

Constitutional Legitimacy of the Basic income in the German Social State

Date of Submission: 08-05-2021

Date of Acceptance: 22-05-2021

I. INTRODUCTION

I. Socio-economic transformation, job precariousness and inequality

We are a long way from achieving the objectives related to poverty and hunger set out in the *2030 Agenda for Sustainable Development Goals* by the United Nations in 2015.¹ A recent report by the UN Food and Agriculture Organisation reveals the increase in global hunger.² What is also alarming is that not European welfare states have escaped the tendency towards growing inequality between rich and poor.³ The problem is particularly acute in the case of children, since in 2016 over a quarter of them were at risk of poverty or social exclusion, according to the European Union statistics office (Eurostat). An example: in the country with the lowest rate of child poverty - Denmark - 13.8% of children are at risk of poverty, which demonstrates the major problem facing even rich countries.⁴ As their poverty derives principally from their parents' economic situation, and not from their work, this group will be studied later (in section D.II. on collective basic income for minors), following establishment of the impossibility of introducing a universal basic income.

In this context, the debate goes on as to whether citizens have the right to a minimum existence level that guarantees subsistence, which was traditionally possible by means of employment. Thus, during the 20th century, with social protection based on an industrial based employment model, a good balance was achieved. It is a well-known fact that the welfare state of the day sought to reduce certain risks of contingencies (such as illness, work-related accidents, disability, unemployment) with contributory protection schemes. The fact that these risks could be statistically estimated made it possible to construct a social security system that worked reasonably well for the majority of people.⁵ However, in practice, genuine full employment has never existed. In other words, there has always been a part of the population without a job with social security contributions (e.g., taking care of children or elderly).⁶ In this context, it is paradoxical that concern about the lack of work has come to the fore again - to the point of contemplation of a basic income (hereinafter BI) - when there has always been an unemployed sector of the population. BI is an unconditional income for all citizens without it being necessary to demonstrate a state of need, nor participate in active employment policies. Forecasts suggest that full-time employment is going to be as scarce commodity. As a result, in recent years there has been increasing discussion of the need for a basic income, to the extent that today it is seen by many a viable and urgent alternative to alleviate the suffering deriving from job precariousness.⁷

¹ United Nations, Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development (A/RES/70/1),

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf

² Hunger in the world continues to rise, affecting a little over 820 million people in 2019. See Report by the UN Food and Agriculture Organisation on the State of food security and nutrition in the world 2019, <http://www.fao.org/news/story/en/item/1200484/icode/> (last visited Sept. 20, 2020).

³ In 2017 there were 112,8 million people at risk of poverty. EUROSTAT database,

https://ec.europa.eu/eurostat/documents/portlet_file_entry/2995521/3-16102018-BP-EN.pdf/16a1ad62-3af6-439e-ab9b-3729edd7b775 (last visited Mar. 5, 2021).

⁴ While the European average of child poverty in 2016 stood at 26.4%, figures vary considerably from country to country: for example, the German average is 19.3% compared with Spain's 32.9%. See <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20171120-1> (last visited Mar. 5, 2021).

⁵ GUY STANDING, LA RENTA BÁSICA. UN DERECHO PARA TODOS Y PARA SIEMPRE, 77 (2018).

⁶ Hans-Martin Schönherr-Mann, *Zur Genealogie des bedingungslosen Grundeinkommens - Perspektiven der politischen Philosophie*, 7, ZEITSCHRIFT FÜR POLITIK, 23 (2015).

⁷ JOSÉ LUIS REY PEREZ, EL DERECHO AL TRABAJO Y EL INGRESO BÁSICO. ¿CÓMO GARANTIZAR EL DERECHO AL TRABAJO?, 198 (2007); PHILIPPE VAN PARIJS & YANNICK VANDERBORGHT, INGRESO BÁSICO. UNA PROPUESTA RADICAL PARA UNA SOCIEDAD LIBRE Y UNA ECONOMÍA SENSATA (2017); Casassas, David & Jurgen De Wispelaere, *Renta básica y emancipación social: principios, diseños y coaliciones*, in LA RENTA BÁSICA EN LA ERA DE LAS GRANDES DESIGUALDADES, 111 ff (David Casassas & Daniel Raventós ed. 2011); IMANOL ZUBERO, EL DERECHO A VIVIR CON DIGNIDAD: DEL PLENO EMPLEO AL EMPLEO PLENO (2000); Daniel Raventós, *La renta básica como derecho humano emergente y ante la crisis económica actual*, in DESAFÍOS ACTUALES A LOS DERECHOS HUMANOS: LA RENTA BÁSICA Y EL FUTURO DEL ESTADO SOCIAL, 95 (María Eugenia Rodríguez Palop, Ignacio Campoy Cervera & José Luis Rey Pérez, ed. 2012).

The actual corona crisis is not helping to reduce the first goal of the Agenda 2030; on the contrary, poverty numbers are increasing. Moreover, the Corona pandemic is now proving to be an economic disaster for many people. In particular, the Corona crisis threatens to exacerbate the problem of child poverty.⁸ Consequently, the UN is calling to provide citizens with a universal basic income, to help against inequality.⁹ It should be noted that the crisis was no more than the straw that broke the camel's back. The debate over basic income is not new, the idea dates back to the 16th century and Thomas More¹⁰ and his followers (Juan Luis Vives). The notion of an unconditional basic income made a brief appearance in Europe in the late 18th century.¹¹ The BI was again the subject of short-lived public debates in the United Kingdom, the USA and Canada in the late 1960s. In the 1980s, there was revival of interest in various European countries, until the concept found itself at the centre of international debate from a philosophical economic and legal point of view.¹²

The formulation currently being debated - which will be explained in the second part of this text - is recent, less than 20 years old.¹³ However, assuming that "full employment" has never truly existed, why are we now so concerned that there are calls for the introduction of a basic income? In order to answer this question it is necessary to refer to the global context, in which the deterioration of the welfare state model has led to an increase in poverty: the disappearance of communism and rise of neo-liberalism, greater automatization in production, austerity policies and more flexible markets, technological revolution associated with globalization, demographic change etc... Owing to these changes in the late 20th and early 21st centuries, the income distribution system collapsed and employment is no longer a guarantee of a sufficient salary.¹⁴ So the expression "work dignifies" has become obsolete for much of the population, including the young. Today, the predominantly tertiary service economy - characterised by temporary jobs and unpaid overtime - does not guarantee basic security, or decent social security contributions. Consequently, economic insecurity today is structurally different from in the 20th century. Currently, precarious employment creates chronic insecurity, characterised by uncertainty, which according to economists is something different from risk, and which cannot be covered by the classic social security system of protection against contingencies.¹⁵ Furthermore, recent decades have witnessed an intensification of certain tendencies that increase precariousness: most significantly the advance of robotics and the ageing of the population, breaking the generational contract. The evidence suggests that the great challenges of the future, like job insecurity and the shortcomings of the system of social protection, will increase.¹⁶

In this context, it is believed that a BI will provide universal security that is not offered by the existing social security programmes created by Sir William Beveridge and Chancellor Otto von Bismarck. Above all, the latter fail when it comes assisting the growing number of people that find themselves victims of precariousness, and are typically unable to make sufficient social security contributions and have no regular income. A BI may improve security more efficiently than existing conditional programmes. It should be underlined that the latter lead beneficiaries to fall into the poverty trap, as access to them requires one to renounce employment.¹⁷

Finally, the classic defence of the basic income is that it can reduce poverty because it is the instrument that best guarantees social justice, freedom, equality and economic security. Though poverty can never be

⁸ Anette Stein, Antje Funcke & Sarah Menne, *Kinderarmut: Eine unbearbeitete Großbaustelle*, BERTELSMANNSTIFTUNG, 22nd July 2020, <https://www.bertelsmann-stiftung.de/de/themen/aktuelle-meldungen/2020/juli/kinderarmut-eine-unbearbeitete-grossbaustelle>.

⁹ Senior UN Official Calls for universal basic Income to tackle growing inequality: "The spread of COVID-19 has fundamentally shaken economies, and people are beginning to question existing economic models: this pandemic has really thrown up the existing levels of both injustice and inequality worldwide. So bolder ideas are needed, including some, that previously, were pushed aside." <https://news.un.org/en/story/2020/05/1063312> (last visited Mar. 10, 2021).

¹⁰ See STANDING, *supra* note 5, at 19.

¹¹ Paine proposed a radically different program to public aid like the Social Security. "Create a national fund from which everyone would be paid 15 pounds sterling at the age of 21 as a compensation, for the loss of their inheritance by the introduction of the large estates system, and also the amount of 10 pounds per year (for life) to any person aged 50." Thomas Paine, *Agrarian Justice*, in COMMON SENSE AND OTHER WRITINGS, 321-345 (2005).

¹² See VAN PARIJS & VANDERBORGH, *supra* note 7, at 99-133; REY, *supra* note 7, at 251-254.

¹³ María Julia Bertomeu & Daniel Raventós, *El Derecho de existencia y la renta básica de ciudadanía: una justificación republicana*, in LA RENTA BÁSICA COMO NUEVO DERECHO CIUDADANO, ESTRUCTURAS Y PROCESOS SERIE DERECHO COLECCION, 22 (Gerardo Pisarello & Antonio De Cabo De La Vega ed. 2006).

¹⁴ See REY, *supra* note 7, at 143 ff.; Pablo Miravet, *La filosofía normativa neo-empleocentrista: derechos, condiciones, representaciones*, in DESAFÍOS ACTUALES A LOS DERECHOS HUMANOS: LA RENTA BÁSICA Y EL FUTURO DEL ESTADO SOCIAL, 145 (María Eugenia Rodríguez Palop, Ignacio Campoy Cervera & José Luis Rey Pérez, ed. 2012).

¹⁵ "Uncertainty has to do with the unknown and undermines resilience. No one can be sure about their own interests or what is best to do if an adverse outcome is raised". See STANDING, *supra* note 5, at 74-78; See Raventós, *supra* note 7, at 100.

¹⁶ David Lizoain, LA SEGURIDAD ECONÓMICA PARA LA ÉPOCA POST-CARBONO, <https://sinpermiso.info/sites/default/files/textos/14dlrb.pdf>; See ZUBERO, *supra* note 7, at 186-190.

