

DANIEL ERYK LACH

Equality vs. differentiation: on solidarity and justice in social law

Introduction

In discussing the meaning and content of the rules of equality, solidarity and social justice in relation to social law, first it should be noted that social law, as an instrument of social policy, is characterized by its own axiology. Its underlying assumption lies in the need to help and equalize the diverse social conditions of citizens, to guarantee citizens – by fulfilling the provisions of the Constitution of the Republic of Poland – the realization of the right to social security in the event of their inability to work due to an illness or disability, or when they reach retirement age (Article 67 § 1), as well as equal access to healthcare financed from public funds, regardless of the citizens' financial standing (Article 68 § 2). By defining the rights (to services or benefits), and obligations (payment of contributions), the public authority differentiates the legal situation of diverse groups of subjects when determining the amount of defined benefits (e.g. pensions of particular occupational groups), or the basis and interest rates of contributions (e.g. health insurance contributions of workers, farmers and the self-employed).

This permissible differentiation is limited by the principle of equality, expressed in Article 32 of the Constitution, and, with regard to health insurance, is reflected in the principle of equal access to healthcare services from Article 68 § 2. Considering the statements of the doctrine and the decisions delivered by the Constitutional Court (Trybunał Konstytucyjny), an assessment of the grounds justifying differentiation of the legal situation of specific groups of subjects, and the compliance of those grounds or reasons with the principle of equality, should be based on the following principles: (i) the criterion for the classification of subjects leading to the differentiation of their legal situation should be objective, real, and noticeable; (ii) the objectively existing differences between the parties should be legally-relevant, have a direct, rational relation to the aim and the main content of the norms in which the controlled standard is contained, and achieving that aim; (iii) the adopted criterion must be proportionate, which

means that the weight of interest, which is designed to differentiate the situation of the addressees of the norm, must be in proportion to the seriousness of the interests that will be affected as a result of the unequal treatment of similar subjects; (iv) the statutory classification of subjects resulting in the differentiation of their legal status must be fair, which means that the choice of a specific criterion of differentiation should result from the adopted system of values, principles or constitutional norms justifying different treatment of similar subjects.

It should be noted that the criterion for justifying the differentiation, i.e. recognition that different rules have priority over the principle of equality and justify the unequal distribution of duties or rights, is essential in the judicial practice of the Constitutional Court, because the other criteria generally do not cause problems. This paper analyses the principles of social justice, social solidarity and the common good as the key ideas of the social security system that justify the differentiation of the legal situation of different groups of the insured and the beneficiaries.

The axiology of social law as an instrument of social policy

The function of social law

As already indicated, social law is characterized by the specific axiology resulting from its very function, which is the implementation of social policy. The aims and methods of social policy have evolved over years, with the milestones of this evolution being some key legal institutions and concepts, such as social insurance (Bismarck), the system of “social supply” in the framework of a welfare state, i.e. the responsibility of the state for the well-being (or living) of its citizens (Beveridge) and, finally, the concept of the privatization of public tasks and the idea of the enabling state (*Gewährleistungsstaat*).¹ Today, it should be assumed that activities undertaken within the scope of social policy cover three different types of situations: firstly, to equalize the situation of economically vulnerable and helpless individuals (groups) to a standard recognized in society as fair; secondly, to create equal access to constitutionally guaranteed services and social benefits; and thirdly, the insurance of social risks that may affect any individual or any social group.²

Thus, social law also includes – in addition to social security law (which guarantees social benefits of a protective/emergency character, fulfilled only in the event that certain social risks occur) – providing social compensation and social support, stimulating the responsibility of the beneficiaries for their own living, and providing them a better start and equal opportunities in a society. The institutions of the social law ensure not only traditional benefits, which have passive character; they also encompass the active

1 D.E. Lach, *Zasada równego dostępu do świadczeń opieki zdrowotnej*, Warszawa 2011, pp. 38–47, 81–87.

2 J. Auleytner, *Polityka społeczna, czyli ujarzianie chaosu socjalnego*, Warszawa 2002, p. 41.

prevention of disadvantageous situations that citizens might face in the future, and thus they are future-oriented, aiming at increasing the activity of subjects incurring or under certain risks, and at promoting a specific social prevention, consistent with the principle of subsidiarity. These measures should not result in a fragmented response to the occurrence of undesirable events in the lives of individuals. Instead, public authorities should treat social issues in a comprehensive way, which is of particular importance when it comes to poverty and social exclusion. By promoting equal opportunities, social policy will promote social inclusion and social cohesion, which will create a consolidated society.³ For this reason, an analysis of the differentiation of the legal situation of particular groups of subjects in social legislation must take into account the essential function of social policy, which is the equalization of opportunities and the standards of living of citizens, by eliminating excessive differences.

