidents and occupational disease, Convention no. 128 from 1967 covering invalidity, old-age and survivor’s pensions, and Convention no. 130 from 1969 on medical care and sickness benefits.
7 According to the Recommendation 67 from 1944, financial support should be provided from the state sources to secure proper and healthy conditions for children, to help families raising many children and to supplement social security benefits covering the cost of child maintenance.
8 In question here are especially the EU regulations and the ECJ case-law, which extend the interpretation of the concept of the family benefit, cf. (Uścińska 2005b).
9 Revising the Recommendation from 1952 on the protection of maternity (no. 95).
10 Provisions for the dismissal before or just after the maternity leave were also included.
11 The relation between the two documents is visible in the history of the Code, which is often named “the European version of the convention no. 102”.
12 The Code does not provide for temporary exclusions and leveling down of some standards.
13 Aside from this, however, the very notion of an average entitled person or an average beneficiary has evolved accounting for the changes in the model of family and in the personal scope of national social security schemes.
14 In legal studies this approach is conceded, cf. also (Pennings 1998, pp. 205–206 and 213–214).
15 The ECJ judgment in case C-499/06 Nerkowska, from May 22, 2008 and the ECJ judgment in case C-211/07 Zablocka-Weyhennüller, from December 4, 2008. According to the latter judgment, Article 18 (1) of the EU Treaty should be interpreted the payment of the survivor’s pension should not be refused on the basis of the fact that the claimant (a surviving spouse of a person deceased as a result military actions at war) does not reside within the territory of the relevant Member State.
16 Included into the EU Treaties (TUE, TFEU) under the Treaty of Lisbon in 2007.
17 In Poland modification were made in the provisions on invalidity pensions and aid for war victims, and also in tax law, cf. (Uścińska 2008).
19 The European Employment Strategy was introduced after the “Luxembourg summit on Work”, consult: http://www.europa.eu.int/comm/employment_social/employment_strategy/index_eu.htm.
24 The papers following this article contain such analysis.

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INTRODUCTORY NOTE

Social rights guaranteed by the European Social Rights Charters of 1961 and 1996 are treated and protected as human rights (Świątkowski 2009, p. 3 et seq.). Therefore, they have an individual character and (Fabre 2005, p. 15) are considered as subjective rights enjoyed by those who are entitled to them. Natural persons, nationals of Member States of the Council of Europe and other persons lawfully residing in those countries have the right: to work, to adequate and safe working conditions, to decent wages, to counseling and vocational training, to equal opportunities and equal treatment in employment and occupation without discrimination based on sex, to protection in the event of termination of employment by the employer, to the protection of their claims in the event of employer insolvency, to the protection of dignity whilst at work, to associate in trade unions (employees) or employers’ organizations (employers), to negotiate collective bargaining agreements, to participate in collective legal actions, to participate in the decision-making process by employers in matters relating to the workplace and the employees, to health care, to social security, and to social and medical care. Children, minors, pregnant workers, and those in their period of maternity, as well as people with disabilities benefit from special, enhanced legal protection that allows them to combine the duties of life and work (Świątkowski 2007).

The European Social Charters are international treaties, which grant certain powers to individuals, imposing on Member States specific responsibilities in order to allow persons who are entitled to claim social rights, to make use of such rights. Thus, almost all the social rights guaranteed by the European Social Rights Charters are individual in nature. The principle of individualisation of social rights however is not a universal one. The provision of Article 16 of both the Social Rights Charters of the Council of Europe sets the standard for a family to ensure the right to social, legal and economic protection. The Charters do not contain a legal definition of family. A family, within the meaning of the European standard of social rights protection, is therefore considered to be at least two individuals living in the same accommodation, declaring the desire to raise children. A family is a couple – two people of different sexes or of more individuals related by bonds of kinship.

The social rights that are guaranteed by Article 16 of the European Social Charters apply not to one, but at least two people. The question arises whether there are, based on the above reasons, grounds to conclude that a provision guaranteeing a family the social, legal and economic protection, is an exception from the rule of individualisation of social rights in the European system of protection of human rights?

THE RIGHT OF THE FAMILY TO SOCIAL, LEGAL AND ECONOMIC PROTECTION

The European Social Charters regard the family as a fundamental unit of society. In order to ensure the family the necessary conditions for full development, Article 16 of the Charters obligates Member States to take measures to ensure legal, social and economic protection for the family. The provision in question has a broad scope. It obligates Member States to initiate and carry out various measures, which will form social policy protecting the family, harmonise such measures as well as adapt them to the already existing pro-family measures existing within the given country.

In Article 16 of the Charters the following measures have been stipulated for Member States to follow and ensure legal, social and economic protection for the family: social and family services, fiscal arrangements and taxation benefits, encouraging housing developments appropriate to family needs, benefits for young married couples. These measures are examples only. The provision in question obligates authorities of Member States to take various measures ensuring the family full development. During the first supervisory cycle the Committee obligates authorities of Member States to present information dealing with the following: domestic systems dealing with family social security, benefits and exemptions for families with multiple children from public responsibilities, social services, assistance and care for families rearing children, legal property protection, family housing developments, financial assistance for those families in need.

The Community hands down decisions of compliance or non-compliance with international standards stipulated by Article 16 of the Charters of Member States, based on the information gathered from the reports presented. The provision in question is dynamic in its nature. The Committee is of the view that authorities of Member States are obligated for mostly to indicate, which measures have been taken to ensure development for families. The Committee is therefore interested, to a lesser degree, in the results attained from administering such measures. It rendered a decision of non-compliance of Member States to the international standards under Article 16 of the Charters for establishing material benefits for families and children at too low of a level. Authorities of Member States are therefore obligated by the decisions handed down by the Committee for establishing general social security systems for families and their children as well as ensuring families the right benefits at an appropriate level.

The right of the family to social, legal and economic protection has no normative meaning. Article 16 of the Charters defined obligations for Member States to fulfil and attain the specified goals, i.e. creating necessary conditions for the family so it can fully develop. Based on such reports the authorised entity such as is the family, has no right to file claims against the authorities of Member States in terms of social security. Article 16 of the Charters is therefore a provision, which establishes the provisions under the address of the authorities of Member States.

The Committee during the first supervisory cycle was of the opinion that the above understanding of the family’s right to social, legal and economic protection is entitled to approval because attaining the above goals is possible not by individual measures (even when they have a legal status of dealing with claims), but rather through centralised measures carried out by the authorities of Member States. In reality therefore the provision of guaranteeing a family the protection in order for it to develop is ensured by pro-family policies, which should be carried out by the authorities of Member States.

Article 16 of the Charters obligates Member States to create and sustain conditions, which are necessary for the full development of a family. Deducing from the decisions rendered by the
Committee it may be concluded that such conditions are met when Member States fulfil the following: ensure parents equal legal status, parents and guardians are ensured the required family and social benefits, fiscal arrangements, social services and family housing. Equal rights and responsibilities of the parents should be guaranteed. This refers to property and parental rights, with emphasis placed on paid parental leave. The Committee is of the opinion that Member States, which do not abide by the above principles, discriminate against one of the parents (in property cases it is usually the woman, in terms of child rearing it is usually the man), and therefore do not abide by the standards established under Article 16 of the Charters.

Three Member States were viewed as being discriminatory against parents by not ensuring equality, namely Malta and Turkey, giving the male the status as the “head” of the family authorised to manage the family property. Great Britain on the other hand, as the third violating state in question, was seen to be discriminatory, as it did not ensure women in Northern Ireland equal rights along with the men to manage joint family property. Due to the Committee’s influential decisions, family rights provisions were changed in some Member States. Men were granted parental rights in divorce cases, by being given child rearing holidays, termed as parental leave from the mother, as well as the child are Danish citizens or have been legally residing on Danish territory a year prior to when the benefits are to be paid out. Family benefits are paid out thanks to social security, especially contributory benefits (e.g. those families where the breadwinner is employed in the public sector or under a collective labour agreement) and is non-compliant with the international standards established by the provision in question is to organise and maintain a social security system in accordance with the requirements set up by the ILO convention No. 102.

The Committee decided that family benefits are part of family allowances provided through social security, a necessary source for the full development of the family. The Committee alluded to Article 12 of the Charters, a provision, which orders the establishment and the maintenance of a social security system. It reminded that one of the conditions for fulfilling the requirements established by the provision in question is to organise and maintain a social security system in accordance with the requirements set up by the ILO convention No. 102 or by the European Code of Social Security. The Committee views that the introduction into domestic social security systems assurances of paying out family assistance, according to the international treaties, for those unable to work (thus realising three out of the nine factors named in the ILO convention No. 102), the obligations established by Article 12 of the Charters are met. Family benefits are just one of the nine types of property assistance named in the ILO convention No. 102.

Member States therefore may elect not to take on the obligation of introducing family benefits into the domestic social security regulations, and despite the above decision there is a lack of evidence in establishing decrees about the non-compliance of Member States with the obligations set under Article 12 of the Charters. The Committee is of the view that the obligation specified under Article 16 of the Charters is particular in its nature in comparison to the general obligations specified under Article 12 of the Charters. Because the European Code of Social Security allows Member States to establish 6–month residency requirements within the territory of a member state before granting an individual the right to non-contributory social security benefits, the Committee was of the view the Danish social security regulations were non-compliant with the international standards based on Article 16 of the Charters.

Family benefits should be of a sufficient level. They should be protected against inflation. The level of family benefits should reflect the costs of living standards. These benefits should a family the right to economic protection. The Committee regarded negatively those Member States, which paid out family benefits equal to 2.45 euros and 4 euros per month. Taking into consideration living costs, the above family benefit amounts cannot be regarded as sufficient entitlements assuring a family (the core unit of society) full development.

Family benefits should be made available to all families in which children are raised. The above obligation is not fulfilled when only certain families are ensured the right to family benefits (e.g. those families where the breadwinner is employed in the public sector or under a collective labour agreement) and is, by the Committee as non-compliant with Article 16 of the Charters. A similar decision was rendered in situations where it was obvious a member state had set criteria for eligibility for family benefits at such a level that the majority of families raising children could not meet. Such and other reasons where in given Member States a small amount of families raising children is entitled to family benefits, is seen as general non-compliance by domestic regulations with international standards established by Article 16 of the Charters.
Family benefits should be paid out to families for the duration of time whereby children are unable to support themselves and instead are being financially supported by their parents. Generally family benefit entitlements should be made available until the coming of age day. In the case of continuing with university studies and being supported by parents, such benefits should be made available until the age of 25 or 26 years of age. Taking into consideration the above standards, the Committee unanimously passed a negative decree with regards to social security regulations of Lithuania, which granted family benefit entitlements for children until the age of 3.21

Examining the level of social services provided for families the Committee looks at the following: the scope, the amount, the quality and the availability of such services.22 It was interested in whether the costs of the above services were accessible for less well off families.23

An important social pro family policy element is the exemption and relief in public duties. In the form prepared by the Committee, which forms a basis upon which Member States model their reports on, questions were included dealing with certain tax exemptions for families raising children.24 Commencing from the 14th supervisory cycle the Committee did not seek information from Member States dealing with the tax exemption issue in question. Examining the Spanish reports, it took note at the low level of family benefits, which could not be accepted in justifying tax exemptions for families with multiple children.25

Family housing is of importance amongst other resources, which should be allocated by Member States to enable full family development, adapted to the requirements of a family raising children. The Committee sought reports from the authorities of Member States dealing with family housing conditions in which children are being raised. It was interested in the built up areas of family housing.26 Housing should meet the requirements and should be equipped with the necessary amenities (electricity, water, heating).27 Appropriate housing is housing with defined parameters, which should not be less than the minimum requirements within a given member state.28 Article 16 of the Charters encourages authorities of Member States to erect housing for families. The above obligation is understood as carrying out housing initiatives by state institutions or administrative bodies of Member States as well as supporting private businesses in undertaking such actions to meet their commercial goals.29

In the opinion of the Committee Article 16 of the Charters is a basis upon which information demands can be made on the authorities of Member States concerning details of housing rental costs as well as the accessibility to loans and mortgages for the purchase or the building of houses for young and not too well off families.30 The provision in question also forms a legal basis for protecting tenants against eviction.

The Committee obligated authorities of Member States to pay particular attention to the situation of poor families affected by an above-average unemployment problem, not having enough resources to cover the rent and to be made open to eviction.31 It also dealt with exceptional cases. It rendered a decision concerning Turkey’s inability to fulfil the obligations stipulated under Article 16 of the Charters. Turkey’s security forces carried out compulsory evictions of persons, under the pretext of terrorism, residing in southeast Turkey.32

Article 16 of the Charters ensures families the right to social, legal and economic protection. The provision in question contains legal definitions of family. The Committee accepted the definition provided in the report handed down by the Netherlands in 1996, stating the “family is a social group comprised of one or more adults (of age) responsible for the raising of one or more children”.33 This broad definition encompasses all families as well as homosexual relationships raising children.

The Committee does not demand from Member States to legally recognise relationships of different sexual orientation. It only obligates the authorities of such Member States to ensure social, legal and economical protection for these relationships, which according to domestic legal regulations carry the family status (Harris, Darcy 2001, p. 186, footnote 1154). In defining the scope of entities legally protected under Article 16 of the Charters, the Committee points out that the changes occurring in society means the idea of the nuclear family unit made up of two adults of the opposite sex raising children, is undergoing alterations due to the increase in divorce rates, the widespread management of property by persons not remaining in the marriage and the entrusting of grandparents with the care of children of single parents.34

The Committee is of the opinion that a lack of a legal definition of family with Article 16 of the Charters creates a possibility for a functional debate of this provision to such an extent as the moral standards of the European continent allow. It draws attention to that neither the provision in question nor other Charters provisions provide a legal basis for distinguishing between adult persons in joint household maintenance, either in a marriage or in a non-married situation.35 It does however point out that the protection of certain rights under Article 16 of the Charters is available only to persons forming a family and remaining married. The Committee is concerned with property rights, which are available solely for persons remaining in a marriage.36 Article 16 of the Charters obligates Member States to ensure protection for single parents raising children.37 Regarding violence within the family as a pathological occurrence, the Committee was interested in gaining information with regards to actions taken by authorities of Member States of certain Member States to counteract such pathological family behaviour.38

The Charters orders Member States to treat equally its own citizens and foreigners of other Member States, parties to the international treaty. Equality and the prohibition of discrimination are applicable to social, legal and economic protection of a family legally residing within the territory of another member state. The Committee emphasises to Member States that the above principles of equality are applicable to their own citizens as well as to the citizens of other states. Cases do not exist whereby citizens of other Member States receive privileged treatment whilst residing on the territory of another member state. It is usually the case for authorities of Member States to introduce more difficult criteria for foreign nationals not fulfil when attempting to access specified family entitlements. The Committee considers such instances and passes non-compliance judgments of domestic regulations with international standards established by Article 16 of the Charters when:

– the right to benefits is only assured to a state’s own citizens;39

– the right to family benefits is dependent upon residency for a given period of time as specified by domestic regulations;40 unless this condition does not remain in any way linked to social security sought out by citizens of another member state.41 A period of residency within a given member state as a condition for attaining the right to family benefits out of social security, should be proportional to the benefits, which are sought by a citizen of another member state, party to the Charters;42

– granting the right to family benefits to citizens of only certain Member States (those entering the European Union or the European Economic Area or states that are part of certain bilateral agreements);43

– introducing various conditions before family benefits are granted for a member state’s own citizens and for foreign nationals of other Member States, parties to the Charters.44

The Committee did not conclude upon the grounds required to establish non-compliance of domestic regulations with Article
16 of the Charters, in cases where a member state introduces conditions upon which family benefits are granted or not, based on the residing children receiving benefits that are passed on to their parents.\textsuperscript{46}

A particular case deals with the discrimination of families of a member state’s own citizens, namely the ethnic Roma minority. The Committee in all cases of unequal treatment of ethnic minorities ruled non-compliance with the standards established under Article 16 of the European Social Charters.\textsuperscript{46}

CONCLUDING REMARKS

The provision under consideration, Article 16 of the European Social Charters, does not establish an exception to the principle of individualisation of social rights guaranteed to a family. The international standard defined in this rule requires the authorities of the Member States of the Council of Europe to ensure legal protection for the individuals, who are constituting a family, and who are in need. The broad scope of protection (social, economic and legal) standards granted by the European Social Charters requires Member State authorities to take various actions to different, but always clearly identified beneficiaries – members of one family. Therefore the scope of the guarantees contained in the provision is varied.

Depending on the needs, either an individual or all members of the same family have the right to seek from a Member State the necessary social services (in kind or in property). Because a close relationship between the needs of family members exists, it makes sense for policies that are aimed at aiding in the full development of the family, ensure protection to individual members of the family, who are in need of assistance. Support for one and/or all members of a given family, is a sign of individualisation of social rights available to individuals. This case of individualisation of social rights is proof that the social rights guaranteed by the Charters are included in the category of human rights under international legal protection.

