



## DIALOGUES SOLIDARITY AND CONFLICT

# THE FUTURE OF SOCIAL EUROPE AND OF EUROPEAN INTEGRATION AT A CROSSROADS: HOW CAN WE RECOVER AND ENFORCE SOLIDARITY AS A FUNDAMENTAL PRINCIPLE OF EUROPEAN CONSTITUTIONAL LAW (OR DIE)?

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**ABSTRACT:** This *Dialogue* is conceived as a conversation with Silvana Sciarra about the present crisis of social Europe and European integration, starting from the ideas she has proposed in her recent book *Solidarity and Conflict. European Social Law in Crisis* (Cambridge: Cambridge University Press, 2018). A special focus is put on possible ways of restoring and enforcing solidarity as a fundamental principle of European Constitutional Law. After placing the book in context, including references to the current debate, we highlight Sciarra's general approach towards the crisis of solidarity in the EU and point out her understanding of two main issues: the role played by Courts, especially Constitutional Courts; the potential role of cooperation and "synergies", both at judicial and institutional level, both within and beyond the EU, in order to develop the social dimension of the integration process. In so doing, we also wish to contribute to such a debate. Finally, considering the growing risk of disintegration, we wonder if we are still in time to avoid a new European dark age, by applying Sciarra's proposal as an antidote to "fears" and as a remedy which should lead to a reconciliation between the European project and the principles of social Constitutionalism. We conclude that policy makers should listen to her call to action and engage with no delay to achieve this absolutely primary objective.

**KEYWORDS:** European Union – solidarity – crisis – synergies – Constitutional adjudication – institutional cooperation.

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## I. A REFERENCE POINT IN THE CRUCIAL DEBATE ABOUT SOCIAL EUROPE

All those who care about the “European Social Model”, about the “Social and Democratic State, subject to the Rule of Law”<sup>1</sup> and, ultimately, about the future of social Constitutionalism in the continent, as well as anyone who takes the future of the European ideal to heart, should be very grateful to Silvana Sciarra for the contribution she has given in the fields of Labour Law and especially of European Social Law over the course of her long academic career. Our appreciation grows after the publication of her recent book *Solidarity and Conflict: European Social Law in Crisis*.<sup>2</sup> Here, this scholar summarises and presents her analyses and reflections about the transcendent and even dramatic changes of the European Union’s legal system we have witnessed during the last decade, with a special focus on their implications for “social Europe”. With this new contribution,<sup>3</sup> she participates in the current debate on the social dimension of the European Union and such a debate is now, more than ever, crucial for the success of the European integration process as a whole and for its survival.

Rather than considering in detail all the topics Sciarra deals with in the chapters of her book – a synthetic and yet very dense book – the intention of the present writers is to ideally engage in conversation with her about the social dimension of the European integration and about her ideas and suggestions. This will be done with a reference to the current academic discussion.<sup>4</sup> In particular, we wish to emphasise Sciarra’s understanding of two main issues, which are of topical importance in the current debate on social Europe: the role played by Courts and especially by some Constitutional Courts, in the context of the crisis of solidarity within the European Union and the driving force of synergies, at different levels, in the same context. This allows us to compare her point of view with those of other scholars researching on “social Europe”. By so doing, we intend also to refer to our own contributions to this ongoing discussion.<sup>5</sup>

<sup>1</sup> This is the translation of the expression “Estado social y democrático de derecho”, used in Art. 1 of the Spanish Constitution, recalling the similar expression used in Art. 20 of the German Basic Law (“demokratischer und sozialer Bundestaat”).

<sup>2</sup> S. SCIARRA, *Solidarity and Conflict: European Social Law in Crisis*, Cambridge: Cambridge University Press, 2018.

<sup>3</sup> Updated and significantly revised version, presenting new analyses, of a book the Author published in her mother tongue some years ago: S. SCIARRA, *L’Europa e il lavoro. Solidarietà e conflitto in tempo di crisi*, Roma, Bari: Laterza, 2013.

<sup>4</sup> This contribution is, in fact, the continuation of a conversation which took place in Madrid, at the Centro de Estudios Políticos y Constitucionales, on 4 April 2018, when Silvana Sciarra participated, together with the Authors of this contribution, in a seminar on “Europe and employment”, in which she presented her still unpublished book.

