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EUROPEAN UNEMPLOYMENT BENEFIT SCHEME TO FACE SOCIAL EXCLUSION: A REAL PERSPECTIVE OR JUST A POLITICAL SHANGRI-LA?

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The article analyses the possible introduction of an unemployment subsidy at European level. The first section describes the constitutional background at three different levels: first, the role played by social rights; second, how the Italian Constitution outlines protection against unemployment; third, the tricky relation among national and supranational law sources.

The analysis goes further considering some thorny aspects of the European Unemployment Benefit Scheme (EUBS) through the labour law lenses: its link with social safety nets; the risk that the new European insurance might ensure low protection standards; and above all the inevitable link of the EUBS with the minimum wage issue. The final remarks regard the risk that the EUBS could produce positive effects for people only following greater integration at political and economic level.

L'articolo analizza la possibile introduzione di un sussidio europeo contro la disoccupazione. La prima parte descrive le basi costituzionalistiche su tre livelli: il ruolo giocato dai diritti sociali; le modalità con cui la Costituzione italiana disegna la protezione contro la disoccupazione; e la complessa relazione tra il sistema delle fonti nazionali e sovranazionali.

L'analisi prosegue considerando alcuni problemi che emergono studiando la tematica del Sussidio europeo di disoccupazione (EUBS) con le lenti del diritto del lavoro: il legame con le reti di protezione sociale; il rischio che il sussidio possa garantire bassi standard di protezione; e soprattutto la sua connessione con il tema del reddito minimo. Nelle conclusioni si osserva che forse l'EUBS potrebbe produrre effetti sociali positivi solo dopo una maggiore integrazione a livello politico ed economico.

1. The constitutional background

1.1. Fundamental rights v. social rights (in the constitutional history)

The constitutional protection of social rights is not coeval with constitutionalism.

The liberal revolutions of the 18th century confined the political power of the monarchy, but in doing so, they only proclaimed the fundamental rights of bourgeois nature, in accordance with the principle of formal equality[1]. In their claims, there was no room to protect people with limited means.

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* Despite being the result of common reflections, the article is divided into two main sections. Fabio Ferrari is the author of Section 1 (1.1, 1.2, 1.3, 1.3.1); Simone D'Ascola is the author of Section 2 (2.1, 2.2, 2.3).

[1] Cf. Zagrebelsky (1992, 20 ff.).

It was not a mistake or a forgetfulness: it was a specific political plan. In fact, democracy of the 19th century had to face the early instances of salaried workers and, more generally, of all the poor people that were not part of the bourgeoisie. But this dialogue was not possible, because, on the one hand, the middle age class represented a very small part of the entire population; on the other hand, it was the only one with the right to vote; therefore, to extend political representation to poor people would have meant – for a simple numeric reason – to allow them to get the majority in parliament and everybody knew the reforms they wish to pass: limiting private property with a view to redistribute wealth belonging to...the bourgeoisie[2].

For these reasons, the access to parliament had to be severely denied to the lower social classes: otherwise, through the approval of statutes, they could have overturn the power relationships of their society. The instrument thanks to which the bourgeoisie avoided this risk was, of course, the electoral system: the social conflict was accepted, but it had to be fought just on the public squares, with cannons and bayonets: it could not cross the threshold of representative institutions.

So, at that time the society was divided into different classes, but the law had to remain based on a single class[3].

This tension covered the entire 19th century and prepared the grounds for many, tragic fascisms known in Europe in the following years.

After the Second World War, rigid constitutions gave a first, important and rational solution to this huge problem: they protect the fundamental interests of any social class that is part to the constitutional agreement; the political group that holds the majority in parliament cannot harm or damage minorities, because the latter can block the amendment of the constitution in order to secure their main rights; in addition, there is a judge, usually called "Constitutional Court", which rules on whether laws are unconstitutional.

So, the conflict is finally played within the parliament (through the dialectic and the compromise taught by Kelsen[4]) but just on the level of statute law, because the constitution and its rights are untouchable by the simple majority. The comparison between the "new" Article 3.2[5] of the Italian Constitution and the "old" Article 24[6] of Statuto albertino provides the key to understand this important innovation: besides formal equality, the State has to protect the substantial one.

Nevertheless, the constitutional protection of social rights was not completely sufficient to recognise their *status* of fundamental rights: in this regard it was argued that, unlike civil and political rights, the social ones need money and public resources; therefore, they have to be balanced with the sustainability of public finances. Moreover, as the aforementioned historical events have shown, they represent rights of last generation, so it is incorrect to demand the same protection guaranteed to traditional freedoms of constitutionalism: the latter should be a sort of prerequisite in democracies; on the contrary, social rights could be limited more easily, especially in a time of economic crisis[7].

[2] Cf. Bin (2007, pp. 11-9).
[3] Cf. Giannini (1986, 35 ff.).
[4] Cf. Kelsen (1990, 105).
[5] "It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country".
[6] "All subjects of the Kingdom are equal before the law, regardless of their rank or title. All shall equally enjoy civil and political rights and shall be eligible to civil and military offices, except as otherwise provided by law".
[7] Schmitt (2008, pp. 203-7): "Basic rights in the actual sense are only the liberal human rights of the individual

These reasons have been highly criticised and they seem outmoded now. First, each single right, regardless of its nature, has a cost[8]; one only needs to consider the State's economic burden necessary both to organise elections and to guarantee personal security: the right to vote and protection of citizens are two trademarks of democracy and, of course, they belong to the first generation of rights; notwithstanding, it is impossible to ignore that their effectiveness is strictly related to taxes and public resources, exactly as it happens with social rights. Second, trying to prescribe a clear hierarchy among different generations of rights can be very risky: it is enough to think that, looking at the traditional classification, the healthy environment is often ranked among the rights of the last generation, but the fact that there can be no kind of right without a healthy environment is simply auto-evident. At the same time, each citizen needs at least a minimum standard of political and institutional culture in order to express his or her vote consciously: as it is evident, to reach this goal a common system of public education – i.e. the social right to education – is probably essential.