\textsuperscript{1} Conclusions I, p. 75.
\textsuperscript{2} As above.
\textsuperscript{3} Conclusions XIV-1, p. 56.
\textsuperscript{5} The Committee handed down a decision with regards to Turkey and its inability to comply with the standards under Article 16 of the Charters due to its failure to develop a family social security system.
\textsuperscript{6} Conclusions I, p. 75.
\textsuperscript{7} Conclusions XIII-3, p. 59; Conclusions XIV-1, p. 332 (Germany).
\textsuperscript{8} Conclusions XIII-2, p. 27.
\textsuperscript{9} Conclusions XII-1, p. 309 (Belgium); Conclusions XIV-1, p. 574 (Germany).
\textsuperscript{10} Conclusions XIV-1, p. 543 (Portugal); p. 382 (Turkey).
\textsuperscript{11} As above, p. 43, p. 153 (Italy).
\textsuperscript{12} Conclusions IV, p. 102 (Norway); Conclusions XIV-2, p. 155 (Great Britain); Conclusions XIV-2, pp. 132–133 (Belgium).
\textsuperscript{13} As above, p. 25–26.
\textsuperscript{14} As above, p. 27.
\textsuperscript{15} As above.
\textsuperscript{16} Conclusions XIII-3, p. 156 (Great Britain); Conclusions XIV-1, p. 132 (Belgium); p. 133 (Germany).
\textsuperscript{17} Conclusions XIV-1, p. 434 (Ireland).
\textsuperscript{18} Conclusions 2002, p. 207 (Slovenia).
\textsuperscript{19} Conclusions XIV-1, p. 131 (Belgium); p. 236 (Finland); p. 330 (Germany); p. 474 (Italy); Conclusions 2004, vol. 2m p. 384 (Lithuania).
\textsuperscript{20} Conclusions XIV-1, p. 58.
\textsuperscript{21} As above. Applying the above measure, the Committee decided that the period of residency for 6 months or for period of one year, as a condition for attaining the right to family benefits, is in accordance with Article 16 of the Charters. Conclusions XIV-1, p. 199 (Denmark); p. 746 (Sweden).
\textsuperscript{22} Conclusions XIV-1, pp. 56–57 (Austria); p. 332 (Germany); p. 541 (Malta). Conclusions XV-1, pp. 95 and following, pp. 276–277; pp. 307–308; pp. 347–348; Addendum to Conclusions XIV-1, p. 38; Conclusions XVII-1, vol. 1, p. 45 (Austria); p. 219 (Germany); Conclusions 2004, vol. 2, p. 539 (Slovenia).
\textsuperscript{23} As above, p. 43; p. 153 (Italy).
\textsuperscript{24} Conclusions XIV-1, pp. 307–308; pp. 347–348; Addendum to Conclusions XV-1, p. 28; Conclusions XVII-1, vol. 1, p. 45 (Austria); p. 219 (Germany); Conclusions XIV-1, pp. 132–133 (Belgium).
\textsuperscript{25} As above, p. 27.
\textsuperscript{26} As above.
\textsuperscript{27} Conclusions XIV-1, p. 156 (Great Britain); Conclusions XIV-1, p. 132 (Belgium); p. 133 (Germany).
\textsuperscript{28} Conclusions XIV-1, p. 434 (Ireland).
\textsuperscript{29} Conclusions 2002, p. 207 (Slovenia).
\textsuperscript{30} Conclusions XIV-1, p. 131 (Belgium); p. 236 (Finland); p. 330 (Germany); p. 474 (Italy); Conclusions 2004, vol. 2m p. 384 (Lithuania).
\textsuperscript{31} Conclusions XIV-1, p. 58.
\textsuperscript{32} As above. Applying the above measure, the Committee decided that the period of residency for 6 months or for period of one year, as a condition for attaining the right to family benefits, is in accordance with Article 16 of the Charters. Conclusions XIV-1, p. 199 (Denmark); p. 746 (Sweden).
\textsuperscript{33} Conclusions XIV-1, pp. 56–57 (Austria); p. 332 (Germany); p. 541 (Malta). Conclusions XV-1, pp. 95 and following, pp. 276–277; pp. 307–308; pp. 347–348; Addendum to Conclusions XIV-1, p. 38; Conclusions XVII-1, vol. 1, p. 45 (Austria); p. 219 (Germany); Conclusions 2004, vol. 2, p. 539 (Slovenia).
\textsuperscript{34} As above.
\textsuperscript{35} As above, p. 43; p. 153 (Italy).
\textsuperscript{36} Conclusions XIV-1, pp. 307–308; pp. 347–348; Addendum to Conclusions XV-1, p. 28; Conclusions XVII-1, vol. 1, p. 45 (Austria); p. 219 (Germany); Conclusions 2004, vol. 2, p. 539 (Slovenia).
\textsuperscript{37} As above, p. 27.
\textsuperscript{38} As above.
\textsuperscript{39} Conclusions 2002, p. 207 (Slovenia).
\textsuperscript{40} As above.
\textsuperscript{41} Conclusions XIV-1, p. 58.
\textsuperscript{42} As above. Applying the above measure, the Committee decided that the period of residency for 6 months or for period of one year, as a condition for attaining the right to family benefits, is in accordance with Article 16 of the Charters. Conclusions XIV-1, p. 199 (Denmark); p. 746 (Sweden).
\textsuperscript{43} Conclusions XIV-1, pp. 56–57 (Austria); p. 332 (Germany); p. 541 (Malta). Conclusions XV-1, pp. 95 and following, pp. 276–277; pp. 307–308; pp. 347–348; Addendum to Conclusions XIV-1, p. 38; Conclusions XVII-1, vol. 1, p. 45 (Austria); p. 219 (Germany); Conclusions 2004, vol. 2, p. 539 (Slovenia).
\textsuperscript{44} As above, p. 43; p. 153 (Italy).
\textsuperscript{45} As above, p. 27.
\textsuperscript{46} As above.
\textsuperscript{47} Conclusions XIV-1, pp. 307–308; pp. 347–348; Addendum to Conclusions XV-1, p. 28; Conclusions XVII-1, vol. 1, p. 45 (Austria); p. 219 (Germany); Conclusions 2004, vol. 2, p. 539 (Slovenia).
\textsuperscript{48} As above, p. 27.
\textsuperscript{49} As above.
\textsuperscript{50} As above.
INDIVIDUALISATION OF ENTITLEMENTS TO BENEFITS AGAINST THE BACKGROUND OF CHANGES AND REGULATIONS IN THE EUROPEAN UNION

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INTRODUCTION

The aim of this paper is to present the conditions and justify the need to introduce changes in the social security systems of European States against the background of socio-economic transformations at the turn of the 20th and 21st centuries, with special attention paid to individualisation of rights to benefits. Individual and derivative rights to benefits exist in all social security systems, however their proportions differ between various states. The widest scope of rights’ individualisation is observed in Scandinavian countries. As it seems, in other countries, even if the very changes aimed at extending the scope of rights’ individualisation are not introduced, they are for some years now under intense discussions (Meyer 1998).

It is interesting to see how this subject is approached in the European Union legislation. Since the EU uses an Open Method of Coordination (OMC) in an increasing number of cases in the social field, this method will be discussed with special attention paid to the individualisation of rights to benefits.

Thus, the objective of this paper is to show the problem against the background of the OMC – to check if the Open Method of Coordination in the field of pensions may contribute to extension of the scope of individual rights to benefits and if individualisation of rights to benefits may contribute to achievement of goals of the Open Method of Coordination.

First of all we should answer the question if the OMC applied to pensions provides for individualisation of rights to benefits in a direct or indirect way. Secondly we must consider if the OMC is a legal instrument that could contribute to practical individualisation of rights in the Member States. Practical effectiveness of the OMC as a regulatory method is also discussed.

It seems that elements indicating the need to individualise rights to benefits could be found in the OMC; however the wording used in the OMC is often very general and one must base on supposition rather than on a specific guideline.

The paper is composed of five parts. In the first part I describe the place of social issues in the EU policy. The second part is devoted to a concept of individualisation of rights to benefits. Then I present the economic and social background for promoting the labour market flexibility with the guarantee of social security – the flexibility – and the role of individualisation of rights to benefits in this context. The fourth part includes the OMC analysis from the standpoint of individual rights to social benefits being used in this method. The paper ends with summary.

SOCIAL POLICY IN THE EUROPEAN UNION

The EU guiding principle is to preserve the Member States’ competence in social policy. It is assumed that decisions on social systems will be the responsibility of the national governments, by contrast with economic issues, which are to a large extent covered by EU regulations. However, this principle is not fully implemented in practice, mainly because social issues may not be explicitly separated from the economic ones (Adnett 2000). With the growing EU integration, regulations in the economic sphere require interventions in the social field. For example, implementation of the principle of free movement of workers resulted in introduction of the coordination of social security systems for employees moving within the Community.

There are much more spheres of EU intervention in the national social policy. Intensification of EU legislative activity in social issues was observed in the second half of 1990s, inter alia due to unemployment growth and resulting extension of the poverty sphere. A new method had been devised to tackle social issues, which was later called the Open Method of Coordination. It was aimed to reconcile two, theoretically mutually contradictory, goals: on the one hand – preservation of Member States’ legislative autonomy, and on the other hand – impact on the national social policies. In 1997 European Employment Strategy was launch with four pillar Luxembourg Process – a method very similar to OMC.

Individualisation of rights to benefits was expressed in the Commission document of 1997. The need to increase economic activity of women and to eliminate discrimination has inclined EU authorities to call for individual rights to benefits. An opportunity to introduce or increase individualisation of rights depends on the national social security systems in force. Therefore, considering the introduction of individualisation, it is interesting to see how this issue is expressed in the instruments of influence on the social policy, in particular in the OMC.

INDIVIDUALISATION OF ENTITLEMENTS TO BENEFITS

Two types of benefit entitlements exist in the social security system: individual and derivative. As regards individual rights to benefits, the legal title is assigned to a specific person. Entitlement may be based on payment of contributions (usually in connection with employment), taxes or on nationality.

And as regards derivative rights, the benefit entitlement results from a specific status (e.g. marital status or child status) in relation to a person having the primary right. It means that a person having the derivative right may lose his or her right benefit entitlement if the situation of a person with the primary right or the relation between these two persons is changed. Derivative rights are typical of the social insurance systems where benefit entitlements are dependent on contribution payment. Payment of the contribution often results in various derivative rights. As an example one should mention health insurance, which covers the whole family of a person having the primary right. There could be also mentioned the pension insurance, providing for the survivors’ pension for members of family of a person insured in the event of his or her death. However, it does not mean that derivative rights are inherent to insurance systems.

The derivative rights result from the concept of the social security system introduced in the 19th century and in the beginning of the 20th century. This concept corresponded to contemporary social and occupational relations.

Family life was organised in such a way that the working man was the sole breadwinner of the family, maintaining his wife and children from the “family wage”. Wives usually were not economically active, but took care of children. Stability of marriage and of employment were the pillars of the social system and the social security system. Social insurance was associated with employment, thus a man was usually an insured person (having the primary rights) and his family exercised rights in this respect – the derivative rights.
SOCIO-ECONOMIC CHANGES AND A NEW CONCEPT OF THE SOCIAL SECURITY (FLEXICURITY)

In the 1950s and 1960s after the world war two, the prevailing career model and the corresponding family model were still based on employment of the main breadwinner of the family throughout the whole vocational career in one place of employment.

The period of change in this model came during the 1970s. Labour market transformations; the growing labour demand resulted in the growing demand for women’s work. This process was harmonised with the female emancipation movements. Women were eager to resign of the role of “household guardians” dependent on their husbands, and were entering the labour market.

These transformations resulted in undermining of marriage and family institutions. On the one hand, women were extending the sphere of their activity. On the other hand men were resigning of their role of the sole breadwinners. The number of divorces was increasing. Gradually an institution of matrimony was complemented with an institution of partnership, also of persons of the same sex. In consequence, there is a growing number of children born out of wedlock. Family relationships often include persons with previous marriage or partnership experiences.

And the labour market was changing in accordance with economic transformations. Employment structure was undergoing changes. The dominance of industry was replaced with the dominance of the service sector, and globalisation increased reactivity to economic cycles. Economies were becoming more flexible. They had to react quickly to dynamically changing demand, both in size and in quality. The need for flexible labour market has emerged, with the changing manpower demand and the changing employment structure. Employment is not stable on the flexible labour markets: there are interruptions in employment and the demand for qualifications is changing. It results in the need for the life-long learning, often connected with interruptions in employment.

Family life flexibility is harmonised with labour market flexibility.

In result of the above described changes, both on the labour market and in the family life, the social security model, created more than 100 years ago and adjusted to the earlier socio-economic situation, now stops to play its role. The social security based on the long-term and permanent employment as well as the long-term and permanent matrimony does not work anymore.

The following examples illustrate this phenomenon. The _survivors’ pension_ is a support for survivors of the breadwinner. It is determined in relation to the level of earnings or benefit of the deceased person. In a situation where women are active on the labour market, widows’ pensions lose their _raison d’être_; a wife does not need – so definitely as before – a protection in the form of survivors’ pension. The question also arises as to how survivors’ pensions should be regulated in the case of multiple marriages. Which widow (widower) should acquire the right to the survivor’s pension and what should be its amount? If the pension must be divided between several widows (widowers), its amount will not allow to fulfil the function of material security. Widow’s pension is also perceived as a benefit contributing to restriction of female economic activity, because its amount may be higher than an old-age pension of the widow. Women, especially in older age, may lose interest in taking up employment or in its continuation, faced with a perspective of higher benefit after the death of their husbands.

Besides, in effect of anti-discrimination regulations, also men are entitled to survivors’ pensions after the death of their spouses. In this way, married persons are better supported than single persons, which – in particular in the present social situation – may lead to considerable discrimination of single persons.

Health insurance of family members. In the case of derivative rights in the health insurance, labour market flexibility creates the risk of deprivation of the health care entitlement (if the system is of fully insurance nature, i.e. if non-payment of contribution results in non-insurance), because if the person insured loses a job, not only s/he but also members of his/her family, including children, lose the health care entitlement. In practice, “pure” health insurance systems are not popular. Usually access to health care is ensured to children, but also to some other categories of persons not paying contributions. It may be stated that these systems de facto resign of derivative entitlements.

The concept of flexicurity is not precisely defined. According to Streeck (Streeck 2009), flexicurity may be broadly defined as a form of social security or protection of social stability that is intended to be compatible with high manpower mobility in external labour markets. There is also widely discussed the replacement of job security with employment security. The point is to guarantee employees not a given job in a given place of employment, but some job in some place of employment, with necessary – in such situation – interruptions in employment.

Streeck writes (Streeck 2009) that where flexicurity is intended to mean more than just flexibility, the State is required to provide employees and their families with social security in the changing world. For example in Germany, expansion of employment was accomplished by increasing labour market flexibility, which resulted in rise in unstable and low-wage employment, not in the core but in the growing fringe of the labour market, often in the spheres of women’s employment. While it is generally accepted that “old” social security systems are not adjusted to new reality, it is not clear how the new systems should look like. Labour market liberalisation and flexibilisation involves redefinition of the idea of social security: from public protection from the market to public activation for the market, if necessary combined with public assistance. Ute Klammer (Klammer 2002) mentions the following issues that need to be raised in further social security debate: access to benefits for persons with flexible and low-paid employment, a problem of minimum benefits, benefits’ individualisation and the policy of promoting labour market activity.


In the context of flexicurity, the derivative rights are nowadays perceived as a problem. The fact that benefits are connected with matrimony may be interpreted as discriminatory for a growing number of unmarried persons. On the other hand, spouses – usually wives – are dependent on employed persons holding individual entitlements.

OPEN METHOD OF COORDINATION AND INDIVIDUALISATION OF ENTITLEMENTS TO BENEFITS

The _Open Method of Coordination_ is an instrument of the so-called soft law introduced to tackle issues of importance for the European Union, which however are not covered by EU legislative powers. The Open Method of Coordination, although under a different name at the time, has been first applied in the field of employment and unemployment, then in the field of poverty, pensions and health care. Historically, it was a reaction to the growing EU’s economic integration, which resulted in a need to
raise social issues. As mentioned above, it was assumed that the soft law would allow to achieve common objectives in social policy with preserved autonomy of Member States in this field (Barbier 2004).

Four stages have been distinguished in operation of the OMC: setting goals, development of indicators, transposing guidelines into the national legislation, evaluation of results in individual states against the value of agreed indicators – ranking from the standpoint of goals’ implementation. During the next stages the Member States were intended to approach gradually the devised goals. Applied indicators are of relative nature, which means that they relate e.g. to a value of average wage/salary in a given Member State. Besides, the OMC does not provide for sanctions if the devised goals are not met (Cze- puls–Rutkowska 2004).

In practice the OMC proved to be a poorly effective instrument for several reasons. Firstly, devised goals and objectives not always were explicit and clear. Secondly, it happened that individual goals and objectives were mutually contradictory. Thirdly, implementation of soft law is subject to political impacts; any change in political option means a shift in emphasis (Kroeger 2009).

In their reports on implementation of OMC goals, Member States usually present their legislation, trying to prove that it meets the devised goals and objectives. However, it is difficult to perceive there any legislative actions undertaken under the influence of the OMC.

With all those reservations, it must be however admitted that the OMC plays a significant role in the EU legislation. It indicates a trend in thinking about various spheres of social policy. It also shows certain contradictions in thinking, which reflect diversities and contradictions within the European Union.

The OMC for pensions includes three basic goals and three objectives within each of those goals. In the analysis below I try to answer the question if the OMC provides for extended individualisation of benefit entitlements. It is interesting to see if the EU legislation refers – directly or indirectly – to individual entitlements and if one may believe that rights’ individualisation will contribute to implementation of goals and objectives within the framework of the OMC in favour of elderly people.

**Benefit Adequacy.** This overall goal, sub-divided into objectives, is not directly associated with the individualisation of benefit entitlements. Adequate benefits mean benefits in suitable amount. In the present socio-economic situation benefits are being reduced as compared to their level from the 1950s and 1960s by means of various methods. It is mainly an effect of demographic processes – the increase in the number of beneficiaries. In the light of these changes, a high old-age pension of the sole breadwinner, in suitable amount to ensure an adequate living standard for the matrimony, is not available any more. A retired couple will achieve higher living standard if both spouses receive benefits. The mere fact of existence of derivative rights does not exclude the situation where both spouses receive benefits if both of them had vocational careers. However, studies show that women with prospects for adequately high survivor’s pension after their husbands' death or for various supplements to the old-age pension received by him, may resign of vocational career or full vocational career. It means that derivative entitlements may indirectly support decisions which in the old age will result in inadequate material security. Deliberations on the first overall goal also refer to its objectives. However, account should be taken of particular determinants of each of those objectives.

The first objective is to prevent poverty. Mainly old women are at risk of poverty, because statistically their vocational careers are shorter and wages/salaries are lower. Individualisation of entitlements does not lead directly to poverty preven-
however, not sufficient to provide for social security; to secure its nationals in a situation of flexible families and flexible labour markets, the State should undertake many other actions. However, in the light of these changes, individualisation is a necessary step.

Filling the gap between security for women and men. Although in the literal sense this objective does not provide for individualisation of rights, but – as it seems – the transparency of principles and the possibility to adjust to changes also leads to demand for rights’ individualisation.

Analysis of OMC association with the individualisation of rights to benefits is difficult for two reasons: firstly, individualisation is not directly mentioned, secondly, OMC formulas are general and not always explicit. For this reason the demand for individualisation may not be easily derived from this method.

The OMC in the security for elderly persons indicates both the need to maintain hitherto achievements of the European States and the need to meet the requirements of flexicurity, because the OMC – as a method of influencing the law – is intended to allow the Member States latitude in deciding on the scope, contents and speed in transposing the regulations.