<sup>5</sup> We allude in particular to F. VALDÉS DAL-RÉ, *El constitucionalismo laboral europeo y la protección multinivel de los derechos laborales fundamentales: luces y sombras*, Albacete: Bomarzo, 2016; P. MASALA (ed.), *La Europa social: alcances, retrocesos y desafíos para la construcción de un espacio jurídico de solidaridad*, Madrid: Centro de Estudios Políticos y Constitucionales, 2018, and P. MASALA, *¿Qué perspectivas*

## II. SOCIAL EUROPE AND EUROPEAN INTEGRATION TODAY: A WORRYING PICTURE

As for the present context, it cannot be ignored that, during the last decade, the financial crisis and, especially, the new economic governance which has been taking shape in the Eurozone have significantly increased the pre-existing “constitutional imbalance between ‘the market and ‘the social’ in the European Union”.<sup>6</sup> The asymmetry between these two components was justified, at the early stages of the integration process, by a clear separation of powers and tasks between the European Communities (the market) and the Member States (the social), but it is no longer tolerable in the present Union. Both external and internal factors affect the sovereignty of Member States in defining and implementing their social and employment policies, in a way that has reduced substantive equality and internal solidarity in European societies. Globalisation entails new challenges for the “European Social Model”; moreover, the development of the European Single Market and of the Economic Monetary Union has had a strong impact on national welfare states. All this implies that the conferral of more extended powers (and resources) to the Union, allowing the partial federalisation of the social domain, is desirable, as it would entail a more effective protection of social rights, through a fair cooperation between the Union and the Member States.<sup>7</sup>

It is well known that some attempts were made, in the decade before the crisis, in order to reduce the original gap, by providing some legal foundations for the partial development of a social dimension of the Union: namely, since the approval of the Treaty of Amsterdam, when some limited competences were conferred to the European institutions (especially the Commission and the Council) in the fields of social and employment policies. Later, the Treaty of Lisbon reinforced the social aims and objectives of the Union and “constitutionalised” the Charter of Fundamental Rights of the European Union, which includes a quite rich and detailed list of social rights in its title about “Solidarity”. However, even on that occasion, the Union’s powers and resources in that specific domain were not increased. Positive integration in “the social” has remained weak and ineffective, and made recourse quite often to soft law, for example in the open method of coordination, implemented within the Lisbon strategy and then within the Europe 2020 strategy.<sup>8</sup> Finally, the

*para el constitucionalismo social en Europa? (buscando, e intentando encender, luces en tiempos oscuros), in Lex Social: Revista jurídica de los derechos sociales, 2018, p. 58 et seq.*

<sup>6</sup> S. GARBEN, *The Constitutional (Im)balance between ‘the Market’ and the ‘Social’ in the European Union*, in *European Constitutional Law Review*, 2017, p. 23 et seq. See also, among others, S. GIUBBONI, *Cittadinanza, lavoro e diritti sociali nella crisi europea*, in M. CINELLI, S. GIUBBONI (eds), *Cittadinanza, lavoro, diritti sociali. Percorsi nazionali ed europei*, Torino: Giappichelli, 2014, p. 85 et seq.; M. BENVENUTI, *Libertà senza liberazione. Per una critica della ragione costituzionale dell’Unione europea*, Napoli: Editoriale scientifica, 2016.

<sup>7</sup> As timely argued, in particular, by S. GIUBBONI, *Diritti sociali e solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo*, Bologna: Il Mulino, 2012, pp. 231-234.

