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PROPERTY PROTECTION OF SOCIAL RIGHTS: PERSPECTIVES OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE SLOVENIAN CONSTITUTIONAL COURT

Abstract

Following the in-depth introduction, in which the vivid relationship between proprietary entitlements and social security is depicted, the authors focus on ways in which the right to social security has been merged with the right to property by the European Court of Human Rights (ECtHR) and the Slovenian Constitutional Court. Due to the comprehensive state of the art concerning proprietary (property) protection of both contribution- and tax-based social security benefits in front of the ECtHR, the authors try to add to the debate by means of including a comprehensive theoretical starting point to the abovementioned merger of property rights and social rights, whilst providing the reader not only with an overview of the ECtHR's most relevant case-law but also with predictions on the possible future role of property protection of social rights in times of ageing European societies. In the discussion, they also include relevant case-law of the Slovenian Constitutional Court, which in a relatively short period of time, following an almost proverbial conceptual shift from communal to the individual understanding of property, developed rich jurisprudence in the field of property protection of social security benefits, fore and foremost property protection of pension rights.

Keywords: Social Security, Property, European Convention on Human Rights, Article 1 of Protocol No. 1, European Court of Human Rights, Slovenian Constitution

I. PROPERTY AND SOCIAL SECURITY LAW: A LIBERAL UNDERSTANDING

The protection of the (private) property is one of the oldest forms of protection known to law. It was, for example, included in the *Magna Carta Libertatum* from 1215, which limited the powers of the sovereign, thus ending a severe political crisis involving the king, the nobility and the clergy. According to Article 39 of the *Magna Carta Libertatum*, "*No free man shall be seized or imprisoned, or stripped of his rights or possessions* […]"[1] Similar is the wording of the Fifth Amendment to the United States Constitution, according to which "*No person shall*

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[1] The English translation is available with the British Library at: https://www.bl.uk/magna-carta/articles/magna-carta-english-translation (access 22 December 2020).

[…] *be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation*."[2] According to Shaw, "the American Revolution foremost arose from the British violation of the rights of the colonists in a series of Acts introduced from 1763, which taxed or imposed other obligations upon them without consent or consultation."[3] Referring to Hutchinson, the author notes that "*the prevailing reason at this time is, that the Act of Parliament is against Manga Charta, and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void*."[4] According to Shaw, the colonists objected to these violations to their rights to property, liberty and due process of law, which they argued belonged to them as Englishmen."[5] The idea of property rights as natural or original and thus inalienable rights is traditionally traced back to Locke's *Second Treatise of Government* in which the author rationalizes one's departure from the free but treacherous state of nature with the obtainment of property protection: "*This* [auth. note: man's uncertainty, constant exposure to the invasion of others in the state of nature] *makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property*."[6]

It may be argued it is this exact classical-liberal heritage, also comprised of earlier writings by Hobbes and later ones by Hume, from which the strongly protected right to property has sprung as one of the hallmarks of modern liberal democracies, now firmly embedded at the heart of their legal orders. Put plainly, both Hume and Locke agreed, even if differing in their argumentation, that the sole end or aim of civil society in the preservation of private property,[7] and if property is understood in strict classical-liberal or even libertarian terms, consisting not only of one's (material) possessions but also his *lives* and *liberties*, then the right to private property is, put simply, the single original human right and therefore the single human right in need of protection as it entails the protection of all other human rights, going to the extreme, even the right to life. In its essence, the reason behind merging social rights with the right to property, thus affording a typical negative right protection to a typical positive right, could be seen as originating from the exact classical-liberal or even libertarian idea of offering secondary legal protection to the fruits of one's labour that were primarily reduced by means of compulsory taxation and social security contribution payment obligation for the sake of allowing social and economic institutions of wealth (ex-post) redistribution to function.[8] A purely liberal or libertarian understanding of property, excluding any egalitarian, and, of course, communitarian objectives, naturally allows only for contract-based disposition of property entitlements. However, for social and economic institutions of the state to function, a strictly liberal conception of the state, possibly a conception of the minimal state, offering to its citizens only the protection of life, and property and contractual arrangements, ought to be combined with positive obligations towards the individual. As observed by Eichenhofer in regard to the liberal legacy of the welfare state, following the French Revolution, the concept of individual

[2] See also Golay, Cismas, 2010, p. 2, who trace the right to property to the early philosophical writings predating the French Revolution's *Declaration of the Rights of Man and of the Citizen* and the *Bill of Rights.* The work comprehensive contribution by Golay and Cismas also consists of a comparative overview of constitutional clauses on property rights in common and civil law systems. See ibid., pp. 7-9.
[3] Shaw, 2015.
[4] Ibid.
[5] Ibid.
[6] Chapter IX. Section 123.
[7] Panichas, 1983, p. 391.
[8] On the role of different theories of political philosophy in social security and their relationship, see Mišič, 2018, pp. 271 and the following.

rights was strongly interrelated with the concept of the national state.[9] The latter, understood as an organic entity, was supposed to uphold and defend individual rights, thus adding a protective component of equal rights and freedoms to the classical concept of a liberal state. However, according to Eichenhofer, for safeguarding life in human dignity, guaranteed freedom and equality are not enough: as long as one's basic needs are not met, freedom and equality are not secured since both rights need a substantial underpinning.[10]