The interpretation that – generally speaking – the system of security for elderly people should be in perspective compatible with the concept of flexicurity seems justified. The mentioned system should provide for material security in the situation of flexible labour markets and modernised family.

As earlier indicated, individualisation of rights to benefits is compatible with the concept of flexicurity, but derivative benefits are not compatible with this concept.

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INDIVIDUAL RIGHTS AND FAMILY MATTERS

• NATIONAL LEGISLATION AND THE CONCEPT OF THE INDIVIDUALISATION OF SOCIAL RIGHTS.

AN EXAMPLE OF FINLAND

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SOCIAL SECURITY IN FINLAND

The Finnish system is commonly characterized as a Scandi-
vian, Nordic or social democratic welfare regime or cluster as opposed to the Central-European/Corporatist/Conservativemodell or the Liberal/Anglo-American model. (Esping-Andersen 1990, p. 26 – or for more recent see, for example, Kangas 2010, p. 53). Often, however, the usefulness of such broad categories is questionable since the generalisations are simply too broad and the variation among the countries within a cluster can be huge.

This applies to Finland which can be seen as having been part of the Nordic model only just since 1980. Yet, there are some common typical features which may help comprehend the nature of the system: the Nordic model is known for broad, universal coverage, individual rights, high income replacement rates, a wide scope of citizenship rights, and the fact that the social security is typically understood broadly to include besides income protection or health-related social security also services such as education, day care, elderly care and public transport subsidies, housing subsidies as well as active labour market expenditure. The Nordic system is service intensive in contrast to the other models.

As the Nordic model presumes social security in Finland is based on a universal, primarily residence-based scheme – all residents have an individual right to basic social security independent of their contributions or status as economically active or non-active. An essential characteristic of universalist programmes is that they are intended not only for the poor but provide for all citizens in the society. Within the universalistic programmes of Nordic welfare regimes “all benefit: all are dependent; and all will presumably feel obliged to pay” (Esping-
Andersen 1990, p. 28).

Residence-based social security legislation is applied to persons permanently resident in Finland who have their actual place of residence and home in Finland and who principally reside in Finland on a continuous basis. Citizenship is not required. All persons permanently resident in Finland are covered for healthcare services and health insurance, parental allowances, family benefits and national pensions. Some benefits such as unemployment benefits are either residence-based or employment-based depending on the economic activity of the recipient; others such as pensions consist of a basic residence-based national pension that can be complemented with an earnings-related pension from an employment-based or private pension scheme. Some areas of social security such as private accident and occupational disease insurance are entirely employment-based.

The Nordic welfare states are said to have liberal qualifying conditions for benefits. However, the amount one gets may not be that high. There are also relatively high fees for many public services in Finland. The Central European cluster characteri-

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United Kingdom being an exception with close to universal flat-rate benefits. As Kangas sums up, in the Central-European cluster a limited number of people get a lot, in the Nordic countries everyone gets quite a lot, whereas in the Liberal regimes, very few get only a little. (Kangas 2010, p. 53).

The administration and financing of social security is somewhat scattered. The social security benefits based on residence are administered primarily by the Social Insurance Institution, an autonomous body supervised by the Finnish Parliament and regulated by public law. Earnings-related benefits are mainly administered by pension insurance companies, pension funds and foundations, and unemployment funds. The municipalities are also important actors as they are above all in charge of the services. As a rule, the State finances the basic security benefits, the municipalities finance the services and the earnings-based security is financed through employers’ and employees’ contributions.

Why a society adopts a particular model of social security is often explained by its social, political, religious and economic history and is closely related to gender relations and institutional continuity. There seldom is a profound and systemic ideology behind it and some solutions may even be the outcome of relatively brief and opportunistic political coalitions.

According to Kröger, Anttonen and Sipilä (2003) the yearning for independence during the period of Russian rule, the defeat of the working class in the Civil War, the alignment with Scandinavian countries especially after the Second World War and fundamental shifts in public opinion in the 1960s all played their parts in determining social policy in Finland. The Lutheran church has always accepted the primacy of the State and it does not compete in education or social welfare. The country’s late industrialization and the widespread poverty that persisted well into the twentieth century meant that the social security system was slow to emerge from its poor law origins. Children were thought to be of great importance to the young republic and this can be seen both in the early support given to the nurseries and, more recently, in the unique guarantee of universal day care for small children.

Also the early shift of women into paid employment outside the home has affected the development of care institutions. Temporary strategic coalitions between the traditionally opposed political representatives of town and country have played a role in introducing some radical, innovative solutions to support care at home. (Kröger, Anttonen, Sipilä 2003, see also Niemelä, Salminen 2006, pp. 9–24.)

OVERVIEW OF BENEFITS AND SERVICES

In the following we will describe some of the basic means of guaranteeing social security in Finland as well as its financing and administration. Some benefits and services are subject to “if -> then” testing: if the applicant meets the set criteria, the benefit or service must be granted. Many benefits are means tested, but if the means of the applicant do not exceed a set level, the benefit must be granted. These cases are usually quite clear. However, cases where entitlement depends on needs, which is often the case in municipal social and health services, are often more complicated. It may be difficult to assess whether an applicant is poor or needy in the sense described by an Act and thus entitled to a service or benefit. Other than the above mentioned subjective social rights, there are also benefits and services which are tied to the municipalities’ budget (a benefit such as informal care support may be granted if the municipality has enough money) and ones that a municipality can volunteer to organize, such as preventive social assistance (Tuori, Kotkas 2008, pp. 242–246).

Persons residing in Finland are entitled to primary health care and hospital services. This individual right applies also to minors who may themselves decide on their care provided that their age and level of development allows it. Municipalities are responsible for providing public health services for their inhabitants. Public health care services are complimented with the private provision of health services. Public health care services are financed through municipal tax revenues, State subsidy and patient fees. Patient fees consist of municipal-specific fixed-rate fees for health centre visits, out-patient visits to the hospital, for day surgery and for in-patient care. After reaching a yearly ceiling set for municipal health care fees (633 in 2010), the patient gets out-patient services free of charge and short-term in-patient care at a lower rate for the remainder of the year. The fees of children under the age of 18 are taken into account in the parent’s payment ceiling. Private health services are charged a fee-for-service basis.

National health insurance provides reimbursements for part of the patients’ costs of treatment in the private sector, for medicine expenses, and for travel costs related to sickness. Employers are required to arrange, at their own expense, occupational health care services for their employees. Costs incurred by the employers are partly reimbursable under the national health insurance. The national health insurance scheme also covers cash benefits for sickness. Sickness allowance is paid on a daily basis to compensate for loss of earnings of an employed or self-employed person during a period of incapacity for work due to sickness if he/she has been employed during the three months prior to the incapacity.

National health insurance reimbursements and cash benefits are administered by the Social Insurance Institution. The national health insurance is financed by employers’ and employees’ insurance contributions and a State subsidy: daily allowance benefits are financed through employees’, self-employed persons’ and employers’ contributions, and medical expense insurance by the insured persons’ contributions and the State.

Persons with disabilities or long-term illnesses may be eligible for disability allowances. Disability allowances are State financed and administered by the Social Insurance Institution. The Social Insurance Institution also funds rehabilitation services (vocational rehabilitation, medical rehabilitation and assistive devices) and provides income security during rehabilitation. Support for persons with disabilities or long-term illnesses is also provided by municipalities in the form of services such as home help or institutional care. Caring at home is subsidised by municipal informal care allowance, which is paid to a relative or a friend taking care of a sick and in most cases old person at his/her home. Disabled persons have a subjective right for example to a certain allowance of free transport, to assistive devices, interpretation services, home renovations or a personal assistant organised by the municipalities, as well as service accommodation and institutional care.

Parents are entitled to maternity, paternity and parental allowances on the basis of pregnancy, childbirth and childcare provided that they have been covered by the health insurance scheme for a minimum period of 180 days preceding the expected delivery. Expectant mothers whose pregnancy has lasted for at least 154 days are entitled to a maternity grant that can be paid either in cash or in the form of a maternity package containing childcare items. These are financed by employees’ and employers’ contributions and the State.

Each child under the age of 17 who is resident in Finland is entitled to child benefit. Children under school age have the right to municipal day-care. As an alternative to placing their child in municipal day-care, parents can choose to receive child home care allowance, provided that they have a child under the age of 3 in which case they may also get financial help with the child care costs of any other children under school age, or private day care allowance, if their child, who must be under school age, is looked after by a private childminder recognized by the municipality.
A student studying in an upper secondary school, vocational institution or institution of higher education may be eligible for student financial aid: a study grant and a student loan guaranteed by the State. Student meal subsidies, travel subsidies and loan interest assistance are also available to support studying. The study grant is partly means tested, as will be discussed later. Education in Finland is in practice free.

In the event of unemployment, a resident of Finland, who does not belong to an unemployment fund and is thus not entitled to earnings-related allowance, may qualify for basic unemployment allowance (flat-rate), if he/she fulfills the condition regarding previous employment. If he/she does not fulfill the condition of previous employment, or has received basic unemployment allowance for the maximum period allowed, he/she may be entitled to labour market subsidy (means-tested). Unemployed immigrants may qualify for labour market subsidy in the form of integration assistance for the first three years of their residence in Finland. The labour market subsidy is financed jointly by the State and the municipalities. The basic unemployment scheme is financed mainly by the State. Earnings-related unemployment benefits are financed through the unemployment insurance contributions of employers and employees, the unemployment funds' membership fees and government funding.

The old age income is secured by the pension system. The Finnish statutory pension system consists of an earnings-related pension and a national pension. The national pension scheme is based on residence and guarantees a minimum subsistence for a pensioner who has no other pension or whose earnings-related pension is very small. The earnings-related pension is based exclusively on employment. Both schemes provide survivor's pensions: widows and widowers are eligible for a spouse's pension following the death of their spouse, and children under the age of 18 for an orphan's pension following the death of their mother, father or other guardian. The national pension scheme is financed by employers' contributions and State subsidy, and the earnings-related pensions through employers' and employees' insurance contributions. Accident insurance is based entirely on employers' contributions. Additionally, the municipalities provide home services and old age institutions of various kinds for the elderly.

Apart from the labour market subsidy and student grants, none of the above mentioned benefits and services are means tested. Housing benefits available to low-income households, pensioners, conscripts and students, however, are. A low-income household may be eligible to receive a general housing allowance towards costs of living. Similarly, low-income pensioners may be entitled to a housing allowance towards their costs of living. Conscripts may get housing assistance if they pay rent or a maintenance charge for their home while performing military or alternative service. The allowance may also include a basic allowance to the spouse and children of the conscript to help with living expenses. A student may be eligible for student financial aid in the form of a housing supplement. Housing allowances are State financed and administered by the Social Insurance Institution. Municipalities provide means tested social assistance as a last-resort form of income security when the income and resources of a family are insufficient to cover daily expenses.

MEANS TESTING VS. INDIVIDUAL RIGHTS

Section 19 of the Constitution of Finland (731/1999) provides that those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care. Unlike most social, economic and cultural rights, the right to indispensable subsistence and care is subjective – an individual can, in theory, rely on it directly, although in practice implementation of the right is based on benefit specific acts. The right is also one of last resort – a general prerequisite of the right, as clarified by the Government bill on the Constitutional reform, is that the person cannot de facto, by his/her own actions or from the social security schemes or from other persons, obtain the indispensable subsistence and care necessary for a life of dignity. Therefore, individual means or rather needs testing is applied to each case in order to determine the prerequisites of the support in that particular case. Means testing may take account, inter alia, of the family relations of the person such as marital status and spouse’s income, number of dependents, etc.

Section 19 of the Constitution further provides, that everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider. The term everyone can be construed as referring to the principle of universality according to which everyone in a situation described by the provision should have the right to a benefit that guarantees their right to basic subsistence. It was, however, emphasized in the preliminary work of the constitutional reform that the provision in no way intends to absolutely preclude the application of means testing to benefits of basic subsistence and that elements requiring means testing could be incorporated into benefit specific schemes by an Act.

The principle of universality denotes the individual nature of the right to basic subsistence. The principles of social law suggest it too. The principles of autonomy and participation, for example, stress an individual’s right to be heard and the right to take part him/herself in the planning and realisation of his/her services. The principle of integrity underlines the duty to respect the human dignity, conviction and privacy of a client and a patient as well as to take into account, inter alia, his/her cultural background and native language. Also the principle of promoting independent initiative, participation and ability to influence advances the idea of respect for the individual. Means testing, however, leans the system towards a more family-specific approach.

Some social security benefits are indeed intended to support an entire family, or household, such as general housing allowance, and it is then logical to take into account the income and expenses of each member of the household. Others, however, are essentially meant to provide financial assistance to an individual in need of it. Some, although individual, may be decreased, or increased, according to family relations. The amount of national pension, for instance, is smaller for a person who is married in a registered partnership or in a common-law marriage, but it can be supplemented with a child increase if a child under the age of 16 lives in the same household with the pensioner or if the pensioner is otherwise responsible for the subsistence of his/her child living elsewhere. Single mothers receive a higher child benefit than mothers who are married, in a registered partnership or in a common-law marriage. The amount will also depend on how many children there are in a family – the benefit is increased for every child for up to five children. Contrary to the labour market subsidy, the basic unemployment allowance is not means tested. But even though it is flat-rate and is not affected by spouse’s income, it is increased for every child living in the same household with the recipient.

The Constitutional Law Committee has considered the means testing applied to the labour market subsidy, which may decrease due to the unemployed person’s spouse’s or parents’ (if living in same household) income, not to be entirely in harmony with the individual nature of constitutional rights. According to the Committee, means-testing that takes account only of the unemployed person’s own income would better accord with the Constitution. Subsequently, the SATA Committee set up by the Government of Finland in 2007 to prepare a reform of the social protection system has considered dispensing with the application of means testing to the labour market subsidy as a logical
step in aiming towards individual benefits. The reform is under preparation, but due to economic recession it most likely will not proceed during this government.

The Constitutional Committee has nevertheless held, with regard to benefits that provide basic subsistence in the event of unemployment, that the constitutional right to basic subsistence, as per paragraph 2 of Section 19 of the Constitution, does not require such benefits to be extended to persons who, upon an overall assessment of the available statutory security schemes and the person’s family relations, have the prerequisites of subsistence.

In Finnish family law married spouses and partners in a registered partnership have a duty to maintain each other. No such duty exists between common-law spouses. Yet for means tested benefits such as the labour market subsidy account is taken of the income of a married spouse and a common-law spouse alike – but unlike a married spouse the common-law spouse cannot legally be obliged to provide the presupposed maintenance.

Family law provides that parents have a duty to maintain their child. The parents’ obligation to provide maintenance to their child ends, when the child turns 18. Yet means testing of the labour market subsidy of an adult child living in the same household with his/her parents takes account also of the parents’ income, despite the fact that the parents are no longer legally obliged to provide maintenance to the child. Parents will, however, be responsible for the costs of the child’s education even after the child turns 18, if it is considered reasonable. In assessing the reasonableness, account must be taken of the child’s aptitudes, the duration and costs of the education, as well as the chances of the child being him/herself able to cover the costs incurred from the education upon completion.

The Supreme Administrative Court of Finland has held that, in assessing the need for basic social assistance the parents’ duty to maintain their adult child cannot be based on the responsibility for the costs of the child’s education. Funds a student has de facto received from his/her parents have nonetheless been viewed by the Court as a living from other income or assets. In a case that involved an adult student who had received a loan from his/her parents for rent and food, the Court had held that although the parents were not under obligation to provide maintenance to their adult child under the Social Assistance Act 1412/1997, the student could not be seen as being in need of support, having appropriate regard to what is provided in the Child Maintenance Act 704/1975 and to the fact that the student had de facto received from his/her parents funds that he/she was not required to pay back immediately, at least not while the studies were ongoing. To sum up, the presumed duty to support a spouse or child in social law does not equate with the statutory duty to do so in civil law.

The purpose of social assistance is to ensure a person’s or family’s living and to help them cope independently – it can thus be paid to an individual or a family. In the case of an applicant living with his/her parents, the benefit would seem family-specific. The applicant is seen to be living with his/her parents and he/she receives 73% of the full amount awardable. However, from the parent’s perspective the benefit would seem individual – the parent is considered to live alone and he/she receives the full amount awardable.

Although the line between individual benefits and so-called family-specific benefits is somewhat blurred by means testing, and although an individual’s benefit may decrease or increase according to dependence or dependents (statutory or presumed), the right to social security is inherently individual. The only purely derived social security benefit is the survivor’s pension that a widow or orphan is entitled to following the death of their provider. And that too, may be affected by the family relations of the recipient. The spouse’s pension, for example, decreases if the recipient remarries. Otherwise entitlement to social security is not derived by reason of family relations, like marital status or parent-child relationship, but instead on the basis of residence or in some cases on the basis of the individual’s own employment in Finland. A recent Supreme Court decision perhaps best demonstrates this: Despite having obtained a residence permit under false pretences, a woman and her children were considered legally resident and thus entitled to benefits based on residence.

In the case in question A had applied for a residence permit for herself and her child on the basis of family ties. She based her application on the fact that she was married to B, who had a permanent residence permit in Finland, and who was the father of her child. A was issued a residence permit. She brought her second child from Ethiopia to Finland and gave birth to her third child. Together A and B applied for social welfare benefits, namely child benefit, child home care allowance, maternity allowance and parental allowance from the Social Insurance Institution and social assistance from the municipality. Later on that year A and B notified the authorities that their marriage was not real and B was not the true father of the children.

The district Court convicted A on two accounts of aggravated fraud. The Court of Appeal did not amend the decision. A was granted appeal to the Supreme Court. The Supreme Court quashed the decision of the District Court. Amongst other questions that are of less relevance to the subject at hand, the Court considered the question of whether the charges of aggravated fraud should be dropped on the grounds that the actions of A in applying for social welfare benefits and social assistance did not fulfil the characteristics of fraud.

Firstly, the Court found there to have been no legal grounds for holding the residence permits invalid. Therefore, at the time A applied for the benefits she and her children had a valid residence permit – a prerequisite for eligibility to the benefits in question. The welfare benefits and social assistance applied and received by A were not illegal merely because she had given false information in order to get a residence permit.