<sup>8</sup> The persisting contrast between “faiblesse de l’intégration législative positive” and “force de l’intégration pretorienne negative” in the areas of Employment and Social Policy is highlighted by P.

institutional changes introduced in the context of the crisis have prompted – instead of a momentous development of the social potential of the recently reformed Treaties – a drastic subordination of the social objectives to financial stability and to the market. The “collision” between these priorities and the European Social Model<sup>9</sup> has determined, in practice, the “displacement of social Europe”<sup>10</sup> and this has occurred as a result of a “constitutional mutation”, which has affected democracy and the rule of law as well, both at the European and at the national level.<sup>11</sup> Such an impact has been asymmetric, concerning especially some “peripheral”, financially more vulnerable, Member States: mainly Southern European states, where the implementation of the new economic governance has entailed austerity measures and more flexible labour markets.<sup>12</sup> The corresponding “competence *coup*”<sup>13</sup> affecting national welfare states (even more seriously than the “competence creep” determined by the well-known pro-market case law of the CJEU) has not been compensated by an extension of the powers and resources the Union may use to ensure better protection of social rights. On the contrary, there has been a regression even in those fields where some progresses had been made: it is enough to mention the recent involution of the CJEU’s case law which, on the grounds of the Union citizenship and of the principle of non-discrimination, had previously assured equal conditions for mobile European citizens (including the “inactive” ones) in their access to social benefits within the Union.<sup>14</sup> In constitutional terms, the moving back of social Europe has meant the “amputation” of solidarity (redistributive solidarity, condition for social justice), enshrined in the Charter of Funda-

RODIERE, *Actualité des solidarités sociales en droit européen*, in A. SUPIOT (ed.), *La solidarité: Enquête sur un principe juridique*, Paris: Odile-Jacob, p. 311 *et seq.*, in particular, pp. 314-319.

<sup>9</sup> M. FERRERA, *Rotta di collisione: Euro contro welfare?*, Roma, Bari: Laterza, 2016.

<sup>10</sup> This is the title of a workshop that took place at the European University Institute, Florence, on 15 and 16 December 2016 (see at [www.eui.eu](http://www.eui.eu)) and of a paper by C. KILPATRICK, *The displacement of social Europe, a productive lens of inquiry*, in *European Constitutional Law Review*, 2018, p. 62 *et seq.*

<sup>11</sup> See, in particular: A.J. MENÉNDEZ, *La mutación constitucional de la Unión Europea*, in *Revista Española de Derecho Constitucional*, 2012, p. 41 *et seq.*; C. KILPATRICK, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts*, in *Oxford Journal of Legal Studies*, 2015, p. 325 *et seq.*; T. BEUKERS, B. DE WITTE, C. KILPATRICK (eds), *Constitutional Change through Euro-Crisis Law*, Cambridge: Cambridge University Press, 2017.

<sup>12</sup> For an overview: S. CIVITARESE MATTEUCCI, S. HALLIDAY (eds), *Social Rights in Europe in an Age of Austerity*, London, New York: Routledge, 2017.

<sup>13</sup> S. GARBEN, *The Constitutional (Im)balance*, cit., p. 51.

<sup>14</sup> See, among others, A. SILVEIRA, *Cidadania social na União Europeia – quo vadis? Avanços e recuos entre forças de coesão e fragmentação*, in E. PAZ FERREIRA (ed.), *União Europeia. Reforma ou declínio*, Lisboa: Nova Vega, 2016, p. 293 *et seq.*; S. GIUBBONI, *Free movement of persons and transnational solidarity in the EU. A melancholic eulogy*, in S. CIVITARESE MATTEUCCI, S. HALLIDAY (eds), *Social rights*, cit., p. 273 *et seq.*; P. MASALA, *Libertad de circulación y de residencia y acceso a las prestaciones sociales de los ciudadanos europeos “inactivos”: construcción y deconstrucción de un estatuto de integración social transnacional*, in A. CARMONA CONTRERAS (ed.), *Construyendo un estándar europeo de derechos fundamentales: Un recorrido por la jurisprudencia TJUE tras la entrada en vigor de la Carta*, Cizur Menor: Thomson, Reuters, Aranzadi, 2018, p. 219 *et seq.*

mental Rights of the European Union and in post-war democratic Constitutions of the Member States<sup>15</sup>. On the other hand, the new conditional solidarity implemented in the Eurozone, particularly through the European Stability Mechanism, has deepened tensions and divides among Member States (creditors and debtors, hosts and “migrants”) and has increased the levels of social inequality both within the Union and in the Member States, especially in the ones that received financial aids. Overall, these constitutional changes have increased the distance between the Union and European citizens, in a way that is seriously endangering the future of the integration process.

