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## THEORIES OF POLITICAL PHILOSOPHY AS GUIDING PRINCIPLES IN SOCIAL SECURITY

### Abstract

In the contribution, I explore some of the value-based foundations of social security, i.e. foundations of social security and social assistance schemes, deriving them from three selected theories of political philosophy: liberalism, libertarianism and communitarianism. The three theories are briefly accompanied by the theory of utilitarianism, in the contribution limited to the notion economic efficiency. Relying on the theories' hallmarks, I address the notions of social solidarity, property and freedom (of conduct) as three commonly conflicting elements linked to the legal framework of every social protection scheme. By doing so, I try to show how arguments stemming from political philosophy can be used in order to morally affirm, legitimize or invalidate particular institutions or regulatory elements regarding social security. If used by courts or the legislator, they can offer guidance in bringing about changes to the (use or development of) social security legislation. Different arguments can be used in order to achieve different, even diverging goals, e.g. broadening or limiting personal or material scope of coverage, increasing or decreasing the level of benefits, enhancing or diminishing the role of private insurance.

The discussion is based upon a generalized or textbook model of Bismarckian social insurance and tax-funded social assistance schemes with universal, tax-funded social security schemes added to the debate only briefly. Several generalizations also apply to the depiction of key features of the selected theories, since their in-depth analysis would by far transgress the scope of this contribution.

**Słowa kluczowe:** zabezpieczenie społeczne, pomoc społeczna, solidarność społeczna, wolność działalności, liberalizm, libertarianizm, komunitaryzm

**Key words:** social security, social assistance, social solidarity, property, freedom of conduct, liberalism, libertarianism, communitarianism

### Why merge political philosophy and social security?

Social security is by nature inextricably linked to some of the fundamental questions posed and repetitively re-examined by different political philosophy theorists from the beginning of political thought onwards. The link is of course not a distinctive mark of social security or social security law. On the contrary, key questions regarding the relationship between individuals, the individual and the community, and the individual or the community and the state, permeate the majority legal disciplines, e.g. criminal

law, tort law, human rights law, constitutional law. They are a distinctive mark of law as such, at least in an implicit way commonly on display in rulings of the highest national courts and international courts. Some legal scholars and practicing lawyers, blinded and at the same time comforted by the craftsmanship-like approach to law, might not be aware of the notion or even tend to dismiss it. Others, commonly portrayed as legal positivist, wish to rinse the hierarchically structured system of matching superior and subordinate legal rules and principles, i.e. the law as they perceive or approach it, clear off any value-based elements, such as morality, customs, communal ties, etc.

The aim of the contribution, which is in-part based on a previous discussion exploring the *reflections of political philosophy* in social security law,<sup>1</sup> is not to oppose the practical, nor the theoretical positivists' approach to law. Its goal is to broaden the observers and "users" outlook on the legal order at hand, enabling him or her to see beyond or question its validity. A doubter, armed with arguments of political philosophy and critical reasoning, namely possesses the power to change the law for the better. In case of the contribution at hand, it is the field of social security law which is being scrutinized. The means used are taken from the toolboxes of liberalism, libertarianism and communitarianism. Key topics addressed in the tongue of the selected theories are the following: solidarity, property and freedom of conduct.

The discussion is predominantly built on a typified or textbook model of a contribution-based Bismarckian social insurance model, with a tax-based universal social security scheme and a tax-based social assistance scheme added to it in selected places. The listed schemes are in the contribution commonly referred to as social protection schemes. Due to the scope of the article, the selected theories are to some extent generalized.<sup>2</sup> The latter is most evident in the case of utilitarianism, regardless of its many faces limited only to brief mentions and to the narrow scope of economic efficiency. The approach does not do justice to the multi-layered and vivid theories of political philosophy, but serves the overall purpose of the contribution, trying to show, how and why arguments of political philosophy can or should be applied to the field of social security. As aforementioned, it gives rise to the empowered doubter, who reaches beyond what lies in plain sight, i.e. beyond the letter of the law, in order to change the law or the system for the better. In case of social security law this means furthering social solidarity, the level of social protection, social inclusion, equality and social justice.

## Social solidarity

In the context of social security, social solidarity or simply *solidarity*, can be described as a state of communal sharing of burdens imposed on the individual (or family) due to

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<sup>1</sup> See L. Mišič, *Odsevi politične filozofije v pravu socialne varnosti* [Reflections of political philosophy in social security law], *Delavci in delodajalci* 2018, 18, 1, p. 57–84.

<sup>2</sup> Cited references invite the curious reader to do further research of his own.

a particular contingency or realization of a social risk, e.g. disease, old-age, death. Same applies to cases of social exclusion and poverty.<sup>3</sup> As observed by Becker,

Solidarity, understood as a legally constituted community for the fulfilment of state-assumed responsibility, is the fundamental requirement for the inclusion of certain persons in specific situations of need and subject to specific risks. In social security law, the solidarity principle manifests itself in an interpersonal redistribution of risk-based burdens within the compulsorily insured community – possibly forming a community (in solidarity) distinguishable from society as a whole.<sup>4</sup>

In case of compulsory social insurance schemes, as well as in cases of tax-funded social security and social assistance schemes, solidarity functions as a legal principle, imposing upon its subjects a system of mandatory redistribution of income, flowing in a vertical and horizontal direction.<sup>5</sup> It is an institutional form of solidarity, established regardless of one's personal beliefs, motives or moral imperatives. It has been state-enforced for the first time in the 1880's under the rule of Otto von Bismarck and "his" public insurance system compensating for accidents, disabilities and disease.<sup>6</sup> It should be distinguished from what is often considered to be sincere or true solidarity, established as a result of a moral imperative. Either an imperative commanding unconditional respect of a fellow human being, or an imperative grounded in the relativized empirical experience of communal ties, sense of belonging, customs, love, tradition, etc. However, sincere or true solidarity, i.e. solidarity as an ethical category, is often called upon when examining, legitimizing or proposing changes to different social protection schemes. It plays a distinct role both in social security and social assistance schemes. Its sources are numerous, often heterogeneous and in a rational public discourse commonly grounded in arguments implicitly stemming from the listed theories of political philosophy.