¹⁷ See STANDING, *supra* note 5, at 78; Mario Segura Alastrué, *Los robots en el derecho financiero y tributario*, in LA LEY ACTUALIDAD, 182 (2018); REY, *supra* note 7, at 369 ff.

eliminated, the threat it poses will be reduced, which is no trivial matter.¹⁸ In this context, it is important to highlight the fact that traditional welfare benefits are intended for the poor, and not for citizens who are on the edge of precariousness. In other words, the well-designed BI has the potential to prevent insecurity, precariousness and thus poverty.¹⁹

II. A well-designed basic income policy and the country selection

This work insists that the BI should be well designed and compatible with current model of social state. Given that different conceptions exist with regard to the BI²⁰ (neoliberal, republican, emancipatory etc.) there is no point in an abstract debate on the BI, given the dire consequences this might produce.²¹ The instrument has the flexibility to adapt to the politics of each context and historical moment.

There is no unique BI model. Each of the various BI models responds to a political ideology and profile and, therefore, pursues different political and social objectives. In other words, in this study it is necessary to be specific and limit both the amount of the BI and the territory in which it is applied. To operate otherwise would not make sense. For instance, when constructing an argument in favour of or against the basic income in the context of a specific country, it is necessary to take into account the national GDP per capita.²² For this reason, I shall use the example of an economically wealthy European nation, which from the financial and constitutional point of view is in a position to introduce a BI. Which means that the country can offer this benefit from a legal and economic perspective. Therefore, one needs to ask whether the existing system of social protection have a similar basis and origin to the BI.

Today it is a well-known fact that basic incomes exist for specific collectives within the population. The best known case is that of the universal income for all pensioners in Sweden (guaranteed income),²³ which guarantees a minimum in old age irrespective of whether one has paid social security contributions or not.²⁴ Less well known, but no less interesting, is the case of the universal income for minors in Germany (*Kindergeld*). This child benefit is simply a monthly basic income that is received on an unconditional basis by all children.²⁵

Although it is not yet officially described as a BI, in practice, it functions as such, and some define its legal bases as those of a BI.²⁶ Since it is only available to a group of citizens with specific characteristics - and is not universal - it is a collective basic income. Therefore, for compelling reasons that have already been mentioned and in view of the impossibility of studying the establishment of the BI in every European legal system, this work will focus on one in particular: the Federal Republic of Germany. The example of the *Kindergeld* allowance in Germany may serve as a model to be followed by all legal systems, including Spain's, which have a pay-as-you-go pension system.

Moreover, the German constitutional framework has certain characteristics, which render it necessary to study the BI in the context of its legal system. It is noteworthy that the Basic Law does not oblige the citizen to work.²⁷ Unlike the Spanish Carta Magna, which does establish this obligation in its art. 35 Spanish Constitution (hereinafter SC), the Basic Law²⁸ excludes it in art. 12 GG.²⁹ This means that the obligation to work set out in art. 35 SC could make it impossible to free the citizen from work, which is what the *left-wing emancipatory version* of the BI aspires to. Which would lead us to rule out his study's vision and restrict us to

¹⁸ See Raventós, *supra* note 7, at 102-103.

¹⁹ *Id.* at 79-82.

²⁰ Bertomeu & Raventós, *supra* note 13, at 19.

²¹ Shannon Ikebe, THE WRONG KIND OF UBI. WITHOUT THE RIGHT DESIGN, A UBI WOULD DO LITTLE TO ADVANCE RADICAL CHANGE, [HTTPS://WWW.JACOBINMAG.COM/2016/01/UNIVERSAL-BASIC-INCOME-SWITZERLAND-FINLAND-MILTON-FRIEDMAN-KATHI-WEEKS/](https://www.jacobinmag.com/2016/01/universal-basic-income-switzerland-finland-milton-friedman-kathi-weeks/) (last visited Mar. 9, 2021).

²² See VAN PARIJS & VANDERBORGHT, *Supra* note 7, at 27.

²³ Peggy Letzner, *Die Reform der Alterssicherung in Schweden*, in DEUTSCHE RENTENVERSICHERUNG JAHRGANG 1959, 8, 501-515 (2003).

²⁴ Wolfgang Strengmann-Kuhn, *Schritt für Schritt ins Paradies*, in WEGE ZUM GRUNDEINKOMMEN, 81-94, Bildungswerk Berlin der Heinrich-Böll-Stiftung (Dirk Jacobi/ Wolfgang Strengmann-Kuhn, ed. 2012).

²⁵ PATRICIA MERINO, MATERNIDAD, IGUALDAD Y FRATERNIDAD, 448 (2017).

²⁶ Richard Hauser, & Irene Becker, *Soziale Gerechtigkeit - ein magisches Viereck. Zieldimensionen, Politikanalysen und empirische Befunde*, in HANS-BLÖCKER-STIFTUNG (2009).

²⁷ Thomas Holzner, *Bedingungsloses Grundeinkommen im Lichte des deutschen Staats- und Verfassungsrechts*, in ZEITSCHRIFT FÜR POLITIK, 7, 190 (2015).

²⁸ According to art. 2 Grundgesetz (hereinafter GG) [Basic Law] (principle of free development of personality) in relation to art. 12. II GG it is not possible to force a person to work if they can live off interest income or a lottery prize. A duty to work as established by the Weimar Constitution would today be incompatible with the German Basic Law.

²⁹ Art. 12. II GG: Nobody can be obliged to perform a specific job except within the framework of a public duty of service that is habitual, general and equal for all.

the *neo-liberal version* of the BI.³⁰ The study of the implantation of the BI in the German legal system enables us to study both versions.

Having defined the sphere of application of the possible BI - the German legal system - we can proceed to analyse whether or not sufficient constitutional legal bases exist to introduce a universal or collective BI into the current legal system. To this end, it is necessary to specify the amount and define the recipients of this income. The following pages will attempt to pinpoint and redefine a model of BI that could be integrated within the model of social state established by the Constitution. Ultimately, it will be a question of providing legal justification for the validity of a specific model: the universal BI for minors, whilst ruling out the possibility of introducing a universal basic income for all.

II. DEFINITION OF THE BASIC INCOME AND ITS ALTERNATIVES

The basic income is an instrument that guarantees basic incomes, which has been given many different names over the years. The following formulae are currently employed to refer to the same concept: subsistence level income, basic income, universal basic income, unconditional basic income, guaranteed income, basic citizen's income and guaranteed universal subsidy.³¹ This work has opted for the term basic income, because of its simplicity.

I. Characteristics and features of the basic income

Before beginning to study the model of BI compatible with the existing social state, it is appropriate to define a basic income. Although many variations exist, a BI can be defined as a modest pecuniary quantity payable without any conditions to all individuals on a regular basis,³² irrespective of their family or economic circumstances.

Some authors stress that the BI is paid with the primary objective of increasing the individual's "freedom".³³ Thus, the BI would make it possible for autonomous and responsible people, freed of the obligation to work, to fulfil themselves,³⁴ or increase their income by freely choosing to work.³⁵ At the same time, the stigmatisation of unemployment is eliminated, salaries for badly-paid jobs increase, government bureaucracy is reduced, and there is greater innovation in society.³⁶

A particular feature of the BI is its *universality*. Which means that BI would be paid to each habitual resident of a specific region or country.³⁷ In other words, beneficiaries would have to be members of a particular community, according to the principle of territoriality.³⁸

Without a doubt, this should be an *individual* income. It would thus be paid to each individual, regardless of marital, family or domestic status. Unlike many other contemporary allowances, it would not be one income per family. If the basic income were paid to the family as a whole, one of the members could control and distribute it at will, subjecting the others to their control.³⁹ The BI would thus break with the presumption of automatic distribution of income within the household. It would be paid equally to adults, whatever their circumstances. Most advocates of the income argue that a lesser amount should be paid to children.⁴⁰

Assignment of the basic income should be *regular*, for example, on a monthly basis. Unlike most public benefits, the BI would be guaranteed and pre-established on a long-term basis. This predictability is a fundamental element of security and subsistence.⁴¹

The income would be payable in *cash*. Citizens have to be trusted to manage their domestic economy. It has been demonstrated that efficient economic distribution requires far less bureaucracy than the distribution of food, clothing and housing. An obvious example of basic income provided in kind is that which is employed in prisons,⁴² which is not a desirable model.

³⁰ As explained earlier, the *neo-liberal version* is the political ideology that defends the BI as a minimum sum guaranteeing subsistence and alleviating precariousness, but without freeing us from work. While it also proposes the dismantling of the social state. It is a version that goes against the idea pursued by this work, as, irrespective of the amount, the current social state should be maintained.

³¹ See VAN PARIJS & VANDERBORGHT, *supra* note 7, at 22-23; STANDING, *supra* note 5, at 26; JUAN RAMÓN RALLO, CONTRA LA RENTA BÁSICA. POR QUÉ LA REDISTRIBUCIÓN DE LA RENTA RESTRINGE NUESTRAS LIBERTADES Y NOS EMPOBRECE A TODOS, 415-424 (2015).

³² See STANDING, *supra* note 5, at 13.

³³ See VAN PARIJS & VANDERBORGHT, *supra* note 7, at 17.

³⁴ See Holzner, *supra* note 27, at 186; Werner Götz, *Hartz IV löst nur leid aus*, <https://taz.de/!347765/> (last visited Mar. 9, 2021).

³⁵ The results would vary depending on the design model of the Basic Income. See Holzner, *supra* note 27, at 186.

³⁶ See Götz, *supra* note 34, at 80 ff.

³⁷ See VAN PARIJS & VANDERBORGHT, *supra* note 7, at 32-38.

³⁸ *Id.* at 23.

³⁹ See RALLO, *supra* note 31, at 22-23.

⁴⁰ See VAN PARIJS & VANDERBORGHT, *supra* note 7, at 29; STANDING, *supra* note 5, at 15.

⁴¹ See STANDING, *supra* note 5, at 16.

⁴² See VAN PARIJS & VANDERBORGHT, *supra* note 7, at 27-29.

All its advocates agree that the benefit should be paid in *the absence of any kind of condition*. Consequently, being unconditional, the BI would be paid to every individual resident in a specific territory. The amount of work and cost involved in confirming fulfilment or not of conditions established by government agencies is common knowledge. In the first place, there would be no checking of resources and income. Secondly, the BI would be paid without restrictions or control of how and when the allowance is spent. Thirdly and lastly, there would be no conditions related to conduct or acceptance of specific jobs.⁴³ In simple terms, and to differentiate it from other welfare benefits, in order to receive the BI it is not necessary to demonstrate a state of need, or to have contributed to a state insurance scheme, or to be unemployed. This characteristic is what differentiates the BI from other state programmes like *integration minimum incomes*,⁴⁴ which will be explained below.