If this discomfoting diagnosis is correct, then it is evident that a radical change in the opposite direction is needed: this should be based on the politicisation of social issues at the European level,<sup>16</sup> hence on the restoration of the rule of law and democracy, especially by extending the role of the legislative<sup>17</sup> (and primarily the role of the European Parliament in the legislative process, in general and in particular in the social domain), within the framework of a relaunch of the process of constitutionalisation and federalisation of the Union. A complete “reconstruction of the European constitutional order”, recovering real solidarity, is necessary,<sup>18</sup> both for preserving the jeopardised European Social Model and for restoring the Union’s legitimacy. The destinies of the Union and of that Model are clearly intertwined: on one hand, the failure of the European project would definitely make it impossible to defend and update the latter in a globalised world; on the other hand, if the integration process is not reconciled with solidarity it will definitely lose its legitimacy and its chance to survive.

### III. A CONSTRUCTIVE APPROACH

Faced with the present crisis of European solidarity – the “social question”, which is at the same time an effect and a cause of the crisis of democracy and of the rule of law in the continent<sup>19</sup> – Sciarra’s first contribution in her recent book consists of a careful assessment of the reactions of the main actors within the EU, both at national and supranational levels. Secondly and more importantly, she coherently proposes some ideas which help us to reflect about what should be done in order to overcome the continuing crisis and to recover and enforce solidarity as a fundamental principle of European Constitutional Law.

<sup>15</sup> S. RODOTÀ, *Solidarietà: Un’utopia necessaria*, Roma, Bari: Laterza, 2014, pp. 105-106.

<sup>16</sup> See S. GIUBBONI, *Diritti e solidarietà in Europa*, cit., especially pp. 231-234.

<sup>17</sup> As conclusively argued by S. GARBEN, *The Constitutional (Im)balance*, cit.

<sup>18</sup> S. RODOTÀ, *Solidarietà*, cit., pp. 105-106.

<sup>19</sup> With special reference to the Italian case: P. MASALA, *Crisi della democrazia parlamentare e regresso dello Stato sociale: note sul caso italiano nel contesto europeo*, in *Rivista AIC*, 4/2016, www.rivistaaic.it. More in general, a reference point among the recent contributions on the “democratic question” and the “crisis of the rule of law” in the EU, also and particularly in a proactive perspective, is C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2017.

Sciarra's overall attitude towards the present situation is of course critical, but it seems to us that what characterises her work is the constructive approach she adopts: her purpose is to shed light on present problems and especially to try to identify possible solutions. In the opening of the book, after warning that "this should be the time to thoroughly rethink the European architecture and finding ways to reconcile European citizens with supranational institutions", she shows a specific "intention" to disguise "possible synergies among existing policies and to look at ways in which solidarity and conflict face new social demands [...] looking at developments in recent years".<sup>20</sup> The book is in fact an attempt to reconstruct all recent initiatives in policy-making, in view of proposing some "paths for reflections" in the fields of European employment and social law.<sup>21</sup>

Sciarra's commitment is to "dissolve" and overcome the "fear from Europe" and the "fear of Europe" (citizens and social partners' increased disaffection and mistrust), starting from the firm conviction (we openly agree with) that the solution can only be found in a shared project of the EU as a whole. In the aftermath of the crisis, there should be an overall attempt at "rethinking institutional changes and enhancing reforms".<sup>22</sup> In particular – she argues – "protectionism[...] is not an adequate solution", whereas "an antidote can be found in closer synergies within a multilevel legal system, with the creation of new places for negotiations treasuring in a virtuous manner the financial resources the EU provides and giving new responsibilities to social partners".<sup>23</sup> In sum, the "suggestion" made by the book "is to continue on the path of better synergies among existing policies, in view of sturdier political stability, which could encourage more structural reforms at an institutional level".<sup>24</sup> Insufficiently known positive practices are identified and analysed in order to put forward concrete proposals. In particular, it is proposed to address the problems of wage competition by means of a better cooperation and exchange of information among European and national administrations; to promote collective autonomy within the European social dialogue and especially transnational collective agreements (for which Sciarra claims a proper European legal framework); to make better use of structural funds in order to strengthen social cohesion.<sup>25</sup>

The Author's constructive approach does not lead her to underestimate the gravity of present challenges and the reasons for fears. She recognises that these are "not unjustified and need to be taken in serious consideration by policy makers": overcoming fear re-

<sup>20</sup> S. SCIARRA, *Solidarity and Conflict*, cit., pp. XI-XI.