If social law has emerged as a result of social inequalities and the desire and need to provide for their (at least partial) equalization, its norms, by definition, differentiate the legal situation of their addressees. In order to determine whether the principle of equal treatment has been taken into account, first it must be established whether the criteria used to define a group whose legal situation is subject to differentiation have been objective, relevant, proportional and fair, and, secondly, whether, or to what extent, the regulated distribution of rights and duties among the differing groups is equal and fair, i.e. to what extent it has taken into account the existing differences between these groups.

To determine whether the definition (differentiation) of selected groups of subjects and the differentiation of their legal situation is justified, it is necessary to examine the legitimacy of the adopted criterion of differentiation, as it should result from the system of accepted values, principles or constitutional norms, justifying different treatment of similar subjects. In this context, the first thing to recall is the principle of social justice, which is somewhat difficult to define and has a complicated relationship with the principle of equality. Secondly, it must be remembered that the principle of social solidarity, which is the basis (the key idea) of the concept of social insurance as the realization of the idea of social security, consists mainly in the beneficiaries of the social policy system fulfilling their insurance obligations, rather than exercising their rights. The principle of social solidarity ultimately constitutes the basis for the assessment of citizens' participation in the social risk community (should they be in the insurance community) and their contribution to the financing (how much should they pay). And thirdly, the principle of the common good should be mentioned, because the common good and working towards it are the objectives and consequences of the existence of a community characterised by solidarity.

3 W. Anioł, *Polityka socjalna Unii Europejskiej*, Warszawa 2003, p. 30 *et seq.*

Social justice as distributive justice

From the times of Aristotle's *Nicomachean Ethics*, distributive justice has been defined in practically the same, constant manner. It is about sharing the relevant goods or spreading burdens fairly between persons.⁴ In the source literature, it has been pointed out that the concept of distributive justice is an idea which rules over the principles of the distribution of goods, and therefore concerns the relationship between an individual and other people in a situation of relative scarcity (when the sum of the needs exceeds the number of goods which are to be distributed).⁵

The Constitutional Court also referred to the concept of distributive justice, stating that the concept of justice as the overriding principle is used to evaluate social differentiation. When unfair differences occur, in the distribution of goods and in the associated differentiation of the recipients of these goods, they are considered to be inequalities. The Court remarked then that according to the principle of distributive justice “the equal must be treated equally” and “the similar must be treated similarly.” In the latter case, the extent to which certain features that are taken into account in the distribution process occur in individuals or groups of individuals, should be considered.⁶ In other statements directly concerning the principle of social justice, the Court pointed out that this principle should be understood as “the correction of the principle of equality in favour of the citizens who are in the most difficult economic situation,”⁷ and that the principle of social justice ensured “the balance of the burden and benefit.”⁸

More on distributive justice and its formulas has been written by Z. Ziemiński.⁹ Firstly, he mentioned the formula of simple egalitarianism, as the easiest to use, which requires that everyone be treated equally (in the same way), regardless of his/her distinguishing features. This formula reduces the possible arbitrariness in providing institutional support, and may temporarily promote solidarity. At the same time, according to Ziemiński, the formula is primitive and unsuitable for use in seriously treated social policy, because it does not encourage working towards the common good, it can also cause social tensions and the waste of goods distributed to everyone equally, regardless of the perceived needs. Secondly, Ziemiński characterised the formula “to each according to his (justified) needs,” as the “amended egalitarian formula,” but he stated that, in the face of the scarcity of goods and the limitlessness of needs, that formula has a utopian character. He also noted, though, that one should see its “more realistic variety, according to which each could expect from ‘society,’ and in practice from the state, a guarantee that

4 Z. Ziemiński, *O pojmowaniu sprawiedliwości*, Lublin 1992, p. 93.

5 W. Sadurski, *Teoria sprawiedliwości. Podstawowe zagadnienia*, Warszawa 1988, pp. 49, 70 *et seq.*

6 Judgement from 9 March 1988, U 7/87, OTK 1988, no. 1, item 1.

7 Judgement from 28 May 1986, U 1/86, OTK 1986, no. 1, item 2.

8 Judgement from 26 October 1993, U 15/92, OTK 1993, no. 2, item 36.

9 Z. Ziemiński, *op. cit.*, p. 25.

he/she will be able to satisfy the most basic needs.”¹⁰ He emphasizes that the term “basic needs” is very problematic, and that in practice additional conditions or reservations are formulated, such as, for example, the absence of fault on the part of the subject whose needs are to be satisfied.¹¹ Ziemiński noted that the two egalitarian formulas cannot be, in practice, isolated from the merit formula, which expects fulfilment of certain specific requirements from those claiming benefits. What is more, the merit formula dominates over the egalitarian formulas. In this context, Ziemiński refers to the formula “to each according to merit,” noting however, that the concept of merit is problematic as it can be identified either with the value of (the results of) work or with the individual effort, which could eventually lead to many practical difficulties, if one were to objectively determine their degree.¹²