Benson, referring to a theory on private property, notes that a "*theory must determine which sorts of things* […] *can be privately owned or transferred and the limits or provisos to which this is subject, all in light of the end of realizing social and political justice*."[11] Private property is, according to Benson, "*to be evaluated from the standpoint of political, that is distributive, justice, and it is to be compared with alternative ways of distributing holdings, viewing it always as one part of a complex system of social, economic, and political institutions*."[12] Benson's call for evaluation mirrors the notion of justice that Miller describes as justice across societies in contrast to justice within groups.[13] Social security law, on the one hand, consists of rules, governing redistribution within groups, e.g. insurance groups of particular branches of social insurance, but, on the other hand, commonly stipulates such rules of the personal scope of coverage that, if not the whole, at least a great majority of the population falls within at least one insurance group of at least one branch of social insurance, e.g. health insurance. Additionally, social security rules, governing not the redistribution of resources, accumulated by social security contribution payments, but the redistribution of wealth, accumulated by means of general taxation, from which (i) universal social security schemes are financed, (ii) insurance-based social security schemes are commonly co-financed, and, most notably, (iii) social assistance schemes are financed, relate not to justice within groups but, almost exclusively, to justice across the society since entitlement is based on one's societal integration or, put differently, the obtained right to belong.[14] However, every intra-group, especially intra-societal redistribution of resources means that one person's private autonomy is now limited: (i) in a liberal sense, for the sake of widening the private autonomy of another, (ii) in a utilitarian sense, for the sake of enhancing the well-being or utility of the highest possible number of individuals or, more precise, the highest possible aggregate well-being or utility, and (iii) in a communitarian sense, for the sake of caring for another member of the community. Each of the three simplified theoretical approaches regarding the relationship between redistribution of resources and private autonomy can, in theory, be traced back to some sort of a societal contract, either a contract imposed on the person by the sheer fact of him being a member of a particular community, thus a contract, which may be withdrawn only by means of leaving the community, either a contract negotiated and concluded in some sort of a pre-actual state of the community. In the latter case, the contract is not imposed at least for the first, original members of the community. In life's reality, this is in a way reminiscent of both a contract-based entry into private insurance groups,[15] possibly mutual insurance groups, or a compulsory, non-consensual entry into as a rule public social insurance groups, offering no means of exclusion if remaining a member of the community (e.g. permanent, habitual residency) in which the insurance group is established by heteronomous rules.

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[9] Eichenhofer, 2006, pp. 3-4.
[10] Ibid.
[11] Benson, 2020, p. 1.
[12] Ibid.
[13] See Miller, 2003, p. 62.
[14] See, extensively, in Mišič (2020), pp. 41 ff.
[15] The discussion on contractual origins of any redistributive scheme, especially a corporatist one, is strongly related to the general question, what is the main ideal of social security, stakeholding or redistribution? See Eichenhofer, 2007, pp. 160-162.

Put differently, with the authority of public law, social insurance schemes establish *strains of commitment*[16] that, on the one hand, limit one's private (income) autonomy, in order to, on the other hand, widen the private (income) autonomy of any member of the insurance group, in some cases coinciding with the community as a whole, when he or she if faced with a particular contingency, e.g. sickness, old-age, parenthood. From a Rawlsian perspective,[17] it would have to benefit the least privileged members of the community most, whilst existing social security systems commonly seem to be tailored to the average member of the community most. However, as famously stated by Nozick at the very beginning of his *Anarchy, State, and Utopia,* "[I]*ndividuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state*?"[18]

From the perspective of the right to property and the wider right to personal autonomy, comprising also one's freedom of using personal income in line with personal needs, wants, wishes or desires, social security law serves two masters, i.e. social solidarity and private autonomy. On the one hand, it is grounded in the notion of vertical (solidarity between high- and low-earners) and horizontal solidarity (in essence, solidarity between persons as good and bad insurance risks),[19] promoting not only *ex ante* but also, to a certain degree, *ex post* equality of social rights beneficiaries. On the other hand, it must do so with as little interference with one's private and/or income autonomy. Referring to Cheneval and the fact "*that property has been a privilege of the few and served in the past as a means of excluding the large mass of non-possessors from social and political life*",[20] Golay and Cismas point at what they call "*an intrinsic tension between the right to property as a civil liberty and its social function*."[21] According to the authors, the right to property is closely related, on the one hand, to the realization of the right to life and other individual's human rights, and is, on the other, limited for the realization of other human rights of other individuals.[22]

It is for this exact reason, i.e. tensions between property entitlements of the individual and morally justifiable entitlements of others that pose social side-constraints on the use of (private) property, proprietary protection of social rights, especially contribution-funded social security rights, has become an important perspective of judicial review and a high barrier for any legislator eager of disproportional amendments to social security legislation, especially rules, which would have the power to interfere with persons' social rights in the course of acquisition or even acquired (vested) rights. The claim for property protection is especially strong regarding rights, formed and enjoyed in longer time-periods, e.g. the right to an old-age pension, since in such cases social security contribution payment obligations resemble compulsory income saving. Referring to the case of *Müller v. Austria* from 1974, Gómez Heredero notes that the:

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[16] The term is taken from the title of Banting's and Kymlicka's magnificent edited book *The Strains of Commitment: The Political Sources of Solidarity in Diverse Societies* from 2017.

[17] See Mišič 2018, pp. 281-283.

[18] Nozick, 1999 (1974), p. ix.

[19] Autonomous social, not heteronomous legal solidarity can in its true form be observed only in cases of private charity. Put differently, members of a compulsorily established social insurance group can either agree or disagree with their mandatory inclusion but it makes no difference since they cannot, when fulfilling legislative conditions, escape the burden of mandatory cooperation and income redistribution. In that sense, they are not expressing solidarity with one another. Solidarity is imposed upon them for the sake of the normal functioning of society. Both forms of social solidarity (vertical and horizontal) become, once prescribed by the law, forms of legal solidarity. According to Becker, 2007, p. 1, solidarity, when understood as a legally constituted community for the fulfilment of state-assumed responsibility, represents a fundamental requirement for the inclusion of certain persons in specific situations of need that are subject to specific risks.

[20] Golay, Cismas, 2012, p. 2.

[21] Ibid.

[22] Ibid.