It follows that belonging to one or another 'class' of rights does express a mainly descriptive meaning: it can rarely produce some prescriptive consequences[9].

Obviously, the category of social rights is too wide and variegated: it includes a generic right to health or to work and, simultaneously, the hypothetical right to have high-level public pension or a completely free-of-charge medical care; therefore, it could be asserted that just a part of social rights is really fundamental in constitutionalism, because at least some of them do not seem to have anything to do with the basic needs of human beings.

It is a crucial issue for our topic and it is well known by the Italian Constitution.

1.2. Citizens v. workers (in the Italian Constitution)

In the Italian Constitution there is a norm that seems, in some ways, to recall the unemployment benefit: it is Article 38.1:

> Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support.

Thanks to a literal interpretation, it is possible to discover a significant issue: the State must guarantee "welfare support" only on two conditions. First, a citizen has to be poor; second, he or she also has to be "unable to work"; the consequence is simple: to be people in need of money in order to live a dignified life is not sufficient to claim assistance from public authorities, because the Constitution seems to consider a man or a woman even only potentially able to work – albeit poor – unentitled to receive welfare support.

It is very hard to accept this interpretation, especially in a time of *continuing* financial and economic crisis in which finding a job becomes more and more difficult for a great part of the population; moreover, it contradicts the traditional idea of the Second World War constitutions, which plays the role of real bulwarks defending rights of poor people; lastly,

person [...]. Constituted differently, on the other hand, the essentially *socialistic* rights of the individual are dependent on the positive services of the state. They cannot be unbounded, for every right to the service of another is limited, as is the case, however, with a right of all to state services. This type of rights presupposes a state organization that incorporates the right-holding individual. In this way, this individual's right is already rendered relative" (original emphasis).

[8] This is the crucial point developed by Holmes, Sunstein (1999).

[9] See also Bassini, Ferrari (2014, pp. 210-3).

Article 38 is included just in the third title of the Constitution[10], very far from the ethical and fundamental principles placed in the first parts of the text.

Nevertheless, this kind of reading of Article 38 makes sense: labour is so central in the Italian Constitution that it represents a sort of identity card of the Italian Republic, which is founded on it[11]; citizens cannot demand any kind of relationship with the nation but the one they build with their job. At the same time, the same Republic has

> [...] to promote those conditions which render right to work effective (Article 4).

So, on the one hand, each citizen has the duty to contribute to the common wealth of the nation thanks to his or her working activity; on the other hand, to this end the Republic must guarantee a job for everybody: as it emerges looking at the Constituent Assembly's debates on this issue, Italy cannot disgrace this promise in line both with Article 4 and – mainly – with Article 3.2[12]. Having said that, the idea of a citizen able to work who does not find a job against his or her will is not an option.

As it is well known, the reality is very different: a various degree of unemployment is structural, even in the case – very different compared to the current one – of economic growth and development.

In this new scenario, both the Constitutional Court and scholars proposed a different interpretation of Article 38[13]; labour keeps playing a leading role in the Constitution, but it is a means, not an end: human dignity is the supreme principle protected by the legal system, and employment is just an instrument – probably the most important one – to reach it.

The consequence is clear: Article 38.1 ceases to be strictly connected to labour, because it mainly protects the essential needs of a citizen, taking a real ethical meaning; it follows that the reasons for which people are temporary unemployed are irrelevant in order to achieve the particular kind of public benefits guaranteed by that article, because being in serious need becomes the only condition required. The legislator is free to shape the extension of personal benefits but it cannot deny the *minimum* necessary to guarantee a decent existence.

This is a crucial node of the issue because it has to do with the changes of legal interpretation due to diachrony: the ethical meaning of Article 38 is absolutely worthy of support both from an ideological and legal point of view, but it is not the only one; for example, trying to be as much as possible consistent with the mentioned interpretation of the original intent of the Constituent Assembly, it could be argued that public resources should be spent to implement a plan for employment development rather than "to gift" public money to all the needs.

It is a question of political choices, because they both seem constitutionally legitimate.

In the same article there is another important subparagraph, no. 2:

> Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment.

[10] "Economic rights and duties".
[11] On the interpretation of this article Mortati (1975, 1 ff.).
[12] See Tripodina (2015, sec. 3).
[13] Ivi, sec. 4.

Looking at the end of this precept – "involuntary unemployment" – the differences between the two subparagraphs are evident: first, in the latter, the recipient of benefits is a worker and not a simple citizen; second, public contribution cannot be limited to the *minimum* necessary to guarantee a decent existence, because it has also to be "adequate" to protect needs and necessities. Workers, in the view of the Constituent Assembly, offers a more important contribution to the national economy than simple citizens; in addition, thanks to their working activity, they support the formation of social groups that Article 2 calls into play with great emphasis, because they metaphorically represent the places in which human beings express their personality[14].