Regarding the concept of social justice, it has been noted in the source literature that “adding to the term ‘justice,’ which has multiple definitions in the social sciences [...], the adjective ‘social’ indicates that this constitutional principle applies to both the relations between social groups and the relations between them and the state, and not to the relation between the state and an individual,”¹³ and it is not about the subjective sense of justice, but about justice as a social category. It has also been pointed out that there are many possible meanings of the concept of justice, and one should opt for its distributive meaning, understood broadly, as “the balance of burdens and benefits in a situation of relative scarcity of goods.”¹⁴ From the social law literature, a statement by J. Jończyk may be recalled, namely that the norm of Article 2 of the Constitution, according to which the Republic of Poland is a “democratic state ruled by law and implementing the principles of social justice,” applies to the entire system and all areas of law and “its meaning in social security law is special, because this branch primarily deals with the question of fair distribution.”¹⁵ Jończyk emphasizes that the norm of Article 2 of the Constitution refers to the principles (in plural), rather than to the principle of social justice, it is not “the one and only principle of social justice, whose metaphysical meaning is only available to the intuition and feelings of a person holding an office, but it is rather about different principles of social justice, existing objectively as socially accepted and used, that often,

10 *Ibidem*.

11 D.E. Lach, *op. cit.*, p. 218 *et seq.*

12 *Ibidem*, p. 312 *et seq.*

13 B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, commentary to Article 2 point 10; T. Dybowski, *Zasady sprawiedliwości społecznej jako problem konstytucyjny w orzecznictwie polskiego Trybunału Konstytucyjnego*, “Sądownictwo Konstytucyjne” 1996, no. 1, p. 78.

14 C. Jackowiak, *Gloss to the judgment of the Constitutional Court from 29.01.1992*, K. 15/91, “Państwo i Prawo” 1993, no. 2, p. 100.

15 J. Jończyk, *Prawo zabezpieczenia społecznego*, Kraków 2001, p. 26.

or even usually, are divergent or even contradictory.”¹⁶ Jończyk also emphasizes that the implementation of these principles means that they should be applied in a balanced way and taken into account, both in the legislative process as well as when making individual decisions. Consequently, Article 2 of the Constitution should be seen as a systemic rule of care, not a substantive basis for the decision. In other words, the legislative, the judiciary and the executive powers should be fair. This means that in making a decision (creating a law), common good (social solidarity), freedom and human dignity, respect for social dialogue, and the principle of subsidiarity should be taken into account.¹⁷

Against this background, it can be concluded that social justice is useful for evaluating the distribution of goods and burdens, which means that it is identical with the distributive understanding of justice. The fact that in the Article 2 of the Constitution the principles of social justice are mentioned in plural leads to the conclusion that it is to be understood that there are many formulas of distributive justice concerning the distribution of rights and duties, which are based on many different doctrinal assumptions that cannot be simultaneously achieved. They can, however, provide the basis for evaluation of the distribution of different burdens (contributions or taxes), or multiple goods (the security of the minimum subsistence in the context of the catalogue of guaranteed services in the healthcare system and personalized levels of pension benefits), and their conformity with the idea of justice. Therefore many formulas can be invoked: “from each according to strength,” “from each according to his ability,” “from each according to calling,” “to everyone their equal share,” “to each according to their (legitimate) needs,” “to each according to effort,” “to each according to the results,” “to each according to merit,” “to each according to birth,” but each of these formulas raises a number of controversies, serving different aims and fulfilling different functions. It is therefore necessary to agree with the statement by Ziemiński that, in fact, social justice is a conglomerate of different formulas of justice, and the roles assigned to individual formulas undergo changes depending on the situation in which the acts of distributive justice are to be implemented. Simply put: social justice means taking into account the well-being of every member of society and rejecting excessively deep social stratification, and in particular radical discrimination against any category of subjects.¹⁸

Concerning the relationship between the principle of equality and justice it has to be pointed out that this question has been discussed in a number of judgments of the Constitutional Court. Against this background it was rightly claimed in the literature¹⁹

16 *Ibidem*, p. 27.