"*Commission stated that the duty to contribute to a social security scheme might, in certain circumstances, give rise to a property right over certain* assets *thus constituted and that the existence of such a right might depend on the way in which these* assets *were used for the payment of a pension*."[23] Put differently, compulsory income saving should relieve persons of the need to rely on private income protection, i.e. relieve them of accessing private savings and investment schemes, investing in real estate, etc. Since a part of their income has been compulsorily deducted, effective and sufficient private income protection is also much more difficult or even impossible to achieve for the average individual. As for example put forward by the European Court of Human Rights (hereinafter: ECtHR) in *Stec*: "*In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable*."[24] However, it is clear that the societal patterns of ageing European societies are putting more and more financial pressure on public, social insurance schemes, especially pension and health insurance schemes, thus possibly reshaping the relationship between private or individual and public or communal responsibility for income protection. Then, proprietary protection of social rights, especially rights, formed and enjoyed in longer periods of time, might become even more important as one of the key arguments going up against any sudden and/or disproportionate changes to social security legislation that would have a negative effect on persons' social rights in the course of acquisition or vested rights, even if considered by the general legislator as being in the greatest public interest due to enabling long-term financial sustainability of the scheme. However, as established for example in *Koufaki and Adedy*,[25] the legislature possesses a wide margin of appreciation in implementing social and economic policies, thus also austerity measures which can be considered as an interference with beneficiaries' legal right to peaceful enjoyment of possessions, but not necessarily an unlawful one.[26]

II. THE RIGHT TO PROPERTY IN INTERNATIONAL LAW

Surprisingly, a number of universal and regional human rights documents do not include the right to property, at least not its direct stipulation. The International Covenant on Civil and Political Rights, for example, stipulates a prohibition of discrimination on grounds property and a prohibition of any distinction, also on ground of property, in regard to its personal scope of coverage. Similar applies, among others,[27] to the International Covenant on Economic, Social and Cultural Rights, which, again, refers to the property as a prohibited criteria of distinction when guaranteeing rights stipulated by the Covenant. In regard to the European Convention on Human Rights (hereinafter: ECHR), which is set at the heart of this debate, the right to property was added to its material scope of coverage with the passing of Protocol No. 1 to the ECHR in 1952, stipulating in Article 1 the right of every natural or legal person to peacefully enjoy his *possessions* which can be deprived only on grounds of public interest and when subject to the conditions provided for by law and by the general principles of international law. The concept of possessions has an autonomous meaning that is independent from any formal classification

[23] Gómez Heredero, 2007, p. 24.
[24] *Stec and Others v The United Kingdom*, 65731/01, 6 July 2005, Paragraph 51.
[25] *Koufaki and Adedy v Greece*, 57665/12 and 57657/12, 7 May 2013.
[26] See Information Note on the Court's case-law No. 163 from May 2013, pp. 19-20.
[27] For other core universal human rights treaties and their relationship to the right to property, adopted after 1966, see Golay, Cismas, 2012, p. 4. For regional human rights, treaties see pp. 5 and the following.

in domestic law and is not limited to the ownership of physical goods.[28] Even if domestic laws of a state do not recognise a particular interest as a right or as a property right this does not mean that the said interest falls outside of the concept of possessions as stipulated by the Convention and developed by the ECtHR.[29] Article 1, therefore, imposes no restrictions on contracting states' freedom to decide whether or not to have in place a particular social security scheme, nor does it restrict their freedom to decide on the type and the amount of provided benefits under a social security scheme.[30] However, if a social security scheme from which benefits are paid, either on a contributory or non-contributory basis, the legislation in which they are grounded ought to be regarded as generating a *proprietary interest* falling within the ambit of Article 1.[31] According to the ECtHR, possessions can cover either existing possessions or assets and claims that are covered at least by what is considered legitimate expectation by the claimant of obtaining effective enjoyment of a property right.[32] In the field of social security, legitimate expectations were, even if among social security lawyers commonly referred to in relation to rights in the course of an acquisition, e.g. pension rights, for example, extended to the eligibility of a disabled person for the free medication (cancer drugs).[33] As observed by Cousins, the ECtHR uses the notion of legitimate expectation in two related contexts. First, it uses it as a way of expanding the scope of property or possessions. Second, it uses it as to refer to a person's expectations regarding the future peaceful enjoyment of their possessions.[34] According to Cousins, the failure of the ECtHR to clearly define the notion and the fact that it uses it in two distinct ways led to significant confusion in its jurisprudence concerning social security.[35]

Similarly to the ECHR in times prior to the passing of Protocol No. 1, no mention of the right to property is found in the European Social Charter (hereinafter: ESL), even if, as observed by Golay and Cismas, west liberal tradition places the right to property among (other) freedoms, whilst its characteristics unequivocally lead to its inclusion among economic, social and cultural rights.[36] From this perspective, a lack of its inclusion in both Covenants and in the ESL and only its later addition to the ECHR, seem rather odd. However, the omission, which cannot be understood as a denial of the right, originates from antagonistic ideological views between the East and the West, as well as the North and the South,[37] which in a way also mirrors the common divide between liberal and communitarian thought. The first built around the almost atomistic notion of the self, the second around the notion of the self that is predetermined by community affiliation.

Unlike the abovementioned human rights documents that either do not refer (the ESL) or refer to the right to private property only indirectly, mostly as prohibited grounds for discrimination (both Covenants) or were subject to a later addition of the right under its material scope of coverage (the ECHR), the Universal Declaration of Human Rights in Article 17 stipulates that everyone has the right to own property alone or in association with others without being arbitrarily deprived of his property. Simultaneously, Article 17 does not make an explicit mention to the limitations of the right to property. Nevertheless, its possible limitations stem from the prohibition of arbitrary deprivation which entails that limitations or even deprivations

[28] Council of Europe, 2020, p. 7.
[29] See ibid.
[30] Ibid., p. 17.
[31] Ibid. See, for example, *Kopecký v Slovakia*, 44912/98, 28 September 2004, Paragraph 35. The reasoning was later confirmed, for example, in the abovementioned decision in *Stec*, Paragraph 54.
[32] Council of Europe, 2020, p. 8.
[33] Ibid., p. 17.
[34] Cousins, 2020, p. 2.
[35] Ibid.
[36] Golay, Cismas, 2012, p. 2.
[37] Ibid., pp. 3-4.

that are not arbitrary may be considered lawful.[38] This would, for example, be the case when limitations or even deprivations are in the public interest and subject to conditions provided by the law (see Article 1 ECHR). The wording of Article 17 of the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) is almost identical to the wording of Article 1 of the Protocol No. 1 to the ECRH, but for the fact of explicitly mentioning fair and timely compensation for any loss, i.e. deprivation of property. According to the final sentence of Article 17, the use of property may be regulated by law in so far as is necessary of the general interest. Similarly to the Covenants, Article 21 of the Charter prohibits discrimination based on the personal circumstance of property. From the perspective of social security law, property or wealth as a personal circumstance can also play an important role when accessing private, especially semi-private, semi-public insurance schemes, or, put differently, when public income protection is merged with private income protection in ways that make the former dependent on the latter, e.g. in cases of co-payments within public health insurance schemes, supplementary, second pillar pension insurance schemes, etc.