This approach has important consequences on the legislative level: unlike the first subparagraph – in which the extent of the benefits has to do with the common dignity of each person and so it theoretically remains the same regardless of the details of single cases – in the second, the contribution changes – i.e. must change – in relation to the economic value of the job that workers did before "involuntary unemployment".

For all these reasons, the latter subparagraph involves a heavier public charge than the first; in choosing among many instruments to protect needs, it is important to have clear in mind both the different degrees and types of protection that the Constitution provides for.

1.3. Validity v. effectiveness (in the EU scenario)

We cannot complain about the lack of law sources regarding social rights in EU primary law or doubt about the competence of European institutions to intervene in this field, even concurrently[15]. The text of the treaties is full of references to social policies, international texts promoting them and, of course, the same constitutional traditions of Member States[16]. Member States commit so deeply to the protection of social rights that this protection typifies the name of the State's form itself: social… State.

Indeed, from a formal point of view there is nothing precluding an EU effort in the matter here analysed.

In any case, there are two necessary explanations: the first one concerns the real meaning of the adjective "social" in the EU Constitution. The second one, which is strictly connected with the first one, does not regard the theoretical nature of the sources, but the practical effects of their implementation.

As concerns the first aspect, if we exclude the preamble, the adjective "social" is first included in Article 3 of the Treaty on European Union (hereafter "TEU")[17]. This adjective

[14] Cf. Violini (2006, 781 ff.).

[15] As it is laid down in Art. 4.2 TFEU. However, as noted by Craig (2013, sec. 5b), the right understanding of the nature of competences in the Treaty of Lisbon cannot ignore – especially in social policy – previous case law of the Court of Justice, because "[...] Article 152 to 161 TFEU [....] do not provide explicit guidance as to which areas fall within shared competence, and which do not"; in addition, on the one hand, the *harmonisation* of social systems is mentioned (but just in "guarded tones"); on the other hand, it is precluded.

[16] See, for example, Arts. 3 and 9 TEU and Arts. 151-161 TFEU. It is important to underline the Art. 151 TFEU specifically recalls the "[...] *fundamental social rights* such as those set out in the *European Social Charter* signed at Turin on 18 October 1961 and in the 1989 *Community Charter of the Fundamental Social Rights of Workers*», emphasis added. See also Chapter IV – Solidarity of the Charter of the fundamental rights of the European Union. For a wide description of the European law sources dedicated both to protect and to promote social rights, see Triggiani (2014, 22 ff.) and Galetta (2013, 1180 ff.).

[17] Art. 3(3) TEU: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive *social* market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance" (emphasis added).

has always highlighted a relevant juridical and symbolic value[18]. Indeed, everyone knows the original economic nature of the EU, which is far from the protection of fundamental rights and completely focused on the protection of economic freedoms of the market[19]. In accordance with the current doctrine, this "trademark" attenuated over the years thanks to the creative activity of the Court of Justice on the protection of first and second-generation rights. These rights were successively included in the same primary law of the EU. Lastly, the recognition of social rights completed this development by filling the democratic gaps of the origins of the European Communities. Article 3 TEU, which imposes the balancing requested by the adjective "social" referred to market economy, represents the best confirmation of the abovementioned encouraging trend.

However, this is partly a misunderstanding: as effectively affirmed, this is an "optical illusion"[20].

"Social market economy" does not symbolise a neutral expression, but a precise economic doctrine, which can be ascribed to the principles of Ordoliberalism[21]. The focal point of this doctrine is represented by the protection of private subjects' competition within a highly competitive market: the aim of the State is not to remove the obstacles that cause inequalities between subjects, but to eliminate any distortion that damages the unfailing competitive system[22].

The State represents a means; the market, with its geometrical functioning, constitutes the aim.

The substantive equality, which is the architrave of democratic constitutions and the prerequisite for the recognition of any social right[23], is deprived of its content: at best, just a general reference to a quite different concept of solidarity remains[24].

This is a political perspective that is light-years away from the rationale of the democratic State[25]; the social conflict is no more accepted and managed by representative institutions. More simply, the social conflict is denied because there are no alternative concepts to the economic model analysed[26].

The juridical effects of this system are perfectly coherent, but they are not reassuring. Within the EU the power is firstly expressed by the governance (and not by the

[18] For example, Fumagalli (2014, p. 18).

[19] See Art. 2 of the Treaty establishing the European Coal and Steel Community (ECSC) (Treaty of Paris).Among scholars, Cartabia (2007, p. 15), Pinelli (2002, 39 ff.).

[20] Cf. Somma (2016, p. 135).

[21] Cf. ivi, p. 135, Felice (2015, pp. 78-80).

[22] Cf. Dardot, Laval (2013, chap. 7, sec. 2): "[...] the doctrinal originality of ordoliberalism [...] was that it operated (in Foucault's words) a 'double circuit' between state and economy. While the state provided the framework of a space of liberty within which individuals could pursue their particular interests, the free play of the economy would create and legitimate the rules of public law of the state in another direction. In other words, 'the economy produces legitimacy for the state that is its guarantor'. [...] Ordoliberalism aims to ground a social and political order in a determinate type of social relation: free, fair competition between individuals who are completely sovereign over their own existence. Any distortion of competition betrays the illegitimate domination either of the state or of a group of private interests over the individual. It is comparable to tyranny and exploitation".