17 J. Jończyk, *Transformacja ubezpieczeń społecznych i ochrony zdrowia*, [in:] *Konstytucyjne problemy prawa pracy i zabezpieczenia społecznego*, ed. H. Szurgacz, Wrocław 2005, pp. 119–120.

18 Z. Ziemiński, *op. cit.*, p. 95 and 130, 132–133.

19 J. Nowacki, *Sprawiedliwość a równość w orzecznictwie Trybunału Konstytucyjnego*, [in:] *W kręgu zagadnień konstytucyjnych*, ed. M. Kudej, Katowice 1999, pp. 83–103.

that the Court “does not present a uniform view, moreover, the diversity of its statements means that they are far from being clear.” J. Nowacki criticized the Court and some of its judgments:

Equality is [...] sometimes treated as a separate principle of justice, sometimes as a derivative of justice, sometimes again as an element of justice, sometimes justice and equality cumulate (or they do not), sometimes justice comes before equality, and yet sometimes it suffices that equality is justified by the principle of justice.²⁰

Sharing Nowacki’s objections, and taking into account the above notes on the concepts and formulas of distributive justice, one must agree with Nowacki’s thesis that the rule of equality is in fact only one of the rules of justice, in the sense that fair distribution can be either equal (identical – to each the same or the same amount) or unequal – differentiated. It should be mentioned that in the case of a legislator’s action, in particular in the area of social law, it is difficult to imagine a situation in which it would be possible to make a decision concerning the equal distribution of goods, rights or obligations.

Social solidarity

The principle of social solidarity lies at the basis of the concept of social insurance²¹ and the healthcare system in particular. It is in particular the foundation for such solutions as the non-contributory co-insurance of the family members, the absence of a connection between the amount of the contribution and the range of guaranteed services and no restrictions on the level of the contribution base, binding it with all income sources (the principle of universality of contribution). The principle of solidarity also justifies the subsequent inequalities resulting from these solutions, which may affect particular groups of beneficiaries. This justification is important in light of the principle of the state policy referred to in Article 68 § 2 of the Polish Constitution to create a healthcare system which will serve not only the practical realization of the right to life and a related right to health, but will also provide citizens, regardless of their financial situation, with equal access to healthcare services financed from public funds.

When defining the concept of social solidarity, first the idea of solidarity that appeared in the social sciences at the turn of the 20th century should be recalled. The starting point was a new vision of society, understood as an independent entity, based on the solidarity of its members. E. Durkheim considered social solidarity to be a moral

²⁰ *Ibidem*.

²¹ J. Jończyk, *Prawo...*, *op. cit.*, p. 38; D.E. Lach, *O solidarności społecznej w „ubezpieczeniu zdrowotnym*, [in:] *Aksjologiczne podstawy prawa pracy i ubezpieczeń społecznych*, eds. M. Skąpski, K. Ślęzak, Poznań 2014, the judgment of the Constitutional Court from 11 February 1992, K 14/91, OTK 1992, no. 1, item 7.

phenomenon, whose outward expression is law.²² L. Duguit, referring to the idea of Durkheim, emphasized that solidarity, understood as social interdependence, consists of two elements: the similarity of the needs of people belonging to the same social group, and the diversity of their needs and abilities. Therefore we can talk about “solidarity by similarity” (people connect with one another to satisfy a common need) or “solidarity by the allotment of labour” (people connect to provide services to one another and thereby to satisfy diverse needs). Duguit stated that the justification for the existence of the state is “solidarity by the allotment of labour.”²³ By contrast, it has to be concluded that the basis and justification of social insurance and trusteeship as ways of ensuring social security is “solidarity by similarity.” Social risk communities are created because people cannot otherwise satisfy their needs following the occurrence of these risks.²⁴

In the 20th century, the concept of integral humanism was the answer to the totalitarian ideologies and the drama of World War II. The emphasized dignity of a human person in social life and his priority to society became the basis for the concept of social personalism.²⁵ This idea was the starting point for the teaching of the second Vatican Council and the conciliar encyclicals, such as *Mater et magistra* (1961), which highlighted the primacy of private initiative and reduced state intervention for promoting, stimulating, coordinating, assisting and complementing these initiatives, in accordance with the principle of subsidiarity. The concept of solidarity appeared in later encyclicals as well. In *Laborem exercens* (1981) solidarity was recalled in its defensive meaning, with regard to the conflict between labour and capital. It was defined as the collective and right reaction against the degradation of a human person as the subject of labour. Another meaning of solidarity was formulated in *Sollicitudo rei socialis* (1987). Solidarity was defined as “firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all,” thus, unlike in *Laborem exercens*, solidarity was given the positive, “involved” meaning.²⁶