<sup>21</sup> *Ibid.*, p. 4.

<sup>22</sup> *Ibid.*, pp. 2, 3 and 7.

<sup>23</sup> *Ibid.*, p. 46.

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

<sup>25</sup> Specific chapters of S. SCIARRA, *Solidarity and Conflict*, cit., deal with these topics. In particular, the issue of structural funds is considered in some detail at pp. 42-45, drawing on the inspiring proposals of the "Barca Report" (F. BARCA, *An agenda for a reformed cohesion policy. Independent report prepared at the request of Danuta Hübner, Commissioner for Regional Policy*, April 2009, available at ec.europa.eu).

quires credible changes, reforms, and especially the development of “better synergies”, as said.<sup>26</sup> However, first of all, we should be aware of existing synergies, of current misunderstanding and inadequate communication, taking into account that fear is also “fuelled by the references, instrumentally made in domestic policies, to obligations imposed by the EU”: obligations which are, “in fact, the outcome of political negotiations frequently made at intergovernmental level, rather than within the European institutions”.<sup>27</sup>

#### IV. JUDICIAL ENFORCEMENT OF SOLIDARITY: POSSIBILITIES AND LIMITATIONS

Let us now look first at the role played by Courts and then at the role of cooperation and synergies, within the EU and beyond the EU.

As for Sciarra’s assessment of the role played by Constitutional Courts in the context of the crisis, it is especially interesting to consider her review of the most significant case-law concerning austerity measures, specifically with regard to the reduction of wages and pensions. She examines, in particular, selected cases of the Greek Council of State and of the Portuguese, Italian and Spanish Constitutional Courts<sup>28</sup> and, on this basis, she argues for “the independence of the judiciary from political contingencies and the need to rebalance political priorities within a coherent constitutional network”.<sup>29</sup> She also observes that Constitutional Courts and international organisations enforcing labour standards “have been called to play a central role” in the crisis and post-crisis context and concludes that, in general, “judicial strategies have, by all means, been relevant to re-establish a balance and to broaden the interpretation of EU-Law”: this is “a fully accountable process, which preserves the rule of law and strengthens parliamentary discretionary powers”.<sup>30</sup> Finally, she notes that “judicial and quasi-judicial activism has reinvigorated the circulation of international standards and provoked a beneficial contamination of legal sources”,<sup>31</sup> hence arguing that these are “valuable and should be further pursued”.<sup>32</sup> This implies a favourable opinion about the development of judicial synergies beyond the EU legal order, with other international organisations and institutions and concretely among national Constitutional Courts and European and international Courts. A chapter of the book is devoted to the positive implications, in terms of strengthened protection of fundamental social rights, which are the outcomes of interactions among the Luxembourg Court, the Strasbourg Court, the Committee of experts

<sup>26</sup> S. SCIARRA, *Solidarity and Conflict*, cit., p. 46.

<sup>27</sup> *Ibid.*, p. 28.

<sup>28</sup> *Ibid.*, pp. 13-18.

<sup>29</sup> *Ibid.*, p. 18.

<sup>30</sup> *Ibid.*, pp. 135-138.

<sup>31</sup> *Ibid.*, p. 137.

<sup>32</sup> *Ibid.*, p. 7.

of the International Labour Organisation and the European Committee of Social Rights of the Council of Europe<sup>33</sup>.

We can therefore conclude that Sciarra highlights and looks favourably at the possibilities of the “judicial enforcement of solidarity”.<sup>34</sup> However, we must immediately add that she is also aware of its structural limitations: judges cannot replace politics, neither would this be, of course, desirable. Indeed, in her overall reflection, she stresses the need to strengthen cooperation at the institutional level, to re-politicise social issues and to revitalise the role played by social partners and collective autonomy at transnational and supra-national levels. We are going to consider all this in the next part of our conversation.