III. CASE-LAW OF THE ECTHR AND FUTURE CHALLENGES OF AGEING EUROPEAN SOCIETIES

Protection of property constitutes one of the most widely used provisions of the ECHR.[39] This applies both in general as well as in the field of social security law. Property protection can, however, complicate social security cases. Especially those, deliberated by supranational courts since their decisions might not only interfere with the social policy of other democratically elected authorities[40] but can also affect the balance of powers or competences between the international organization and the contracting state. In a narrow 9 to 8 decision in *Bélané Nagy* from 2016,[41] the ECtHR even established, at least at first glance, a right to a social security benefit where entitlement to that benefit did not exist under domestic law. However, in the said case, the ECtHR at the same time prevented the loss of a significant part of the personal income of a vulnerable person who otherwise would have fallen victim to legislative amendments containing no transitional arrangements for persons who once possessed a right to a disability pension, lost the right due to changed criteria of medical evaluation, but would have been eligible for the obtainment of a disability (rehabilitation) allowance (replacing the right to a disability pension) under new conditions had they fulfilled the newly established condition of 1,905 days of the insurance period. The claimant in the said case did not meet the latter criteria because she lost the right after the first legislative amendment to complete only 947 instead of 1,905 of social security coverage in the previous five years prior to the re-filed request for the benefit, more precisely, prior to the filing of the request to obtain a newly introduced disability (rehabilitation) allowance.[42]

Before social rights began to enjoy comprehensive protection under Article 1 of the Protocol No. 1 to the ECHR (hereinafter: the Protocol), the ECtHR first expanded the notion of civil rights and obligations, as determined by the right to a fair trial, in a way as to cover social security rights and obligations.[43] It is this crucial extension from civil and political to social from 1986[44] that lead to the protection of the right to social security under the ECHR even if

[38] See ibid., p. 3.
[39] Cousins, 2008, p. 17.
[40] See Leijten, 2019, p. 308.
[41] *Bélané Nagy*, 53080/13, 13 December 2016.
[42] See Paragraph 9-25. For a summary of the case see Information Note on the Court's case-law No. 182 from February 2015.
[43] Kresal Šoltes, 2000, pp. 303 ff. See also Strban, 2013, p. 385.
[44] See Kapuy et al., p. xix.

the right is not included in the document itself but in the ESL. In its case-law on property protection, the ECtHR suggests several criteria, clearly depicted by Cousins,[45] according to which interference with a property right may be considered a breach of the ECHR. First, does the matter in dispute fall within the scope of Article 1 of Protocol No. 1 to the ECHR? Second, does there exist a sufficient claim to the possession and what is the scope of the property right that is protected? Third, has peaceful enjoyment of the property right been interfered with, and, fourth, is such interference in accordance with the public interest and subject to conditions provided by the law?[46] In general, the property protection argument concerning social rights has been subjected to dynamic developments from the 1960s onwards, when the European Commission of Human Rights (hereinafter: Commission) first stated in *X v Germany*[47] that the ECHR does not include a right to a pension. The claim made in the said case was considered falling outside the material scope of coverage, thus deemed inadmissible. In 1971, in *X v The Netherlands*,[48] the Commission first stated that paid social security contributions could constitute proprietary entitlements even if it denied the claim put forward in the case. As highlighted three years later in *Müller* and *G v Austria*,[49] the older case-law of the "Convention organs" any compulsory contributions towards a social insurance scheme was considered to constitute a property right protected by the Protocol only if there existed a direct link between the level of contributions paid and the awarded benefit.[50] Only such a link established an identifiable and claimable share in a particular fund.[51] It was only in 1996 in the case of *Gaygusuz*[52] that the ECtHR pronounced itself for the first time on the merits of a case, linking the right to social security with the Protocol.[53] According to Kapuy and others, it is this decision in which the ECtHR took on a new direction of the jurisdiction in the field of social security,[54] even if, as observed by Dembour,[55] the ground for *Gaygusuz* was laid out from a very early period onwards since the Commission countenanced that contributory social security benefits came within the scope of the Protocol long before the case came in front of the ECtHR.

In *Gaygusuz*, the ECtHR determined, without referring to the level of contributions paid and the awarded benefit, that an obligation to pay social security contributions to an insurance fund establishes entitlement to social benefits. The case, however, could also be read (and grammatically understood) in a way as to consider the (in)eligibility to receive a disputed social security benefit (in the said case an emergency payment) as not exclusively dependent on the fact that social security contributions were paid. The case namely concerned a benefit, granted to persons, who have exhausted the contribution-based right to unemployment benefits.[56] In Paragraph 39, the ECtHR stated that the: "[e]*ntitlement to this social benefit is therefore linked to the payment of contributions to the unemployment insurance fund, which is a precondition for the payment of unemployment benefit* […]. *It follows that there is no entitlement to emergency assistance where such contributions have not been made*, whilst adding in Paragraph 41 that the: "[c]*ourt considers that the right to emergency assistance - in so far as provided for in the applicable legislation - is a pecuniary right for the purposes of Article 1 of Protocol No. 1 (P1-1). That provision (P1-1) is therefore applicable without it being necessary to rely solely*

[45] Cousins, 2020, p. 4. For a comprehensive overview see Cousins, 2008, pp.18 ff.
[46] Ibid.
[47] *X v Germany*, 2116/64, 17 December 1966.
[48] *X v The Netherlands*, 4130/69, 20 June 1971.
[49] *Müller v Austria*, 5849/71, 16 December 1974, *G v Austria*, 10094/82, 14 May 1984.
[50] Council of Europe, 2020, p. 16.
[51] Ibid.
[52] *Gaygusuz v Austria*, 17371/90/90, 16 September 1996.
[53] Kapuy et al., p. xviii.
[54] Ibid.
[55] Dembour, 2012, p. 694.
[56] See also Strban, 2015, 1263.