II. The advantage of the unconditionally of the basic income compared with the classic integration minimum income

In order to understand the subject matter of this study, apart from defining the characteristics of the BI, it has to be differentiated from other benefits. To this end, it is necessary to outline the current system of social legislation in Germany. The social state basically means the existence of the obligatory, supportive economic distribution of resources between high and low-earning citizens. It represents the most significant fiscal function of the German state, given that it accounts for 50% of the budget.⁴⁵ A more detailed explanation of the laws basically requires a differentiation based on European Community law: on the one hand, there is a social security system financed by contributions and, on the other, a system of social benefits financed by taxation.⁴⁶

The social security system (*Soziale Sicherung*) comprises the following insurances against professional contingencies: old age, health, dependency, unemployment and accidents. They are called insurances because access to them is via advance payment of contributions. Demonstrating a state of need is not a condition for their concession. As the BI is not focused mainly on the interests of workers, but attends more to the emancipation of the underprivileged, let us examine the allowances that demand a state of need. These are the social welfare benefits known as “social benefits in the strict sense”,⁴⁷ which are financed by taxation: social assistance (*Sozialhilfe*) in the twelfth book of the Social Security Act XII (hereinafter, SGB) and the unemployment benefit (*Arbeitslosengeld II*) in the second book of the Social Security Act (SGB II). Added to these are the following allowances for the young in the eighth book of the Social Security Act (SGB I) and all the other benefits included in the § 68 of the first book of the Social Security Act (SGB I): study grants (*Bäfo*), housing, maintenance, child care allowances, child benefit (*Kindergeld*), paid parental leave etc.⁴⁸

The total volume of welfare benefits in the strict sense - financed by taxation - is around 147,000 million euros per year. For example, for 2012 the following figures are available (in millions of euros): unemployment benefit (SGB II) 46,400, social assistance (SGB XII) 25,000, housing 2000; paid parental leave 4,700, children and the young (SGB VIII) 25,000; study grants (*Bäfo*) 2,200, child care allowances 1,100, and finally, child benefit (*Kindergeld*) 41,000. In short, the cost of benefits in the strict sense accounts for only 19% of a total welfare benefit budget of 760,500 million euros.⁴⁹

There currently exist other alternative forms of income transfer by the state the characteristics of which partly overlap with the BI, and which, for this reason, are usually confused with the latter. For this reason, it is appropriate to clarify the similarities and the differences between the basic income and other state programmes.⁵⁰ Most notably, the minimum income and the basic income are two different formulae that are sometimes confused. First of all, it is necessary to address the subject of conditional minimum incomes.

⁴³ See STANDING, *supra* note 5, at 15-16; VAN PARIJS & VANDERBORGHT, *Supra* note 7, at 38-41

⁴⁴ See RALLO, *supra* note 31, at 23.

⁴⁵ KURT-PETER MERK, *EUROPÄISCHES UND INTERNATIONALES RECHT FÜR SOZIALE BERUFE*, 200 (2004).

⁴⁶ Kurt-Peter Merk, *Ein bedingungsloses Grundeinkommen in Deutschland für Kinder und Jugendliche in sozialrechtlicher und familienpolitischer Sicht*, in *Auf dem Prüfstand: Ein bedingungsloses Grundeinkommen für Deutschland?*, in *ZEITSCHRIFT FÜR POLITIK*, 7, 77 (Rigmar Osterkamp, ed. 2015); THOMAS OPPERMAN, CLAUS DIETER CLASSEN & MARTIN NETTESHEIM, *EUROPARECHT*, 533 ff, 4. Edition (2009).

⁴⁷ The social assurance system is called “welfare state system”. See Merk, *supra* note, 46, at 200.

⁴⁸ EBERHARD EICHENHOFER, *SOZIALRECHT DER EUROPÄISCHEN UNION*, 188, (2010); See MERINO, *Supra* note 25, at 448.

⁴⁹ See Merk, *supra* note, 46, at 200 201; STATISCHES BUNDESAMT [Federal Statistics Office], *Statisches Jahrbuch Bundesanzeiger* (2012), https://www.statistischebibliothek.de/mir/servlets/MCRFileNodeServlet/DEAusgabe_derivate_00000139/1010110127004.pdf;jsessionid=E40315170F15F6B941BAE09CDC84F81C.

⁵⁰ In this context it is worth mentioning: unemployment insurance benefit, contributory and non-contributory pensions, guaranteed work, food subsidies and vouchers, taxcredits, participatory income, negative income tax, and finally integration minimum incomes. In this study - given the similarity of the term and the brevity of the article - only the last one should be studied. For more information about the similarities and differences between the basic income and other state programmes. See RALLO, *supra* note 31, at 415-424; STANDING, *supra* note 5, at 151-173.

Minimum incomes are allowances for people who have lost the right to receive any kind of benefit and constitute a last resort safety net that guarantees subsistence. They are conditional programmes by means of which the state guarantees the poor some income provided they can demonstrate a state of need.

This mechanism extends the old model of public aid created in the 16th century and which today takes the form of guaranteed minimum income programmes subject to certain conditions. The programme helps to supplement the income that poor households obtain directly or indirectly by means of work, until they reach a certain limit established by the authorities. The beneficiaries have the right to a regular monetary allowance for as long as they remain in poverty against their will.

This allowance is paid to those individuals who do not attain a minimum income threshold in order to guarantee their subsistence, being conditional upon fulfilment of the obligations set out in the inclusion agreement⁵¹ which the recipient must sign in order to receive the income (obligations that include integrating within society, seeking work, exhausting one's assets and savings and receiving retraining).

This social aid programme differs from the BI on account of both its being conditional upon income level and the obligation to work or have worked.⁵² In Europe the quantities paid differ considerably from one country to another, owing to the differences in terms of cost of living and spending power.⁵³

Although this tool helps to ensure the subsistence of recipients, it also has some disadvantages that call it into question: it stigmatises and humiliates them, restricts the beneficiary to a spiral of poverty from which it is difficult to escape.⁵⁴ Ultimately, although it helps to alleviate the situation of poverty in which individuals find themselves, this income does not provide an exit from that situation, but actually perpetuates the latter: this is known as the "poverty trap". In other words, in practice it is a disincentive to work. So, as well as discouraging the beneficiary from actively looking for a job (quite the contrary of the goal of social aid), it is an inefficient means of ending inequality and poverty.⁵⁵

Furthermore, it excludes from its coverage: minors (perpetuating child poverty), the long-term unemployed⁵⁶ and housewives. Many families even choose not to apply for the allowance so as not to be stigmatised, to prevent the state from controlling their lives and restricting their already limited freedom by means of activation programs.

A recent study⁵⁷ has revealed that currently there are more poor children in Germany (4.4 million) than had previously been estimated. According to official government figures, there are three million children living in poverty. However, this figure only includes families that receive welfare benefits. In fact, according to the study there are 1.4 million minors living in families that have not applied for welfare benefits, because their parents are dissuaded by the bureaucracy, guidelines and stigmatisation this involves. This is not a trivial decision, as to demonstrate a state of need one first has to exhaust one's savings and sell all the assets accumulated over the space of a lifetime.

Consequently, experience teaches us that the minimum income will be an inefficient and insufficient instrument to guarantee assistance for the enormous quantity of unemployed people that society will have to support in the not-too-distant future. We know today that both types of income are important in order to alleviate poverty, but an unconditional income goes further than the conditional minimum income. The objective of the BI is not to alleviate poverty but to scape it.⁵⁸

III. The ambiguous meaning of the term "basic" and its different conceptions

The objective of the term *basic* is to provide basic security, and not total security, which would be neither viable nor desirable. There is a variety of opinions as to what might constitute a BI. According to the theory of "good society" this income should ensure that an individual has enough to eat and a roof over their head, access to health care and training opportunities. Others argue in abstract and imprecise fashion that it

⁵¹ "The *minimum income* is at the opposite extreme to the *basic income* and is in a sense its antithesis: it is not universal (it is limited to those on the edge of subsistence), is not unconditional (it is conditional upon the search for employment or the fulfilment of other obligations conducive to social reinsertion), is subsidiary rather than priority (subsidiary to other public or private benefits that may be received) and the quantity is not added to but complements the income the beneficiary may receive (in other words, if it is established that a person needs 500 euros a month to survive, the *integration minimum income* does not pay 500 euros per month to every person in need, but the difference between other incomes received and the 500 euros per month)". See RALLO, *supra* note 31, at 416.

⁵² See RALLO, *supra* note 31, at 423.

⁵³ The system of minimum incomes in Spain is complex and fragmented, since it is a competence of the Autonomous Communities.

⁵⁴ See VAN PARIJS & VANDERBORGHT, *supra* note 7, at 27.

⁵⁵ FRANZ SEGBERS, GRUNDEINKOMMEN-VORAUSSETZUNG FÜR SELBSTVERWIRKLICHUNG UND TEILHABE?, https://cdn.website-editor.net/98d5a38d38064defa97b9164c019f4fe/files/uploaded/Stuttgart_2018_03_01.pdf (last visited Mar. 9, 2021).

⁵⁶ *Id.* at 1.

⁵⁷ DEUTSCHE KINDERSCHUTZBUND BUNDESVERBAND e.V. [Study by the German Federation for the Protection of Children], <https://www.dksb.de/de/artikel/detail/kinderarmut-deutlich-hoehere-als-gedacht-44-millionen-kinder-sind-nach-berechnungen-des-dksb-betroff-1/> (last visited Mar. 9, 2021).

⁵⁸ See VAN PARIJS & VANDERBORGHT, *supra* note 7, at 20-21.

should guarantee “participation in society,”⁵⁹ which prepares and positions the individual in society as a citizen of equal status⁶⁰

We also find various and sometimes conflicting stances vis-à-vis how high the income should be. Basically, the BI has become part of the political, social and economic landscape in recent years, with supporters among both social democrats and liberals, which regard it as a solution to the problems and imbalances generated by economic crises and globalization.⁶¹

However, it should be emphasised that today the BI itself is neither a left-wing nor a liberal measure. It does not have socialist origins, as one would expect, but a liberal provenance. Its beginnings date back to the idea of a negative tax proposed in the United States, which was even discussed within the government of liberal President liberal Valéry Giscard d’Estaing.⁶²

As stated above, the BI has the flexibility to adapt to the politics of each context or historical moment. There is no unique model of and each model responds to an ideology and political profile that pursues different objectives. There are very different proposals with regard to the quantity of the allowance, its financing, reforms of social and fiscal systems and its relationship with employment.⁶³ The introduction of a BI might involve tax changes that could pose constitutional questions, which this study does not propose to analyse in depth.⁶⁴ So advocating the BI in abstract fashion, apart from not making sense, has dangerous consequences. In principle, one identifies two major trends: the neo-liberals and the social democratic emancipatory movement.