[23] See *supra* section 1.1.

[24] See Rodotà (2001, p. 81).

[25] Cf. Dardot, Laval (2013, chap. 7, sec. 6): "Müller-Armack, propagator of the term 'social market economy', explained that the market economy was 'social' because it conformed to the choices of consumers, because it realized a democracy of consumption through competition by pressurizing firms and wage-earners to improve productivity: 'This orientation to consumption is in fact equivalent to a social service of the market economy'. He added that 'enhancement of productivity, guaranteed and constantly imposed by the competitive system, also acts as a source of social progress'".

[26] On the relation between social market economy and the absence of social conflicts, see Commisso (2015, pp. 267 and 279).

government) and the sources of law are first of all soft-law ones (and not ordinary provisions). Government and parliament recall more closely institutions that intend to place politics before the economy and that limit the economy through politics itself. Therefore, it is better to substitute them with the above-quoted fascinating neologisms. However, these neologisms hide only partially their substance, i.e. the progressive abandonment of the pillars of the social and democratic State[27].

The constitutionalisation of the balanced budget amendment and the persistent refusal of any vaguely Keynesian economic doctrine represent a further development towards the unique model described above[28].

This clarification allows for the introduction of a second reflection: the consequences of this model on the effective protection of social rights – and not on their simply announced protection – in the EU are disruptive. Parties and trade unions, that is the subjects historically in charge of the conduction of this conflict within representative institutions, struggle considerably. Indeed, while the democratic constitutionalism considers them as the pillar on which the representation of any interest is based, the European decisional procedures minimise their role and functions, and they often mortify them[29].

Consequently, European citizens still highlight any political responsibility only at national level and their requests are not expressed in Brussels (and in Strasbourg)[30]. This is particularly important; indeed, we must remind that the meaning of the normative provisions does not exclusively depend on the view they are given by law experts. The normative provisions live and develop inside a social "normative universe". This universe, which is based on a "bottom-up approach", is constantly connected with the scientific-institutional system represented by law experts and politicians and influences their activity and answers[31]. If this bottom-up universe does not emerge, the meaning of normative provisions remains an exclusive prerogative of technocratic institutions, which seem to be scarcely inclined to stimulate the social side of European institutions.

[27] About the role played both by governance and soft law in EU and on the distance between these two "new" concepts and the typical trademarks of a constitutional and social democracy, see Bin (2009, 31 ff.). In addition, on this theme see Dardot and Laval (2013, chap. 12, sec. 1, n. 9): "The notions of 'governance' and 'sovereignty' are therefore antinomic in part. Governance firstly presupposes obeying the injunctions of the bodies that represent the major commercial and financial interests. Depending on the international balance of power and geostrategic interests, it also permits the right of interference by NGOs, foreign armed forces, or creditors, in the name of human rights or the rights of minorities, or, more prosaically, in the name of the 'market freedom'".

[28] Cf. Somma (2016, p. 134), Commisso (2015, 269 ff.), Sharpf (2011, pp. 5-9).

[29] Dani (2012, p. 634): "[...] for all the changes introduced in the institutional setting and practice of the Union, it does not seem that the original structures of supranational law have undergone fundamental changes and, in particular, that social conflicts have become the catalyst element of EU politics. The market ethos and consensus culture remain enduring features of supranational law. Notwithstanding a certain relativisation of its importance. [...] Far from having produced a reconfiguration of Europeans' political self-understanding and supranational politics, European citizenship has been used first in courts and then in legislation as a tool to extend free movement to noneconomic actors. By doing so, citizenship has paradoxically become the vehicle for the amplification of the very social practices it was expected to reform. Through European citizenship, indeed, European individuals have not learned to organise themselves and voice in supranational politics their aspirations for social justice. If anything, European citizenship has encouraged an increasing number of subjects to persist in the individualist practices associated with the market such as shopping for the most convenient opportunities offered by national labour markets and welfare states". In addition, see Lupo (2014, pp. 367-74), Ciancio (2014, pp. 4-8), Dani (2013, pp. 257-63).

[30] Cf. ivi, p. 341.

[31] The "normative universe" is probably the main concept developed by Cover in one of his most important essay (1983-1984, 3 ff.); on it see also Bin (2015, 2 ff.).

If we also add the case law of the Court of Justice on social rights, this scenario becomes quite discouraging[32].

In summary, the schemes adopted to support income constitute the pillars of the welfare state, i.e. real social rights necessary for the elimination of inequalities and for the concrete possibility to exercise other fundamental rights[33]. The adoption of this kind of measure at European level could be desirable and technically possible. What is felt to be missing to this end is not competence or responsibility from a strictly juridical point of view, but the political will. Indeed, nothing prevents from considering the social rights enshrined in the treaties from a perspective that is more suitable to the democratic constitutionalism and less inclined to an ordoliberal development.

The attention with which the proclamation of fundamental rights in the treaties is underlined is without doubt justified, but maybe this attention is excessively optimistic. The "constitutional" structure of the EU, as briefly described, still represents ideological clear-cut choices of an evidently commercial nature and the decisional processes seem to be substantially developed to maintain these basic options.

It is not necessary to quote Kelsen to understand that one matter is the validity of a provision and another matter is its effectiveness[34]: the ascertainment of the constant reference of the EU treaties to fundamental rights (the social ones included) must not mislead on their real and concrete effect on the European policies. Indeed, the difference between what is potentially provided for by the treaties and what is implemented daily by European institutions actually seems to be particularly relevant[35].