Secondly, the Court found that, according to the benefit-specific Acts in force at the time, marriage, common-law marriage and custody were facts that might affect the amount of the benefit awarded, but correct information on marriage, spouse or paternity of children were not prerequisites of any of the benefits in question. Therefore the granting of the welfare benefits and social assistance was not the consequence of the false information on family relations given by A, but she would have according to the benefit-specific Acts been entitled to the benefits irrespective of the false information. Further, no clarification had been provided as to the amount of benefits A would have been entitled to on the basis of correct information on her family ties. It had thus not been proved, that the false information given by A had resulted in her obtaining unlawful financial benefit or causing economic loss to the Social Insurance Institution or the municipality. The Court held, that A’s actions did not constitute fraud and dropped the charges brought against her.

CONCLUSION

The principle of universality has received strong support in Finland and it also has institutional support in the Constitution. Although the Finnish welfare state is under pressure financially, so far the suggested reforms have not questioned the individuality of social security. There is, however, emergent talk about a paradigm shift to familism in the sense that families are responsible for an individual’s wellbeing instead of the individual him/herself or the society. For example in organising elderly care a tax reduction available for those who buy services for their parent, grandparent or parent-in-law may be seen as illustrative
of a shift toward the responsibility of the family. Family care is also encouraged with an informal care support, which is paid to a person who cares for an old or sick family member at home as well as child home care allowance, which is payable to parents choosing home care instead of municipal day care for their child.

On the other hand all plans to activate the citizen emphasize individual responsibility. Also the ongoing trend towards private service delivery – even when financed by the public sector – underlines individuality. These changes are motivated by individual rights, the right to autonomy and the freedom to choose. It is interesting from a lawyer’s point of view that social security is increasingly organised by private law such as contract law. Such contractualism has its pros and cons. The more public services are arranged by contracts, the bigger the role the contractual terms and practices play – not to forget the importance of the activity, ability and negotiation skills of the client. There individuality may also mean abandonment. The danger of growing contractualism is that the weakest cannot formulate or justify their needs in contractual terms and therefore cannot benefit from the advantages of contractualism. Even though contracts as such could further the development of a client’s autonomy, the fulfilment of his/her individual needs and thus equality, the result can be quite the opposite. A contract can promise more than it can fulfill, an agreement does not automatically guarantee the quality of the service or the openness of the activity, nor does it consider social inequality. The possibilities of legal tools to protect human and civil rights are easily inconsistent with the usability of them in reality. (Saksin, Kesktalo 2005; Kesktalo 2008; Kalliomaa-Puha 2009).

Activation is most eagerly executed in unemployment benefits but it is also familiar among care. For example care allowances are intended to be used for organising care by oneself. Also, an act on vouchers has recently been adopted giving municipalities the option of organising both health and social services by vouchers. The vouchers emphasize the ability and responsibility of the care-needers. However, activation often in reality signifies the growing responsibility of the family as the citizen him/herself may not be fit to act.

Although it must be admitted that universalism and individuality are no (sole) guarantors of welfare and from an individual’s point of view his/her rights – access to services or benefits – may well be fulfilled in other ways (see Saksin 1998, pp. 157–158), we believe there to be nonetheless an ideological difference in whether one has an independent social right as a human being or a derived right as a spouse or a child of someone. However, the two need not be opposed to each other. Firstly, although the rights are individual, the individual often – and perhaps increasingly – needs the family as a voice to claim those rights. Secondly, although family relations may decrease an individual’s benefits, they may also increase them – the system does not restrict itself to viewing each individual as separate or detached but it can also consider the individual in a larger context as part of a social unit, a family.

5 See the Act, No 380/1987, on disability services and support (not translated yet).
7 Ibid.
8 See Act on the Status and Rights of Patients as well as Act No 612/2000 on the Status and Rights of social welfare clients (not translated yet). See also (Tuori, Kotkas 2008, p. 168).
9 See the Constitution 1, 7 and 11 f and (Tuori, Kotkas 2008, pp. 168–170).
12 Reports of the Ministry of Social Affairs and Health 2009:62 (summary in English).
18 Supreme Court, Decision 24.2.2009, KKo:2009:14
19 The Aliens Act, No 378/1991 (overridden by Act No 301/2004) did not include a provision according to which a residence permit issued on the basis of false information would be invalid. The residence permit issued to A had also not been cancelled under Section 21 of the Aliens Act No 378/1991 nor had it been found invalid in administrative judicial proceedings.
20 A person is eligible for maternity and parental benefits under the Health Insurance Act, No 1224/2004 and to child benefit under the Child Benefit Act, No 792/1992, if he/she is (legally) resident in Finland according to the Act on the Application of Residence-based Social Security Legislation, No 1573/1993; a child is entitled to home care allowance if he/she resides de facto in Finland; and a person or family, who permanently reside in the territory of a municipality, may qualify for social assistance under the Social Assistance Act, No 1412/1997.
21 Chapter 36, Section 1 (Fraud) and 2 (Aggravated Fraud) of the Criminal Code of Finland, No 39/1989.
22 Act No 569/2009. There is no translation available at the moment.
23 See, for example, Kangas 2010, who studied how the welfare state models effect life expectations. He found that life expectancy has a lot to do with wealth, not so much with the welfare regime even though for the life expectancy of a population to improve, it is better to have broader coverage or universal access to care as well as adequate pension to all than to have more generous benefits that are channelled to a limited circle of citizens, (pp. 56–57). See also (Stephens 1998, p. 43).

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UNCONSCIOUS INDIVIDUALISATION
OF SOCIAL SECURITY RIGHTS IN HUNGARY

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INTRODUCTION

The social protection system of all the Member States of the European Union has regulations which attach the individual’s social protection to the special family status – single, married, common-law spouse. The same is true for Hungary.

However, by the end of the 20th century the structure of families changed, the number of divorces and one-parent families increased, and the mass employment of women necessarily led to a change in the traditional distribution of tasks between spouses (see for more details: Pongráczi, Tiborné, Molnár, Edit-Dobossy 2000). At the same time social protection schemes did not change, they failed to follow the social changes.

In the background of individualisation there are basically two major factors: one is the dependent position of women, their disadvantageous situation in the labour market, the other is the high expenses of social protection schemes set up at the end of the 19th and at the beginning of the 20th century.

Hungary has faced deep changes in its economic structures as well as in political and social life on the road of transition and labour market restructuring. Consequently, the impact of economic transformation has been different for men and women. As a whole, the most pressing issues for women and gender relations in the world of work in Hungary may be characterized as follows:

- Difficulties in securing employment and decent income in fluctuating labour markets.
- Inadequate coverage and effectiveness of social protection and social services (illegal and clandestine work).
- Inadequate participation of women in social dialogue and decision-making structures concerning the economic and political environment.

The unemployment is more often a problem of women than for men, with higher unemployment rates. Unemployed women are also exposed to a greater risk of remaining unemployed for a longer time. In addition, women are affected to a great extent by hidden unemployment and work in the growing informal sector.

The willingness of women to find employment is also suppressed by the fact that in many cases they continue to be entitled to social insurance benefits based on the so-called derived rights. At the same time they may find themselves defenceless in case their marriage breaks up or the partnership is ceased.

As a rule, Hungary ratified the core ILO Conventions on gender equality and discrimination, thus legally guaranteeing equality between men and women. Nevertheless, in practice women still face marginalization and unequal treatment in the labour market, and especially in decision making.

Gender segregation in employment still prevails in Hungary. In the labour market, low-paid occupations in the office work, health and education, public sector and services are as a rule female dominated. Women are very often paid less for equal work of equal value.

Equality was not a driving force of social security reforms in Hungary. Instead, the driving forces of social security reforms were:

a) an urgent need to assist “losers” from the transformation process,

b) fiscal constrains,

c) political priorities,

d) public priorities.

The effects of that process were:

a) downsizing of services,

b) targeting of benefits,

c) “marketization” of social security,

d) individualization of pension benefits,

e) increase of the retirement age.

The above-mentioned individualisation has basically occurred only in the second pillar (obligatory, private pension insurance).

Along this line of thinking one should also mention children, who – as future employees – are often partly insured based on the parents’ right. If, however, due to the above-mentioned reasons derived rights are meant to be terminated, the problem arises under what entitlement children possibly without a parent providing for them will be eligible for benefits.

It must be stated in advance that in Hungary the problem of individualisation of social security rights is not a well-known issue either in practice or on an academic level. Even the following individualisation-like provisions and issues are rather unconscious than conscious actions on the legislator’s part.

The purpose of the present study is to examine derived rights and personal dependency relations as well as to identify cases of entitlement to benefits not covered by contributions in the Hungarian system of social protection, and – if possible – to determine what purpose they serve within the structure. After the review and legal analysis of relevant regulations, the cases in which the problem of derived rights is encountered will be highlighted. The present study focuses mainly on health, pension and unemployment schemes.
THE CONCEPT AND SOURCES OF THE HUNGARIAN SOCIAL SECURITY LAW

According to Article 70/D of the Hungarian Constitution: Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health. The Republic of Hungary implements this right through institutions of labour safety and health care, through the organization of medical care and the opportunities for regular physical activity, as well as through the protection of the urban and natural environment. Furthermore, Article 70/E states that Citizens 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. The Republic of Hungary implements the right to social support through the social security system and the system of social institutions.

In Hungary the substance of social security is regulated by laws, these are supported by government decrees that regulate implementation.

There is no strict definition of social security in Hungary. However, a distinction is often made between three basic forms of social security: social insurance scheme (látási biztosítás), social assistance scheme (szociális segélyezés) and universal scheme (általános kölcsönsegítés). The social insurance scheme in Hungary covers the risks of sickness, maternity, health care, work accidents and professional diseases, work incapacity, old age and survival pension. The social insurance scheme is a state run, compulsory, pay-as-you-go type, financed by contributions and based on the performance of some kind of professional activity. All persons covered by social insurance (employees, the self-employed etc) belong to the same scheme. There are no special schemes for specific professions, such as farmers or civil servants. However, certain occupations (such as law enforcement agencies, the armed forces, miners and artists) enjoy special additional rules, which can be found in the legislation governing those professions. Although passive unemployment benefits are not officially classified as social insurance, they are still deemed to fall within the ambit of social security and are organised according to social insurance principles.

The social assistance scheme provides means-tested financial assistance, both in cash and in kind, for any individual who cannot support him/herself.

The universal scheme provides benefits which are not granted under either social insurance or social assistance, but guaranteed by the state and financed out of the general budget (taxation). They are therefore not dependent upon the need of the beneficiaries or the performance of some professional activity. A scheme is defined as “universal”, when every citizen who meets the conditions is entitled to the benefit. The new Hungarian family support scheme, which covers the majority of child and/or family related benefits, came into force on 1 January 1999 and is managed according to the universal principle.

As a summary, we can say that the main force of the Hungarian social security scheme is the social insurance system. It is supplemented by the social assistance and universal type systems.

INDIVIDUALISATION VERSUS COMMON GOOD: POLITICAL AND IDEOLOGICAL BACKGROUND

It is often assumed that Eastern Europeans have been isolated from the global trend of individualization after the Second World War because of the collectivist ideology, which dominated the region till 1989. In reality, in the course of the rapid industrialization and urbanization and together with the increase of the general well-being, all forms of modern individualization found their way to the region. The enlargement of the pool of alternatives for personal realization coincided with the enhancement of personal capacities to make well-founded selections and to take proper decisions. In a parallel manner, the potential for conflicts also increased since the strong state interventionism into economic and cultural life used to put narrow limits on the individual initiative and responsibility. On the other side, the formalized organizational patterns of official collectivism gradually eroded the communal bonds of state socialist societies.

While taking the common good as an important point of reference, the new Constitutions or constitutional amendments passed in Eastern Europe during the nineties have a rather different focus. It is the substance and range of individual human rights. The strategic difference between the state socialist and the new Constitutions exemplify a profound shift from collectivist institutional arrangements towards institutionalized individualism. One might assume that the major problem of opening opportunities for unrestricted personal development and actualization has been thus resolved all over the region. A closer look at realities helps to understand that they are more complex and complicated than the generalized Constitutional provisions. Across Eastern Europe, individualization via privatization brought about unemployment, poverty, ethnic clashes and new forms of alienation of individuals. The expected revival of communities did not come true. Neither was the universal respect to the rights and freedoms of individuals materialized. One may see this immediately in the answers to the direct questions on the respect of human rights in individual Eastern European countries.

CHANGING FAMILY PATTERN

The traditional family approach

Traditionally in Hungary, the family served as the basic social unit. It had multiple functions, providing security and identity to individuals and reinforcing social values. In rural areas, it was also the basic economic unit, all members worked together for the material well-being of the whole family. After the communist takeover, intensive industrialization and forced collectivization prompted many of the younger peasants to leave agriculture for industrial work or other jobs in the cities, some commuting long distances between home and work. Patterns of family life changed. A growing number of women worked outside the home, and children spent much of their time in school or in youth organization activities. Family members spent less time together. The emphasis in daily life shifted from the family to the outside world. Nevertheless, time budget studies indicated that women were still responsible for most of the child rearing and housework despite their employment outside the home. Women usually worked longer hours than men. Working women spent an average of more than four hours each day on household chores, including child care, while men averaged ninety-seven minutes in such activities.

In Hungary, the traditional concept of the family as upheld and transmitted by family socialization was seemingly in conflict with daily life, since the formerly appreciated family model with the working husband and homemaker wife raising the children could not be realized in practice. Moreover, this traditional model was no longer considered to be desirable, since women were better educated, professionally trained and actively participating in the workforce. Many observers have tried to explain this ambivalence, some by exploring the “double bind” social pressure that the political leadership and its subservient economic, scientific and cultural elite exerted on society.

The reference to families and family values has been the main element and the common denominator of the social poli-
cies pursued by the various governments since the democratic transition. Family refers implicitly to young families with children; older people, those living alone, or who have already raised their children no longer seem to fit into the category (Steinhilber 2004).

Alternatives for family approach

Three stages: marriage, cohabitation (unregistered) and registered partnership ("registered cohabitation")

In Hungary, there are many possibilities for partners to choose their relationship form: for same-sex couples they can enter into a registered partnership or a factual cohabitation and different-sex couples are provided the same possibilities, alongside the possibility of marriage (Szeibert-Erdös 2008).

- The unregistered cohabitation (in Hungarian: élettársi kapcsolat) of different-sex couples was recognised in 1996.
- Hungary provides registered partnerships (in Hungarian: bejegyzett élettársi kapcsolat) to same-sex couples since 1 July 2009. This institution offers nearly all the benefits of marriage.
- Cohabitation was legally defined and regulated in 1977 for the first time as a non-registered form of partnership restricted to different-sex partners. Later, in 1996 the gates of this informal partnership were opened for same-sex partners as a consequence of a decision of the Hungarian Constitutional Court. Thereafter, the most notable changes happened recently, especially in 2007. In December 2007 the Hungarian Parliament approved the Act of CLXXIV on Registered Partnership, which entered into force in January 2009. The Act makes it possible for same-sex and different-sex couples to enter into a registered partnership.

Although there are some differences between the regulation of marriage and of registered partnership. The new Act orders the application of rules regarding marriage to apply correspondingly to registered partnership, at least as a main rule and for the relationship between the partners. The enactment of this Act is admittedly the most notable change in the regulation of same-sex partnerships, but many other changes have also taken place. The Constitutional Court has pronounced a number of judgments over the course of the last fifteen years affecting the legal position of homosexual persons and the adjudication of homosexuality itself (Szeibert-Erdös 2008).

Same-sex partners can neither marry each other nor establish a registered partnership according to the Hungarian legislation. Nevertheless, they are permitted to live in an unmarried partnership within the framework of the current legislation in the field of informal cohabitation. This type of partnership is not regulated in the Family Act, Act IV of 1952, so it does not create any familial relationship between the partners. This cohabitation – élettárs in Hungarian – is defined in the Civil Code. The Code contains a number of limited and brief legal provisions with regards this cohabitation form.

Nevertheless, although many of the consequences of marriage are extended, this is not without exception. The property consequences are the same in their entirety, that is to say, the statutory property regime for registered partners is the communality of property.

**RISKS AND BENEFITS**

**Old age**

The Hungarian old age pension system has undergone considerable reform. As from early 1998, the compulsory Hungarian old age pension system consists of two components:
- a conventional, pay-as-you-go social insurance pension from the Pension Insurance Fund, (hereinafter the "first pillar");
- a mandatory private pension provided by private pension funds, (hereinafter the "second pillar").

First pillar

According to the relevant provisions, the first and second pillars were mandatory for all new entrants into the labour force as of 1 July 1998. Workers who had already acquired pension rights under the old system and those who entered the labour market before July 1998, had the option of either staying in the (reformed) first pillar, or switching to the new system comprising of the first and second pillars. The new system began operating on 1 January 1998. Workers were given two years to exercise their right to switch to the new system (until August 1999).

Those who initially opted for the new system were free to return to the first pillar until December 2002. After that date, workers will be permanently affiliated either with just the first pillar or with the new, mixed system of the first and second pillars. Those who chose to remain within the first pillar will still receive a full pension from the PAYG fund. Those who join the new system will receive a pension from the first pillar equal to three-quarters of that given to those who decided to stay with the first pillar. Their first pillar pension is then supplemented by their second pillar pension.

The first pillar of old age pension forms the backbone of the social insurance pension system. The first pillar operates on a solidarity basis. The contributions paid by the insured persons are not individualised. In this system the retirement age was gradually being increased from 60 (men) or 55 (women) to 62 years for both sexes. The retirement age will increase in the forthcoming years until the age of 65.

The amount of the pension is calculated according to the claimant’s service record and his/her average monthly gross earnings upon which contributions have been paid. The calculation of average earnings takes into account all earnings received between 1 January 1988 and the day of retirement. Earnings made before the third year preceding retirement have to be adjusted upwards to the level of the second year preceding retirement, and that average has to be taken into account thereafter. Basically, the full pension may not be less than the minimum pension (28.500 HUF in 2010), which is set annually. For a service record of 20 years the pensioner will receive 53% of his/her average monthly earnings (up to the contribution ceiling). S/he will receive an extra 2% for each year of service between 21 and 25 years of service record, 1% for each year of service between 26 and 36, 1.5% for each year of service between 36 and 40, and 1.5% for each year s/he works after 40 years of service.