As observed by Pieters, in the context of social security all boils down to the question of solidarity between people: "[...] who belongs to the scope of application *ratione personae* in the distributing function of social security?"<sup>7</sup> It is a question inextricably linked to the notion of distributive justice: "The idea of distributive justice presupposes a bounded world within which distributions takes place: a group of people committed to dividing, exchanging, and sharing social goods, first of all among themselves."<sup>8</sup>

<sup>3</sup> A simplified utilitarian or welfarist calculus calls for inclusion of the socially excluded in order to raise their welfare and promote the greatest happiness for the greatest number of individuals. See J. Le Grand, *Individual choice and social exclusion*, in: K. Dowding et al. (eds.), *Justice and Democracy*, Cambridge 2004, p. 170.

<sup>4</sup> U. Becker, *Solidarity, financing and personal coverage*, *The Japanese Journal of Social Security Policy* 2007, 6, 1, p. 1.

<sup>5</sup> Horizontal solidarity meaning solidarity between individuals who are facing different levels of social risks (e.g. solidarity between the old and the young, men and women) and vertical solidarity meaning solidarity between individuals with different levels of personal income.

<sup>6</sup> See R. ter Meulen, *Solidarity, justice and recognition of the other*, *Theoretical Medicine and Bioethics* 2016, 37, p. 18.

<sup>7</sup> D. Pieters, *Social Security: An Introduction to the Basic Principles*, Alphen aan den Rijn 2006, p. 21.

<sup>8</sup> M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, New York 1983, p. 31.

## ***A communitarian understanding***

As observed by R. ter Meulen, solidarity, which is portrayed as an alternative to an individualized concept of autonomy, obtained a clear definition in sociology. It is defined as “the degree of social cohesion in a group or society whereby individuals, because of various motivations, are willing to serve and promote the collective interest of the group or of society.”<sup>9</sup> Ter Meulen however notes that a sociological understanding does not constitute a moral imperative that would oblige individuals to do so.<sup>10</sup> A similar conclusion could be reached in regard to communitarian foundations of solidarity as such. In line with communitarian reasoning,<sup>11</sup> proverbially neglecting the atomistic understanding of an individual, members of a particular group or community should support the normative principle of solidarity, imposing upon them a system of mandatory redistribution of income meeting the costs accumulated by the realization of social risks, social exclusion or poverty, because they share a special link, e.g. shared identity, customs, tradition, territorial affiliation, that separates them from the *others*. The imperative can however hardly be described as ethical or moral, at least in line with its categorical understanding, since it is grounded in an empirically perceptible sense of belonging, limited only to a particular group of individuals, e.g. the family, occupational group, local community. As observed by Nagel, the notion of solidarity as such has a sinister side to it. It can lead members of a particular group to act against non-members.<sup>12</sup>

A communitarian understanding of solidarity, if taken into consideration when forming legislative conditions for inclusion into a social security or social assistance scheme, can exclude a number of potential beneficiaries from accessing or enjoying social rights or social protection. Such commonly implicit tendencies complement utilitarian and macro-economic arguments in favour of exclusion, most visible in case of access to social assistance schemes. Van Houdt and others have referred the notion of the so called neoliberal communitarianism, for instance demanding that citizenship – commonly the legal status offering full social protection and inclusion – is earned,<sup>13</sup> with emphasis in politics and policy given to “market logic, individual responsibility and a community logic of attribution of causes and responsibility.”<sup>14</sup> Despite the fact that the notion has

<sup>9</sup> R. ter Meulen, *Solidarity, justice...*, p. 18.

<sup>10</sup> *Ibidem*.

<sup>11</sup> It should again be noted that the portrayed picture of communitarianism contains several generalizations. For a detailed overview see W. Kymlicka, *Contemporary Political Philosophy: An Introduction*, Oxford 2002, p. 208 and the following.

<sup>12</sup> T. Nagel, *Equality and Partiality*, Oxford 1991, p. 119.

<sup>13</sup> See F. Van Houdt, S. Suvarierol, W. Schinkel, *Neoliberal communitarian citizenship: Current trends towards ‘earned citizenship’ in the United Kingdom, France and the Netherlands*, *International Sociology* 2011, 26, 3, p. 410. Citizenship is traditionally regarded as a status, offering equality regarding rights and obligations to those, who possess it. See T.H. Marshall, *Citizenship and Social Class*, Cambridge 1950, p. 28–29.

<sup>14</sup> F. Van Houdt, W. Schinkel, *A genealogy of neoliberal communitarianism*, *Theoretical Criminology* 2013, 17, 4, p. 494–495.

been used in the field of criminology, penal law and population management, the latter can be and has been transferred onto other disciplines.<sup>15</sup> The notion of merit, representing at least an implicit eligibility criterion for participation, is commonly perceived through the lens of one's economic activity and economic integration within a given society. It is through economic achievement – for example brought about by means of stable or continuous employment –<sup>16</sup> one earns his right of membership by contributing to the common good.

The notion of an earned status or right, linked to the sufficient level of societal integration, can be observed under EU law rules stipulating conditions and limitations regarding the right of free movement and temporary or permanent residence for EU citizens and their family members. Put plainly, those, who are not economically self-sufficient or economically active, do not benefit from free movement rights.<sup>17</sup> Article 7 of the “Freedom of movement” Directive requires the condition of “sufficient resources [...] not to become a burden on the social assistance system of the host Member State during their period of residence and [...] comprehensive sickness insurance cover in the host Member State;”<sup>18</sup> to be met by the Union citizen residing on the territory of another Member State for a period longer than three months, who is not a worker or self-employed in the host state. Lack of sufficient resources or comprehensive insurance can lead to expulsion. Workers and the self-employed are not subject to special conditions, since additional limitations would violate or hamper freedom of movement, guaranteed in Article 45 of the TFEU. Unlike Article 45, Article 21, guaranteeing the right to move

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<sup>15</sup> As observed by Overbeek, Bieling argues: “[a] communitarian rethinking of neo-liberalism fulfils at least three purposes: first, it delivers an effective critique of devastating social effects of a disembedded economy; second, it leaves the prevailing social power structure intact; and, third, by stressing the importance and the productive potential of community networks it claims to provide a new perspective, which corrects and mitigates some of the painful social effects of neo-liberal restructuring without relapsing into old-fashioned Keynesian state intervention.” See H. Overbeek, *Transnational political economy and the politics of European (un)employment: Introducing the themes*, in: H. Overbeek (ed.), *The Political Economy of European Employment: European Integration and the Transnationalization of the (Un)employment Question*, London 2003, p. 6.

<sup>16</sup> As observed by Esping-Andersen: “Strong protection for the stably employed combined with huge barriers to labour market entry has, in many countries, nurtured a deepening abyss between privileged ‘insiders’ and precarious ‘outsiders.’” See G. Esping-Andersen, *Towards a good society, once again?*, in: G. Esping-Andersen (ed.), *Why We Need a New Welfare State*, Oxford 2002, p. 16.