This is a serious matter, but mainly of a political and not of a juridical nature.

1.3.1. A Trojan horse?

On the other side, there is a hope: the forms of income support do not seem to be ontologically contrary to the social market economy. The proof is offered by the presence of this type of measure in Germany, the native country of the economic doctrine examined here.

From an ordoliberal point of view, these measures are not certainly used to support the poorest subjects or to fight against social inequalities: more pragmatically, the access to the market is prevented if the private subject (not considered as a citizen, but as a producer or consumer) has no minimum means of support. In this case, in the full application of the principle of subsidiarity, the State intervenes at economic level. The State's aim is once again to safeguard the highest competition of the market and not to protect fundamental rights.

In this context, it is necessary to underline the perspective that could emerge as regards social rights: the aims of a provision do not always correspond to the meaning that the same provision has in general interpretations. Europe, which has an historical minimum consent, could be revitalised by the adoption of a social measure of this kind: it does not matter which are the "ideological" reasons of this legislative choice and the provision could

[32] As it is known, the crucial decisions on this topic are C-438/05 (*Viking*), C-341/05 (*Laval*), C-346/06 (*Rüffert*), C-319/06 (*Commission v. Luxemburg*), and C-271/08 (*Commission v. Germany*).

[33] Cf. Bronzini (2011a, pp. 25-38).

[34] Cf. Kelsen (2007, 122 ff.).

[35] "Democracy was not part of the original DNA of European integration. It still feels like a foreign implant. With the collapse of its original political messianism, the alienation we are now witnessing is only to be expected. And the formal rule of law only serves to augment the alienation", Weiler (2011, p. 694).

be considered by the European public opinion as a relevant innovation. This change could finally develop European institutions that are more sensible to citizens' social problems and could open an extraordinarily relevant social breach in the policies of the EU. In this way, the most classic heterogony of ends could be established: A measure adopted as guarantee for the market and its geometrical functioning could potentially become the standard of a new Europe, concretely sensitive to rights. The law could allow for this: we just wait the political will.

2. The EUBS in the labour law and social security view

Once the constitutional background is clarified, it is now possible to analyse in which terms the European Unemployment Benefit Scheme (EUBS) is feasible and desirable (or not). First of all, though, it seems extremely important to specify that reasoning about the introduction of an institution like this is not possible on a completely "neutral" basis: the evaluation of feasibility and usefulness of the EUBS strictly depends on the general idea and the purposes adopted.

In fact, there is probably no doubt on the efficacy of the EUBS as an economic stabiliser in the context of the economic and monetary union, where economic shocks are frequent and the presence of a mechanism of tendential balancing is certainly a necessary condition[36].

Labour law confronts unemployment[37] in at least three different dimensions. Firstly, by arranging types of employment contracts in order to prevent unemployment, thereby providing enterprises with instruments that allow them to increase employment. Secondly, by regulating any breach of employment contracts (e.g. limiting the right to fire), and thirdly by establishing benefits for people who are involuntarily unemployed whether they have already worked or not.

The third dimension, actually, pertains not only to labour law in a strict sense, but also to "social security law", which deals with welfare systems, and it is pertinent also to administrative and public law. Leaving aside this formalistic collocation, it is essential to focus on the fundamental objective of social security, welfare and unemployment benefits as it was conceived and how it has developed for decades in relation to poverty[38] and social exclusion, neutralising to the largest possible extent a variety of risks run by the *person who works*, whose sustenance and dignity have to be guaranteed. This is the general purpose of welfare systems, in both its aspects: *previdenza* and *assistenza* as they are classified in the Italian system[39].

As it stands, we can comment on the purpose of the EUBS. European leaders who met in 2015[40] to discuss the introduction of a common instrument to combat unemployment at European level were mainly worried about the economic stability of the Eurozone. It is an important concern and it is appropriate that they try to pursue this stability[41]. What, though,

[36] Many influential studies have already been published about this profile. They are mainly due to economists. Some of them are: Andor (2014), Fattibene (2015), Claeys *et al.* (2014), and Beblavý, Marconi, Maselli (2015).

[37] About the seriousness of cyclical unemployment effects in the present context, a relevant collection of studies is Ambrosini, Coletto, Guglielmi (2015).

[38] About poverty in Europe during the years of the great economic crisis and especially about the phenomenon of the "working poor", see Saraceno (2015, 51 ff.).

[39] See above, where the different principles of Art. 38 of the Italian Constitution are outlined.

[40] See EU Commission (2015).

[41] About the efficacy of the EUBS as a means to contrast economic downturns and instability, see Dullien (2013).

seems to be less adequate, in our view, is that a subsidy for unemployment should not be seen as the means to achieve stability. Or better, this can be one effect of the EUBS but not the *reason* for the introduction of the EUBS itself, whose most important purpose should be dealing with the consequences of poverty, absence of job in the labour market and low incomes. Furthermore, especially when the cyclical component of unemployment is higher than the structural one, under the "social" point of view the main concern should be the redistribution of resources, in order to avoid the crumbling of the society, which occurs when people are exposed to a series of unexpected events without a protection net[42].