on the link between entitlement to emergency assistance and the obligation to pay »taxes or other contributions.« Gómez Heredero for example highlights the fact that the ECtHR defined the right to emergency assistance, granted by the state to persons in need, as a pecuniary right, meaning that the provisions of the Protocol are applicable without having to rely (as put by the ECtHR) solely on the link between emergency assistance entitlement and the obligation to pay taxes or contributions as was, for example,[57] the case in *Van Raalte*[58] from 1997. In *Van Raalte,* the applicability of the Protocol was derived directly from the right of the state to secure the payment of taxes or other contributions.[59] What might be interesting from this perspective is the fact that the invoked right to emergency assistance was not a typical social security benefit, which traditionally possesses (ed) stronger legal protection, but more of a social assistance benefit,[60] grounded not only in a two-sided social insurance relationship, but also in the redistributive criteria of *need*, but available, importantly, only after insurance-based benefits have been exhausted by the applicant.[61] This also does not change the fact that the ECtHR made explicit reference to the link between social security payment obligations and the entitlement to unemployment benefits, granted prior to the granting of emergency assistance. From this perspective, *Gaygusuz* ought to be seen first and foremost as a groundbreaking case in the field of equal treatment concerning social rights. The claimant was namely a Turkish national who had lived and worked in Austria and was denied access to emergency money solely on grounds of not possessing Austrian citizenship, even if having paid social security contributions to the unemployment insurance fund.[62]

In *Kuoa Poirrez*,[63] another case linked to discrimination on grounds of nationality, as well as in a number of other cases,[64] the ECtHR extended property protection to non-contributory social security benefits. Referring to *Gaygusuz,* the ECtHR stated in *Kuoa Poirrez* that: "*the Court considers that the fact that, in that case, the applicant had paid contributions and was thus entitled to emergency assistance* […] *does not mean, by converse implication, that a non-contributory social benefit such as the AAH does not also give rise to a pecuniary right for the purposes of Article 1 of Protocol No. 1.*"[65] Thus, it did not apply a strict *a contrario* reasoning in regard to *Gaygusuz*, where social security contributions were paid. The decision from *Kuoa Poirrez* was two years later confirmed and further articulated in *Stec* in which the ECtHR noted that the decision in *Gaygusuz was* ambiguous on the important point of emergency assistance (not) being dependent on the prior payment of social security on contributions, with two distinct lines of authority subsequently emerging in the case-law. According to the ECtHR, the Commission and the Court itself continued to find in some cases that a "welfare benefit" or the

[57] Gómez Heredero, 2007, p. 24. The reasoning of the author, however, appears to be shrouded in a veil of ignorance, since no additional explanation for the selected commonly quoted paragraphs of *Gaygusuz* is given. It seems as the author wanted to depict the ECtHR's case-law development from the strict granting of property protection to contribution-funded benefits only to a later period of "only" a *claim*, if sufficiently well established to be enforceable, having the power to be deemed as *possessions* under the Protocol. See ibid., pp. 23-26. For anti-discrimination cases concerning social security benefits or, as in *Matthews* the wider notion of social subsidies or advantages (the merger of the Protocol and Article 14 ECHR) see pp, 30 ff.

[58] *Van Raalte v The Netherlands*, 20060/92 from 21 February 1997.

[59] See Gómez Heredero, 2007, p. 24, and Paragraph 34 in *Van Raalte*. The applicant, who had to pay social security contributions under the General Child Care Benefits Act, claimed that he, as an unmarried childless man over 45 years of age, was discriminated against since, if he was an unmarried childless woman over 45 years of age, he would have been exempt from that obligation.

[60] Kjønstad, 2007, p. 183.

[61] The link between social security contribution payment obligation (payment to the unemployment insurance fund) and eligibility to emergency assistance is highlighted in Council of Europe, 2020, p. 17 as well. No reference to *Gaygusuz* as introducing important development in the case law is made.

[62] On that matter see, fore and foremost, Dembour, 2012, pp. 689 ff.

[63] *Kuoa Poirrez v France*, 40892/98, 30 December 2003.

[64] See Council of Europe, 2020, p. 16.

[65] *Kuoa Poirrez*, Paragraph 37.

right to a pension only fell within the scope of the Protocol where social security contributions were paid to a particular fund that financed the benefit, whilst in other cases held that even a non-contributory welfare benefit could constitute possession under the Protocol.[66] The ECtHR importantly stated that "[g]*iven the variety of funding methods and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No. 1. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through the payment of tax.*"[67] According to such reasoning, it is also the common mixed nature of social security benefits regarding their financing that extended the scope of the Protocol. However, the extension cannot be ascribed solely to such mixed nature. If, as already mentioned, a state has in force legislation providing for the payment as of right of a "welfare benefit" that legislation ought to be regarded as generating a proprietary interest falling under the Protocol, regardless of whether the benefit is made conditional or not upon the prior payment of social security contributions.[68]

Generally, the ECtHR took a dynamic approach to the interpretation of the ECRH, for example concerning the equal treatment and the export of benefits in times of enhanced population mobility and higher levels of international cooperation and integration, and developments in the banking services and information technologies that no longer justify largely technically motivated restrictions to the export of social security payments to beneficiaries, residing abroad.[69] Limitations concerning the export of pension benefits were, for example, already deemed unconstitutional by the German federal constitutional court in 1980. The right to social security or benefits, through which it is manifested, can be treated as property under Article 14 of the German constitution if the said benefits safeguard persons' livelihood, if they are in their private interest and if contributions, which are beyond marginal, were paid by the beneficiaries.[70]

A dynamic approach was also adopted when Hungary abolished the private but mandatory second pension pillar scheme, transferring the funds to the first, public pillar. The claimant argued that the state's financial difficulties cannot justify an arbitrary, radical, sudden and disproportionate encroachment of pension entitlements. The ECtHR found no violations concerning the right to property, considering the limitations to be legitimate, proportional and in the public interest.[71] Next to the abovementioned case of *Koufaki and Adedy*, the ECtHR also confirmed austerity measures adopted by the Portuguese legislature which had an impact on a part of social security benefits, granted to the applicants under the public sector pension scheme. Referring to similar circumstances as present in Greece, i.e. in the said case of *Koufaki and Adedy*, the ECtHR found that the austerity measures did not upset the fair balance between the demands of the general interest of the community and the requirements of the protection of the applicants' individual fundamental rights.[72] The Slovenian Constitutional Court, for example, established that in the case of a relative diminishment or slower increase of pensions as expected according to previously valid legislation the principle of legal certainty or trust in law was affected.[73] However, the legislative intervention was deemed urgent to secure the effectiveness of other principles and to secure the value of public interest which was given priority – the