<sup>17</sup> N. Rogers, R. Scannell, *Free Movement of Persons in the Enlarged European Union*, London 2005, p. 62.

<sup>18</sup> Paragraph 1(b), Article 7 of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Official Journal of the EU, L 158. For effects of C-140/12 of 19. 9. 2014 *Brey* see: H. Verschuere, *Free movement or benefit tourism: The unreasonable burden of Brey*, European Journal of Migration and Law 2014, 16, 2, p. 147 and the following. For effects of C-333/13 of 11. 11. 2014 *Dano* see H. Verschuere, *Preventing “benefit tourism” in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in Dano*, Common Market Law Review 2015/1, 52, 2, p. 363 and the following.

and reside freely within the territory of Member States for every Union citizen, refers to limitations, conditions and measures restricting the right.<sup>19</sup> As observed by Rogers and others, the friction between national bodies and Union citizenship is strongest when additional financial obligations for Member States stem from the latter.<sup>20</sup>

According to Regulation 492/2011, all social and tax advantages, which are not subject to Regulation 883/2004,<sup>21</sup> are guaranteed under the same conditions to national workers and workers from another Member State. Migrant workers enjoy same social and tax advantages as national workers.<sup>22</sup> Unlike economically inactive citizens, migrant workers, who despite their salary do not have enough means of subsistence for themselves and their families, can for instance enjoy the right to monetary social assistance under same conditions as nationals of the host state, without any additional conditions being imposed.<sup>23</sup> Despite the prohibition of discrimination based on (national) citizenship enshrined in Article 18 of the TFEU, it is however reasonable to demand a certain level of societal integration from economically inactive citizens in order to enjoy access to social assistance benefits.<sup>24</sup> According to the CJEU, a 5 year period of residence was held lawful in case *Förster* in 2008.<sup>25</sup> As stipulated in paragraph 23 of the preamble to the Directive, genuine integration into the host Member State makes it harder for public authorities to expel Union citizens and their family members. Measures should be proportionate to the level of integration. The greater the level of integration, the greater the level of

<sup>19</sup> Economically inactive persons can rely on Articles 20 and 21 of the TFEU, whilst Articles 45 and 49 safeguard the right of freedom of movement for workers and the self-employed.

<sup>20</sup> N. Rogers, R. Scannell, J. Walsh, *Free Movement of Persons in the Enlarged European Union*, London 2012, p. 62.

<sup>21</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Official Journal of the European Union, L 166.

<sup>22</sup> Paragraph 2, Article 7 of the Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Official Journal of the EU, L 141, 27. 5. 2011.

<sup>23</sup> See G. Strban, *Terminološke zagate pri vsebinskem razlikovanju izrazov v pravu socialne varnosti* [Terminological issues in substantive distinctions between terms in social security law], accepted for publication in: M. Jemec Tomazin, G. Strban, K. Škrubej (eds.), *Pravna terminologija: V teoriji, zgodovini in praksi* (working title), Pravna obzorja, Ljubljana 2018–2019.

<sup>24</sup> *Ibidem*.

<sup>25</sup> *Ibidem*. Regarding the notion of a *genuine link* and the condition of integration see also paragraph 57 in C-209/03 *Bidar* of 15. 3. 2005: “In the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students, who have demonstrated a certain degree of integration into the society of that State.” See also paragraph 139 in Opinion of Advocate General Wathelet delivered on 20. 5. 2014 in Case C-333/13 *Dano* regarding special non-contributory cash benefits: “Therefore, in the light of the foregoing, I consider that the answer to the second and third questions should be that Regulation No 883/2004 and Directive 2004/38 do not preclude a national legislature from choosing to exclude nationals of other Member States from entitlement to a special non-contributory cash benefit on the basis of a general criterion, such as the reason for entering the territory of the host Member State, which is capable of demonstrating the absence of a genuine link with that State, in order to prevent an unreasonable burden on its social assistance system.” See also paragraphs 66–70 in C-138/02 *Collins* of 23. 3. 2004.

protection against expulsion should be. As aforementioned, the act of expulsion can occur as a consequence of the economically inactive Union citizen, residing in another Member state, not possessing sufficient resources (and comprehensive insurance).

In line with communitarian reasoning, access to a particular community, i.e. Member State, more precisely, its social institutions or income redistribution schemes, is granted only to Union citizens who earn it or citizens of the particular Member State, i.e. those who a priori belong to a particular community and share common elements such as territorial affiliation, culture, tradition, etc. with its other members. As aforementioned, the notion of merit is seen through the lens of one's economic activity or integration and a self, pre-established level of income protection and social inclusion. Only individuals who contribute – by means of taxation and social security contributions – to the common good, not those, who diminish it, can reside long-term in the territory of a given member state, partaking in the social institutions of the national welfare state. As noted by Verschueren, “It appears that the EU conditions imposed upon economically active as well as inactive migrants to obtain the right to reside in and to social benefits from the host state are not based on a genuine sense of solidarity”,<sup>26</sup> even if a certain degree of financial solidarity exists between nationals of different Member States.<sup>27</sup> According to the author, “The fundamental right to free movement as well as to equal treatment seems to conflict with the traditional territorial understanding of interpersonal solidarity [...]”<sup>28</sup>

Frontiers of solidarity, both in case of social security and social assistance schemes, are determined by the financial sustainability of a particular scheme. Arguing against macro-economic indicators would make little sense. As observed by Lenaerts, “Financially, public authorities must strike the right balance between the number of persons who contribute to the functioning of the welfare system and the number of persons who benefit from it [...] Understood as a criterion limiting the personal scope of social solidarity, the concept of membership guarantees the financial stability of national welfare systems.”<sup>29</sup> However, once a member, i.e. a fully integrated individual, the respect of human dignity, the right to social protection and social assistance, social inclusion, etc., prevail or at least should prevail over demands of economic efficiency. Such type of regulation begs the somewhat typical question – are social rights as human rights for sale?

It is a similar rationale which is enshrined in Article 153 of the TFEU. Provisions adopted under it ought not to affect Member States' right to define fundamental principles of their social security systems and ought not to significantly affect their financial equilibrium, neither does the EU possess true competencies regarding combat against social exclusion or the modernisation of social protection systems. According to Article 34 of the Charter of Fundamental Rights, the Union recognises and respects

<sup>26</sup> H. Verschueren, *Free movement of EU citizens: Including for the poor?*, Maastricht Journal of European and Comparative Law 2015/2, 22, 1, p. 33.