So, it would be in any case a positive mechanism in so far as it would implement a process of redistribution of wealth at European level, oriented towards *people* (whilst at the moment in the EU all the redistribution of wealth involves single Member *States* and never directly people). It is fundamental to underline that a European unemployment benefit should have social inclusion as its *first* objective.

This is the perspective of a labour lawyer as it becomes clear that it is not by chance that discussions about minimum wage and guaranteed minimum income intensified very much in recent years of economic crisis (at least in Italy, where this sort of instruments does not exist).

The concern for a living minimum standard and for the *dignity* of people has increased in parallel with the worsening of the crisis and in Europe it has been tackled also by intervening on minimum incomes in various countries[43].

2.1. Minimum wage, guaranteed minimum income and unemployment benefit: similarities and differences in the actual context

Some notes on the issue of the introduction of the guaranteed minimum income (GMI) are fundamental, adopting Italy as a sort of case study. This comparison is inevitable because of the (desirable) *function* of an instrument like the EUBS. There is no real difference between the problems the EUBS should face and the problems the GMI should face; there is a (potential) absence of distance between the transfer mechanisms the two instruments would activate; again, there is no substantial difference between the people who would benefit from the EUBS and the people who would benefit from the GMI (especially if they are linked more to citizenship than to the previous job history of the beneficiary[44]).

So, we can in general distinguish between two main profiles in the debate on income support interventions: on the one hand, the concrete will and feasibility have to be taken into account; on the other hand, their features are crucial to determining the effects.

With regard to the first aspect, we have to note that in Italy the trade unions have refused for a long time the implementation of a GMI or a minimum wage because they have always considered collective bargaining as a more powerful instrument to find the

[42] A classical sociological reflection in this direction can be read in Castel (2004, 17 ff.).

[43] The issue is recapped by Schulten (2014).

[44] Actually, it is possible to distinguish at least three different kinds of institutions in this field: the *basic income* is the measure more anchored to citizenship and less sensitive to the working history of the subject; the *GMI* is bound to the working age of the subject and to the search for a job (but not necessarily limited in time); the *unemployment benefits* depend on the loss of a previous job, are limited in time and are usually commensurate with the wage previously perceived. Then there is the *minimum wage*: it is technically a further concept, because it refers to a universal minimum value of the salary (hourly or monthly), therefore considering a situation of existence of a job, while all the others basically face the absence of a job. Nevertheless, they are often contemplated together in the political and scientific debate because there is a strong and mutual influence between each other and between them and the usual system adopted to determine the "price" of the salary.

proper value of wages, accomplishing what is set by Article 36 of the Italian Constitution through collective agreements. Furthermore, governments have shown no enthusiasm for this task, considering the high costs both financially and politically[45].

The other classical objection to a universal minimum wage is the possible negative effect on the willingness to work and how this might be an incentive to abstention from working.

Well, both these classical arguments can be considered in a very different light given the economic crisis in recent years. Indeed, the unions suffered a visible loss of contractual strength and representativeness, and the political parties opened the debate since it started to appear as a social urgency. Now the discussion is wide and is attracting widespread participation[46].

This was perhaps inevitable since the space for collective bargaining in Italy is today very restricted and the Italian labour law system has always faced unemployment without *universal* subsidies. All the instruments adopted by the legislator have been based on the previous income standard and with limitations of the periods covered, following the scheme of Article 38, paragraph 2, as we have seen earlier. One of the effects of this limitation is that young people who are looking for their *first* job are not considered.

As already mentioned, in the *Jobs Act* (Law no. 183 dated 10 December 2014) the Parliament authorised the Government to adopt a measure for a minimum wage. The authorisation expired without having been substantially taken into consideration: the Government introduced institutions – the New Social Insurance Provision for Employment (*Nuova prestazione di Assicurazione Sociale per l'Impiego*, NASpI), the unemployment allowance (*assegno di disoccupazione*, ASDI), etc. – very slightly different from what already existed and still attached to the mechanism of conditionality, inducing some observers to talk again about the Bismark and Beveridge models and collocating the Italian path in the first, more restrictive, approach[47].

Therefore, currently in Italy there is just a subsidy (NASpI) limited in many senses and a universal measure is missing. So, it is necessary to notice that the declared purpose of the EUBS in the main projects is to create a measure that applies to the same group of persons as those covered by the national scheme. As a consequence, if we keep considering Italy as a case study, we realise that the absence of universality[48] in the protection would remain. No one of the EUBS models would enlarge the group of entitled people and only the "genuine top-up" type of EUBS would possibly make the amount of the subsidy increase (if the level established in the European context overtakes the national one).

2.2. Feasibility of the EUBS and unresolved matters

First of all, to consider more closely the issue of feasibility (with all its different meanings), it is essential to clarify that in the field of social rights legal rationality is strictly connected to economical sustainability[49]. So, the two aspects have to coexist in the better possible way, without pursuing any utopia.

[45] Even though in 2014 a parliamentary decree (Law no. 183 dated 10 December 2014, Art. 1, para. 1, letter G) authorised the government to adopt a sort of minimum wage, but the authorisation expired without having been followed by a governmental decree on that point. See Biasi (2015, 371 ff.).

[46] See BIN Italia (2016) and Bronzini (2011a).

[47] See Orlandini, in BIN Italia (2016, 73 ff.).

[48] See Garofalo (2016, p. 353) for a description of the national benefits against unemployment in Italy, as they have been reshaped after the Jobs Act.