**Caring credits and gender equality**

Prior to 1990, all pension schemes provided pension credits for time periods that workers spent out of employment in order to care for young children at home. Given the prevailing gender division of care responsibilities, it was almost exclusively women who benefited from this provision. While the rules for counting such periods varied across countries, a year spent outside the workforce was generally treated as equal to a year of employment, even though no contributions were paid. This meant that periods of child care did not reduce the pension that a parent would receive. Caring credits were financed within the pension system by a cross subsidy from all contributors. Given the social importance of unpaid care work, not only care for children but also for other family members, and the great gender inequality in the allocation of this type of work, caring credits are a key instrument for enhancing gender equality in pensions. Penalizing those who take time off to care for others is a disincentive for parents in well-paid jobs, mostly men, to take child care leave.

Pension reforms during the 1990s brought revisions of caring credits. In Hungary, the revisions of caring credits diminished their value.
**Individualised compulsory, private pension scheme (2nd pillar)**

The trend toward including individual accounts as part of the mandatory pension system continues unabated in many countries, including Hungary as well. The mandatory private pension component was introduced as an integral part of the statutory social insurance type pension scheme, as the second pillar of a multi-pillar pension. When an insured person pays his/her pension contributions part of these are kept in the first pillar PAVG fund and another part is transferred to a private pension fund.

In the popular pension discussion, “individual accounts” are often used as short hand for funded, privately managed, defined-contribution type pension arrangements. However, this can be misleading since each of the main characteristics of a mandated pension system – benefit type, financing and management – can be combined in essentially any form and often are.11

The private pension component, which was introduced as a second pillar of the pension scheme in Hungary, by definition is not redistributive. Pension savings are accumulated in individual accounts. At the moment of retirement, the accumulated savings (plus interest gained, minus administrative costs), is converted to an annuity that will pay a monthly benefit until the worker’s death. Over the course of the working life of most workers, individual savings accounts for pensions contribute further to women’s disadvantage in pensions. Again, this is mainly an effect of the women’s weaker labour market position (reflected in lower incomes and lower pension contributions), and their shorter total working life, mainly due to childcare breaks. One advantage of such a system, however, is that all contributions, even those paid during a short period of employment, are reflected in the savings accumulated. Previously, a number of restrictions had applied regarding the length of the employment contract or hours worked, for example.

The second pillar pension is derived from the sum that has accumulated from the insured person’s contributions plus the interest borne therefrom. Since 2002 there is no minimum guaranteed private pension annuity paid under the second pillar. The Guarantee Fund of private insurance scheme guarantees only the sum which has been accumulated from the insured person’s contributions plus the interest of this amount.

The second pillar pension fund provides annuities (pension) and/or lump sum payments for its members.

The annuities available are as follows:
- an annuity paid until the end of the member’s life,
- an annuity that is disbursed to a pension fund member until a certain set period and thereafter until the end of his/her life, or
- an annuity that is disbursed to a pension fund member until the end of his/her life and thereafter to his/her for a certain period, or
- a joint-life annuity, beginning on a specified date; paid until both husband and wife have died.

Lump sum payments may be made in the following cases:
- if a pension fund member dies before reaching the retirement age (62); (in such case the designated surviving relatives are entitled to receive the lump sum payment),
- if a member failed to acquire 180 months of membership in one or more pension funds.

**Disablement in the two-pillar scheme**

Should disablement occur, an insured person might return to the social insurance pension scheme because the private pension scheme is not prepared to handle the risks of disablement. When a person returns to the social insurance pension system, there are two options: the sum on his/her personal account is either transferred to the Pension Insurance Fund or it is not. If it is, then his/her case is treated as if s/he were an ordinary contributor. Consequently, his/her pension is calculated according to the general rule. If that sum (membership fee plus interest) is not transferred, then the person is entitled to a reduced social insurance pension.

**Death**

Survivor’s pensions are of outstanding importance in the study of the individualisation of social rights in the Hungarian system of social security. There are three types of survivor’s pension:

- a widow’s or widower’s pension;
- an orphan’s allowance;
- a parents’ (grandparents’) pension.

**Survivor’s pensions**

Survivor’s pensions will only be paid when the deceased person giving entitlement was either actually in receipt of a retirement or invalidity pension at the time of his/her death or had accumulated a sufficient service record to claim one of these pensions.

A temporary widow’s or widower’s pension may be paid to the surviving spouse, divorced spouse or partner (same-sex partner as well).

- The widow’s or widower’s pension is paid to the surviving spouse, divorced spouse or partner (same-sex partner as well).
- The benefit is paid to common-law spouses (unmarried partners) provided that they have a child and have co-habited for at least one year or have no children but have lived together for at least ten years. According to Section 685/A of the Hungarian Civil Code: Unless otherwise provided by legal regulation, common-law spouses shall be construed as two unmarried persons living together in an emotional and financial community in the same household.” It is important to underline that the sex of the partners is indifferent.
- Divorced and separated spouses are also entitled provided that they received alimony from their ex-spouse, the amount of their benefit can never exceed the amount of alimony to which they were legally entitled. Temporary widow(er)’s pension is usually paid for one year. However, its duration is extended to 18 months if the survivor cares for a child of the deceased or up until the child’s third birthday if that child is disabled.

The temporary widow(er)’s pension is 60% of the pension that was (or should have been) due to the deceased spouse. If the widow(er) is entitled to his/her own pension, their permanent survivor’s pension equals 30% of the deceased’s pension. The temporary widow(er)’s (or widower’s) pension may thus be combined with the pension of the widow(er).

Following the expiry of the temporary widow(er)’s pension the surviving spouse is entitled to a permanent pension if s/he has reached retirement age, is disabled or takes care of at least two orphaned children of the deceased. The pension that is paid to widow(er)s who do not receive an old age or invalidity pension in their own right is set at 60% of the pension that was actually (or should have been) paid to the deceased. If the widow(er) is entitled to his/her own pension, their permanent survivor’s pension equals 30% of the deceased’s pension. The permanent widow(er)’s (or widower’s) pension may thus be combined with the pension of the widow(er).

**Orphan’s allowance**

Orphan’s allowance may be drawn until a child reaches 16 (or 25 for full time students), and if the child becomes disabled whilst receiving the pension, it is paid indefinitely. The sum of
the orphan’s allowance is 30% of the pension of the person who obtained entitlement. If both parents have died or the remaining parent is disabled, this is increased to 60% of that pension. If both of the orphan’s parents gave entitlement to a pension, then the higher of the two is used for calculating the benefit. The orphan’s allowance never falls below a certain minimum, which is fixed annually.

The parents’ (grandparents’) pension

The parents’ (grandparents’) pension is also part of the survivor’s benefit system and is paid if the deceased person’s parents or grandparents were either disabled before his/her death or aged 65 years or over and primarily supported by the deceased for at least a year before his/her death. If the deceased died as a result of an employment injury or occupational disease, entitlement to benefits exists even if the insured person did not have a sufficient service record to obtain an old age or invalidity pension. The widow(er) of a victim of an employment injury or occupational disease receives a pension even if she is below retirement age and there are no dependant children.

As a summary it can be stated that the Hungarian old age pension system of dependents operates entirely on derived rights. In every case an insured person has to acquire entitlement, after whose death his/her surviving relatives will receive pension. As concerns the sum of the pension, a certain difference can be seen between widow(er)s’ pension and parent’s pension. Two possible cases have to be distinguished. One is when the person has direct entitlement to pension and also entitlement to widow(er)’s or parent’s pension at the same time. The other case is when the claimant is entitled only to survivor’s pension. The basic difference between the two is the following: in the first case survivor’s pension is due to the person concerned in addition to his/her direct entitlement pension. Its extent is 30%. In the second case only survivor’s pension is due, the extent of which is 60%.

As far as I know the idea of making survivor’s pensions universal (individualisation of pension rights) was raised neither during the last pension reform (1998) nor nowadays.

Incapacity for work

Sickness benefit

An insured person is deemed to be temporarily incapacitated for work due to illness, pregnancy or childbirth (if not in receipt of maternity benefit) or nursing a sick child (the nursing of sick children under the age of one year is restricted to mothers and single fathers). For those who are not nursing sick children the employer is obliged to pay 80% of the employee’s normal earnings for a period of 15 days.

After this period entitlement to sickness benefits (tápellénz) under the social health insurance begins. The amount paid by the social insurance scheme depends on the claimant’s service record and daily average earnings over the previous twelve months (up to the contribution ceiling). For those who have been insured for less than two years, 50% of the daily average wage is paid. For those with more than two years of service record, 60% of daily average earnings are paid. All those receiving in-patient treatment receive 60% of their previous average earnings regardless of their service record. Victims of employment injuries and occupational diseases are entitled to a periodic benefit equal to 100% of their average earnings for a period of at least one year (with the possibility of an extension to 2 years).

There are strict limits on the amount of time that can be taken off work in order to care for sick children and these depend upon the age of the child. These periods are increased for single mothers. For children less than one year old there is no limit, for children aged between 1 and 3 years a maximum of 84 days is provided, for those aged between 3 and 6 this is 42 days (84 for single parents) and those aged 6 to 12 this is 14 days (28 for single parents). The amounts paid during these periods (tápellénz) are the same as those paid to insured persons missing work due to sickness.

Sickness benefit is invariably due to the person incapable of work. Derived right does not arise during the enforcement of claim.

New extended disability system

Since 2007 a new double system has been introduced. The first “pillar” of the system is the rehabilitation annuity (Act LXXIV of 2007). The rehabilitation annuity is strongly intended to be individualised. The applicant is going through extensive and comprehensive assessment. The second pillar is the reformed disability pension (Act LXXI of 1997). These two pillars have a close interrelationship. The basic eligibility conditions to:

- rehabilitation annuity: damage on health between 50–79%, and ability to be rehabilitated,
- disability pension: damage on health (égbészékkárosodás) is between 50–79% or exceeds 79%, and cannot be rehabilitated.

Rehabilitation annuity

A new Act LXXIV of 2007 on Rehabilitation Annuity was adopted in late 2007 and is in effect from 1 January 2008, aiming at maintaining a benefit system and an employment-centred rehabilitation system for persons with changed working capacities. Only those active-age persons could receive invalidity pension who are not able to work even with rehabilitation. Thus the qualification system of Invalidity Pension (Rokkantsági nyugdíj) has also changed from 2008. The decision is based on the extent of damage on health and not on reduction in working capacity, and the classification changed as well:

- Class III: the extent of damage on health is between 50–79%, cannot be employed without rehabilitation, but rehabilitation is not proposed;
- Class II: more than 79% without, and
- Class I: more than 79% with need of permanent care by others.

According to this new Act new provisions are set for returning to active life for which rehabilitation is needed. There is a very individualised assessment procedure. Four actors are involved in this process:

1) the authorized rehabilitation expert team (it consists of specialised licensed doctors), which decides upon the extent of damage on health, in which profession the claimant is able to work, the degree of rehabilitation and its modus and duration;
2) the regional employment centre in relation with training and re-training;
3) the pension institution determines and pays the rehabilitation annuity; and
4) the recipient should cooperate with the relevant regional employment centre, should accept the rehabilitation plan and sign the rehabilitation agreement.

Rules of procedure

The rehabilitation allowance can be demanded in writing on the broadsheet for rehabilitation allowance or disability pension. In order to consider the demand, the benefit claimant has to verify his/her regular income. The state tax authority will give forth the claimant’s data on his/her wages within 10 days of the demand of the pension insurance authority.

After the pension insurance authority has required the rehabilitation plan, the claimant is entitled only to survivor’s pension. The basic difference between widow(er)'s pension and parent’s pension. Two possible cases have to be distinguished. One is when the person has direct entitlement to pension and also entitlement to widow(er)’s or parent’s pension at the same time. The other case is when the claimant is entitled only to survivor’s pension. The basic difference between the two is the following: in the first case survivor’s pension is due to the person concerned in addition to his/her direct entitlement pension. Its extent is 30%. In the second case only survivor’s pension is due, the extent of which is 60%.

As far as I know the idea of making survivor’s pensions universal (individualisation of pension rights) was raised neither during the last pension reform (1998) nor nowadays.
basis of the provisions of the relevant act and issues an expert report:
- on the extent of the health impairment;
- on the person’s professional capacity;
- on the conditions of rehabilitation, the possible direction of the rehabilitation, the rehabilitation needs and the period of time needed for the rehabilitation;
- on the rehabilitation needs, and
- on the period needed for rehabilitation.
During the procedure the pension insurance authority is bound by the experts’ opinion of the rehabilitation expert body.

The pension insurance authority suspends the procedure until the issuance of the expert opinion of the rehabilitation expert body.

Cooperation obligation and rehabilitation procedure

The person who is entitled for the rehabilitation allowance – in order to realize the rehabilitation – is obliged to cooperate with the public employment organization; in the framework of this he/she has to:
- a) contract an agreement with the public employment organization,
- b) fulfil the requirements that are set in the annexes of the rehabilitation agreement.

The rehabilitation agreement contains:
1. the statement of the person who receives the rehabilitation allowance that
   a) he/she fulfills the provisions of the agreement,
   b) accepts the workplace offered for him/her and the training opportunities that are free of charge, furthermore;
2. the forms of job-seeking, obligatory for the person receiving rehabilitation allowance;
3. the rehabilitation services of the public employment organization that are offered for people receiving rehabilitation allowance;
4. the forms and frequency of the obligatory visits paid by the person receiving the rehabilitation allowance to the public employment organization.

In case the rehabilitation allowance is granted, the pension insurance authority calls the attention of the beneficiary to fulfill the obligation of cooperation and informs the person about the legal consequences of breaching the agreement.

When setting up the rehabilitation agreement, the rehabilitation needs and also the conditions of the labour market of the given region should be taken into consideration.

If the person entitled to rehabilitation allowance is on gainful employment, an attempt should be made to provide the rehabilitation within this framework. For the sake of this, the public employment organisation contacts the employer. The employer is bound to make a consultation on the rehabilitation options within 10 working days of the date of the contact. In case the employer is willing to undertake the necessary rehabilitation until the issuance of the expert opinion of the rehabilitation expert body.

The person who is entitled for the rehabilitation allowance is bound to cooperate with the public employment organization; in the framework of the expert body.

The pension insurance authority suspends the procedure until the issuance of the expert opinion of the rehabilitation expert body.

Disability pension

Eligibility criteria for disability pension:
- extent of damage on health exceeds 79%;
- extent of damage on health is between 50–79%, cannot be employed without rehabilitation, but rehabilitation is not proposed;
- attaining the service period criteria relevant to his/her age;
- having no gainful activity or the income gained could be maximum 70% of the average income gained in the last 4 calendar months before the damage on health occurred;
- not a recipient of sickness benefit or work accident sick pay.

For pensions determined after 31 December 2007, there are three classes of Disability Pension:
- Class III: the extent of damage on health is between 50–79%, cannot be employed without rehabilitation, but rehabilitation is not proposed,
- Class II: more than 79% of the extent of damage on health but no need of permanent care by others;
- Class I: more than 79% of the extent of damage on health and needs permanent care by others.

Entitlement to an invalidity pension then depends upon the incapacitated person satisfying the necessary service record (period of insurance). The required service record varies according to the age of the person concerned. Those who began work before 22 years of age must have completed at least two years of service before their incapacity, this amount gradually increases until those aged 55 years and over have to demonstrate 20 years of service.

The size of the invalidity pension depends on the following factors: the average earnings, the measure of disablement, service record (period of insurance) and age. The average earnings that are used for this purpose are usually the same as those applied for retirement pensions. The measure of disability relates to three categories:
- Class III: persons who are disabled but retain a limited measure of working capacity.
- Class II: persons who have lost all their working capacity but do not need to be taken care of by others,
- Class I: persons who have lost all their working capacity and need to be taken care of by others.

Those in Class II receive 5% more than those in Class III and those in Class I receive 10% more than those in Class III.

Sickness benefit is invariably due to the person incapable of work. Derived right does not arise during the enforcement of claim.

Unemployment (job-seeker’s benefit)

Act IV of 1991 (Unemployment Act) makes a distinction between active and passive means of employment policy. This is a compulsory social insurance scheme financed by contributions, covering the active population (employees and self-employed) and providing earnings-related benefits. There is no special unemployment assistance scheme. However, there are two benefits regulated in the Act:
- a) job-seeker annuity (álláskeresési járadék) and
- b) job-seeker aid (álláskeresési segély).

The passive means of unemployment (job-seeker’s benefits)

Eligibility conditions

1. Job-seeker annuity. According to the Act the main conditions for job-seeker’s annuity are as follows:
- a) being a job-seeker (to be voluntarily or involuntarily unemployed),
- b) no entitlement for old-age, invalidity pension, work accident-related disability pension or sickness benefit,
- c) seeking employment (to be available for full time work and to be registered as a job seeker),
- d) co-operation with the labour centre to build up an individual action plan.
The qualifying period of job-seeker persons concerned shall be employed for at least 365 days during the previous 4 years. In the case of involuntary unemployment there is no waiting period, but in the case of voluntary unemployment there is a waiting period: 90 calendar days after registration with the labour centre.

2. Job-seeker aid can be granted to a job seeker who was employed for at least 200 days during the previous four years.

Calculation of benefits

The gross average salary of the previous four calendar quarters are taken into account. The rates of benefits vary according to the period of job-seeking:

**Job-seeker annuity (Álláskeresési járadék):** In phase one (half of the period of the disbursement period but maximum 91 days) the job-seeker annuity amounts to 60% of the beneficiary’s earlier average wage, with a fixed minimum and maximum amount. Minimum 60% of the minimum wage, i.e. HUF 42,900 (€ 158), maximum 120% of the minimum wage, i.e. HUF 85,800 (€ 316).

The duration in phase two is the number of remaining entitlement days, but a maximum of 179 days. Benefit: fixed amount, 60% of the minimum wage HUF 42,900 (€ 158).

**Job-seeker aid (Álláskeresési segély):** is payable for 90 days and equals 40% of the minimum wage, i.e. HUF 28,600 (€ 105).

Duration of benefits

1 day of Job-seeker annuity (Álláskeresési járadék) is paid for every 5 days of being employed, up to a maximum of 270 days of benefit.

Job-seeker aid (Álláskeresési segély) shall be payable for 90 days, or for 180 days if the job-seeker has already reached 50 years of age or until the job-seeker becomes eligible for old-age pension, invalidity or accident-related disability pension.