<sup>27</sup> *Ibidem*.

<sup>28</sup> *Ibidem*.

<sup>29</sup> K. Lenaerts, *European Union citizenship, national welfare systems and social solidarity*, Jurisprudence 2011, 18, 2, p. 398.

rights aimed at preventing social exclusion. In a strongly economically, socially and culturally differentiated group of Member States, it is the notion of a sustainable national welfare state – with EU coordination mechanisms limited to social security benefits primarily financed by social security contributions – that prevails over social cohesion and solidarity among Member States, combat against social exclusion and discrimination, and the promotion of social justice – all EU’s aims stipulated in Article 3 of the TEU. It will be interesting to see, whether the in 2017 declared European Pillar of Social Rights will truly enhance EU’s social dimension, or will the latter remain a market union, in fear of social or welfare tourism<sup>30</sup> fostering only freedom of movement of economically active or socially and economically empowered, able or entrepreneur-like citizens from one closed national welfare state to the other.

As observed by Ferrera in 2005, “European integration has the potential of prompting changes that are more far-reaching than ‘just’ a mutual rebalancing of markets and states in response to social needs. What is at stake is the basic spatial architecture of social citizenship, that is, the territorial reach of solidarity, the identity of its constituent communities [...],”<sup>31</sup> suggesting the establishment of subnational, transnational, or supranational structures of redistribution or social protection. The most evident but at the same time possibly unreachable solution lies in the formation of a fiscal union in which Member States share a same common budget from which they distribute social benefits. Bauböck notes that questions related to political sources of solidarity in the EU are no longer merely theoretical, but practical, with their level of urgency raised by the financial and refugee crises since 2008.<sup>32</sup> Since a transformation into a federal state seems highly unlikely, the author remains rather reserved in regard to sources of solidarity within the EU,<sup>33</sup> unless a new shared collective identity is established: “[i]nstead of referring to what Europeans have in common in terms of their culture, values, and history, those who want to promote integration appeal now more often to deep interdependence between the Member States [...] It is this perceived interdependence that could eventually strengthen structural relations of solidarity between the component parts of the European polity in spite of their relatively weak institutional sources in the construction of Union citizenship.”<sup>34</sup>

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<sup>30</sup> Vandenbroucke notes that fear of social dumping and welfare tourism is necessarily not empirically well-founded. See F. Vandenbroucke, B. Vanhercke, *A European Social Union: 10 Tough Nuts to Crack*, Brussels 2014, p. 14.

<sup>31</sup> M. Ferrera, Maurizio, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection*, Oxford 2005, p. 51.

<sup>32</sup> R. Bauböck, *Citizenship and collective identities as political sources of solidarity in the European Union*, in: K. Banting, W. Kymlicka (eds.), *The Strains of Commitment: The Political Sources of Solidarity in Diverse Societies*, Oxford 2017, p. 81. The question of third nationals’ and refugees’ access to social protection schemes has in this contribution however been set aside.

<sup>33</sup> *Ibidem*, p. 100.

<sup>34</sup> *Ibidem*, p. 103.



The notion of collective identity also plays an important role in a more narrow sense, i.e. in the formation of national social insurance communities.<sup>35</sup> As in case of solidarity among members and non-members of a particular national, regional, local community, it is also the frontiers of membership which determine the frontiers of social solidarity in social insurance schemes. The term *social* solidarity indicates that solidarity forms part of a relationship between members of a particular society as a whole. As aforementioned, in social security the principle of solidarity imposes upon the members of the community a system of income redistribution. In cases of social assistance schemes (means tested, distribution according to *need*), it is as a rule imposed on all members of the community, i.e. the taxpayers, in cases of social insurance schemes (income proportionate, distribution according to *need* and *merit*)<sup>36</sup> it is imposed on community members and – with regard to EU and bilateral rules of social security coordination – non-members paying social security contributions, i.e. individuals performing gainful employment in the national territory. The dichotomy of course only refers to textbook examples, since the majority of social insurance schemes possess at least two sources of funding, with the state obliged to co-fund the schemes, either from general taxation, either by means of socially earmarked taxes.<sup>37</sup> At the same time, social insurance schemes are as a rule never purely professional. However, it is the professional schemes which are discussed below, since social insurances traditionally stem from the notion of the (industrial, male) worker.

If a social insurance scheme, e.g. a health insurance scheme, is unified, not divided into individual insurance communities, commonly coinciding with particular professional groups (e.g. civil servants, farmers), and established as compulsory insurance, offering no means of opting-out, and stipulating numerous insurance basis (e.g. contract of employment, employment-like economic activities, residence, family status), solidarity truly can be described as *social*, with the majority of community members partaking in the distributional framework. It is also the term of *social* insurance that lives up to its name. As observed by Strban in case of the highly unified Slovenian health insurance: “There are no special schemes for workers, self-employed persons, farmers or civil servants. This way the broadest possible solidarity is emphasized”.<sup>38</sup> However, a largely heterogeneous insurance community, whose members do not share a special link upholding a special sense of belonging, might not share what I have referred to as a sense of sincere or true solidarity. If the representatives of the insured possess significant powers regarding the administration of the social insurance carrier, possibly also possessing competencies to stipulate rights and obligations, diverse interests of different members

<sup>35</sup> The evident case of universal social security schemes, grounded in the citizenship or resident status, is set aside.

<sup>36</sup> For the criteria of distributive justice (*merit, desert, need*) see D. Miller, *Principles of Social Justice*, Cambridge, Mass. 2003.

<sup>37</sup> See B. Spiegel (ed.) (et al.), *The Relationship between Social Security Coordination and Taxation Law*, Analytical Report 2014, FreSsco, European Commission, April 2015, p. 14, 15 and the following.

<sup>38</sup> G. Strban, in: B. Kresal, K. Kresal Šoltes, G. Strban, *Social Security Law in Slovenia*, Alphen aan den Rijn 2016, p. 66.

might leave the principle of self-regulation not to reach its full potential. In a system in which primary legislative competencies are reserved for the general legislator, diverse interests (e.g. frictions between private sector workers and civil servants or workers and self-employed) might surface not only in formal processes of democratic participation, but also via informal political pressure.