[66] *Stec*, Paragraph 46.
[67] Ibid., Paragraph 50.
[68] Paragraph 54 in *Stec.* For an in-depth analysis of the right to minimum subsistence and property protection, afforded by the ECHR and ECtHR see Leijten, 2019, pp. 307 ff.
[69] See Paragraph 53 in *Pichkur v Ukraine*, 10441/06, 7 February 2014.
[70] Becker, von Hardenberg, 2010, p. 108, cited in Strban, 2015, p. 1257.
[71] See *E. B. v* Hungary, 34929/11, 15 January 2013 and Strban, 2015, 1263.
[72] See Paragraph 27 ff. in *Da Conceição and Santos Januário*, 62235/12 and 57725/12, 8 October 2013.
[73] Strban, 2016, p. 251.

financial burden of the active generation and the economy regarding the financing of pensions ought not to, according to the court, make economic growth impossible and disturb the established agreement between the active and the retired generations. The interference with the "principle of trust in law" was deemed admissible since it was considered necessary and not excessive. Only such reductions made it possible to withhold the balance between the active and inactive generations.[74]

In a recent case from March 2020,[75] the ECtHR gave priority to the claimant's property entitlements over the *res iudicata* principle since the application of the latter would in the said case constitute a disproportionate burden for the claimant. The claimant, who was deprived of the right to a disability pension since the competent institutions determined in 2008 that he was no longer completely unfit for work, re-filed the claim in 2010 and was, after having lodged a complaint against the second negative decision, eventually granted the benefit by a court decision. The right to a disability pension was however granted only from the moment of the re-filed request in 2010 onwards due to the application of the *res iudicata principle* and not from the moment of losing the right in 2008, even if the experts within the court proceedings determined that he was completely unfit for work in 2008 as well. The ECtHR, after having stated that it was certain that the applicant was unfit for work and fulfilled other conditions for obtaining the benefit from 2008 onwards, decided that the proportionality principle was violated in the said case, since, even if the departure from the *res iudicata* principle was not the only means of the domestic authorities to relieve the applicant from the disproportionate burden placed on him, the domestic authorities should have provided the applicant with a legal solution. According to the ECtHR, such a solution involved him being paid compensation by the pension fund since it was the fund's experts who made the mistake of declaring him as not being completely unfit for work. According to the ECtHR, referring also to the principle of good governance (i.e. acting in good time), an excessive burden was imposed on the applicant because the *res iudicata principle* meant that the entire burden of that mistake was transferred onto the applicant.[76]

Moving away from *Grobelny*, it is most likely that in the future the number of the case, similar to those concerning austerity measures and social security benefits (reduction of benefits or aggravation of eligibility conditions) will rise due to the long-term challenges, faced by the ageing European societies. From the perspective of a threatened future long-term financial sustainability of European social security schemes, especially pension, health, and long-term care insurance schemes, it is important to note that no financial difficulties cannot justify and arbitrary, radical, sudden and disproportionate encroachment of not only pension,[77] but also other social security entitlements. Especially entitlements that enable not only the normal functioning of the society but also broaden one's personal autonomy and offer to the individual and his family members means for free life-plan development. The reasoning of course also applies to potential austerity measures in the field of social security, triggered by the post-Covid-19 economic crisis. The Slovenian Constitutional Court for example argued, that cash benefits, on the one hand, have to be proportional to income from which social security contributions were paid and that they cannot be limited to minimum protection only. On the other hand, social security systems can only fulfil their basic task of providing sufficient levels of social security to all eligible persons only if they are adapted to the continuous societal

[74] Ibid.

[75] *Grobelny v Poland*, 60477/12, 5 March 2020. See Wujczyk, 2020, pp. 333-337.

[76] *Grobelny v Poland*, Paragraphs 67, 70.

[77] As established in *Cichopek v Poland* (and 1,627 other applications), 15189/10, 14 May 2013, an infringement of a (pension) right ought not to result in the impairment of the essence of the (pension) right. Such could for example be the case of a pension (social security) right becoming a social assistance right due to posed limitations or reductions.

changes. The Constitutional Court also recognized the principle of adjusting the law to the changing societal relations as one of the sub principles of the rule of law principles – the legislature does not only possess the right but is under the obligation to modify and amend legislative acts in the field of social security if such amendments are dictated by the changed societal relations.[78] The negative effects of the ageing society can, on the one hand, thus demand the introduction of additional sources of financing, higher levels of tax-co-financing, etc., or, on the other, legitimise a reduction of benefits, an aggravation of eligibility conditions, etc. At the same time, the "adjustment principle", which was mentioned in only two decisions by the Constitutional Court, might also be in conflict with the wide margin of appreciation possessed by the Slovenian legislature in the field of social and economic rights. The clash between (gradual) adaptation of social security rules to ever-changing social reality and individual's social entitlements, and the clash between the need to maintain social security systems at an appropriate level in the future of possible economic turmoil and the wide field of discretion possessed by the legislature in the field of the social and the economic is, of course, a challenge faced by many if not all European legislatures, societies and their welfare states. It should also be considered that the ESL in Article 12 binds the contracting states not only to establish or maintain a system of social security but also to endeavour to progressively raise it to a higher level.