The *right-wing neo-liberal version* argues that the BI should have a sustainable high level, which should be a quantity superior to the poverty threshold. Furthermore, the usual argument is that the BI could replace all state services and welfare benefits.⁶⁵ In other words, advocates of the free market support the idea of a generous BI, but on condition that public services are privatised, which would represent a loss of social gains achieved by previous generations and the dismantling of the Welfare State.⁶⁶ The BI would not be introduced for reasons of social justice, but to reduce the cost of social contributions and free the social market economy of the pressure of full employment.⁶⁷ This tool, rather than encourage revolutions, puts a brake on them.⁶⁸

On the other hand, the *left-wing emancipatory version* advocates a top-to-bottom distribution of income (with higher taxation of the wealthier) to guarantee a minimum level of existence and participation in society as an extension of the social security network.⁶⁹ It is clear that, regardless of the quantity payable, the BI should not serve as a pretext to dismantle the welfare state.⁷⁰ In other words, the state should continue to guarantee the existence of the welfare state.⁷¹ Therefore, the second variant of the BI model would be more in line with the point of view expressed in this work, albeit acknowledging its utopian nature and at risk of too radical a break with the existing social security system, resulting in situation that produces more harm than good.⁷² It should be remembered that to date the system has functioned according to the principle of justice of compensation in exchange for something. The new version should aim to adhere as closely as possible to this principle; otherwise, it would not be accepted by a part of the population.⁷³

Although the BI is normally based on an idea of social reform, the point of view expressed in this work is that the BI should be implemented via the development of the existing social security system, not by means of its dismantling.⁷⁴

⁵⁹ In line with the current constitutionalism of art. 9.2. SC and art. 3.2. of the Italian Constitution. See Giuseppe Ugo Rescigno, *Il progetto consegnato nel comma secondo dell’art. 3 della Costituzione italiana*, in REVISTA AIC, https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_2003-2010/dottrina/libertadiritti/rescigno.html (last visited Mar. 9, 2021); Beniamino Caravita, *Oltre l’eguaglianza formale: un’analisi dell’art. 3 comma 2 della costituzione*, in PUBBLICAZIONI DELL’ISTITUTO DI DIRITTO PUBBLICO DELLA FACOLTÀ DI GIURISPRUDENZA, 175-195 (1984); Luis Prieto Sanchís, *Los derechos sociales y el principio de igualdad sustancial*, in REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES, 22, 9-57 (1995).

⁶⁰ STANDING, *supra* note 5, at 13-14.

⁶¹ In this context one could also mention ecologists, feminists etc.

⁶² See Schönherr-Mann, *supra* note 6, at 23.

⁶³ See Holzner, *supra* note 27, at 185; SEGBERS, *supra* note 55, at 2.

⁶⁴ See Holzner, *supra* note 27, at 195.

⁶⁵ See STANDING, *supra* note 5, at 14; Segura, *supra* note 17, at 180.

⁶⁶ See THOMAS STRAUBHAAR, RADIKAL GERECHT, WIE DAS BEDINGUNGSLOSE GRUNDEINKOMMEN DEN SOZIALSTAAT REVOLUTIONIERT (2017).

⁶⁷ See Schönherr-Mann, *supra* note 6, at 30; SEGBERS, *supra* note 55, at 2.

⁶⁸ See Schönherr-Mann, *supra* note 6, at 31.

⁶⁹ See Segura, *supra* note 17, at 180; Casassas & De Wispelaere, *supra* note 7, at 111.

⁷⁰ See STRAUBHAAR, *supra* note 66.

⁷¹ See STANDING, *supra* note 5, at 14.

⁷² See SEGBERS, *supra* note 55, at 4; Guillem Lopez i Casasnovas, *Cuidado con la renta básica*, in EL PAIS, September 2 (2018) <http://www.elpais.com> (last visited Mar. 9, 2021).

⁷³ It proposes that in times of job precariousness, work is more than a job. So it proposes an extension of the definition of the term work in the Social Security to make it possible for more people to enjoy coverage and protection in the Social Security. SEGBERS, *supra* note 55, at 8.

⁷⁴ *Id.* at 4.

The key question is whether the current system of social protection has a similar basis and origin to the BI. In any case, it should be borne in mind that a badly designed or implemented basic income could leave citizens worse off than under existing social protection programs.⁷⁵ This work believes that the emancipatory goals of a BI will be realistic if they improve, strengthen and legitimate the existing Welfare State. Moreover, their implementation should follow a policy of gradual advances, which, ultimately, allow for partial reform of the social security system.⁷⁶

Examples with these characteristics exist. Unlike the universal BI for all - which continues to be a utopia⁷⁷ -, there are already specific sectors of the population (minors in Germany and pensioners in Sweden⁷⁸) that are receiving a BI.⁷⁹ Each of these incomes responds to different problems and social challenges.

III. EXAMINATION OF THE QUESTIONABLE CONSTITUTIONALITY OF THE UNIVERSAL BASIC INCOME IN THE AGE OF ROBOTICS

I. Criticism of two theories on the fourth industrial revolution: the end of work and the need for a universal Basic Income

The fact that we have suffered a crisis is not reason enough to now justify with the BI a change in the model of social protection. Without a doubt, we have always lived in crisis to a greater or lesser degree. Why then is the BI more popular and urgent than ever today?

We are currently experiencing the third industrial revolution⁸⁰ and are already in the brink of the fourth, known as the technological digital revolution.⁸¹ This concept is not yet a reality,⁸² but there is no doubt that it will bring major social changes in the years to come.⁸³ Because of the changes in the work market during this phase, there is concern over the number of workers that will find themselves unemployed.⁸⁴ According to forecasts, long-term unemployment will be so high - half the jobs in Europe may disappear -⁸⁵ that it will be necessary to introduce a BI in order to guarantee social peace and a minimum consumption capacity on the part of the population. In view of this, solutions are needed to compensate for the lack of income caused by the shortage of work. The outlook leads many to the conviction that the growing unemployed population needs to be offered some means of livelihood.⁸⁶ The BI appears to be the most popular option.⁸⁷

Specifically, concern is focused on the stereotypical worker in full-time employment until their retirement. It is widely accepted that this kind of worker is set to become rarer and rarer.⁸⁸ As we know, this development will threaten not only citizens' subsistence, but also the pension system itself, financed as it is by workers' contributions. Consequently, we face a complex problem that embraces both employment and the sustainability of the social security system.

In this context, it should be remembered that since the industrial revolution there has been an ever-present fear of workers being replaced by machines. In other words, fear of the disappearance of jobs owing to the advance of technology has been a recurrent and politically profitable topic in times of high unemployment.

⁷⁵ See STANDING, *supra* note 5, at .65; Lopez, *supra* note 72.

⁷⁶ See SEGBERS, *supra* note 55, at 5; for more information about a collective Basic Income see Ulrike Hermann, *Das Grundeinkommen im Jahr 2025*, in WEGE ZUM GRUNDEINKOMMEN, 71-74 (Dirk Jacobi & Wolfgang Strengmann-Kuhn 2012); Strengmann-Kuhn, *supra* note 24, at 81-94.

⁷⁷ See MAX BAUER, UBI UTOPIA? VERFASSUNGSRECHT UND GRUNDEINKOMMEN (2016).

⁷⁸ See Strengmann-Kuhn, *supra* note 24, at 81-94.

⁷⁹ See Letzner, *supra* note 23, at 501-515.

⁸⁰ The third industrial revolution, also known as the scientific-technological revolution or intelligence revolution, involves the combination of Internet communication technology and renewable energies in the 21st century. See JEREMY RIFKIN, LA TERCERA REVOLUCIÓN INDUSTRIAL, CÓMO EL PODER LATERAL ESTÁ TRANSFORMANDO LA ENERGÍA, LA ECONOMÍA Y EL MUNDO (2011).

⁸¹ ERIK BRYNJOLFSSON & ANDREW MCAFEE, THE SECOND MACHINE AGE: WORK, PROGRESS, AND PROSPERITY IN A TIME OF BRILLIANT TECHNOLOGIES (2014).

⁸² The first industrial revolution brought the greatest set of economic, technological and social transformations in the history of humanity since the Neolithic age, with the shift from a rural economy fundamentally based on agriculture and commerce to an urban, industrialized and mechanized economy. The second industrial revolution consisted of the set of socio-economic transformations produced between 1890 and 1938. Julián Chaves Palacios, *Desarrollo tecnológico en la Primera Revolución Industrial*, in REVISTA DE HISTORIA, 17, 93-109 (2004).

⁸³ For more on the changes predicted for 2050, See YUVAL NOAH HARARI, 21 LECCIONES PARA EL SIGLO XXI (2008).

⁸⁴ According to the estimates included in the report *The Future of Jobs*, published in 2016 by the World Economic Forum, between 2015 and 2020 around 7 million jobs will be lost all over the world, mostly in routine office and clerical work. In parallel, barely 2 million new jobs will be created in the STEM area (Science, Technology, Engineering and Mathematics), so the net balance of the advance of the Digital Revolution during these 5 years will be the loss of around 4 million jobs. Segura, *supra* note 17, at 177.

⁸⁵ See SEGBERS, *supra* note 55, at 1.

⁸⁶ See VAN PARIJS & VANDERBORGHT, *supra* note 7, at 20.

⁸⁷ See NOAH HARARI, *supra* note 83, at 58.

⁸⁸ Maddalaine, Ansell, *Jobs for life are a thing of the past. Bring on lifelong learning*, in THE GUARDIAN, 31st May 2016 (<http://www.theguardian.com> (last visited Mar. 9, 2021); Miravet, *supra* note 14, at 145.