[49] Cf. Spadaro (2015, p. 24) and, with particular reference to the issue of the amount of salaries, Ricci (2015, p. 199) underlined that it can no longer be "unconditional", although it is a fundamental right.

Among all the models of EUBS already hypothesised and discussed (equivalent, basic genuine, genuine top-up type)[50], we can focus on the "genuine top-up" one. It is probably the best model to fulfil the purpose of an extension of social protection through the EUBS.

Since the mechanism of this type of subsidy is conceived to raise the level of protection guaranteed by the Member State (at least in terms of duration and replacement rate), it could produce positive results if, once introduced, the single Member States do not reduce the entity of their National Unemployment Benefit System (NUBS). The genuine top-up EUBS would also represent a good measure in the direction of virtuous harmonisation. The downside, though, would be that only some States would take advantage from it and they would probably be always the same (those whose current economic condition is weaker and those with higher unemployment rates), while the States whose NUBS already reaches the level established would just pay the funding for the others[51].

In any case, as the introduction of universal measures is very hard in the national context, there is even more reason to believe that it would be harder in the "European space"[52].

The most evident problems are: the financing for the benefits, the criteria to determine who is entitled to receive the benefit, and the choices concerning the level of the benefit, considering that the cost of living and the average income change considerably from one area to another[53].

The first coordinate that needs to be taken into account is territoriality. In recent years, the activity of the national legislator in the field of labour and social security law narrowed clearly (because of European governance and its restrictions)[54]. Nevertheless, it is not sure that this erosion of national sovereignty would help to arrange a supranational satisfactory unemployment benefit.

With regard to financing mechanisms, it is clear that both in the equivalent EUBS and in the genuine EUBS the biggest problem is not the operational mode[55], but the economic resources of the States (or of the EU, which is indirectly the same).

If domestic and European institutions interpret the EUBS as an instrument to neutralise asymmetric shocks and to stabilise the Eurozone[56], it is very likely that they cannot finance the EUBS beyond that purpose[57]. And the specific risk in this regard is that the agreement between the Member States could be circumscribed to a low level of EUBS (in terms of duration, reference wage, replacement rate and qualified period), even implicitly authorising a regressive path for those countries whose actual NUBS is higher, because they could feel free to reduce it, if the minimum established at the EU level is lower. They

[50] See for example all the materials discussed in the conference held in Brussels on 11th July 2016 at the following link: https://www.ceps.eu/events/feasibility-and-added-value-european-unemployment-benefits-scheme.

[51] A smart countermeasure for this kind of problems has been suggested by Beblavý, Marconi, Maselli (2015): they propose limiting the intervention of the EUBS to the case a State is facing an *increase* in the unemployment rate, disregarding the general level of unemployment.

[52] But a variety of proposals have been submitted to the attention of scholars in the last year: as to the idea of minimum wage policy (for workers) at European level, see Schulten (2008); for the suggestion of a GMI at European level, see Bronzini (2011b).

[53] Not by chance, M. Thyssen, the European Commissioner for Employment and Social Affairs, has recently stated that "the inequalities we experience are both within and between countries" (Thyssen, 2016).

[54] Nevertheless, the imposition of limits to the national legislator was not compensated by concrete actions towards the integration of social security systems driven by the EU: on the contrary, the Union has always intervened very weakly in the social security field: Balandi (2009, p. 537).

[55] Which is quite precisely outlined, e.g. through the clawback mechanism.

[56] See the document drafted by the Italian Ministry of Treasury: "European unemployment insurance scheme" (October 2015).

[57] See beyond for a clarification on the chance to use the European Social Fund (ESF).

are merely theoretical hypothesis, but thinking in these terms helps to understand also the negative side of this institution.

Moreover, as we have seen, the "ideal EUBS" should be modelled on the scheme of the universal minimum income, anchored to citizenship, in order to achieve a concrete buffer towards poverty and social exclusion. It should be a means useful to guarantee the *ius existentiae*[58], the freedom of people, and other fundamental rights descending therefrom.

A benefit able to achieve all these objectives is going to be really expensive: that is why it would need courageous and complicated political choices in terms of redistribution, and it is probably incompatible with the cultural hegemony of "austerity".

In any case, though, the main problem is the great imbalance between different States. Economic differences are enormous and the various NUBS, with regard to the respective situation of the countries, are different, so it is probably hard to find political consensus on these aspects.

Again, with regard to eligibility criteria: how can we determine who is entitled to receive the benefit – when labour markets differ substantially from country to country? States feature significant differences in terms of impact of losing a job, as well as of how easy it is to find a new one. This is another issue to be considered in the shaping of the measure.

2.3. Troubles in the European response

Coordinating different social security regimes is an extremely hard operation in a union consisting of 28 States (perhaps 27 within a few years…), and the direct implementation of a new common institution at European level would probably be even harder. Harmonisation in these fields is not easy[59] and it needs *previous* interventions on other political and juridical fields: there are various theories on European harmonisation and they all agree on the point that it is a complex process[60], likely ineffective unless it develops simultaneously at different levels: at least political, legal, and economic. If this is the general idea, however, it must be considered that in some cases consequential relations between different harmonisation steps are required. This is definitely the key point for scepticism about the EUBS.

In particular, since social security systems are extremely different among Member States, as a consequence it would result useless or even damaging, forcing harmonisation in a crucial aspect of social security without previously operating on a higher political, fiscal and legal integration level, at least in the field of labour rules and social rights. Furthermore, it has largely underlined the crisis suffered by the model of "Social State"[61] in recent years.