IV. CASE-LAW OF THE SLOVENIAN CONSTITUTIONAL COURT

First, it is important to note, that the Slovenian constitution[79] ascribes an economic, social and environmental function to the acquisition and usage of property,[80] thus transgressing (unlike the Slovenian property code) at the level of the basic law the sheer liberal understanding of property. Put differently, the constitution itself foresees limitations to persons' property entitlements, traditionally understood as civil liberties, for the achievement of common goals of the society or group of persons. The legislature's obligation of balancing individual and communal aspects of the property has also been recognized by the Slovenian constitutional court.[81] Its definition of the property also transgresses a traditional civil law understanding, encompassing any proprietary legal relationship, consisting of movable and immovable, and material and immaterial rights.[82] Similar, of course, is the abovementioned understanding of property, developed by the ECtHR. The concept of possessions does not include only the right to ownership (physical ownership of things) but a wide array of pecuniary rights such as rights arising from shares, patents, arbitration awards, *established entitlements to a pension*, entitlement to a rent and rights arising from running a business.[83] The mandate to restrict (private) property, provided to the Slovenian legislature by the constitution, can be understood as a social side-constraints of property, limiting the owners' individual assessment regarding its usage in a way as to consider the public interest, liberty and the development of others and

[78] See Strban, 2016, p. 250 and Decision No. U-I-330/97 from 30 November 2000 and Decision No. U-I-36/00 from 11 December 2003.
[79] Constitution of the Republic of Slovenia, Official Gazette of the RS, No. 33/91-I to 75/16. See Article 67.
[80] Crawford, 2011, p. 1089, describes the five words of *the social function of property* as being "*so pregnant with meaning and promise, yet for many so ill-defined*." The author understands the social function of property as a "notion that aims to secure the goal of human flourishing for all citizens within any state."
[81] Strban, 2015, p. 1255. Please note that the majority of decisions, reached by the Slovenian constitutional court are available only in Slovene. See Decision No. Up-156/98 from 11 February 1999. The general overview of the case-law of the Slovenian constitutional court in the field of social security is accessible in Strban, 2015, pp. 341 ff. or Strban, 2016, pp. 243 ff.
[82] Strban, 2015, p. 1255.
[83] Grgić (et al.), 2007, p. 7. See also Council of Europe, 2020, p. 7.

the society as a whole.[84] This applies to the field of commerce, environment (environmental protection) and the social field.[85] A similar conclusion could be drawn from Article 30 of the Macedonian Constitution, according to which "[O]*wnership of a property creates rights and duties and should serve the wellbeing of both the individual and the community*."[86] Interestingly, the right to ownership of property is stipulated under the second chapter on economic, social and cultural rights, not under the first chapter on civil and political freedoms and rights.

Second, Article 50 of the Constitution, derived from Article 2 of the Constitution,[87] reads as follows: "Citizens have the right to social security, including the right to a pension, under conditions provided by the law. The state shall regulate compulsory health, pension, disability, and other social insurance, and shall ensure its proper functioning. Special protection in accordance with the law shall be guaranteed to war veterans and victims of war."[88] With the sole use of grammatical interpretation, the right to social security appears to be limited to Slovenian nationals only, whilst the right to a pension might appear to enjoy a higher level of constitutional protection than other social security rights due to its explicit mention added with a constitutional amendment in 2004. The first interpretation was even followed by the constitutional court,[89] as if the court was not aware of the primacy of European Union law, its rules on social security coordination with the key principle of any prohibition on grounds of (national) citizenship, or, additionally, the basic nature of a social insurance relationship, in which the social insurance carriers are obliged to pay social security benefits to any insured person, who has fulfilled minimum insurance period criteria and, in that period, paid social security contributions. Instead, the constitutional court extended the scope of the right to a pension to citizens of other countries by means of recognizing the right as to be protected by the right to private property (Article 33 of the Slovenian Constitution).

The explicit mention of the right to a pension can, on the one hand, be viewed as redundant, since both international and national law clearly defines the content of the right to social security, whilst it would also seem controversial to claim that old-age benefits are more important than, for example, sickness or long-term care benefits or even social assistance benefits that can be derived from the Slovenian constitution even if the right to social assistance is not stipulated.[90] What is true, however, is the fact that old-age benefits are as a rule formed and enjoyed in the longest time periods, making them particularly sensitive to societal changes and their related legal measures. On the other hand, the explicit mention of the right to a pension gives a clear signal to the Constitutional Court to further define the constitutional substance of the right, even if such signal could be derived from the sole fact that the constitution safeguards

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[84] Virant, 2002, p. 637.

[85] Ibid., p. 638.

[86] The English translation is available at: https://www.legislationline.org/download/id/3652/file/fYROM_Constitution_excerpts_relevant_migrant_1991_am2011_en.pdf (access 21 January 2021)

[87] Article 2 establishes Slovenia as a "*state governed by the rule of law and a social state*." As observed by Kresal and others, 2016, p. 30, the social state principle represents the basic foundation of social security law in Slovenia. All other articles of the Constitution that concern social security stem from this principle.

[88] The English translation is available at: https://www.dz-rs.si/wps/portal/Home/PoliticniSistem/URS/jezikovneRazlicice/!ut/p/z1/hU7BDoIwFPsarntvKgjeUCNBjBAu4C4GyBwkjJExXeLXi0cTjb00Tdu0wKAENlSPTlSmU0PVz_rCvOv2nLtxElGMktTFONvlh32YUsxWUPwLsNnGHwgRjsC6WhLbSIKEBi4NaOD5C5_O5K3f--FQL30BTPMb11yTu55vtcaM08ZBB621RCglek4aJR38VmnVZKD8TMIoy-eJF-ELxAmyAg!!/dz/d5/L2dBISEvZ0FBIS9nQSEh/ (access 13 January 2021)

[89] See Strban, 2015, p. 1257, and Decision Up-770/06 from 27 May 2009 or Decision U-II-1/11 from 10 March 2011.

[90] Derived from Article 2, establishing the rule of law and social state (germ. *Sozialstaatsprinzip*) principle, Article 34 (Right to Personal Dignity and Safety) and Article 50 (right to social security).

the right to social security without any (other) rights being explicitly mentioned. Additionally, an explicit mention of the right to a pension in Article 51 of the Slovenian Constitution reaffirms the position of public income protection schemes for old-age or, put differently, the importance of providing the beneficiaries with a high enough public pension that is proportionate to their previous earnings without them necessarily having to rely on topping-up benefits from additional pension insurance schemes or annuities from fully private savings and investment schemes.