Termination of benefits

Payment of Job-seeker benefit (Álláskeresési járadék) and Job-seeker aid (Álláskeresési segély) is terminated if:

a) the job seeker ceases to be registered,
b) the unemployed person does not accept the appropriate job offered by the labour centre, or fails to enrol in a free training course,
c) pursues studies as a full-time student at any educational institution,
d) the person concerned dies.

The payment of Job-seeker benefit (Álláskeresési járadék) and Job-seeker aid (Álláskeresési segély) is also terminated if the recipient performs a wage-earning activity (except short-term activity not exceeding 90 calendar days during which the payment is suspended) or s/he accepts a training placement with regular support amounting to the sum of the minimum wage.

Illegally claimed benefit is to be repaid to the labour centre. Administrative penalties are imposed in case of breach of reporting obligations or impeding the control of the labour centre.

Unemployment (job-seeker) cash benefits are invariably due to the person incapable of work. Derived right does not arise during the enforcement of claim (Czúcz, Hajdú, Pogány 2005, pp. 355–428).

Active means of unemployment

**Labour market services:** The National Labour Service assists to find a job, to find appropriate employees and to keep the employee status. The forms of labour market service are as follows:

- a) providing information relating to labour force and employment;
- b) counselling in employment, career development, job finding, rehabilitation, local (regional) employment issues;
- c) employment exchange.

The above-mentioned first two (under points a-b) labour market service providers are supported.

Support for labour market programmes

This is a financial support for labour market programmes which are intended to:

- a) assist regional employment development,
- b) influence labour market trends,
- c) enhance the employment rate of persons with disadvantages in the labour market.

The measures of the promotion of employment programmes and the support for labour market programmes can be given simultaneously and can build on each other.14

Health care

During the socialist period, the health care was a universal type system. In 1993 the Health Insurance Fund was established with the goal of being self-supporting, based on compulsory payroll contributions from both employers and employees and a very limited investment portfolio. The HIF is designed to fund the running and ongoing costs of the health care system, but a peculiarity of the Hungarian reform is that capital items are funded through general taxation via local government or the Ministry of Health, Social and Family Affairs.

Private providers have been encouraged and developed in the primary and some of the secondary sectors, however, the provision of inpatient care is still state owned and controlled via local governments. These institutions have led a precarious life, with a shortage of funding to continue to maintain the infrastructure, and many of these institutions running into funding problems and incurring large debt burdens.15

Health Care Financing

The Hungarian health care system operates on the basis of dual financing. As it was mentioned before, the major investments like construction/maintenance, or equipment purchasing are financed by the owner (usually local or regional government) or co-financed from the Ministry in charge of health affairs. All expenditures of the daily operations, including salaries of health care professionals, are financed by the Health Insurance Fund; however, rates can be too low to cover the real costs of providing the services. The lack of adequate funding has lead to the continuation of informal payments and use of public facilities for private practice businesses to enable health care staff to supplement their incomes.

The health care contributions payable by employers and employees are a large burden on salaries and act as a brake on employment, with numerous and widespread schemes to avoid the high level of taxation. This in turn reduces the tax base for health care provision.

Health care benefits

According to the Hungarian health insurance law, two types of health care benefits can be distinguished. One is the benefits in kind [health services] (egészségügyi szolgáltatások), and the other is cash benefits (pénzbeni szolgáltatások), such as maternity-confinement benefit (terhességi-gyermekágyi segély) sickness benefit (táppénz) and child care fee (gyermekgondozási díj (GYED)). In keeping with the structure of this paper the
sickness benefits have already been explained in the section on “Incapacity for work” above and the maternity-confinement benefit and child care fee are excluded from this paper.

Health care services are provided by either physicians who are employed by the local governments or independent doctors who have their own contract with a county level body of the National Health Insurance Fund Administration.

The basic principle is that medical services can be used to the extent justified by the person’s state of health. Health care is generally provided free of charge. This means that the prevention, diagnosis and treatment of diseases by family physicians, dentists and hospitals do not usually incur any co-payments by the patient. Rehabilitation (including occupational therapy), maternity care and ambulance transport are also provided free of charge.

Co-payments are required for certain services such as the provision of dental braces to adults. Hungarian health insurance does cover between 50 and 100% of the cost of medicines contained within an official list. The full cost of medicines will be covered for victims of employment injuries and occupational diseases as well as some low-income elderly or disabled persons. The patient will also incur charges if s/he makes unauthorised use of prescription only treatment, uses the services of a non-contracted health care provider or asks for extra services including a better room in a hospital.

The insured person specified in the Act on Social Insurance is entitled to all health care services. With respect to health care services, partly insured persons as well as persons obtaining services on the basis of a special agreement are considered as the insured (see personal scope). For this reason the derived rights discussed there are not going to be mentioned again.16

Health Care for uninsured foreigners

Refugees and beneficiaries of subsidiary protection are entitled to a wide range of public health care services for a period of two years following the recognition of their status, even if they are not employed (in which case, contributions deducted from their salaries would entitle them to have access to the public health care system).

CONCLUSION REMARKS

As it was stated earlier, the individualisation of social security rights is not a central and key issue in the Hungarian social security legislation. However, intentionally or even unintentionally there are some elements of the Hungarian system which are appropriate for the requirement of individualisation. These include, for example, the 2nd pillar of mandatory pension scheme, or rehabilitation annuity, or the active measures in the unemployment scheme. There have been changes in the family concept as well. Recently, there have been three stages: marriage, (unregistered) cohabitation and registered partnership („registered cohabitation for same-sex couples”). However, the classical examples of the derived rights concept still exist in the Hungarian surviving pension system. Our task is eternal, at least marriage, (unregistered) cohabitation and registered partnership family concept as well. Recently, there have been three stages: marriage, (unregistered) cohabitation and registered partnership family concept as well.

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1 European Commission: Modernising and Improving Social Protection in the European Union, Communication from the Commission, COM (97) 102, p. 15.

2 Ibidem, pp. 15–16.


4 Central and Eastern Eurobarometer 1998: Figure 73.

5 http://countrystudies.us/hungary/58.htm.


7 685/A Civil Code (Polgári törvénykönyv).

8 578/G (1)-(2) and 685. b) Civil Code.

9 Typically, credits were also granted for compulsory military service, however, to the exclusive benefit of men. In some contexts, for example Hungary, provisions for caring credits varied depending on which child care benefit was received by the parent. See (Lückcs and Frey 2003).

10 685/A Civil Code (Polgári törvénykönyv).


12 http://onyf.hu.

13 http://onyf.hu.

14 Act IV of 1991 Article 19/B.


INTRODUCTION

The right to social security is a fundamental human right, recognized by the General Declaration for Human Rights and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). This is a right to everybody as a member of the society to have living conditions corresponding to the human dignity as a human being. This right is a recognized and guaranteed by the law possibility to everybody to earn his/her means for life through his/her labor and to taking by the society a part of the risks of incapaibilty to earn such means (More about the right to social security in: Sredkova 1999a, pp. 18–27, 2008, pp. 35–36; Koke-moor 2004, pp. 5–6; Eichenhofer 2007, pp. 2–10).

THE BASIC INSTRUMENTS

The basic instruments for achieving social security are:
- promotion of employment,
- social insurance,
- social assistance.

Promotion of employment

Social security must be achieved first of all through the personal efforts of the individual – through his/her labor. Labor is the basic instrument for ensuring means for life and for determination of the person’s position in society. That is why the society has to give real opportunities to everybody to earn means for life through work, that is freely chosen or accepted, and the state has to undertake measures for exercising this right (Article 6 ICESCR).

Bulgarian state recognizes the right to work and is obliged to assist exercising this right [Article 48 (1) Constitution of the Republic of Bulgaria (Const.)]. This means that the state is obliged to establish economic, political and legal guarantees for receiving work according to the wishes and capabilities of everybody seeking for work in order to earn material means for his/her life.

Social insurance

In cases when the individual may not earn himself/herself means for life or has not typical for his/her everyday expenditures because of objective reasons, independent of the person, benefits that substitute labor incomes come to help. They presuppose participation of the capable for work and working people in collection of financial means in specially separated funds, from which the sick, old and not working people receive material support.

This is the system of social insurance. This system combines personal contribution (participation through insurance contributions in the social insurance funds) and social solidarity (using the means collected in these funds by particular individuals) for achievement of social security.

Social assistance

In cases when social insurance also can not guarantee the social security of the individual (because he/she is not insured, because the social insurance benefits are not enough, etc.) the society takes the care for him/her. These are exceptional heavy cases of material or other living need of individuals that can not be got over in another way. This need may be satisfied by the system of social (public) assistance. It is performed by public funds and is not presupposed by preliminary participation of the assisted individuals in collection of the means of these funds.

THE RIGHT TO SOCIAL SECURITY

The right to social security is a fundamental right of Bulgarian citizens. It is proclaimed not explicitly, but with its elements: right to work (Article 48 Const.), right to social insurance [Article 51 (1) Const.], right to health insurance [Article 52 (1) Const.] and right to social assistance [Article 51 (1) Const.].

Pursuant to Article 57 (1) Const. these rights may not be restricted or abolished by the legislation as all basic constitutional rights. There is also constant practice of the Supreme Administrative Court on this issue. These rights are to be exercised through the existing systems of social insurance and social assistance. They are basically regulated by the Social Insurance Code (SIC), the Health Insurance Act (HIA), the Social Assistance Act (SAA), the Family Allowances for Children Act (FACA) and the Integration of Disabled Persons Act. Persons exercise the rights to social insurance and to health insurance with the social insurance scheme, and the right to social assistance – with the social assistance scheme.

The social insurance scheme and the social assistance scheme together with employment promotion formation the system of social security in Bulgaria.

THE SOCIAL SECURITY BENEFITS

Before discussing of the individualisation of the social rights in Bulgaria, it is necessary to have a look over the social security benefits provided by the existing social insurance and social assistance schemes.

Social security benefits in the Republic of Bulgaria may be classified with regard of the sources for their payment as:
- social insurance benefits,
- social assistance benefits.

Social insurance benefits

The social insurance funds grant these benefits. The right to such benefits belongs to insured persons when insured contingencies occur. The insured social risks are general disease, accident at work, professional disease, maternity (pregnancy, childbirth, upbringing of young child), unemployment, old age, death. The social insurance benefits system provides benefits for compensation of the lost labor incomes or untypical for the habitual life of the person expenditures. Social Insurance Code regulates these benefits.

The Social Insurance Code, the Health Insurance Act, and the secondary legislation for their implementation regulate social insurance benefits. Social insurance is a scheme providing cash benefits or benefits in kind, when persons can not earn means for their subsistence through their personal work because of incapacity for work, maternity, unemployment, old age or death of the person providing support to them, or when they have to pay for unusual revenues (health care in case of illness, pregnancy or childbirth). As a rule, personal incomes and personal needs of the insured person make no difference for the social insurance. It is at the expense of the means of social insurance funds and of the budget of the National Health Insurance Fund. Social insurance benefits are always an entitlement except the special merits pension.
Social insurance benefits are two types:

First, **contributory social insurance benefits.** The insured persons who have paid contributory benefits to the social insurance funds and to the budget of the National Health Insurance Fund are entitled to these benefits.

Second, **non-contributory social insurance benefits.** Everyone, for whom the circumstances provided for in the law exist, has a right to these benefits. Non-contributory social insurance benefits are social pensions, personal pensions, civil invalidity pension, military invalidity pension, and special merits pension. These pensions are granted at the expense of the “Pensions not related to Labour Activity” – Fund of the National Social Insurance Institute. The main source of means of this fund is the Republican budget. Non-contributory benefits are also the urgent health care, the psychiatric care in state medical establishments as well as haemodialysis. Non-contributory social insurance benefits are entitlements except the special merits pension that is only opportunity.

From all these social insurance payments only the right to survivor’s pension, which will be discussed below, is derivative one.

**Social assistance benefits**

They are granted by the Republican Budget. The right to these benefits belongs to every person who can not satisfy his/her vital needs neither alone nor by the assistance of persons obliged to support him/her. Social Assistance Act, Family Allowances for Children Act and Integration of Disabled Persons Act regulate these benefits (in details Srdikova 1998, pp. 55–92). With regard to the need that must be satisfied the social assistance benefits may be classified as:

- **Social Assistance Benefits under General Scheme.** They are provided for every person in need independent of the reason for this need.
- **Social Assistance Benefits under Special Schemes.** These are the schemes of social assistance to parents, to disabled persons and for other special needs.

With regard to the nature of the benefits they may be:
- **benefits in kind.** Health Care, some social allowances, as well as social services are benefits of this kind;
- **cash-benefits.** All social insurance benefits as well as the social allowances and some health insurance benefits (reimbursement of costs) are of this kind.

**SOCIAL INSURANCE SCHEMES**

Social insurance schemes in Bulgaria are statutory and non-statutory.

The statutory social insurance is the basic element of the social security system in Bulgaria. The insurance obligation originates ex lege. This insurance scheme grants the basic social insurance protection to a widest circle of persons. It is public insurance.

The obligatory insured persons for **disability for work, maternity, unemployment, old age and death** are pointed out in Article 4 SIC. They are all persons earning remuneration with dependent work as well as self-employed (persons exercising freelance professions, traders etc.). These persons are:

First, **obligatory insured for all social risks:**

1. Employees hired for more than 5 working days or 40 hours during one calendar month.
2. Persons included in the programme “From Social Assistance to Employment” and “In Support of Motherhood”.
3. Civil servants.
4. Judges, prosecutors, investigators, state bailiffs, judges for the entries and court employees.
5. Military servicemen/women.
6. Civil servants under the Law for the Ministry of Interior, the Law on the Defence and the Military Forces, the Law for Execution of the Penalties and the Law on the State Agency “National Security”.
7. Members of cooperatives who perform work and receive remuneration in the cooperative.
8. Contractors in contracts for management and control of commercial companies, sole traders, non-personalized companies, as well as syndics and liquidators.

Second, **obligatory insured for some social risks** (invalidity for general decease, old age, and death):

1. Employees hired by one or more employers for not more than 5 working days (40 hours) during the calendar month.
2. Persons registered as exercising freelance profession or craft activity.
3. Persons who work as sole traders, owners, or partners in commercial companies and natural persons – members of non-personalised companies.
4. Registered agricultural producers and tobacco producers.
5. Persons who work without employment contract.
6. Civil servants under the Law for the Ministry of Interior, the Law on the Defence and the Military Forces, the Law for Execution of the Penalties and the Law on the State Agency “National Security”.

**SOCIAL ASSISTANCE SCHEME**

Social assistance scheme includes all nationals (both Bulgarian and foreign) residing permanent in Bulgaria (Article 2 SAA). Nationals of the Member States, of the States Parties of the European Economic Area Agreement and of the Confederation of Switzerland nave the same rights as Bulgarian nationals under the coordination rules of the EU.

**INDIVIDUALISATION OF SOCIAL SECURITY RIGHTS SUBJECT OF SPECIAL THEORETICAL STUDIES OR PRACTICAL DISCUSSIONS?**

Since the establishment of the social security system at the beginning of the 20th century social security rights in Bulgaria have always been individual. They used to be reco-
gnized to persons because of their personal characteristics that determine also the ground for their social insurance. This is due to the fact that the right to social insurance is derivative from another – primary, characteristic of the insured person (an employee, tradesman, civil servant etc.). The tie of relationship or marriage bond is material only to some cases which will be dealt with below. On the other hand, the right to social assistance depends on the personal need of the person. That is why the problem for individualisation of social security rights has not yet been subject of special theoretical studies or practical discussions.

There is no special definition of the individualisation of rights in general, and of the social security rights in particular in Bulgarian legal theory. Social security rights are traditionally regulated by the legislation and treated in the legal literature as universal human rights (See Radolksi 1957, pp. 628–630; Sredkova 2000, pp. 18–20)

REMARKS

The obligatory social insurance is in existence since the beginning of the 20th century. It is regulated now by the Social Insurance Code and the Health Insurance Act and grants:

a) short-termed social insurance: compensation in a case of temporary incapability for work; compensation in case of temporary decreased capability for work; compensations for maternity; compensations for unemployment (See Sredkova 1999b; 2008, pp. 313–375; Mingov 2003; Mraczkov 2009, pp. 256–278);

b) long-termed (pension’s) social insurance: retirement pension; social old age pension; disability pensions (for general disease; for accident at work or for professional decease; social disability pension; civil invalidity pension; military invalidity pension); survivor’s pensions (See Sredkova 2008, pp. 376–478; Mraczkov 2009, pp. 279–334);


All the above pointed rights except survivor’s pensions belong personally to the insured person. They are provided for because as a result of the decease (general or professional, or accident at work), maternity, old age, unemployment the insured person is not able to earn incomes through his/her own work or has to pay expenditures for his/her medical treatment.

Also the health insurance rights in Bulgaria are individual. They are universal. Health insurance for children is at the expense of the state budget and for spouses who don’t work – for their own expense. Everybody has his/her own insurance card.

The problem of the individualisation of benefits concerns the pension’s insurance.

Pensions in Bulgaria are individual as a rule. This concerns the contributive (labor) as well as the non-contributive (state) pensions. They are to be conceded to the corresponding insured person personally.

The right to survivor’s pension is derivative.

All the personal contributive pensions can turn into survivors’ pensions and also the pension for military invalidity of the non-contributive pensions. Widow or widower, parents and children are subjects of a right to survivor’s pension. These three categories of persons have an equal right, i.e. there is no a circle of inheritors who excludes the others. But the preconditions for conceding this right are different.

It is necessary for the widow or the widower to gain a right to survivor’s pension:

First, to reach a certain age and namely an age that is 5 years lower than the age when an entitlement to retirement pension is acquired. If she/he is invalid, they have a right regardless of the age [Article 82 (2) SIC]. Both the spouses have an equal right to survivor’s pension. This is due to the fact that both the spouses traditionally work for the common support of the family and of the children.

Second, not to be married again [Article 96 (1) (3) SIC]. The pension shall be ceased when the widow/widower gets into a new marriage.

It is necessary for the right to survivor’s pension of the child to be not older than the age of 18 [Article 84 (1) SIC]. This is the lawful age. The right may be exercised after this age, when:

First, the child continues his/her education – until the graduation but not later than at the age of 25.

Second, the child became invalid before the age of 18 (25). Parents have a right to survivor’s pension when they reach the retirement age [Article 84 (3) SIC]. The age requirement is not necessary for parents of children, who dye during their time as soldiers.