22 H. Olszewski, *Historia doktryn politycznych i prawnych*, Warszawa 1982, p. 327; J. Oniszczyk, *Filozofia i teoria prawa*, Warszawa 2008, pp. 910–911; C. Mik, *Solidarność w prawie Unii Europejskiej. Podstawowe problemy teoretyczne*, [in:] *Solidarność jako zasada działania Unii Europejskiej*, ed. C. Mik, Toruń 2009, pp. 33–34; A. Czarnota, *Prawo a współczesne odmiany solidaryzmu społecznego*, [in:] *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, ed. A. Łabno, Warszawa 2012, pp. 60–64.

23 L. Duguit, *Kierunki rozwoju prawa cywilnego na początku XIX wieku*, [in:] A. Czarnota, J. Justyński, *Wybór tekstów źródłowych z historii doktryn politycznoprawnych*, Toruń 1988, p. 196; C. Mik, *op. cit.*, p. 34; H. Olszewski, *Historia doktryn politycznych i prawnych*, Warszawa 1982, pp. 422–424.

24 Slightly different it is in the case of a welfare state, where the community includes all citizens (residents), and public authorities are responsible for providing social security (although to a very limited extent).

25 J. Auleytner, *Polityka społeczna, czyli ujarzianie chaosu socjalnego*, Warszawa 2002, pp. 198–199.

26 *Ibidem*, pp. 198–203.

In this context it should be pointed out that emphasizing the dignity of a human person in social life and his primacy over society does not have to stand in opposition to the principle of the primacy of the common good, which is associated with justice and social solidarity. Social personalism emphasizes the dignity and importance of the individual against totalitarianism and its oppression. In a democratic state of law, individualism should not transform into egoism. It can be even said that a precondition for a solidarity risk community is that the subjects forming this community be aware of its purpose and meaning, even if its membership is mandatory. It should also prevent individuals from abusing solidarity and encourage respect for certain rules (obligations arising from solidarity), including recognition of the primacy of the community's interest (the principle of common good).

A statement by W. Szubert should be recalled here, from the canon works of the Polish doctrine on social security. Szubert pointed out that "the special feature of social security benefits is that their weight should be distributed to a wider community of people." However, in that context Szubert did not use the term "social solidarity."²⁷ T. Zieliński, in turn, discussed issues of solidarity in relation to the principles of subsidiarity and personalism as elements of the Catholic and evangelical social philosophy, forming the basis for the ideology of the welfare state. Zieliński, speaking of social insurance, pointed out that social solidarity is to be understood as "realization of the concept of self-help by the provision of services or benefits to people in need, from funds earned by a joint effort of the insured."²⁸ Zieliński also invoked the principle of insurance solidarity, which he identified with the idea of mutuality, which means that the insured carry the burdens of insurance by themselves, in accordance with the formula "all for one, one for all." And yet, the principle of mutuality (insurance solidarity) is not synonymous with the principle of obligations mutuality/equivalency (synallagma of the provisions: contribution and the services/benefits), because the absence of synallagma is characteristic of social insurance law.²⁹

J. Piotrowski also emphasized the importance of the principle of solidarity for the creation of a risk community, when it comes to the distribution of liability to all the insured. He said that the core of solidarity is a duty to spread the costs of covering the need resulting from the occurrence of a random event throughout the whole of society, or at least to a number of persons threatened in a similar way by such a random event.³⁰

27 W. Szubert, *Ubezpieczenie społeczne. Zarys systemu*, Warszawa 1987, pp. 62–63.

28 T. Zieliński, *Ubezpieczenia społeczne pracowników. Zarys systemu prawnego – część ogólna*, Warszawa – Kraków 1994, p. 20.

29 *Ibidem*, pp. 17, 130–131.