This fear has also materialised in philosophical currents like Luddism, which gave rise to the destruction of machines, was characterised by opposition to the introduction of modern machinery in the 19th-century production process and claimed that machines would leave workers without jobs.⁸⁹ Even early in the last century, leading economists⁹⁰ proposed solutions geared towards the sustainability of employment in a context of automatization. Later, in the age of internet and globalization - the 1980s and 1990s - the same fears emerged, predicting the end of employment.⁹¹ However, history has shown this not to be the case.⁹²

Analysis of the short-term impact of earlier revolutions only points with any degree of certainty to the disappearance of low-skilled jobs. The long-term effect on employment has not been harmful, and workers have in fact enjoyed more free time, higher salaries and less monotonous and dangerous jobs. There has also been a generalised fall in prices,⁹³ which has increased spending power. Ultimately, the standard of living of workers has risen in spectacular fashion.⁹⁴

Curiously, figures show that more robotised countries - like Germany - have lower rates of unemployment (3,1%), than less robotic nations like Spain (in 2019 unemployment stood at 14,1%).⁹⁵ Moreover, bearing in mind that Germany recovered from the crisis sooner, it can be concluded that unemployment is the result of other factors and not technology.

Ultimately, it is easy for populist ideological sectors (both left- and right-wing) to blame the rise in unemployment on technology, proposing a BI to quell the protests of those excluded from society.⁹⁶ The loss of jobs due to robotics could be the perfect pretext for the introduction of a basic income.⁹⁷

There is no doubt that it is very difficult to make an accurate forecast vis-à-vis the future of production systems and the labour market.⁹⁸ But it would be unwise to rush into modifying or eliminating the system of social protection by means of the BI on the basis of mere speculation.⁹⁹ Therefore, taking into account all the above, one can say that the fear of the disappearance of all industries in the short¹⁰⁰ and medium term, owing to robotics, is unfounded. So this is not an argument that legitimates the BI.

II. The unconstitutionality of the implantation of a universal basic income

Although the concept of the BI has enjoyed considerable support in many sectors of society in recent years, there are still a number of objections. It is common knowledge that any significant idea in relation to social policies is initially attacked for three reasons: it will not work, it will have unknown and undesired consequences, and it will jeopardise other objectives (risk).¹⁰¹ In the particular case of a BI, the following arguments are added:¹⁰² its financing would not be viable, it is a utopia, it will encourage parasitism¹⁰³ (beneficiaries will stop working), conditional subsidies intended for those in a state of need are preferable, it would lead to the dismantling of the welfare state, it would break with the policy of full employment, increase the number of people out of work, it would lower salaries, it would be inflationary and would stimulate immigration.

It is important to analyse some of these arguments in relation to its legality. In the event of the implementation of a universal BI, from a perspective of *formal legality*, the main issue to be clarified would be

⁸⁹ See Segura, *supra* note 17, at 170-173.

⁹⁰ STUART MEDINA MILTIMORE, EL LEVIATÁN DESENCADENADO (2016); JOHN MAYNARD KEYNES, ECONOMIC POSSIBILITIES FOR OUR GRANDCHILDREN (1930).

⁹¹ See Segura, *supra* note 17, at 170-171.

⁹² See NOAH HARARI, *supra* note 83, at 38; Segura, *supra* note 17, at 170; Harald, Seubert, *Das bedingungslose Grundeinkommen in rechtsphilosophischer und theologischer Perspektive*, in ZEITSCHRIFT FÜR POLITIK, 7, 176 (2015).

⁹³ See Segura, *supra* note 17, at 171.

⁹⁴ GREGORY WOIROL, THE TECHNOLOGICAL UNEMPLOYMENT AND STRUCTURAL UNEMPLOYMENT DEBATES, 18-20 (1996); AMY SUE BIX, INVENTING OURSELVES OUT OF JOBS? AMERICA'S DEBATE OVER TECHNOLOGICAL UNEMPLOYMENT 1929-1981, 1-8 (2001); JOE MOKYR, THE GIFTS OF ATHENA: HISTORICAL ORIGINS OF THE KNOWLEDGE ECONOMY, 255-257 (2002); Melanie Arntz, Terry Gregory & Ulrich Zierahn, *The risk of automation for Jobs in OECD countries*, in OECD SOCIAL, EMPLOYMENT AND MIGRATION WORKING PAPERS 89 (2016); PIVA, Mariacristina & VIVARELLI, Marx, *Technological change and employment: were Ricardo and Marx right?*, in IZA INSTITUTE OF LABOR ECONOMICS, DISCUSSION PAPER, 10471 (2017).

⁹⁵ See INTERNATIONAL FEDERATION OF ROBOTICS (IFR) for robotic density. <https://ifr.org/ifr-press-releases/news/robot-race-the-worlds-top-10-automated-countries> (last visited Mar. 9, 2021); See EUROSTAT for unemployment statistics in European countries. <https://ec.europa.eu/eurostat/databrowser/view/tps00203/default/table?lang=en> (last visited Mar. 9, 2021).

⁹⁶ See Segura, *supra* note 17, at 172.

⁹⁷ *Id.* at 183.

⁹⁸ For more on forecasts for the future See NOAH HARARI, *supra* note 83, at 44.

⁹⁹ See Segura, *supra* note 17, at 186; on speculation. See NOAH HARARI, *supra* note 83, at 53.

¹⁰⁰ See NOAH HARARI, *supra* note 83, at 44.

¹⁰¹ ALBERT HIRSCHMANN, DENKEN GEGEN DIE ZUKUNFT. DIE RHETORIK DER REAKTION (1992).

¹⁰² See Bertomeu & Raventós, *supra* note 13, at 22-27; STANDING, *supra* note 5, at 93-105.

¹⁰³ See Holzner, *supra* note 27, at 190.

whether the federal government has exclusive competence to introduce a BI on the basis of art. 74 I 12 GG.¹⁰⁴ There are doubts as to whether the BI is a competence of the federal government in the area of unemployment and social welfare. This would be one of the first legal questions to clarify with regard to the BI, but one that will not be analysed in depth,¹⁰⁵ since this work focuses above all on concepts related to *material legality*.

The availability of benefits without proof of need or conditions does not derive from the Constitution.¹⁰⁶ Therefore, the legislator does not violate their freedom of legal configuration by rendering social protection conditional upon the lack of other means in order to ensure subsistence.¹⁰⁷ Equally lawful are the different requirements involved in the process of applying for aid. Consequently, these do not violate the right to human dignity, not even in cases when individuals are discouraged from submitting their application. In this sense, the Constitution neither defends nor requires unconditional concession of the BI.¹⁰⁸

Nobody questions the fact that the allowance should guarantee the minimum subsistence level of the individual recipient. However, what is meant by minimum level? According to German Constitutional Court case law (*Bundesverfassungsgericht*) the quantity payable should be guided by the principle of human dignity (art. 1 GG) and the social state (art. 18 and art. 20 GG).¹⁰⁹ As a result, the state should provide the minimum conditions necessary to ensure that all members of society enjoy a dignified existence.¹¹⁰ This should prevent people from living in insufficient economic circumstances. In this context it guarantees what is sufficient for a minimum material existence,¹¹¹ so will only provide physical necessities;¹¹² clothing, food, accommodation, heating and health care.¹¹³

However, as the Constitution does not specify the obligatory level of the allowance, the German Constitutional Court prescribes the indicative reference of social welfare aid (*Sozialhilfe*), which equates to an integration minimum income. Therefore, the legal system follows the reference of the social assistance¹¹⁴ established by¹¹⁵ the legislator in accordance with the principle of human dignity.¹¹⁶ In this sense, the legislator should take into account the social consensus of the moment that expects a minimum subsistence level that allows for socio-cultural participation.¹¹⁷

So the BI, which follows the reference of social aid (*Sozialhilfe*), will be governed by the principle of the state of need,¹¹⁸ which is covered by the minimum amount of the social aid.¹¹⁹ Other additional special needs

¹⁰⁴ Art. 74 I 12 GG Area of Social Security including unemployment insurance: labour law with inclusion of the system of organic regulation of companies, labour protection and job centres, and social insurance with the inclusion of unemployment insurance.

¹⁰⁵ For more about the conditions of its legal formality see DEUTSCHE BUNDESTAG [German Parliament] Wissenschaftliche Dienste. Rechtliche Voraussetzungen für die Einführung eines bedingungslosen Grundeinkommens in Deutschland, 3-5. <https://www.bundestag.de/resource/blob/485786/617093ae998b8ff2868436ce1929cf81/wd-3-262-16-pdf-data.pdf>

¹⁰⁶ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2866 (2867), 2010 (Ger.).

¹⁰⁷ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 505 (507) (margin no. 134, 2010 (Ger.)).

¹⁰⁸ See Holzner, *supra* note 27, at 188.

¹⁰⁹ *Id.* at 186.

¹¹⁰ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 121 (133); 44, 353 (375); 48, 346 (361); 82, 60 (80, 85); 84, 133 ff.; 89, 346 (353); 125, 175 (222); 132, 134 (159 margin no. 62 ff) (Ger.). Matthias Herdegen, in GRUNDGESETZ. LOSEBLATTSAMMLUNG KOMMENTAR SEIT 1958, art. 1 margin no. 121 (Theodor Maunz & Günter Dürri 2010); Ulrich Sartorius, DAS EXISTENZMINIMUM IM RECHT (2000).

¹¹¹ In other words, while from the principle of social state derives an objective obligation of the State, the human dignity creates a subjective law which should guarantee a dignified existence. Maximilian Wallerath, *Zur Dogmatik eines Rechts auf Sicherung des Existenzminimums*, in JURISTENZEITUNG, 63, 157-168 (2008).

¹¹² See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 125, 175 (223) (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVerwGE] 35, 178 (180) (Ger.).

¹¹³ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 120, 125 (155 ff); 132, 134 (159 margin no. 64) (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVerwGE] 14, 294 (296 ff); 87, 212 (214) (Ger.).

¹¹⁴ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 99, 246 (259).

¹¹⁵ José Martínez Soria, *Das Recht auf Sicherung des Existenzminimums*, in JURISTENZEITUNG, 13, 644 (2005).

¹¹⁶ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 22, 180 (204); 125, 175 (224 ff); Bundessozialgericht [BSG] [Federal Social Court] ENTSCHEIDUNGEN DES BUNDESZOZIALGERICHTS [BSGE] 97, 265 margin no.51; 100, 221 margin no.31 (Ger.).

¹¹⁷ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 125, 175 (223); 132, 134 (159 margin no.64, 66 ff) (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVerwGE] 14, 294 (296 ff); 25, 307 (317 ff); 107, 234 (234 (236) (Ger.); Christian Starck, in DAS BONNER GRUNDGESETZ KOMMENTAR, art. 1 I margin no. 24 (Hermann Mangoldt, Friedrich Klein & Christian Starck, 6 ed. 2010).