Before that, we just want to openly agree with Sciarra’s understanding of the role played by Courts in the context of the crisis. In particular, we believe that some concrete reactions of some Constitutional Courts to the “dismantling of the social and democratic state, subject to the rule of law”<sup>35</sup> which has taken place in Europe during the last decade, particularly in Southern European Member States, have been fully justified and legitimate. We allude, specifically, to some important judgements of the Portuguese and the Italian Constitutional Courts, which held unconstitutional some of the austerity measures adopted by national legislators (or rather, in most cases, by national Governments which widely used decree-laws and marginalised national Parliaments), as they considered those measures in breach of constitutional principles of proportionality, equality and (especially in the Italian case) solidarity. We believe that Courts must apply a strict scrutiny when deciding about the constitutionality of such measures, in particular when using the proportionality or reasonableness test. Likewise, they should be demanding in relation to the compliance with constitutional principles relating to the exercise of legislative power, especially in emergency situations: they should reaffirm the prescriptive nature of those principles and consequently counter the abuses committed by Governments.<sup>36</sup> Finally, we also firmly believe that judicial dialogue and the development of synergies in this domain, also beyond the EU, must be welcomed: in particular, they are necessary in order to overcome the present “asymmetry” between

<sup>33</sup> *Ibid.*, pp. 118-132.

<sup>34</sup> A. SUPLOT, *Judicial Enforcement of Social Solidarity in View of Recent European, German and French Jurisprudence*, in J. VAN DER WALT, J. ELLSWORTH (eds), *Constitutional Sovereignty and Social Solidarity in Europe*, Baden-Baden: Nomos, 2015, p. 109 *et seq.*

<sup>35</sup> L. JIMENA QUESADA, *Devaluación y blindaje del Estado social y democrático de derecho*, Valencia: Tirant lo Blanch, 2017.

<sup>36</sup> In this sense, P. MASALA, *Crisi della democrazia parlamentare e regresso dello Stato sociale*, cit. We openly agree with C. KILPATRICK, *Constitutions, Social Rights and Sovereignty Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, in T. BEUKERS, B. DE WITTE, C. KILPATRICK (eds), *Constitutional Change through Euro-Crisis Law*, p. 279 *et seq.*, when she argues that the charge of “juristocracy”, with regard to the alluded constitutional case law concerning austerity measures, must be refuted.



the density of the recognition of fundamental social rights in European Constitutionalism, especially at the supranational level, and the ineffectiveness of their protection.<sup>37</sup>

## V. STRENGTHENING COOPERATION AND SYNERGIES (*IL FAUT CULTIVER NOTRE JARDIN*)

The idea of “synergies” is a *leitmotiv* in Sciarra’s reflection. Not only it is stressed with reference to judicial dialogue, but it is also proposed, in general, as an “antidote” which should be applied at different levels to overcome fears<sup>38</sup>. In particular, there is a call to strengthen cooperation and to develop synergies at the institutional level, within the EU (among supranational institutions and Member States) including social partners in all such efforts, by revitalising collective autonomy and collective bargaining, especially at supranational level.<sup>39</sup> The development of synergies beyond the EU, namely with other international organisations such as the International Labor Organisation and the Council of Europe, for the definition and implementation of better standards of protection of social rights, is also an important component of this recommended strategy, as we have just seen.

Of course, Sciarra is not unaware that, rather than virtuous cooperation and synergies, negative interactions in the social domain have been produced by the choices made (mainly at intergovernmental level) in the context of the crisis; and she is well aware that, even prior to the reform of the economic governance of the Eurozone, a well-known case-law of the Court of Justice of the European Union had seriously affected fundamental workers’ rights, collective bargaining and traditional national conflict rules.<sup>40</sup> Indeed, it is in her search for solutions to the problems arising from this negative kind of interaction, that she highlights the possibilities of “synergies” within the EU. However, she also highlights the shortcomings and limitations of the cooperation which has been implemented so far. She does so, in particular, when she considers the use of soft law and the unsatisfactory outcomes of the open method of coordination in the fields of employment and social protection. She underlines that the severe impact of the crisis requires a reconsideration of the employment policies and of the overall ra-

<sup>37</sup> This “asymmetry” is highlighted in F. VALDÉS-DAL RÉ, *El constitucionalismo laboral europeo y la protección multinivel de los derechos laborales fundamentales*, cit.: see, in particular, pp. 110-125. With special reference to the possible synergies between national Constitutional Courts and the case law of the European Committee of Social Rights, see L. JIMENA QUESADA, *Social Rights and Policies in the European Union. New Challenges in a Context of Economic Crisis*, Valencia: Tirant lo Blanch, 2016, pp. 140-143.