30 J. Piotrowski, *Zabezpieczenie społeczne. Problematyka i metody*, Warszawa 1966, p. 173.

Jończyk wrote in the same spirit and insisted that the literature “rarely refers to the solidarity of the risk community in its legal sense, although it is the foundation of all forms of social security.”³¹ Especially noteworthy is Jończyk’s statement that:

[...] the question of solidarity refers to the obligation, burden, individual contribution, joint effort, not distribution of benefits in cash or in kind because the solidarity of the risk community is expressed in the financing (through individual contributions) of the social security and should not be confused with the equalization of financial burdens between the risk communities and solidarity communities.³²

For this reason Jończyk remarked that “in the context of the distribution of benefits we should rather talk about justice, not about solidarity.”³³ Referring to the content of the principle of solidarity, Jończyk stated that the creation of a risk community (including the risk of “being unhealthy”) is based on the assumption that there are subjects involved that are – although to varying degrees – capable of bearing and ready to bear the cost of protection against the effects of the occurrence of a given risk. In social security systems in general, and healthcare systems in particular, there are differences not only in the capability to bear the cost of protection, but also in the “vulnerability to risk,” which should be understood as an individual threat of the occurrence of a random event, on the basis of which social risk as a legal term is constructed. There is also “no symmetry between the contribution and the realized benefit; and what is more, the asymmetry is characteristic and through it, the sense of solidarity is expressed: everyone is contributing, often uneven shares, and for a longer or shorter time, but the compensation is received only by the one who has suffered damage”³⁴ (injury or loss – D.E.L.). For this reason – and also in order to counteract the “selfishness and speculation” – the creation of a risk community must be obligatory “because it is a guarantee of solidarity and the ability to bear the burden of social security.”³⁵

The statements of the Constitutional Court referring to the principle of solidarity must also be recalled here. In the judgment from 11th February 1992, K 14/91, the Court stated:

The justification [...] of the redistributive function of the insurance is the principle of social solidarity, ordering the distribution of the burden of benefits to the wider community of people covered by social insurance.

31 J. Jończyk, *Prawo...*, *op. cit.*, p. 38.

32 *Ibidem*.

33 *Ibidem*.

34 *Ibidem*.

35 *Ibidem*, p. 39.

In the judgment from 7th January 2004, K 14/03,³⁶ the Court also emphasized the financial content of solidarity, stating:

[...] the access to services financed from public funds must be equal for all citizens, regardless of their financial situation. Article 68 § 2 of the Constitution stipulates that there should be equality in the access to healthcare services and refers to the principle of equality and the concept of social solidarity as expressed in Article 32. The rules of using healthcare services in this area are in fact independent of the level of participation of individual members of the community in the creation of a resource of public funds which are the source of the funding of those services.

From these statements it can be seen that solidarity is understood primarily as a justification for the acquisition of rights by poorer people, tacitly: at the cost of the richer. Similarly, it has been noted in Polish sources that:

[...] the principle of social solidarity as a principle of health insurance means, in fact, that the fund created from health insurance contributions is anonymous. The rule is that those who pay contributions do not know for whose benefit the money they have contributed is spent. What is more, regardless of the amount they have paid, they do have the same rights to services or benefits as those who have made higher, or lower, contributions. This means that none of the insured acquires a better position in the context of access to services or benefits because his contributions have been of greater value than those of another person.³⁷

Against this background it has to be pointed out that in German sources the principle of solidarity is understood in a different way.³⁸ Two primary obligations of members of

36 Dz.U. 2004 no. 5 item 37.

37 J. Nowak-Kubiak, B. Łukasik, *Ustawa o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*, Warszawa 2006, commentary to Article 65. It is worth adding that with the exception of a capital financed pension insurance fund, every other insurance fund is anonymous because the contributions (i.e. their level) are not linked to any particular insured person. The lack of the relationship between the contribution to the scope of the service/benefit is the quintessential principle of social solidarity.

38 H.F. Zacher, *Individuelle und soziale Sicherung gegen die Notfälle des Lebens in der sozialen Marktwirtschaft*, Berlin 1973; M. Faude, *Selbstverantwortung und Solidarverantwortung im Sozialrecht. Strukturen und Funktionen der sozialrechtlichen Relevanz des Selbstverschuldens des Leitungsberechtigten*, Bonn 1983; W. Gitter, *Strukturen der Reform der gesetzlichen Krankenversicherung*, "Die Sozialgesetzmäßigkeit" 1991, no. 3; F. Kirchhof, *Das Solidarprinzip im Sozialversicherungsbeitrag*, [in:] *Sozialfinanzverfassung: 5. Sozialrechtslehrtagung 6. bis 8. März 1991 in Göttingen*, ed. B. Schulin, Wiesbaden 1992; G. Haverkate, *Gleichheitsprobleme an den Nahtstellen der Sozialleistungssysteme – Am Beispiel der Alterssicherung*, [in:] *Recht zwischen Umbruch und Bewahrung, Völkerrecht, Europarecht, Staatsrecht. Festschrift für Rudolf Bernhardt*, eds. U. Beyerlin, M. Bothe,