On the contrary, a homogeneous insurance community, whose members share a special link of professional affiliation (likely meaning also a similar socio-economic status), limits the boundaries of solidarity to a narrower circle of members, but possibly enhances what is perceived as sincere or true solidarity. A sense of collective identity might encourage the insured to take on greater obligations towards the scheme and other members, enhancing their level of social protection.

### ***A liberal understanding***

Unlike communitarianism, the theory of liberalism puts the individual, his personal autonomy and freedom into the foreground. It treats a person as an individual of his own, not only prohibiting discrimination based on any ground such as sex, race, age, religion, etc., but also breaking his communal ties. In that sense, traditional Bismarckian social insurance, commonly offering a higher level of social protection to the family man and members than to the single individual, can be deemed illiberal. Liberalism's hallmark is the defense of individual liberty against various forms of tyranny that are justified and prosecuted in the name of some other, allegedly higher ideal.<sup>39</sup> Such would for instance be the ideal of the common good prevailing over individuals' liberty. Mullard notes: "The communitarian citizen is firmly embedded in a community deriving identity from the story of the community [...] Issues of freedom, liberty and individualism are meaningless when discussed in abstract."<sup>40</sup> The theory of liberalism could be described as the exact counterpart of such reasoning. However, once liberalism is merged with the notion of welfare, both liberty and equality are defended.<sup>41</sup> Liberal egalitarians do not argue in favour of a narrow set of pre-political rights, posing limits on human interaction (as libertarians do), but claim that sets of positive and negative rights create strong obligations of individuals contributing to social justice and towards the worst-off in society.<sup>42</sup> Egalitarian political liberalism stands for equal and ultimate moral value of all individuals.<sup>43</sup> It is shaped in the form of ethical individualism, promoting equality

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<sup>39</sup> J. Deigh, *Liberalism and freedom*, in: J.P. Sterba (ed.), *Social and Political Philosophy: Contemporary Perspectives*, London and New York 2001, p. 81.

<sup>40</sup> M. Mullard, *Discourses on citizenship: The challenge to contemporary citizenship*, in: J. Bussemaker, *Citizenship and Welfare State Reform in Europe*, London and New York 1999, p. 18.

<sup>41</sup> See J.P. Sterba, in: J. Naverson, J.P. Sterba, *Are Liberty and Equality Compatible?*, Cambridge 2010, p. 229.

<sup>42</sup> P. Kelly, *Liberalism*, Cambridge 2005, p. 12–13.

<sup>43</sup> *Ibidem*, p. 13.

and concern, but perturbed with coercion and political power, therefore posing limitations upon the latter.<sup>44</sup> In general, egalitarian political liberalism is concerned with the political framework or social institutions of a given society and issues of equal (starting) opportunities.

In the following paragraphs, I will discuss the notion of liberal equality through the political liberalism of John Rawls.<sup>45</sup> As noted by Kymlicka at the beginning of his discussion on what he calls “Rawls’ Project”, “[t]here are limits to the way individuals can be legitimately sacrificed for the benefit of others. If we are to treat people as equals, we must protect them in their possession of certain rights and liberties.”<sup>46</sup> It is the exact friction between individuals’ liberties and obligations towards the common good or consideration for the other that is triggered by the establishment of solidarity-based social security and especially social assistance schemes. The first are co-shaped by the principle of equivalence, in case of cash benefits demanding equivalence between paid contributions (also in regard to duration) and received benefits, with limitations favouring the socio-economically weaker individuals set either on the contribution or calculation base. The second depend fully on the distributional criterion of *need*, legitimizing distribution of income from “rich to poor” to the point in which social exclusion and poverty are prevented. Relying on Rawls’ principles of justice,<sup>47</sup> I will try to demonstrate how key arguments stemming from his understanding of social justice can politically, even morally, legitimize both mandatory social insurance, as well as social assistance schemes, with the principle of solidarity functioning at the level of the society as a whole.<sup>48</sup>

It could be argued that Rawls’ theory of justice, in which he tries to answer the question, what is the most just and feasible arrangement of basic social institutions that realizes democratic values of freedom and equality for all citizens,<sup>49</sup> is a theory of distributive justice realized through mechanisms of procedural justice. The chosen hypothetical procedure, in which individuals also stipulate rules governing the distribution of goods in a society, sets the individual in the original position behind the veil of ignorance,<sup>50</sup> where he and others select the principles of justice governing the basic structure of a future society: “[n]o one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence,

<sup>44</sup> *Ibidem*.

<sup>45</sup> The scope of the article sadly does not allow me to venture into the *theory of equality*, proposed by Ronald Dworkin. For glimpses of his theory see below.

<sup>46</sup> W. Kymlicka, *Contemporary Political Philosophy ...*, p. 53.

<sup>47</sup> Regarding the selected principles of justice, I refer to Rawls’ *Justice As Fairness: A Restatement* from 2001. For a full overview and development of his theory one should examine at least his fundamental work *A Theory of Justice* from 1971 and *Political Liberalism* from 1993.

<sup>48</sup> A similar task was taken on by Roger Paden, see R. Paden, *Social security, insurance, and justice*, *Public Affairs Quarterly* 1998, 12, 2, p. 183 and the following.

<sup>49</sup> S. Freeman, *Introduction: John Rawls – An overview*, in: S. Freeman (ed.), *The Cambridge Companion to Rawls*, Cambridge 2003, p. 2.

<sup>50</sup> See e.g. S. Maffetone, *Rawls: An Introduction*, Cambridge 2010, p. 104–112.

strength and the like. [...] This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.”<sup>51</sup> As observed by Bloom, “Justice is fairness in the sense that it is only fair to abide by the results of a game the rules of which are seen to be reasonable and just, even though one might have wished for another result and would like to alter the rules for one’s personal advantage.”<sup>52</sup> The principles of justice Rawls claims would result from such procedure are the following: (i) Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (ii) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society.<sup>53</sup> In the discussion on social security, the *difference principle* plays a vital role. The first principle namely applies to the constitutional structure and guarantees of the political and legal system, the second to social and economic systems, especially when affected by tax policies and policy regarding social security, employment, disability compensation, child support, education and medical care.<sup>54</sup> The difference principle can be used as a political and moral argument legitimizing solidarity-based social protection schemes compulsorily distributing income from the advantaged to the less and least-advantaged or worst-off members of the society.<sup>55</sup> In mandatory social insurance schemes, the distribution of income benefits them in three ways: first, they can access services (e.g. health care services, long-term care services) that might be inaccessible or provided at a lower level of quality in a market-based system; second, due to their lifestyles and level of personal income, the less and least-advantaged commonly enjoy services in values exceeding the level of funds raised by contributions that were paid by them or by other subjects (e.g. the state, local communities) on their behalf; third, even if cash benefits are paid in accordance to the principle of equivalence, as aforementioned, they are commonly only paid up to a certain amount, with the surplus of gathered funds increasing the minimum amount of benefits.<sup>56</sup> The level of institutional solidarity is greatest when the calculation basis is

<sup>51</sup> J. Rawls, *A Theory of Justice*, Cambridge, Mass. 1971, p. 12.