¹¹⁸ See Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVerwGE] 108, 47 (53) (Ger.).

would be investigated and covered in each individual case according to the principle of individualization.¹²⁰ However, as with the BI there are neither conditions nor proof of individual need, on occasions the amount falls below what is required by the Constitution.¹²¹ Ultimately, one can say that the amount of the BI would not guarantee the minimum subsistence level provided for in the constitution, given that as it is an unconditional and universal benefit, the *principle of individualization* is disregarded.

A BI that ensured a minimum subsistence level could have two effects. On the one hand, the possibility of freely choosing a job without any kind of economic pressure.¹²² In this case, the image of the individual in the Constitution (*Menschenbild*)¹²³ would be respected

On the other hand, with no obligation or pressure to work, there would be a risk of the individual completely abandoning the labour market.¹²⁴ This would occur, above all, in cases in which the amount of the BI exceeded income from work. As a result, the state would be responsible for discouraging people from working and creating dependence on welfare benefits.¹²⁵ Meaning the individual would move from dependence upon a job to dependence upon social security benefits.

The dignity of the individual¹²⁶ (art. 1.1 GG) does not contemplate the obligation to work, but rather a person's inviolable right to a minimum subsistence level.¹²⁷ However, in this context it should be borne in mind that associating art. 1.1 GG with other fundamental rights creates a specific image of a person (*Menschenbild*): that of the responsible and sovereign individual that develops their personality, and thereby achieves fulfilment.¹²⁸ An essential element of this life of autonomy, responsibility and self-fulfilment is the possibility of working.

The understanding is that a job¹²⁹ provides independence via an economic foundation and social recognition.¹³⁰ This is made clear by the special protection of the right to work in art. 12 I GG.¹³¹

In this context, it should not be forgotten that the integrating function of work along with the subsidiarity of state benefits are not only essential for the individual, but also for society. Thus, the system of social protection is mainly based on the citizen's own sense of responsibility and production capacity, which will generate income to pay benefits. To this end, the social state requires individuals to cooperate in accordance with their possibilities and make a contribution to society.¹³² In this way, freedom is combined with responsibility. However, solidarity has to be subsidiary¹³³ and should help beneficiaries to escape from poverty by dint of their own efforts in order to reduce social costs as far as possible. Nevertheless, the unconditionality of the BI encourages the individual to retire at society's expense.¹³⁴ This not only eliminates the integrating function of the social state,¹³⁵ but also endangers its financing.¹³⁶

¹¹⁹ See Holzner, *supra* note 27, at 187.

¹²⁰ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 132, 134 (159 margin no. 62).

¹²¹ See Holzner, *supra* note 27, at 188.

¹²² See Götz, *supra* note 34.

¹²³ See Holzner, *supra* note 27, at 190.

¹²⁴ Siebert Horst, *Gegen die bedingungslosen Grundeinkommen*, in FAZ, 27th June 2007, <https://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/standpunkt-ein-grundeinkommen-fuer-alle-1459479.html> (last visited Mar. 9, 2021).

¹²⁵ See Martínez, *supra* note 115, at 644.

¹²⁶ The human image (*Menschenbild*) in relation to and placed within society arising from the right to human dignity is the predominant idea when interpreting fundamental rights. However, it does not normally result in specific declarations beyond those related to fundamental rights. Therefore, no right of a person's self-fulfilment in society can be derived. So the image of the individual pursued by the Basic Law neither follows nor protects the idea of Basic Income. See Holzner, *supra* note 27, at 189.

¹²⁷ See Götz, *supra* note 34, at 59 ff.

¹²⁸ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 4, 7 (15); 41, 29 (50); 45, 187 (227); 108, 282 (300); 115, 118 (158); 221, 69 (92) (Ger.).

¹²⁹ According to Kant, "The individual does not have a right to do nothing". Emmanuel Kant, *DIE METAPHYSIK DER SITTEN*, Rechtslehre (margin no. 6), 447 (1797).

¹³⁰ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 50, 290 (362); 81, 242 (254); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVerwGE] 67, 1 (5). For more See Hans-Peter Schneider, *Artikel 12 GG - Freiheit des Berufs und Grundrecht der Arbeit*, in VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTSLEHRER, 43, 7-15 (1985).

¹³¹ See Holzner, *supra* note 27, at 190.

¹³² For this reason, for example, the Bavarian Constitution regulates in art. 166 III an obligation to work.

¹³³ See Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVerwGE] 23, 149 (153); 47, 103 (106 ff.); 67, 163 (168) (Ger.).

¹³⁴ See Horst, *supra* note 124.

¹³⁵ See Heinz Stapf-Finé, *Ein Grundeinkommen sprengt unser Sozialsystem. Bedarforientierte Grundsicherung ausbauen - und so (Alterns-)Armut vermeiden*, in SOZIALE SICHERHEIT, 257 (2007).

¹³⁶ See Holzner, *supra* note 27, at 192.

This dissociation from work¹³⁷ neither coincides with the notion of the person's right to dignity (art. 1.1 GG), nor represents the Constitution's image of humanity (*Menschenbild*), which is that of an individual related to and integrated within society through work.¹³⁸ In other words, the Constitution does not reflect the image of the isolated and independent individual promoted by the BI.¹³⁹ The BI would render this socialisation superfluous for part of the population.¹⁴⁰

Finally, this work concludes that the German Constitution does not require this instrument, and also that the amount of the BI falls below the constitutional guarantees that ensure existence, given that it does not guarantee the minimum individual subsistence level demanded by the Constitution. In other words, without the condition of proof of need, all benefit equally, special individual needs are not covered.¹⁴¹

In this context, it is worth noting that social benefits should be understood according to the slogan "help for self-help" (*Hilfe zur Selbsthilfe*). In other words, they are intended to help the individual to find a new job, so social aid has a subsidiary nature.¹⁴²

The BI turns upside down this principle of exception, where the allowance is the rule and work is voluntary. For this very reason, it is appropriate to conclude with the unconstitutionality of this model of BI.¹⁴³ From the constitutional point of view, it is possible to extend and develop the social security and tax system. However, there are serious doubts as to the constitutionality of a BI of this type.¹⁴⁴

IV. CONSTITUTIONAL LEGITIMACY OF THE COLLECTIVE BASIC INCOME IN VIEW OF THE PROBLEMS ARISING FROM THE BREACH OF THE GENERATIONAL CONTRACT

I. Basic Income to guarantee the generational contract

It is obvious that among the serious problems facing the future of Europe is the demographic crisis.¹⁴⁵ The continent is ageing at a rate of knots and forecasts estimate that by 2035 the problem will affect every member state with the exception of Ireland and France. It will be difficult for future generations to enjoy today's standards of living, in the absence of generational renewal (an indispensable element for the maintenance of the system).

Specifically, the low birth rate means that there is insufficient generational replacement to guarantee maintenance of the system of social protection, and of pensions in particular. As we know, old age pensions represent the largest component of the social protection budget. Political promises with regard to the sustainability of the pension system, which totally ignore demographics, have lost all credibility. The silent redistribution battle between young and old is threatening the systems. Instead of becoming the most dynamic and competitive zone in the world, as predicted by the Lisbon Strategy,¹⁴⁶ Europe is on the way to becoming a retirement home. The demographic factor is an economic problem to which the state should pay due attention.¹⁴⁷

It should be emphasised that the pension system, has always had a fundamental flaw. The problem lies in its financing: in the *short term* via economic contributions (known as "pay-as-you-go"), and in the *long term* via investment in the generation of human capital.¹⁴⁸ While the former take the form of workers' contributions, human capital depends on the birth of children who in the future will finance pensions. Therefore, for the system to function, the following are necessary: high contributions made possible by a healthy economic situation, and several children per citizen. Which means that when either of these elements fails - as is the case today - the system enters a crisis.

¹³⁷ See Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVerwGE] 67, 1 (5) (Ger.).

¹³⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 4, 7 (15 ff); 33, 303 (334); 45, 187 (227); 109, 133 (151); 221, 69 (92) (Ger.).

¹³⁹ According to Kant's doctrine, the concession of an emancipatory Basic Income to the individual would be illegal from the point of view of property rights and has no specific constitutional relationship. Gerald Süchting, *Die Rechtswidrigkeit des Bedingungslosen Grundeinkommens*, in VON DER IDEE DES GEMEINBESITZES ZUM PROJEKT EINES UNBEDINGTEN GRUNDEINKOMMENS, 111-132 (Diethelm Kleszczewski, Steffi Müller-Mezger & Frank Neuhaus ed. 2013); See BT-262/16, *supra* note 104, at 7.

¹⁴⁰ See Holzner, *supra* note 27, at 191.

¹⁴¹ *Id.* at 197.

¹⁴² See Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVerwGE] 149 (153); 27, 58 (63); 67, 1 (5 ff); 68, 91 (94); 98, 203 (204) (Ger.).

¹⁴³ See Holzner, *supra* note 27, at 191.

¹⁴⁴ On the unlawfulness of a Basic Income, See Süchting, *supra* note 139, at 111-132.

¹⁴⁵ Hans-Werner Sinn, *Europe's demographic deficit. A plea for a child pension system*, in DE ECONOMIST. NETHERSLANDS ECONOMIC REVIEW, 153, 1 (2005).

¹⁴⁶ European Council of Lisbon, 23 and 24 March 2000, <http://www.europarl.europa.eu>.

¹⁴⁷ See Sinn, *supra* note 145, at 1.

¹⁴⁸ See Hans-Werner Sinn, *Die Krise der Gesetzlichen Rentenversicherung und Wege zu ihrer Lösung*, in BITBURGER GESPRÄCHE JAHRBUCH 2000, 22-41 (2001).

It should be remembered that originally maintenance during retirement was traditionally the responsibility of the family, which for centuries provided the necessary care and sustenance. The active generation took care of older generations in the context of a great family. To this end, it was important to have a lot of children. However, with the advent of the first industrial revolution, this task could not be fulfilled within families. Which led to the creation of capital funded pensions schemes. Thus, at the end of the 19th century, when families could no longer take responsibility for caring for and maintaining their elders, Bismarck's social legislation introduced a disability pension along with a retirement pension.¹⁴⁹ The new pension system freed retired people of their dependence on family support.