a community derive from the idea of solidarity. They include: (i) participation by payment of contributions despite the lack of equivalence between the contributions and the resulting services or benefits, and (ii) loyal, solidary behaviour. Referring to Jończyk's statement cited earlier, it must be emphasized that "the question of solidarity refers to the obligation, burden, individual contribution, joint effort, rather than to the distribution of benefits in cash or in kind and in the context of the services or benefits, distribution justice, rather than solidarity, should be mentioned."³⁹ In other words, looking for an axiological justification for the differentiation of the legal situation of the beneficiaries of a system (the criterion of such differentiation should arise from the adopted system of values), it is the principle of (social) justice, which may justify the differentiation of granted rights (e.g. special services for pregnant women, children or veterans), while the principle of social solidarity will apply to the evaluation of the differentiation of duties imposed on the participants in the system (e.g. income-related contribution).

In summary, it can be concluded that the content of the principle of social solidarity means that burdens and duties are taken on by the community (e.g. the beneficiaries of the healthcare system), which leads to social compensation within the community. The idea of solidarity assumes "making the risk common," or the "deindividualization" of a risk, manifested primarily in paying a contribution which depends on (is calculated and determined on the basis of) the income rather than the individual danger or need (interpersonal equalization). The solidarity of the community members is primary in the relation to the primacy of the common good over the individual. The common good and the activities or measures to achieve it are the goal and the consequences of the existence of a community characterised by solidarity. Therefore, from the principle of social solidarity there follows, *inter alia*, a duty of loyalty to other members of the community, which manifests itself in the taking of actions aimed at avoiding a chance of occurrence of a risk, or at minimizing its effects, as well as in a reasonable use of the guaranteed services/benefits, and co-operation, taking into account the interests of other members of the community.

The principle of the common good

As already mentioned above, the principle of common good is important for the evaluation of differentiation in social law, and it is closely linked to the principle of social solidarity. The recommendation to take the common good into account, understood as the recognition of the primacy of the community's interest over the interests of the insured individual beneficiary or patient can also be drawn from the principles of social justice,

R. Hofmann, E.U. Petersmann, Berlin 1995; U. Volkmann, *Solidarität – Programm und Prinzip der Verfassung*, Tübingen 1998; F. Ruland, *Solidarität*, "Neue Juristische Wochenschrift" 2002, no. 48; H.M. Heinig, *Der Sozialstaat im Dienst der Freiheit*, Tübingen 2008.

39 J. Jończyk, *Prawo...*, *op. cit.*, pp. 38–39.

because “it is a factor helping to achieve a just, or at least fair balance between public interest (the common good) and the interest of an individual.”⁴⁰

Generally speaking, taking the common good into account means that the legislature recognizes the priority of the interests of a community over the interests of an individual member of this community, which is essential for the construction and functioning of various communities of beneficiaries of social security systems. The application of this principle is reflected in the regulation of the healthcare system, in which the principle of the common good is to be understood in such a way that the scarcity of financial resources at the disposal of the National Health Fund legitimizes the introduction of instruments restricting access to certain services, or imposes specific obligations on beneficiaries, which leads to diversifying their access to services. There are, in practice, two instruments. First, it is the limited access to guaranteed healthcare services and waiting lists which differentiate patients’ access to defined services on time. Second, it is the duty of the beneficiaries to carry a part of the costs of the guaranteed services (e.g. medicines and medical supplies), which is associated with the individual financial situation of the recipient, and leads to the differentiation of access to services. In both cases the differentiation of the legal situation of an individual is justified by the principle of the common good, because the interest of all beneficiaries, based on the recognition of certain healthcare services as guaranteed (which often have to entail limited access to those services), prevails over the interest of a particular beneficiary (patient), who has to wait for the provision of a given service or bear part of its cost. This is also related to the structure of a system in which the insured (service-entitled), rather than the patients (service-receivers), are the beneficiaries. For this reason, when discussing the solidarity that binds the community of the insured, Jończyk emphasizes that this is neither the solidarity of the patients, nor the solidarity of the insured and the patients, but the solidarity of the insured. The insured are predominantly interested in paying low contributions and receiving, when need be, a wide range of guaranteed services, hoping, at the same time, that it will be never necessary to claim them.⁴¹

Conclusions

To sum up, below are some general theses that may be formulated:

1. Social law is an instrument of social policy. One of its primary aims is to equalize opportunities and to eliminate excessive disparities between the living conditions of different groups of subjects. Therefore, the norms of social law, by definition, differentiate the legal situation of the recipients when it comes to their rights or duties. The