<sup>52</sup> A. Bloom, *Justice: John Rawls vs. the tradition of political philosophy*, *The American Political Science Review*, 1975, 69, 2, p. 648–662.

<sup>53</sup> J. Rawls, *Justice as Fairness: A Restatement*, Cambridge, Mass. 2001, p. 42–43.

<sup>54</sup> T. Nagel, *Rawls and liberalism*, in: S. Freeman, *The Cambridge Companion to Rawls*, Cambridge 2003, p. 66.

<sup>55</sup> The least advantaged possess – among other primary goods – little income and wealth. See J. Rawls, *Justice as Fairness...* p. 58. The “worst off”, defined in terms of resources or “primary social goods” are – from the standpoint of justice, the poorest among us. See S. Freeman, *Introduction: John Rawls...*, p. 7.

<sup>56</sup> Sterba in line with libertarian reasoning (see below) notes: “[...] there must be the liberty not to be interfered with (when one is poor) in taking from the surplus possessions of the rich what is necessary to satisfy one’s basic needs. This must be part of the bundle that constitutes the greatest amount of

limited and the contribution basis unlimited. If set in the original position, a rational, risk-averse individual should select the mandatory social insurance scheme before voluntary<sup>57</sup> public or even private insurance schemes, since the risk of becoming the least-advantaged member of the society in any system but the system of mandatory public insurance is greater than the loss of net-income experienced by the advantaged members of the newly established society. *Mutatis mutandis*, a same conclusion can be reached in regard to other public social security and social assistance schemes, with the latter presenting an ever stronger case in favour of selecting the difference principle as a guiding principle of justice. If the least advantaged members of society are interpreted as the ones challenged by poverty and social exclusion, the risk of becoming one in a society offering no social assistance schemes, is far greater than the loss of net-income incurred by mandatory taxation.<sup>58</sup>

A liberal understanding of social justice, linked to the promotion of equality, equal opportunities and concern for the least advantaged members of the society can as aforementioned offer political and moral support for legislation which limits one's economic freedom in order to enhance the level of social protection of all members of the community, with marginal utility of arrangements benefiting the worst off the most. It can offer support for a solidarity-based social insurance scheme as a system which despite being grounded in heteronomous legal rules and imposing upon the community a mandatory system of income redistribution, represents an institution which as a rule furthers personal freedom and individual autonomy by allowing the individual to follow and develop freely his life-goals. Such freedom is safeguarded by common dispersion of costs accumulated by the occurrence of social risks upon the (insurance) community, enabling one to use his disposable income for things and activities offering him personal fulfilment. As argued, it can also offer support for social assistance schemes, preventing poverty and social exclusion as states in which an individual as a rule cannot fulfil his life-goals.

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liberty for each person because this liberty is morally superior to the liberty with which it directly conflicts, that is, the liberty not to be interfered with (when one is rich) in using one's surplus possessions to satisfy one's luxury needs." See: J.P. Sterba, in: J. Naverson, J.P. Sterba, *Are Liberty...*, p. 18–19. In his other work Sterba however supports the commonly isolated notion of libertarian premises that support welfare rights. See D. Shapiro, *Is the Welfare State Justified?*, Cambridge 2007, p. 255.

<sup>57</sup> A social insurance scheme offering voluntary exclusion benefits the advantaged members of the society, since they can exclude themselves from mandatory redistribution of income and insure themselves in private insurance schemes.

<sup>58</sup> As observed by Murphy and Nagel, "Taxes that are used to fund programs that promote distributive justice or equality of opportunity help to purify the relation between the market and personal responsibility, rather than undermining it." See L. Murphy, T. Nagel, *The Myth of Ownership: Taxes and Justice*, Oxford 2002, p. 68.

## Property

Property lies in the heart of social security discussion. Mandatory redistribution of income, occurring in order to finance social security and social assistance schemes, interferes with one's possessions or property, the protection of which is enshrined in Article 1 of Protocol no. 1 of the European Convention on Human Rights, containing three distinct principles.<sup>59</sup> A communitarian rationale allows for such interference whenever redistribution enhances the level of common good as perceived by a particular community. A (egalitarian Rawlsian) liberal rationale allows for such interference whenever social institutions redistributing income are grounded in the aforementioned principles of justice, especially when they respect the conditions provided by the difference principle, benefiting the worst-off members of the society the most. A utilitarian rationale allows for such interference whenever the redistribution enhances the overall utility of the greatest number of individuals. With some adjustments, it could be the notion of public or general interest which is perceived as the common denominator of all of the listed theories. Even in Rawlsian terms, since any social protection scheme will, at least to a certain extent, most likely benefit the general population and to a large extent "constrain" only the well-off members of the community. The public interest exception, allowing for possessions to be deprived if conditions provided by the law are fulfilled, is for instance stipulated in Article 1 of Protocol 1 and Article 17 of the Charter of Fundamental Rights of the European Union. The latter also allows for the use of property to be regulated by law in so far as is necessary for the general interest. Limits to the use of property also present a common feature of European constitutions, usually referring to public good or interest exceptions or its social and other functions.<sup>60</sup> Property, even if perceived by many as the essential or existential precondition for leading a life of value and personal fulfilment, can be limited if limitations contribute to the common good. In general, the above discussed liberal rationale calls for any limitations to be proportionate and based on a morally legitimate reason, such as the protection of human rights, promotion of social inclusion, prevention of poverty, etc. However, there exists a key theory in political philosophy that strongly opposes any interference with one's private property, which is not grounded in voluntary agreement between two or more parties, but follows what is to be considered an end-state or patterned doctrine interpreting justice as the promotion of a particular end-state (e.g. social inclusion of the largest number of population) or pattern (e.g. distribution according *need, wants*).<sup>61</sup> It is the somewhat radical theory of libertarianism, grounded in the liberal tradition

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<sup>59</sup> See A. Gómez Heredero, *Social Security as a Human Right: The Protection Afforded by the European Convention on Human Rights*, Strasbourg 2007, p. 23.