This public pension was initially created as a funded pension system. The model of this system is reflected in the Constitution itself. Thus, the 1949 Basic Law of Bonn¹⁵⁰ protects and guarantees pensions¹⁵¹ in its article 14 GG via the protection of property.¹⁵² Because it was originally based on a *funded pension system*, it treats pensions as property, rather than with a *collective insurance system* (pay-as-you-go system).¹⁵³

But as a result of the two world wars in the 20th century, the capital accumulated in Germany was lost and the system was modified. Thus, in the 1950s due to inflation and the economic crisis, the public pension system was turned into an intergenerational *pay-as-you-go system*, a trend that spread to neighbouring countries.¹⁵⁴

When the German Chancellor Konrad Adenauer approved the reform of the pensions system (1957), generational renewal appeared to be guaranteed. Witness his well-known affirmation that "people always have children". However, this is not so today: the number of active workers per pensioner is steadily decreasing, which generates problems of financing and intergenerational injustice. Without a doubt, for a pay-as-you-go pension system it is essential to have sufficient contributions and human capital. In this context, families make a fundamental contribution to the economy, to the state and to society. In contrast to what actually happens, the contribution represented by having children is a fundamental element of the *principle of solidarity*, and not an element foreign to the insurance.

No sooner had the pension reform come into force in 1957 than it was criticised by its promoters. Thus, Oswald von Nell-Breuning defined the new old age pension as "a system that rewards those who do not have children".¹⁵⁵ And the man known as "the father of dynamic incomes,"¹⁵⁶ **Wilfried Schreiber**, identified the same problem, and recommended taking into account the labour of child rearing when calculating pension rights. Thus for the first time he proposed the distribution of income produced by work into *three generations*: childhood and youth, active working phase and old age.

His draft pension reform, which served as inspiration for Konrad Adenauer, proposed an income for children and the young, which was finally ruled out. This income was considered to be an "investment in the next generation", repayable by bringing up children - if one had them - or in monetary form - if one did not - . In this way, the childless population would make a contribution to future generations, and its childhood debt would be paid.

However, the final version of Adenauer's reform only took into account *two generations*: the active population and the elderly, regarding child rearing as a private matter, leaving the burden of and responsibility for children exclusively in the hands of their parents, and thereby seriously neglecting to guarantee generational

¹⁴⁹ Hans-Werner Sinn, *The pay-as-you-go pension system as fertility insurance and an enforcement device*, in JOURNAL OF PUBLIC ECONOMICS, 88, 1336 (2004).

¹⁵⁰ Basic Law of Bonn 23.5.1949 (BGBl. p. 1), modified for the last time in art. 1 on 29.9.2020 (BGBl. I p. 2048).

¹⁵¹ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 76, 256 (Ger.). Bruno Schmidt-Bleibtreu, in KOMMENTAR ZUM GRUNDGESETZ, art. 14 GG margin no.4a (Bruno Schmidt-Bleibtreu & Franz Klein, 9 ed. 1999).

¹⁵² Article 14 GG: Property, right to inheritance and expropriation. (1) Property and the right to inheritance are guaranteed. Their contents and limits will be determined by laws. (2) Property entails obligations. Its use must serve the common good.

¹⁵³ Ultimately, each of the Constitutions reflects the type of Constitution of the era. In other words, on the one hand, the Bonn Basic Law of 1949 is a Constitution prior to the pension reform of 1957 in which the system of distribution was introduced. Therefore, art. 14 protects pensions under the *Funded pension system* by guaranteeing ownership. On the other hand, in art. 50 Spanish Constitution on the basis of the principle of solidarity, public powers guarantee adequate and updated pensions based on the *pay-as-you-go system*. Irrespective of their drafting, today both Constitutions basically defend the failed pay-as-you-go system.

¹⁵⁴ A good example is art. 50 of the SC, which states that "The public authorities shall guarantee, through adequate and periodically updated pensions, sufficient financial means for senior citizens. Likewise, and independently of the obligations of their families towards them, they shall promote their welfare through a system of social services which shall provide for their specific problems of health, housing, culture and leisure". The current art. 50 SC aspires to the old age pension model approved by the Christian Democrat German Chancellor (Konrad Adenauer) via the 1957 reform. This was the first introduction of an *intergenerational system of distribution of solidarity* based on the idea of "dynamic incomes" which are adjusted over time. The insurance ceases to be a contract of individual saving like a life insurance (funded pension system), to become a collective insurance such as *pay-as-you-go system*.

¹⁵⁵ See Sinn, *supra* note 145, at 2.

¹⁵⁶ Wilfried Schreiber, *Existenzsicherheit in der industriellen Gesellschaft. Vorschläge des Bundes Katholischer Unternehmer zur Reform der Sozialversicherungen*, in SCHRIFTENREIHE DES BUNDES KATHOLISCHER UNTERNEHMER, 3 (1955)

replacement. The pensions system is based upon the expectation that in the future there will be enough active workers to finance pensions. Unfortunately, this system requires the constant replacement of one generation by the next, which today is not the case.

Consequently, it can be said that the public pensions system, by not taking into account the contribution of child rearing, has had a fundamental design problem since its very origins. The paradox behind this is as follows: the pension depends exclusively on workers' contributions, with the (undesired) consequence that couples without children (hereinafter *DINK*, "dual income, no kids") receive a higher pension than others who, as a result of child rearing and a shorter working life, have paid less in social security contributions, in spite of the fact that these very children will pay the higher pensions of the *DINK* couples and the lower pensions corresponding to their parents. It is clear that the conditions required by the pay-as-you go intergenerational system no longer exist. The main reasons are the absence of generational replacement and the longevity of the population.

Although this replacement is guaranteed by child rearing, in Europe today children have become a nuisance. Thus, the economic factor plays a very important when it comes to deciding on the size of the family. It is a fact that the income per capita of a family with two salaries and no children is five times that of a family with one income and three children. Raising a child is obviously expensive, and increases the risk of the family suffering poverty and social exclusion. Furthermore, as well as costing money, it limits the individual's options with regard to work, consumption and leisure time.¹⁵⁷ As a result, life as a single person or childless couple is very attractive and increasingly generalised.¹⁵⁸ In southern Europe in particular, couples that decide to have children often opt for an only child.

What this work proposes is a social benefit that supports families and the birth rate, while reducing child poverty: a BI for minors.

II. Constitutionality of a basic income for minors

As has been explained, it makes no sense to contemplate a model of BI in an abstract manner. Although the idea of a BI is usually placed within a new system,¹⁵⁹ the aim of this work is to implement it within the existing system.

In this context, it makes sense to analyse the proposal for a BI in terms of the current legal system, asking whether existing regulatory structures allow for the introduction of a BI without the system collapsing. In particular, whether the social legal system already contemplates a social benefit with the characteristics of the unconditional BI without demonstration of the state of need.¹⁶⁰ If it does, the BI could be systematically associated with that existing allowance (*lege data*). As is reflected in art. 20.1 GG, the BI must have a constitutional basis.¹⁶¹ However, the formulation of the principle of the social state pursuant to art. 20 GG is very broad and quite imprecise, leaving considerable room for manoeuvre in the distribution of resources.¹⁶²

In spite of this, it is not difficult to find a benefit – financed by taxation- that is consistent with the nature of a BI: this is the aforementioned allowance, the *Kindergeld*, the literal meaning of which is "child's money", included in article X of the Law on Income Tax (*Einkommensteuergesetz*, hereinafter EStG). This benefit has existed in the current system for decades and is received on an unconditional basis by all those with dependent children.

According to § 31 EStG, the child allowance helps to promote the family and guarantee the child's minimum subsistence level, including care and schooling or education. Therefore, the child benefit, according to § 31 EStG, reflects the right to a basic income that covers the subsistence minimum for the minor. Consequently, one can say that, for decades, a legal basis has already existed for a BI that is demanded today as if it were a novelty.¹⁶³ Thus, the initial question can be answered in the affirmative: BI *lege data* already exists, although it is restricted to young people and their families on the basis of SGB VIII.¹⁶⁴

In this context, one cannot help but ask: why then has this social group been for decades the one most threatened by poverty? This is obviously a question that requires a quantitative rather than a qualitative answer. The legislator, pursuant to § 66.1 EStG, has set the amount for the first and second child at 204€, 210€ for the third, and 235€ for the fourth and subsequent children. One would clearly be mistaken in thinking that these quantities cover a child's vital needs, as set out in § 31 EStG. Ultimately, this is no more than a symbolic

¹⁵⁷ See Peter Moss, *Cuidado de los hijos e igualdad de oportunidades. Red europea de formas de atención a la infancia*, 83, DOCUMENTATION DOSSIER, 48 (1990).

¹⁵⁸ See Sinn, *supra* note 145, at 2.

¹⁵⁹ See Merk, *supra* note, 46, at 201.

¹⁶⁰ § 9 I *Sozialgesetzbuch* (hereinafter SGB II) [Social Security Act] unemployment benefit.

¹⁶¹ Art. 20 I GG: The Federal Republic of Germany is a democratic and social federal state.

¹⁶² See Merk, *supra* note, 46, at 200.

¹⁶³ See Merk, *supra* note, 46, at 206.

¹⁶⁴ SGB VIII [Social Security Act]: children and youths.

political fiction, which gives the impression of attaching social importance to the young and their families. For this reason, the § 31 EStG is known as “family compensation”.¹⁶⁵ The objective of this somewhat confusing precept is to distract the political debate over discrimination against families and children. There can be no doubt that in order to speak of a real, effective family compensation the quantity would have to be increased until it covered the child’s real needs. This would satisfy § 31 EStG’s requirement that the minor’s minimum subsistence level be guaranteed, including care and schooling or education.

Most researchers into poverty, especially where children are concerned, employ a broader concept of poverty rather than one that is purely material. In industrialised countries at least, very few children suffer from material needs that threaten their very existence. In general, they do not starve or freeze to death. The consequences of poverty are often not immediately visible. For instance, poverty may mean the absence of social and cultural participation. Children raised in poor families may not be able to afford to go to the cinema, learn to play an instrument, have private classes or invite their friends to a birthday party. In many cases, these children lack self-confidence, struggle to make friends, and as working adults do not exploit their full potential. As a result, they earn relatively little and “transfer” poverty to their own children.¹⁶⁶ In other words, as the statistics show, poverty is inherited and perpetuated over ensuing generations.