The Slovenian Constitutional Court, in the major part of its case law dealing with old-age benefits only, defined the right to a pension as an economic category, predetermined by the duration of social security contribution payments and its amount, whilst simultaneously recognizing its solidarity-based elements. Exclusive treatment of old-age benefits as an economic category, especially when combined with an absolute understanding of vested rights, would also mean that persons of a certain age, who have reached a sufficient insurance period, would become eligible to obtain a full old-age pension or other old-age benefits even if they remained fully economically active. Such regulation would of course reshape the original understanding of social security benefits as benefits, granted only after a particular contingency, e.g. old age, sickness, unemployment, has occurred. Exclusive economic understanding of old-age or any other social security benefit for that matter would also weaken the solidarity-based foundations of social security, whilst increasing the importance of the (private) insurance principle of reciprocity, that is *what you put in, you get out*. The Slovenian constitution, however, does not guarantee the right to a pension in a specific amount but in the amount that ensures *proportionality* in relation to the amount of social security contributions paid, whilst surpassing the amount of income support benefits.[91] The Constitutional Court argued that the essence of the right to a pension consists of the right to receive a pension which, under reasonably set conditions, provides social security.[92] In its case-law, The Slovenian Constitutional Court also recognized and further developed the protection of vested (acquired) rights and the protection of legal expectations (rights in the course of acquisition), also highlighted the importance of legal clarity, equal treatment and the proportionality of legislative measures in the field of social security, whilst introducing the abovementioned principle of adjusting the law to the (changed) social relations, applicable also in the field of social security.[93] The Constitutional Court also annulled the legislation that allowed for the possibility of deferral, installed payment or writing-off of social security contributions. The employer was namely the sole person eligible to file the application without any involvement of the employee. What is key, however, is the fact that the court afforded property protection to mandatorily deducted social security contributions, which are deducted from the employee's gross salary and paid on his behalf by the employer. The obtainment and the amount of social security benefits obtained by the employee is namely dependent on the amount of paid social security contributions.[94] The Constitutional Court also treated social security contributions, paid into the mandatory supplementary pension insurance scheme, i.e. mandatory occupational insurance scheme for persons, performing hazardous jobs, as private property, limiting the supervisory powers of the tax office.[95] It also allowed for a negative valorisation or other *ex nunc* reduction of old-age benefits if grounded in a valid, non-arbitrary reason.[96]

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[91] See Strban, 2015, pp. 1257-1258 and Decision No. Up-1419/08 from 22 October 2009 and Decision No. U-II-1/11 from 10 March 2011.

[92] Strban, 2016, p. 257.

[93] See ibid., pp. 251-253.

[94] See Strban, 2015, p. 1258, and Decision No. U-.I-281/09 from 22 November 2011.

[95] See Strban, 2015, pp. 1259-1260 and Decision No. U-I-248/10 from 7 June 2012 and Decision No. U-I-158/14 from 2 October 2014.

[96] See Strban, 2015, pp. 1261-1262.

V. CONCLUDING REMARKS: FINDING THE RIGHT BALANCE

In its older case-law, the ECtHR did not afford proprietary protection to social rights. Protection, stemming from Article 1 of the Protocol, was afforded gradually, with comprehensive protection, comprising both contributory and non-contributory benefits where a sufficient claim to the property is established, developed from the 1990s onwards. In between 1955 and 1967 the Commission rejected several applications concerning the award of non-contributory benefits, including invalidity, old-age and widowhood allowances and unemployment, family, sickness and housing benefits.[97] A different view was later taken in regard to contributory pensions and allowances, with the view of the Commission that an individual, who had contributed to a social security scheme, creating an entitlement to a benefit, thus holds a right to those benefits which is considered as a property right under Article 1 of the Protocol.[98] Such reasoning was developed further as to extend the scope of protection with many cases concerning discrimination in accessing social security benefits.[99] The gradual development towards comprehensive protection, which in some cases might even appear too broad – especially concerning the division of competences between the ECtHR and the contracting state – begs the question – is the merger of the right to social security with the right to property really necessary? Could it even have a negative effect on the afforded level of social protection?

On the one hand, the right to social security is a well-established human right both in international law, where it is stipulated both in charters and covenants as well as standard-setting documents, and domestic (constitutional) law. Should its effective protection really be dependent on the protection of another human right, i.e. the right to (private) property? On the other hand, the right to social security can be considered as being perhaps the most typical positive right, dependent not only upon the wide margin of appreciation of the domestic legislature when determining the content of this social and economic right at the level of ordinary legislation but also upon the actual financial capacities of the state and its social insurance carriers. The right to social security is also not included in the ECHR but only in its "weaker" relative, the ESL. From this perspective, a typical negative right, i.e. the right to private property, empowers any substantiated claim for one's social entitlements. This is the case both in international and national, for example, Slovenian social security law (and the case-law of the Slovenian Constitutional Court).

As indicated, the protection of social entitlements or social rights through property entitlements or the right to property is expected to gain momentum in the foreseeable future of steady negative demographic growth and population ageing in Europe that will have, if no alternative means of financing public income protection are offered, a strong impact on the long-term financial sustainability of European welfare states, especially particular branches of social insurance, e.g. pension (and disability) insurance, health insurance, long-term care insurance. However, a growing proprietary understanding of social rights, which can, on the one hand, safeguard their substance and bind the legislature not pass swift and disproportionate amendments in the field, can, on the other, establish the primacy of the principle of equivalence over the principle of solidarity in the field of social insurance. The principle of equivalence is namely a key principle of private insurance, in social insurance schemes strongly mitigated by the principle of vertical and the principle of horizontal solidarity. Treating social security benefits, especially social insurance benefits, as private property can have a transformative effect on the notion of social security as *public* and not *private* income security, thus possibly opening the gates of functionally substituting public insurance schemes with private ones.

[97] Gómez Heredero, 2007, p. 23.
[98] Ibid., p. 24.
[99] Ibid.

However, if no property protection is not afforded to social insurance benefits and the latter fall victim to means of facilitated reduction, then the importance of private savings and investment schemes as means of securing income protection in old-age, cases of sickness, unemployment, etc., might grow even more significantly. From this perspective, it is key that European legislatures in the future endure seeking a right balance between an economic or proprietary and solidarity-based understanding of social rights, especially social security or social insurance benefits. It is the finding of this balance that can enable a fair functioning of public income replacement and private-cost reduction schemes, whilst allowing for private insurance schemes to take on the role of offering additional social security, private income protection or providing the customer with a "five-star treatment" concerning benefits in kind.

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