<sup>60</sup> See Article 14 of the German constitution, Article 42 of the Italian constitution, Article 14 of the Dutch constitution, Article 16 of the Belgian constitution or Article 67 of the Slovenian constitution.

<sup>61</sup> See A.R. Lacey, *Robert Nozick*, Chesham 2001, p. 37.

and understanding of property, as developed by John Locke in his *Two Treatises of Government*, i.e. property as *lives, liberties, and estates*.<sup>62</sup>

Robert Nozick, possibly the most prominent libertarian author, begins his famous monograph *Anarchy, State and Utopia* with the following words: “Individuals have rights, and there are things no person or group may do to them (without violating their rights).”<sup>63</sup> Nozick is the author of the *entitlement theory*, which distinguishes entitled holdings from unentitled ones: (i) A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding. (ii) A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding. (iii) No one is entitled to a holding except by (repeated) applications of 1 and 2.<sup>64</sup> Put plainly, every transfer or property has to originate in a transfer from the first to the second entitled holder and so on. Any authoritative or other intervention which is not grounded in an agreement between the current and potential holder breaks the chain and causes for the obtainment of property to be illegitimate. At the same time, libertarianism merges the notion of private property with individual sovereignty and responsibility. Libertarians believe that persons ought to be self-governing and ought not to be ruled by others without their consent.<sup>65</sup> As observed by Machan: “Ownership without the authority to decide to what use the owned item will be put is meaningless, absurd. Similarly, if it is your life, somebody who wants to do something to it must gain your permission [...]”<sup>66</sup> Libertarianism, similarly to liberalism, safeguards one’s private autonomy and personal freedom as long as his behaviour does not interfere with private autonomy and personal freedom of another. Unlike the case of liberalism, property relations are the only legally and morally relevant relations between individuals, since all fundamental rights are perceived through the lens of the right to property. The state, in order to be deemed legitimate, has to limit its functions to the protection of private property. It is commonly described as the night-watchmen-state, offering protection of one’s lives, liberties and estates.

Needless to say, any heteronomous establishment of an income redistribution based scheme, such as social insurance, is deemed illegitimate and immoral, even if it would redistribute the gathered funds according to *need*, thus helping the poor or the socially excluded, i.e. the case of social assistance schemes. Fleishacker notes that libertarians will allow for property rights to trump the good of helping the poor.<sup>67</sup> Any schemes offering income protection ought to be autonomously established, i.e. private. The theory of libertarianism, grounded in the idea of negative rights and dismissing the

<sup>62</sup> Locke, IX, 123.

<sup>63</sup> R. Nozick, *Anarchy State and Utopia*, Oxford 1974, ix.

<sup>64</sup> *Ibidem*, p. 151. For justice in acquisition, the primary obtainment of property, see Locke’s Theory of Acquisition. *Ibidem*, p. 174 and the following. See also A.R. Lacey, *Robert Nozick*, p. 42 and the following.

<sup>65</sup> T.R. Machan, *Libertarian justice*, in: J.P. Sterba (ed.), *Social and Political Philosophy: Contemporary Perspectives*, London and New York 2001, p. 51.

<sup>66</sup> *Ibidem*, p. 52.

<sup>67</sup> S. Fleishacker, *A Short History of Distributive Justice*, Cambridge, Mass. 2004, p. 91.

notion of involuntary positive rights and obligations, is thereby only compatible with private market arrangements, leaving the underinsured, poor and the socially excluded to private charity.<sup>68</sup>

Despite the theory's *prima facie* incompatibility with the fundamental characteristics of social security and social assistance schemes, some of its outcomes can be used to argue in favour of proprietary protection of social rights, as applied in several cases by the European Court of Human Rights.<sup>69</sup> Generally, in cases where an individual contributes to a social security scheme, an entitlement to a benefit is established, e.g. when *paying* unemployment, parental, pension contributions. The right to such benefits is interpreted as a property right within the meaning of Article 1.<sup>70</sup> Proprietary protection of social rights has the strongest effect in regard to cash benefits provided in social insurance schemes. It is of key importance in cases of benefits established over a long(er) period of time, formed in proportion to one's personal income obtained during a particular calculation period, possibly paid by different employers in different countries. However, it could also be used to argue against the decline in the level or quality of health care services, since the individual paying mandatory social security contributions can legitimately expect the level of provided benefits in kind to be of certain quality and provided in due time. If not, he possesses, from a viewpoint of a rational and self-governing agent, legitimate grounds to leave the particular public scheme and join a different public or private scheme, answering not only to his needs, but possibly also his wants or wishes. As aforementioned, the archetypical social insurance scheme as a rule does not allow for voluntary exclusion to occur, since it would enable the transfer of "good risks" to more favourable schemes or providers and *vice versa*, limiting the effects of the principle of solidarity in the redistributive framework.

In a libertarian sense, the working individual is the owner of the fruits of his labour. If his personal income has been compulsorily redistributed by means of paying social security contributions, the least the general legislator or the courts can do from the point of libertarian justice is to protect the benefits financed by such involuntary transactions, thus limiting the exploitation of one's possessions and private autonomy for the benefit or goals of others. The stronger the equivalence between income or the amount of contributions and the level of cash benefits or the value of benefits in kind, the more tolerable the social insurance scheme from a viewpoint of libertarianism. It is clear that libertarianism considers voluntary private insurance to be the most just

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<sup>68</sup> The question of involuntarily non- or underinsured individuals, the poor and the socially excluded, whose socio-economic position cannot be perceived as a result of their autonomous decisions, is in this discussion mostly set aside (see the relationship between *option* and *brute* luck below).

<sup>69</sup> See e.g.: Case of *Gaygusuz v. Austria*, of 16. 9. 1996, Case of *Willis v. United Kingdom* of 11. 6. 2002, Case of *Azinas v. Cyprus* of 28. 4. 2004.

<sup>70</sup> See A. Gómez Heredero, *Social Security...*, p. 24.



form of insurance.<sup>71</sup> Tax based social protection schemes, both security and assistance schemes, however present a tale of its own.

## Freedom of conduct

The final point of the discussion, focused on social health insurance, is addressed in a rather brief manner, since it provides concise answers to the following question: are insured individuals morally obligated to adjust their above-average risky lifestyle in a way to fit the average individual and his lifestyle or should they conclude private health insurance from which they are to cover the costs incurred by such lifestyles? A similar question could be posed in regard to the relationship between public social insurance schemes and private saving schemes, all offering income protection in cases of old-age, disability, unemployment, etc. The question of personal responsibility is also inextricably linked to the eligibility conditions regarding the access to social assistance benefits.