The widow/widower has another specific right. It is a supplement to his/her individual pension. This allowance is also derivative – it depends on the entitlement to an individual pension of the deceased spouse. This supplement is 20% of the individual pension of the deceased spouse. It shall not be cumulated with a survivor’s pension from the same spouse. This right, as well as the right to survivor’s pension, doesn’t exist in cases of divorce or cohabitation.

Social assistance rights are also individual. The social assistance allowances are means-tested and in this sense we can say that they depend on the common income of the family or of the cohabitees.

There is also certain dependence between the right to social assistance and the right to support by the family members. Pursuant to Article 2 (3) SAA entitlement to social assistance shall accrue to citizens, families and cohabitees who, due to health, age, social and other reasons beyond their control, are unable to meet their basic necessities of life on their own through their own work or on income accruing from property they own, or with the help of the persons whose dependants they are by law. The Family Code defines the dependants. But this doesn’t mean that the right to social assistance is derivative. This means only that society helps only when the individual can not help themselves neither alone nor with the help of their closest relatives and family members.

Although the social security rights in Bulgaria are individual, family relations are important for some benefits or for conditions for their payment. Such relations are relevant for:

- Compensation for Taking Care of a Disabled Member of the Family or accompanying him/her for Medical Examination, Investigation, or Treatment. In this case, the spouses and their next of kin in ascending and descending line are treated as family members [Article 45(4) SIC].
- Aggregation of periods of insurance that are relevant for entitlement to Retirement Pension, when the insured person has taken care for a disabled family member. In this case the spouses and their next of kin in ascending and descending line are treated as family members [Article 7 (2) (3) Ordinance for Pensions and Periods of Insurance – OPPI].
- Lump-sum Death Allowance. The survived spouse, children, and parents of the deceased insured person have a right to such allowance [Articles 11(2), 12(2) and 13(2) SIC].
- Calculation of the guaranteed minimum income for the entitlement to Social Old Age Pension, to Personal Pension for Persons, who Have Taken Care for Disabled Member of the Family and to social allowances. The spouses and their minor children except those married are treated as family members for these needs [Article 7 OPPI; § 2 of the Additional Provisions of the Regulations for the Implementations of the Social Assistance Act].
• Calculation of incomes for entitlement to Family Allowances for Children. The family includes the spouses, their minor children as well as full age children if they continue to study, till graduation of higher school but not later than rounding 20 years of age (born, legitimated, adopted, step children, except those married) [§ 1 (1) of the Additional Provisions FACA].

No changes connected to the individualisation of social security rights in Bulgaria are envisaged now-a-days. Like at the very beginning of the establishment of the social security system, these rights continue to be individual.

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SOCIAL RIGHTS IN THE POLISH SOCIAL SECURITY SCHEME. THE SCOPE OF INDIVIDUALISATION

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It follows from the provisions of the Constitution that the state is obliged to act for the benefit of the families requiring aid and support through the central and the local governments.

In the family law (The Legal Code of Family and Care, from 15 February 1964), the notion of “family” is used sporadically. Marriage is defined as a union between a man and a woman (Article 18 of the Constitution, Article 1 of the Family and Care Code), also relatives and other persons related through blood ties are mentioned, including the lineal relatives (the descendants, the ascendants), siblings and the collateral relatives (relatives in-law) (Article 26 of the Family and Care Code). It follows from the provisions of the Constitution and the Code that the notion of family covers the spouses, their relatives and in-laws. Such understood social unit of family is under special protection and care provided by public authorities (Nitecki 2008) in the area of social security. Particular acts further specify the scope of the definition of family in different ways for different purposes.

THE SCOPE OF SOCIAL SECURITY IN THE CONSTITUTION OF THE REPUBLIC OF POLAND

Polish constitution establishes in Article 2 that the Republic of Poland is a democratic state under the law and realizing the principles of social justice. Articles 67–68 and Article 71 generalize the coverage of social security. Specifically, Article 67 provides that a citizen is entitled to social security measures in case of inability to work due to sickness or invalidity, or when reaching the retirement age. The scope and forms of social security is specified in the relevant legal acts. The citizen unemployed due to external conditions and deprived of the means for maintenance is entitled to social security in the scope and form stipulated by the relevant legislation. Furthermore, Article 68 states that everyone has a right to health care; all the citizens, regardless of their material condition and status, are provided by the state authorities with an equally distributed access to health care benefits financed from public funds. The terms and
conditions as well as the scope of benefits are regulated by the relevant legal act. Public authorities are also obliged to ensure that pregnant women, children, disabled persons and elderly persons are covered by an extensive health care.

Article 69 stipulates that disabled persons receive support and means for their maintenance under the relevant legislation, including social inclusion measures and professional training. Article 71 provides that the wellbeing of family should be taken into account in the social and economic policy of the state. Families experiencing economic hardship and threatened with social exclusion, especially in case of families with multiple children or single-parent families, are entitled to extensive care and support provided by public services. Moreover, a mother, in the period before and after the birth of her child, is entitled to particularly concentrated health care and support, the provision of which is regulated under relevant pieces of legislation.

The Constitutional character of social security rights has been recognized in Polish case-law, especially within the jurisprudence of the Polish Supreme Court, which proposed the following: It is generally assumed that the provisions of Article 2 and Article 67 of the Constitution do not stand for a sufficient legal basis for claims made by the citizens in the legal proceedings. Article 2 is a general and political declaration, which does not create individual rights or an obligation on the part of the state to ensure specific legislation, not to mention legislation satisfying financial claims.

Similarly, Article 67 of the Constitution is merely a source of constitutional guarantee and a political blue-print for specific legislation; it generalizes the terms and conditions of social security measures to be specified by the concrete provisions. No individual rights or financial and other claims can be deduced from the content of this Article within the framework of social security or social assistance benefits. Such approach was enforced also by the Constitutional Tribunal and the Supreme Court.

It should be underlined that neither the Article 67 of the Constitution nor any other provision of the regulation currently in force instructs that every citizen unable to work due to sickness or reaching the retirement age is entitled to some benefits. There is also no provision guaranteeing benefits for every citizen covered by the social security scheme based on the objective of securing his or her basic needs.

The entitlement to those benefits, the qualifying conditions and their amount are regulated by the legislator, who established the terms and conditions of the functioning of the social security scheme in the aforementioned legal acts, and thus fulfilled the obligations stipulated by the Article 67 of the Constitution (Garlick 2003).

POLISH SOCIAL SECURITY SCHEME – LEGAL FRAMEWORK

In Polish legal doctrine and legislation one would not find any definitions of the individualisation of rights in the general sense, nor in the context of the social security entitlements. In both the legal studies and the social legislation itself such rights are treated as universal human rights.

Polish social insurance scheme has been thoroughly reformed since January 1, 1999. The personal scope of the Polish social insurance scheme is fairly vast and distinguishes diverse professional and social groups and categories of persons, including workers and self-employed persons.

The rules for the social insurance of workers and other professional groups are laid down in the Act on Social Insurance Scheme, from 13 October 1998, which entered into force on 1 January 1999, hereafter referred to as the ‘Scheme Act’. The material scope of social insurance is stipulated by the Scheme Act – social insurance covers the following areas of social risk: old-age pension insurance, inability to work pension insurance, sickness insurance (covering maternity), accidents at work insurance (covering the risk of occupational disease), Remaining types of social security are regulated under other acts of social policy legislation.

The qualifying conditions for the benefits are indicated in the provisions of relevant legislation. Specifically, qualifying conditions for the entitlement to old-age pension and inability to work pension for workers and other insured persons are laid down in the provisions of the Act on Social Insurance Fund, from 17 December 1998, which entered into force on 1 January 1999. In addition, pension rights derive also from other legal provisions.

The rules for the entitlement to benefits covering the social risks issuing from maternity and sickness, as well as rules for the distribution of the benefits among the insured persons, were laid down in the Act on Benefits in-cash of the Social Insurance Scheme in Case of Sickness or Maternity, from 25 June 1999. The rules for the social insurance coverage and entitlement to benefits in-kind covering sickness are regulated by the Act on Public Health Care Services, from 27 August 2004.

The qualifying conditions for the entitlement to accidents at work benefits and occupational disease benefits are laid down in the Act on Benefits Covering Accidents at Work, from 30 October 2002. Family allowances are regulated by the provisions of the Act adopted on 28 November 2003. Unemployment benefits are provided by the Act on promotion of employment and labour market institutions, from 20 April 2004. There are also other legal acts regulating the functioning of the social security scheme in Poland.

For instance, a separate social insurance scheme covers all agricultural workers. The rules of its functioning are laid down in the Act on Social Insurance of Agricultural Workers, from 20 December 1990. The social assistance scheme, in turn, functions under the Act on Social Assistance, which entered into force on 14 March 2004.

It can be concluded from the above considerations that the Polish social security scheme is regulated by a number of legal acts, which comprise the social security legislation in Poland and define the right to social security as an individual social right.

SOLUTIONS IN THE POLISH OLD-AGE PENSION SCHEME

On 1 January 1999 the reform of the Polish old-age pension scheme commenced. Its introduction had been induced by a number of factors, including the demographic tendencies in recent years in the Polish populace, especially the process of the ageing of Polish society. In Poland, similarly to other developed European countries, the percentage of the people in post-productive age was on the increase. As is concluded from the demographic forecasts, the disadvantageous ratio between people in productive age and the retirees will continue to rise. Polish scheme had been previously based on a defined amount benefits solutions.

The reformed old-age pension scheme was based on the theory of necessity to provide for the old-age through differentiated scheme of three pillars, though it introduced some modifications. It was decided, for instance, that the maximum financial security of the old-age pension scheme can be guaranteed only through a diversification of financial resources for the old-age pensions to be paid in the future.

It was assumed that from the 1st Pillar the benefits will be calculated on the basis of work history and income earned throughout this history. Similarly the scheme functions in case of the 2nd Pillar, though through an accumulation of the raised capital. Legislators also established that the second Pillar is to become, in the long run, obligatory for all persons. It is worth mentioning that the idea that the second Pillar should be mandatory has been criticized by numerous experts.
Importantly, the solutions structuring the reformed old-age pension scheme cover young people (currently in their thirties), who are obligatorily insured under the new rules. Workers in their thirties and forties (up to 50) had a right, till the end of 1999, to either remain insured under the old regime or to select the newly introduced bi-pillar scheme. People after 50 were, as a rule, opted out from the restructuring.

Following those modifications, the new old-age pension was arranged as comprising the following components:

- old-age pension financed in the traditional way from the public old-age pension fund (a part of the Polish Social Insurance Fund) – this Pillar is managed by the Social Insurance Institution (ZUS);

- resources accumulated in the privately managed Open Funds for Old-Age Pension – these constitute the so-called 2nd Pillar;

- various individually chosen forms of saving and accumulation – the so-called 3rd Pillar.

In the new scheme the amount of pension is thus based on the level of contribution to the scheme as well as the retirement age.

The essential characteristics of the Polish old-age pension scheme thus include the obligatory and private 2nd Pillar scheme, in which private funds manage individual pension-plans, and the non-obligatory private 3rd Pillar, in which all other private forms of saving and securing future income are included. The Act on Pensions financed from the Social Insurance Fund, from 17 December 1998, is the basic legal document regulating the pension scheme in Poland. It covers benefits from the so-called 1st Pillar covering the universal and obligatory insurance. The Act provides also for the rules of disability (and inability to work) pension scheme. This latter was not reformed to a similar degree as the old-age pension scheme. The modifications of the disability pension scheme were introduced in 1997, before the old-age pension scheme reform. Both schemes are not entirely co-ordinated, though the Scheme Act provided for their co-dependence and inseparability of the old-age pension insurance and the inability-to-work insurance within the Pension Scheme. The suggestions for changes in the disability pension scheme are made by various social bodies.

**THE RULES OF THE PENSION SCHEME COVERAGE**

The rules of the pension scheme coverage are laid down in the Act on Social Insurance Scheme, from 13 October 1998 (the “Scheme Act”). Article 6 of the Scheme Act stipulates which social and professional groups are covered by the obligatory pension insurance. This means that it is defined under the law when a person is covered obligatorily by the insurance (the Act enlists a number of entitlements for the economically active persons, including workers, non-agricultural entrepreneurs, persons employed on the basis of civil-law contracts, etc.). Other cases, including situations of temporal inactivity within the labour market based on reasons recognized by the legislator as socially valid, are also counted in as the periods of obligatory insurance, namely: maternity leave, parental leave, periods of the payment of maternity benefit or a benefit of the same amount. The contributions of the persons on maternity or parental leave paid to the pension scheme are fully financed from the state budget through the Social Insurance Institution.

Other situations covered by the obligatory pension scheme insurance include persons resigning from work in order to take care of sick or elderly family members as well as persons not living with the mother or the father the contributions of whom are paid by the social assistance institution.

It should be noted that in the social legislation adopted so far, the worth and social meaningfulness of some periods of economic inactivity has been appreciated, as in case of periods of fulfilling the parental duties of taking care of children or taking care of the sick or the elderly. It is both the former solutions and the solutions adopted after the reform in this area that can be classified as going towards the individualisation of social rights. They constitute a form of compensation for the work done, usually by a woman, for the benefit of family members or, more generally, in the sphere of private life. Providing care for children and the elderly is understood as socially valuable and its usefulness is highlighted. In the previous legal regime, the periods of economic activity were taken into account (in the scope provided under the law) when establishing the entitlement to the benefit and when calculating its amount. In the current legal framework (after the 1999 reform), the contributions are paid by the state, thus having an impact on a future pension.

It can be assumed that the sphere of obligatory pension insurance belongs within the competence of the state, which provides relevant legislation regulating such obligation. The Scheme Act provides also for the rules of the functioning of non-obligatory pension schemes. It enlists (in Article 7) groups of persons that may be covered by such insurance (an entitlement to such insurance can be based on the termination of coverage by the obligatory scheme due to the fact of providing care to a sick or elderly family member, it covers also the university students and Ph.D. students, Polish citizens employed abroad, etc.). The right to a voluntary continuation of the insurance under the obligatory scheme after its termination is also provided as an option, in Article 10 of the Act.

The right to non-obligatory pension insurance will promote personal responsibility with respect to securing more favorable level of future disability or old-age pensions curtailing the negative social consequences in case of occurrence of the risks covered.

The basis for the calculation of contributions in the non-obligatory pension insurance is provided by an amount declared by the insured, however not lower than the level of minimum salary provided under social policy legislation (currently, in 2010, it is 1317 PLN). Both in case of non-obligatory insurance and voluntary continuation of insurance under the obligatory scheme, the provisions of relevant legal acts underscore a key role of the state. The insurance is, however, based on the willingness on the part of the insured and the financial resources enabling the payment of contributions.

The matters of participation in the Open Funds for Old-Age Pensions (OFE) are laid down in the Act on Organization and Administration of Open Funds, from 28 August 1997. The coverage by the 2nd Pillar (Open Funds) is obligatory for persons born after 31 December 1968. Capital accumulated within an Open Fund is covered by the rules for joint property of spouses and inheritance law. This is regulated by Chapter 12, Articles 126–130 and Chapter 13, Articles 131–133 of the Act on Organization and Administration of Open Funds, from 28 August 1997. A person applying to the OFE has to declare all the financial agreements and property arrangements made with the spouse. He or she can also indicate a person who will inherit the accumulated resources in the event of death of the insured. In case of divorce or annulment of marriage, the capital is divided between the ex-spouses under the family law as a part of joint property of a married couple and an appropriate amount is sent as a transfer into the Open Fund pension account held by the entitled ex-spouse. The transfer is made after submitting legal evidence that the spouse is entitled to the capital. Such solutions are indicative of the individualisation of social rights.

Among the practices within the 3rd Pillar, the pension schemes provided by an employer (the so-called Worker’s Pension Programs) regulated under the Act on Workers’ Pension Programs, from 20 April 2004, can be discussed. The Act stipulates the rules for administration and operation of such schemes by the employers, while the rules for entitlements are provided both in the Act and within the programs themselves.
Remaining methods of saving depend on the caution and foresight on the part of the insured (the most typical way is to purchase a life insurance policy in a private company).

To sum up, it can be stated that the coverage of the insurance under the disability and old-age pension scheme is crafted by the state authorities, who provide relevant legislation. Sometimes, though less commonly, an important role is played by the willingness and independent decision on the part of the insured to secure his or her future. This applies, strictly speaking, only in case of the right to non-obligatory pension insurance of specified kind.

The discussed provisions on the personal scope of pension insurance scheme in case of different groups of persons (including economically inactive persons) underline the changes in the personal scope of the pension scheme. It became more universal than under previous regulations. Also the rules for coverage and entitlement with respect to diverse groups have been standardized – this may follow from the objective of ensuring equal treatment and social justice within the framework of the scheme. Consequently, the state takes on the burden of financing the participation in the scheme by some social groups, e.g. persons on maternity leave or parental leave (Uścińska 2005b).

New solutions adopted after the 1999 reform are based to a greater extent on the individual character of the entitlements and rights of the persons insured under the old-age and disability pensions.

THE LEGAL CHARACTER OF BENEFITS FROM THE PENSION SCHEME

The inability to work pension is granted under the rules provided by the Act on Pensions of the Social Insurance Fund, from 17 December 1998. The rules for the entitlement to this pension are as follows. The entitlement is based on fulfilling the three qualifying conditions:

1) inability to work;
2) completion of the period of insurance set by the relevant provisions;
3) the inability to work occurred during the contributory periods or before the time of 18 months after the termination of the payment of contributions.

The amount of benefit is based on a social part and the calculation of periods of insurance. This is completed by a theoretical career history (up to the age of 60). The solutions are based on individual rights.

Family pension – granted on the basis of the Pension Act to entitled family members of a person who, at the moment of his or her death,

1) had a right to the inability to work or old-age pension,
2) fulfilled the qualifying conditions for the entitlement to those benefits.

The right to family pension may serve as a typical example of the derived rights. The entitlement to family pension covers the following:

1) children, children of the second spouse, adopted children;
2) grandchildren when under the custody and before reaching adult age, other children, including adoptive families, siblings;
3) a spouse (a widow, a widower);
4) the parents (including step-parents and guardians).

Children have a right to family pension till reaching the age of 16, or 25 if they continue their education. Regardless of age would entitlement be valid in case when the children become fully unable to work and take care of themselves before reaching the age of 16, or 25 when continuing formal education.