40 Judgment of the Constitutional Court from 12 April 2000, K 8/98.

41 J. Jończyk, *Transformacja ubezpieczeń społecznych i ochrony zdrowia*, [in:] *Konstytucyjne problemy prawa pracy...*, *op. cit.*, pp. 119–120.

regulations of social law may be evaluated only in this context and in two stages: firstly, if the criteria used in order to differentiate the groups of subjects are objective, relevant, proportional and fair; and secondly, if the distribution of rights and duties among the distinguished group of subjects is fair, i.e. as far as it takes into account the existing differences between the groups of subjects.

2. How the principle of equality may be reflected in social legislation and be effective depends on the extent to which the regulations of social law justify differentiation of the legal situation of certain groups of subjects. Such differentiation can follow objective criteria and thus be neutral (e.g. a specific scope of services guaranteed only to pregnant women), or may be linked to the axiology of the branch and therefore be evaluative (e.g. paying contributions contingent upon the income rather than individual danger, the potential need, or the non-contributory insurance of family members).

3. Solving the dilemmas of the definition of differentiation criteria is the task of the legislature, which has to fulfil the obligations arising from the state policies contained in the Constitution, but we must also take into account the social and economic situation of a state and respond flexibly to changes that are taking place, realizing at the same time the state's political programme.

4. On the basis of the literature and decisions delivered by the Constitutional Court it should be said that for the evaluation of the fairness of the differentiation of the legal situation of certain groups of subjects it is essential that the legal classification of the subjects be justified. This means that the choice of the differentiation criterion should result from the adopted system of values, principles or constitutional norms that justify different treatment of similar subjects.

5. In the context of axiological justification of the differentiation of the legal situation of certain groups of subjects and the relationship between the principles of equality and justice, one should say that the principle of equality is, in fact, only one of the rules of justice, because fair distribution can be either equal (identical – to each the same or the same amount), or unequal, that is, differentiated.

6. The concept of equality before the law has no independent content; it depends on other value judgments and principles.⁴² It is secondary to the principles of material justice, so it cannot be a criterion for its admissibility. This also means that the principle of equality has no absolute character and that the differentiation of the legal situation is acceptable. It must be justified so as not to be regarded as discrimination or preference.⁴³

7. Discussing the axiological justification for differentiating the categories of subjects and their legal situation, it should be noted that different principles of social justice can

42 W. Sadurski, *Teoria sprawiedliwości. Podstawowe zagadnienia*, Warszawa 1988, pp. 87–88; J. Nowacki, *op. cit.*, pp. 95, 103.

43 L. Garlicki, *Zasada równości i zakaz dyskryminacji w orzecznictwie Trybunału Konstytucyjnego*, [in:] *Obywatel – jego wolności i prawa*. ed. B. Oliwa-Radzikowska, Łódź 1998, p. 66.

be defined, accepted and used when enacting and applying a law which may turn out to be divergent or even contradictory.

8. The principles of social justice justify a regulation, which, taking into account the scarcity of resources, recognizes the primacy of a community interest over the interests of an individual, which may lead to the differentiation of the legal situation of individuals (the principle of the common good).

9. Taking into consideration the special axiology of social law, it can be said that if the principle of justice is used to evaluate the admissibility of differentiation and the applied differentiation criteria, then its modification is the principle of solidarity, being also the basis for the principle of the common good.

10. The content of the principle of social solidarity is, due to the existing correlation, the fact of taking over by the community some burdens and obligations accordingly, which then leads to social compensation within the community ("making the risk common," or the "deindividualization" of the risk). In other words, the idea of solidarity consists in the redistribution of healthcare costs among all the beneficiaries (members of the common risk community), which inevitably leads to inequalities in the financial burden of individual subjects.

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SUMMARY

Equality vs. differentiation: on solidarity and justice in social law

The paper describes the question of the principle of equality in social law against the background of permissible differentiation and its justification. The author refers to the axiology of social law as an instrument of social policy by presenting the function of social law. He discusses the question of social justice as distributive justice, and defines the principle of social solidarity and the principle of the common good as the most important for the healthcare system.

Keywords: social law, axiology of the healthcare system, principle of equality, principle of social solidarity, principle of social justice, principle of the common good

DANIEL ERYK LACH, Adam Mickiewicz University Poznań, Faculty of Law and Administration, Al. Niepodległości 53, 61-714 Poznań, Republic of Poland, e-mail: daniel.lach@amu.edu.pl.