The question regarding the conduct of the insured refers both to the negative, i.e. refraining from risky activities, as well to positive duties, i.e. performing activities enhancing one's wellbeing and health, but excludes cases of so called brute luck.<sup>72</sup> It is a common perception the community owns less to individuals, who contributed to their medical condition by ill life-choices.<sup>73</sup> Communitarian sense of belonging is not the single architect of the frontiers of social solidarity. Its scope is also defined by what the insurance community or the general legislator regard as a lifestyle "worthy" of inclusion and coverage. The question is not purely theoretical, since social security legislation can exclude particular social risks from the material scope of coverage, if its realization can be (directly causatively) ascribed to the conduct of the insured individual.<sup>74</sup> Same applies to socially earmarked taxes, levied for example on tobacco and alcohol

<sup>71</sup> See also D. Shapiro, *Is the Welfare...*, p. 280–281. The author also addresses the relationship between mandatory private and social insurance.

<sup>72</sup> Referring to Dworkin's discussion on equality I distinguish between so called *option* and *brute* luck: "Option luck is a matter of how deliberate and calculated gambles turn out- whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined. Brute luck is a matter of how risks fall out that are not in that sense deliberate gambles [...]. If someone develops cancer in the course of a normal life, and there is no particular decision to which he can point as a gamble risking the disease, then we will say that he has suffered brute bad luck. But if he smoked cigarettes heavily then we may prefer to say that he took an unsuccessful gamble. Insurance, so far as it is available, provides a link between brute and option luck, because the decision to buy or reject catastrophe insurance is a calculated gamble." See R. Dworkin, *What is equality?*, Part 2: *Equality of resources*, *Philosophy & Public Affairs* 1981, 10, 4, p. 293.

<sup>73</sup> See: N. Daniels, *Individual and social responsibility for health*, in: C. Knight, Z. Stemplowska (eds.), *Responsibility and Distributive Justice*, Oxford 2011, p. 265.

<sup>74</sup> For the Slovenian example see L. Mišič, *Meje zdravstvenega zavarovanja so meje mojega sveta: O svobodi ravnanja in izbire življenjskega sloga* [Limits of health insurance are the limits of my world: On freedom of conduct and the choice of a lifestyle], *Pravna praksa* 2017, 36, 30/31, p. 11–13.

consumption. Not only do they follow a utilitarian or at least a fiscal-efficiency calculus, their imposition on certain transactions also indicates that community members value or recognize one lifestyle as superior to the other, thus shaping a perfectionist society penalizing what are considered bad habits. If a particular lifestyle or conduct is deemed unwanted, its explicit or implicit, e.g. additional financial burdening by means of (socially earmarked) taxation, suppression is deemed legitimate.<sup>75</sup> However, it is commonly the smokers and the drinkers who are considered as those, who should compensate the insurance community for the (potential) damages incurred by their ignorant decisions. What about the Sunday triathletes, workaholics, recreational tight head props or – to stretch the argument to its boundaries – individuals, who fail to commit suicide and only self-inflict an unnecessary injury?

In accordance with the theory of communitarianism, it is the community which defines what are to be considered valuable and invaluable or desired and undesired lifestyles, the ones which contribute and the ones which diminish the common good. It could be argued that a rational individual, whose way of life opposes the community ideal or at least the expected average, is morally obligated to adjust his risky or “expensive” conduct in order to promote or at least not diminish the common good or, for the same reasons, conclude private health insurance covering for his risks. Furthermore, an individual, whose conduct causes unnecessary financial harm to the solidary (insurance) community, is legitimately penalized. Similar is the answer provided by the briefly mentioned theory of utilitarianism, which aims at maximizing the overall utility, unless full freedom of conduct, promoting one’s personal interests and his personal fulfillment, is considered to increase its level – it all boils down to the definition of *utility*. In accordance with the theory of liberalism which is grounded in rational agreement on what can be perceived to be in the public or general interest, a rational individual, whose conduct would willingly deviate from the rationally founded way of life, could possibly be held morally and legally culpable for such deviations. In line with theory of libertarianism any further limitations to one’s personal autonomy are to be deemed morally illegitimate. The insured individual is to lead any lifestyle regardless of its effects towards the community of the insured. The only limitations posed to his conduct are the limitations stemming from another man’s property. An argument grounded in the notion of proprietary protection of social rights or benefits (making them one’s property), thus legitimizing limitations posed against the insured person’s freedom of conduct (since it would interfere with one’s property if the lack of funds would result in the decrease of the amount or quality of the provided benefits) seems rather farfetched.

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<sup>75</sup> “Our capacity to act as reasoned people relies greatly on our being anchored in relatively thick communities. Moreover, community-wide conceptions of the good provide criteria used in finding which shared decision-making and which public policies are legitimate.” See A. Etzioni, *Citizenship in a communitarian perspective*, *Ethnicities* 2011, 11, 3, p. 339.

## Conclusion

As set out in the beginning of the discussion, its goal was to broaden the observers and users outlook on “his” social security legislation, enabling him to see beyond or question the validity of a particular legal rule or legal order. By nature, the discussion thereby produced very little if any definite answers or findings. Nevertheless, the theories of communitarianism, liberalism and libertarianism have unveiled a particular impact of the strongly interconnected and commonly conflicting notions, ideas or ideals in social security: communal ties or sense of belonging, equality, freedom and property. Referring to the theory of utilitarianism, the notion of overall utility, commonly expressed through economic efficiency, can be added to the list. Once the selected notions are placed side by side with (the principle of) solidarity, vivid challenges surface. Such challenges call for the shaper or the maker of legal rules and principles to be added to the aforementioned user and observer. It is the legislator’s and courts’ role to take into account different value-based contradictions and find a solution which presents a balance between diverging interests of different stakeholders, their rights and their obligations. However always paying special attention to the international law’s imperative of furthering the level of social protection and minding the worst-off members of the community. As noted by Eichenhofer: “Philosophy helps to point out under which circumstances social security can assume legitimacy, i.e. to be accepted on the basis of values broadly shared in a given society. Can – and if: how can – it be justified under the auspices of a liberal society? The answer requires a clarification of the basic assumptions social security is built upon.”<sup>76</sup>

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<sup>76</sup> E. Eichenhofer, *Social security and philosophy*, *Študije FDV* 2006, 3, 3, p. 3.

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