A widow has a right to family pension if she fulfills the following conditions:

- at the moment of death of her husband she had already reached the age of 50, or become unable to work within 5 years after his death;
- takes care of at least one child (grandchild, siblings) entitled to family pension after the deceased spouse (before 16, or 18 if continuing education at school).

A divorced spouse or a spouse not remaining in the marital union at the moment of death of a spouse is entitled to family pension if she fulfills an additional requirement, i.e., if, at that time, she was entitled to alimony benefits paid by the deceased husband and granted by the court or legal agreement.

The discussed provisions do not recognize any possibilities for the entitlement to family pension granted to persons remaining in the so-called informal relationship (i.e. to concubines). It needs to be remembered, however, that the children from such relationships are entitled. The legal act under consideration provides also for a temporary family pension, granted if a widow does not fulfill all the said conditions.

As far as the entitlement for a widower is concerned, he acquires the right to family pension under the condition that he reached the age of 50 and fulfills other requirements stipulated for the widows. A divorced widower or a widower not remaining in the marital union at the moment of death of a spouse is entitled to family pension if he fulfills an additional requirement of being entitled to alimony benefits to be paid by the deceased wife, at the moment of her death, and such alimony benefits were granted by the court or through a legal agreement.

It follows from the above considerations that the right to family pensions in case of widowers is surrounded by the same qualifying conditions.

The rules for the calculation of the amount of family pensions are as follows:

a) for a one entitled person the amount equals 85% of the benefit that the deceased would be entitled to;

b) for two entitled persons the amount equals 90% of the benefit that the deceased would be entitled to;

C) for three or more entitled persons the amount of the family pension equals 95% of the pension that the deceased would be entitled to.

The amount of benefit that the deceased would be entitled to is defined as the amount of either old-age pension or a full inability to work pension.

The discussed rules for the calculation of the amount of family pension supports the view that the Polish scheme defines and distributes family pensions on the basis of derived rights. Previously such was also the case in establishing the entitlement to the benefits. Suggestions for changes in this area were included in diverse documents and publications (MGPiPS 2004; Uścińska 2008).

Conclusively, it seems fair to say that the Polish old-age pension scheme is based on the concept of social rights as individually gained rights. Similarly, the inability to work pensions are based on individual entitlements. In case of family pensions, however, the benefits are clearly based on the derived rights.

LEGAL CHARACTER OF THE HEALTH CARE BENEFITS

The current Polish scheme approaches a universal health insurance model. The health care legislation comprises general provisions and additional provisions. The former include the Constitution of the Republic of Poland and the Act on Health Care Benefits, from 27 August 2004. The latter include provisions on health care units, medical professions and others.

Health insurance coverage is, principally, universal and obligatory under the Act from 2004. There are also voluntary insurance solutions provided. In several points, the Act en-
lists categories of persons covered by the obligatory health insurance scheme, at the same time naming the source of the entitlement. It can be assumed that primarily it is economic activity (employing workers, civil service, other activity), receiving certain benefits, or other situations categorized by the legislator that create an entitlement. In most cases, these are individual entitlements of the insured persons. There are also derived entitlements, which essentially refer to members of family of the persons covered by the personal scope of health care insurance.

According to the Act, a family member as a category covers the following:

- children, also children under custody before reaching the age of 18, or 26 if continuing their formal education; if they have a certified category of disability or an equivalent medical certification there is no age limit;
- a spouse;
- parents sharing a household with the insured;

Possibly, the individualisation of rights in case of family members should be considered, especially in case of children. Current methods and practices are not fully suitable for the changing needs and the reality. In the current legal framework children are registered for the purposes of health insurance by one of the parents. Practical difficulties stem usually from changing situation of the custody over a child (e.g. in case of divorce), or changes in the legal source of entitlement to health care benefits (e.g. after the completion of the education and before the commencement of the gainful economic activity). The individualisation of social rights in the area of health care benefits would strengthen the rights of beneficiaries and also clarify the spending and financial administration in the sector of health care benefits.

Voluntary health insurance schemes cover persons not enlisted among the categories entitled to obligatory health insurance as well as persons the entitlement of whom terminated (e.g. due to the termination of employment or economic activity).

**THE LEGAL CHARACTER OF THE UNEMPLOYMENT BENEFITS**

The essential legal act – the Act on the Promotion of Employment and Institutions of Labour Market, from 20 April 2004 – regulates the entirety of tasks and objectives in the area of labour market policy. It provides also for the rights granted to persons registered as unemployed. Those rights include the right to benefits in cash and in kind. The basic right is the entitlement to an unemployment benefit. The entitlement is granted to a person registered as unemployed after 7 days since the day of registration in the work office, if:

1) there is no suitable job on the market (including trainings, apprenticeships, other forms provided in the legislation);
2) within the period of previous 18 months, he or she was, during the period of at least 365 days in a row:
   a) employed and earning income at the level of at least minimum income, from which the contributions are obligatorily paid to the Work fund;
   b) was carrying out other economic activity (provided by the relevant legislation) and earned an income at the level of at least minimum income, from which the contribution were paid to the Work Fund.

The unemployment benefit is of fixed amount and currently equals 717 PLN per month during the first three months and 563 PLN per month during the remaining period of the entitlement to the benefit. The amount varies depending on the job seniority\(^{18}\). The period of the payment of unemployment benefit equals 6 to 12 months and depends on unemployment rate in a given region. In cases identified by relevant provisions the right to unemployment benefit is not granted to an unemployed person who:

1) received some financial compensation (discharge allowance, terminal wage, dismissal wage, etc.) after the termination of employment or due to a reduction in period of notice;
2) refused to undertake an employment offered after the previous employment (including apprenticeship, training, work) without any justified reasons;
3) in the period of 6 months before registering as unemployed terminated a job contract (employment) through a bilateral agreement or without an agreement and due to the fault on his or her part.

An unemployed person has also a right to receive health care benefits. This applies also to members of his or her family. The legislator differentiated those rights based upon family situation of the unemployed. Accordingly, on the basis of the Act on Health Care Benefits (Article 66 (1) (24)), the unemployed not covered by the obligatory health insurance, due to the lack of any entitlement based on, e.g., economic activity or being a family member of an insured person, become covered by health insurance on this ground. Furthermore, the Act (Article 67) stipulates that a person covered by the obligatory health insurance is obliged to report to the National Health Fund (NFZ) all his or her family members, who consequently gain a right to health care benefits.

In the Polish scheme there is then a formal differentiation with reference to exercising the right to health care by the unemployed. In some cases such rights are defined as individual rights, in other cases they function as derived rights (based on, for example, the fact of being a member of the family of the person insured under the obligatory or voluntary health insurance).

Such solutions are often targeted by critical remarks focusing on the lack of clarity and the need for modifications (Ministry of Labour and Social Policy 2009, pp. 93–94).

**FAMILY ALLOWANCES IN POLAND**

The family allowances scheme is regulated under the Act on Family Allowances, from 28 November 2003. Basic allowances include the family benefit, granted under the qualifying condition of income level per person in the household (means-tested)\(^{19}\) and the age\(^{20}\) of a child. The amount of benefit depends on the age of a child. It increases when the child gets older. The catalogue of benefits covers also additional benefits. These are not independently granted but based on the entitlement to family benefit plus an occurrence of other situations specified in relevant provisions of the Act, e.g. a birth of a child, single-parent families, rehabilitation or therapy for the child with certified disability, etc. The right to family benefits is granted to persons enlisted in the Act, though its realization in practice depends on family situation and the means-test. Within the framework of family allowances, the family does not function as a subject of rights, though it has its legislative definition. This notion appears in the Act on Family Allowances in a different sense than in the social assistance legislation, since it refers solely to qualifying conditions for the entitlement to specified kinds of benefits (Nitęcki 2009).

In the light of the legislation on family allowances (Article 2 (16) of the Act), the notion of “family” refers to the following family members: spouses, children, parents, guardians, dependant children below 25, children regardless of age with certified disability or an equivalent document and receiving long-term care benefits. Married children and adult children having their own progeny are excluded from the personal scope of the notion. According to the Article 2 (16a) of the Act, a “family with multiple children” means a family with three or more children entitled to family benefits. Finally, “a single-parent family” (Article 2 (17a) of the Act) means that a child is raised by: a single woman or a single man, a widow or widower, a spouse in legal separation established by a court, a divorced person.
SOCIAL ASSISTANCE – BASIC LEGAL ARRANGEMENTS

Under the Act on Social Assistance, from 12 March 2004, the scope of social assistance is established. According to Article 2 of this legal document, social assistance is defined as an institution of social policy devised by the state, the aim of which is to enable persons struggling with economic hardship and difficult situations to solve the problems in case when their own means, rights and abilities are not sufficient (the principle of subsidiarity).

Social assistance is organized by the bodies of government administration and local administration, while the cooperation with social partners, Catholic church, other churches and various institutions and NGO’s is also vital. The right to specified types of social assistance is granted to particular persons. Its realization is based on fulfilling the qualifying conditions defined ex lege, and referring also to the family situation. Besides individual persons, the beneficiary can also be a family. The notion of “family” is not based solely on blood ties – more important is the formation of community. Family is thus defined in social assistance legislation as a couple or a group of related and non-related persons living together in a household and forming, matter-of-factly rather than formally, a relationship (Article 6 (14) of the Act). Under this definition, informal relationships can also form and be recognized as a family. Family does not have legal identity (is not a legal body) in Polish law. Still, however, it is recognized in legislation as a subject of rights and duties (Sierpowska 2007).

CONCLUDING REMARKS

Assuming that the individual rights are rights belonging to persons as human beings, while derived rights are based (predominantly) on personal links and family relations (i.e. on the fact of being a family member, a spouse, a child), it can be stated that Polish social legislation and social insurance scheme guarantee individual rights and individual entitlements to persons covered by the scheme. This refers, in particular, to old-age pensions, disability pension, benefits in-cash within the social insurance scheme (sickness benefits, maternity benefits, accidents at work benefits). In case of health care benefits, the legislator adopted the arrangements that include individual rights, but also derived rights.

The right to family pensions is an individual right. The fulfillment of the qualifying requirements, however, is being evaluated through an examination of the family situation (e.g. the means-tested benefits). The notion of family is, to this end, defined in relevant legislation. This means that the individual right can be exercised under certain conditions and those may include testing the situation of the family of the claimant.

In the social assistance scheme the entitlement to benefits is granted to specified categories of persons. Their realization is based on the fulfillment of qualifying conditions established ex lege. The Act on Social Assistance defines family as a subject of rights and duties (even though family does not have legal identity).

Polish social security scheme is based on individual rights and derived rights. Both types of rights complete each other in order to ensure protection against negative consequences of different social risks. In some cases, however, it seems necessary to replace the derived rights with individualized entitlements. This refers, first and foremost, to the rights of children to receive health care benefits. Such a reform would bring the scheme closer to reality and more adequately respond to the needs of the entitled persons.

It is worth mentioning that the realization of certain rights, both derived and individual, could be made more efficient through an introduction of a unified definition of family. In the current legal framework the terms and definitions are multiple and often incoherent.

1 The judgment from 13 April 2007, I CSK 488/08.
2 E.g. the judgment from 7 September 2004, (SK 30/03, OTK-A Zb. Urz. 2004, no. 8, loc. 82).
3 E.g. the judgment from 14 March 2002, (III RN 141/01, OSNP 2002, no. 24, loc. 584).
4 Its scope is in line with the scope as proposed in the ILO Convention no. 102 on Minimum Standards for Social Security (cf. Uścińska 2005a).
5 The concept of the reform carried out in Poland from 1 January 1999 combines German proposals with the suggestions made by World Bank (see, inter alia, “Averting the Old Age Crisis”, World Bank 1994). The differences from the World Bank model include modifications in the 1st Pillar: in Poland it provides benefits based on career history and the income earned, and not universal standardized benefits.
6 Social Insurance Fund (FUS) is a core public fund administered by the Social Insurance Institution (ZUS). The rules of the functioning of FUS and ZUS are provided for in the Act on Social Insurance Scheme, from 13 October 1998. The rules for the payment of benefits are laid down in the Act on FUS-distributed pensions, from 17 December 1998.
7 The rules of the functioning of the Open Funds for Old-Age Pension (OFE) are included in the Act on organization and administration of the Old-age Pension Funds, from 28 August 1997.
8 The old-age pension contributions equal the 19,52% of the income level being basis for the contribution: 9,76% (a half) is paid by the employee and 9,76% by the employer. From the part of contribution paid by the insured person 7,3% is redirected to a chosen Open Fund for Old-Age Pension.
9 Rules for the individual forms of saving within the 3rd Pillar are regulated by various legal acts, among others the Act on Workers’ Pension Programs, from 20 April 2004, and the Act on Individual Pension Accounts, from 20 April 2004.
10 Additional forms of saving may include insurance bought in a private insurance company, acquiring stock exchange and investment funds units, taking part in pension plan programs and initiatives provided by the employers. In the latter solution the obligatory contributions are paid by the employers, on the level of 7% of income calculated as the basis for the contribution, while workers may also pay additional contributions.
11 As far as the 2nd Pillar benefits are concerned, there is so far no legal act under which the payment of benefits would be regulated. The rules for the payment of the transitory capital-based pensions, in turn, are laid down in the Act on Capital-based Pensions, from 21 November 2008.
12 The contributions are paid under the Act on Social Assistance, from 12 March 2004.
15 The insured born between 31 December 1948 and 1 January 1969 could decide to select and subscribe to an Open Fund for Old-Age Pension (OFE) till 31 December 1999.
16 The required period of insurance amounts to a period of one to five years. In case when inability to work started before the insured reached the age of 20 the required period is one year, whereas after reaching the age of 30 the required period of insurance equals 5 years. For the persons in-between the requirement increases gradually.
17 The Pension Act, in Article 70, defines the qualifying conditions for the widows.
18 In legal studies an opinion is occasionally supported that the solutions adopted in the Polish family pension scheme are not based on derived rights. According to one theorist, the event of death of a breadwinner is in itself a fact from the individual life of the insured and it triggers an individual entitlement to a benefit based on the event of death of a spouse or parent (cf. Jórczyk 2001, p. 168).
19 80% of the basic unemployment benefit in case of job seniority shorter than 5 years; 100% of the unemployment benefit after the 5 years of employment/economic activity; 120% of the benefit after 20 years of seniority. The 100% of the benefit equals 717 PLN during the first 3 months, and 563 after that.
20 Household income per person cannot exceed the amount of 504 PLN, or 583 PLN in case of a family with a child with certified disability.
21 The age below 18, or 24 in case of a child who continues his or her formal education.
Individualisation of Social Rights – Concluding Remarks

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Individualization of social rights is an accepted category for a research into the tendency, scope and nature of changes in the legal character of social rights in the national and international social legislations.

In the European Union the subject matter of individualization in the field of social security rights is neither well researched nor well-known, and the concept is rarely applied both in academic discourse and practical or legal solutions. It is often that legislative changes introduce individualized rights without consciously addressing the problem of individualization.

In national legislations, as well as in international law, rights in the field of social security are treated as universal human rights. The right to social security has an individual character and is granted on the basis of personal features that determine entitlement to social insurance. The fact of being a worker or an economically active person entitles to social insurance coverage. Personal links in turn, such as family ties or marriage, are relevant for the determination of nature and scope of the derived rights.

Solutions based on universal applicability also feature within the EU as in some countries all the inhabitants are covered by the social protection system, irregardless of their status as economically active or non-active persons. There are various criteria applied for the determination of entitlement to benefits (including means-testing and needs-testing). Social entitlements are individually or family dependent. The Council of Europe, i.e. the Lisbon Treaty, establishes in Article 20 the EU citizenship and underscores that all the EU citizens have rights and duties under the provisions of the EU treaties.

The subject matter of the individualization of social rights requires a continued analysis and discussion within different forums and in different contexts, including the academic, legislative and practical sides of the problem.
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The Institute of Labour and Social Studies – ILSS (Instytut Pracy i Spraw Socjalnych) based in Warsaw, Poland, is a scientific research institute. The Institute has been operating for forty years serving not only government administration and policy makers, but also taking active part in academic research works, tutoring and supervising series of publications, especially those valuable in the teaching process. The Institute's basic research works are accompanied by applied studies, and the requirements of current and strategic social and economic policies. The main forms of activities are: research activities as: statutory research, State Committee for Scientific Research grants, international projects, seminars, conferences.

International co-operation as: international research projects, bilateral research projects, data base development; Expert reports and consulting as: assignments commissioned by various institutions, activities of public services; Education as: post-graduate studies, phd studies. The research activities of the Institute cover the labour and social policy questions in an interdisciplinary manner. The research directions are adjusted to the current needs of the national socio-economic policy, and comprise such areas as economy, law, political sciences, sociology, pedagogic sciences. The research covers the topics crucial to currently pursued socio-economic policy and directions of change processes, such as:

- Labour problems (labour market policy, migration for work, human resources management, working time, remuneration and motivation systems, occupational science, labour law).
- Social policy (state social policy, social security, social institutions and instruments, family problems and family policy, poverty, social exclusion and counteracting measures).
- Collective labour relations (social partners, collective disputes, employee participation, collective bargaining, collective agreements, collective labour law).

Institute research findings are used by the central and local government administration as well as by business entities. The publishing house of the Institute prepares numerous publications (for Polish and international markets) that are useful in the teaching process. The seminars and conferences organized by ILSS are forums for exchanging experiences, ideas, expertise and knowledge on a national and international level. The researchers employed in the Institute are recognized scientists, both in Poland and abroad. Their expertise and experience encourages foreign partners to undertake international research projects with ILSS. As a leader of labour and social studies in Poland, ILSS took part in numerous EU funded research activities under 5th & 6th FP, PHARE, Leonardo da Vinci, etc.

The Institute has actively participated in the processes of accession and integration of Poland into the European Union. In the wake of the accession the research activities focused on:

- Problems of adaptation of Polish law to European legal regulations,
- Influence of EU integration on labour market situation and trends,
- Labour market and social policy and the challenges of Integration,
- European and Polish standards of social security,
- Social exclusion and reintegration.

Poland's accession into the European Union on 1st of May 2004 does not mark the end of the ILSS activities and struggles in these research areas. On the contrary, we expect new problems to appear and to be identified and dealt with.

If you have any questions regarding activities or research of ILSS, please feel free to contact us. We are eager to undertake any form of international cooperation with institutions and individuals.

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