<sup>38</sup> S. SCIARRA, *Solidarity and Conflict*, pp. 45-46.

<sup>39</sup> *Ibid.*, *passim* and especially pp. 65-90.

<sup>40</sup> We allude, in particular, to the *Viking* and *Laval* judgements (Court of Justice: judgement of 11 December 2007, case C-438/05, *International Transport's Workers Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*; judgement of 18 December 2017, case C-341/05, *Laval un Parteneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggetan and Svenska Elektrikerförbundet*); see S. SCIARRA, *Solidarity and Conflict*, cit., pp. 91-117.

tionale supporting the OMC and she argues for a “shift to hard law” in order to reassess active labour market policies and to enhance exchanges of information among national administrations. One proposal is sketched with great emphasis, to counterbalance the impact of monetary policies, namely a European Unemployment Benefit Scheme for the euro area, which should provide support to Member States undergoing fiscal constraints in order to avoid cuts of automatic stabilisers, while implying benefits also for countries not in need of support, but interested in macroeconomic stability.<sup>41</sup>

Re-politicisation of social issues<sup>42</sup> is another fundamental goal which should be achieved in a context of cooperation: at the end of the book, Sciarra argues that, “in order to re-politicise deliberations” in the areas of employment and social protection, in particular with the view of rescuing the most disadvantaged groups from a condition of marginality and under-representation, “the adoption of a pragmatic view and of shared consensus is needed”. At this respect, she stresses once again that “re-politicising EU-decision making implies an expansion of hard law [...] and a link to incentives provided by structural funds”.<sup>43</sup>

Finally, Sciarra’s attitude towards the recent initiatives of the Juncker Commission, particularly the “European Pillar of Social Rights”, solemnly proclaimed in Gothenburg in November of 2017, seems to imply a cautious optimism. She welcomes the “commitment” shown by the Commission “in making structural and investment funds available for social policies in the 2014-2020 budget” and the declared intention to “complement” the EU social *acquis*. She looks favourably at the recommendation establishing the twenty principles of the Pillar that should inspire future actions, such as the European Labour Authority, which should favour the adoption of fairer rules in the internal market, in order to ensure equality in wages, especially for mobile workers. She is not unaware, however, of the many obstacles in current developments of European social policies and she underlines that such announcements “*should be promptly implemented*”.<sup>44</sup>

At first glance, especially if compared to the severe attitude of other scholars, Sciarra’s cautious optimism could perhaps seem to be too confident and indulgent.<sup>45</sup> But what re-

<sup>41</sup> S. SCIARRA, *Solidarity and Conflict*, cit., pp. 140-141. The proposal for a European Unemployment Benefit Scheme was first released by the Italian Minister of Finance in October 2015 and further developed: Ministero dell’economia e delle finanze, *European Unemployment Benefit Scheme*, August 2016, [www.mef.gov.it](http://www.mef.gov.it).

<sup>42</sup> Especially recommended also, among others, by S. GIUBBONI, *Diritti sociali e solidarietà in Europa*, cit. and by S. GARBEN, *The Constitutional (Im)balance between the 'Market' and the 'Social' in the European Union*, cit. (see, in particular, the conclusions of both works).

<sup>43</sup> S. SCIARRA, *Solidarity and Conflict*, cit., pp. 141-142.

<sup>44</sup> *Ibid.*, pp. 142-143 (emphasis added).