This is confirmed by *Bertelsmann’s* recent study of child poverty in Germany (October 2017): “one in five children spends a long time living in poverty and is often trapped there, and very few families will be able to escape poverty”.¹⁶⁷

According to the last Bundestag report,¹⁶⁸ the child benefit (*Kindergeld*) would have to be at least 628€ to guarantee the child’s right to a minimum subsistence level as set out in § 31 EStG, and in order reasonably to “call it family compensation”. This would ensure physical survival (408€) as well as social participation including care and schooling or education (220€).¹⁶⁹

In this context, the question again arises vis-à-vis the financing and sustainability of the social security system for “future generations”. The good news is that its financing would not require a tax increase; it would be sufficient to increase some modifications to the current system of social protection. There are still today many social and tax benefits associated with the institution of marriage, since it represents a figure that the state has a particular interest in protecting, as “this protects the family and its offspring”.

Times have changed, and many couples get married in order to enjoy tax breaks and other social benefits without any intention of having children. These are, therefore, outdated measures that discriminate against unmarried couples with children. Consequently, it would be legitimate to limit these privileges to the period of child rearing. By making these measures fairer and more in keeping with the times, it would be possible to save around 30,000 million euros, which could finance a BI that would guarantee a child’s minimum subsistence level.¹⁷⁰ As a result, there would also be a saving in *integration minimum incomes* (SGB II Hartz IV and SGB XII),¹⁷¹ as a beneficial effect of the BI for children. In other words, many families would improve their economic situation and find themselves in a position to forego these stigmatising benefits.¹⁷²

All of which demonstrates that its introduction is a question of political priorities. In other words, the sector of the population protected here - children and youths - have a reduced electoral importance because they do not have the right to vote, and lack sufficient public representation to claim any rights. It is clear that both in Germany and in the rest of Europe, it is adults that have the most power when it comes to insisting on their rights. Which is why we should not be surprised by the fact that instruments of universal BI already exist which guarantee the existence of a minimum subsistence level for the elderly (the case of Sweden), but not for children. No political party has so far proposed this kind of protection. One has to accept that without an

¹⁶⁵ See Merk, *supra* note, 46, at 206; See MERINO, *Supra* note 25, at 448.

¹⁶⁶ Christoph Hasselbach, *Kreislauf der Kinderarmut durchbrechen*, 2nd February 2018, <https://www.dw.com/de/kreislauf-der-kinderarmut-durchbrechen/a-42388960> (last visited Mar. 9, 2021); REY, *supra* note 7, at 200-201.

¹⁶⁷ Anette Stein & Sarah Menne, *Kinderarmut ist in Deutschland oft ein Dauerzustand*, BERTELSMANNSTIFTUNG, 23th October 2017, <https://www.bertelsmann-stiftung.de/de/themen/aktuelle-meldungen/2017/oktober/kinderarmut-ist-in-deutschland-oft-ein-dauerzustand> (last visited Mar. 9, 2021).

¹⁶⁸ Deutsche Bundestag Drucksache [German Parliament Printed Matter] BT-18/10220, 2.11.2016, 11. Existenzminimumbericht die verfassungsrechtlich notwendige Höhe. <https://dip21.bundestag.de/dip21/btd/18/102/1810220.pdf>

¹⁶⁹ On basic income for children *Kindergrundsicherung* See <http://www.kinderarmut-hat-folgen.de> (last visited Mar. 9, 2021).

¹⁷⁰ For example, the unconditional social insurance of the spouse in the marriage could be limited to the period of child rearing. This would remove the privilege from childless married couples, with a saving of around 15,000 million euros. Furthermore, the current tax privilege of the division of the marriage “*Ehegattensplitting*” could be limited to the period of child rearing, as well as no longer being available to childless couples. This would save another 15,000 million and that money could be rechannelled towards genuine protection of families with children. There is no doubt that marriage today is no guarantee of parenthood, so special protection is only justified provided couples have contributed children to society. See Merk, *supra* note, 46, at 207.

¹⁷¹ SGB II [Social Security Act] is social aid for those seeking work (known as Hartz VI) and SGB XII [Social Security Act] is the remaining social aid.

¹⁷² See Merk, *supra* note, 46, at 210.

increase in political representation, it will be difficult to eliminate economic age discrimination against children and their families.¹⁷³

It should be stressed that the main problem lies in the lack of financial incentives to invest in human capital. The *pay-as-you-go pension system*, rather than valuing child rearing, indirectly penalises it. Consequently, having and raising children becomes a less attractive proposition.¹⁷⁴ This occurs in almost every European country, and some, aware of the problem, have introduced measures to encourage a higher birth rate.

Finally, one may conclude that the benefit “for the child” (*Kindergeld*) represents the existence in German legislation of a tool that satisfies the requirements of a collective BI, but which, however, is still quantitatively insufficient to guarantee children’s real subsistence.¹⁷⁵

V. CONCLUSION

This work has shown that society, the labour market, the Constitution and the German social state are not currently prepared for or in need of a universal basic income, but that it would be viable to introduce a collective basic income for a specific group of individuals.

As was the case with previous industrial revolutions, there is a generalised fear that the robotic revolution will mean the “end of work”. The facts show, however, that what has occurred throughout history is actually the very opposite. More automatized countries, like Germany, recovered from the economic crisis far more quickly than less robotic nations like Spain. This shows that there are other contextual factors - unrelated to technology and automation - which create unemployment.

It is time to stop being afraid of technology, which, apart from being unstoppable, is in the long term beneficial for the labour market.¹⁷⁶ So, contrary to what has been proposed (by the neo-liberal and the emancipatory schools of thought), there is no justification for a basic income to compensate for the loss of jobs to robots.¹⁷⁷ It is time to stop being distracted by fictitious dangers¹⁷⁸ and dedicate our efforts to recycling workers.¹⁷⁹ In short, we should focus on quality jobs in order to achieve a satisfactory coexistence rather than seeking emancipation from work by means of a basic income. Moreover, the loss of jobs due to the advance of robotics could be used by the neo-liberal Right as the perfect excuse to introduce a basic income and dismantle the Welfare State.¹⁸⁰

Bearing in mind that the basic income has the potential to emancipate the individual from paid employment,¹⁸¹ it represents a break with the traditional market rules: the model is inverted and the citizen gains “freedom from work”, and not “through work”. This paradigm shift may represent a challenge for today’s model of social state based on the work ethic. Furthermore, one should take into account that the introduction of a universal BI for all could reopen class, cultural and ethnic conflicts, which would benefit populist parties.¹⁸² This measure would split society into two classes: those who work and those who receive income. This profound difference could potentially create a social divide.¹⁸³ It would also act as disincentive to work, further destabilising the social state.

From the point of view of Constitutional law, it has been demonstrated that a universal BI, in not applying a *principle of individuality* when needs are assessed, does not guarantee the minimum subsistence level established in the Basic Law of Bonn. Therefore, there are serious doubts as to the constitutionality of an unconditional universal BI.¹⁸⁴ However, it is constitutionally viable to develop a social¹⁸⁵ and tax system directed towards individual needs.

In other words, this study shows that within the system there are other safer alternatives to an unconditional BI that do not threaten social cohesion. As I have explained, it is possible to develop the social system by means of the introduction of a collective basic income for minors. To this end, a monthly allowance already exists that is conceded to every child on an unconditional basis. Moreover, this collective income will

¹⁷³ *Id.* at 209.

¹⁷⁴ Sinn, *supra* note 149, at 1336.

¹⁷⁵ See Merk, *supra* note, 46, at 209.

¹⁷⁶ See WOIROL, *supra* note 94, at 18-20; BIX, *supra* note 94, at 1-8; MOKYR, *supra* note 94, at 255-257; Arntz, Gregory & Zierahn, *supra* note 94; Piva & Vivarelli, *supra* note 94.

¹⁷⁷ See NOAH HARARI, *supra* note 83, at 44.

¹⁷⁸ See Seubert, *supra* note 92, at 182.

¹⁷⁹ See Segura, *supra* note 17, at 185.

¹⁸⁰ See Segura, *supra* note 17, at 183.

¹⁸¹ See Casassas & De Wispelaere, *supra* note 7, at 105.

¹⁸² See Segura, *supra* note 17, at 181; the author wisely warns that “adopting a measure like the universal BI has many variables, and all should be considered before a decision is taken”. See STANDING, *supra* note 5, at 65; Lopez, *supra* note 72.

¹⁸³ See Segura, *supra* note 17, at 184.

¹⁸⁴ See Holzner, *supra* note 27, at 197.

¹⁸⁵ For example, as an alternative and given current job insecurity, it would be interesting to extend the definition of the term work in Social Security, to enable more people to enjoy coverage and protection in Social Security. See SEGBERS, *supra* note 55, at 8.

help to eliminate all the problems and doubts associated with emancipation from employment and the universal basic income, given that children do not work.

To summarise, there is no evidence that the unemployment of the future will generate sufficient inequality to threaten social cohesion, but there is no doubt that the shortage of contributors to the social security will do so by endangering the sustainability of the system. Today, society has not yet reached that point, so there it seen to be no need to introduce a universal BI, but a collective BI is considered necessary.

Ultimately, the flaws, shortcomings and limitations of existing social assistance systems make it necessary to reassess the social protection system. However, this is not a reason to introduce a universal basic income for all, as has been explained in these pages. Without a doubt, the most viable and sustainable solution for today's social state is the collective basic income for children

In its current format, the social security system - in spite of the progress that has been made - continues to reflect how the state and society undervalue childhood and the family. In this context a case should be made for the promotion of child-rearing incentives to ensure compliance with the generational contract. There really is no choice, given that it is the state's duty to contribute to the sustainability of the system. In view of the immense cost to the social security system represented by the payment of pensions, it is legitimate to invest in basic income for minors, since they will be the future contributors who will guarantee those pensions and with it we will comply with the generational contract.

The example of the "child's money" (*Kindergeld*) benefit in Germany is certainly a major step in that direction, which may serve as a model to be followed by legal systems with a *pay-as-you-go pension system*. From a *qualitative* point of view, the allowance in question (*Kindergeld*) fulfils all the requirements in order to be an unconditional income for children that guarantees the minimum subsistence level established by the Constitution. However, from the *quantitative* point of view - the amount of the benefit -, it still has significant shortcomings and the state should act so as to guarantee what is established by law and accepted by social consensus (§ 31 EStG).

XXXXX. "Constitutional Legitimacy of the Basic income in the German Social State."
International Journal of Humanities and Social Science Invention (IJHSSI), vol. 10(05), 2021,
pp 51-67. Journal DOI- 10.35629/7722