Moreover, everybody knows that the golden era of "social Europe" expired a long time ago[62] (at the end of the 1990s probably) and, if the European social model is so evanescent, it could be dangerous to make such a step forward. The "pillar" of social politicy has been made by soft law for quite a long time and the situation in the different Member States is now extremely varied: there is no homogeneity. Some countries have implemented good welfare practices, others have not; and the economic crisis enhanced the gap in many cases. Moreover, the economic governance of the EU is very stiff in providing resources

[58] See Bronzini (2011a, p. 35).

[59] See Carinci, Pizzoferrato (2016, p. 345).

[60] The introduction of the EUBS would in fact require a process of harmonisation rather than coordination, even though the new institution is conceived as a measure that should coexist with the national unemployment benefits.

[61] See above, Section 1, and also all the articles in the issue 3/2013 of the review *Lavoro e diritto*, dedicated to "L'attualità dello Stato sociale".

[62] A clear idea of the great changes in Europe in recent years is provided by Sciarra (2013).

for social scopes. For example, *rebus sic stantibus*, neither the European Social Fund (ESF) can probably be used[63] to build the EUBS, which would need *ad hoc* funds.

After all, it is quite easy to see that in the EU a supranational social security system simply does not exist and probably even the prerequisites for it are missing. One of the smaller examples of a policy on social security is the one regarding migrants[64]. Basically, there is not much more, as can be seen from the handbooks and studies about social law in Europe[65].

In the UE nowadays, workers take advantage of the freedoms of movement and establishment guaranteed by the treaties, but everybody has seen what kind of consequences on social rights occurred in some cases[66].

It is very important to wonder if the EU is ready for an instrument like this. There is the concrete possibility that the actual EU, in the current context, would arrange a weak unemployment benefit.

To enforce a long-term *policy* in this direction[67], it would be necessary above all to achieve more intense integration at political and juridical level[68]. This is probably the prerequisite for arranging an efficient EUBS in terms of contrast to social exclusion and poverty as possible consequences of the loss of a job.

After all, a 20 million reduction of the people threatened by poverty is one of the goals of the Europe 2020 strategy and it is not less important than monetary stability.

3. Conclusion

In conclusion, it is useful to summarise how the problem of the *feasibility* of the EUBS is structured because, within this profile, we retrace many relevant points of the whole discourse.

Feasibility can be divided into two main dimensions. One is more juridical and the other is more "political".

The juridical one can be articulated in two general questions. The first regards the competence of the EU in this field. Once we admit the EU can intervene in this field (and it can[69]), the problem is to determine the level of detail and the space left to the Member States to adapt the benefit to its context. With regard to this second aspect, it is rather complicated to identify a model applicable to all the States, for the reasons already illustrated: once consensus is found on a unique type of EUBS (for example, the genuine top-up type), then legal and administrative adaptations necessary to make it compatible with domestic benefits would reveal to be absolutely tricky.

The "political" matter instead refers basically to the will of the States. Here the questions are: do the Member States really want to introduce this kind of benefit? Do *all* of them

[63] The competent office of the European Commission has sent a specific notice to some Italian ministries in order to exclude that any new "passive measures" could be eligible for ESF financing (EMPL E3/LC/vd, 21 May 2015).

[64] Cf. Roccella Treu (2016, 145 ff.).

[65] E.g. see Sciarra (2010). However, talking about the "social" dimension, we are now referring to the "protection in the labour market", not to "social law" interpreted as a synonym of "labour law".

[66] See Section 1 about the shortcomings of the social market economy of the EU and Sciarra (2013, 67 ff.) for detailed examples.

[67] As it is actually hypothesised in the EU Commission (2015).

[68] Also with reference to labour market rules and institutions.

[69] See above, Section 1.3.

want it? In that case, what kind of concrete configuration would they really imagine for it? How inclusive? How would they want to structure it? Here the current chronicles tell us that a common and shared will is clearly missing (e.g. the German government is not in favour)[70].

Scepticism on this issue is not caused by the belief that it would be useless; on the contrary, if it were well implemented, the EUBS would be an ideal path to face social exclusion and poverty and also the "original sin" of the purpose of the EUBS could be overtaken[71], but many outstanding problems emerge from this standpoint. Actually, having a "well-implemented" benefit scheme would require political consensus on many aspects that are lacking now. So, the political will and the perspective adopted by the observer interfere strongly with the concrete judgement of the EUBS because it is impossible to tell in general terms if it is a positive instrument or not.

Greater integration in the EU is necessary at different levels and an instrument like the EUBS will represent a serious measure to pursue the targets of greater juridical, political and fiscal integration. Under the point of view here adopted, though, it would hardly represent an *immediate* progress. There are too many rules, practices and approaches that differ considerably among EU Member States. When deeper harmonisation in these respects is gained, the EUBS will exploit the possibility to represent a considerable step forward for the European social model, whereas as of now there is a serious risk that the scheme is thought to produce effects and give responses wider than those it can actually provide.

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[70] Cf. Giovannini (2016, p. 7).

[71] As seen in Section 1.3.1, the aim of a provision does not always correspond to the meaning of the provision as it is perceived in the common interpretation: a "social EUBS" would be in this sense compatible with social market economy, although the original goal is the economic stabilisation of the Eurozone.

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