<sup>45</sup> Sciarra’s evaluation of the European Pillar of Social Rights is quite different, for instance, from the assessment made by S. Giubboni, which is openly critical and sceptical: see S. GIUBBONI, *Appunti e disappunti sul pilastro europeo dei diritti sociali*, in *Quaderni costituzionali*, 2017, p. 953 et seq. (this criticism is also largely shared by P. MASALA, *The European Pillar of Social Rights: A first step in the right direction or*

ally matters is that she develops throughout the book a complete overview of the many threads of social and employment policies that could be pulled together in an optimal scenario of political convergences. Hence, it is clear that Sciarra is not at all Voltaire's Pangloss; neither she adopts a too radical, maximalist approach. She seems aware of the complexities underlying this phase of European integration and this is why we can say that, through her book, she shows how to recognise and balance the best part of Don Quixote and the best part of Sancho. To add yet another example, she is as wise as Candide at the end of its vicissitudes, when, settled in Constantinople, he warns us that our garden must be cultivated and that we must engage in this work all together.

## VI. *NON PRAEVALEBUNT?*

In conclusion, it seems to us that Sciarra's cautious optimism is very similar to the "un-resigned realism" which was pointed out by Stefano Rodotà as the attitude which should lead to success in overcoming the present crisis of solidarity:<sup>46</sup> pragmatism, reformism (not forgetting that "more structural reforms at an institutional level" are the final aim), cooperation and synergies in a multilevel legal system, shared commitment, hence Europeanism, are also in our opinion the only approaches which can avoid a new dark age upon Europe. What is certain is that, if the EU and the Member States still aspire to have a bright future, then they should base their action on suggestions such as those made by Sciarra in her book: as implementing such proposals would allow them to cope with the present crisis of solidarity and democracy and to provide concrete proof of their understanding of European citizens' "fears". In this sense, there is no reasonable alternative to Sciarra's wise pragmatism, as the sole alternative would be resignation and, in this case, the achievements and dreams the Union has represented would definitely be lost and fade: hence, scholars could only write an "obituary"<sup>47</sup> or a "melancholic eulogy"<sup>48</sup> for the European project, the celebration of a glorious – albeit imperfect – recent past like in Pericle's funeral oration; and then, as Europeans, we could only express our grief over the world of yesterday.<sup>49</sup>

*rather a palliative, cosmetic care? Some critical remarks from a constitutional perspective*, in *Unio EU Law Journal: The Official Blog*, 17 December 2018, officialblogofunio.com.

<sup>46</sup> See S. RODOTÀ, *Solidarietà*, pp. 136-137: the original expression is "realismo non rassegnato".

<sup>47</sup> R. GILLINGHAM, *The European Union: An Obituary*, London, New York: Verso Books, 2016.

<sup>48</sup> As S. Giubboni properly does with specific reference to "Free movement of persons and transnational solidarity in the EU", in his mentioned contribution about this topic (S. GIUBBONI, *Free movement of persons and transnational solidarity in the EU*, cit.).

<sup>49</sup> We allude to the well-known memoir of S. ZWEIG, *Die Welt von Gestern. Erinnerungen eines Europäers*, Stockholm: Bermann-Fischer Verlag, published in 1942: it seems to us that reading (or re-reading) this book and especially its first pages today is as disturbing as recommendable for any living European, as it sounds like a dramatic *memento* which should not be ignored.

Thus, can we finally say: *non praevalerunt* (uncertainty, fears and darkness)? What is clear, at this point, is that preventing them from prevailing is a shared responsibility. In other terms, the answer depends on choices which shall be made by policy makers, by European citizens, and also by scholars. We can already say, in this sense, that Silvana Sciarra has taken part in the effort: overall, her book should be regarded as a successful effort to illuminate reality through thought and as a call – especially to policy makers – to act, to take social Europe seriously, to restore and strengthen European solidarity before it is too late. The further question is then: are we still in time to cooperate to reconcile European integration with social Constitutionalism (and with European citizens)? Unfortunately, we cannot hide that our uncertainty and fear, at this respect, grow as time goes by: we cannot ignore that, after the publication of the book, in just a few months, darkness and fears (new nationalisms, anti-Europeanism, xenophobia, division) have grown much faster than light (awareness of the urgency to act and agreement for cooperation). However, we support Sciarra's call without hesitation, as we are convinced (and our belief has been strengthened after reading her book) that, despite uncertainty, fears and growing concern – actually, because of all of this – no effort must be spared to achieve that absolutely primary goal.